IN THE EMPLOYMENT COURT
CHRISTCHURCH

CC 4A/08
CRC 32/07

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TERESA SEFO Plaintiff
AND	SEALORD SHELLFISH LTD Defendant

Hearing: 31 March and 1 and 2 April 2008
(Heard at Nelson)

Appearances: Peter Cranney, Counsel for Plaintiff
A E Scott-Howman and M J McGoldrick, Counsel for Defendant

Judgment: 17 April 2008

JUDGMENT OF CHIEF JUDGE GL COLGAN

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[1] The issues for decision in this challenge (other than by hearing de novo) to a determination of the Employment Relations Authority are:

- whether Teresa Sefo was unjustifiably disadvantaged in employment by having been suspended from work pending investigation by Sealord Shellfish Ltd of allegations of misconduct (breach of contract) against her;

- Ms Sefo having been dismissed unjustifiably, whether she should be reinstated in employment; and

- whether there should be a reduction of remedies to which Ms Sefo would be otherwise entitled by reason of her conduct that gave rise to the grievance.

[2] Neither party challenges the Authority's decision that Ms Sefo was dismissed unjustifiably and that she was entitled to the compensation awarded for both wage loss and distress attributable to her dismissal. Ms Sefo contends that the Authority was wrong to have decided that her suspension was justifiable, that her monetary remedies were to be reduced by 20 percent to reflect her contribution to circumstances that gave rise to her dismissal, and that reinstatement was impracticable.

[3] Ms Sefo had worked for Sealord at Nelson since 1981. She had held a variety of positions in its land-based processing operations and, from 1993, worked at what was known as Sealord Shellfish. Ms Sefo had undertaken appropriate training and other courses, had a good attendance record and was classified *"proficient plus"* by the company. In 1998 and again in 2005 and 2006 Ms Sefo was elected by staff to represent them at collective agreement negotiations and was, at the time of her dismissal, a union delegate.

[4] Ms Sefo's working environment at the shellfish factory 2 site is significant. Employees stand side by side at individual work stations around what is described as "the table" but are, in reality, a series of conveyor belts. Partially cooked mussels but still in unopened shells pass along the top conveyor belt in front of the openers. Each opener takes an unopened mussel, opens the shell with a knife, and removes the mussel's "beard" from the meat that remains attached to one half of the shell. The removed half shell, beard and any other waste material is then placed on a chute down to a conveyor belt and disposed of. The mussel still attached to the half shell is deposited in another chute, passes by an electronic counter and then is deposited on one of two half shell conveyor belts. These half shell conveyor belts identify the position number of the opener and move alternately so that while one is stationary accumulating half shelled mussels from the opener, the other belt is conveying the same opener's previously shelled product to checkers who will inspect the quality of the product by sample batches. Depending upon the length of time since the arrival

of the unopened shells on the conveyor belt, the skill and experience of the opener and other factors, individual mussel openers can open mussels in this manner at rates between 8,500 and 11,500 per 10-hour shift and for which they are paid a piece rate of .153 cents per mussel opened. It is important that waste does not get onto the half shell conveyor belts and that the opened mussels on these belts have been correctly de-bearded, that the meat is intact, and that the mussel remains attached to the half shell.

[5] At the time of these events, if, upon inspection by the checkers, any individual mussel opener had more than 3 percent of his or her product defective, this resulted in an appropriate percentage deduction to the employee's piece rate earnings. The presence of defective product attributable to an individual mussel opener can also result in the return of that defective product to the opener, thus reducing the opportunity for a higher rate of opening and therefore remuneration.

[6] Mussels so opened and checked are then conveyed via a second checking process to a "spiral" freezer where they are glazed before further processing that is not at issue in this case.

[7] The number 2 factory is a very noisy environment and mussel openers and others are required to wear ear muff protectors supplied by the employer. Substantial numbers of these devices have radios incorporated into them so that for those openers wearing them, not only is much external noise cut out but alternative noise, usually in the form of music, is provided. Conversations between individuals, even very close to each other, need to be shouted to be heard while the factory's operations are in progress, certainly at the table beside the belts. Mussel openers work quickly and intensely for periods that are limited for health and safety reasons but with an almost mechanical rhythm and flow that maximises the number of mussels opened and therefore their incomes.

[8] Malfunctioning of the half shell belts, with which this case is concerned, can occur in two ways. First, the belts will stop operating altogether so that product accumulates on the belt and then back up the product chute, thus nullifying the electronic counting mechanism. This type of breakdown is frustrating for mussel

openers if only because it affects their production levels and therefore incomes. Although sometimes a temporary fix of such malfunctions can be achieved quickly by the openers themselves, more serious and repeated malfunctions require the intervention of an engineer.

[9] The second sort of malfunction to the half shell belts involves their continuous instead of intermittent movement so that product deposited down the openers' chutes is not attributable to any particular individual opener although being counted electronically. It was common ground that such a malfunction may allow openers to cheat by placing waste product down the chute and having it counted as product but without the waste being attributable to any individual employee. Although probably not as frustrating as a half shell belt jam, this form of malfunction is nevertheless annoying for employees as well as the company because it means that the process cannot run as intended.

