

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN William Alexander Butterfield (Applicant)
AND Alliance Group Limited (Respondent)
REPRESENTATIVES Mary-Jane Thomas, Counsel for Applicant
Ken Smith, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 22 June 2004
23 June 2004
DATE OF DETERMINATION 8 February 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant lodged four claims in his statement of problem citing he had been subject to; a) unjustified demotion from the rendering plant; and b) unjustified suspension from his employment while his conviction for cannabis cultivation was investigated; and c) unjustified demotion from the pallet store at the respondents Lorneville Plant on 5 February 2004; and d) unjustified final warning for verbal sexual harassment.

[2] In the course of the investigation meeting the claim relating to the unjustified final warning was withdrawn.

[3] The remedy the applicant seeks are reinstatement to his role in the rendering section of the respondents operation at Lorneville, reinstatement of his seniority, reimbursement of lost wages in the approximate sum of \$23,400.00 gross, compensation for hurt and humiliation in the sum of \$25,000.00 and costs.

Brief history of events

[4] Mr Butterfield began working for the respondent at its Makarewa site during the 2001 season later transferring to the labour pool and thence very quickly to the Lorneville rendering department where he worked for two seasons.

[5] The applicant says he was promised a permanent position for the 2002/03 season in that department by Gordon Wilson, the day shift supervisor of the department.

[6] The applicant did not initially obtain a position in the department but after discussions between the union and the department the applicant was placed in the department on a months

review. He was confirmed in the department on 16 December 2002. On 7 March 2003 the applicant was called into the office by Trevor McIntosh, the night-shift supervisor, who handed him a document outlining incidents of concern in Mr Butterfield's performance. Much of the document was sourced from a diary kept by the previous night-shift supervisor, Tony Longman who had by this time left the respondent's employment.

[7] The applicant took issue with the document and its contents particularly the alleged unsafe practices and involved the union to sort the matter out. He contended Mr McIntosh was simply trying to get rid of him.

[8] On 13 March a meeting took place, the primary outcome of which was an agreement to discard the Longman diary notes and to put in place a fair performance monitoring process to evaluate the applicant's work. In short, the applicant rejected the proposed process alleging bias on Mr McIntosh's part. An attempt by the applicant to rally support from his co-workers fell largely on deaf ears and a meeting on 17 March 2003 involving the applicant, Kevin Blackburn, the union delegate and Mr McIntosh degenerated into a verbally aggressive and unfruitful affair with the applicant totally rejecting the company's concerns about the safety related aspects of his performance and returning to his refrain of Mr McIntosh's bias against him personally.

[9] On 27 March 2003 Mr Butterfield was called to a meeting at which he was advised that he was to leave rendering and return to pool labour. The applicant says he was refused representation at that meeting however, his own evidence confirms the company and union had met to discuss the issues. It is evident the company saw the matter as one relating to safety in a potentially dangerous department while the applicant rejected those concerns and saw his transfer as a demotion. In such circumstances it is understandable that Mr Butterfield felt aggrieved. He wrote to the manager of the rendering department on 29 March 2003 setting out his complaints and alleging that his employer's actions were unjustified substantively and procedurally and that if the company transferred him to the labour pool he would be significantly disadvantaged. Towards the close of his letter he states:

...

I will transfer under protest, but I in no way accept that this varies my current employment terms and conditions and that I should still be employed in the rendering department.

Please be advised that I intend to pursue this matter vigorously, which will include reimbursement of any losses I incur as a result of the employers unjustified actions.

I urgently request a meeting to resolve this matter.

[10] In the period between 27 March 2003 and 28 November 2003 the applicant was employed predominantly in the offal department. During this period there appears to have been negotiations between the union and the management to address the applicant's aggrieved feelings over his transfer from rendering. The result of those negotiations is summed up in a letter dated 28 November 2003 from the company to the applicant:

...

*Prior to the end of the 2002/2003 season an arrangement was made that Mr Butterfield be transferred to the pool labour department. From here he will be transferred to a department of his choice (other than rendering, **AND** providing there is a vacancy). If this new department is unsatisfactory to Mr Butterfield, he will get the choice of one other department that has a vacancy.*

...

