

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 96
5368301

BETWEEN JOHN SAYERS
Applicant

AND S B McPHERSON HOLDINGS
LIMITED t/a BOULEVARD
SERVICES
Respondent

Member of Authority: Michele Ryan

Representatives: Piers Hunt, Counsel for the Applicant
Doug Abraham, Advocate for the Respondent

Investigation Meeting: 18 July 2012 at Napier

Submissions Received: At the investigation meeting

Determination: 27 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 17 November 2011 Mr John Sayers was summarily dismissed from his supervisor's position by his employer S B McPherson Holdings Limited trading as Boulevard Services.

[2] The dismissal occurred as a result of an investigation undertaken by Boulevard Services into whether Mr Sayers was correctly reporting accidents following an incident at the premises of one of its major clients, Pan Pac Forest Products Limited (Pan Pac).

[3] Mr Sayers says he had previously been instructed by his employer to not report minor accidents. He regards his dismissal as unjustified and says he has been used as a scapegoat by Boulevard Services so as to avoid scrutiny of its accident

reporting mechanisms and circumvent potential loss of future commercial contracts with Pan Pac.

[4] Boulevard Services denies that it dismissed Mr Sayers unjustifiably and rejects Mr Sayers' claims that he has been used as a scapegoat. Boulevard Services says as a result of its investigation into Mr Sayers' conduct it no longer had trust and confidence in Mr Sayers to perform his role of Supervisor and says that he was dismissed for good cause following a fair process.

Brief summary of relevant information

Background

[5] Boulevard Services provides a range of commercial and industrial cleaning services including the supply of cleaners to Pan Pac's pulp and paper mill in Whirimaki, north of Napier.

[6] Mr Sayers was employed by Boulevard Services in 2008. In mid 2010 he was promoted to the position of Supervisor based at Pan Pac's mill. Mr Sayers worked night shift and was responsible for supervising between 2-5 employees who were supplied to work at Pan Pac.

[7] On 19 October 2011, one month prior to the events which led to Mr Sayers' dismissal, Mr Sayers received a final written warning which related to matters of timeliness, time reporting and performance. Mr Sayers does not dispute the justifiability of that warning.

The events which gave rise to a disciplinary investigation

[8] On 12 November 2011 at approximately 4.15am an incident occurred at Pan Pac whereby Mr Robert Duston, an employee who reported to Mr Sayers became injured.

[9] Mr Duston advised the Authority that as he was walking across a gridded platform, his right foot went through a small hole which resulted in his leg collapsing through the platform and his leg became jammed up to his knee. Mr Duston required assistance by Mr Sayers and another employee to get out of the hole, and needed support to get down a number of stairs to an area where he was able to sit and elevate his leg.

[10] Approximately 20 minutes after the incident Mr Sayers and Mr Duston were approached by Mr Conrad Blythe, a supervisor employed by Pan Pac. Mr Blythe told Mr Sayers that the accident needed to be reported to security. There is some dispute as to the exact detail of Mr Sayers' response to that request but Mr Blythe's evidence is that he understood Mr Sayers to advise that he was not going to report the accident as the Director and General Manager of Boulevard Services, Mr Shaun McPherson, did not want employees to report minor accidents. I shall return to this aspect of evidence later in the determination.

[11] Mr Blyth insisted the accident be formally reported to Pan Pac's security office which Mr Duston and Mr Sayers duly did.

[12] Later that day during a routine visit at Pan Pac's premises, Mr McPherson was called to a meeting with Mr Blythe who expressed concerns that Mr Sayers was not reporting accidents on Mr McPherson's instructions. Mr Blythe advised Mr McPherson he was aware of a previous accident 4 to 8 weeks ago which involved both Mr Sayers and Mr Duston and also had not been reported. Mr Duston had gashed his forehead on a hanging chain in circumstances where he had not been wearing a hard hat as was required.

[13] Mr McPherson denied that he had instructed Mr Bayer not to report minor accidents and Mr Blythe's evidence is that Mr McPherson was surprised by the concerns he had raised.

[14] On 14 November 2011 Mr Sayers received a letter on behalf of Boulevard Services which requested he attend a disciplinary meeting the following day to explain why he had advised Mr Blythe that he would not be reporting accidents because he had been instructed not to do so.

[15] Disciplinary meetings in relation to the allegations against Mr Sayers were held on 15 and 16 November 2011. Boulevard Services and Mr Sayers were both assisted by representation.

