

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 65  
5343208

BETWEEN

PETER JAMES WALKER  
Applicant

A N D

FIRTH INDUSTRIES -  
A DIVISION OF FLETCHER  
CONCRETE &  
INFRASTRUCTURE  
LIMITED  
Respondent

Member of Authority: K J Anderson

Representatives: Peter Walker, In person  
Don Mackinnon, Counsel for Respondent

Investigation Meeting: 20 November 2012 at Dunedin

Date of Determination: 9 April 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] The applicant, Mr Peter Walker, claims that he was unjustifiably dismissed on 24 January 2011. Mr Walker asks that the Authority find that he has a personal grievance and award him various remedies. The respondent, Firth Industries, a division of Fletcher Concrete & Infrastructure Limited (Firth), rebuts Mr Walker's claim and says that he was dismissed for serious misconduct pursuant to the company's code of conduct.

## **Background**

[2] Mr Walker was employed as a driver at the Firth Dunedin plant. He reported to Mr John Ritchie, the Plant Manager. Mr Ritchie, in turn, reported to Mr Aaron Charteris, the South Canterbury/Coastal Otago Area Manager for Firth.

[3] The Firth operation in Dunedin is quite small with four drivers and two other staff. The evidence of Mr Charteris is that although Mr Walker was employed as a driver, he had also been assessed and trained to batch mix concrete and run despatch. Mr Charteris says that because of the small scale of the operation, it is important that the company has employees with a broad range of skills, so that they can cover for other employees, when required.

## **An incident on 21 December 2010**

[4] In August 2010, Mr Ritchie went off work due to a back injury. One of his duties was to carry out the concrete batching. The evidence of Mr Charteris is that he did most of the batching in the immediate period after Mr Ritchie's injury. But with the beginning of a new wind farm project, Mr Charteris had to carry out the batching at the wind farm site and Mr Walker performed the batching at the Dunedin plant.

[5] Mr Ritchie returned to work sometime in November 2010, but he says he could only work for four hours a day and was unable to drive a vehicle. The evidence of Mr Charteris is that Mr Ritchie was working six hours a day but not much hinges on that difference except that the actual hours that Mr Ritchie could work were not enough to cover the total amount of batching that was required every day.

[6] On 21 December 2010, Mr Charteris approached Mr Walker and informed him that he was required to carry out the batching role after his lunch break. The evidence of Mr Charteris is that when the request to carry out the batching was put to him, Mr Walker: ["... *completely lost his cool* ...". Mr Charteris attests that Mr Walker said something like: ["...*no way, I'm not doing batching any more*" and started walking away.

[7] Mr Charteris says he called out to Mr Walker and asked him to stop (walking away). The further evidence of Mr Charteris is:

*I then called out "why do you keep pushing Peter. If push comes to shove, I'll push harder than you". Peter, at this point, turned around*

*and charged over to me. He got right into my face (literally almost touching) with his chin inches from mine and started yelling at me. Spittle was flying from his mouth, his fists were clenched, and his eyeballs were popping out of his head. He looked incredibly angry and I felt sure he was about to hit me.*

[8] The further evidence of Mr Charteris is that Mr Walker was: [“...*incredibly aggressive and quite irrational*”. Mr Charteris says that he stepped back from Mr Walker and suggested that the conversation should continue with Mr Walker’s union representative being present. Mr Charteris attests that Mr Walker “*stormed off*” still yelling that he was not going to do the batching and that Mr Charteris couldn’t make him.

[9] It is the evidence of Mr Walker that there was a “*heated argument*” between him and Mr Charteris in regard to their contact on 21 December 2010. While the evidence of Mr Walker is somewhat less explicit as to what was actually said the Authority has no reason to doubt the veracity of the evidence of Mr Charteris in regard to Mr Walker’s behaviour towards him; and in fact I found Mr Charteris to a credible witness overall.

[10] It is also commonly accepted that Mr Walker left the workplace shortly after his exchange with Mr Charteris. It is also established that before leaving the workplace, Mr Walker spoke to his manager, Mr Ritchie, and stated to him that he was leaving to see his doctor and the union. The evidence of Mr Ritchie is that while it seemed that Mr Walker was making a statement rather than seeking permission to leave, Mr Ritchie accepted Mr Walker’s departure as he assessed that for health and safety reasons, Mr Walker was not in a fit state to be at work.