[10] On 6 June 2006 Ms Sefo was working on the shellfish factory 2 line belt as a mussel opener. She occupied *"spot 1"* at the bottom of the table. The half shell belt malfunctioned on several occasions during the day. Ms Sefo called out to the checkers, asking them if they could fix the belt on at least one of those occasions.

[11] After smoko at about 3 pm an engineer arrived to fix the belt because of the number of breakdowns. At about the same time Ms Sefo walked down the line belt to speak to a colleague. On her return to her station she had a brief conversation with another employee, Darren Anderson. What Ms Sefo said to Mr Anderson and the implications of her statement brought about her subsequent dismissal.

[12] Mr Anderson told a colleague, Wayne Gardner, what Ms Sefo said to him. Mr Anderson's colleague made a written statement of complaint to the company. At its request Mr Anderson made a written statement about these events and other employees on the line that day were interviewed.

[13] Some weeks later Ms Sefo was summarily suspended on pay and made aware of the company's investigation into misconduct alleged against her being her encouragement of another employee or employees to cheat the company's product

checking system. Ms Sefo was then dismissed summarily. She brought a personal grievance against Sealord alleging that she had been dismissed unjustifiably and seeking remedies including reinstatement in employment, compensation for lost remuneration, and compensation for distress and humiliation.

Employment Relations Authority determination

[14] Because this challenges is only to parts of the Authority's determination unfavourable to the plaintiff (what is known colloquially as a non-de novo hearing), the determination must be shown to have been wrong. It is appropriate therefore to summarise the determination and the reasons for it.

[15] The case turned on what Ms Sefo said to work colleagues and the implications to be drawn from her words. Ms Sefo's evidence in the Authority was that she told another employee or employees *"the belts are fucked again, ha ha fucking ha"*. The company's conclusion was that in addition to those words or others like them, Ms Sefo also said *"go for it"*. It was the company's case that these three words were an invitation to other employees to claim dishonestly a greater level of production by them than would have been revealed if operational checks had been working and to obtain dishonestly unearned remuneration.

[16] The company's case justifying dismissal relied on what it said was the information of other employees passed on to it. Wayne Gardner made a written complaint to the company that contained a hearsay account of what Ms Sefo said. That is, Mr Gardner's account was that after observing Ms Sefo talking to other employees but not overhearing her *"When I got a lift home with one of the openers she had approached they told me she had said 'the belts are broken, go for it'."* It could be inferred from Mr Gardner's written complaint that he understood what Ms Sefo was alleged to have said was dishonest and reprehensible conduct by a union delegate. Mr Gardner expressed his expectation that his complaint would be kept confidential.

[17] A second and shorter complaint was also received from Darren Anderson. It was said to *"back up the statement that was put forward by Wayne Gardner."* Mr

Anderson said that Ms Sefo approached him on the line and *"told me to go for it the product belt was stuffed."* Mr Anderson also expressed his expectation that his complaint be kept confidential.

[18] The accuracy of Mr Anderson's complaint was therefore central to the case. In giving evidence on oath before the Authority, Mr Anderson was less adamant about what Ms Sefo had said than in his written statement. Mr Anderson said that he told Mr Gardner that *"… she said the belts were stuffed and that I was pretty sure I heard her say 'go for it'."* In his evidence in the Authority Mr Anderson said that he recommended Mr Gardner not take the matter further because *"… there is a chance I didn't hear her right. I told him that I was not 100% sure she had said anything. It was very noisy in the factory at that time."*

[19] Company representatives acted on Mr Gardner's written complaint to them. It was in these circumstances that Mr Anderson provided the written statement to the company at its request that has been referred to above. Mr Anderson told the Authority that he added the sentence *"I expect this matter to be kept confidential"* at the suggestion of a management representative so that no one else would see the statement. Mr Anderson signed the statement in the expectation that the matters referred to in it would not go further.

[20] The company realised that if it wanted to take the matter further, it would need Messrs Gardner and Anderson to waive their requirements for confidentiality and they did so. Ms Sefo and her union delegate were provided with copies of the complaints and she was advised that she was suspended on full pay pending the company's investigation. Despite attempts to persuade the company not to suspend her, Ms Sefo was summarily suspended from employment from that time. The company's rationale for the suspension was the necessity to speak with other people in the factory and to avoid what was described as peer pressure not to give true answers. The company considered that Ms Sefo's presence in the factory might influence its investigation. As the Authority noted, however, further interviews with Mr Anderson were conducted in an area of the factory to which other employees had access, what the Authority described as a main thoroughfare through which staff entered the processing area.

