

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Aynslee Catherine Lieshout (Applicant)
AND Alliance Group Limited (Respondent)
REPRESENTATIVES Mary-Jane Thomas, Counsel for Applicant
Ken Smith, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 30 November 2004
DATE OF DETERMINATION 10 February 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Lieshout) alleged that she was disadvantaged in her employment by three unjustifiable actions of the respondent employer (Alliance), namely a requirement to work in an unsafe environment, an unjustified verbal warning and an unjustified redeployment which had the effect of reducing her income.

[2] Alliance, for their part, deny any disadvantage or any unjustifiable action by them.

[3] The matter went to mediation which was unsuccessful and accordingly it fell to the Authority to determine the matter.

The facts

[4] Ms Lieshout was employed by Alliance as a seasonal worker at Alliance's Matura freezing works.

[5] She started work in the cutting room in the 1995/1996 season and worked in a variety of positions in the plant until she ended up in what is called the carton room, a position she has been in for the last three seasons at the works.

[6] On 18 December 2003 Ms Lieshout arrived at work to find that the pallets in the carton room were stacked far too high for her and her female co-worker to reach.

[7] Ms Lieshout said that she decided to take some action on the matter and she spoke to a variety of people to try and get something done about it. She spoke to Mr Voss (about whom we will hear more later) who is the nightshift foreman for lamb boning. He was unhelpful and, she says, abusive. Next she spoke to the union nightshift delegate and then she spoke to the union's shed secretary but neither of them seemed able to solve the problem for her.



[8] Then she wrote to Bruce Campbell who is the manager of the Mataura plant for Alliance. Mr Campbell's evidence was that he got straight on to it and amongst other things referred the matter to Murray Scobie who is employed by Alliance as the safety officer at the Mataura plant. Mr Scobie inspected the site and although he says he did this in conjunction with the supervisors and Ms Lieshout he resiled from the latter suggestion at the investigation meeting and acknowledged that he had not in fact engaged with Ms Lieshout at that time.

[9] He did, however, inspect the carton room with supervisors and he found that the room was appropriately stacked at the point at which he made the inspection. He noted, however, during his inspection that there were marks on the wall which had apparently been made by Ms Lieshout which indicated the height at which the cartons had previously been stacked and he acknowledged that that mark represented a stack that was too high.

[10] Accordingly, Mr Scobie initiated changes to work practices which were designed to resolve the problem that Ms Lieshout had identified.

[11] Alliance thought that they had resolved the problem and clearly the evidence from Alliance's witnesses was to the effect that at this point, it was believed the matter had been satisfactorily resolved.

[12] However Ms Lieshout was still experiencing difficulties at some times and her evidence was that on 16 January 2004 (a Friday) she again arrived at work to find an over stacked carton room. Although Mr Campbell's written brief implied that he had contacted Ms Lieshout to advise progress on the matter that she had written to him about, he agreed in his verbal evidence to me that he had not, in fact, rung her at all but had actually received a call from her on 19 January in which Ms Lieshout simply sought to establish what was going on because the pallets were still stacked too high. Mr Campbell said that he would deal with it.

[13] Mr Campbell's evidence was that he was annoyed when Ms Lieshout made a further complain on 16 February. In his brief he says *I was annoyed at the fact it had taken the applicant so long to get back to me if there was still an issue*. However, as I have just noted, Ms Lieshout had rung Mr Campbell on 19 January to tell him there was still a problem and he undertook then to deal with it.

[14] There was a further over stacking on Friday, 30 January 2004 according to Ms Lieshout's evidence which I accept and on yet another Friday, 6 February also an over stacking. On 13 February (again a Friday) there was a relevant incident. Ms Lieshout bumped an over stacked pile of cartons when she was trying to move them and this caused the pallet to fall over, leaving cartons spilled on to the floor.

[15] Ms Lieshout says that she was upset and she left the carton room, in her words, *to pull myself together*. Given the difficulty in her addressing this issue with her employer, the fact that she was upset at this event seems hardly surprising.

[16] Ms Lieshout was ordered back to work by a supervisor, Chris Panirau, and threatened with dismissal if she did not get back to the carton room after this event.

[17] On 16 February (which breaks the cycle because it was a Monday) Ms Lieshout rang Mr Campbell again and told him that the carton room was still over stacked. It is common ground that Mr Campbell was rude to Ms Lieshout in his response. She says that he said that he *had more important things to do with his bloody time* than talk to her. Mr Campbell acknowledged when he gave evidence at the investigation meeting that he had been rude to Ms Lieshout and he apologised for offending her. She accepted that apology so that closed that particular matter.

[18] Despite his poor humour during the telephone discussion with Ms Lieshout on 16 February, Mr Campbell acted promptly to this second referral from Ms Lieshout and on this occasion he involved not only Mr Scobie, the plant safety officer, but also Ross Norman who is production manager in the further processing department of the plant.

[19] I accept that Mr Scobie and Mr Norman did in fact investigate this second referral and I also accept their evidence that they involved the Meat Workers Union in the investigation. I also accept their evidence that they found nothing amiss in the heights of the cartons in the carton room.

[20] What did become apparent from this second investigation was that there was some sort of personality conflict which was impacting on events in the carton room. In the briefs of evidence lodged by Alliance, the references were to a personality clash between Ms Lieshout and a man called Rhys Harpur. When the evidence came out in the investigation meeting, it seemed that it was more a conflict between two shifts of workers, one of which included Ms Lieshout and one of which included Mr Harpur, rather than a personality conflict between those two individuals as such.

[21] Either way, Alliance formed the view that Mr Harpur was to some extent responsible for the reasonably regular Friday night excesses and the evidence was that he was spoken to initially after the applicant's referral of the matter on 16 February and warned about his behaviour and when he subsequently did it again, Alliance's evidence was (and I accept) that he was threatened with dismissal.

[22] Again, Alliance thought it had dealt with the problem. Its investigation on the second occasion had not disclosed any safety concerns and it had identified what it thought was the culprit and spoken to that person about their behaviour.

[23] However the matter was not resolved. There was an incident on 20 February 2004 when the applicant's work colleague, Rosie Heath, was hurt trying to get cartons from the top of the stack down and Ms Lieshout decided to make a further attempt to have the matter resolved by talking directly to Murray Scobie who she spoke to on 23 February 2004. She says Mr Scobie told her that she had not been through the right channels. Mr Scobie did not deny saying those words but he indicated that he was frustrated that the applicant had not contacted him if there was still a problem. Mr Scobie also said that there was nothing further that he could do because his inspections identified that there was no problem with the height of the stacks of cartons. When I asked him whether he had inspected the stacks on a Friday night he said that he had not. He said that he always inspected them during the day. Of course, as I have already identified, the problem tended to happen on a Friday night.

[24] On 5 March 2004, Ms Lieshout sent a letter to Mr Campbell as follows:

To Mr Campbell

We would like to know why our pellets were and still are over stacked.

This letter which the applicant freely acknowledges she prepared was signed by six co-workers and Ms Lieshout. Ms Lieshout was very clear that she prepared the letter herself but she denied putting pressure on her co-workers to sign the document. Mr Scobie in his evidence said that he talked to the other workers after the receipt of this letter and none of the workers had any issues in relation to health and safety. Mr Scobie's view was that they had felt under some obligation to sign the letter to support Ms Lieshout.

[25] On 9 March 2004, Ms Lieshout was summoned to a meeting with Alliance where Alliance was represented by Ross Norman, production manager of the further processing department, and

Michael Voss, the supervisor who Ms Lieshout had previously had an altercation with, amongst others.

[26] At that meeting, Mr Norman gave Ms Lieshout a verbal warning in respect to the incident on 13 February which I have already described wherein Ms Lieshout had caused a stack of pallets to fall in the carton room and had become upset and had left the workplace temporarily to compose herself. Critically, from the employer's perspective, on Ms Lieshout's return she did not restack the pallets and the employer's evidence, which I accept, was that that was a serious matter by reason of the hygiene standards required in food processing facilities of this kind.

[27] It is not necessary for me to go over the detail of the dispute between the parties. I simply note that the employer's case was that Ms Lieshout had pushed over the cartons deliberately and then not restacked them and that that was a fundamental breach of the hygiene standards required of the plant and therefore a disciplinary matter pursuant to Ms Lieshout's employment agreement.

[28] Conversely, Ms Lieshout's position was that she had been upset by the incident and while she readily acknowledged that she had not restacked the cartons when she returned to the carton room, she denied deliberately pushing them over in the first place and she asserted her right to remove herself from the workplace when she was upset and distressed.

[29] Alliance sought to interest me in the proposition that the disciplinary meeting which resulted in a warning for Ms Lieshout and removal from the carton room was completely free of any contamination from the long running dispute between Ms Lieshout and Alliance in respect to health and safety issues. I have given earnest consideration to this submission but simply find it to be in all the circumstances completely implausible.

[30] I prefer Ms Lieshout's recollection of events and I find it difficult to see how either party could have regarded the events of 13 February 2004 and the subsequent disciplinary meeting as anything other than another step in a continuum of issues revolving around the height of pallets in the carton room.

[31] In any event, whatever view one takes of the meeting of 9 March 2004, from the applicant's perspective, the issue of the height of the pallets was still not resolved and accordingly she contacted Occupational Safety and Health and asked them to investigate. It was not clear from the written briefs how OSH became involved but Ms Lieshout freely agreed when questioned by me that it was she who had approached them. They wrote to the employer on 11 March 2004 and the employer responded promptly which resulted in OSH satisfying itself that there were no issues. Ms Lieshout however remained concerned about the matter and at the mediation which followed shortly thereafter in respect to Ms Lieshout's employment relationship problems with Alliance, there was further discussion between the parties on this issue. Alliance's evidence before me was that they decided to ask OSH to revisit the matter and there were subsequent inspections by OSH which gave Alliance a clean bill of health in respect to the issues raised by Ms Lieshout.

Discussion

[32] Ms Lieshout says that Alliance failed to provide her with a safe workplace by failing to deal appropriately with her various requests for lowered carton heights in the carton room. She also contends that the verbal warning issued to her on 9 March 2004 was in all the circumstances unfair and that the removal from the carton room to another part of the plant was in effect a penalty. Certainly in her oral evidence before me, Ms Lieshout was very clear that she felt she was being punished as a troublemaker by the receipt of the warning and the removal from the carton room. By implication she appears to be contending that had she not in her terms *stirred up trouble* over the height of the carton stacks in the carton room, she would not have been given a warning for the

events of 13 February and/or those events may not have happened and similarly she would not have been removed to another area of the plant and therefore lost overtime in consequence.

[33] For its part, Alliance says that it dealt promptly and appropriately with Ms Lieshout's various complaints about the height of the pallets and that as a matter of fact Alliance itself, Ms Lieshout's union and the OSH representatives were all satisfied at the height of the cartons in the carton room. Only Ms Lieshout seemed dissatisfied according to the employer.

[34] Further, Alliance denies any punitive intent in respect to the warning and redeployment consequent upon the events of 13 February. Alliance says that Ms Lieshout's actions justified a stronger response than the verbal warning but that in the circumstances as they knew them to be, Alliance's response was temperate.

[35] In relation to the redeployment, Alliance simply says that it has a contractual right to redeploy staff whenever it chooses and it was simply exercising that right in this case. It says that it had lost trust and confidence in Ms Lieshout as a consequence of the events of 13 February and accordingly it wanted her working somewhere where she could be properly supervised.

[36] At the end of the taking of evidence at my investigation meeting, I encouraged the parties to have further discussions with a view to trying to resolve matters between them. I indicated to them that I thought both had made mistakes in the way in which they had dealt with the issues between them and I thought that their best interests were served by trying to resolve matters between them. A particular motivating factor in me taking that course of action was that this is a continuing employment relationship. At the commencement of each new season, Ms Lieshout will present for work and Alliance will employ her in accordance with the employment agreement between the parties. That being the case, it was all the more important that the issue was resolved with the least possible disputation between the parties and the least possible hardening of positions, the one against the other. I accept that the parties have endeavoured to do that but have not been successful.

[37] Accordingly, it falls to me to decide the matter and in doing so I have endeavoured to be sensitive to the continuing needs of the parties to have an ongoing employment relationship.

[38] In reaching a decision, I have found most helpful the evidence of Gary Davis, an official with the Otago Southland branch of the NZ Meat Workers Union. I was interested not just in his take on the dispute between the parties but also on his assessment of Ms Lieshout and how *difficult* and/or *unreasonable* she was in relation to the dispute.

[39] Having interviewed Mr Davis and listened carefully to his responses to my questions, I find it difficult not to agree with his view which he expressed to me in these terms (referring to the carton height issue) *it seemed to me such a simple thing to fix*.

[40] Mr Davis said that he spoke to Mr Campbell on a number of occasions about the matter and when it became clear that there was some sort of interpersonal issue involving the man Rhys Harpur, Mr Davis said that he expected that Mr Harpur would be the person that was removed rather than Ms Lieshout. In fact what Mr Davis said was that he was *flabbergasted* that Alliance moved the applicant out of the carton room rather than moving Mr Harpur away from his workplace once it became clear that there was some interpersonal issue going on. Mr Davis's evidence was clear that it seemed that Mr Harpur was effectively generating the carton height problem and yet Ms Lieshout ended up in his terms being punished for complaining about the issue notwithstanding there was clear evidence that Ms Lieshout's work colleague, Rosie Heath had been hurt trying to get top cartons down from the top of the stack.

[41] Mr Davis said that he regarded Ms Lieshout as a spokesperson for others and believed that she was harshly treated by Alliance.

[42] Mr Davis's evidence, while graphic in its support for Ms Lieshout's position, really begs the question of why the union was unable to deal with the matter on her behalf and she was forced to bring a claim to the Authority and have the matter determined here. Mr Davis's evidence on this point was simply that the matter almost got too big for the union, too amorphous and too difficult to resolve.

[43] Having said that I found Mr Davis's evidence compelling, it is appropriate that I also record that I do not believe that Alliance acted in bad faith in relation to this matter. I think that generally Alliance did their best to resolve an issue which on the face of it was straightforward but which actually became quite intractable. The essence of the carton problem is simple: when Alliance, the union and OSH inspected, carton heights were fine. When Ms Lieshout was working, particularly on a Friday night, carton heights were not fine. Because nobody seems to have inspected the carton room on the occasions when Ms Lieshout was working, and because it seems to have taken Alliance a reasonably long time to work out the pattern of Friday nights, Alliance probably reached the conclusion at a reasonably early stage that Ms Lieshout was at best exaggerating the difficulty.

[44] However, once Alliance identified what seemed to be the problem (the interpersonal issues between either two shifts or two individuals) I am bound to say that I prefer Ms Lieshout's view of the appropriateness of their response to Alliance's. I think it is unreasonable and unfair for Alliance to remove Ms Lieshout from the carton room in order to enable her to be better supervised when the whole context of what happened on 13 February 2004 seems to have been completely ignored by Alliance.

[45] Here was a situation where a worker had complained to her employer about a safety issue not once but three times before the events of 13 February and the employer seeks to penalise her for her conduct because of it.

[46] Further, by the time the employer calls a meeting about the matter a further three weeks have passed (between 13 February and 9 March) and during that time the employee has complained about the same issue another three times.

[47] It seems to me axiomatic that in those circumstances a sensible employer would tread very carefully before seeking to make a disciplinary response and initiate a redeployment. For the reasons that I have outlined above, I do not accept Alliance's submission that the disciplinary meeting can be separated out from Ms Lieshout's numerous complaints about the height of the cartons. It seems to me any dispassionate analysis of the facts will produce the result that the events of 13 February 2004 which the employer complains about have to be taken in the context of the stream of complaints from Ms Lieshout about the height of the cartons.

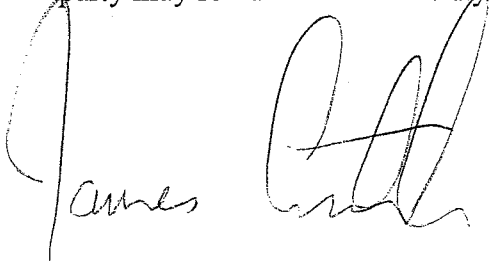
Decision

[48] It follows that I accept Ms Lieshout's claim that she has been unjustifiably disadvantaged in relation to: (a) health and safety issues in the carton room; (b) the issue of a verbal warning in respect to her behaviour on 13 February 2004; (c) her removal from the carton room to another area of the department.

[49] I direct Alliance to reinstate Ms Lieshout to work in the carton room and I order Alliance to pay Ms Lieshout a compensatory sum of \$2,500.00 under section 123 (c)(1) of the Employment Relations Act 2000.

[50] I accept Alliance's evidence that the verbal warning issued to Ms Lieshout has now expired by effluxion of time and that there was not any documented evidence of that warning on her personal file in any event. In the event that that is not the position, I direct that the evidence of that warning is to be expunged.

[51] The parties are to seek to determine costs between them. Should they be unsuccessful, either party may revert to the Authority and an order will be made.



James Crichton
Member of Employment Relations Authority