[16] During the Authority's investigation meeting it became apparent that handwritten notes had been taken by both of the parties' representatives during each of the meetings. However, neither party produced the notes in evidence.

The meeting of 15 November 2011

[17] The parties agree the meeting lasted approximately 1½ hours. At issue was whether Mr Sayers had advised Mr Blythe that he was unwilling to report Mr Duston's injury because Mr McPherson had instructed him not to report minor accidents and whether Mr Sayers would have reported the incident at all but for the intervention of Mr Blythe.

[18] At the meeting Mr Sayers accepted that he had advised Mr Blythe that he did not intend to report the accident but denied that he told Mr Blythe that he had been instructed by Mr McPherson to not report minor accidents. He said he did not mention Mr McPherson's name at all to Mr Blythe.

[19] Mr Sayers advised that the recent incident involving Mr Duston's knee was minor as there was no blood or breakage of the skin and only bruising occurred.

[20] Mr Sayers' solicitor explained that Mr Sayers had gained an impression that only serious accidents need be reported and that Mr Sayers had used his discretion on what was to be reported. Mr Sayers' representative said it was common knowledge amongst Boulevard Services' employees based at Pan Pac that minor incidents were not to be reported, and that Mr Sayers had understood Mr McPherson to have personally instructed him not to report minor accidents.

[21] Mr McPherson asked Mr Sayers about the incident involving Mr Duston's head injury two months previously. Mr Sayers said that the incident involving Mr Duston's forehead had also not been serious, that his forehead had not been cut nor had he been staggering. He said that Mr Duston had not wanted him to report it. Mr Sayers advised that he had not told anyone about that accident, including Mr Blythe, because he considered it minor and did not want the matter to go further. Mr Sayers was asked if his failure to report Mr Duston's head injury was out of loyalty to Mr Duston and so as to prevent either of them becoming involved in disciplinary action. Mr Sayers denied that this was the case but described his difficulty with ensuring staff maintain health and safety requirements.

[22] Mr Sayers acknowledged that he had signed a copy of Boulevard Services' Handbook which included information on employees' health and safety obligations as well as accident reporting. He accepted that he been provided with Pan Pac's induction safety package in 2008 and again in 2009. Mr Sayers agreed that he was

aware of his responsibility to report accidents and hazards and that he fully understood and acknowledged the health and safety procedures within Boulevard Services' policies.

[23] At the end of the meeting, Mr McPherson's representative advised that Mr Sayers' explanations caused trust and confidence concerns. He further stated there were disparities between Mr Sayers' account of material events and in particular how Mr Blythe had become aware of Mr Duston's previous head injury, the extent of Mr Duston's knee injury, and what exactly Mr Sayers had reported to Mr Blythe as regards Mr McPherson's instructions to not report minor accidents. Mr McPherson advised he would make further inquiries with Mr Blythe and with Mr Duston to clarify if Mr Sayers' explanations corroborated with their views.

[24] Mr McPherson and his representative made further inquiries with Mr Duston and Mr Blythe and the parties met again with their respective representatives on 16 November 2011.

Meeting of 16 November 2011

[25] Boulevard Services' representative reported on the information obtained from Mr Blythe and Mr Duston. He advised that each disputed Mr Sayers' account of events.

[26] With respect to Mr Duston's knee injury, both Mr Duston and Mr Blythe had advised that the accident had resulted in skin breakage and that Mr Duston's knee was bleeding. Mr Blythe had said that he had become aware of Mr Duston's head injury directly through Mr Sayers and that Mr Sayers had told him that Mr McPherson told him not to report minor accidents.

[27] Mr Sayers reiterated his position that he had been told not to report minor accidents and that he had discretion as to what should or should not be reported. He said he had formed this view based on instructions given to him by the previous incumbent and that the instruction was common knowledge.

[28] Mr Sayers further stated that it was his belief that Mr McPherson had advised him earlier in the year, in January or February that he "*did not need to report minor accidents*" although he conceded that Mr McPherson may not have explicitly said

this. When asked directly what was said to allow him to form this belief Mr Sayers refused to answer.

[29] The parties canvassed the effect of Mr Sayers' previous final written warning and alternatives to dismissal. There were some 'without prejudice' discussions but no resolution was reached and it was agreed that Mr Sayers would be advised via his representative as to penalty.

[30] On 17 November 2011 Mr Sayers was informed that his employment with Boulevard Services was terminated with immediate effect and any entitlements he was owed would be paid out accordingly.