### **Disciplinary action**

[11] Via a letter from Mr Charteris dated 21 December 2010, Mr Walker was required to attend a disciplinary meeting on 22 December 2010. Mr Walker was informed that his behaviour could be viewed as serious misconduct as defined under the *Firth Code of Conduct*; specifically:

- (k) Engaging in any conduct that causes the company to lose trust and confidence in you as an employee.
- (l) Refusing to obey an instruction from a superior or refusing to perform assigned work or walking off the job without the permission of the Manager.

- (m) ... threatening violence against another person on Company premises.
- (n) Assault, abuse or threats of violence against ... an employee.

### **Meeting 22 December 2010**

[12] Mr Walker and his union representative attended a disciplinary meeting on 22 December 2010 along with Mr Charteris and Ms Victoria Donohue, a human resources person. The handwritten notes taken by Ms Donohue have been typed and produced to the Authority. Unfortunately, the notes are rather cryptic and not particularly helpful in regard to being a record of the proceedings. Nonetheless, it is established that at the beginning of the meeting a medical certificate for Mr Walker was produced. The certificate records that Mr Walker had been seen that day (22 December 2010) and he was unfit for work until 10 January 2011 because of “undue stress”. However, there was no indication given that Mr Walker was unfit to attend the meeting.

[13] It appears that in regard to his refusal to carry out the batching, Mr Walker stated that he had only been doing the batching as “a favour” until the wind farm project was finished. In regard to the conflict with Mr Charteris, Mr Walker claimed that he had felt threatened when Mr Charteris used the words: “I’ll push harder than you”, albeit Mr Charteris was some metres away at the time.

[14] There was some discussion about the provisions of the Code of Conduct relating to refusing to perform assigned work, walking off the job without permission and threatening behaviour. When the discussion returned to the requirement for Mr Walker to carry out the batching when requested, Mr Walker informed that he would not be doing that any more as there had been too many complaints about it. It was explained to Mr Walker by Mr Charteris that he had to do the batching when required. But Mr Walker was adamant that he would not be doing that type of work and he could not be made to.

### **Meeting 23 December 2010**

[15] At this meeting, Mr Walker was represented by another officer of the EPMU, Ms Juanita Willems. The evidence of Mr Charteris is that the allegations set out in the company’s letter dated 21 December 2010 were discussed again with Mr Walker and he was asked to comment. Mr Charteris says that Mr Walker: [“... *hardly said a*

*word and when he did, it was usually to say something aggressive and confrontational*". Mr Charteris says that Mr Walker made it clear that he would not be doing the batching.

[16] The evidence of Mr Walker is that he admitted to disobeying the instructions of Mr Charteris to take over the batching, but this was because of health and safety concerns relevant to stress and the inability to cope any more with the job. Mr Walker attests that he denied abusing or threatening Mr Charteris and walking off the job without permission.

[17] The evidence of Ms Willems, Mr Walker's representative at the meeting, is that Mr Walker did "eventually" acknowledge that the incident between him and Mr Charteris did occur and that he had "lost his cool" and stood right in the face of Mr Charteris; but he felt that Mr Charteris had threatened him. Ms Willems attests that Mr Walker also made it clear that he was not going to carry out any more batching.

[18] The meeting was adjourned on the understanding that it would reconvene on 17 January 2011. However, for various reasons, related to Mr Walker's health, and a shoulder injury he incurred during the Christmas/New Year break, the meeting was postponed until 24 January 2011.

### **Meeting 24 January 2011**

[19] This meeting appears to have followed a similar theme to the previous two, apart from Mr Walker raising (for the first time) an allegation that Mr Charteris had "egged him on" or provoked him on 21 December 2010. Mr Charteris denies this allegation. The meeting was adjourned to allow Mr Charteris and Ms Donohue to consult the direct manager of Mr Charteris, Ms Michele Creagh, and the company's Organisational and Development Manager, Mr Dan Mulvagh, Ms Donohue's manager. Both of these managers had been continuously briefed regarding the disciplinary process pertaining to Mr Walker.

