IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 153
5306809

	BETWEEN	TEVITA FIFITA Applicant
	AND	FRESH CONNECTION LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	T Darby, Counsel for Applicant C Knowles, Advocate for Respondent
Investigation Meeting:	27 October 2010 at Auckland
Submissions Received:	7 January 2011 for Applicant 1 February 2011 for Respondent
Determination:	14 April 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Tevita (David) Fifita, claims that pursuant to s 103(1)(b) of the Employment Relations Act 2000 (the Act), his employment was affected to his disadvantage by an unjustified action by his employer. Alternatively, Mr Fifita claims that there was a breach of his employment agreement due to his employer requiring him to change his duties. Mr Fifita also claims that he was unjustifiably dismissed on 19th March 2010. He asks the Authority to find that he has a personal grievance (or grievances) and award him the remedies of reimbursement of wages for three months and compensation of $5,000. The respondent, Fresh Connection Limited says that all of its actions pertaining to Mr Fifita were justified due to his misconduct.

[2] Section 103A of the Employment Relations Act 2000 provides the test to be applied to a dismissal; and also to circumstances where an unjustified disadvantage in employment claim arises. In determining whether a dismissal or an action was

justifiable, the Authority is required to consider on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

Background Facts and Evidence

[3] The Auckland branch of Fresh Connection Limited (FCL) is a distribution centre. The company purchases fruit and vegetables at the wholesale markets each morning and then prepares and delivers bundles of produce to customers in the food service industry according to their orders. The business is an 18 hour operation each day with staff on the first shift starting work between 9:00p.m. and 11:00p.m. and staff on the second shift starting work between 4:00a.m. and 6:00a.m. The work fluctuates each day depending on the size and the number of orders received. The evidence of Mr Paul Tate, the Auckland Branch Manager of FCL, is that the supply of produce to the food service industry is a "highly competitive" business. It is also a demanding industry as the customers are working to tight deadlines.

[4] Mr Fifita commenced his employment with FCL on 7th April 2008 as a truck driver delivering orders to food service customers. On 31st July 2009, an issue arose regarding Mr Fifita leaving the work place part way through his shift without giving notice that he was going to do so. He received a verbal warning, recorded in writing and of the same date as the misconduct. There was an apparent repeat of the same misconduct by Mr Fifita and he received a written warning dated 26th August 2009. The memorandum recording this warning concludes:

> The consequences of failing to make the required improvements or corrections will result in the termination of your contract with Fresh Connection.

[5] The evidence of Mr Tate about the two warnings, is that the company has a policy that requires employees to notify their immediate supervisor before leaving the work site. There are two reasons for this requirement. Firstly, for health and safety reasons, so that management is aware of who is on site (or not) in the event of an emergency. And, so that management can check that all work has been properly completed for the day. The matter of the two warnings and their significance regarding the dismissal of Mr Fifita will be examined again later.

The claim of unjustified disadvantage

[6] Mr Fifita claims that before he was dismissed he was disadvantaged in his employment by an unjustified action by his employer. The action in question is that some time in September 2009, Mr Fifita was substantially removed from his duties as a truck driver and required to work in the store where the produce is sorted and packed prior to delivery to customers.

[7] The evidence of Mr Tate is that in September 2009 it was "evident to management" the produce delivery run that Mr Fifita had been engaged for as a driver, had diminished to a point where it was no longer viable for him to be engaged solely on the delivery run. Mr Tate says that as there were no other delivery runs that could be undertaken by Mr Fifita, in order to avoid making his employment redundant, alternative work was found for him in the produce store (the store). Mr Fifita continued to carry out driving duties making deliveries on each Monday.

[8] The evidence of Mr Fifita is that he objected to be required to work in the store and he also told his supervisor that he could not work inside the "fridge" (produce cooler) because it was not good for his health. There is no evidence as to why it would not be good for Mr Fifita's health to work in the cooler. The evidence of Mr Tate is that when he became aware that Mr Fifita was unhappy in his revised role, he arranged for Mr Fifita to drive some school delivery runs. The effect being that Mr Fifita was then driving delivery runs twice a week. Mr Tate says that Mr Fifita was "accommodated" further with further deliveries as the market for such improved. However, Mr Tate says he "put a halt" to giving Mr Fifita further delivery runs as felt that the performance issues that has arisen with Mr Fifita (pertaining to the two warnings) and subsequently, could be managed best if he worked predominantly "on site."

