

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA  
TAIMAHI ŌTAUTAHI ROHE**

[2024] NZERA 682  
3276420

BETWEEN KOMIHANA REWI MITCHELL  
Applicant

AND ALLIANCE GROUP LIMITED  
Respondent

Member of Authority: Antoinette Baker

Representatives: Mary-Jane Thomas, Katherine McDonald, Applicant counsel  
Shaun Brookes, Ella Hawkey-D'Aeth, Respondent counsel

Investigation Meeting: 6 & 7 August 2024 in Invercargill

Submissions received: 7 August 2024

Final information received: 12 August 2024

Determination: 18 November 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Mitchell worked for the respondent (Alliance) at its Lornville plant as a seasonal worker for approximately 17 years until his dismissal for serious misconduct at the end of January 2023. He was dismissed after he had driven a forklift toward two women employees seated outside their break room causing both to move when the forklift approached and stopped close to them. Mr Mitchell through his union<sup>1</sup> representation accepted that this action was serious misconduct but says the resultant decision to dismiss him for this conduct was too severe. This was because Mr Mitchell had been a long term employee, the 'verbal warning' the day before for driving a loader fast was either procedurally flawed and or not serious enough to count toward considering an outcome of dismissal; that no one was injured in the forklift

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<sup>1</sup> New Zealand Meat Workers and Related Trades Union.

incident (reported as a ‘near miss’); and Mr Mitchell had no intention to scare or injure the two women and had apologised to them.

[2] It is also submitted for Mr Mitchell that Alliance as a large well-resourced employer had flaws in its procedure of investigation. It says there was a lack of documentation and note taking including that Mr Mitchell was not clearly given letters outlining steps and what was being alleged and investigated and then considered in terms of outcome. Mr Mitchell submits that Alliance was not clear about who the real decision maker was and that the plant manager simply wanted him gone (submitting predetermination of dismissal); that the decision to dismiss was inconsistent with the way other employees had been treated; that the decision to dismiss was influenced by Mr Mitchell’s wife’s live grievance issues with Alliance at the time or as above the new plant manager simply wanting Mr Mitchell gone.

[3] Mr Mitchell seeks permanent reinstatement (albeit, in reality, the opportunity to be taken back on in further contracts at the same seniority preference); lost wages including a claim for lost superannuation; and compensation. His initial claim that he was unjustifiably disadvantaged in his employment (relating to suspension for the same conduct) was withdrawn in March 2024.

[4] Alliance says its decision to dismiss was an outcome that a fair and reasonable employer could have arrived at in all the circumstances<sup>2</sup> even if its process was not perfect. It says Mr Mitchell knew what was being investigated and alleged; that he was given the opportunity to comment further on dismissal as an outcome albeit choosing his union to represent him in relation to this. Alliance says it was within reasonable scope for it to have decided Mr Mitchell’s actions were ‘deliberate’ and not part of a parking manoeuvre as was Mr Mitchell explained. Alliance submits that this was an unsafe use of a forklift and Mr Mitchell was trained in and had knowledge of the safety policies. It says the action could have resulted in serious harm or death.

### **The Authority’s investigation**

[5] Mr Mitchell lodged these proceedings on 2 February 2024, just over a year after his dismissal and after having raised personal grievances on 5 April 2023 through his union representative, Mr Ray Hunter. An investigation meeting was held across two days after parties

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<sup>2</sup> Employment Relations Act 2000, s103A.

had previously lodged and served briefs of evidence. I asked questions of the deponents of evidence on oath or affirmation. Parties had the opportunity to do the same. For the applicant I heard from Mr Mitchell and wife, Ms Mitchell; and from Mr Mitchell's union representatives during the investigation and or disciplinary meeting: Messers Blackie, Tohiariki and Hunter. For Alliance I heard from Mr Mitchell's supervisor at the time of the dismissal, Mr Christopher Richardson (now retired); its Lornville plant manager, Mr Jason Graham; and its former production manager, Alliance's nominated investigator and decision maker towards the dismissal, Mr Yaser Ali. Mr Ali appeared by AVL because he left Alliance's employment just after the dismissal and now works outside of New Zealand. I heard and received written submissions from respective counsel at the end of hearing from the witnesses.