[31] Mr Sayers says he had not anticipated dismissed as an outcome and was shocked by this eventuality.

The issues

[32] The onus is on Boulevard Services to justify its decision to dismiss Mr Sayers. In determining the justification of Mr Sayers' dismissal, the Authority must assess whether Boulevard Services' actions and what how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred¹.

[33] The evidence is that Boulevard Services raised its concerns with Mr Sayers on 14 November 2011. Mr Sayers was assisted by his solicitor to respond to those concerns on 15 November 2011. Boulevard Services made further inquiries in response to Mr Sayers' explanations and Mr Sayers was provided with a further opportunity on 16 November 2011 to respond to the employer's concerns.

[34] I am satisfied that Boulevard Services complied with minimum statutory requirements of procedural fairness as set out at s.103A(3)(a)-(c)² with regards its obligation to raise its concerns with Mr Sayers and provide a reasonable opportunity to allow him to respond to those concerns.

[35] Mr Sayers disputes that there was any reasonable cause for a disciplinary investigation and submits that no misconduct occurred in circumstances where he had

¹ Section 103A(2) Employment Relations Act 2000

² Employment Relations Act 2000

reported Mr Duston's knee injury. He says there was nothing in the incident itself that could justify Boulevard Services' decision to dismiss.

[36] He further says that in breach of s.103A(3)(d) Boulevard Services did not genuinely consider his explanations to the allegations against him. He says as a consequence it unfairly concluded it no longer had trust and confidence in him. He says these were not the actions of a fair and reasonable employer and his dismissal was unjustified.

[37] The following issues need to be examined:

- a. Was it reasonable for Boulevard Services to commence a disciplinary investigation into Mr Sayers' practice of reporting accidents as a consequence of Mr Duston's knee injury?
- b. Was it reasonable for Boulevard Services to not accept Mr Bayer's explanations, and in particular:
 - i. Mr Sayer's assertion that he did not refer specifically to Mr McPherson during his discussion with Mr Blythe immediately following Mr Duston's knee injury?
 - ii. that it was common knowledge that Boulevard Services' employees were not to report minor accidents?
 - iii. that Mr Sayers was instructed by Mr McPherson to not to report minor accidents?
- c. Did Boulevard Services dismiss Mr Sayers to avoid scrutiny by Pan Pac of its accident reporting records and processes?
- d. Was it reasonable of Boulevard Services to find it no longer had trust and confidence in Mr Sayers such that it was reasonable to dismiss him?

Was it reasonable for Boulevard Services to commence a disciplinary investigation into Mr Sayers' practice of reporting accidents as a consequence of Mr Duston's knee injury?

[38] Mr Sayers says that although he had considered not reporting Mr Duston's knee injury as advised to Mr Blythe, he says that he did in fact report the accident. In these circumstances he says no misconduct occurred. Mr Sayers further says it was unreasonable of Boulevard Services to commence an investigation into the accident when it is clear he had complied with the Boulevard Services' accident reporting policies associated with the accident.

[39] I do not accept this aspect of Mr Sayers' claim. There is no evidence that Boulevard Services alleged that Mr Sayers had not reported Mr Duston's knee injury nor is there any evidence that he was dismissed for this reason.

[40] The evidence is that when Mr McPherson became aware via Mr Blythe that Mr Sayers had not intended to report Mr Duston's knee injury (prior to Mr Blythe's intervention), Boulevard Services raised concerns with Mr Sayers and asked for an explanation as regards his advice to Mr Blythe. In this respect it was Mr Sayers' alleged reasoning for not reporting the accident that was of concern for his employer. I conclude it was open to Boulevard Services as a fair and reasonable employer to raise these concerns with Mr Sayers even and although there was no misconduct in the instance which triggered the issues of concern.

Was it reasonable for Boulevard Services' to not accept Mr Bayer's explanations?

What did Mr Bayer communicate to Mr Blythe on 12 November 2011?

[41] Throughout both disciplinary meetings Mr Sayers maintained steadfast that at no point during his discussion in the early hours of 12 November 2011 with Mr Blythe had he referred to Mr McPherson in any way and in particular he says he did not say "*Mr McPherson has instructed to not report minor incidents*". It was apparent during the Authority's investigation that this matter was an area of significant concern for Mr Sayers.

[42] Mr McPherson's evidence is that he spoke to Mr Blythe in or around mid-day on 12 November 2011 and again on 15 November 2011. He reports that on both

occasions Mr Blythe advised him that Mr Sayers had told him on 12 November 2011 that "Mr McPherson" had instructed him "to not report minor accidents".