[9] Mr Tate also refers the Authority to a provision of Mr Fifita's employment agreement[1] that allows the company to vary his duties. This is at clause 2 of the agreement:

2. **THE POSITION**
   2.1 The position is that of Part Time Driver

[1] While the employment agreement is unsigned it appears to be accepted by both parties that its terms and conditions apply.

> 2.2 Notwithstanding this, the Employee is regarded first and foremost as an Employee of the Employer. The Employee may be required by the Employer and the Employee agrees to undertake any duties associated with the business of the Employer: provided that the Employee has the necessary skills/training, or can learn on the job, to perform the duties required and provided further that no reduction in the rate of pay shall be made to the Employee as a result of the operation of this clause.

Was Mr Fifita disadvantaged in his employment by an unjustified action by his employer?

[10] The submissions for Mr Fifita acknowledge that his duties can be changed under the above terms of the employment agreement. But, it is submitted, any change is subject to certain provisos. In an apparent reference to the proviso that: "the Employee has the necessary skills/training, or can learn on the job, to perform the duties required" - the submission is that Mr Fifita did not have the "aptitude and the characteristics required" to bring him within the scope of the proviso, in that his abilities, skills and interests were as a driver rather than as a store person. It is also submitted that it was unfair "to expect a Tongan who prefers a warm climate" to work in a cool room when that was not the type of work he was engaged to do.

Analysis and conclusions relating to the claim of unjustified disadvantage

[11] Turning firstly to the term of the employment agreement discussed above, I conclude that the scope of the clause is such that it gives the employer a substantial entitlement to require the employee "*to undertake any duties associated with the business"* provided that the employee has the necessary skills or training or alternatively, is capable of learning what is required to carry out the duties. Therefore, given that there was a shortage of delivery work in September 2009, I find that it was appropriate for the employer to require Mr Fifita to carry out work in the store, particularly if by doing so; he retained his employment rather than having it terminated on the ground of redundancy. There is nothing to suggest that Mr Fifita was not capable of carrying out the duties expected of him in the store, or that he was not a suitable person to carry out those duties. I find the submissions to the contrary are not supported by any tangible evidence. In conclusion, while I had some initial reservations about whether it was appropriate for Mr Tate to continue to withhold driving work from Mr Fifita, if and when it was more available, given the evidence of Mr Tate that he continued to "have issues" with Mr Fifita's attendance, the very broad

scope of clause 2 of the employment agreement and the general paucity of evidence as to precisely how much driving work may have been available, I do not find that Mr Fifita was disadvantaged to any material extent or that there was any unjustified action by his employer. For completeness, I also record that given the provisions of clause 2 of the employment agreement, I find that there was not a breach of contract as posited to be an alternative argument.

The claim of unjustified dismissal

[12] In February 2010, Mr Tate was on leave for two weeks. His role was filled by Mr Tony Taylor, the National Sales and Marketing Manager for FCL. The evidence of Mr Taylor is that a number of issues arose regarding Mr Fifita. When Mr Tate returned to work, Mr Taylor discussed these issues with him. A meeting was held with Mr Fifita on 17th February 2010. The evidence of Mr Tate is that prior to the meeting, Mr Fifita was given notice of it and the opportunity to bring a support person.

[13] A letter (from Mr Tate) was subsequently given to Mr Fifita on 25th February 2010. It informs of the issues that were of concern in regard to his performance. Given that the matters contained within the letter relate to the core of Mr Fifita's subsequent dismissal, it warrants reproduction in full:[2]

> Re: Disciplinary action regarding breach of company policy
>
> 1. Further to the disciplinary meeting we held with you on 17 February 2010 this letter confirms the issues discussed at the meeting and the preliminary view that Fresh Connection has formed.
>
> **Performance issues**
>
> 2. At the meeting we discussed our serious concern that, since receiving written warnings on 31st July and 26th August 2009 for leaving work without advising your Supervisor you have breached the same policy and several other company policies.
>
> 2.1 That you failed to notify your supervisor that you were leaving the premises of Fresh Connection to go home.
>
> 2.2 That you were absent from work 3 February 2010, made no effort to notify Data Entry that you were unable to attend your scheduled work shift due to losing your phone.
>
> 2.3 That you failed to wear the Fresh Connection uniform 4 February 2010 to work instead you chose to wear casual street wear namely an American sports shirt with the number 55 emblazed on the shirt.