[6] After the investigation meeting, as per my request, I received from Alliance a final pay slip, and from Mr Mitchell a complete IRD record of his earnings after his employment together with clarification about the policy document outlining contributions and entitlement terms and conditions for Mr Mitchell's superannuation scheme.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings and expressed conclusions as necessary to dispose of the matter and make appropriate orders. It has not recorded all evidence and submissions received.

[8] This determination has been issued slightly outside the statutory period of three months. When I advised the Chief of the Authority this would occur, he decided, as he is permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

### **The issues**

[9] The issues requiring investigation and determination are:

- a. Was Alliance justified in concluding that Mr Mitchell's serious misconduct warranted summary dismissal?
- b. If not, and if Mr Mitchell was unjustifiably dismissed is he to be permanently reinstated, and or awarded compensation and or lost earnings under s 123 of the Act?

- c. Are any remedies to be reduced under s 124 of the Act for employee contribution to the actions that gave rise to the grievance?
- d. Should either party contribute to the other party's costs?

### **What likely occurred in the lead up to the dismissal?**

[10] Much of the evidence before me includes what various players in the investigation and disciplinary process had to say to each other about what should happen in relation to Mr Mitchell's ongoing employment as a result of his forklift driving actions on 18 January 2023. There are disputes about what was meant or inferred in conversations including 'side conversations' about Mr Mitchell's continued employment prospects both during and after his dismissal when Mr Mitchell with union assistance sought to be considered for re-employment for the new season. There was a lack of documentary recording by Alliance during its investigation and disciplinary process. Messers Hunter and Richardson produced their own handwritten diary entries and Mr Tohiariki (closer to the investigation meeting) provided a recording which has been transcribed from what he discreetly recorded (but says inadvertently did not disclose earlier) in a meeting he attended for Mr Mitchell. This is not complete and not always clear because people talk over each other. Doing my best within this context I set out, as follows, the lead up to Alliance's decision to summarily dismiss Mr Mitchell and make findings where necessary.

[11] Mr Mitchell worked at Alliance's Lornville plant on seasonal fixed term contracts for approximately 17 years.

[12] I am satisfied based on documentation before me that Mr Mitchell was well trained and experienced to operate and drive a forklift and had signed documentation showing he understood policies about safe procedures including not to drive a forklift within 5 metres of people at the plant.<sup>3</sup> He gave confident oral evidence that he had been driving a forklift for 35 years, that the forklift he was driving had a weighting of '3½ tons' and that the forks of the vehicle he drove on 18 January 2023 were 1.8 metres long.<sup>4</sup> Mr Mitchell further explained to me that his role included '90%' forklift driving and that he was a 'leading hand' at the time he was dismissed. He explained his leading hand role meant that he managed a small team to make

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<sup>3</sup> Document 4 of the respondent's bundle of documents.

<sup>4</sup> Komihana Rewi Mitchel, oral evidence including in cross examination.

sure that he and the team's daily tasks went 'smoothly' and 'got done'. He explained he had been a 'leading hand' for about five years for which he is paid at a slightly higher rate.

*Verbal warning for driving conduct on articulated loader*

[13] On 17 January 2023 the day before Mr Mitchell drove the forklift towards the two women he was reported in the Alliance safety system as driving an articulated loader at 'excessive speed'. Mr Richardson wrote in his diary a note to record that he met Mr Mitchell about this, gave Mr Mitchell a chance to have representation which was declined, heard Mr Mitchell's explanation that he was driving to beat the ash truck to the felly and that Mr Richardson then gave Mr Mitchell a verbal warning. The diary note included that Mr Richardson told Mr Mitchell he was a senior employee who should have shown more leadership to the team he represented. Mr Mitchell says variously that he was not given the verbal warning or through his union it is accepted he was verbally warned but that it was not a written warning and therefore not something serious enough to show a 'history' of behaviour.<sup>5</sup>

[14] Mr Richardson seemed vague in his oral evidence about the process for entering a verbal warning in the Alliance system and seemed to rely on what he had 'always done' which is record the same in handwriting in his diary. Alliance has produced an Incident Case report which supports that the matter was reported on 17 January 2023 consistent with Mr Richardson's diary note. It appears this electronic report entry was made at a latter time.

[15] I find that Mr Mitchell was verbally warned for driving a loader fast the day before the forklift incident.