[43] It is apparent from the evidence and Boulevard Services' letter of 22 November 2011 that Mr McPherson preferred Mr Blythe's version of the discussion held between Mr Blythe and Mr Sayers on 12 November 2011 and concluded that Mr Sayers had told Mr Blythe that he had been instructed by Mr McPherson to not report minor accidents. This conclusion had contributed to Boulevard Services finding that it no longer had trust and confidence in Mr Sayers.

[44] Before the Authority Mr Blythe acknowledged that when he reported Mr Sayers' statement to Mr McPherson on 12 and 15 November 2011 he had said that Mr Sayers had explicitly referred to Mr McPherson as the cause of his reluctance to report accidents. However before the Authority Mr Blythe said that Mr Sayers did not expressly use Mr McPherson's name during their discussion on 12 November 2011. He says that based on their previous discussion and the tenor of words used by Mr Sayers he had concluded that Mr Sayers was referring to Mr McPherson. Mr Blythe agrees that when he raised his concerns with Mr McPherson he did not make a distinction between the words actually used by Mr Sayers and what he regarded Mr Sayers had been referring to.

[45] As a finding of fact I hold that Mr Sayers did not specifically refer to Mr McPherson during his discussion with Mr Blythe on 12 November 2011.

[46] However I do not regard Mr Blythe's altered evidence exclusively determines the justifiability of Mr Sayers' dismissal. This is because the disparity between Mr Blythe's and Mr Sayers' account of their discussion on 12 November 2011 was not the sole factor on which Boulevard Services relies to justify Mr Sayers' dismissal. Additionally the Authority is required to assess the employer's actions at the time the dismissal was made³. At the time Mr Sayers was dismissed both Mr Blythe and Mr Duston had each stated that Mr Sayers had specifically referred to Mr McPherson in his dialogue with Mr Blythe on 12 November 2011 and I consider it was reasonable of Mr McPherson to rely on this information.

³ Section 103A(2)

Was it common knowledge that employees were not to report minor accidents?

[47] Both Mr Sayers and Mr Duston attested that it was common knowledge amongst Boulevard Services' employees based at Pan Pac that Mr McPherson did not want minor accidents reported.

[48] Mr Sayers says he was advised of this by the previous supervisor, Mr Graham Rubick.

[49] Mr Duston acknowledged during questioning that it was predominantly Mr Sayers who had told him of the instruction and that he tended to believe what Mr Sayers told him "*because he is my boss*".

[50] The Authority was provided with an unsigned written statement by Mr Rubick. Mr Rubick had been summonsed on behalf of Mr Sayers to appear at the Authority's investigation however Mr Rubick does not have a fixed address and the summons had not been effected. Efforts to contact Mr Rubick by phone were unsuccessful.

[51] Mr Rubick did not attend the Authority's investigation meeting and the contents of his statement were not able to be tested. In these circumstances I am unable to give weight to his purported evidence although I have referred to information contained within his statement to give context to evidence given on behalf of both Mr Sayers and Boulevard Services.

[52] Mr Rubick's statement refers to a serious "*near – miss*" incident involving an independent contractor at Pan Pac in June 2010. Mr Rubick states that Mr McPherson asked him to withdraw the complaint associated with the incident as Boulevard Services was engaged in "*contract renewal negotiations and employees may lose their jobs*". Mr Rubick's statement advises that he was dissatisfied with both Boulevard Services' and Pan Pac's response to the incident which was unfairly labelled as a personality clash between him and the independent contractor. His statement reports that Mr McPherson's attitude towards him and other employees changed after this incident and that Mr McPherson told him not to fill out incident reports for minor scrapes and bruises. In due course Mr Rubick relinquished his position as Supervisor and returned to a cleaner's position. He resigned from Boulevard Services some time after.

[53] Mr McPherson denies Mr Rubick's claim that he was asked to abandon his complaint because Boulevard Services' contract may not be renewed. He says Boulevard Services' contract with Pan Pan is renewed annually every April and Pan Pac has not tendered for an alternative supplier since 2000.

[54] Mr McPherson disputes that there was any arrangement with Mr Rubick not to report accidents. He says Mr Rubick's near-miss incident was investigated by Pan Pac and found to have occurred largely as a result of an ongoing personality clash between Mr Rubick and the other contractor. He says Mr Rubick was unhappy with the investigation findings and believed Boulevard Services had not sufficiently "backed him". Mr McPherson says after this matter Mr Rubick's attitude changed and he was implicated in numerous frivolous accidents. He says Mr Rubick went from being an experienced employee with a sound safety conscious record to one who was involved in "*too many silly accidents*".

