

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 1/08  
5075452

BETWEEN                      HARRY BUTCHER  
   Applicant  
  
AND                                OCS LIMITED  
   Respondent

Member of Authority:      Paul Montgomery  
  
Representatives:            Tim Oldfield, Counsel for Applicant  
   Paul McBride, Counsel for Respondent  
  
Investigation Meeting:    11 September 2007 at Christchurch  
  
Submissions received:    21 September and 1 October 2007 from Applicant  
   25 September and 1 October 2007 from Respondent  
  
Determination:              10 January 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant claims he was unjustifiably summarily dismissed from his position as a trolley person at Christchurch International Airport by the respondent company which provides a range of services to the airport company. In his claim he seeks lost wages, compensation for hurt and humiliation and costs.

[2]     The respondent says the dismissal was not unjustified as Mr Butcher had disobeyed a formal, reasonable and lawful instruction not to smoke in company uniform at any time outside the permitted smoking areas and only during his official breaks. Further, the respondent says its procedure was correctly carried out with the applicant represented by his Union organiser. In addition, it says that as Mr Butcher was approaching retirement, it offered alternative work to him at *less sensitive* sites.

[3] The parties attempted to resolve the relationship problem using the Mediation Service of the Department of Labour but were unsuccessful.

**What caused the problem?**

[4] Mr Butcher is a heavy cigarette smoker who had been employed at the airport as a trolley person by the respondent and its predecessor since 1995.

[5] The events which led to these proceedings occurred on Thursday, 6 October 2005 when Mr Butcher, while on his tea break, was walking to a permitted smoking area when he observed there was a shortage of trolleys in the domestic baggage area. He says he went out to the carpark and picked up a load of trolleys and took them to the luggage area. He then went and undertook a regular cleaning task at 7pm. While returning from that task and driving a tow cart pulling trolleys, the applicant says *it was starting to get dark and there was no one around and I decided to have a smoke on the way back. Then I heard Dean Christie yell out, "Harry, put that smoke out". I looked around. I didn't even see the guy and I could not tell where he was. I just carried on and took the trolleys back to baggage inside.*

[6] On 3 November, a disciplinary meeting was held to investigate the incident. The applicant attended accompanied by John Miller of the Service and Food Workers' Union. The company was represented by the general manager of human resources, Clive Menkin, Jacque Hale (Mr Butcher's supervisor), and Richard Lange, the then operations manager.

[7] Following an adjournment of that meeting, Clive Menkin asked if he could speak privately and off the record to John Miller who, on his return, told the applicant that the company was considering dismissal but was open to consider any other alternatives to dismissal including have Richard Lange identify less sensitive sites for the applicant to work. The company wanted responses from the applicant and/or the Union prior to 10 November 2005 when Mr Butcher was going on leave. Although retained on pay, the applicant was not requested to attend work, the respondent taking the view that the risk of Mr Butcher's reoffending was high, as was the risk to the respondent's contract with the airport company.

[8] The respondent says it made it clear to the applicant and his representative at the meeting that it considered the incident to be serious misconduct but was prepared to consider options other than dismissal. It says Mr Lange provided information

about other possible work sites but neither the applicant nor the Union made any substantive response on these, nor did the applicant or his Union propose any other alternative for it to consider.

[9] In a letter dated 4 November, the Union claimed the respondent was unable to dismiss Mr Butcher because the company handbook listed smoking as simple misconduct, not serious misconduct. The company replied on 8 November 2005 stating that its decision was based on the applicant's admission of non-compliance with a lawful and reasonable instruction from his employer. That letter also sought a response to the respondent's request for alternatives to dismissal. When none was received, Mr Menkin wrote to Mr Butcher, copying to Mr Miller, advising that having had no response from the applicant, he was dismissed effective 3 November 2005.

[10] To place the dismissal decision in context, it is necessary to refer to a letter issued to Mr Butcher on 18 November 2004 following a disciplinary meeting with the respondent following an incident involving the applicant smoking in uniform while on duty at the airport. The letter is as follows:

*Dear Harry,*

*Following our meeting of 12 November regarding disciplinary action with smoking on duty in uniform I advise as follows.*

*Your reason being you are attempting to give up smoking and had forgotten your patches on the day in question leading to you needing a cigarette is accepted. Whilst accepted it is a clear breach of our Code of Conduct and that of the airport authority and you have been reminded of this on several occasions.*

*The outcome of this meeting is that you have been given a verbal warning and a very clear instruction on behaviour in this regard. As this verbal warning was quite detailed, I wish to reiterate the instructions to you in writing (this is not a written warning).*

*You are not permitted to smoke in any restricted area of the airport. You are not permitted to smoke in the OCS uniform at any time outside of permitted areas of smoking and at any other time than official breaks.*

*With the new regarding smoking to come into effect 10 December 2004, you are not able to smoke at any time and any place within the confines of the airport other than any designated area that may be provided by the airport authority. You will be liable for any fines that you may incur.*

*Any breaches of this instruction will be deemed as serious misconduct and may result in disciplinary action being taken which could result in your dismissal.*

*You have acknowledged your understanding of this action in the presence of Andy Lea, organiser of the Service and Food Workers Union – Jacquie Hale, contract manager OCS-Airport Site and the writer.*

*Yours faithfully,  
John Beeby  
Branch Manager*

[11] The applicant's view is that the respondent, in dismissing Mr Butcher, was relying on an expired verbal warning on a matter, he says, was not capable of breaching the serious misconduct threshold as smoking is listed in the Code of Conduct as misconduct only.

[12] The respondent's position is that it did not rely on the verbal warning confirmed by the letter, but on the *instructions* issued verbally to the applicant and also confirmed by the letter. It says the instructions were, and remained regardless of the date of their issue, lawful and reasonable instructions.

