

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
OTAUTAHI ROHE**

[2025] NZERA 670
3327780

BETWEEN	CONNOR TE KOORO First Applicant
AND	BLAKE MCCORKINDALE Second Applicant
AND	IZAEA HUBBARD Third Applicant
AND	ALLIANCE GROUP LIMITED Respondent

Member of Authority	Andrew Dallas
Representatives	Mary-Jane Thomas and Katherine McDonald, counsel for the Applicants Shaun Brookes and Wendy Jone, counsel for the Respondent
Investigation Meeting	1 and 2 April 2025 in Invercargill
Submissions and other information received	Up to, and including, 24 July 2025
Date of the Determination	22 October 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Connor Te Kooro, Blake McCorkindale and Izaea Hubbard were employed by Alliance Group Limited (Alliance) as meatworkers at the Lorneville Plant in Southland. They, along with another meatworker, were dismissed for serious misconduct on 8 March 2023. The findings of serious misconduct for the trio arose out of an allegation of drinking alcohol at work. An additional finding of failing an alcohol test was also substantiated against Mr Hubbard.

[2] Mr Te Kooro, Mr McCorkindale and Mr Hubbard say their dismissals were procedurally and substantively unjustified. This is strongly resisted by Alliance. As remedies for their personal grievances, Mr Te Kooro, Mr McCorkindale and Mr Hubbard seek \$25,000 compensation for hurt, humiliation and injury to feelings. There is no claim for lost wages. Earlier actions for reinstatement and unjustified disadvantage were ultimately not pursued in the Authority.

The Authority's investigation

[3] As originally lodged in the Authority, the Statement of Problem included a fourth applicant, Dillon Cooper. Mr Cooper also alleged he was unjustifiably dismissed by Alliance. While Mr Cooper provided a witness statement to the Authority, he did not attend the investigation meeting. Attempts were made to contact Mr Cooper, but these did not facilitate his attendance. Mr Cooper's employment relationship problem with Alliance was then orally withdrawn by the representative for the Applicants. The investigation meeting proceeded without him.

[4] During the meeting, I received and heard evidence from Mr Te Kooro, Mr McCorkindale and Mr Hubbard. In support of them, Te Wiata Rule, another meatworker employed by Alliance at Lorneville, and New Zealand Meatworkers and Related Trades Union (NZMU) officials, Bob Blackie, Robert Ashworth and Selina Forbes also gave evidence. For Alliance, I heard from Production Manager, Roger Pope, Regional People and Culture Partner, Graham Vincent and, Human Resource Admin Manager, Rawina Putt.

[5] After the investigation meeting concluded, and I had reserved my determination, the Applicants' representative advised that contact had been established with Mr Cooper and a request was made to hear his evidence via audio-visual link. This was opposed by Alliance. Alliance said it was entitled to rely on the withdrawal of Mr Cooper employment relationship problem, and it had predicated its' case on that basis. I agreed with the position advanced by Alliance and advised the parties as follows: "[a]t the conclusion of the investigation meeting, the Authority reserved its determination pending the provision of written submissions. The parties are to lodge and serve their submissions as directed. If Mr Copper wishes to press any matters against his former employer, he will need to take advice as to how to proceed further".

[6] Having regard to s 174E of the Employment Relations Act 2000, I have not referred to all the evidence received from witnesses, or the submissions advanced by the representatives in this determination.

Issues

[7] The issues for investigation and determination are as follows:

- (a) Were Mr Te Kooro, Mr McCorkindale and Mr Hubbard dismissals, and how the decision was made, what a fair and reasonable employer could have done in all the circumstances at the time;
- (b) If Alliance's actions were not justified should Mr Te Kooro, Mr McCorkindale and/or Mr Hubbard be awarded compensation for humiliation, loss of dignity and injury to feelings;
- (b) If this remedy is awarded, should it be reduced under s 124 of the Act for blameworthy conduct by Mr Te Kooro, Mr McCorkindale and/or Mr Hubbard which contributed to the situation giving rise to their grievances?; and,
- (c) Should any of the parties contribute to the costs of representation of another party or parties?

What caused the employment relationship problem?

[8] During the 2022/23 season, Mr Te Kooro, Mr McCorkindale and Mr Hubbard were employed by Alliance as "slaughtermen" at its Lorneville plant. They worked the same shift pattern. Mr Te Kooro had been working at Lorneville since 2018, Mr McCorkindale since 2017 and Mr Hubbard since the 2019.

Events of 9 February 2023

[9] On 9 February 2023, Mr Te Kooro, Mr McCorkindale and Mr Hubbard commenced their shift as usual at 6.45am. The plant had a breakdown at around 8.00am. Mr Te Kooro, Mr McCorkindale and Mr Hubbard, along with some other meatworkers including Mr Cooper and Mr Rule, passed the time in the locker room waiting for the plant to restart.