[55] Mr McPherson says he discussed these concerns with Mr Rubick and assessed "*that neither the work nor the environment had changed but that Mr Rubick had*". He says the issue with Mr Rubick was not that he was "*reporting*" accidents but that he was "*having*" accidents. He does not accept that Mr Sayers could conclude that Mr Rubick's alleged instruction to not report minor accidents was reasonable when both Mr McPherson and Mr Sayers had specifically discussed concerns as to Mr Rubick change in behaviour.

[56] It was apparent before the Authority that Mr Sayers' conviction to not report minor accidents stemmed largely from comments he says his previous supervisor had made and also from an assumption that he was acting in the Boulevard Services' best interests. Mr Sayers was unable to explain what interests of Boulevard Services would be served by omitting to report minor accidents other than to say he had nothing to gain personally from not reporting minor accidents.

[57] Having assessed the witnesses and the evidence, on balance I am not persuaded that Boulevard Services was unreasonable when it did not accept Mr Sayers' "common knowledge" explanation.

Was Mr Sayers instructed, either expressly or impliedly, by Mr McPherson to not report minor accidents?

[58] Mr Sayers says that in or about January/February 2011 he was instructed by Mr McPherson to use his discretion when reporting accidents and not to report minor accidents.

[59] At the meeting of 16 November 2011 Mr Sayers, having raised his perception that Mr McPherson had previously instructed him not to report minor accidents, was asked on what basis he considered he had been so instructed. In particular he was told *“this is your opportunity to convince your employer why you have the belief that you shouldn’t report minor accidents”*. Mr Sayers does not dispute that his response was *“I don’t think I should answer that”* and that he further stated *“it’s my fault, I misinterpreted what [Mr McPherson] has to say, that’s all I can say”*.

[60] When questioned by the Authority as to why, when he was asked to provide further details during a disciplinary meeting about what exactly had been instructed by Mr McPherson, Mr Sayers said that he did not respond because he felt under duress. He said he did not want to inflame the situation as he considered the discussion was becoming heated.

[61] I do not accept Mr Sayers’ explanation for not providing further detail to his employer. I accept that Mr Sayers may have felt some discomfort with stating views that were likely to be in direct opposition to those of his employer however I regard that this was the moment, having been invited, for Mr Sayers to provide information in support of his explanation for consideration. The evidence was that throughout both disciplinary meetings Mr Sayers was represented by his solicitor acting largely as his voice and he was not bullied or threatened. Mr Sayers acknowledged he was aware that the allegations against him were serious and that the meetings provided an opportunity to explain himself and preserve his employment.

[62] I do not accept Mr Sayers’ claim that his employer did not genuinely consider his explanations. It is clear Mr Sayers stated that he regarded he had been instructed to not report minor accidents but refused to advise as to how he formed this view. I conclude that to the extent Mr Sayers did provide an explanation Boulevard Services did consider the substance of it and this is evidenced by its request for more information. Mr Sayers was not willing to provide further information. Boulevard Services was only able to make a decision on the information it had received and it is

apparent that it did not find Mr Sayers' limited explanation satisfactory and rejected it. In the absence of more fulsome information I do not consider Boulevard Services' actions were unreasonable in these circumstances.

[63] At the Authority's investigation Mr Sayers was unable to progress his view that he was instructed to not report accidents. No additional information was provided as to the exact nature of the instructions he says he was given by Mr McPherson beyond his assertion advanced during disciplinary meetings.

[64] Mr McPherson emphatically denies that any conversation of this description ever occurred.

[65] Having heard and assessed the evidence I consider it unlikely that Mr McPherson had instructed Mr Sayers to not report minor accidents and I prefer Mr McPherson's evidence in this regard.

Did Boulevard Services dismiss Mr Sayers to avoid scrutiny of its accident reporting?

[66] Mr Sayers submits that he was used as a "sacrificial lamb" and unjustifiably dismissed so that Boulevard could maintain an appearance with Pan Pac that it was proactive with its health and safety obligations including reporting of accidents. In support of his claim Mr Sayers refers to an email dated 11 October 2011 which evidences a request on behalf of Pan Pac to Boulevard Services to improve its practice in a particular area of Pan Pac's site so as to eliminate exposure to a potential hazard, and to Pan Pac's inquiry with Boulevard Services as to its accident reporting regime soon after Mr Duston's knee injury.