[21] The Authority considered that this was a rare case of justified summary suspension without the need for a fair process to involve Ms Sefo in the decision whether to suspend before making it. About 12 employees were interviewed by management representatives in the course of the company's investigation. One, Heather Price, was the only other person who confirmed that she had been approached by Ms Sefo and told that the belts were malfunctioning. She told company investigators that she took no notice of that comment and carried on with her work. None of the employees interviewed said that they had heard the words *"go for it"* and none indicated that Ms Sefo was encouraging others to breach their employment obligations. The Authority concluded that this left only Mr Anderson asserting that these words were spoken and that Ms Sefo encouraged others to cheat.

[22] Nevertheless, at a disciplinary meeting at which both sides were represented and notes taken, the company began by asserting as truth that Ms Sefo had said that *"'the belts are broken, go for it'"* and that this was *"irresponsible and could have affected quality."* The Authority described this opening by the company as *"quite extraordinary"* given the information it had obtained in its recent investigation.

[23] Ms Sefo's representative then asked for all documents and written material in the company's possession which had not been provided despite an earlier request. Further documents were then provided. Ms Sefo's representative questioned Mr Anderson's reliability and emphasised Ms Sefo's consistent denial that she had used the words *"go for it"*. There was a suggestion that there should be a joint further interview of Mr Anderson about the degree of his certainty of what Ms Sefo had said to him. Company representatives did not agree to Ms Sefo's union representative speaking with Mr Anderson. There was, however, a further interview of Mr Anderson by three company managerial representatives during adjournment of the disciplinary meeting with Ms Sefo. The account given to the Authority of this re-interview with Mr Anderson was that he said that he was *"50% to 60% certain of the precise words that Teresa (Sefo) had said."* Mr Anderson was said to have been *"absolutely sure that Teresa's motivation was to encourage him to leave the beards on the mussels so they could not be checked."* The company's investigators also concluded that Mr Anderson was absolutely sure that he had not been joking with Ms Sefo.

[24] In giving evidence to the Authority, however, Mr Anderson spoke about his recollection of his conversation with Ms Sefo. He said she spoke to him on her way back to her position at a time when he had his ear muffs radio on. He said he moved his ear muff to one side of his head and leaned over because Ms Sefo did not get up onto his stand. He said that she pointed towards the belt and said *"'oh the belt's – the belts are stuffed'."* Mr Anderson said that he turned back towards the table and leaned over to look under it at the belts to see if they were moving at the same time. He said to the Authority: *"As I was doing this, I thought I heard her say 'go for it'."*

[25] Mr Anderson, in his evidence to the Authority, denied that he had been interviewed in the way that company representatives claimed before Ms Sefo was suspended. He said of this re-interview:

> *… they asked me if she had said "Go for it", did I believe she was encouraging me to cheat.*
>
> *… I said "Yes, if that was what I heard her say, but I could not be sure that that is what she said."*

[26] In coming to its decision by applying the statutory criteria under s103A of the Employment Relations Act 2000, the Authority described the contest as one that was finely balanced but that dismissal was unjustified. It concluded that Mr Anderson had not been re-interviewed during the investigative process but only after a decision had been made to dismiss her but not conveyed to Ms Sefo. The Authority concluded that it was wrong for the company to have relied on Mr Anderson's less than absolute certainty of what had been said to him, in reaching its decision. The Authority noted that although the company had checked Mr Anderson's employment record, no such check had been made of Ms Sefo's and there was no evidence of the company's consideration of alternatives short of dismissal. The Authority concluded that the company ought to have told Ms Sefo and her representative of the outcome of its re-interview of Mr Anderson as this may have provided the opportunity for Ms Sefo's union representative to seek to persuade the company about what should be done.

[27] As to employee contribution, the Authority found that the fact that Ms Sefo left her position at the table was *"at best imprudent."* It agreed with the company that

she should have remained at her position or, knowing the belts were malfunctioning again, should have approached her supervisor or an appropriate person. Leaving to talk to other employees was not the act of a senior and experienced employee in that situation. This caused the Authority to reduce by 20 percent the monetary remedies it would have otherwise allowed Ms Sefo.

[28] Addressing the plaintiff's claim to reinstatement, the company opposed this, not only on the grounds of Ms Sefo's irresponsibility in leaving her stand to talk to other employees but also because reinstatement would involve *"considerable difficulties"* for Sealord. The Authority accepted that the evidence of the company's principal witness on this matter, Patrick Smith, had to be regarded with *"considerable caution"* because of the number of unfounded statements made to it in an attempt to disparage Ms Sefo.

[29] The Authority said that its decision not to reinstate was affected by Ms Sefo's contributory conduct that went to practicability. It said that if it had found no fault on her part it would have unhesitatingly reinstated her. Counting against that were what the Authority described as *"her imprudent actions and derisory comments"*. Ms Sefo had been a charge hand, had attended a course for team leaders and supervisors, had been a fire warden and a staff representative in collective negotiations. The Authority concluded that this indicated that Ms Sefo was a person in whom the company was entitled to have considerable confidence and from whom it could expect leadership at times of difficulty. It accepted the company's case that its former trust had disappeared because of Ms Sefo's actions around this incident. These were sufficient to persuade the Authority to not reinstate her.