[10] Evidently, Mr Te Kooro, Mr McCorkindale and Mr Hubbard when wandering around the locker room happened upon four “Canadian Club”¹ cans in an open, unused locker. On their account, the cans were empty.

[11] Due to what was described as “boredom”, Mr Te Kooro, Mr McCorkindale, Mr Hubbard (and Mr Cooper) decided they would each imitate a “shotgun” of the cans. The evidence disclosed that in order to “shotgun” a can, a person is required to puncture the can, place their mouth over the resulting hole, and then open the can by conventional means thereby producing a rapid flow of the contained liquid.

[12] On their account of Mr Te Kooro, Mr McCorkindale and Mr Hubbard, a bottle of Pepsi Max was being stored by Mr McCorkindale in his locker. Mr McCorkindale said the bottle was a large bottle and full or nearly full. This was located and acquired. Mr Te Kooro, Mr McCorkindale and Mr Hubbard (and Mr Cooper) then each punctured a hole in one of the cans, which they strenuously maintained were empty, and poured the Pepsi from Mr McCorkindale’s bottle into the cans, blocking the holes with their fingers to prevent spillage.

[13] Mr Rule was then asked to film on Mr Te Kooro's mobile phone. In what was described as in “synchro”, Mr Te Kooro, Mr McCorkindale and Mr Hubbard (and Mr Cooper) then raised the cans and tilted their heads back to drink from the hole that had been pierced in the bottom of the can. Mr Te Kooro, Mr McCorkindale and Mr Hubbard said they then pretended to open the tab of the can (which they claimed was already open) and “sculled”, on their account, the Pepsi. Alliance said, and maintained, that what the trio had actually done was open fresh Canadian Club cans and “sculled” Canadian Club and, therefore, not Pepsi. In their evidence, Mr Te Kooro, Mr McCorkindale and Mr Hubbard said they were trying to make the “shotgun” process look as “real” as possible.

[14] Having filmed the episode, Mr Rule then gave the phone back to Mr Te Kooro. Somehow, and the reason or reasons for this remain unclear to me, the video was “posted” onto Mr Te Kooro's Snapchat and in a manner that was visible to Mr Te Kooro's Snapchat “friends”. Mr Te Kooro would say that he did not intend for this to happen.

¹ A premixed can (formerly) containing “Canadian Club” whisky and dry ginger ale.

[15] At some point after being posted one or more of Mr Te Kooro's Snapchat "friends", or someone associated with them, drew Alliance's attention to the video. Seemingly, the video was then recorded by Alliance's human resources department from the informant's phone. Still images of the video provided by Alliance show the video had been annotated with the words: "work breakdowns...cheers fellas".

[16] At or about 1.20pm, the plant recommenced, and Mr Te Kooro, Mr McCorkindale and Mr Hubbard returned to work. Mr Pope said he was notified by Alliance's Don Street office of the existence of the video at or about 2.15pm. Mr Pope said Alliance were able to identify the four individuals appearing on the video: Mr Te Kooro, Mr McCorkindale, Mr Hubbard (and Mr Cooper). He also said a fifth person could be seen in the video "but we were unable to identify who that was".

[17] At or around 3.00pm, NZMU official Mr Ashworth, who was working on the chain, was approached by senior supervisor, Paul White. Mr White informed Mr Ashworth that Alliance had footage of "the boys" (Mr Te Kooro, Mr McCorkindale, Mr Hubbard along with Mr Cooper) "drinking alcohol". Mr Ashworth said he followed Mr White into his office where he was advised Alliance wanted to take "the boys" down to the medical centre for an alcohol test.

[18] Mr Ashworth said he asked Mr White if he could review the footage. He said Mr White told him that he did not have it. At or about this time, Mr Pope arrived in Mr White's office. Mr Ashworth said he asked Mr Pope if he could see the footage, but this request was refused.

[19] The action then moved to the locker room, where Mr Pope and Mr White undertook a search of Mr Te Kooro, Mr McCorkindale and Mr Hubbard's lockers. No alcohol was discovered but a half full Pepsi Max bottle was found in Mr McCorkindale's locker. Mr Ashworth said Mr Pope also searched the rubbish bins. Mr Pope said he also spoke to the cleaner for the locker room on 10 February 2023.

[20] Mr Pope indicated he still wanted Mr Te Kooro, Mr McCorkindale and Mr Hubbard tested for alcohol. Mr Ashworth then contacted NZMU official Ms Forbes and explained the situation. Ms Forbes said she asked Mr Ashworth if Alliance had "proof of reasonable cause" for the testing. Mr Ashworth confirmed they did but said the company had not shown him

“anything”. Ms Forbes then spoke to Mr Pope, and while agreeing to meet him at the medical centre, asked him not to do anything until she had seen the footage.