*Investigation of forklift incident on 18 January 2023.*

[16] Mr Richardson's evidence includes that he was first approached by a leading hand employee who verbally told him they had witnessed the incident of Mr Mitchell driving up to the two women in the forklift. Mr Richardson says he told the person to fill in an incident report. An 'Incident Case Report' was filled in but apparently sometime later. There was an intervening weekend, and it seems the matter was not acted upon until 23 January 2023 by managers.

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<sup>5</sup> From the 30 January 2023 transcript.

[17] The incident report describes the 'Details of the Event' as:

Hana Mitchell driving forklift came in near smoking area by the side of canteen made as if to pick up a chair while a person sitting in it, horse play. It was just mucking about but could have led to serious injury.

[18] Mr Ali confirms in his evidence that he first became aware of the incident and was appointed investigator on 23 January 2023. His written evidence is that he was 'shown' the CCTV footage of the incident and that it 'appeared to [him] that Hana intentionally drove the forklift towards his fellow employees to scare them, hence putting their safety at risk.' Mr Richardson verbally asked Mr Mitchell to attend a meeting which occurred on 24 January 2023. It is unclear where or when this happened. Attending a meeting on 24 January 2023 were Mr Mitchell, Mr Richardson and Mr Ali.

#### *24 January 2023 meeting and suspension*

[19] At the 24 January 2023 meeting Mr Mitchell was suspended on pay pending the investigation of a 'near miss' incident. It appears not in dispute that this communication was in a suspension letter that Mr Ali had prepared and gave to Mr Mitchell at the meeting. The letter included that:

We have received a 'near miss' report involving you driving a forklift towards/ at other employees on Wednesday 18<sup>th</sup> January 2023 and which may constitute a serious breach of our safety rules. We have concluded that suspension is appropriate under the circumstances pending a full investigation into the matter.

[20] The remainder of the suspension letter included reasons for the suspension, that Mr Mitchell was entitled to have representation, that Mr Mitchell was to keep matters confidential and acknowledged he could seek access to the counselling service available. The letter was penned by Mr Ali who confirmed in his evidence that he was appointed to investigate. The letter did not include that the outcome of the investigation could result in dismissal, but it did include that it was an investigation for 'serious breach of our safety rules.'

[21] Mr Mitchell's evidence is that he knew the rule was not to drive a forklift within 5 metres of people; that he declined to have someone with him as support at the 24 January 2023

meeting because while he knew about the incident and knew he had made ‘an error of judgement and owned it’ but that he did not think he could get dismissed for it.<sup>6</sup>

[22] Mr Ali’s evidence is that at the 24 January 2023 meeting he also explained the allegation in relation to the forklift to Mr Mitchell albeit not apparently recording in writing what was said. In his oral evidence in answer to my questions Mr Mitchell recalled he had the ‘process’ explained to him at the 24 January 2023 meeting and was invited to a meeting the next day, 25 January 2023 at 10 am. He explained to me that he ‘Had heard a fair amount of talk’ and had a ‘pretty good idea’ what it was about.

[23] Coupled with his written evidence referred to above at [22] and that it seems the word was out about what Mr Mitchell may have done (according to his own evidence) I find a high likelihood that Mr Mitchell was well aware at this stage that Alliance was raising issue with what it saw as a ‘serious breach of safety rules’ relating to him driving towards the two women in a forklift on 18 January 2023.

*Between the 24 January and 25 January 2023 meetings*

[24] Mr Mitchell then engaged his union to come to the 25 January 2023 meeting with him. He spoke with Mr Hunter about this. Mr Hunter told Mr Mitchell to write up his version of what occurred which Mr Mitchell did. That write up, as noted above, included Mr Mitchell’s detailed explanation of parking spaces being short due to other forklifts parked to the right of the building (everyone congregating for morning tea in respective tea rooms) and that he had to manoeuvre to park in a park that required him to drive close to the women before reversing, an action needed because of the turning capability of the forklift.

*25 January 2023 meeting*

[25] Mr Mitchell attended the 25 January 2023 meeting with Mr Hunter and Mr Reid both as his union support. Mr Richardson and Mr Ali also attended.

[26] At the 25 January 2023 meeting Alliance provided to Mr Mitchell the following:

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<sup>6</sup> Brief of Evidence of Komihana (Hana) Rewi Mitchell dated 12 June 2024 at paragraphs 18.4 and 19 and 21.

- a. screenshots of the incident from CCTV footage of the forklift incident showing various stages of Mr Mitchell driving the forklift in a line towards the women with one showing the forklift close to the women with the forks then lowered and filling the space between the forklift and the two women;
- b. two brief signed witness statements dated 25 January 2023 from each of the two women that Mr Mitchell drove the forklift towards. One woman refers to hearing the forklift and 'jumped' because the other woman did. She says Mr Mitchell stopped 1.5 metres away, reversed, got out and was laughing as he went to his dining room. The other woman said she heard a forklift coming 'what I thought was towards me. I heard the forks drop. I lifted my legs because of this. I think the forklift stopped approximately 1.5 metres';
- c. a copy of Mr Richardson's handwritten diary record page recording the verbal warning for driving the loader fast on 17 January 2023.

[27] Mr Mitchell produced at the 25 January 2023 meeting his handwritten detailed version of his actions.

[28] Mr Hunter's handwritten diary notes about this meeting included that the 'Company then asked if we wanted to view the video ... viewed video.' While Mr Hunter in his evidence says the video included a longer piece when he first saw it relating to Mr Mitchell getting out of the forklift (relevant to whether Mr Mitchell was afterwards laughing as one of the women claimed in her statement), the CCTV played in the investigation meeting showed the action which I find was likely taken from the relevant time when Mr Mitchell drove straight towards the women, and they move as he reaches very close to them.

[29] To summarise then at this stage, Mr Mitchell had union representation and support, he had been provided with all of the above and saw the video footage of the incident to which he had screen shots given to him as well, an incident that I find he was well aware of by then. He in turn had provided his explanation of why he drove the way he did which was related to manoeuvring into an available park.

[30] Nothing was recorded or communicated in writing to Mr Mitchell by Alliance in terms of next steps. Mr Ali says the union asked for more time to meet again and this was granted. Mr Hunter's handwritten diary notes are consistent with this:

Hana further suspended until 10am Fri 27<sup>th</sup> after discussions Hana suspended = Mon 30 January 2023 so union could seek advice.

*Before the 30 January 2023 meeting*

[31] Mr Blackie is the Senior organiser for the union and as such not employed by Alliance at Lornville (like Mr Hunter). I accept his evidence that he was first aware of Mr Mitchell's issues from a phone call from Mr Hunter 'sometime after' the 25 January 2023 meeting. Mr Blackie says he understood from Mr Hunter the plant manager [Mr Graham], 'wanted [Mr Mitchell] dismissed'. Mr Blackie's evidence further includes that dismissal was proposed by Alliance at the 25 January 2023 understanding this from Mr Hunter. Mr Hunter's evidence about this is that his view about the plant manager wanting to dismiss Mr Mitchell was based on having a 'quiet' conversation on his own with Mr Ali after the 25 January 2023 meeting when he asked, 'where is this all going?' He says that Mr Ali told him he was acting on his manager's instructions. Mr Hunter's evidence is that 'he took from this that it meant, 'Jason Graham [the plant manager] was calling the shots'. Mr Ali's evidence responds that Mr Hunter took the wrong inference from his words which simply meant he was instructed to investigate. Mr Hunter denies that he said that 'he's a goner' after seeing the CCTV footage after the 25 January 2023 meeting as is Mr Richardson's evidence. I find a likelihood that at the very least everyone understood Alliance were considering dismissal by this time. Its lack of clear documentation is not admirable however I am not satisfied the further inference taken that the matter was predetermined is made out.

[32] Mr Graham had only started at the plant on 9 January 2023. In his evidence he says he was aware of the investigation into Mr Mitchell's forklift incident but that the decision making was handled by Mr Ali. He recalls Mr Ali discussing the matter with him at some point and that termination may be the outcome. In his oral evidence he says he assumed Mr Ali, being in a managerial position, knew what he was doing and presumed he had human resources support. He said in response to a cross examination question about whether he knew matters were not well documented, he responded that he did not get into that level of the detail of the investigation at the time. I found Mr Graham to be a straightforward witness. To the extent that much has been made of Mr Graham somehow being the decision maker who predetermined the decision to dismiss Mr Mitchell I find nothing plausible before me to support this.

*30 January 2023*

[33] Mr Blackie's evidence is that he attended the plant site to go to this meeting with Mr Hunter. He attended with Mr Hunter and Ray Tohiariki another on site union person. The latter's evidence is that 'originally I was not going to attend' ... 'but because I was on site at the time, Bob Blackie our Senior Organiser, told me to attend so I did.' In cross examination he said, 'I was hauled in off site.' Mr Tohiariki also says in his evidence that Mr Hunter had told him that Alliance 'had already indicated that the Applicant was likely going to be dismissed and the purpose of the meeting was for us to try and get them to pull back from dismissal which we all believe to be excessive.'

[34] Again at this stage, considering the above, I find a likelihood that as part of its process, Alliance through Mr Ali had likely indicated the potential for dismissal albeit not in clear documentary form.

*Attendance by Mr Mitchell at the 30 January 2023 meeting*

[35] Before setting down as best I can what was likely discussed at the 30 January 2023 meeting I note that Mr Mitchell did not attend the first part of that meeting.

[36] Mr Mitchell's oral evidence is that Mr Blackie told him not to come to the meeting. Mr Blackie explained to me that he did not have Mr Mitchell come to the meeting because they were just going to 'try and resolve it'. Mr Tohiariki's evidence includes, the aim was to go and have Alliance pullback from a decision to dismiss. The transcript from Mr Tohiariki phone recording, such as it is, supports that this is what happened but crucially Mr Blackie accepted when he saw the CCTV that the conduct was 'serious misconduct'. I note here that Mr Blackie confirmed in his oral evidence that he went to the meeting without having seen any footage or material that was provided to Mr Mitchell and Mr Hunter at the 25 January 2023 meeting.

[37] Considering the above I find Mr Mitchell chose to do not attend the first part of the 30 January 2023 meeting and do not accept Alliance can be held to account for him not attending. I find that by this stage it was likely that the parties knew this meeting was to discuss whether in the face of what happened Mr Mitchell should be dismissed. By this stage Mr Mitchell had explained his actions, he had received the information from Alliance, and he provided and had

his union representation hand in at the first part of the 30 January 2023 meeting two letters of typed apology (which he signed) to the two women concerned which read:

I had a momentary lapse of judgment and although I had the forklift under control, I used it thoughtlessly near the canteen smoking den. Although I had no intention of hitting you, nor any other person or object, I acknowledge my actions would have seemed frightening to you. Please accept my apologies and be assured you or anyone else will not be put in this position again.

[38] I accept the submission that Alliance was entitled to rely on Mr Mitchell having the union represent his interests at this meeting. I do not accept that Mr Mitchell could have been mistaken about the purpose of the meeting being a further opportunity for him to have his say about proposed dismissal for serious misconduct.

*30 January 2023 meeting*

[39] The first part of the 30 January 2023 meeting was attended by Mr Blackie, Mr Hunter, Mr Ali and Mr Richardson. I conclude from the transcript of Mr Tohiariki's recording and weighing the evidence of the parties that the first part of the 30 January 2023 meeting included the following:

- a. Mr Blackie having by then seen the CCTV footage, accepted for Mr Mitchell that Mr Mitchell's action was serious misconduct and that there was a verbal warning the day before for driving the loader fast albeit questioning if this was so serious it would have been a written warning;
- b. Mr Ari says in this meeting that the CCTV shows the action was more than 'foolish' as described by Mr Blackie but was deliberate and inconsistent with Mr Mitchell's explanation about parking;
- c. Mr Richardson asks about other options if not dismissal and this is reiterated by Mr Blackie as a written warning and stand down for training, Mr Blackie referring to long term service and personal circumstances and others being treated differently albeit not giving details;
- d. Mr Richardson at one point says other matters with forklifts did not involve driving directly at others and that they can't see how they can have someone like this continuing

at the plant noting the driving of the forklift towards the women and the verbal warning for driving the day before.

[40] The following is what Mr Ali said during the 30 January 2023 meeting about the CCTV footage compared to Mr Mitchell's statement:

So, he was driving straight basically going that side. Otherwise, if it were to have been ... See we also see that if that if there was a -what do you call it – when you said that it's a foolish to act what he did. It means he did it himself. Right? If it would have been another accident thing, we would have taken it lightly. Something like that. That he didn't see them. Or they came in front of an open door. Something like that. It would have been like we would have investigated more. Right? And we would have been a little more lenient on it. But it's done deliberately, you can see he's driving that way. And according to his statement, he wanted to have a look on the right-hand side where there were already four forklifts parked. That doesn't make his statement correct as well. It contradicts his statement as well.