[11] On 16 December 2003 and again on 23 December 2003 the solicitor now acting for the applicant wrote to the company requesting that her client be offered one of six vacancies existing at that time in the pallet stores. The applicant was duly appointed to one of these vacancies and commenced work in the pallet store on 19 January 2004.

[12] On 17 January 2004 the applicant was convicted and fined \$500.00 in the District Court for the cultivation of cannabis. The conviction was published in the Southland Times.

[13] Later in the day on 19 January 2004 Mr Butterfield was approached by the supervisor of his new department who when questioned by the applicant told him they were going to meet with Mr Larsen, the plant manager. After having it confirmed that the meeting was on a disciplinary matter the applicant approached the union delegates but as they were busy he telephoned his solicitor who advised that the applicant should not meet the management without her being present and asked the applicant to request Mr Larson to telephone her. Mr Butterfield evidence was...*I asked Ricky Larsen to contact my solicitor three times but he continued on with the meeting despite me saying that I did not want to meet or discuss this matter until such time as I had representation. I was told that I was suspended pending an investigation into serious misconduct. I was told that the conviction was a "sackable offence".*

[14] On 21 January 2004 the applicant and his solicitor met with management to discuss the issues with the respondent expressing its serious reservations about the applicant's suitability for ongoing employment in the pallet store. This was on the grounds that the company viewed the pallet store role required a considerable amount of responsibility and persistent concentration. It appears the applicant challenged this and in response to a letter written to the company by the applicant's solicitor requesting specifics of which duties Mr Butterfield was considered to be unsuitable for, the company pointed to the financial consequences of a lapse in concentration in that department and went on...*The company's view is that Mr Butterfield may be more suitable working in an area such as offal where the consequences to the company of a lapse in concentration are likely to be less serious.*

[15] In the last analysis the company made the decision to transfer the applicant from his position in the pallet store.

[16] The applicant in his claim is now challenging the lawfulness of this transfer claiming he has been significantly disadvantaged thereby.

Analysis

[17] For a reason that will become evident a little later in this determination, I will concentrate my analysis on the events which took place in January and February 2004.

[18] The question of the lawfulness of the applicant's suspension following the discovery of his conviction under the Misuse of Drugs Act 1975 is determined by considering whether the conditions of employment provided a contractual right for the respondent to suspend in the specific circumstances of this case.

[19] The transfer from the pallet store in the last analysis rests on a judgement exercised by the respondent. The question to be asked is whether that judgement was fairly exercised in considering the applicant's suitability for the tasks in the light of the conviction and the sanctions available to the respondent under the collective employment agreement. There is little doubt that the employer has a *managerial prerogative* in assessing employees for positions in its operations. An issue in this

case is to weigh the exercise of that prerogative given the agreement entered into with the applicant in the end of the 2002/2003 season and the discovery of the conviction for the cultivation of cannabis on the day he started in the pallet stores.

[20] I accept Mr Butterfield evidence that the three plants which led to his conviction were for his personal use and am in no doubt that the respondent accepts there is no suggestion that he ever brought cannabis to work or used it while at work. What has exercised my mind for a considerable time is why, aware of the concentration lapses in the rendering department which gave rise to serious safety concerns, the company appointed him to a position which on its own evidence demands *a high level of responsibility, awareness and concentration*.

[21] Having appointed him under the terms of the 'agreement' the respondent then suspended him, investigated the alleged serious misconduct and transferred him from the pallet stores because of the risk of a concentration lapse which may have had serious commercial consequences for the company. Compounding this are the terms of the 'agreement' by which the respondent was bound. The only department excluded was rendering and if the...*new department is unsatisfactory to Mr Butterfield, he will get the choice of one other department that has a vacancy*.

[22] This raises two issues. The pallet store was satisfactory to the applicant. It was the company which ruled that the applicant was unsatisfactory for the department. The second is the issue of the *one other department that has a vacancy* as set out in the 'agreement'. From the evidence I heard at the investigation meeting it appears clear to me that under the terms of the 'agreement' between the parties the applicant still has one further opportunity to apply for a position in a department of his choice provided a vacancy exists in that department.

[23] I have come to the view that having entered into an agreement with the applicant the respondent was bound to accede to his request to fill a vacancy in the pallet store. While it may have had some anecdotal evidence of the applicant using cannabis, that would provide insufficient ground to exclude him from the pallet store. The evidence of Mr Larsen, the plant manager, set out the thought process reasonably succinctly;

...