[21] Ms Forbes then attended the medical centre by which time, Mr Te Kooro, Mr McCorkindale and Mr Hubbard were there with Mr Pope and Mr White. Mr Pope then showed Ms Forbes the footage. The footage was “timestamped” 11.41am.

[22] Mr Te Kooro, Mr McCorkindale and Mr Hubbard were tested for alcohol at or about 3.40pm. The following were the outcomes for each:

- a) Mr Te Kooro recorded 0 micrograms;
- b) Mr McCorkindale recorded 0 micrograms; and
- c) Mr Hubbard recorded 330 micrograms.

[23] Returning a positive or “non-negative” result following a just-cause alcohol test is classified by Alliance as “an example of behaviour which may amount to serious misconduct”.²

[24] After the testing, Mr Pope asked Mr Te Kooro, Mr McCorkindale and Mr Hubbard to accompany Ms Forbes to the NZMU office. About thirty minutes later, Mr Pope arrived and advised Mr Te Kooro and Mr McCorkindale they would be suspended on full pay pending an investigation. Mr Pope suspended Mr Hubbard without pay until he returned a negative breath test. Mr Te Kooro, Mr McCorkindale and Mr Hubbard said Mr Pope should have consulted with them or the NZMU about their suspensions prior to confirming the decision to do so.

[25] Mr Pope advised Mr Te Kooro, Mr McCorkindale and Mr Hubbard that he wish to meet with them the following morning. Ms Forbes arranged for the trio to attend the NZMU office at 8.00am.

Meeting on 10 February 2023

[26] When Mr Te Kooro, Mr McCorkindale and Mr Hubbard arrived at the union office for their meeting with Mr Pope he was, Ms Forbes’ account, not ready to commence because he was waiting on Mr Vincent to finish preparing letters for each of them.

² Alliance Employee Information Handbook, p.39

[27] While waiting for Mr Pope, Ms Forbes took the opportunity to ask Mr Te Kooro, Mr McCorkindale and Mr Hubbard about what had occurred the previous day. Ms Forbes said they explain to her they had “found some empty cans in an unused locker, were bored and decided to take the piss” and they described their actions with the cans. Mr Hubbard told Ms Forbes that he had had been drinking until 6.00am on the morning of 8 February 2023 but felt that he was “ok” to attend work (at 6.45am). Mr Forbes then asked them to each prepare a statement about what had taken place in the locker room.

[28] At or about 10.15am, Mr Pope arrived at the union office with the letters for Mr Te Kooro, Mr McCorkindale and Mr Hubbard which invited them to a disciplinary meeting on 13 February 2023. Mr Pope verbally told them they were still suspended pending completion of the investigation. Mr McCorkindale and Mr Te Kooro were on full pay and Mr Hubbard was still unpaid. Ms Forbes asked for Mr Hubbard to be breath tested so they could be suspended on full pay as well. Mr Pope agreed, they went to the Medical Centre. Mr Hubbard passed the test so was then placed on paid suspension.

[29] The letters given to the trio which were dated 10 February 2023 had the following attention line: “invitation to attend a meeting in terms of the company rules relating to alcohol”.

[30] Mr Te Kooro, Mr McCorkindale and Mr Hubbard were invited to attend disciplinary meetings on 13 February 2023 for the stated purpose of responded to allegations made against them by Alliance. The trio were advised that the allegations “if proven” may amount to misconduct or serious misconduct pursuant to the company’s code of conduct and standards of behaviour and making them liable for disciplinary action including dismissal.

[31] The primary allegation put against Mr McCorkindale and Mr Te Kooro was "drinking alcohol on the company premises on the 8th/9th February". As outlined above, there were two allegations advanced against Mr Hubbard: allegedly failing an alcohol test on 9 February 2023 and "drinking on the company premises on the same or preceding day". Specific reference was also made provisions contained in Alliance Employee Information Handbook relating to the possession, supply or use of alcohol (and other substances) and the consequences arising out of that.

Meetings on 13 February 2023

[32] On 13 February 2023, Alliance held individual meetings with Mr McCorkindale, Mr Te Kooro and Mr Hubbard. Also attending these meeting were Mr Pope, Ms Putt and Ms Forbes. The meetings were recorded.

[33] Mr McCorkindale, Mr Te Kooro and Mr Hubbard each gave their statements to Mr Pope. In summary, these statements they had found empty cans in an unused locker, filled them with Pepsi Max from Mr McCorkindale's locker and made a video pretending to "shotgun" the cans. And that the video was then accidentally uploaded to social media and once this was realised, it was immediately removed.

[34] During the meetings Mr McCorkindale, Mr Te Kooro and Mr Hubbard were shown the video. Each provided an explanation for their recorded actions. Ms Forbes said Ms Putt "would not accept the responses" and Mr Pope brought up matters unrelated to the allegations.

