

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 224/09
5281888

BETWEEN MITCHELL BIRSE
 Applicant

AND ALLIANCE GROUP LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Mary-Jane Thomas, Counsel for Applicant
 Ken Smith, Counsel for Respondent

Investigation Meeting: 30 November 2009 at Invercargill

Determination: 23 December 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Birse) alleges that he was unjustifiably dismissed from his employment by the respondent (Alliance) from its Mataura plant on 4 September 2009. Alliance resist that claim maintaining that the dismissal was a justified dismissal for serious misconduct.

[2] Mr Birse was in the employ of Alliance at its Mataura plant for in excess of a decade on a season by season basis but for the past two years has been employed as a mutton and lamb boner. Over that same period, Mr Birse has been a Union delegate and at the time of his dismissal was the *winter kill delegate*.

[3] Mr Birse does not keep good health and was feeling unwell on 1 September 2009 but went to work anyway. At 2.30pm on that day or thereabouts, Mr Birse was approached by Mr Leitch, a foreman and told that he (Mr Birse) was needed upstairs

for a meeting. It is common ground that Mr Leitch did not explain to Mr Birse what the meeting was about. Mr Birse claims that he said he was unwell and declined to go upstairs. Mr Leitch undertook to pass on the fact that Mr Birse was declining to go upstairs.

[4] Mr Birse was then approached by another foreman, Mr McFaul, who asked Mr Birse if the latter was refusing an order. Mr Birse says he repeated that he was feeling unwell and asked Mr McFaul to leave him alone. Mr Birse's evidence is that he felt threatened and intimidated by Mr McFaul, that his heart was racing and that he was suffering a panic attack.

[5] Mr McFaul departed and Mr Birse went to find his Union delegate, Mr Crown, to complain about Mr McFaul's alleged bullying and intimidating behaviour. Mr Birse said that he found Mr Crown upstairs and he says that he made his complaint about bullying and harassing behaviour from Mr McFaul. When Mr Birse had completed his story (and by all accounts he did this in a very agitated state) he went to leave the manager's smoko room that Mr Crown was sitting in and claimed to have had a punch thrown at him by Mr McNaught, the plant's production manager. Mr Birse left the plant *very stressed* and went home. The following day, 2 September 2009, Mr Birse attended a meeting first thing in the morning and was promptly suspended and told that a disciplinary meeting would be held the following day 3 September 2009. The suspension was in respect to three allegations, failure to obey an order, an alleged health and safety breach and an allegation of leaving work early.

[6] At the disciplinary meeting on 3 September 2009, the process commenced with discussion about the allegation of failing to follow instructions. This was about Mr Birse refusing to *go upstairs* when asked to do so by the two foremen on 1 September 2009. After hearing Mr Birse's explanation, Alliance representatives at the disciplinary meeting accepted that Mr Birse had not been told why he was required upstairs and, as a consequence of that, Alliance proposed to *put that matter aside*. However, Mr Birse insisted that the matter be progressed. He referred to the complaint he made to Mr Crown, his Union delegate, about the bullying/intimidation from Mr McFaul and he alleged that Mr McNaught had *thrown a punch* at him as he attempted to exit the manager's smoko room the day before.

[7] Mr Neylon, the Human Resources Manager who presided at that meeting on behalf of Alliance indicated that Mr Birse's claim against Mr McNaught was a very

serious allegation and if it was found to be unsubstantiated Mr Birse would face severe disciplinary consequences, including perhaps dismissal. In order for that serious allegation to be investigated, the disciplinary meeting was adjourned and when it reconvened sometime later, Mr Birse was told that Mr McNaught denied throwing a punch, that another foreman who was in the vicinity had seen the incident and had not seen a punch thrown and that there was a *secret* witness who had also seen the incident and who also denied seeing a punch thrown.

[8] The meeting then continued to progress the alleged breaches of health and safety policy by Mr Birse and the allegation that he left the site early. Both those matters were *put to one side* by Mr Neylon after Mr Birse had made his explanation.

[9] Mr Neylon then indicated that Alliance was satisfied the allegation about Mr McNaught throwing a punch was a false one and they wished to adjourn the meeting so that the Union could recommend to Alliance what penalty ought to apply.

[10] After that adjournment there was a meeting between the Union and Mr Birse in which it was suggested that a five day suspension would be appropriate to propose to Alliance although Mr Birse protested that he had not made a false allegation.

[11] The disciplinary meeting then reconvened on Friday 4 September 2009, the company considered the five day suspension proposal but after reflecting on it, rejected that suggestion and dismissed Mr Birse summarily.

