

**Attention: Please note the non-publication order  
made at paragraph [7] below.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2017] NZERA Christchurch 114  
5577392

BETWEEN WILLIAM (SANDY)  
BUTTERFIELD  
Applicant

AND ALLIANCE GROUP LIMITED  
Respondent

Member of Authority: Christine Hickey

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

Investigation meeting: 8 and 9 June 2017 in Invercargill

Submissions received: At the investigation meeting

Determination: 4 July 2017

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Butterfield claims that he was unjustifiably disadvantaged and unjustifiably dismissed.

[2] Alliance says that when it was investigating and considering its response to what it says was serious misconduct outside of work, Mr Butterfield was not in an employment relationship with it. Therefore, Alliance says Mr Butterfield cannot bring personal grievances.

[3] If the Authority decides Mr Butterfield is able to bring personal grievances, Alliance says its actions were justified.

[4] By way of remedy, Mr Butterfield claimed that he should be reinstated. However, he withdrew that claim at the investigation meeting. Now, Mr Butterfield claims compensation of \$10,000 for humiliation, loss of dignity and injury to his feelings. He also claims lost wages, and reimbursement of his legal costs.

[5] I have issued two preliminary determinations in response to Alliance's claims to strike out Mr Butterfield's personal grievance claims.<sup>1</sup>

[6] I declined to strike out Mr Butterfield's claims. In the second determination, I set out my view that the seniority provisions in the collective agreement may be contractual provisions that survive during the off-season, a breach of which may give rise to an ability to bring a personal grievance for unjustified disadvantage.

[7] I have exercised my power under clause 10 of Schedule 2 of the Employment Relations Act 2000 to render Alliance's witnesses and other people mentioned during the investigation meeting that were not present to give evidence anonymous. I order that the real names of those people not be published.

### **What happened?**

[8] Mr Butterfield was a member of The New Zealand Meat Workers' and Related Trades Union Incorporated and covered by the Collective Employment Agreement (2014-2016) between the Union and Alliance.

[9] Mr Butterfield was 28<sup>th</sup> on the seniority list. He claims that Alliance was obliged to offer him re-engagement at the beginning of the new 2014-2015 season, in early July 2014. He says that instead Alliance re-engaged workers who had less seniority than him. He claims Alliance's actions caused him unjustified disadvantage.

[10] Mr Butterfield's claim of unjustified dismissal rests on a letter sent to his lawyer by Alliance on 23 December 2014 stating that Alliance would not re-engage him again.

### **Events leading up to the claims**

[11] Mr Butterfield had been employed by Alliance in Southland for every season since his first in 2000-2001, latterly in the pallet store, until these events in 2014 resulted in him not being re-engaged.

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<sup>1</sup> [2016] NZERA Christchurch 24 and [2017] NZERA Christchurch 24

[12] Mr Butterfield considered another pallet store employee, Mr Y, had been involved in, and causative of, three separate assaults on him in 2008, 2012 and 2013. Two of the alleged assaults occurred at work.

[13] The first alleged assault, in 2008, was investigated and ended in Alliance finding that the assault could not be proved. However, Mr Y was given a written warning, and Mr Butterfield was told he would be counselled. Mr Butterfield says that he was not counselled.

[14] The second assault occurred in 2012, outside a bar where Mr Butterfield, Mr Y and another employee, Mr D, had been drinking. Mr Butterfield and Mr D went outside and Mr D punched Mr Butterfield a number of times and knocked him to the ground. Mr Butterfield complained to the police. Mr Y had followed the other two outside and witnessed Mr D punching Mr Butterfield at least twice. He gave a statement to the police that he believed that Mr Butterfield and Mr D had agreed to fight each other. The police concluded that Mr Butterfield had either invited Mr D to fight him, or had agreed to fight Mr D. The police did not lay any charges.

[15] The third assault occurred at work. Alliance resolved the situation by dismissing Mr C, who was established to have punched Mr Butterfield. Ultimately, although a charge of assault was laid, Mr C was not convicted.

[16] The operations manager for the pallet store, who jointly investigated Mr Butterfield's complaint against Mr C, was summoned by the defence to give evidence at Mr C's trial for assaulting Mr Butterfield. He gave evidence and Mr C was acquitted.

[17] Mr Butterfield considers that to be evidence that all three of those who he says assaulted him and the operations manager were acting against him in a concerted way. I have not made a decision on this point, because as will become clear below I do not need to do so.

[18] During 2013 and 2014, Mr Butterfield continued to harbour resentment. He considered that he had been the victim of a sustained campaign of bullying led by Mr Y, which was inadequately dealt with and enabled by Alliance management, especially the operations manager.

[19] Mr Butterfield raised a personal grievance in 2013. That was resolved in mediation by way of a settlement agreement in mid-2013. One part of the agreement was that Alliance would tell all employees at the induction for the new season, and by way of a letter to individual employees, that it would not tolerate workplace bullying, and that any such bullying would be fully investigated and could result in disciplinary action.

[20] Unfortunately, that letter was delayed. David Kean, Plant Manager, wrote the letter and distributed it to all employees in the pallet store in early 2014. Mr Kean also stated in the letter that any non-work events that spilled over into work would be taken seriously and investigated by Alliance.

[21] In November 2013, Mr Butterfield sent a typed seven and a half page letter to Mr Kean and to the Union, in which he went over his personal history, the three alleged assaults and made allegations against the operations manager being complicit in protecting the alleged assailants and having a 'vendetta' against him. His letter referred to a potential third case that he might take against Alliance, and referred to possible constructive dismissal. The letter did not raise any personal grievances. Mr Kean took advice from Mr Smith what to do about the letter. They decided no action was necessary. Therefore, Alliance did not respond to the letter.

[22] There were no further incidents of violence against Mr Butterfield and no formal complaints by him for the rest of the season. Mr Butterfield finished the season in June 2014, expecting to be offered re-engagement within a couple of weeks. Mr Butterfield was not offered re-engagement. Mr Y's seniority was such that he worked all year round.

[23] According to Bob Blackie, the Union secretary for the Lorneville plant, who gave evidence at the investigation meeting, five men who had less seniority than Mr Butterfield were re-engaged on 7 July 2014. Mr Blackie relied on Union and Alliance records to reach that conclusion.

## The text

[24] On 8 July 2014, someone sent a text to a friend of Mr Y. The text was passed on to Mr Y:

[x] you tell [y] tht we haven't forgotten tht he set up [a] & me; that he assaults me at work and is gutless to meet me so he gets [d] to stalk me out while on th piss after 7 hours and gets [c] to assault me at work & even gets his P-head mate ... to hunt me out while im out on the town/ u tell th gutless sack of shit that we r going to ply th same game to hav someone sort him out and and when done properly we won't have to work with the coward again karma and money well spent :-)<sup>2</sup>

[25] When Mr Y was shown the text, he reported it to the Police, to the operations manager and to a Union representative. He alleged Mr Butterfield sent the text.

[26] On 29 July 2014, the Lorneville plant manager, David Kean, sent a letter to Mr Butterfield stating that Alliance viewed the matter of the text seriously and it was obliged to take all practicable steps to manage health and safety. It said the threatened employee was genuinely concerned the threat may be followed through by Mr Butterfield getting someone to assault him.

[27] The letter invited Mr Butterfield and his representative to a meeting to obtain his response to the proposition that he sent the text:

As you are aware, you are currently not an employee and accordingly your attendance at such a meeting would be entirely voluntary.

However, I must advise that this issue must be satisfactorily resolved before you can re-engage as an employee for the 2014/2015 processing season.

A potential outcome of the meeting is that the company may redeploy you to a different shift or area of the plant. This would be on the basis that such a measure was a practicable step the company is required to take to manage workplace health and safety.

Any redeployment could result in your length of season and earnings being detrimentally affected.

## The meeting

[28] Mr Butterfield attended the meeting on 27 August 2014 with his lawyer, Ms Thomas, and Mr Blackie. Alliance was represented by the operations manager, Mr Kean, and Mr Smith, Alliance's legal counsel. Alliance also provided a minute taker.

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<sup>2</sup> This is quoted exactly how it was written.

[29] Mr Butterfield denied sending the text, and denied it came from his phone. He said a number of people had access to his phone.

[30] Before the meeting, Mr Butterfield undertook some research on the internet and discovered that there were apps available that could make it look as if the text had come from his phone, when it did not. He showed the meeting such an app that he had downloaded onto his phone before the meeting. He suggested that the text could have been intended to make him the victim of the serious allegation he now faced. He argued he may have been set up.

### **The investigation**

[31] In light of Mr Butterfield's denial and his suggestion he may have been set up, Alliance interviewed Mr Y and asked him if he had sent the text, or caused it to be sent. He denied having done so.

[32] On 27 August 2014, Mr Butterfield provided written authority for Alliance to make reasonable enquiries as to whether on 9 July 2014 a text was sent from his cellphone to the cellphone of the recipient.

[33] Alliance sought evidence from Mr Butterfield's phone service provider. However, there was initially some confusion over which provider he was with.

[34] On 4 September 2014, Alliance sent a letter to Ms Thomas asking Mr Butterfield to provide his phone for forensic analysis to see if the text was sent from his phone, and to undertake forensic analysis of other texts sent from his phone to see if the use of language matched the language used in the subject text.

[35] On 10 September 2014, Ms Thomas replied that Mr Butterfield was not willing to allow Alliance to use his phone to obtain extracts of other messages sent from it. He was willing to allow only an investigation of whether or not the message had come from his phone.

[36] On 15 September 2014, Mr Smith responded that in the circumstances, with Mr Butterfield's involvement in the investigation being voluntary, the investigation would be concluded on the evidence available.

[37] On 17 September, Ms Thomas replied that she did not consider the investigation could be concluded on the evidence available without examining Mr Butterfield's phone to see if the text had been sent from his phone. This was despite Mr Butterfield having denied Alliance access to his phone.

[38] On 14 October 2014, Mr Smith replied that Alliance had requested information from Mr Butterfield's cellphone provider and Alliance should be in a position to report further on the status of the investigation once it received such information.

[39] On 15 October 2014, Ms Thomas emailed that she had concerns if Alliance intended that Mr Butterfield was not going to be able to start work for the season until after the investigation was completed. She asked when he could expect to start.

[40] On 30 October 2014, Mr Smith replied that Alliance's view was that any re-engagement prior to the completion of the investigation would be inappropriate in light of the company's concerns, which had been *elevated following developments in the investigation*. In addition, Alliance said it had informed Mr Butterfield already that the matter needed to be resolved satisfactorily before it would re-engage him for the current season.

### **The result of the investigation**

[41] Mr Smith's letter also disclosed that a cellphone forensic examination report showed that a message was sent from Mr Butterfield's phone on 9 July 2014 that matched up with the text message in question. Mr Smith stated, that given Mr Butterfield's emphatic denial, the issue of authorship was still in question and noted that the company wanted to undertake forensic linguistic analysis but that Mr Butterfield refused to give permission to access sample text messages. The letter concluded:

... your client is not an employee and is not required to actively involve himself in the investigation, however, in order to avoid any misunderstandings, we wish to be clear that given his explanation, if he does not take reasonable steps to assist the investigation then this may justify the company drawing reasonable inferences from the information that is available. ...

If it is proven that your client is in fact responsible for this message and has fabricated the scenario of a third party being responsible this would elevate the existing health and safety concerns in relation to your client working in any area of the plant and further would

constitute a fundamental breach of trust and would likely result in your client not being allowed to re-engage at the plant again.

[42] On 3 November 2014, Ms Thomas raised a personal grievance of unjustified disadvantage alleging Mr Butterfield's return to work had been delayed unjustifiably and unreasonably. On 5 November 2014, Mr Smith responded that Alliance denied Mr Butterfield had a valid personal grievance of any kind.

#### **Mr Butterfield's disclosure to Ms Thomas**

[43] On 18 November 2014, Mr Butterfield wrote to Ms Thomas disclosing "I told you I didn't send the text, when in fact I did." He wrote explaining why he sent it, and giving his reasons for misleading her and Alliance. Essentially, he was worried when he got the letter inviting him to participate in an investigation about the text that he could lose his job. He believed that Alliance had been waiting for an opportunity to dismiss him.

[44] On 20 November 2014, Ms Thomas wrote to Mr Smith stating that Mr Butterfield had told her he did send the text. Ms Thomas was very clear that she did not have any knowledge of that previously. She raised the possibility that Mr Butterfield may have been suffering from severe depression when he sent the text. She suggested he could return to work if he was not in the presence of Mr Y or his associates. She suggested Mr Butterfield be put on night shift.

#### **Alliance's consideration of the new information**

[45] On 26 November 2014, Mr Smith wrote to Ms Thomas:

We take it that you intend providing some medical information for consideration by David Kean prior to him advising the outcome of this process.

If it transpires that you have nothing further to contribute to this process please advise and David Kean will consider all the relevant material and advise his decision.

Otherwise we will await the receipt of the further information so this process can be completed.

[46] On 18 December 2014, Ms Thomas sent a medical certificate from Mr Butterfield's GP. He wrote that Mr Butterfield had been his patient for many years and had struggled with mental health issues for some time "being disabled by anxiety and stress symptoms following three assaults from former work mates." Dr Brown

wrote that he had “no doubt [Mr Butterfield’s] mental health issues have resulted in bad decision making.” He advised Mr Butterfield was taking medication and seeing a counsellor and seemed to be improving.

[47] On 23 December, Mr Smith sent this letter:

I refer to your letter of 20 November and the medical certificate forwarded on 19 December which have been referred to David Kean, the decision maker in this investigation.

Your client has admitted the allegation and David Kean has given careful consideration to the points raised in your letter and the medical certificate. His decision is that your client will not be re-engaged at the plant again.

David Kean is responsible for the health and safety of large numbers of workers and he finds your client’s actions in this matter deeply concerning. For obvious health and safety reasons he is not prepared to have your client on the Plant again.

This matter has destroyed all trust and confidence in relation to your client.

## **Determination**

### *Unjustified disadvantage?*

[48] Mr Butterfield and a number of other workers were on a seasonal layoff in late June/early July 2014. In late 2016, the Court of Appeal case of *AFFCO New Zealand Limited v the NZMW & Related Trades Union Incorporated*<sup>3</sup> re-stated what had been established law that in the off-season meatworkers are not employees because their employment terminated with the end of the season. Nonetheless, the Court affirmed that some obligations persist during the off-season, particularly contractual obligations set out in the applicable collective agreement.<sup>4</sup>

[49] The relevant contractual obligation in this case is clause 32 of the collective agreement, which obliges Alliance to offer re-engagement to workers in seniority order. Seniority can only be broken by an employee “voluntarily leaving or being discharged from their employment” or “failure to return from a layoff” after reasonable notice of an offer of re-engagement by management. Clause 32 also notes that nothing contained in it “shall affect any right which the employer has in terms of clause 34.”

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<sup>3</sup> [2016] NZCA 482

<sup>4</sup> *AFFCO* case, above at 4.

[50] Clause 34 allows Alliance to retain:

... full power to manage and control their own business and the conduct of their workers in connection therewith, and to make reasonable rules and regulations not inconsistent with the provision of this Agreement relating to the management hereof, and to the hiring, conduct, duties and dismissal of persons in their employment.

[51] However, clause 34 cannot operate to over-ride Alliance's obligation to offer re-engagement for the new 2014 season in strict seniority order. If it did, it would negate the effect of clause 32. Seniority is very important in the meat industry and the Union and its members actively protect the operation of seniority rights.

[52] I rely on Mr Blackie's evidence, which was not met by any evidence to the contrary from Alliance, to decide that Alliance did not offer to re-engage Mr Butterfield in seniority order as at 7 July 2014 for the 2014-15 season. That was a disadvantage to his terms and conditions of employment, as set out in the collective agreement.

[53] I need to consider whether that disadvantage was unjustified. In my view, in order for Alliance to investigate the text as a matter going to its obligations of health and safety to its employees, or to its trust and confidence in Mr Butterfield, he needed to be its employee. At the earliest, that could only happen once Alliance had offered re-engagement and Mr Butterfield had accepted re-engagement. Then he would have been a "person intending to work", which satisfies the Employment Relations Act 2000 definition of an "employee".

[54] I cannot be entirely sure when Alliance was made aware of Mr Y's concern about the text. However, Mr Butterfield sent it on 8 July. On 29 July 2014 Alliance wrote its letter to Mr Butterfield inviting him to voluntarily attend a meeting.

[55] The parties agree that if Mr Butterfield had been offered and accepted re-engagement Alliance would have had the ability to suspend him on pay while it investigated the allegation that he had sent the text.

[56] I consider Alliance should have offered Mr Butterfield re-engagement by at least 7 July 2014. The fact that he was not re-engaged was a contractual breach of the collective agreement and was an unjustified disadvantage.

[57] Had Mr Butterfield been re-engaged it is highly likely Alliance would have suspended him while undertaking its investigation.

[58] It is likely that Mr Y drew the text to Alliance's notice by 10 July 2014.

[59] The text threatened that Mr Butterfield, or someone, would arrange criminal injury of Mr Y, another worker. The fact that the police did not lay any charge does not make the threat any less serious.

[60] In order to adequately consider whether to suspend Mr Butterfield Alliance would have had to carry out a fair process. I consider it was likely to have suspended him at the earliest by 14 July, had it carried out a fair process.

[61] It is not clear to me why the meeting to investigate the allegation took place as late as 27 August 2014. However, that is the first opportunity that Alliance gave Mr Butterfield to respond to its concern that he had sent the threatening text. That is when Mr Butterfield's period of denial began.

[62] I accept Alliance's view that Mr Butterfield's detailed denial was designed to mislead Alliance, and that it did so. After hearing on 27 August from Mr Butterfield, and Ms Thomas who had also been misled, Alliance embarked on a thorough and detailed investigation. That investigation cost Alliance Mr Smith and Mr Kean's time and \$1,246.37 in external costs for the forensic examination of the phone to which Mr Butterfield had sent the text.

[63] I also accept that the realisation that Mr Butterfield had deliberately misled it, combined with the serious threat to another employee's safety, was sufficient to destroy the trust and confidence that Alliance had previously maintained in Mr Butterfield.

[64] It is my view that Mr Butterfield's actions, beginning in the 27 August meeting and from then on, disentitle him to a finding that any pay from that day on was justified.

[65] The fact that Mr Butterfield decided to deny sending the text and maintain that denial for an extended period was entirely up to him. Up until 27 August 2014, while Alliance viewed the threat as very serious, it was open to Mr Butterfield being re-engaged possibly in another part of the plant or a different shift from Mr Y. It is

impossible for us to know what might have happened had Mr Butterfield been re-engaged, attended the meeting, told the truth, expressed remorse and disclosed he was under medical care. Alliance may have continued to employ him. Mr Kean was clearly open to that. However, Mr Butterfield did not act in that way.

[66] Mr Butterfield has his own beliefs that colour how he saw Alliance's actions. He feels aggrieved by its failure to re-engage him and believes it acted in the way it did because it had been looking for an excuse to get rid of him for years. This determination means he is only partly vindicated by the finding of unjustifiable disadvantage. The period of unjustifiable disadvantage that he experienced was short.

[67] I note that Mr Butterfield, whether for reasons of his ill health or not, has not expressed remorse to Alliance for sending the text or for his sustained lying to it. In addition, even in his letter to Ms Thomas, in which I accept he expressed remorse for lying to her, he sought to put a reading on the text that it cannot reasonably bear. He wrote:

the end bit about money well spent was only meant to mean that if I needed to pay for a bodyguard to look after me while I was out drinking, I would get one. I certainly didn't mean anything more sinister.

