

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 63
5567348

BETWEEN KELVIN FRANKS
Applicant

AND ALLIANCE GROUP LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Mary-Jane Thomas, Counsel for the Applicant
Shaun Brookes, Counsel for the Respondent

Investigation meeting: 15 and 16 March 2016 in Invercargill

Submissions: At the investigation meeting

Determination: 17 May 2016

DETERMINATION OF THE AUTHORITY

- A. Alliance Group Limited unjustifiably dismissed Kelvin Franks.**
- B. Alliance Group Limited must pay Kelvin Franks:**
 - (i) \$13,000 gross in lost wages**
 - (ii) \$7,000 in compensation for humiliation, loss of dignity and injury to his feelings**
- C. It is not reasonable or practicable for Alliance Group Limited to reinstate Mr Franks.**

Employment relationship problem

[1] Kelvin Franks worked at the Alliance Group Limited's (AG) Mataura freezing works each season from 2007 until his dismissal on 25 May 2015. AG decided he had committed serious misconduct by making a false allegation against a supervisor, Vaughan Kirk. Mr Franks claims he was unjustifiably dismissed. He wishes to be

reinstated and to be paid lost wages and compensation for humiliation, loss of dignity and injury to his feelings.

[2] AG considers it justifiably dismissed Mr Franks after a fair process.

Background facts

2014 events

[3] In February 2014, Mr Franks made a formal complaint that Mr Kirk, his supervisor, had subjected him to bullying for several years.

[4] In March 2014, AG rejected the allegation of bullying by Mr Kirk but agreed to go to mediation. In response to that letter, Mr Franks raised a personal grievance of unjustified disadvantage alleging that AG refused to meet with him to discuss workplace bullying and that AG had not provided a safe working environment.

[5] Also in March 2014, AG alleged Mr Franks had used abusive language towards a co-worker. It agreed with Mr Franks' union representative that the appropriate consequence was for Mr Franks to apologise and receive a verbal warning.

[6] I understand mediation took place in mid-2014. Whether because of that or not, Mr Franks and Mr Kirk no longer worked on the same shifts. Mr Kirk was no longer Mr Franks' supervisor. Mr Franks worked on night shifts.

The 21 April event

[7] On 21 April 2015, the following events were caught on CCTV camera. They occurred at about 3.50 pm, near the beginning of Mr Franks' shift and the end of Mr Kirk's shift. Mr Franks arrived outside the gear room with Margaret Katon who entered the day shift gear room. Mr Kirk was in the day shift gear room and Mr Franks had seen him there. Mr Franks waited in the hallway for about 10 seconds. He was at the door waiting to go into the gear room as Mr Kirk was about to leave. Mr Franks had hold of the door. Mr Kirk exited at the same time as Mr Franks entered the gear room. Mr Franks was in the gear room for about 9 seconds and left when Ms Katon left.

[8] What Mr Franks later said about the incident is disputed. However, at least once during the shift Mr Franks approached his supervisor, Allen Thompson. Mr Thompson says that Mr Franks told him that Mr Kirk had dropped his shoulder and deliberately walked into him in the gear room. Mr Thompson told Mr Franks he would investigate the allegation and it may have been on camera.

[9] Mr Thompson says that Mr Franks approached him a further two times repeating the allegation and asking if he had yet seen the CCTV footage.

[10] Mr Franks denies making an allegation or complaint against Mr Kirk. Mr Franks says that at the beginning of his shift he heard some co-workers talking about how Mr Kirk had been in a bad mood. He says he spoke to Mr Thompson about a close call he had had with Mr Kirk in the gear room doorway. He says he told Mr Thompson that Mr Kirk had come a bit close to him and he was forced to step sideways to avoid Mr Kirk.

[11] Later, after Mr Thompson had seen the footage, he told Mr Franks that he had seen it and there was nothing in it. Mr Franks says he told Mr Thompson to forget about it and that he was not worried about it.