### **The issues**

[13] To determine this matter the Authority needs to decide the following issues:

- Was the respondent justified in relying on the 18 November 2004 letter in addressing the incident on 6 October 2005; and
- Was the investigation of the later incident full and fair; and
- Was the alleged suspension of the applicant on 3 November 2005 lawful; and
- Was the dismissal of the applicant unjustified; and
- If so, what, if any, contribution did the applicant make to the circumstances of the dismissal; and
- What remedies are due to the applicant?

### **The test**

[14] The test for justification is set out in s.103A of the Employment Relations Act 2000 and requires the Authority to consider, on an objective basis, whether the

employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

### **The investigation meeting**

[15] At the investigation meeting, the Authority heard evidence from the applicant, Mr Miller and from two former employees, Pauline Sheppherd and Norma Timms. For the respondent, evidence was given by Mr Menkin, Mr Lange and Ms Hale.

[16] All were open and straightforward in their responses to questions, however, some difficulty arose for the applicant in that neither he nor Mr Miller were able to provide notes they had taken at the 3 November 2005 meeting and were often unable to recall details clearly. The respondent's witnesses were less reliant on memory having provided copies of notes taken and a typed and dated account event of the meeting. No substantial challenge was made regarding the accuracy of these notes.

[17] The Authority appreciates the time and effort witnesses provided to assist it. I am also grateful for the assistance of Mr Oldfield and Mr McBride at the meeting and for their timely and on point submissions.

### **Analysis and discussion**

[18] At the outset it needs to be made clear that in considering this matter I have had no regard to the unsolicited letter from eight co-workers of Mr Butcher tendered to the Authority by fax the afternoon prior to the investigation meeting.

[19] At the heart of this matter is the letter set out above. Analysis of this document makes it clear that there are two distinct points being advised to Mr Butcher by the then branch manager, Mr Beeby. Following a disciplinary meeting, the letter confirms in writing a verbal warning *and a very clear instruction on behaviour in this regard. As this verbal warning was quite detailed, I wish to reiterate the instructions to you in writing (this is not a written warning).* The instructions are then set out clearly and the letter continues, *any breaches of this instruction will be deemed as serious misconduct and may result in disciplinary action being taken which could result in your dismissal.*

[20] It is quite clear Mr Beeby is confirming verbal instructions issued to the applicant and confirming that any breaches of these instructions will be considered

under the classification of serious misconduct. The letter indicates the respondent wanted to ensure Mr Butcher was left in no doubt as to the possible outcome should he breach the smoking regulations in the future.

[21] The letter also records Mr Butcher's accepting of the warning and the instructions in the presence of Mr Andy Lea, a Union organiser, and in the presence of Ms Hale.

[22] Turning to the meeting notes of 3 November 2005, they record John Miller telling the meeting *at no point are we trying to dispute what has happened* (on the evening of 6 October 2005). That is a straightforward admission of the behaviour complained of and essentially a breach of the clear instructions issued in writing to the applicant by the company almost a year earlier. While I accept there is some merit in the argument that the verbal warning had likely expired, that does not mean that the formal instructions to restrict Mr Butcher's smoke practice to the authorised places, times and conditions expired with it.

[23] The letter also dispels the applicant's claim that the respondent was acting in breach of its own policies by considering the final incident as serious misconduct.

[24] Mr Butcher complained that he was unhappy with John Miller talking to Mr Menkin *behind my back* at the 3 November 2005 meeting. That is surprising given that Mr Menkin held out to Mr Butcher a route that would avoid the sanction of dismissal. I am satisfied, on the evidence before the Authority, that as instructed, Mr Lange searched out other available work for the applicant and relayed these possibilities to Mr Butcher, but received no response. I also accept his evidence that while the sites on offer may not have immediately provided 40 hours per week, it was simply a matter of time before a full complement of hours would be available to the applicant.

[25] Having considered the issue of what rates might be payable on other sites, I am of the view that no finality was reached as the non-response from Mr Butcher meant the matter did not arise for discussion and possible negotiation. Notwithstanding this, the applicant remained staunch in his assertion that the positions under discussion would have yielded him a lower hourly rate.

[26] The Authority commends the approach adopted by the respondent in attempting to assist Mr Butcher remain in its employment. The compassion and

understanding displayed by the company executives and by Mr Menkin in particular does them considerable credit.

### **Determination**

[27] Returning to the issues set out above in this determination:

- I find the respondent was justified in relying on the specific instruction issued to Mr Butcher in the 18 November 2004 letter and was entitled to consider the 6 October 2005 alleged breach as serious misconduct.
- I find the investigation of the later incident by the respondent was full and fair and the company's actions were what a fair and reasonable employer would have done in all the circumstances of this case.
- I find that having made proposals for alternative work to the applicant and having reminded him of the need for a response or alternative proposals by 10 November 2005, the respondent, having had no response, was justified in terminating Mr Butcher's employment by way of letter on 15 November 2005.
- I find that the dispute between the parties over the *suspension* of the applicant pending investigation of alternative positions is not an issue as the meeting notes of 3 November 2005 confirm that *Clive/John agree that we will suspend Harry on pay for this week*. If this was indeed a suspension, it was consented to by the applicant's representative.
- I find the respondent has met the test for justification set out in s.103A of the Act.
- I find that the applicant, although feeling aggrieved, has no personal grievance and regrettably the Authority cannot assist him further.

### **Costs**

[28] Costs are reserved. The parties are to attempt to resolve this issue between themselves. Should this not be achieved, Mr McBride is to lodge and serve his

memorandum within 30 days of the issue of this determination. Mr Oldfield has a further 14 days within which to lodge and serve his memorandum in reply.

Paul Montgomery  
Member of the Employment Relations Authority