[67] Boulevard Services strongly denies an ulterior motive for Mr Sayers' dismissal as suggested. Mr McPherson provided the Authority with significant documentation to evidence the attention Boulevard Services pays to health and safety matters including an employee Handbook, its Health and Safety manual, and copies of reported accidents at Pan Pac for the previous 1½ years as well as evidence of recent accreditation with ACC Workplace Safety Management Practices following an independent audit.

[68] Mr McPherson provided minutes from Pan Pac's monthly Lumber Operations OSH/Safety Meetings over the previous 12 months and advised that Pan Pac and its contractors took identification of hazards very seriously given the nature of the

working environment. It is clear from the minutes of those meetings that Pan Pac required hazards to be minimised if not eliminated, and responsibility for ensuring compliance with those requirements is assigned to attendees of the meetings. Mr McPherson referred to the email of 11 October 2011 and advised it was not unusual for correspondence to be exchanged between Pan Pac and Boulevard Services as to follow up on safety matters.

[69] As regards Pan Pac's inquiry with Boulevard Services of its accident reporting policies and procedures following Mr Duston's knee injury, Mr McPherson says he met with representatives of Pan Pac to review the records of reported accidents over the previous 1½ years. He says both Pan Pac and Boulevard Services were satisfied that there was no evidence to support an allegation that Boulevard Services were not reporting accidents.

[70] Having assessed the information provided I find that there is no evidence to support Mr Sayers' claim that he was dismissed as a means for Boulevard Services to avoid scrutiny by Pan Pac of its health and safety practices. As noted Boulevard Services' contract with Pan Pac is routinely renewed annually every April and there was no evidence that Boulevard Services was at risk of losing its business with Pan Pac on the basis of frequent reporting of minor accidents. I reject this claim.

Was it reasonable of Boulevard Services to find it no longer had trust and confidence in Mr Sayers such that it was reasonable to dismiss him?

[71] I have already found that Boulevard Services did not accept Mr Sayers' explanations as to why he was not reporting accidents and that it was reasonable for Boulevard Services to reject those explanations.

[72] It is also clear that Boulevard Services' concerns were aggravated by Mr Sayers' account as to the severity of Mr Duston's knee injury, and how Mr Blythe became aware of Mr Duston's head injury. I find it was open to Boulevard Services to prefer the responses of Mr Blythe and Mr Duston on these matters having put to Mr Sayers the differing accounts of Mr Blythe and Mr Duston and where Mr Sayers had been unable to explain the disparity between his responses and those of Mr Duston and Mr Blythe. I find that Boulevard Services was entitled to have regard to these aspects of Mr Sayers' responses in its considerations as to disciplinary consequences.

[73] There is evidence that Mr Sayers had been given a final written warning one month previously which stated, amongst other things:

A warning is not intended as punishment, but designed to alter behaviour. What this means is that provided there is no repeat of any of the issues outlined above and no breach of any of our company rules or policies within the next 12 months this warning will expire. However, if there is a further breach within the next 12 months, in the absence of an acceptable explanation your employment will be terminated.

[74] During the Authority's investigation Mr Sayers conceded that he had not reported Mr Duston's head injury to Pan Pac and that it is likely he would not have reported Mr Duston's knee injury if Mr Blythe had not directed him to do so. He agreed that the area in which Mr Duston injured his knee would "*probably not*" have been identified as a hazard if the accident had not been reported.

[75] Mr McPherson says in the absence of his own presence on site Mr Sayers was his "*eyes and ears*". Mr McPherson provided oral evidence of employees who have been dismissed by Boulevard Services in the past for failing to comply with health and safety obligations.

[76] I am also satisfied that sanctions alternative to dismissal were discussed at the meeting of 16 November 2011 in which Mr Sayers participated.

[77] Mr McPherson's evidence is that he considered Mr Sayers' responses but that in circumstances where Mr Sayers' held a senior position which attached a higher standard of care to it and where a final written warning had recently been given he concluded that Boulevard Services no longer had trust and confidence in Mr Sayers to work as a supervisor. I consider it was open to Boulevard Services to have reached such a conclusion.

[78] I am satisfied that summary dismissal was a disciplinary outcome which was available to a fair and reasonable employer in all the circumstances. Mr Sayers does not have a personal grievance and I decline to award the remedies he has claimed.

[79] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority