



# Employment Court of New Zealand

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## Butterfield v Alliance Group Limited [2018] NZEmpC 61 (1 June 2018)

Last Updated: 8 June 2018

### IN THE EMPLOYMENT COURT CHRISTCHURCH

[\[2018\] NZEmpC 61](#)  
EMPC 198/2017

IN THE MATTER OF a challenge to a determination of  
the Employment Relations  
Authority  
BETWEEN WILLIAM BUTTERFIELD  
Plaintiff  
AND ALLIANCE GROUP LIMITED  
Defendant

**EMPC 201/2017**  
IN THE MATTER OF a challenge to a determination of the  
Employment Relations Authority  
AND BETWEEN ALLIANCE GROUP LIMITED  
Plaintiff  
AND WILLIAM BUTTERFIELD  
Defendant

Hearing: 26-28 February 2018 (Heard at Invercargill)  
Appearances: M-J Thomas and A Boock, counsel for Mr Butterfield  
P Chemis and S Brookes, counsel for Alliance Group  
Ltd  
Judgment: 1 June 2018

### JUDGMENT OF JUDGE J C HOLDEN

[1] On 9 July 2014, during the winter off-season, Mr Butterfield sent a threatening text message to someone he had worked with at the Alliance freezing works in Lorneville. When Alliance investigated, he lied about doing so, a lie he maintained for almost three months. Ultimately, these events led to Alliance determining that he would not be engaged at its plant again.

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[2] Mr Butterfield raised two personal grievances:

- (a) The delay in completing the investigation, and the failure to re-engage him in the meantime, was an unjustifiable disadvantage causing him loss of wages;
- (b) The decision not to re-employ him for the 2014-2015 season was an unjustifiable dismissal.

[3] Mr Butterfield's claim of unjustifiable disadvantage has evolved over time. The principal issues now are:

- What personal grievances for unjustifiable disadvantage have been raised within time?
  - In relation to any grievance(s) raised within time, was Mr Butterfield unjustifiably disadvantaged by Alliance's actions?
  - As part of that question, what did the preference provisions of the collective agreement allow in the circumstances?

[4] The principal issues in Mr Butterfield's grievance for unjustifiable dismissal are:

- Was Mr Butterfield an employee for the purposes of s103(1)(a) of the Act in December 2014 when Alliance decided he would not be re-engaged again, so that he can bring a personal grievance for unjustifiable dismissal?
  - If he can bring a grievance, was Alliance's decision unjustifiable?

[5] For the reasons that follow:

(a) Mr Butterfield's re-formulated grievance for unjustifiable disadvantage was not brought within time, and the grievance properly raised fails.

(b) The decision not to re-engage Mr Butterfield was not a dismissal; he was not an employee at the relevant time and is unable to bring a personal

grievance for unjustifiable dismissal. In any event, Alliance's decision not to re-engage Mr Butterfield was justifiable.

## The relevant history

[6] Alliance employs people on a seasonal basis. It is a robust environment and people whose past might present difficulties for them in obtaining employment in other industries may find their past history is less of a barrier in the freezing works.

[7] Seniority is very important. Freezing workers are re-engaged based on seniority. Once they reach a level of seniority, they become eligible for off-season work and effectively can work year-round. At the relevant time, Mr Butterfield had 14 years seniority, which made him one of the more senior freezing workers at Alliance.

[8] Mr Butterfield has been involved in a number of incidents with other freezing workers at Alliance's Lorneville plant. Those incidents included assaults and alleged bullying, but the allegations go both ways. Mr Butterfield brought previous personal grievances that were settled in mediation. While both parties gave evidence about these matters, it is not possible or necessary for the purposes of these proceedings to identify where the blame lies for the incidents mentioned. There is no personal grievance before the Court based on them. They are raised as background to Mr Butterfield's sending the threatening text message.