[68] At the investigation meeting, Mr Butterfield continued to maintain annoyance that Alliance took too long over its investigation into whether he had sent the text. The period of time it took for Alliance to discover the probable source of the text was his phone was due to the complexity of the enquiry, particularly given that Mr Butterfield would not co-operate by providing his phone or sample texts from it to allow a forensic linguistic analysis. The fact Alliance needed to do that at all was because he lied to it.

[69] At the very most, Mr Butterfield would have been entitled to pay from 7 July until 27 August 2014, when Mr Butterfield could have admitted that he sent the text.

### **Unjustified dismissal**

[70] Only if Alliance had re-engaged Mr Butterfield as an employee for the season would he have had the right to bring a personal grievance for unjustified dismissal.

[71] He was never an employee at any time after he sent the text, and therefore, I have no jurisdiction to consider his claim for unjustified dismissal. The decision not to re-engage could not have been an unjustified dismissal.

[72] Therefore, I do not need to consider Ms Thomas' submission that the medical certificate and the letter Mr Butterfield sent to Alliance in November 2013 should have meant Alliance gave greater consideration to Mr Butterfield's mental health issues before deciding on a disciplinary outcome.

### **Remedies**

[73] Mr Butterfield was disadvantaged by not being re-engaged, and not being suspended on full pay to allow the investigation to take place.

[74] Section 128 of the Act applies when the Authority determines that an employee has a personal grievance, as Mr Butterfield has. I need to consider whether "the employee has lost remuneration as a result of the personal grievance." If that is the case, I need to order the employer to pay the employee the lesser of the sum of total lost remuneration or three months ordinary time remuneration.

[75] I consider Mr Butterfield, at the most, could only be eligible for lost remuneration for his unjustified disadvantage from 7 July until 27 August 2014. That is the total of his lost remuneration caused by the unjustified disadvantage grievance.

[76] After that, any lost remuneration was as the result of his sustained denial that he sent the text, not because of any unjustified action by Alliance.

[77] Mr Butterfield has suffered greatly in terms of a loss of dignity and injury to his feelings. However, I am unable to link that loss to Alliance's actions. Mr Butterfield was the author of his own misfortune. Therefore, I make no award under s 123(1)(c)(i) for humiliation, loss of dignity and injury to Mr Butterfield's feelings.

### **Contribution**

[78] Section 124 of the Act requires me to consider the extent to which Mr Butterfield's actions contributed towards the situation that gave rise to his personal grievance. If his actions did that and were sufficiently blameworthy, I must reduce any remedies that would otherwise be awarded accordingly.

[79] Given that Alliance should have re-engaged Mr Butterfield on or around 7 July 2014, both before the text was sent and before Alliance was aware of it, Mr Butterfield's action in sending the text cannot have contributed to the situation leading to his unjustified disadvantage. Therefore, he must be paid as if he had been re-engaged from 7 July to 27 August 2014 inclusive.

[80] I am confident that parties can agree on what amount that would have been without the need for any further intervention by me.

### **Conclusion and Orders**

- A. Alliance Group Limited unjustifiably disadvantaged William Butterfield by failing to offer him re-engagement in the pallet store in order of seniority.
- B. The Authority does not have jurisdiction to determine whether Alliance unjustifiably dismissed William Butterfield, because he was not an employee at the relevant time.
- C. Within 28 days Alliance Group Limited must pay William Butterfield his ordinary time remuneration from 7 July until 27 August 2014 inclusive as if he had been re-engaged and suspended on full pay during that time.
- D. William Butterfield's actions are the cause of any other losses, not the proved personal grievance. He is not entitled to any further remedies.

### **Costs**

[81] Costs are reserved. The parties are encouraged to agree on costs. I note that there have been mixed results for the parties, in that, Alliance's application for a strike out was unsuccessful and Mr Butterfield has had very limited success.

[82] If it is not possible to resolve costs by agreement, the party seeking costs may make an application to the Authority within 35 days of this determination. The other party then has a further 14 days to make submissions in reply.

[83] The investigation meeting took a day and a half. The starting point for the Authority's consideration will be the daily tariff of \$3,500 per day, because the application was lodged before 1 August 2016.

Christine Hickey  
Member of the Employment Relations Authority