[20] The evidence of Ms Creagh sets out the matters which were considered by her, Mr Mulvagh, Ms Donohue and Mr Charteris in regard to whether Mr Walker should be dismissed. Ms Creagh says that the main issue for her was that Mr Walker had refused to follow an instruction to carry out batching and was still maintaining this position. Ms Creagh attests that a decision was reached that Mr Walker should be

dismissed and that this was a shared decision, with Ms Donohue and Mr Charteris putting forward their views. The final decision was made by Ms Creagh after consulting with Mr Mulvagh and her direct manager, Mr David Peterson.

### **The dismissal**

[21] The meeting was reconvened and Mr Walker was informed that he was to be dismissed for serious misconduct. Mr Walker was given the alternative option of resigning, consistent with some earlier discussions that had taken place with his representative. Mr Walker gave some consideration to this option during a further adjournment of the meeting. However, Ms Willems returned to Mr Charteris and Ms Donohue with Mr Walker's keys; confirming that a dismissal was to go ahead.

[22] The dismissal was confirmed later by a letter dated 24 January 2011 from Ms Donohue. In summary, it was confirmed that the company was of the view that Mr Walker had breached the Firth Code of Conduct by declining to follow the instructions of Mr Charteris regarding the batching, and acting in an aggressive and abusive manner towards Mr Charteris.

### **Analysis and conclusions**

[23] Pursuant to s.103A of the Employment Relations Act 2000 (the Act), the question of whether a dismissal is justifiable must be determined by the Authority on an objective basis, by applying this test: Whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in the circumstances<sup>1</sup>.

[24] The reasons why Mr Walker believes that he was unjustifiably dismissed are not entirely clear. Nonetheless, as set out in the submissions for Firth in regard to the company's understanding, it can be reasonably identified that Mr Walker's position is largely as follows:

- (a) *He had told Mr Charteris that he would not be doing the batching work because he was stressed and not coping*

[25] But there is no evidence before the Authority that Mr Walker had ever indicated to the company, prior to the disciplinary investigation, that he was suffering

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<sup>1</sup> This is the test that applied at the time that Mr Walker was dismissed; being prior to 1 April 2011.

from work-related stress. And Mr Walker had not previously conveyed to his employer that the batching duties were particularly onerous, or that it was unfair or unreasonable for him to perform such work.

[26] It seems that Mr Walker did indicate earlier (prior to the weekend of 18/19 December 2010) that he was having trouble sleeping and was feeling tired and run down. The evidence of Mr Charteris is that Mr Walker mentioned this in the presence of the company's South Island health and safety adviser; who suggested that Mr Walker should see a doctor. Apparently Mr Walker indicated that if he did not sleep well over the weekend he might go and see a doctor. However, he came to work on the Monday and was working as usual without any indication that anything was untoward.

[27] I conclude that there is no evidence to show that Mr Walker was stressed and not coping with the batching work prior to the incident on 21 December 2010. And even then, Mr Walker never gave any such reason for refusing to carry out the batching.

(b) *Mr Walker alleges that the disciplinary investigation was not objective and the complainant (Mr Charteris) was also the decision-maker*

[28] In *Allen v C3 Limited*<sup>2</sup> it was stated that:

There is no immutable rule that a person complained about cannot act as a decision-maker and there will be circumstances in which it is not practicable to do so.

And while it is less than ideal that Mr Charteris was as involved in the disciplinary and decision-making process as he was, I accept that the Firth Dunedin operation is very small in its nature and Mr Charteris was the only senior manager on site. Also, Ms Donohue was involved to ensure that there was independence and objectivity in the process adopted. Ms Donohue, in turn, reported to Ms Creagh who had the final authority to agree to whether a dismissal was appropriate having been fully briefed throughout the process. Finally, and of considerable relevance, is the fact that Mr Walker was at all times represented by his union and the evidence is that Ms Willems was entirely satisfied that a fair process was followed. I conclude that,

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<sup>2</sup> [2012] NZEmpC 124

given the overall circumstances, Mr Walker was not treated unfairly or unreasonably in regard to the investigation and decision-making process adopted by Firth.

[29] That then takes us to the substantive reasons for the dismissal whereby an examination of two questions is required. First: Was the conduct of Mr Walker capable of amounting to serious misconduct? And if so, in all the circumstances of the case, was the dismissal warranted?