Issues

[12] The only issue for determination is whether it was available to a fair and reasonable employer to reach a decision to dismiss Mr Birse for serious misconduct in the particular circumstances of the case.

[13] In order to decide this issue, it will be helpful if the Authority considers the following questions:

- (a) Is there relevant background?
- (b) What happened downstairs?
- (c) What happened in the upstairs smoko room?

Is there relevant background?

[14] The evidence discloses that Mr Birse had had a reasonably chequered history. Mr Neylon gave evidence to the Authority about that and amongst other things listed a whole catalogue of previous disciplinary problems involving Mr Birse.

[15] Worse than that, Mr Neylon's evidence was that Mr Birse's behaviour had deteriorated over time. Mr Neylon deposed that he had previously worked alongside Mr Birse on the floor of the plant and that during that period, he formed the view that Mr Birse was *likeable rogue* but that latterly Mr Birse's behaviour had got worse.

[16] Symptomatic of those problems is the fact that at the point at which Mr Birse was dismissed from his employment he was on two final warnings for misconduct. That in itself is unusual given the evidence from Alliance that typically further misconduct on top of a final warning would result in dismissal. The explanation for this unusual state of affairs is set out in Mr Neylon's evidence in the following terms:

However (Mr Birse) was put on a further final warning in one last attempt to give him an opportunity to demonstrate he was capable of respecting the work rules at the plant. I explained to him at that time that I was putting my neck on the line for him by giving him a further opportunity and my recollection was that he was grateful for that and gave an assurance he would not let me down.

[17] The short point then is that at the point at which Mr Birse became entangled with the disciplinary process again, in the present case, he was already sitting on two current final warnings.

What happened downstairs?

[18] The events that happened downstairs on the plant floor on 1 September 2009 are relevant to put into context the basis on which Mr Birse was subsequently dismissed for serious misconduct. It will be recalled that Mr Birse complained of an altercation that he had had with a supervisor.

[19] The position was that Mr Birse's evidence indicated that he was unwell on that day but went to work in any event. Overall, it seemed that Mr Birse did not enjoy good health, was hypertensive, subject to panic attacks and the like. Two supervisors asked him to *go upstairs*. This expression seems to be a form of short-hand for a request that the person referred to is required to participate in a meeting since all of

the plant's meeting rooms are upstairs. On this particular day, Mr Birse was asked to go upstairs first by Mr Leitch. It is common ground that Mr Leitch simply told Mr Birse that he was needed upstairs for a meeting and that Mr Leitch did not tell Mr Birse what the meeting was about.

[20] Mr Birse refused to participate. His evidence is that he assumed that he was being asked to attend the upstairs meeting in his role as a Union delegate, although in fact that was not the position at all. He claims to have told Mr Leitch that he was unwell and that was why he was refusing to be involved. Mr Leitch denied being told that Mr Birse was unwell and recalled Mr Birse tell him that he was not going to participate in the meeting because the working day was nearly finished and he would only meet in the company's time and not in *his* time. I prefer Mr Leitch's evidence on this point over that of Mr Birse.

[21] In any event, Mr Leitch communicated Mr Birse's refusal and shortly thereafter, Mr Birse was confronted by another supervisor Mr McFaul who persevered with the request that Mr Birse was needed upstairs.

[22] Mr McFaul's evidence is that he reiterated the request that Mr Birse was needed upstairs and was again refused by Mr Birse. Mr McFaul then told Mr Birse that the latter was refusing to comply. Mr Birse alleges that Mr McFaul was aggressive and intimidating, that he told Mr McFaul that he was unwell and that the ultimate consequence of the discussion was that Mr Birse had a panic attack with a racing heart. Eventually, Mr Birse says that Mr McFaul left.

[23] Mr McFaul's evidence is different. He denies being bullying or harassing but acknowledges being firm and persistent. In particular, like Mr Leitch, Mr McFaul denies that he was told that Mr Birse was unwell. Again, I must say that I prefer Mr McFaul's recollection of events to those of Mr Birse. Like Mr Leitch, Mr McFaul recalls the only thing that he could remember Mr Birse saying to him was that he would not meet because he would have to meet in *his* time.