[9] The 2013-2014 season ended on 7 June 2014. In early July 2014 the production manager in charge of the pallet store started contacting senior freezing workers to offer them work in the off-season. This seems to have been done relatively informally, through telephone calls, and not documented. The production manager was well aware of the importance of seniority when offering upcoming work. Mr Butterfield did not receive an offer. Mr Blackie, the union secretary of the Alliance Lorneville sub-branch, gave evidence of other people with lesser seniority who were engaged for off-season work. His evidence showed there were people, other than Mr Butterfield who were also not engaged in order of seniority. The only evidence of the

reasons for Mr Butterfield not receiving an offer suggests that the production manager may not have been able to get hold of him. The production manager died in 2016.

[10] In any event, although some freezing workers were engaged on work in the pallet store from 7 July 2014, as at 9 July 2014 Mr Butterfield had not been offered such employment.

[11] On 9 July 2014, a text message was received by one of Mr Butterfield's workmates. On its face, it appeared that the text came from Mr Butterfield. The text message read:

[A] tell [B] tht we haven't forgotten tht he set up [C] and me; that he assults me at work and is to gutless to meet me so he gets [D] to stalk me out while on th piss after 7hrs & gets [E] to assault me at work & even gets his P-head mate [F] to hunt me out while im out on th town/ u tell th gutless sack of shit that we r going to play th same game to have someone sort him out and when done properly we won't hav to work with the coward again karma and money well spent.1

[12] Person A, who received the text, responded that he was not interested; it had nothing to do with him. He then showed the text to person B. Person B was concerned enough to take it to the police who advised him to raise it with Alliance. He therefore went to the production manager's home and showed him the text message. After it became aware of the text message, Alliance determined that it should investigate. It sent Mr Butterfield a letter dated 29 July 2014 inviting him to a meeting to obtain his response. Alliance advised Mr Butterfield that, as he was not currently an employee, his attendance at such a meeting would be entirely voluntary.

[13] Alliance also advised Mr Butterfield that the issue had to be satisfactorily resolved before he could be re-engaged for the 2014-2015 processing season, and that a potential outcome of the meeting was that the Company may redeploy him to a different shift or area of the plant as “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”.

1 Names/nicknames have been omitted and replaced with letters.

[14] Mr Butterfield attended the meeting, held on 27 August 2014, with Ms Thomas as his legal representative and Mr Blackie from the union. The meeting had been scheduled for an earlier date but Ms Thomas was ill and the meeting was re-scheduled. Mr Kean, the Alliance Plant Manager, and Mr Smith, Alliance’s legal counsel, were present for Alliance along with the production manager and a notetaker.

[15] As it transpired, Mr Butterfield had lied to Ms Thomas, saying he did not send the text message. At the meeting, he and Ms Thomas both advocated strongly on the basis that he had not sent the text message and that it must have been fabricated using a cellphone “App”. Ms Thomas said that she would not have been surprised if person B, against whom the threat was made, had written it himself.

[16] Mr Butterfield came to the meeting well prepared and showed the Alliance representatives Apps that could have created the impression that he had sent the text message. Both Mr Butterfield and Ms Thomas were compelling. Mr Smith gave evidence that, at the time, it seemed inconceivable to him that Mr Butterfield was not genuine. The Alliance representatives came out of the meeting determined to find who had “set up” Mr Butterfield.

[17] It embarked on significant further investigations with telephone providers and with a forensic consultant to try to determine who sent the text message and from what phone. The recipient of the text message (person A) provided his cellphone for forensic testing and the apparent target (person B) was interviewed.

[18] The investigation process took some time, and costs were incurred by Alliance. Mr Butterfield consented to Alliance examining the text message in question, and authorised his telecommunication provider to provide information about that text. However, he did not allow Alliance to obtain extracts from his cellphone of other text messages to facilitate a linguistic analysis and would not provide his phone for examination by the forensic consultant. This lack of co-operation prolonged the investigation.