[35] During the interview with Mr Hubbard, Mr Pope said Mr Hubbard told him that he had been drinking until 6.00am on the morning of 8 February 2023. Also, during this meeting, Mr Pope advised that he had spoken to the cleaner who informed him that he had found empty cans in the locker room and had disposed of them. In response, Mr Hubbard asked "did they find any other cans out there". Mr Pope confirmed that there had been and these were also alcohol cans but he declined to disclose the brand.

[36] At the end of the meetings, Mr Pope confirmed Mr McCorkindale, Mr Te Kooro and Mr Hubbard were still suspended on full pay.

[37] Mr Pope said he wanted to meet with Mr Te Kooro, Mr McCorkindale and Mr Hubbard again because he believed the explanations they had provided were inconsistent with the video. He said in his written evidence the inconsistency:

[22] ...was that the trio had told [him] the cans were empty, they had put holes in the bottom side of each can, and then filled them from the newly created hole with Pepsi Max. However, in the video, I could see some of [Mr McCorkindale, Mr Pope and Mr Hubbard] tearing the tab at the top of the can, which would already be open if the cans had been found already

empty. The angle some of the cans were held in the video also indicated that they were had not been open prior to ... [Mr McCorkindale, Mr Pope and Mr Hubbard] opening during the video

[23] Further, in the video, spray can be seen coming from the closest cans when the tabs at the top are pulled. This again indicated to me that the cans had not been empty, as claimed

[38] After the meetings Ms Putt wrote further letters to Mr McCorkindale, Mr Te Kooro and Mr Hubbard inviting them to “outcomes” meetings on 15 February 2023.

Meetings on 15 February 2023

[39] Alliance met with the trio again on 15 February 2023. The individual meetings started at 10.15am. The meetings were recorded. Also in attendance were Ms Forbes, Mr Blackie, Mr Ashworth, Mr Pope, Mr Vincent and, Ms Putt.

[40] The video was shown to Mr McCorkindale, Mr Te Kooro and Mr Hubbard again. Ms Forbes said this also including Mr Vincent “zooming in” on various facets and “adding his own commentary” including articulating Mr Pope's observations about what was occurring and highlighted suggested “discrepancies” in their explanations. Each was given an opportunity to comment on these “discrepancies” but declined to do so. Mr Te Kooro said: “I’ve no comment, just my statement”. Mr McCorkindale did not comment. Mr Hubbard declined to say anything via his union representative.

[41] According to Ms Forbes, the meetings concluded by 10.50am. Directly afterwards, Mr Pope said he considered “everything that had been said” but “considered that the allegations against [Mr McCorkindale, Mr Te Kooro and Mr Hubbard] had been substantiated”. Mr Pope said having viewed the video and heard from the trio, he did not believe their explanation that they had found empty cans and had filled the with Pepsi to make it look like they were drinking alcohol. Mr Pope said he formed the view they were drinking “Canadian Club” and that the fact that Mr Hubbard failed a breath alcohol test approximately four hours after the video had been uploaded supported his conclusion.

Preliminary decision meeting: 15 February 2023

[42] At 11.14am, on Mr Pope's evidence, he met with Ms Forbes, Mr Ashworth and Mr Blackie to provide his preliminary decision. Ms Putt and Mr Vincent were also in attendance.

[43] Ms Forbes said she asked if there was further evidence or whether a statement from the cleaner was being sought. She said nothing further was provided. Mr Pope then advised that he believed the allegations were substantiated, amounted to serious misconduct and that summary dismissal was the proposed sanction. On behalf of the NZMU, Mr Blackie did not accept Mr Pope's preliminary decision for a variety of reasons including that Alliance did not have sufficient evidence to substantiate allegations. He requested 10 days to seek advice and respond to Mr Pope's preliminary decision. Mr Vincent said the company generally accepted "48 hours or thereabouts" for this to occur. Following some interplay between Alliance and the NZMU, a timeframe for providing feedback on Mr Pope's proposed decision eventually fell into place.

[44] On 28 February 2023, Alliance issued letters to Mr McCorkindale, Mr Te Kooro and Mr Hubbard confirming the preliminary decision to dismiss each of them as articulated to the NZMU representatives on 15 February 2023 and setting out the details for the feedback meeting. Mr Hubbard's letter contained an additional substantiated allegation of failing an alcohol test. Seemingly in response, Mr Pope received correspondence from the NZMU's solicitor setting out various contentions about the investigation and proposed sanction.

[45] The NZMU's solicitor then attended Invercargill and interviewed Mr McCorkindale, Mr Te Kooro, Mr Hubbard and Mr Rule. The failure to interview Mr Rule was raised together with several contentions about the alcohol testing, including the calibration of the testing device and the certification of the operator.