I already had some concerns with Sandy's ability to concentrate, follow instructions and deal with detail. However, in an attempt to move forward from the rendering department dispute, I agreed to give Sandy a start in the pallet store. When I became aware that Sandy had been convicted of cultivating cannabis, I had serious concerns about his suitability to work in the pallet store. For this reason I decided that it would be appropriate to suspend Sandy while I investigated the matter further.

...

I stress however, that each individual drug conviction that comes to the Company's attention is assessed in its own right. This is reflected in the Company handbook, which records that a conviction pursuant to the Misuse of Drugs Act 1975 is classified as misconduct which, may result in dismissal. There is certainly no presumption that the fact of a drug conviction renders someone inappropriate or unsuitable to work in any specific department or in the industry, However, where there are existing concerns in relation to a specific individual on matters such as concentration or ability to follow instructions, then it may be that a drug conviction is perceived to be evidence of a risk in relation to that individual to remain in the position in which they are. In Sandy's case, he is open about his drug use and does not appear to acknowledge that it presents any issue at all for his employers.

...

[24] From this evidence which I accept, it is clear that the respondent reconsidered its decision regarding the applicant's suitability for work in the pallet store in the light of his conviction.

Determination

[25] In coming to these determinations I would like to record my thanks to the witnesses who assisted me at the investigation meeting. While I accept that there were differing points of view I found all witnesses to be upfront and genuine in the views they held.

[26] I find that the applicant and the company entered into an agreement at the end of the 2002/2003 season and that that agreement was given effect by Mr Butterfield filling a vacancy in the pallet stores in 2004. By entering into this agreement the applicant affirmed the employment relationship and effectively waived his rights to pursue a personal grievance in respect to his removal from the rendering department.

[27] I dismiss his application for remedies under this head of claim.

[28] Turning to the applicant's claim that his suspension from duties in the pallet store while his conviction for cannabis cultivation was investigated was unlawful, I find the respondent was entitled to suspend the applicant under its clearly notified Code of Conduct set out at pages 25-27 of the employment information handbook.

[29] I find the respondent's action was justly available to it on a contractual ground and dismiss Mr Butterfield's claim in respect to this suspension. However, in upholding its right to suspend in these circumstances, I find the respondent took a high handed approach in not acceding to the applicant's request to contact his solicitor prior to the meeting at which he was suspended.

[30] In the course of the investigation meeting the applicant asserted that he had lost seniority in the workplace. At the meeting very little evidence was presented in respect of the applicant's claim of loss in this regard and so I make no finding on this issue. If, in the light of the other aspects of this determination this remains an issue, the parties are directed to mediation to attempt to resolve it. Leave is reserved in the event that agreement can not be reached in that forum.

[31] Addressing the applicant's claim of unjustifiable demotion from the pallet store on 5 February 2004, I find the company undertook a full and fair investigation and was entitled to exercise its prerogative to transfer Mr Butterfield from that department because he represented, in its view, a significant financial risk. I accept the applicant does not share the company's view but nonetheless I find the respondent's action was one open to a fair and reasonable employer; in fact sufficiently fair and reasonable as to refrain from dismissing the applicant for serious misconduct thus preserving his employment within the company.

[32] I dismiss Mr Butterfield's claim of unjustifiable demotion.

[33] In finding that the applicant's claims lack substantial merit I also accept that Mr Butterfield feels aggrieved at his transfers from two of the higher paid departments at Lorneville. That is understandable however, the role of the Authority is to investigate the facts of a grievance in the light of the law. The applicant may reflect on how his recreational use of the drug has contributed to his present circumstances.

[34] Given my findings on these issues I return to the *agreement* between the parties. Rudimentary arithmetic indicates that one aspect of the agreement remains unfulfilled namely, the choice of one other department by the applicant. I therefore direct the respondent to keep the final part of the

bargain and provide Mr Butterfield with the opportunity to join a department of his choice at Lorneville on the basis that a genuine vacancy exists in that department.

Costs

[35] Costs are reserved. In the event that the parties are unable to agree on this issue leave is given for the submission of a memorandum from either party.

Paul Montgomery
Member of Employment Relations Authority