[19] By email dated 15 October 2014 Ms Thomas questioned whether Alliance proposed not to start Mr Butterfield back until the investigation was completed, an

approach she said she had concerns about. Alliance responded by letter dated 30 October 2014, advising Ms Thomas that its view was that any re-engagement prior to completion of the investigation would be inappropriate in light of the concerns held by the Company.

[20] That letter also detailed the process Alliance had been following in its investigation, and what that investigation had revealed to date. Alliance advised that, while the letter of 29 July 2014 recorded that, if the allegation of sending the text was proven, Mr Butterfield faced redeployment, if it was proven that Mr Butterfield had sent the message and had fabricated the scenario of a third party being responsible, that would elevate the existing health and safety concerns in relation to him working in any area of the plant, and further, would constitute a fundamental breach of trust. Alliance advised such a finding would likely result in Mr Butterfield not being allowed to re-engage at the plant again.

[21] On 3 November 2014 Ms Thomas raised a personal grievance on Mr Butterfield’s behalf, claiming he had been unjustifiably disadvantaged by the delay in his return to work.

[22] Alliance replied denying the validity of Mr Butterfield’s personal grievance and inviting him to respond to any of the issues raised in the letter of 30 October 2014, or to raise any further issues or matters in relation to the investigation.

[23] Then, on or about 18 November 2014, Mr Butterfield came clean to Ms Thomas. He advised her that he had sent the text but that he had told her otherwise out of fear that his employment with Alliance might end. Ms Thomas advised Alliance by letter dated 20 November 2014 that Mr Butterfield had sent the text. She also advised that Mr Butterfield had been referred to his general practitioner as, during her discussion with him, he exhibited symptoms of what she believed to be severe depression. She advocated for a return to nightshift.

[24] Alliance invited Ms Thomas to provide any relevant medical information for consideration by Mr Kean prior to him deciding what the outcome of the process

should be. About three weeks later Ms Thomas provided a brief medical certificate from Mr Butterfield’s GP that noted:

He has struggled with mental health issues for some time being disabled with anxiety and stress symptoms following three assaults from former work mates.

I have no doubt his mental health issues have resulted in bad decision making.

Currently he [is] seeing a counsellor and taking medications. He does seem to be improving.

[25] Mr Kean considered that letter but did not accept that it explained or justified Mr Butterfield's actions. Alliance advised Ms Thomas that Mr Kean's decision was that Mr Butterfield would not be re-engaged at the plant again. Alliance referred to "obvious health and safety reasons" and also that "[t]his matter [had] destroyed all trust and confidence in relation to [Mr Butterfield].".

[26] Mr Butterfield raised a personal grievance for unjustifiable dismissal by letter from Ms Thomas dated 19 January 2015.

[27] In the Authority, Mr Butterfield failed in relation to his personal grievance for unjustifiable dismissal, with the Authority finding it had no jurisdiction to consider the matter as Mr Butterfield was not an employee of Alliance at the relevant time. However, the Authority found that Mr Butterfield had been unjustifiably disadvantaged on the basis that his level of seniority meant he ought to have been engaged on off-season work, which was available from 7 July 2014. He was awarded loss of earnings from then until 27 August 2014, when his lie diverted Alliance's investigation.<sup>2</sup>

[28] Mr Butterfield filed a challenge to the determination. It is expressed as relating to the whole of the determination but is directed to the ultimate failure to re-employ. He seeks:

- reinstatement;
- \$20,000 compensation pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act);

*2 Butterfield v Alliance Group Ltd* [2017] NZERA Christchurch 114.

- reimbursement of lost wages from the date of Alliance's decision not to re-employ him until the date of reinstatement; and
- costs.

[29] Alliance also filed a challenge, directed only to the disadvantage grievance and seeking a determination that:

- Mr Butterfield could not bring a claim for unjustifiable disadvantage as he was not an employee of Alliance at the relevant time;
- his grievance was brought out of time; and
- he was not unjustifiably disadvantaged.

[30] Alliance also sought costs.