[46] Alliance's solicitor responded by advising Mr Pope had revisited the decision to substantiate the allegations considering the further information/accounts provided by the solicitor and had, nonetheless, re-affirmed the decisions made on 15 February 2023. The criticisms of the alcohol testing regime were expressly rejected. As regards the statement provided on behalf of Mr Rule, Alliance's solicitor advised that Mr Pope did not accept his account of the use of the Pepsi and noted that Mr McCorkindale, Mr Te Kooro and Mr Hubbard had not been prepared "to put Mr Rule forward".

“Feedback” meeting: 6 March 2023

[47] The feedback meeting on the proposed disciplinary sanction for Mr McCorkindale, Mr Te Kooro and Mr Hubbard was held on 6 March 2023. In attendance were Mr Pope, Mr Vincent, Ms Putt, Mr Blackie and Ms Forbes. The disciplinary records for each of the three had been disclosed, with only Mr McCorkindale having an unblemished employment record. The NZMU proposed a lesser sanction and noted several similar recent situations where different disciplinary outcomes were achieved. Alliance accepted some similarities with these situations but also noted several key differences, including a different decision-maker and factual matrix. Ms Forbes subsequently provided further information about these situations to Mr Vincent in an email on 7 March 2023.

[48] Mr Blackie confirmed during the meeting that Mr McCorkindale, Mr Te Kooro and Mr Hubbard had not wanted to implicate Mr Rule as the phone cameraperson. Indeed, when asked by Mr Ashworth during his interview on 13 February 2023 if he remembered who was holding the phone, Mr McCorkindale said “no”. However, during the Authority’s investigation meeting Mr McCorkindale conceded that Mr Rule was holding the phone, and he had not wanted to get him into trouble.

Summary dismissal: 8 March 2023.

[49] By way of letters dated 8 March 2023, and hand delivered by author Mr Pope to the union office that day, he confirmed the decision to summary dismiss Mr McCorkindale, Mr Te Kooro and Mr Hubbard. In his correspondence, Mr Pope wrote in each letter that it was an “aggravating” factor that the video of the incident had been posted online.

[50] By email on 9 March 2023, Ms Forbes emailed Mr Vincent and queried why Alliance had not directly dismissed Mr McCorkindale, Mr Te Kooro and Mr Hubbard instead appearing to rely on the NZMU to communicate the outcome of the disciplinary process to them. Without addressing the query directly, Mr Vincent responded by saying it seemed “most practical” to provide the outcome in writing and “this is what [Mr Pope] did”.

[51] On 23 May 2023, the NZMU formally raised personal grievances on behalf of Mr McCorkindale, Mr Te Kooro and Mr Hubbard. A statement of problem was subsequently lodged in the Authority on dated 27 September 2024.

[52] In progressing their cases in the Authority, Mr McCorkindale and Mr Te Kooro both lodged and served witness statements containing prima facie positive defences to the allegation of drinking alcohol at work. Mr McCorkindale disclosed he was a Type 1 Diabetic which significantly effected his ability to drink alcohol. He provided medical evidence in support of this disclosure. Mr Pope said Mr McCorkindale did not disclose this information during his investigation nor provided any medical evidence in support.

[53] Mr Te Kooro disclosed that he was not drinking at the time because he was recovering from a concussion arising out of his involvement in boxing. Mr Te Kooro also provided medical evidence in support of this disclosure. Mr Pope said Mr Te Kooro did not disclose this information during his investigation nor provided any medical evidence in support. The closest thing Mr Te Kooro appears to have said in this regard during the investigation was during his interview with Mr Pope on 13 February 2023 when he stated: "I am an athlete as well, so I don't actually drink". However, the point was not taken any further and there is no mention of boxing or recovering from concussion.

[54] Furthermore, in their witness statements Mr Te Kooro and Mr McCorkindale said that their involvement in a work stoppage in 2021 had some bearing on their dismissals. Mr Pope said this was not raised with him during his investigation and he was involved in the 2021 situation.

Could a fair and reasonable employer have reached, in all the circumstances at the time, the decision to dismiss Mr McCorkindale, Mr Te Kooro and Mr Hubbard?

[55] The test for justification for dismissal is set out in s 103A of the Act. It is an objective, multifactorial test into all the relevant circumstances known at the time of the dismissal.³ In *Cowan*⁴, the Court of Appeal approved⁵ the following approach to the application of the test to presenting circumstances:

- a) The task of the Court [and the Authority] is to examine objectively the employer's decision making process and determine whether what the employer did and how it was done were what a fair and reasonable employer could have done.
- b) It is not for the Court [and the Authority] to substitute its decision for what a fair and reasonable employer could have done in the circumstances.
- c) There may be a range of responses open to a fair and reasonable employer.
- d) The requirement is for an assessment of substantive fairness and reasonableness not a minute and pedantic scrutiny to identify failings.
- e) Regarding the standard of proof, a distinction must be drawn between the inquiry the Court [and the Authority] makes and the inquiry of the employer.
- f) The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a court that the dismissal was justified. The first does not involve a standard of proof. The second does.
- g) In ascertaining the facts, the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. That does not call for the application of any standard of proof.
- h) But when required to prove that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that those facts warranted dismissal were reasonable. That must be shown on the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances.

³ Employment Relations Act, s 103A(1) and (2).

⁴ Above n 6

⁵ Above n 6 at [40]

[56] Alliance said it carried out a procedurally fair investigation into its concerns about Mr McCorkindale, Mr Te Kooro and Mr Hubbard's alleged misconduct, which it substantiated, and this investigation met all facets of the s 103A test.

[57] Contrastingly, yet not surprisingly, Mr McCorkindale, Mr Te Kooro and Mr Hubbard said Alliance had failed on both procedural and substantive grounds to justify their dismissal and advanced a number of arguments in support of these contentions. These are summarised as follows:

- a) failure to sufficiently make inquiries of the cleaner who removed the Canadian Club cans from the locker room and failed to make any efforts to retrieve the cans and organise residual testing of their contents;
- b) failure to interview Mr Rule who could provide evidence about the veracity of the substitution of Pepsi Max claim, as was received by the NZMU's solicitor, and provided to Mr Pope on 1 March 2023, and subsequently contained in a witness statement to the Authority;
- c) failure to identify and interview a further meatworker who can be seen sitting down in the background of Mr Rule's video of Mr McCorkindale, Mr Te Kooro and Mr Hubbard;
- d) concluding that negative alcohol tests for Mr McCorkindale and Mr Te Kooro were not inconsistent with alcohol being earlier consumed in the locker room;
- e) Mr Pope only took 25 minutes after the meetings on 15 February 2023 to finalise his preliminary decision to substantiate the allegations and propose to dismiss Mr McCorkindale, Mr Te Kooro and Mr Hubbard;
- f) Mr Pope formed the view that the uploading of the video to social media was an "aggravating" feature;
- g) Alliance is a large, well-resourced employer and its actions in investigating Mr McCorkindale, Mr Te Kooro and Mr Hubbard must be considered with that context;
- h) too much emphasis was placed on subjective assessments as to what was occurring on the video of the shotgun of the Canadian Club cans with particular reference to angle of the cans, finger positioning and "spray" from the cans;
- i) there was a disparity of treatment by Alliance with other of its employees found to have misconducted themselves in similar circumstances; and

- j) Mr Pope provided no evidence of consideration of alternatives to Mr McCorkindale, Mr Te Kooro and Mr Hubbard dismissals,

[58] In response to these contentions, Alliance submitted:

- a) it clearly put the allegations to Mr McCorkindale, Mr Te Kooro and Mr Hubbard;
- b) it gave them time to consider the allegations and obtain representation;
- c) Mr McCorkindale, Mr Te Kooro and Mr Hubbard were represented throughout the disciplinary process;
- d) gave them two opportunities to provide responses to the allegations, including written responses;
- e) Mr Pope considered all of the evidence related to their alleged misconduct before determining the allegations were substantiated and amounted to serious misconduct; and
- f) gave multiple opportunities to comment on the appropriate outcome before the decision to dismiss Mr McCorkindale, Mr Te Kooro and Mr Hubbard was made.

[59] Alliance said it had structured its approach to investigation around “the inherent implausibility of an innocent purpose”⁶ (that is, the Canadian Club cans contained alcohol and they were consumed by Mr McCorkindale, Mr Te Kooro and Mr Hubbard on that basis) and was entitled to do so. Alliance said it was not required to carry out a “forensic criminal level investigation” and it was now being criticised for not making inquiries and considering matters which had not been disclosed to it during the investigation, specifically Mr Te Kooro’s concussion, Mr McCorkindale’s diabetes and an unrelated work stoppage in 2021. Alliance said if these matters had been disclosed during the investigation, they may have influenced other further steps or inquiries.

[60] As to the specific criticisms of its investigation, Alliance made a number of points in rebuttal. In respect of Mr Rule, Alliance said his name was not put forward by Mr Te Kooro, Mr McCorkindale or Mr Hubbard.⁷ Mr Rule’s account was put before Mr Pope by NZMU’s solicitor, it was considered but it did not change his view that the allegations were substantiated. Alliance said Mr Rule gave inconsistent accounts to the Authority of his understanding of what

⁶ *A Limited v H* [2016] NZCA 419 at [37] (CA)

⁷ See, para [48] above.

Mr Te Kooro, Mr McCorkindale and Mr Hubbard had done with the Canadian Club cans to prepare them for the “shotgun” process.

[61] In respect of the cleaner, Mr Pope said he spoke to the cleaner on 10 February 2023, and it was confirmed he had found “some empty cans”. Mr Pope said he advised Mr Te Kooro, Mr McCorkindale and Mr Hubbard of this on 13 February 2023. The cleaner subsequently declined to provide a statement. Mr Pope did not rely on anything the cleaner said because Mr Te Kooro, Mr McCorkindale and Mr Hubbard accepted they were Canadian Club cans.