[24] In any event, once Mr McFaul left Mr Birse, Mr Birse rushed off to find *his* delegate Mr Crown. Mr Crown was already upstairs in the manager's smoko room waiting for Mr Birse for the scheduled meeting which of course Mr Birse had refused to attend. The purpose of the meeting, it transpired, was to seek explanations from Mr Birse about the series of alleged misconduct issues. I am satisfied on the evidence

that neither Mr Leitch nor Mr McFaul made it clear to Mr Birse what the meeting upstairs was about and so Mr Birse made the decision not to participate without any clear idea about what he was being asked to participate in. Mr Birse said in his evidence that he assumed he was being asked to attend a meeting as a Union delegate (that is to support another worker being interviewed by the management) and I accept that that is a plausible explanation for why he would have been requested to go upstairs.

[25] The Authority ought not to make any findings about the process adopted by Alliance in seeking to arrange for Mr Birse to attend upstairs, because that is not germane to the decision to dismiss and only provides relevant context. It is clear from the process adopted by Alliance that no final decision was ever taken in respect to its allegation that Mr Birse refused to obey a lawful instruction nor was any process undertaken in respect to Mr Birse's allegation that he was bullied and intimidated by Mr McFaul. If the employment relationship were to continue, one or both of those matters would need to be progressed.

[26] The only relevance of this complex of issues is in respect to credibility of witnesses, as the facts themselves provide only context for the eventual matrix that led to dismissal. Mr Birse claims to have told both supervisors that he was unwell when they summoned him upstairs. Neither supervisor remembers that but each supervisor remembers Mr Birse saying he would not meet in *his* time. As I have made clear, I prefer the evidence of the supervisors and I take that into account when I assess Mr Birse's overall credibility.

What happened upstairs?

[27] The evidence is that Mr Birse bounded upstairs looking for his delegate Mr Crown. Mr Crown was sitting in the manager's smoko room waiting for Mr Birse. Mr Crown had been asked to attend the same meeting as Mr Birse and he had readily agreed to participate. He clearly had no idea that Mr Birse was being difficult about attending the same meeting. Equally, it seems from Mr Crown's evidence that he had not been told in clear terms what specifically he was there for and his evidence suggests that Alliance thought he knew what it was about although he did not.

[28] Mr Crown records that he was sitting in the manager's smoko room upstairs when Mr Birse came in. Both men agree that Mr Birse was agitated and *really upset*.

Mr Crown describes him as *yelling and screaming at me* in describing his complaint about Mr McFaul's *bullying and intimidatory behaviour*. Mr Crown deposes that he started writing down what Mr Birse was telling him about the bullying and while he was doing that, Mr McNaught the production manager *appeared in the doorway*. Mr Birse sought to leave the room and both Mr Birse and Mr Crown gave evidence to the Authority that they say Mr McNaught put his arm out in front of Mr Birse. They used different words to describe this action but both claim to have seen it happen. Mr Birse exited the room quickly after this event and went home.

[29] Both Mr Birse and Mr Crown claimed to have seen something from Mr McNaught that looked like him either putting arm out to stop Mr Birse leaving the room (at best) or at worst throwing a punch at him on the way out. The relevant portion of Mr Birse's evidence is as follows:

Bruce McNaught, a production manager ... was there and stuck his arm out in front of me. I took a step back ... and I thought he had thrown a punch at me. ... I took what Bruce had done as a punch. It looked like a punch and took me entirely by surprise.

[30] Conversely, Mr Crown says this in his evidence:.

Mitchell (Mr Birse) was still explaining to me what had happened when I saw Bruce (Mr McNaught) raise his arm. Mitchell was in the doorway and Bruce put his arm straight out. It was like a punch type movement, putting his arm out in front of Mitchell. I don't know if it was to stop Mitchell moving out the door or if it was just towards Mitchell. His arm went across the front of Mitchell while Mitchell was trying to walk away. ... I don't know whether it was a punch that Bruce threw or not.

[31] Mr McNaught's evidence on the matter is supported by the evidence of another supervisor Mr McGowan. Essentially Mr McNaught denies throwing a punch and denies any action similar to that although he does acknowledge that he held the automatic door open with his arm and it is conceivable that that action was construed as the delivery of a punch. Mr McGowan supports Mr McNaught's recollection of those events. So, also does an anonymous witness who declined to be named because of the fear of being *victimised* by Mr Birse. I discussed this issue with Alliance during the course of the investigation meeting. They acknowledged that the fact of having an anonymous witness was far from ideal but were adamant that the witness would not have spoken up if the opportunity to be anonymous had not been proffered.