[30] Ms Sefo was awarded compensation for loss of earnings for a period of 4 months before she found replacement work, albeit with less earnings, after that period. To compensate for the *"very considerable humiliation and injury to feelings"* as a result of her grievance that was unchallenged, and in view of her long service with Sealord, the Authority awarded her $15,000. All of these awards were reduced by 20 percent.

Decision - Unlawful suspension?

[31] As already noted, the Authority found Ms Sefo's summary suspension to have been justified in spite of the absence of any opportunity for Ms Sefo to have been informed of the prospect of this or to have had any opportunity to have input into the decision. The consequence of this suspension was that although Ms Sefo continued to be paid remuneration, she was excluded from the workplace without any opportunity to explain to colleagues the circumstances of her suspension and suffered the indignity and other intangible but real consequences of her employer's action and of the implications flowing from that.

[32] The employer's justification for summary suspension that was determined even before Ms Sefo was informed of the allegations against her seemed to have been as follows. Evidence in justification of the suspension was given by the company's witness Lloyd Murphy, its group wetfish supervisor, but then a shift controller at the plant at which Ms Sefo was employed. The decision to suspend was said by Mr Murphy to have been made for several reasons including principally "… *simply because we would be required to convene an investigation into what could, ultimately, be a determination of serious misconduct."* In addition, company managers considered that their ongoing investigation would require them to be at the factory during the following shift to interview all of the people on the "hot" side of the table where Ms Sefo worked. They considered it was appropriate to remove her from the work site "… *because the presence of a person alleged to have committed such misconduct could have lead interviewees to say something different than if the person wasn't there."*

[33] The law on justification for suspension in employment is longstanding and established in several leading judgments. Absent, as here, an express contractual power of suspension, justification for doing so in any particular case will depend upon the circumstances of the parties and the employment and the fairness and reasonableness of the action at the time and in those circumstances. That is because suspension of an employee pending investigation and determination of allegations of serious misconduct in employment may, and indeed frequently does, affect the

employee's employment or one or more conditions of that employment to the employee's disadvantage. This, if it is unjustified, may amount to a personal grievance as defined in s103(1)(b) of the Employment Relations Act 2000. In these circumstances a decision to suspend summarily and without inquiry of the affected employee will need to be justified as that term is defined now in s103A of the Act.

[34] The severity of suspension from employment was recognised by the Court of Appeal almost 25 years ago in a case involving a probation officer, *Birss v Secretary for Justice* [1984] 1 NZLR 513. In *Birss* Richardson J wrote at p521:

> *Suspension is a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary.*

[35] In *Tawhiwhirangi v Attorney-General in respect of Chief Executive, Department of Justice* [1993] 2 ERNZ 546 the Employment Court confirmed that the rules of natural justice apply to suspensions despite their temporary nature. The Court concluded that the employer had acted unlawfully by failing to observe the rules of natural justice before considering and deciding upon an employee's suspension from employment in that case.

[36] The position was re-examined in *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587. There the Court held:

> *Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so. The passage from* Tawhiwhirangi … *confirms the case by case, flexible and sensible approach to these infinitely variable cases. Imminent danger to the employee or others and an inability to perform safety-sensitive work are two examples of circumstances in which it might be held to be inappropriate to delay an intended suspension to give the employee an opportunity to be heard about that intention. Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct. In many cases that will call for advice and discussion before determining whether to suspend; in others, it may not.*

[37] Since *Graham* was decided, Parliament has added to the considerations legislatively. Section 4 (***"Parties to employment relationship to deal with each other in good faith"***) requires an employer contemplating possible suspension to be active and constructive, responsive and communicative: s4(1A)(b). If a suspension decision is one that will or is likely to have an adverse effect on the continuation of employment of an employee, the employer must provide the employee with access to appropriate and relevant information about the proposed decision and an opportunity to comment on the information before the decision is made: s4(1A)(c).

[38] So it may be seen that an employer contemplating suspension of an employee against whom serious misconduct has been alleged which must be investigated but may result in dismissal or other sanctions, will usually be required to tell the employee of the possibility of suspension, of the employer's grounds for doing so, and offer the employee an opportunity to persuade the employer not to suspend. As the judgment in *Graham* illustrates, that is not an immutable proposition but, as the Authority itself in this case remarked, cases will be relatively rare where an employer is justified in deciding unilaterally to suspend without advice to, or input from, the affected employee.

[39] *Graham* was just such a case. The employee was an operating air traffic controller. She abandoned her control duties in an air traffic control tower in circumstances of considerable tension and upset caused by the prospect of not qualifying and therefore losing her valuable employment. The employee's supervising manager had a long discussion with her about these circumstances including her abandonment of duties although the possibility of immediate suspension was not raised expressly. The employee was then suspended on pay pending further investigation by the employer. The Court held that the need to make accurate, prompt and decisive air traffic control decisions, the employee's unfitness to meet the necessarily high standards of air traffic control duties, and the employer's extensive discussions with the employee immediately before suspension about relevant matters, all combined to cause that to be one of the rare cases where there was no requirement to advise and hear from the affected employee.

[40] It is well established that a suspension of an employee from employment is a disadvantageous action so far as the employee is concerned. Sealord did not argue otherwise. The case here turns on the question of justification.

[41] The Authority's reasoning that Ms Sefo was suspended justifiably is economical. It concluded that this was one of the rare cases in which the employer was entitled to suspend summarily without prior advice to the employee or an opportunity for the employee to be heard. The Authority did not amplify upon this conclusion with reasons arising out of the particular case.

[42] Sealord had known of the serious allegations against Ms Sefo from 6 June 2006. Although it regarded itself as unable to begin a disciplinary process until released from the requirements of confidentiality imposed by Mr Anderson and Mr Gardner and that did not occur until shortly before 23 June, Sealord nevertheless permitted Ms Sefo to continue working as normal during that period. Indeed the evidence shows that it discussed with her the possibility that she might assume a more responsible position in the workplace. That seems to be more consistent with a lower level of concern about how Ms Sefo would react to advice of the allegations than with the need to suspend her summarily on 23 June.

[43] There was nothing to suggest a propensity for Ms Sefo to interfere in the company's investigations once she was aware of them. The company simply did not know what her response would be to advice of these allegations against her. The suspension was not to be for a short period. Investigations were ongoing and the company was conscious of the need to hear Ms Sefo's account of events and submissions as it did. Not surprisingly in these circumstances the suspension lasted for a period of about 14 days from 23 June until 6 July when Ms Sefo was dismissed.

[44] Sealord's justification for the suspension in these circumstances was to attempt to ensure that its inquiries of fellow employees would not be affected adversely by Ms Sefo's presence in the workplace. There was, however, no suggestion from her previous conduct that she would interfere in the company's inquiry, attempt to persuade colleagues not to co-operate, provide false or misleading accounts, or any other reason for ensuring her absence from the site during the investigative process.

[45] In these circumstances it is difficult to understand why Sealord could not have raised with Ms Sefo on 23 June the possibility of a suspension and sought her input into that decision. Indeed, Ms Sefo may possibly have agreed to suspension for a period: in many cases it assists an employee in these circumstances to prepare to answer serious allegations of misconduct without the distraction of ongoing work. Even if Ms Sefo had not agreed to a period of suspension, there may have been the possibility of alternative duties or working on another shift and certainly the possibility of a suspension for a shorter period than ensued, about 2 weeks. Indeed, Sealord's concern being for the period when interviews of other staff were taking place, it appeared likely that this would take a matter of 1 to 3 days, even allowing for the absence at another Sealord plant in Nelson of some of the relevant employees.

[46] As it transpired, the interviews about which Sealord was concerned concluded within that period of 3 days. Nothing ascertained thereafter made the position worse for Ms Sefo than had been alleged on 6 June. Indeed, if anything, the outcome of the company's interview process favoured her position but the suspension was maintained without review for some 10 further days.

[47] The decision to suspend Ms Sefo was predetermined and, despite spirited attempts by her union representative to persuade Sealord management to change their minds, they refused to do so, wishing to maintain complete control of the investigative process.

[48] The company has been unable to establish justification for its election to not hear from Ms Sefo or indeed its express refusal, when challenged by her union representative, to reconsider her suspension. In all the circumstances that was not how a fair and reasonable employer would have acted. It may be that having heard from Ms Sefo and her union representative and having considered the question whether to suspend on its merits, the company may nevertheless have decided to suspend her. On the evidence adduced at this hearing, however, I do not think such a decision could have been justified in substance. But it is the employer's decision not to comply with well established rules of workplace natural justice and its unreasonable refusal to reconsider the question of suspension when challenged

promptly by the union that means that Ms Sefo's suspension from work amounted to a personal grievance, an unjustified disadvantage in her employment.

[49] This was not a case in which the well established requirement of procedural fairness before suspension from employment could have been waived justifiably. Suspension, even on pay, amounted to an unjustified disadvantage in employment. Contrary to the Authority's conclusion, I have determined that Ms Sefo's suspension from 23 June to 6 July 2006 was an unjustified disadvantage personal grievance in that, without justification, Sealord affected her employment, or one or more conditions of it, to her disadvantage by unjustifiable action.

[50] Apart, however, from a finding to this effect that I have made, and that it go to the question of costs, Ms Sefo does not seek an independent remedy for this wrong or that the other remedies to which she might be entitled should be enhanced. An employee such as Ms Sefo is entitled under the legislation to have the Court or the Authority declare and identify a personal grievance and to grant costs accordingly but for no other remedy to be granted. That is all Ms Sefo has asked for and she is entitled to that.

Reinstatement

[51] Section 125 of the Employment Relations Act 2000 provides that reinstatement is to be the "*primary remedy*" where sought by an employee unjustifiably dismissed. Subsection (2) is mandatory. It provides, relevantly: "… *the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement as described in section 123(a).*"

[52] This amounts to Parliament directing that unless reinstatement is impracticable, it must be provided. So the question of practicability or impracticability is at the heart of this case and the employer bears the onus of displacing, on that ground, the statute's requirement for reinstatement as the primary remedy.

[53] "*Practicable*" was the same adverb that qualified reinstatement under earlier legislation and was defined and expanded upon in cases the principles of which are still applicable.

[54] Although now an historical case, the following is one in which the Court of Appeal approved the Employment Court's approach to practicability of reinstatement and has been followed in other cases more recently. In *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243, 286 the Court described the test of practicability in practice as follows:

> *Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.*

[55] Although the Court is entitled to consider a broad range of relevant past events, the focus of the reinstatement inquiry is on the future predicated on past and current events and circumstances.

[56] Here, the defendant's opposition really comes down to different expressions of what it professes is its loss of trust and confidence in Ms Sefo for the future. Although trust and confidence between an employer and an employee is in many respects a subjective notion in the sense that the relevant people on each side assess and express whether they can trust the other or others in working relationships in future, such assessments must be objectively assessable. The need for this is well illustrated by the facts of this case. Mr Sefo was dismissed because her employer said it had lost trust and confidence in her because of what it considered she had done. Loss of trust and confidence was an expressed justification for dismissal in the company's procedures. It was, precisely in that phrase, the ground used to justify dismissal.

[57] But the Employment Relations Authority found that Ms Sefo had been dismissed unjustifiably. There is no challenge to that conclusion. So it must follow that even if Sealord representatives felt and continue to feel that they had lost trust and confidence in Ms Sefo, the Authority found that they were not justified in that

conclusion or at least in so concluding to a level that justified her summary dismissal.

[58] To refuse reinstatement, especially where there is a strong claim to it because of a grievant's circumstances, requires more than an acceptance of the employer's assertion, through relevant witnesses, that the employer has lost trust and confidence in the employee. That is more particularly so where, as will very frequently happen, the Authority or the Court has found a dismissal based on loss of trust and confidence to have been unjustified. Such a finding at least implies that, applying the objective test required by s103A, the Court or Authority has found that the employer could not reasonably have lost trust and confidence in the employee, at least to the extent that may have justified dismissal. In this case, as no doubt in many others, that will not alter the employer's subjective view that there was a loss of trust and confidence. Even in some cases such as this, the employer will accept responsibly the decision that dismissal was unjustified but adhere to its view that there was nevertheless still a loss of trust and confidence that continues and is a relevant consideration in the question of reinstatement.

[59] The Authority decided that reinstatement was not practicable for a number of reasons to do with Ms Sefo's conduct on the day in question. These included the facts that:

- she left her stand at the table to speak with a colleague about other than work matters;

- she uttered words to Mr Anderson which could have been interpreted as an invitation to him to cheat his employer; and

- she failed to alert a supervisor of the malfunctioning of the half shell belts.

[60] In each case I have determined that the Authority was either wrong in its assessment of what occurred or over-estimated the seriousness of what Ms Sefo did.

[61] While it is correct that Ms Sefo left her position on the stand to talk to a colleague about personal matters, the evidence establishes overwhelmingly that this is a common occurrence among openers and, while not condoned by the employer, is not regarded as misconduct and would, at most, warrant a mild reprimand with a suggestion that it not be repeated. I am satisfied that, had it not been for the other allegations made about Ms Sefo's conduct on that day, her doing so would have been entirely unremarkable and should not be a factor against her reinstatement. That she did so does not make reinstatement impracticable.

[62] On the evidence heard by me, the Authority was simply wrong in its conclusion that Ms Sefo's failure to alert supervisory staff of the belt malfunction was conduct that should be held against her in deciding reinstatement. The uncontradicted evidence is very clear that on at least one of the earlier malfunction occasions on that day Ms Sefo had indeed alerted others to the problem. When she became aware of the malfunction occurring at the time she spoke with Mr Anderson, she was aware that an engineer was in the factory attempting to fix the half shell belts or at least there for the purpose of doing so. The plaintiff's submission that in these circumstances there was no requirement to alert the company of the malfunction is unanswerable. Indeed it would be entirely unrealistic to require an employee to point out a malfunction that was already being attended to in the appropriate way. This, therefore, is not a consideration going to the practicability of Ms Sefo's reinstatement.

[63] Although the Authority did not make a finding about what Ms Sefo said to Mr Anderson, it is necessary for me to do so to determine the question of reinstatement practicability.

[64] For reasons on which I will now elaborate, I am satisfied well beyond the balance of probabilities that Ms Sefo did not use the words *"go for it"* when she spoke to Mr Anderson. Rather, the preponderance of the evidence is that she said: *"The belts are fucked – ha ha fucking ha"*.

[65] The evidence establishes that in the noisy working environment in which Ms Sefo conversed with Mr Anderson, the latter had his attention attracted by a tug on

his apron and he had to remove one of the sides of his radio ear muffs to try to hear what Ms Sefo was saying. By the time Mr Anderson thought he might have heard Ms Sefo say *"go for it"*, he had turned away from her to look down towards the half shell belts that she had told him were malfunctioning.

[66] It is significant in my view that the employer's inquiries and the evidence in the Authority and the Court established that no similar words were said by Ms Sefo to other employees although she had both the opportunity to do so and, in at least one case, advised a fellow employee of the malfunction. Although Mr Anderson first told Mr Gardner what he thought he had heard, a very short time afterwards Mr Anderson also told Mr Gardner that he did not want that allegation to go further because he, Mr Anderson, was uncertain about what Ms Sefo had said. By the time the Sealord management representatives again interviewed Mr Anderson about this matter on 6 July, it is common ground that he told them that he was only 50 to 60 percent sure of what he had heard Ms Sefo say. The evidence establishes that both Mr Anderson and the managerial recipients of that advice all considered that he meant that it was only slightly more possible than not that Ms Sefo had said *"go for it"*. On a scale of 0 percent to 100 percent, 0 percent would have represented absolute certainly that Ms Sefo did not say those words and 100 percent would have meant, correspondingly, absolute certainty that she did so. Fifty percent was the tipping point from improbability into probability. Fifty to 60 percent was a very low level of probability. Set against Ms Sefo's consistent denials and the other relevant evidence of what she did and said towards others on that occasion, together with the robustness of Mr Anderson's evidence on oath and subject to cross-examination, I conclude that the words *"go for it"* or similar words were not used by Ms Sefo to Mr Anderson. He was mistaken in his initial assumption of what was said and has subsequently conceded that possibility to a significant level.

[67] Nor do I consider it a reasonable inference to be drawn from this statement in all the circumstances that Ms Sefo was suggesting to Mr Anderson that he cheat. Despite speaking to at least one other employee at the relevant time, Ms Sefo did not make any similar suggestion and there is no explanation why she may have done so to Mr Anderson alone if her intention was to encourage cheating. Nor was there any suggestion that Ms Sefo herself cheated. This was one of a number of machinery

malfunctions that had occurred that day including more than one half shell belts jam that would have been annoying to employees because it affected the ability to record accurately the number of openings attributable to each individual employee and therefore their remuneration. I am satisfied that the words used by Ms Sefo and her intention in using them were to express her frustration about the frequent machinery malfunctions and their consequences. I conclude that the enigmatic words *"ha ha, fucking ha"* were said in an ironic sense, that is not in some sort of gleeful encouragement to cheat but rather in the sense of conveying the antithesis of humour and pleasure.

[68] Turning to considerations of practicability of reinstatement more generally, it is correct that if reinstated as a mussel opener, Ms Sefo would have little if anything to do with the majority of the company's managerial witnesses who gave evidence opposing reinstatement and on grounds with which I have already dealt. The exception to this was the evidence of Gavin Barr, the then and current factory manager who might realistically have to have day to day dealings with Ms Sefo. I find that his evidence was considered and measured and that his concern about having to deal with Ms Sefo in a disciplinary setting was genuine. Without doubting Mr Barr's sincerity, however, much has changed since that time. There is uncontradicted evidence of improvements, both in the operation of the machinery and in management employee relationships at the plant. There has never been any question about Ms Sefo's ability as a mussel opener or, apart from events the subject of this case, about her work performance.

[69] Company managerial witnesses acknowledged that they had taken on board the findings of the Employment Relations Authority adverse to the company and, by implication, that future similar situations will be dealt with differently. I accept this to be a responsible and genuine reaction by the company to the findings made against it. The evidence establishes that the Sealord group has expert human relations and legal resources within the company that would be applied to any future allegations of the sort that led to Ms Sefo's dismissal.

[70] It is unlikely that Mr Barr, as factory manager, would alone have to deal with similar disciplinary issues, whether in respect of Ms Sefo or any other employee. I

consider his genuine concerns about alleged serious misconduct if Ms Sefo is reinstated to be overstated in all the circumstances. That is no less because I have observed Ms Sefo to have been affected significantly as a result of what has happened to her. Irrespective of compensatory remedies, Ms Sefo also has learned some difficult lessons about the consequences of workplace conduct and the need to be very conscious of the perception of her conduct by others. Although one can never be certain, I would be very surprised if Ms Sefo, on being reinstated, set out then to take advantage of that order by misconducting herself seriously in employment.

[71] Contrary to the finding of the Authority, I consider that Ms Sefo's reinstatement will be practicable and that she is entitled to this primary remedy, even after the necessarily long delay in determining her claims. I conclude that Ms Sefo should be reinstated to her former role as a mussel opener. There is no higher paid job in the fish processing industry for which Ms Sefo would be qualified and experienced. She has not been able to earn wages at the same level in other work she has undertaken since being dismissed. There is a strong statutory incentive for reinstatement where this is sought (as here) and where the Authority or the Court is satisfied that it is practicable.

[72] It is, if not inevitable, then certainly not uncommon that reinstatement might be perceived as embarrassing to the employer and the managers responsible for the original dismissal in a way that compensatory money awards are not. Reinstatement may be seen as an obvious criticism by the Court of the employer's decision to dismiss. That is, of course, not the intention of such an order but it may be one of the consequences. If, however, reinstatement of unjustifiably dismissed employees is to be the primary and accessible remedy that Parliament has clearly intended it to be, its implementation must be approached robustly and matter-of-factly.

[73] To avoid experiences in other cases in which reinstatement has been ordered against the opposition of the employer and, although not here, even some fellow employees, Ms Sefo's reinstatement will have to be a carefully managed exercise.

[74] It is to take place at a time and in circumstances to be agreed between Sealord and the Service and Food Workers Union but, in any event, no later than 21 days after the date of this judgment. That will enable Ms Sefo to arrange an orderly departure from her present employment and for the company to make arrangements for her re-introduction to the plant as a mussel opener. If, contrary to my assessment of the position, there are difficulties that cannot be dealt with sensibly and practically by management and union representatives, then the assistance of a Department of Labour employment mediator should be sought. I am aware that in other instances the mediators have assisted parties to resolve such questions as how a reinstatement is to be announced to other employees and the like.

Contributory conduct?

[75] The Authority considered that Ms Sefo contributed to the circumstances that gave rise to her unjustified dismissal sufficiently to warrant a reduction of remedies for that grievance. Without more, it assessed the reduction of monetary remedies to be 20 percent in all cases. As I have said before, a percentage reduction of monetary remedies to reflect contributory fault is a blunt instrument, albeit a simple one to apply. As in most cases, however, in this it does not take account adequately of either the nature of the conduct said to have been contributory or the subtleties of remedies to be reduced. There was, for example, a significant double reduction of remedies because not only were monetary compensations reduced by 20 percent but, for largely the same reasons as this was done, the plaintiff was denied reinstatement, itself a very significant remedy reduction. Quite possibly, also, the Authority double reduced the wage loss reimbursement remedies it allowed. Not only was wage reimbursement for a period of 4 months reduced by 20 percent, but indeed it is difficult to see how the Authority could have set the period of 4 months' wage loss in the first place because it seems clear from the evidence that Ms Sefo incurred wage losses for significantly longer than 4 months. Counsel could not support the Authority's reasoning for this double reduction.

[76] I have dealt with a number of the Authority's grounds for reducing remedies where these were also grounds for refusing reinstatement in that context. As I have already concluded, on the evidence heard by me several of those were wrong

conclusions and, in other respects, the implications to be drawn from proven facts are otherwise than adverse to Ms Sefo.

[77] So, standing back from the evidence that I have on these issues, can it be said that Ms Sefo was guilty of culpable conduct in employment that led to her unjustified dismissal and, if so, what should the remedy reduction that the statute requires the Court and the Authority to make in these circumstances, be?

[78] Not every element of blameworthy conduct on the part of an employee that contributes to a dismissal that is subsequently found to be unjustified should be reflected in remedy reduction. To do otherwise would expect standards of perfection of work performance by employees that are simply unrealistic in most workplaces including in Sealord's plant. So, for example, that Ms Sefo walked away to talk to a colleague about private matters for a brief period and that she expressed her frustration about frequent mechanical breakdowns in less than genteel language is so unremarkable that it would be pedantic and over-sensitive to form the basis of a reduction of remedies. As in most employment relations matters, the Authority and the Court should take a robust and realistic attitude to what occurs in workplaces and not scrutinise pedantically and critically every slight deviation from the ideal or even the norm.

[79] On the evidence heard by me on these issues, a reduction of remedies would not be warranted under s124 because there was no culpable conduct of sufficient seriousness by Ms Sefo to have engaged that section's mandatory requirements for a reduction. It follows that the orders for wage reimbursement and distress compensation that were reduced by the Authority should be restored. It is perhaps fortunate from the defendant's point of view that there has been no challenge to the apparently arbitrary 4-month limit put on wage reimbursement by the Authority.

Costs

[80] The plaintiff is entitled to a contribution to her costs and disbursements on the challenge. If the parties cannot agree on these, she may apply for them to be fixed

by memorandum filed within 28 days of the date of this judgment with the defendant having the same period to respond.

Summary of outcomes

[81] Ms Sefo was suspended unjustifiably and has a personal grievance therefor but no other remedies (than costs) are sought.

[82] Ms Sefo is to be reinstated in employment on the conditions set out in paragraph [74].

[83] There is to be no reduction of monetary remedies for contributory fault.

[84] Ms Sefo is entitled to costs.

GL Colgan
Chief Judge

Judgment signed at 1 pm on Thursday 17 April 2008