The beginning of the investigation

[12] The following day, Mr Thompson told Tony Gilder, the Plant Manager, that Mr Franks had made a serious allegation against Mr Kirk. Mr Thompson was concerned that Mr Franks may have repeated the allegation to other employees. Mr Gilder asked Mr Thompson to write a statement, which he did that day:

Kelvin Franks approached me & accused Vaughan Kirk of dropping his shoulder and deliberately walking into him. I told Kelvin that I would investigate the allegation as it may be on camera. When I had a free moment I viewed the footage. What I observed was Vaughan walking into the gear room, then Kelvin was seen to be standing by the door, as Vaughan was seen leaving Kelvin started to walk towards the door, Vaughan side stepped Kelvin to avoid him. Kelvin carried on into the gear room.

[13] On 23 April 2015, Ricky Gutsell, the Plant Personnel Manager, called Mr Franks into his office and asked him if there had been trouble with Mr Kirk on the night of the 21st. Mr Franks said there had not been any trouble. Mr Gutsell told him Mr Thompson had said something. He asked Mr Franks to make a statement. Mr Gutsell wrote out the statement and Mr Franks signed it:

I was walking through the door talking to Margaret Katon. Vaughan didn't give me much room, there was no contact. I had to step sideways to avoid him. There was no words spoken between either of us. This was about 3.50pm on Tuesday night, 21st.

[14] After that, Mr Franks went to see Ian Swain, also a supervisor at the plant. Mr Franks asked Mr Swain if he was in trouble. Mr Swain asked him why he thought that. Mr Franks and Mr Swain's accounts of what was said next differ.

[15] Mr Swain says that Mr Franks told him that Mr Kirk had dropped his shoulder into him. He then told Mr Franks he was lying because he had seen the CCTV footage. He says Mr Franks asked him if he needed a lawyer. Mr Swain told him he *didn't give a shit what he did*. Mr Swain says he thought Mr Franks was making a false accusation against a senior supervisor.

[16] Mr Franks says Mr Swain told him he had seen the footage and that he had been the one who dropped his shoulder into Mr Kirk. Mr Franks says Mr Swain told him he would lose this time after trying to take Mr Kirk to court the previous year. He agrees that Mr Swain told him he didn't give a shit about whether he got legal representation.

[17] Mr Swain denies saying that Mr Franks would lose this time. There is objective evidence that Mr Swain told Mr Franks that he had dropped his shoulder into Mr Kirk¹. However, Mr Swain does not remember saying that.

The allegation against Mr Franks

[18] On 28 April 2015, Mr Gutsell rang Mr Franks and asked him to come into his office. He read Mr Franks a letter containing the allegation that he had *falsely and maliciously alleged Senior Supervisor Vaughan Kirk deliberately walked into you*. AG asked Mr Franks to attend a meeting. Mr Gutsell wrote he was concerned that Mr Franks' complaint was:

...intended to result in a serious misconduct investigation being instigated against Vaughan Kirk. I record you have previously made a complaint of bullying and harassment against Vaughan Kirk which he strongly denied.

¹ AG produced typed notes to Ms Thomas and the Authority in preparation for these proceedings. They are probably notes made by Mr Gutsell in the course of AG's investigation. They had not been given to Mr Franks or Ms Thomas before the dismissal decision.

[19] Mr Gutsell enclosed Mr Franks' statement and statements from Mr Thompson and Mr Kirk. Mr Kirk's statement reads:

It was slightly before 4:00pm when Margaret Katon came in to hang up her gear and said to me, what is he calling you? I looked around and saw Kelvin Franks standing near to the door at the entrance. I ignored his comments because of previous history and exited the room which meant having to walk around Kelvin as he had moved closer to obstruct the exit. I then carried on to count a chiller thinking no more of it. On Wednesday Allen Thompson said to me that Kelvin had laid a complaint against me for a shoulder charge on him as I was leaving the gear room. I wasn't worried about this allegation as I know it didn't happen and all evidence would be on camera. I discussed this with Ricky Gutsell and Steve Katon on the Wednesday night as I was leaving work.

The meeting to hear Mr Franks' explanation

[20] On 4 May, Mr Franks, Ms Thomas, Mr Gutsell, and AG's counsel, Ken Smith, met. Mr Franks' explanation was that Mr Thompson had misunderstood what he said on 21 April. He said he had simply said that Mr Kirk did not give him much room when walking into the gear room. Mr Franks said the workplace was noisy and that Mr Thompson had earplugs and earphones on and that could explain the misunderstanding.

[21] Mr Franks also explained that he knew there was camera surveillance in the area.

Further investigation and correspondence

[22] After the meeting, Mr Gutsell continued investigating. He wrote a letter to Ms Thomas on 5 May reporting that he had explored the possibility of a misunderstanding with Mr Thompson. However, Mr Thompson rejected the suggestion he did not hear Mr Franks clearly.

[23] Mr Gutsell gave thought to Mr Franks' knowledge of the existence of camera footage. He wrote that it neither proved nor disproved *the central issue which is whether a false complaint was in fact made.*

[24] Mr Gutsell became aware that Mr Swain knew of the allegation and sought a statement from him, which he enclosed in the 5 May letter:

On Tuesday 21st April we had viewed the video footage of the alleged incident. We established between us of what we had viewed that there was nothing in the allegation.

On Thursday 23rd Kelvin Franks came into the office while I was doing the wages and said to me "What have I done wrong, I am in trouble". I asked him why, initially he refused to tell me, then he said that Vaughan Kirk had dropped his shoulder into him. I said to Kelvin that he was lying as we have seen the footage and Vaughan didn't do it at all. Kelvin then said do you think I need a lawyer. I said I don't give a shit what you do.

[25] Mr Gutsell asked for Mr Franks' response to Mr Swain's statement. He recorded that both parties had agreed that if it was proved Mr Franks made the allegation against Mr Kirk dismissal was a likely outcome.

[26] Further correspondence between Mr Gutsell and Ms Thomas took place. Ms Thomas made the following points on behalf of Mr Franks:

- Mr Thompson was not standing directly beside Mr Franks. Mr Franks was adamant Mr Thompson had earplugs in and earphones on.
- Mr Franks denied saying Mr Kirk dropped his shoulder into him.
- Mr Franks knew there was a surveillance camera located to capture footage of people going into and leaving the gear room.
- It was physically impossible for Mr Franks to repeatedly question Mr Thompson on whether he had seen the camera footage as he was up a hoist for the next 2-3 hours.
- Mr Swain's statement is false. Mr Franks did not tell Mr Swain Mr Kirk had dropped his shoulder into him.
- Mr Franks made it very clear there had been no contact and did not complain that Mr Kirk had assaulted him.
- AG should independently verify whether there had been a general discussion that evening about Mr Kirk being in a bad mood.
- Mr Franks said the video showed Mr Kirk was acting in an intimidating way. Mr Franks only made the comment about his encounter with Mr Kirk because other employees were talking about how Mr Kirk was in a bad mood.
- Body language shows that Mr Franks had to twist his body to avoid contact from Mr Kirk. The way Mr Kirk went through the door was aggressive and he came very close to Mr Franks.
- Mr Franks was not obstructing the exit and the video footage does not support that.

[27] Mr Gutsell responded that the only two scenarios he was considering were that Mr Franks made a false allegation to Mr Thompson, or that Mr Thompson misunderstood what Mr Franks said. He said he needed to establish whether a misunderstanding was a reasonable possibility.

[28] Mr Gutsell declined to clarify with other employees if there had been a general discussion about Mr Kirk being in a bad mood. He noted that there were no witnesses to the discussion between Mr Franks and Mr Thompson. He wrote that a general discussion between co-workers did not make it more or less likely Mr Thompson misheard Mr Franks.

[29] Mr Thompson remained adamant he was standing directly beside Mr Franks and had not misheard him. He said he has not worn earphones for 12 years but agreed he was wearing earplugs. He says Mr Franks repeated the allegation against Mr Kirk three times.

[30] Mr Franks was on a work rotation on the rise and fall stand and on the paddy whack removal stand. Both are easy to get on and off. A number of carcasses were diverted around the detain rail and Mr Franks approached Mr Thompson during those times.

[31] Mr Gutsell considered Mr Franks' claimed knowledge of the video surveillance camera to be overstated. He considered Mr Franks only made that explanation after he discovered that there was video footage that did not support an assault by Mr Kirk.

[32] Mr Gutsell denied that the video footage captured Mr Kirk acting in an intimidating manner. He found that claim extraordinary.

[33] Mr Gutsell said he would disregard Mr Swain's statement from his consideration.

[34] Mr Gutsell considered the issue was one of credibility and he had to decide between Mr Franks and Mr Thompson's versions of their conversation.

The decision

[35] On 20 May, Mr Gutsell reported his finding that the allegation of serious misconduct was proven. He preferred Mr Thompson's account of what Mr Franks said on 21 April. He invited Ms Thomas to make submissions on the disciplinary outcome noting that the proven allegation involved serious dishonesty and dismissal was a possibility. Ms Thomas did not make any submissions.

[36] On 25 May, Mr Gutsell wrote to Ms Thomas that the incident had destroyed AG's trust and confidence in Mr Franks. AG summarily dismissed Mr Franks.

Unjustified dismissal?

[37] In deciding whether AG unjustifiably dismissed Mr Franks I need to apply the test in s 103A of the Employment Relations Act 2000. It requires me to assess whether what AG did was what a fair and reasonable employer could have done in all the circumstances at the time.

[38] I need to decide the question of justification objectively. That means I cannot substitute my opinion for that of AG², but in applying the test I must consider whether AG acted fairly in concluding Mr Frank was guilty of serious misconduct.

[39] In particular I need to assess whether, before deciding to dismiss Mr Franks, AG:

- sufficiently investigated the allegation against him,
- raised its concerns with him,
- gave him a reasonable opportunity to respond to the concerns, and
- genuinely considered any explanation regarding the allegation.

[40] I need to be satisfied that AG had reasonable grounds for concluding that:

- the misconduct in question occurred, and
- it amounted to serious misconduct.

[41] I may also examine any other relevant factors. However, I must not find the dismissal to be unjustified solely because of procedural errors if those errors were minor and did not result in Mr Franks being treated unfairly.

² *Angus v Ports of Auckland* [2011] EmpC 160

Did AG sufficiently investigate the allegation against Mr Franks?

[42] Mr Franks submits that AG unreasonably failed to talk to other employees on the same shift as him to establish whether there was general chat about Mr Kirk being in a bad mood.

[43] AG pointed out that Mr Franks had not named any other employees he had heard talking about Mr Kirk's mood to guide its further investigation. During the Authority's investigation meeting, Mr Gutsell said that while he was investigating the allegation he did talk to two other employees that had worked with Mr Franks on 21 April about general discussion on Mr Kirk's mood. However, they were reluctant to make statements and he did not pursue the issue any further.

[44] I do not consider it was a failure of fair process for Mr Gutsell to make no further enquiries. He correctly identified the central issue to be whether Mr Franks had made an allegation to Mr Thompson. Knowing that there had been a general discussion about Mr Kirk being in a bad mood would not have assisted in resolving what Mr Franks said to Mr Thompson. It would only have supported Mr Franks' report that people other than him thought Mr Kirk to have been in a bad mood. I am satisfied that was not a relevant consideration.

[45] Overall, I am satisfied that AG carried out a thorough investigation.

Did AG raise its concerns with Mr Franks?

[46] Ms Thomas is critical of Mr Gutsell's approach to Mr Franks on 23 April when he asked him whether he had any trouble with Mr Kirk on the 21st. She says that by then AG was investigating whether Mr Franks had maliciously made a false allegation. Mr Gutsell denies that by the 23rd he was investigating Mr Franks having made a false allegation. He says he was simply trying to hear both sides of the story.

[47] I am satisfied that by 23 April Mr Gutsell was investigating what Mr Franks said to Mr Thompson. By then Mr Franks knew, because Mr Thompson had told him, that the video did not show Mr Kirk shoulder charging him. He says he was suspicious about why Mr Gutsell was asking him about the encounter. I consider it was a breach of good faith for Mr Gutsell not to be candid about why he was making the enquiry. He should have put it to Mr Franks that he was investigating the

possibility that he had lied to Mr Thompson about what happened in the gear room doorway.

[48] In addition, Ms Thomas submits that AG had in mind that Mr Franks had planned the encounter in the doorway to set up Mr Kirk. However, the 'set up' view was never put to Mr Franks for his explanation, which was unfair.

[49] Mr Thompson believed the video showed Mr Franks deliberately hanging around the door waiting for Mr Kirk. He says that is part of what persuaded him to tell Mr Gilder Mr Franks had made up a serious allegation about Mr Kirk.

[50] Mr Kirk believed Mr Franks' allegation had been unfair to him. That is why he made a complaint about it to Steve Katon, the plant manager. Mr Kirk also believed the video footage showed Mr Franks standing at the gear room door waiting to instigate something with him.

[51] Mr Gutsell's letter of 28 April adequately alerted Mr Franks to the fact AG considered he had planned to get Mr Kirk into trouble. The letter made it clear that AG alleged that he had made a false allegation against Mr Kirk and had done so maliciously. According to the Online Oxford Dictionary *maliciously* means *in a manner characterized by malice or ill will; with intent to do harm*. AG made it very clear to Mr Franks that it considered he acted deliberately, and with ill will towards Mr Kirk.

[52] AG also alleged that if Mr Franks made the false complaint he did so in the hope that AG would instigate a serious misconduct investigation into Mr Kirk's behaviour. It was clear that AG considered that if the allegation was proved it would be viewed as serious dishonesty.

[53] Even if Mr Gutsell wondered whether Mr Franks set-up the doorway situation, I consider AG fairly and clearly put its allegations to Mr Franks. Had that aspect of the allegation been put to Mr Franks there is little more he could have added to his explanation. Any denial that he intended to set up Mr Kirk was compatible with the explanation he gave.

Did Mr Franks have a reasonable opportunity to give his explanation?

Did AG consider Mr Franks' explanation before making its decision?

[54] Ms Thomas is critical of Mr Gutsell's use of the word *extraordinary* to describe Mr Franks' characterisation of Mr Kirk's body language as intimidating. She says that statement was evidence of a closed mind and bad faith.

[55] I have viewed the CCTV footage numerous times, including during the investigation meeting. Mr Franks told me why he considered Mr Kirk's body language in going through the door to be intimidating. That was principally based on his view that Mr Kirk had bullied him. However, from an objective view, at worst Mr Kirk was simply trying to avoid colliding with Mr Franks in the doorway they were both trying to use. Mr Gutsell's denial that he could see any negative body language displayed by Mr Kirk was not evidence of a closed mind or of a breach of AG's duty of good faith.

[56] In the circumstances, I find AG adequately took account of Mr Franks' explanation of a misunderstanding and of his report of general staff talk of Mr Kirk being in a bad mood.

[57] However, Mr Gutsell did not adequately take into account whether Mr Franks knew, before Mr Thompson viewed the footage, that there were cameras showing the entry to the gear room.

[58] Mr Gutsell disagreed with Ms Thomas that Mr Franks' knowledge of cameras was relevant to his consideration of whether Mr Franks lied. He wrote:

I appreciate the point that it would be illogical to make a false allegation when it could be easily established that there [was] no substance to it. However, this assumes that the maker of the allegation knows that there is a video surveillance camera located in exactly the right place to perfectly capture an event – and establish definitively what actually happened – and has that knowledge in mind at the relevant time. If a false allegation was made it was by its nature an irrational act. No person acting rationally simply invents a serious allegation against another person however, the reality is that [it] does happen from time to time.

[59] In a document written by Mr Gutsell during his investigation, Mr Thompson and Mr Swain are noted to *believe Kelvin would have known there were cameras in the area*. That document was not supplied to Mr Franks before his dismissal.

[60] Ms Thomas submits that the issue of the surveillance camera was critically important, especially if AG considered Mr Franks to have been manipulative. She submits that it was a breach of good faith not to disclose to Mr Franks that Mr Thompson and Mr Swain believed he would have known there were cameras in the area.

[61] In his correspondence with Ms Thomas Mr Gutsell did not refer to the document stating that Mr Thompson and Mr Swain believed Mr Franks to have *known there were cameras in the area*. He did not comment on their views at all. That is of concern to me because Mr Gutsell reached an adverse view about Mr Franks without taking into account a relevant piece of information. In addition, Mr Franks did not have access to that information, and so no opportunity to comment on it, before he was dismissed.

Did AG have reasonable grounds for concluding Mr Franks made a false and malicious allegation against Mr Kirk?

[62] AG knew that no shoulder charge had taken place. It had to decide whether Mr Franks alleged that Mr Kirk had shoulder charged him. For Mr Gutsell it came down to whether Mr Thompson or Mr Franks was more credible.

[63] An employer is entitled to prefer one employee's account of a conversation over that of another. In the *Ministry of Maori Development v Travers-Jones*³ the Employment Court observed:

In reaching conclusions, an employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there are conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other. [emphasis added]

[64] Although the employer is entitled to accept one account rather than another, his or her decision to accept one account must be based on reasonable grounds. So Mr Gutsell was entitled to believe Mr Thompson's version of what Mr Franks said, but only if surrounding facts or circumstances supported that account.

³ [2003] 1 ERNZ 174

[65] The work records for the relevant shift showed a number of carcasses were detained and so Mr Franks had the opportunity to approach Mr Thompson more than once; that backs up that aspect of Mr Thompson's version.

[66] However, the key point was whether Mr Franks lied. The opportunity to approach Mr Thompson several times does not serve to prove that Mr Franks lied to Mr Thompson.

[67] There remains the issue of Mr Franks' knowledge of the location of a camera *in the area*. It is problematic that Mr Gutsell did not share Mr Thompson and Mr Swain's view with Mr Franks and did not clarify further with them what they meant by *in the area*. In addition, Mr Gutsell did not take into account that Mr Franks' assertion he knew there were cameras there was supported by Mr Thompson and Mr Swain's belief.

[68] It was highly relevant to whether Mr Franks lied for Mr Gutsell to establish whether he knew the encounter in the doorway was being recorded. However, that was discounted by Mr Gutsell as unimportant. I consider that to have been a breach that renders Mr Gutsell's decision to believe Mr Thompson over Mr Franks unsafe.

Conclusion

[69] Mr Gutsell breached AG's duty of good faith to be communicative with Mr Franks on 23 April. He interviewed Mr Franks and took a statement without telling him AG was investigating whether he had lied to Mr Thompson. AG breached its duty to Mr Franks when it failed to supply the notes of its further investigation that included Mr Thompson and Mr Swain's belief about the cameras. The combined effect of these breaches was not minor and resulted in Mr Franks being treated unfairly. Therefore, I conclude that the decision that Mr Franks was guilty of serious misconduct was not a decision a fair and reasonable employer could have reached in all the circumstances at the time it made its decision. That means AG unjustifiably dismissed Mr Franks.

Remedies

Reinstatement

[70] Reinstatement is a remedy that the Authority may provide for if it is reasonable and practicable to do so. The Employment Court has given some guidance on how issues of reasonableness and practicability are to be assessed:

...not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, ... the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although ...evidence considered when determining justification for dismissal ...may also be relevant to the question of reinstatement.⁴

[71] The meaning of “practicable” in the context of reinstatement was considered by the Court of Appeal in *Lewis v Howick College Board of Trustees*⁵:

Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully.

[72] AG strongly opposes reinstatement. Mr Gutsell, Mr Kirk, Mr Thompson and Mr Swain all gave evidence that they could not work with Mr Franks again. Their main objection is that the essential trust and confidence that AG needs to have in Mr Franks has been so broken that it cannot be restored.

[73] There are two strands to the evidence relied on by AG’s witnesses. The first relates to Mr Franks’ work performance and disciplinary record while employed. AG emphasises the number of warnings he had and says that he required a disproportionate amount of supervisor time because he was easily distracted as well as distracting other staff. AG’s view is that Mr Franks would be difficult to reintegrate into its workforce.

[74] The other strand of AG’s objection to reinstatement is how Mr Franks has acted since his dismissal, particularly towards Mr Gutsell and Mr Kirk and members of Mr Kirk’s family. Mr Franks denies acting inappropriately or harassing Mr Gutsell, Mr Kirk or Mr Kirk’s wider family.

[75] Mr Kirk and Mr Gutsell made complaints to the police. Mr Franks has been spoken to by police. The police have not laid any charges.

⁴ *Angus and McKean*, *ibid.* at paragraph 66.

⁵ [2010] NZCA 320 at paragraph 2.

[76] Mr Gutsell and Mr Franks are both involved in harness racing. Mr Gutsell and his partner Ms Sheridan gave evidence of what they say was Mr Franks' volatile and aggressive behaviour towards Mr Gutsell at racetracks in October 2015.

[77] Mr Franks denies the allegation of shouting abuse at Mr Gutsell and the allegation of tooting his horn and waving a piece of paper near Mr Gutsell's and Ms Sheridan's horses. Mr Franks was often accompanied to the race tracks over that period by Mr Casey. However, I am satisfied that it is likely that Mr Casey was not within earshot at the time of the alleged tooting.

[78] Mr Franks' description of the November incident is that Mr Gutsell approached him while he was taking the cart off one of his horses and accused him of stealing a cart seat. He says he told Mr Gutsell he did not want to speak to him and to either piss off or f*** off. He denies taking a swing at Mr Gutsell and says his sulky only hit Mr Gutsell because Mr Gutsell was standing behind it and should have got out of the way.

[79] I find Ms Sheridan's evidence of the September tooting and the November incidents very credible. I consider Mr Gutsell's approach to Mr Franks about the missing cart seat was provocative, particularly in light of the September encounters. However, Mr Franks' reaction was over the top. In my view the encounter shows that Mr Franks and Mr Gutsell do not trust each other at all.

[80] I have serious concerns about the allegations made by Mr Kirk. These are that on two consecutive days in September 2015 Mr Franks drove past his house and on two occasions tooted and once stopped and watched Mr Kirk for about five minutes. Mr Kirk lives in the country. Mr Franks suggested that he might have been interested in buying swedes from the gate. However, Mr Kirk's evidence, which I accept, is that September is not the season for swedes. There was no credible explanation given by Mr Franks about why he might have been either tooting or stopping outside Mr Kirk's house.

[81] In addition, Ross Grant, Mr Kirk's brother-in-law, says that twice in November 2015 Mr Franks drove up his driveway on Noble Road.

[82] Mr Franks' explanation was that he intended to drop in on another person who lived on the same road. That person had known Mr Franks' father and he wanted to ask him about possible job opportunities at Waitane Freezing Works. However, he was not home and so Mr Franks continued up Noble Road, which is a dead-end road. Mr Franks says he pulled into the Grants' driveway to turn around and go back the way he had come. He says he did not know then that the property belonged to Mr Kirk's family members.

[83] Mr Grant says that the first time Mr Franks drove up the driveway he drove further up than would have been necessary to turn around.

[84] Mr Grant says the second time Mr Franks tooted his horn a number of times so he went out of the house to see what he wanted. He says that Mr Franks was in a very agitated state and told him Mr Kirk had made his life hell. He also made derogatory comments about Mr Kirk's private life.

[85] Mr Franks says that the second time he pulled into the Grants' driveway it was also to turn around. He agrees he spoke to a man but says that man was standing outside when he drove up. He agrees that he told the man that Vaughan Kirk had made his life hell and the man told him that Vaughan Kirk was his brother-in-law. Mr Franks says he was surprised to hear that.

[86] Mr Franks' evidence about the Grants' driveway is not credible. The second time Mr Franks went down Noble Road there would have been no reason for him to continue down the road in that direction, as he knew by then he was in a dead-end road. The Grants' driveway is in the opposite direction to Mr Franks' home. In addition, if he thought Mr Grant was unknown and unrelated to Mr Kirk it is unlikely he would have started talking about how Mr Kirk had made his life hell.

[87] I prefer Mr Kirk's and Mr Grant's evidence about the incidents.

[88] There is also an allegation that Mr Franks drove up Mr Kirk's parents-in-law's driveway in Matura. Mr Kirk also says that he believes Mr Franks made prank telephone calls to his parents-in-law. However, I heard no direct evidence of this from them.

[89] Mr Franks denies knowingly driving into Mr Kirk's parents-in-law's driveway. He gave an explanation of how he was in Mataura trying to find another man, also called Vaughan. He denies having made prank calls.

[90] Mr Kirk says that since the police spoke to Mr Franks the prank calls have stopped.

[91] Mr Swain gave evidence that one night after Mr Franks was dismissed, at 11.30 pm, Mr Franks telephoned his house saying his name was 'Sid' and was abusive to him. He says he recognised Mr Franks' voice. Mr Franks denies making such a call. Mr Swain knew Mr Franks for a long time prior to becoming his supervisor at the works. I accept his evidence that Mr Franks made the late night call. However, I also accept Mr Franks' evidence that he has a certain amount of trust and confidence in Mr Swain.

[92] In considering reasonableness, the effect of reinstatement of Mr Franks on AG's other employees may be considered. Mr Kirk, Mr Gutsell, and Mr Swain remain employed by AG.