[62] In respect of the cans themselves, Mr Pope conducted a search for these on 9 February 2023 in the presence of Mr White and Mr Ashworth. Mr Te Kooro, Mr McCorkindale and Mr Hubbard did not raise the Pepsi Max re-fill process until 13 February 2023, until then Alliance was not aware there was a dispute about the contents of the cans. Alliance said even if the cans were discovered, it had no way of testing their contents and require expert evaluation of the same would “not be required by reasonable employers; it sets the test too high”.

[63] Alliance did not seek a copy of the video from Mr Te Kooro’s phone nor was it offered. Alliance said, based on Mr Te Kooro’s statement and subsequent witness evidence to the Authority, it was not available in any event due to deletion. Alliance said if it had the video, it was unreasonable to require that it be subject to “forensic analysis”.

[64] Alliance did not believe that expert evidence on alcohol metabolism over time was required by a reasonable employer. The allegation of drinking onsite was during the plant breakdown during the morning of 9 February 2023. By the time the testing took place approximately four hours later, it was reasonable for Mr Pope to conclude the presence of alcohol, given the small observed (from the video) consumed amount, would not be detected, which it was for Mr McCorkindale and Mr Te Kooro.

[65] Alliance said no-one could identify who the person in the background to the video was, whose presence it said was “fleeting”, including Mr Te Kooro, Mr McCorkindale and Mr Hubbard.

[66] As to the substantive justification for Mr Te Kooro, Mr McCorkindale and Mr Hubbard’s dismissals, summarised its position as follows:

[Mr Pope] thought it was more likely than not that the Canadian Club cans contained Canadian Club alcohol rather than Pepsi Max. It was open to the decision-maker to reach that finding after considering the video, the alcohol test results, and the explanations given by [Mr Te Kooro, Mr McCorkindale and Mr Hubbard] in the eight interviews carried out. As expressed by the Court of Appeal in *Cowan*, the employer does not have to accept [Mr Te Kooro, Mr McCorkindale and Mr Hubbard's] accounts.⁸

[67] Finally, Alliance denied a disparity of treatment with other employees in similar situations. Submitting those situations were dissimilar, Alliance said the situation here was of a “serious nature” and that it was open to it to consider dismissal as the appropriate sanction. Alliance also noted the Court of Appeal’s decision in *Chief Executive of the Department of Inland Revenue v Buchanan*,⁹ which set a reasonably high threshold for establishing a disparity of treatment by an employer.

Conclusions about Mr Te Kooro, Mr McCorkindale and Mr Hubbard dismissals

[68] Having objectively and fully considered this matter, I find Mr Te Kooro, Mr McCorkindale and Mr Hubbard were justifiably dismissed by Alliance. While not a perfect investigation, it did not have to be. Alliance’s investigation had a sufficient quality of character to enable it, on this occasion, to satisfy the requirements of s 103A of the Act.¹⁰ Expressed another way, a fair and reasonable employer having carried out the investigation undertaken by Alliance *could* have arrived at the same conclusion that the actions of Mr Te Kooro, Mr McCorkindale and Mr Hubbard amounted to serious misconduct and that it reasonably open to dismiss them based on this conclusion.

[69] The circumstances giving rise to Mr Te Kooro, Mr McCorkindale and Mr Hubbard dismissals were quite unusual. On their own best case, the trio said they were seeking to make “shotgun” process look as “real” as possible. Suffice to say this did not help them a great deal when seeking to explain their actions to Alliance after it was alerted to the existence of a video of those very actions posted online. Ultimately, Alliance arrived at the “the inherent implausibility of an innocent purpose” of Mr Te Kooro, Mr McCorkindale and Mr Hubbard actions on the video. As it was entitled to do. The explanation provided by Mr Te Kooro, Mr McCorkindale and Mr Hubbard: in summary, they were bored, they found some used Canadian

⁸ *Cowan v Idea Services Limited* [2020] NZCA 239 at [18]

⁹ [2005] 1 ERNZ 767 (CA)

¹⁰ See para [58]

Clubs cans, they filled them with Pepsi Max, they each mimicked a “shotgun” process, their actions were videoed, and the video accidentally appeared online; was more likely to be rejected than accepted by a reasonable employer, objectively assessing the situation.

[70] I accept the submission of Alliance that it was not required to “forensic criminal level investigation”. While a “boots and braces” approach may have seen the Canadian Club cans, and the video forensically examined neither, in my view, was necessary to meet the test in s 103A. In any event, the evidence established that the original online video was deleted when its existence became known to Mr Te Kooro and the nature of the cans themselves was not disputed, merely the contents. In respect of the latter, I have already found it was reasonable for Alliance to conclude it was implausible to believe that otherwise used and discarded cans would find a new life featuring as props in a (ultimately online) video containing Pepsi Max.

[71] While I accept that Mr Rule should have been interviewed and ultimately, he was – but in the unusual circumstance of this being undertaken by the NZMU’s solicitor. While Alliance could be criticised here, I accept its submission, having also reviewed the transcripts, that Mr Te Kooro, Mr McCorkindale and Mr Hubbard did not mention Mr Rule during their interviews. Indeed, on Mr McCorkindale’s account, he did not mention Mr Rule because he did not want to get him into trouble. Perhaps Mr Rule could have been interviewed by Mr Pope after his contribution to the investigation was provided by the NZMU’s solicitor but it is difficult to see how this could have placed Mr Te Kooro, Mr McCorkindale and Mr Hubbard in a different and better light given Mr Pope had rejected their explanation – as now supported by Mr Rule – that they had undertaken the “shotgun” process with Pepsi Max in Canadian Club cans. As to the other meatworker seen “fleetingly” in the video, no-one seemed to know who this was. Therefore, it is difficult to criticise Alliance for not locating and interviewing this person.

[72] While the cleaner was a relevant witness insofar as he could say whether he found empty cans in the locker room, the existence of the same was never really in dispute. Mr Pope said he spoke to the cleaner on 10 February 2023. He disclosed this during interviews on 13 February 2023 with Mr Te Kooro, Mr McCorkindale and Mr Hubbard. Mr Pope said the cleaner subsequently declined to provide a statement and he did not rely on anything the cleaner had told him.

[73] While of significant concern to Mr Te Kooro, Mr McCorkindale and Mr Hubbard, in the circumstances of this matter, I agree with Alliance that the posting of the video online was an “aggravating” factor. Due to the actions taken by the informant at Alliance’s Don Street office, and those subsequently involved, including Mr Te Kooro, himself, the video received a limited viewership. However, a review of the video finds Mr Te Kooro, Mr McCorkindale and Mr Hubbard clearly dressed in Alliance uniforms and a wider audience and/or a going “viral” for the video could have posed significant problems for Alliance’s brand domestically and internationally.

[74] I accept Alliance’s submission that it was not required to provide expert evidence or otherwise demonstrate alcohol metabolism over time as part of its investigation. The alcohol testing that took place was, at least, four hours after the video was posted online. Given the small amount of liquid shown to be consumed on the video, and the physical nature of the work performed once the plant recommenced, the conclusions drawn by Mr Pope in this respect were open to him. However, it is of significant concern that Mr Hubbard recorded an alcohol reading of 330 micrograms at or about 3.40pm on 9 February 2023, having commenced his shift at 6.45am and having stopped drinking, on his own account, at 6.00am. The controls in place at Lorneville at the time appear not to have worked in this instance and *but for* the video being posted online, and the actions subsequently taken, it is unclear whether Mr Hubbard would have been tested.

[75] It is regrettable that Mr Te Kooro and Mr McCorkindale did not provide their explanations for not drinking on 9 February 2023 prior to the decision to dismiss them was made. Alliance was required by s 103A to have regard to all the circumstances at the time. The circumstances of Mr McCorkindale’s diabetes and Mr Te Kooro’s concussion were not known by Alliance at the time of their dismissals. Unfortunately, and this will come as no comfort to either Mr McCorkindale or Mr Te Kooro, their situation starkly highlights the need for an employee subject to investigation to be open and communicative with their employer to ensure that all circumstances can be taken into account before a decision to dismiss them is made.

[76] Finally, I find there was no disparity of treatment between Mr Te Kooro, Mr McCorkindale and Mr Hubbard and the other similar, but different, disciplinary or potentially disciplinary scenarios provided by the NZMU. It is no doubt difficult finding other scenarios that are on all fours with the matter extant. Even then, were one to manifest, the decision in

Buchanan makes it clear that a dismissal can be justified even in the face of the disparity for which there is no adequate explanation.¹¹ For completeness, nor was there disparity of treatment between Mr Te Kooro, Mr McCorkindale and Mr Hubbard (and Mr Cooper) – all were dismissed based on the range of possible responses to established serious misconduct. I do observe Alliance *could* have arrived at a different outcome for Mr McCorkindale given his “clean” disciplinary record but decided that dismissal was also the appropriate response.

[77] I am not able to assist Mr Te Kooro, Mr McCorkindale and Mr Hubbard further here. Having concluded that they were justifiably dismissed by Alliance, there is no need to consider their proposed remedies.

Costs

[78] Costs are reserved. If costs are sought, the parties are encouraged to resolve any issue of costs between themselves. If the parties are unable to resolve costs, and an Authority determination on costs is needed, Alliance may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, Mr Te Kooro, Mr McCorkindale and Mr Hubbard will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted. The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.

Andrew Dallas
Chief of the Employment Relations Authority

¹¹ Above n 9 at [45]