#### *The adjournment and final decision*

[41] At some point there is an adjournment. The recording becomes unclear exactly when this was in terms of Mr Ali's participation. Mr Richardson is recorded as agreeing that Alliance would talk to its lawyer about matters after Mr Blackie had several times suggested this would be a good idea before deciding an outcome. I accept the submission for Alliance that it was its decision whether to have decided what advice it obtained. What I take from this however is that an outcome was likely the understood next step.

[42] There are varying estimates about how long the adjournment was. Mr Ali says 10 to 20 minutes during which he considered matters. It seems unclear whether he discussed anything with Mr Graham. If he did I accept the submission for Alliance that it was still Mr Ali's decision and refer above to how I find this challenge about who the decision maker was.

[43] It is not in dispute that Mr Mitchell came back to the meeting and received what was effectively the decision as to summarily dismiss him. The written termination notice included that the dismissal was effective immediately and the handwritten reason was recorded as:

Serious breach of safety of fellow workers by driving forklift straight towards them while they were sitting outside. There was a severe risk of injury seriously [sic], even fatality.

[44] The above reason is consistent with what was discussed in the 30 January 2023 meeting.

**Was Alliance justified in concluding that Mr Mitchell's serious misconduct warranted summary dismissal?**

[45] To prove it is justified to dismiss an employee, an employer needs to prove its decision was fair and reasonable.<sup>7</sup> The New Zealand Court of Appeal has said this includes having 'clear evidence upon which any reasonable employer could safely rely or having carried out reasonable inquiries' finds that on the balance of probabilities 'grounds for believing ... the employee was at fault.'<sup>8</sup>

[46] It is not for the Authority to re-run the case and decide what it thinks the outcome should have been but rather to examine whether the decision was one that was within the range of what a reasonable employer could have done in the circumstances.

[47] The issue here is whether or not Alliance as a fair and reasonable employer could have reached a decision that summary dismissal was within scope of a decision to make for the agreed serious misconduct, scope within what a fair and reasonable employer could have decided in all the circumstances at the time. To that extent issues being raised about procedure and the lack of note taking is unlikely to impact on this decision even if that lack of note taking and recording is surprising for a well resourced large employer.

[48] The Employment Court<sup>9</sup> held that an employer was justified to dismiss for serious misconduct when the conduct involved a serious breach of safety standards. In that case a warning had been issued to all employees about throwing items in a high risk manufacturing area. The warning had been issued to all employees and also through direct discussions after a serious harm (causing serious injury) incident had occurred as a result of an employee throwing an item. This upholding of the employer's decision was in the context of an acknowledged context where the dismissed employee was long term but where there had been a known (to the

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<sup>7</sup> Employment Relations Act 2000, s103A.

<sup>8</sup> *Airline Stewards & Hostesses of New Zealand Union v Air New Zealand Limited* (1990) 3 NZLR 549 (CA) at 556.

<sup>9</sup> *Canterbury Timber Products Limited v NZ Timber Industry Employees IOUW* [1991] 3 ERNZ 1078.

employer) history of them being treated adversely by other employees because of the employee's known difficulties in performing their job and engaging with others in the workplace. The Court acknowledged that the employer had sought to accommodate these difficulties in the workplace. In that case the 'throwing' happened during an altercation between the employee and another (who was also dismissed). While this is a case predating the Act and likely other developments in workplaces about the way employees treat each other and what role the employer may have in managing this vis a vis safety obligations, I find some support in this case for the elevation of safety in relation to actions using high risk moving machinery.

[49] Here Mr Mitchell was operating what I accept was a heavy duty industrial vehicle that requires obvious care when driving near people. For Alliance I have been provided with a recent prosecution case where a woman lost her leg after the employer's employee drove a forklift into her in a carpark at its trading outlet. The employer was fined to a significant level.

[50] Mr Mitchell knew the policy of not driving within 5 metres of people. He must have known he drove directly at the two women and not inadvertently through parking because the CCTV footage shows this. The footage shows him driving directly to the two women sitting on chairs outside their break room and as he comes close to them, they take action to avoid him. The path was clear that he could have simply driven straight into a park. The distance between where he stopped and where the women were was close and seems to be approximately the length of the forks. The forks appear to have been lowered. The forks Mr Mitchell confirmed are 1.8 metres. The incident report included the forks lowered such that it looked like someone was going to lift the seat as if having a joke.