[93] I have no doubt that after his dismissal Mr Franks indulged in negative behaviour aimed at Mr Kirk and his wider family and towards Mr Swain and Mr Gutsell. His post-dismissal behaviour stems from his keenly felt sense of injustice about his treatment by AG. I accept it has been difficult for Mr Franks to find other work. However, his post-dismissal actions, in particular those involving Mr Kirk and his family, prove to me that Mr Franks no longer has the kind of trust and confidence in key members of AG's staff that he would need to be able to work at Mataura again.

[94] I also accept that Mr Thompson would find it difficult to work with Mr Franks again because he so clearly believes that Mr Franks lied to him.

[95] Because of Mr Franks' post-dismissal behaviour, I do not consider it feasible that a successful employment relationship could be re-established. It is not reasonable or practicable to reinstate Mr Franks.

Lost wages

[96] Section 123(1)(b) of the Act allows me to provide for the reimbursement by AG of the whole or any part of wages Mr Franks lost because of his grievance. Mr Franks claims \$1,000 lost wages per week for a 42-week period.

[97] Section 128(2) of the Act provides that I must order AG to pay Mr Franks the lesser of a sum equal to his lost remuneration or to 3 months' ordinary time remuneration.

[98] AG gave no evidence about the amount of Mr Franks' weekly earnings. Therefore, I accept Mr Franks' evidence.

[99] Mr Franks did not find alternative employment in the three months after his dismissal. I am satisfied in all the relevant circumstances, including Mr Franks low level employment skills and the low population area in which he lives, that he has adequately mitigated his loss.

[100] AG must pay Mr Franks 3 months' (or 13 weeks) ordinary time remuneration from 25 May 2015. Mr Franks' evidence is that his income was \$1,000 per week gross. Subject to consideration of contribution, Mr Franks is entitled to be paid \$13,000 gross in lost wages.

[101] I have discretion to award lost remuneration for a greater period than 3 months post-dismissal. I am not satisfied that Mr Franks would have remained employed by AG for up to 42 weeks after the end of May 2015. I decline to exercise my discretion to award further lost remuneration.

Compensation

[102] Mr Franks claims \$10,000 compensation for humiliation, loss of dignity and injury to his feelings.

[103] Mr Franks says that he has been left depressed and humiliated. He attributes that partly to bullying he says he suffered at AG. Bullying is not the subject of these proceedings and I cannot award any compensation for bullying unless it stems from a proved personal grievance. The only grievance claimed and proved is that of unjustified dismissal.

[104] Mr Franks says the unfairness he suffered at AG has led to ongoing emotional damage and he has been diagnosed with stress and anxiety for which his doctor prescribed medication.

[105] AG submits that Alliance cannot be held responsible for Mr Franks' difficulty in finding new employment. It says it tried hard to keep him employed because it recognised he had limited employment skills.

[106] I consider that Mr Franks has suffered the usual kind of humiliation inherent in an unjustified dismissal and I accept that it has had an impact on his ongoing emotional wellbeing. In all the circumstances, and subject to my consideration of contribution, AG must pay \$7,000 compensation to Mr Franks.

Contribution

[107] Having determined Mr Franks has a personal grievance s 124 of the Act requires me to consider whether he contributed to the situation that gave rise to his dismissal and if so reduce remedies accordingly.

[108] AG submits that this case is analogous to *Howard v Carter Holt Harvey Packaging Limited*⁶ in which Mr Howard's contribution was held to be 70%. His remedies were reduced accordingly.

[109] However, in that case, Mr Howard had punched another employee and there was no doubt about that. In this case, there remains doubt in my mind about what Mr Franks said to Mr Thompson. It cannot be proved that Mr Franks contributed in a blameworthy way to the situation giving rise to his dismissal and I decline to reduce the remedies awarded above.

Costs

[110] Costs are reserved. It is my preliminary view that Mr Franks should receive a contribution to his costs. The parties are encouraged to agree on costs.

[111] Subject to matters outside of my knowledge, such as Calderbank offers, I would be likely to base costs on the daily tariff of \$3,500. The matter took one and a half days.

⁶ [2014] NZ EmpC 157

[112] If costs cannot be agreed, any party who wishes to apply for costs should do so within 28 days of the date of this determination and the other party has 28 days to file submissions in response.

Christine Hickey
Member of the Employment Relations Authority