[31] At the hearing Mr Chemis, for Alliance, suggested that Alliance's challenge was unnecessary as Mr Butterfield's challenge was to the whole determination. Technically that may be correct, but in any event, the two challenges meant the whole matter is before the Court.

### **The analysis begins with the Act and case law**

[32] [Section 103](#) of the [Employment Relations Act 2000](#) (the Act) enables an employee to bring a grievance against the employer's employer or former employer because of a claim:

- (a) that the employee has been unjustifiably dismissed; or
- (b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

...

[33] For a person to bring a claim that they have been unjustifiably dismissed, the person must have been employed at the time of the alleged dismissal. In contrast, a

claim for disadvantage by unjustifiable action may be brought in relation to a condition that survives the termination of employment.<sup>3</sup>

[34] The situation regarding the employment status of seasonal freezing workers during the off-season was recently considered by the Supreme Court in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc.*<sup>4</sup>

[35] The collective agreement covering AFFCO New Zealand Ltd (AFFCO) included similar terms to those that applied to Alliance and Mr Butterfield. In particular, there was a provision in the collective agreement that gave preference for re-engagement based on seniority. One of the issues for the Court in *AFFCO* was whether the freezing workers were

“employees” during the off-season. Two arguments were raised. First, they were employees because they were employed on employment agreements of indefinite duration, and second, they were employees because they were people who were “intending to work” within the meaning of [s 6\(1\)\(b\)\(ii\)](#) of the Act, as further defined in [s 5](#).

[36] The Supreme Court found that, given the context in which the AFFCO collective agreement was agreed and operated, the freezing workers’ employment terminated at the end of each season and they were not employed during the off-season – their employment was discontinuous.

[37] The argument that the employees were persons intending to work was based on them advising AFFCO at the end of one season of their current addresses and phone numbers on which they wished to be contacted for employment at the beginning of the following season. In the Court of Appeal, the Court held that the freezing workers did not fall within the definition of “persons intending to work” because the formal elements of an employment contract were required, rather than simply an intention by the workers to take up employment.<sup>5</sup>

3. [Employment Relations Act 2000, s103\(1\)\(b\)](#); *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2016] NZCA 482, (2016) 14 NZELR 468 at [61].
4. *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212.

<sup>5</sup> *AFFCO* (CA) at [56].

[38] The Supreme Court commented that, while the freezing workers’ argument had some attraction, it did seem something of a stretch to describe a person who has left his or her name with AFFCO at the end of the season as “a person who has been offered, and accepted, work as an employee”.<sup>6</sup> While the Supreme Court did not determine the point, it went on:<sup>7</sup>

It might be argued that by responding to AFFCO’s invitation to attend the initial presentation about the new season, a worker accepts an offer of employment made by AFFCO through the mechanism of the continuing provisions in the collective agreement ...

[39] It was this comment that Mr Butterfield relies on in bringing his claim for unjustifiable dismissal.

### **Preference provided for in collective agreement**

[40] The collective agreement provides preference in employment for people who worked the previous season, and recognises seniority as a basis for selection. First, clause 31(g) provides:

Subject to the provisions of clause 34 of this Agreement, the employer shall, when engaging labour at the commencement of each season, give prior consideration to applications from workers who have, in the employers’ opinion, been competent and satisfactory workers at that particular plant during the previous season and who are ready, willing and able to commence employment when the employer requires.

[41] Clause 32 then provides:

(c) ... Employees seasonally laid off the previous season will be offered the first opportunity of re-employment at respective plants for the new season and the first opportunity of re-employment prior to the engagement of new employees, subject to:

- (i) Re-employment being consistent with individual plant’s requirements and departmental needs and the individual’s competency; and
- (ii) Departmental and positional skill/experience requirements and a satisfactory work record.

Layoffs and re-employment will be based on department and/or plant seniority.

<sup>6</sup> [Employment Relations Act 2000, s 5](#) “person intending to work”.

<sup>7</sup> *AFFCO* (SC), above n 4, at [52].