[51] I find it within scope for Alliance through Mr Ali's decision to have formed a view that this was an unsafe and dangerous way to have behaved with the forklift and that it was not simply part of a parking manoeuvre as explained by Mr Mitchell but was deliberate. It may well have been for a joke but could still be within scope to consider this deliberate rather than inadvertent or even just a lapse of judgment as Mr Mitchell put into his apology letters.

[52] This was all material before Mr Ali when making a decision to dismiss. He had explained how he interpreted the deliberateness of Mr Mitchell's action in the 30 January 2023 meeting and that this was inconsistent with Mr Mitchell's explanation of what he did. It does not seem that there was an added finding by Alliance that Mr Ali intentionally intended to hurt

the two women that weighed into its decision to dismiss. It is not recorded as such in the termination notice.

[53] As noted above, all had access to the CCTV that captured Mr Mitchell driving towards the two women. I am satisfied that everyone was able to view this and did so likely more than once. While there has been some later lack of availability of the whole footage and arguments about why this was, the key part of the footage I am satisfied was seen and resulted in Mr Mitchell's union representative conceding for Mr Mitchell that the footage showed serious misconduct.

[54] I accept Mr Mitchell was verbally warned for his driving the day before the forklift incident. I accept Alliance could have reasonably taken this into account when deciding to dismiss because it related to the use of heavy machinery and driving this fast. Even if I am wrong about that being relevant to dismissal, I accept the submission for Alliance that the action of driving towards the women was in itself agreed serious misconduct and it was within scope that Alliance could have decided to dismiss for this.

[55] For the sake of completion, I do not find Mr Mitchell has shown he has been treated differently from other employees. I have insufficient evidence to support this given the particular circumstances of this case. Equally, while Ms Mitchell had provided a significant amount of material in her brief of evidence (and in the Statement of Problem lodged) about her own issues with her employment at Alliance and that Mr Richardson told her Mr Mitchell would be re-employed (which he denies) I do not find this alters my conclusion. To the extent Mr Mitchell may be suggesting his dismissal was some sort of retaliation for his wife's employment issues I have insufficient to show this. Equally for the same reason I do not accept the suggestion that the person reporting the forklift incident had some sort of ulterior motive because they were connected to Ms Mitchell's employment issues.

[56] Much has been made of events after dismissal. Mr Graham explained he met with Mr Mitchell at the request of his union to consider re-employment in the following season. I note that the termination notice carries reference to the dismissal being taken into account in considering any new season re-employment application. Mr Graham's evidence is that he heard from Mr Mitchell and consulted managers including Mr Richardson and Mr Ali's replacement. His decision was not to re-employ Mr Mitchell in a subsequent season. I do not find this weighs

into whether or not at the time he was dismissed this was a decision within reasonable scope for Alliance.

[57] While Mr Mitchell says he should have had his long term employment taken into account, and his health issues, the latter is not clearly defined as a connection to a reason for why he drove the forklift at the two women. Rather Mr Mitchell's written response when he says he first took ownership and responsibility for his actions was to say he was parking the forklift rather than acknowledging he drove directly towards them women. This was something Mr Ali and Mr Richardson clearly put forward as a concern in the 30 January 2023 meeting to Mr Mitchell's representatives.

[58] Mr Mitchell's long term employment was what Alliance also had before it when Mr Ali decided to dismiss. However, so was Mr Mitchell's training and level of experience with a forklift. Again, I am not satisfied this alters my conclusion that it was within scope as a fair and reasonable employer for Alliance to have concluded that the agreed serious misconduct in relation to Mr Mitchell's actions on 18 January 2023 could reasonably attract an outcome of summary dismissal.

### **Conclusion and outcome**

[59] Based on the above Mr Mitchell has not succeeded in his claim.

### **Costs**

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[61] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Alliance may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Mitchell will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[62] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual 'daily tariff' basis unless circumstances or factors, require an adjustment upwards or downwards.<sup>10</sup>

Antoinette Baker  
Member of the Employment Relations Authority

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<sup>10</sup> [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1)