**Was the conduct of Mr Walker capable of amounting to serious misconduct?**

[30] I accept the submission for Firth that it is well established that a deliberate refusal to follow a lawful and reasonable instruction (without good reason) is misconduct which can justify summary dismissal<sup>3</sup>.

[31] On the evidence that is available to the Authority, Mr Walker was capable of carrying out the batching role and had done so without any concerns being expressed by his employer, or by him. The evidence shows that Mr Walker had been adequately trained for the role having successfully completed the concrete batching workshop in March 2008.

[32] The Firth collective agreement that Mr Walker worked under also envisages and provides for a driver to be temporarily assigned to batching work as set out at clause 3.3 of the document:

- (a) A suitably qualified and competent driver may be temporarily assigned to batch. In such instances the employee shall be paid at the batching rate for hours so assigned.
- (b) If the employee is assigned to batch for greater than 25 hours in any one working week, the employee shall be paid at the batching rate for one working week.

[33] And then at clause 1.4 of the agreement, there are certain provisions in relation to the duty of employees employed under the agreement to:

- (a) Devote their full energies to their position whilst at work and to carry out diligently and faithfully to the best of their ability any duty required by the Company giving due regard to relevant safety regulations, policies and safe working practices.
- (b) Obey all reasonable and lawful instructions issued by the company.

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<sup>3</sup> *New Zealand etc Shipwrights etc IUOW v. Honda New Zealand Ltd* [1989] 3 NZILR 791 at 794

[34] In addition to the fact that Mr Walker was capable of and had carried out the batching work, and his contractual obligations to do so, serious misconduct under the Firth Code of Conduct sets out, at clause 2, various actions and types of conduct that are considered to be serious misconduct which may result in summary dismissal. Included is:

- (j) Acts of disobedience, negligence or irresponsible behaviour which could prejudice either the safety and wellbeing of fellow employees or that involves the Company in otherwise avoidable costs.
- (k) Engaging in any conduct which causes the Company to lose trust and confidence in you as an employee.
- (l) Refusing to obey an instruction from a superior or refusing to perform assigned work or walking off the job without the permission of the manager.
- (m) Assaulting or threatening violence against another person on Company premises.
- (n) Assault, abuse or threats of violence against a customer, employee or member of the public.

[35] On the evidence available to the Authority, it is difficult to conclude that the behaviour of Mr Walker towards Mr Charteris on 21 December 2010 was of sufficient gravity to fall within subclauses (j) (m) and (n) (above). Rather, it seems more likely that Mr Walker's behaviour towards Mr Charteris fell more within clause 1(e) of the Code of Conduct; that is, acting in an offensive or abusive manner. Nonetheless, without doubt, clause 2(k) and (l)<sup>4</sup> certainly apply and hence the actions of Mr Walker clearly fall within the definition of serious misconduct for which summary dismissal is a sanction under the Code of Conduct. In summary, I find that Firth was entitled to treat the actions of Mr Walker, in regard to his refusal to carry out a lawful and reasonable instruction, as serious misconduct warranting an appropriate sanction. This finding leads to the second question to be determined:

**Was the dismissal of Mr Walker something that a fair and reasonable employer would do in all of the circumstances?**

[36] I find that the dismissal of Mr Walker was something that a fair and reasonable employer would do in all the circumstances. The circumstances were that Mr Walker absolutely and continuously refused to carry out the batching work as

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<sup>4</sup> Although in regard to Mr Walker leaving the job on 21 December 2010, Mr Richie (as the direct manager) does not appear to have had an issue with that citing health and safety concerns.

requested. This was despite the best efforts of his representative, Ms Willems, to persuade him to be more conciliatory. In addition to the refusal to carry out the batching work as requested, Mr Walker maintained a belligerent and aggressive stance during the disciplinary process. Apart from his refusal to carry out the batching work, it is clear that the employment relationship between Mr Walker and Mr Charteris was irrevocably damaged and Firth could no longer have trust and confidence in Mr Walker as an employee who would act in a reasonable manner in the future.

### **Determination**

[37] For the reasons set out above, I find that the dismissal of Mr Walker was justifiable and that his claims are unsuccessful.

### **Costs**

[38] Costs are reserved. The parties are invited to resolve this issue if they can but in the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions. Mr Walker has a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**