...

(i) Any dispute regarding seniority shall be settled between management and the workers’ representatives and if no agreement is reached shall be decided within the employment relationship problem clause of this Agreement.

(j) Nothing in this clause shall affect any right which the employer has in terms of clause 34 of this Agreement.

[42] Clause 34 provides:

Subject to the special provisions of this Agreement, the employer shall retain and have 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 provisions of this Agreement relating to the management thereof, and to the hiring, conduct, duties and dismissal of persons in their employment.

### **Unjustifiable disadvantage grievance raised on two bases**

[43] When Ms Thomas raised Mr Butterfield's grievance for unjustifiable disadvantage in her letter dated 3 November 2014, the basis was twofold:

- he said that the text message investigation, which commenced on 29 July 2014, had not been investigated expeditiously, resulting in his claimed loss of wages; and
- the decision not to employ Mr Butterfield in the new season (ie the 2014 – 2015 season) until the completion of the investigation was unjustified and unreasonable.

[44] No out of time issue arises from the personal grievance as originally formulated. However, Mr Butterfield's grievance shifted. In the Authority, he appears to have raised for the first time that he was not offered off-season work in early July 2014 when other, less senior freezing workers were; in the Court his claim was that he should have been re-engaged on 29 July 2014 when the letter regarding the investigation was sent.

### **No grievance raised for unjustifiable disadvantage for non-engagement in July 2014**

[45] As noted, notwithstanding his success in the Authority, in the Court Mr Butterfield's position was he ought to have been re-engaged from 29 July 2014. Nevertheless, I first consider the 7 July date that the Authority used in finding for Mr Butterfield on the unjustifiable disadvantage claim.

[46] No personal grievance was raised with respect to the selection process adopted by the production manager for the pallet store work available from 7 July 2014, at least until the Authority hearing in June 2017. Nor did Mr Butterfield seek to use the mechanism in clause 32(i) for resolving disputes regarding seniority. At no stage has Mr Butterfield applied for or been granted leave under s 114(3) of the Act to raise a personal grievance out of time. None of the exceptional circumstances that might justify an extension of time set out in s 115 apply here. That is not an exhaustive list, but no other exceptional circumstances have been mentioned. If an application had been made the Authority would also have had to consider whether it was just to allow Mr Butterfield to raise a grievance so late, particularly as the person who knew the process for selection died in 2016.

[47] Mr Butterfield was out of time for raising a grievance with respect to the failure to engage him prior to 10 July 2014 and was not entitled to pursue that grievance.

[48] In any event, on the basis of the evidence adduced, it is far from clear that a claim of unjustifiable action would have succeeded:

- seasonal workers and union delegates take a close interest in, and challenge the employer's actions when issues of seniority arise but no challenge was raised here;
  - the approaches for off-season work were informal, by telephone and subject to the production manager managing to get hold of the freezing workers concerned;
  - Mr Butterfield was not the only person not engaged in order of seniority;
- the production manager intimated that he had not been able to make contact with Mr Butterfield.

[49] Alliance advised Mr Butterfield by letter dated 29 July 2014 that a decision to re-engage him was on hold pending a satisfactory outcome of the investigation into the text message. At that time workers were being engaged on other off-season work

– the “winter kill”. No personal grievance was raised in relation to that decision. Again, no extension of time is sought and there was no evidence of exceptional circumstances that might have justified an extension being granted. Indeed, the obvious time for commencing a grievance would have been at the meeting of 27 August 2014, but no objection was raised.

[50] My conclusion on the first issue is that because no grievance was raised within time in relation to Alliance's decisions in July 2014, the only disadvantage grievance Mr Butterfield is able to pursue is that set out in the letter of 3 November 2014, to which I now turn.

### **Personal grievance contained in letter of 3 November 2014**

[51] When Ms Thomas submitted Mr Butterfield's grievance in her letter dated 3 November 2014, she was unaware that Mr

Butterfield had lied to her and to Alliance.