[32] Mr Birse was dismissed for maliciously making a false allegation namely that Mr McNaught had thrown a punch at him. The question of whether a punch was actually thrown is obviously a tipping point. I am satisfied on the evidence before the Authority that there was no punch or indeed anything like it. I think that Mr McNaught's action in holding the door open with his arm may perhaps have been construed by Mr Crown anyway as the action that he spoke of in his evidence. I am satisfied that Mr Birse was sufficiently wound up at this point to be a thoroughly unreliable witness and I discount his evidence as a consequence. I am influenced to reach that particular conclusion by the evidence of Alliance that the nature of Mr Birse's representations at the time they conducted their inquiry were quite different from the evidence he gave to the Authority. On both occasions, Mr Birse claimed to have seen a punch thrown but in the evidence before the Authority, he was consistently much more equivocal than he was at the interviews conducted by Alliance. In his answers to questions from me, Mr Neylon told me that Mr Birse began by being *adamant* that a punch had been thrown but then started to claim *confusion*. Conversely, Mr Crown's evidence of a punch is more certain in his evidence before the Authority than Mr Neylon remembers it at the time of the investigation. Mr Neylon's own notes of the disciplinary meeting of 3 September 2009 record a gradual process of Mr Birse resiling from his initially adamant contention about the punch. Mr Neylon's recollection is accurate in relation to Mr Crown whose evidence at the investigation meeting struck me as being more supportive of Mr Birse than the comments he made to Mr Neylon at the time.

[33] Critically, when Mr Neylon formed the view that Mr Birse had not dodged a punch from Mr McNaught, he put it to Mr Birse twice during the investigatory meeting that he did not believe a punch was thrown and that he did not believe that Mr Birse believed it either, Mr Birse did not respond. That evidence remained undisturbed by my investigation meeting.

[34] In any event, I am satisfied that the evidence available to Alliance at the relevant time would not have supported a conclusion that a punch had been thrown. As both counsel correctly identified, in the end the issue is one of credibility and I much preferred the evidence of the Alliance supervisors to the evidence of Mr Birse and Mr Crown. Mr Crown clearly was not sure what he saw and by his own admission, Mr Birse was so wound up that his evidence on any point about that exchange would, I fear, be unreliable.

[35] Amongst other things, Mr Birse denies having a conversation with Mr McNaught in the smoko room yet everybody else including Mr Crown acknowledges that there was an exchange between the two men. This is important because the initial claim Mr Birse made was that he did not know that Mr McNaught was in the room and that he turned around and effectively had to duck a punch almost instantaneously. Clearly that is not what happened because everybody records that there was an exchange between the two men.

[36] I am satisfied then that no punch was thrown by Mr McNaught and that the conclusion reached by Alliance to that effect was the correct one in all the circumstances. The real question is whether it is available to Alliance to dismiss Mr Birse on a finding of serious misconduct for making a malicious allegation of this sort to Alliance about one of their managers. In that regard, I put it to Mr Neylon that Mr Birse may simply have been mistaken, that he thought a punch had been thrown, he raised that as a legitimate concern and that having had the matter inquired into and found to be not made out, the issue could simply be left. However, Alliance's position was that Mr Birse had deliberately invented this allegation to deflect Alliance's attention from the variety of other misconduct issues that he was then facing.

[37] During the investigation meeting, there was no serious contention by Mr Birse that it was not available to Alliance to dismiss if it was found that the punch allegation had no substance. The thrust of Mr Birse's argument was that the conclusion that there had been no punch, was flawed. As I have already made clear, I do not agree with that view. I think it was available to a fair and reasonable employer to conclude that there had been no punch thrown by the production manager and as a consequence, the very contention that a manager would go to punch a worker is so outrageous as to reasonably attract a fair employer to conclude that such a wrongful allegation was malicious and thus constituted serious misconduct.

[38] While Mr Birse alleges that the judgments made by Alliance in concluding there was no punch were not the judgments of a fair and reasonable employer there is no contention that the process itself was an unfair one. I note that Mr Birse was represented throughout the investigation process by assertive and able Union officials, that the investigation undertaken by Mr Neylon was measured and reflective, that

Mr Birse remained on pay throughout the process and that Mr Birse had a full opportunity to be heard on penalty.

Determination

[39] I am satisfied that a fair and reasonable employer after the conduct of the fair and reasonable investigation that Alliance conducted in the present matter would conclude that this was a malicious allegation of the gravest kind against a manager, that the allegation was without merit and was invented to deflect attention from serious misconduct issues faced by Mr Birse. It follows that I conclude that the dismissal was justified and Mr Birse's claim fails in its entirety as a consequence.

Costs

[40] Costs are reserved.

James Crichton
Member of the Employment Relations Authority