[52] The first basis raised, that the investigation had not been pursued expeditiously, has no merit. If Mr Butterfield had been honest at the meeting on 27 August 2014, there would have been no need for an inquiry of any substance and, based on the letter of 29 July 2014, it is likely he would have returned to work but to a different shift or area of the plant to that he previously had worked in. Alliance's actions in investigating the matter properly cannot be criticised; the time it took was not unjustifiable but resulted from Mr Butterfield's lying.

[53] The second basis upon which the personal grievance was raised requires more consideration.

[54] Mr Butterfield's complaint was about Alliance's failure to engage him in the new season while the investigation continued. There was no precise evidence as to the date the new season started but I proceed on the basis that it was sometime between 15 October and 3 November 2014. In the previous two years it seems the season started in mid to late October. Mr Blackie gave evidence that the main sheep and lamb season normally starts in November or possibly October. Mr Smith gave similar evidence – of a season that ran from “about October” until June. That timing is consistent with Ms Thomas raising the issue in her email of 15 October 2014, and submitting the grievance by letter dated 3 November 2014.

*What did the preference provisions of the collective agreement allow?*

[55] The issue is whether Alliance was entitled to withhold an offer of re- engagement for the 2014-2015 season pending the completion of the investigation, or whether the collective agreement required Alliance to re-engage Mr Butterfield, even if he then was either redeployed to a different area of the plant or suspended on pay while the investigation took place.

[56] The collective agreement does not expressly deal with the situation faced by Alliance, namely that a question as to the suitability of a freezing worker for re- engagement had arisen during the off-season and not been resolved by the time offers of re-engagement for the new season were being made. But there is reference to an employee's history. Paragraph 31(g) refers to an employee's work during the previous season; sub-paragraph 32(c)(ii) refers to a satisfactory work record. The other exceptions in paragraph 32(c) are to do with operational requirements for the plant.

[57] Paragraph 31(g) is subject to clause 34, and clause 32 similarly provides that “[n]othing in this clause shall affect any right which the employer has in terms of clause 34”. Clause 34 refers to reasonable rules, including in hiring people. However, there is then circularity, in that clause 34 is “[s]ubject to the special provisions of [the] Agreement”.

[58] In both *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd and AFFCO New Zealand Ltd*,<sup>8</sup> the Supreme Court said that the essential approach to interpreting collective agreements is objective, with the aim being to ascertain the meaning the document would convey to a reasonable person having all the background knowledge that would reasonably have been available to the parties in the situation in which they were at the time of the contract.<sup>9</sup>

[59] However, it also agreed that the special features that characterise employment bargaining may be relevant to interpretation in some circumstances. These special features include:<sup>10</sup>

- the “relational” nature of a collective agreement, which represents the progression of an employment relationship on an ongoing basis over a lengthy period;
  - the fact that the collective agreement is a creature of statute;
  - the reality that, generally, collective agreements are not drafted, negotiated or settled by practising lawyers; and
  - that the duty of good faith expressly applies to bargaining, and is a core requirement.

[60] The Supreme Court also remarked that it is necessary to keep in mind the Employment Court's equity and good conscience jurisdiction.<sup>11</sup>

[61] There was little in either party's evidence or submissions on the background to the clauses in the collective agreement. Mr Smith noted that the clauses can be traced back to the meat industry awards from at least the 1960s. His understanding of them is that they apply, all things being equal and subject to suitability, which he says is an important operational safeguard for the Company to ensure workers who are unsuitable for certain roles are not put in those roles.

8. *New Zealand Air Line Pilots' Association Inc v Air New Zealand Ltd* [2017] NZSC 111, 1 NZLR 948, (2017) 14 NZELR 402 at [71]; *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 4, at [38].

9. *AFFCO* (SC) at [38], citing *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

10 *NZALPA*, above n 8 at [75]-[77].

11 At [76].

[62] Mr Blackie did not address the history or context of the clause in his evidence. As noted, he raised no objection at the time to Alliance's approach of dealing with the allegation about the text message before considering the re-engagement of

Mr Butterfield.

[63] Mr Chemis, for Alliance, says that the principles in the cases require paragraph 32(c) of the collective agreement to be interpreted practically. He says a literal interpretation of cl 32 would require Alliance to offer re-engagement where it is demonstrably not possible or practicable to do so. For instance, it would require Alliance to offer re-engagement to those who are:

- (a) not available (eg left the country or in jail);
- (b) ill or injured such that they are incapable of working;
- (c) utterly unsuitable for re-engagement (ie re-employment) (eg an employee who has been investigated for sexual misconduct in relation to Alliance employees that occurred during the previous season or in the off-season).

[64] He says that it cannot be that Alliance has to, for instance, first offer re-engagement and then suspend or terminate. Rather, he says that, based on a proper interpretation of the collective agreement in relation to engaging seasonal workers, it had no obligation to re-engage Mr Butterfield until the text incident was properly dealt with.

[65] Bearing in mind the principles confirmed by the Supreme Court, and especially that a collective agreement is the result of negotiations over time between non-lawyers, I conclude, on the issue of what the collective agreement allows, that when the relevant clauses are read together, they permit Alliance to take its operational requirements into account to the extent that, in managing the hiring of previous employees for a new season, it may refrain from re-engaging those who are not suitable for employment. Further, if suitability is in issue, Alliance can refrain from engaging the previous employee until the issue is resolved.

*Was the decision not to re-engage Mr Butterfield pending the investigation justifiable?*

[66] Any such decision is, however, open to challenge as an unjustifiable action causing disadvantage, in which case the test in s103A of the Act applies – was the action one that a fair and reasonable employer could have done in all the circumstances at the time the action occurred? That is the issue to which I now turn.

[67] Here, at the time it was engaging people in the new season, it was reasonable for Alliance to wish to get to the bottom of the sending of the text message before determining the suitability of Mr Butterfield for employment. Mr Butterfield was treated fairly and had the opportunity to respond to Alliance's concerns. By the time offers were being made for the new season the Company was dealing not only with the possibility that Mr Butterfield had sent a threatening text, but also that he had fabricated a scenario of a third party being responsible. These were serious concerns that justified Alliance's decision not to offer re-engagement for the new season unless and until the concerns were investigated and satisfactorily resolved. Accordingly, I do not accept that not offering Mr Butterfield re-engagement in the new season was unjustifiable disadvantage.

[68] In any event, had I found there to be an unjustifiable action on the basis the collective agreement did not permit Alliance to withhold an offer of re-engagement in the circumstances, I would not have ordered any compensation to be paid. Section 123 of the Act confers remedies in broad discretionary terms. The Court is required to exercise this broad discretionary power as equity and good conscience dictates. In rare cases, an employee's egregious behaviour may mean that no remedy should be given.<sup>12</sup>

[69] I consider this to be such a case. Mr Butterfield was not offered re-engagement from the beginning of the 2014-2015 season because Alliance was still investigating the sending of the text message. Had Mr Butterfield not sent the text message, there would have been nothing to investigate; if he had not lied, the investigation would have been completed much earlier, and almost certainly well before the season commenced.

<sup>12</sup> *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [192], [216].

### **Mr Butterfield's claim for unjustifiable dismissal cannot proceed**

[70] I now turn to Mr Butterfield's claim for unjustifiable dismissal, and first consider the issue of whether Mr Butterfield was an employee at the relevant time.

[71] Mr Butterfield accepts that he ceased to be employed by Alliance on 7 June 2014. But he claims that he was "a person intending to work" and therefore an employee from the time he received the letter dated 29 July 2014 inviting him to a disciplinary meeting where the only outcome proposed was redeployment to a different shift or area of the plant.

[72] I do not accept that argument. A person intending to work is a person who has been offered, and accepted, work as an employee.<sup>13</sup> The letter dated 29 July 2014 cannot be read as an offer of employment. It clearly confirms Alliance's view that Mr Butterfield was not an employee and that the issue being investigated had to be satisfactorily resolved before he could be

re-engaged as an employee for the 2014- 2015 processing season. Even on the strained interpretation proposed by Ms Thomas for Mr Butterfield, it could not be argued that there was an acceptance of the offer in July 2014. Logically the argument would have to be that attendance at the meeting on 27 August 2014 constituted the acceptance. However, as there was no offer, there was nothing to accept.

[73] As he was not a person intending to work, and was not employed by Alliance after 7 June 2014, he was not employed by Alliance in December 2014 when it advised him that he would not be re-engaged at the plant again. Accordingly, Mr Butterfield was not dismissed by Alliance and is unable to bring a claim for unjustifiable dismissal.

### **If Mr Butterfield had been able to bring a grievance for unjustifiable dismissal, he would not have succeeded**

[74] Mr Butterfield's lie went to the heart of the relationship between him and Alliance. Both Mr Smith and Mr Kean gave evidence of the impact on them of Mr

13 [Employment Relations Act 2000, s 5](#) "person intending to work".

Butterfield's conduct. They clearly and understandably were shocked at his lying for such a sustained period and with such elaborateness. Mr Smith said it was "the most compelling, sustained episode of lying I have ever experienced in my entire life". Mr Kean's evidence was to similar effect. They quite reasonably felt they could not trust Mr Butterfield again.

[75] Mr Butterfield accepts that the process was fair and that his conduct amounted to serious misconduct. But he claims Alliance's decision not to re-engage him was unjustifiable because there was insufficient consideration of the medical information he provided.

[76] Mr Kean did consider the medical certificate dated 18 December 2014 but concluded that it did not make a material difference to the outcome. It was reasonable of Mr Kean not to have been swayed by the medical certificate. The certificate was vague and non-specific. It did not deal with the behaviour of concern - either the sending of the text message or the elaborate lie. Nor did it provide Mr Kean with sufficient reassurance that it was safe to re-engage Mr Butterfield.

[77] Because of my conclusions on these matters, there is no need for me to determine remedies. However, I certainly would not have directed reinstatement in this case. Alliance quite reasonably lost all trust and confidence in Mr Butterfield when he engaged in a serious, elaborate and sustained lie. It would have been both impracticable and unreasonable for him to be re-employed.

### **Not an unjustifiable disadvantage**

[78] Under [s 122](#) of the Act I am permitted to find that a personal grievance is of a type other than that alleged. As foreshadowed to counsel at the hearing, and for completeness, I have considered whether the decision communicated in the letter dated

23 December 2014 not to re-engage Mr Butterfield at the plant again was an unjustifiable disadvantage.

[79] It was not. The factors that applied to the decision not to re-engage Mr Butterfield pending resolution of the investigation applied with even greater force

once it was confirmed that Mr Butterfield had sent the text and then fabricated a scenario that a third party was responsible.

[80] In any event, any re-engagement would only have been to then dismiss Mr Butterfield, which I have held Alliance was justified in doing. No compensation would have been awarded.

### **Conclusion and costs**

[81] In conclusion:

- (a) Alliance succeeds in its challenge to the finding for unjustifiable disadvantage;
- (b) Mr Butterfield fails in his challenge in respect of the decision not to re-engage him. It was not a dismissal; he was not an employee at the relevant time and is unable to bring a personal grievance for unjustifiable dismissal. In any event, Alliance's decision not to re-engage Mr Butterfield was justifiable.

[82] The Authority's determination is set aside and this decision stands in its place.

[83] Alliance is entitled to costs and, if they cannot be agreed between the parties, it has 21 days within which an application for costs must be filed. Mr Butterfield then has a further 21 days to respond, with a further 7 days allowed for Alliance's reply.

J C Holden Judge

Judgment signed at 11 am on 1 June 2018

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