[2] The letter has been reproduced as written.

2.4 That you were witnessed by a member of the general public for driving dangerously in a Fresh Connection vehicle, the complainant made the point that the Fresh Connection driver was wearing an American sports shirt with the number 55 emblazed on the shirt.

2.5 That you failed to obtain signatures for your deliveries to Compass sites, a complaint was received 11th February 2010 from the Chef at Combine Mess that he and his Team had not been given the opportunity to sign for Produce deliveries on Mondays to their site for a number of weeks, Mondays being the only day that you deliver to this site.

3. As outlined to you previously, we take these matters very seriously. By not complying to company policy and adhering to the road code you are portraying a poor attitude to your fellow Team members and the general public. Fresh Connection policies have been put in place to ensure the business operates professionally, efficiently and safely as a Produce Wholesaler to its employees, the general public and its customer base.

Your response

4. You made the comment that you could not communicate with Data Entry because you had lost your phone, even in such circumstances we expect at some point of the day that you find a means to contact Data Entry and advise them of your situation.
You made no response to the allegation that you did not notify your supervisor you were going home.
You made no response to not wearing the correct Fresh Connection uniform, all employees are to be dressed in the Fresh Connection uniform ready for work you have been reprimanded for not wearing the correct uniform in the past.
You stated that at no point were you driving dangerously even though a member of the public could identify you by the top you were wearing namely an American sports garment with the emblem 55 emblazed on it and the type of vehicle being driven a Fresh Connection van.
Your response to not obtaining signatures for Compass deliveries is that you were unaware drivers were required to obtain signatures from these sites. We held a meeting with all drivers late last year at this meeting it was emphasised to all drivers the importance of obtaining a signature from all Compass sites as this was proof we required to obtain payment of delivery from Compass HOF should there be an account query, all other Fresh Connection drivers have complied with this task.

Preliminary view

5. Given the written warnings from 31st July and 26th August 2009 for similar offences, our preliminary view is that these breaches of policy may warrant your dismissal. We advised you that we would follow up with a written document of these recent breaches of company policy.

6. In order to give you an adequate opportunity to put forward your views on the matter, before a decision is made, we would like to provide you with the opportunity to attend a follow up meeting with us.

7. At this meeting you will be given the opportunity to respond to the issues described in paragraphs 2.1 – 2.5 and provide us with any other information you would like us to take into account before we make a final decision. You

> are entitled to be represented at this meeting by a lawyer or employment advocate, or to bring a support person with you.

[14] It is the oral evidence of Mr Fifita that he never received the above letter but he makes no reference to this in his written statement of evidence or statement of problem and it has not been raised in his closing submissions. I find that it is more probable than not that Mr Fifita did receive the letter and that he was fully aware of the allegations that he was being given an opportunity to respond to.

[15] A meeting took place with Mr Fifita on 18th March 2010. Notes were not taken of this meeting (or the one on 17th February) and the evidence of Mr Tate and Mr Fifita about how the meeting proceeded is somewhat sparse. But it is apparent that the issues set out in the letter of 25th February 2010 were discussed with Mr Fifita and he made some response, albeit it seems that this was rather limited. It also seems that Mr Fifita chose not to have a representative or support person present. Apart from the rather truncated version of events given by Mr Fifita and Mr Tate[3] the Authority is left with the content of the letter of dismissal (from Mr Tate) dated 19th March 2010. The letter is mistakenly and carelessly headed: "**Re: Final Written Warning"** but notwithstanding this, it conveys to Mr Fifita that a decision has been made to dismiss him and why. The letter records Mr Fifita's response to the performance issues raised with him as:

> You declined to have a further meeting to discuss performance related issues 1.1 to 1.5 further. You had no meaningful comment to disrepute [sic] any of the issues 1.1 to 1.5.

The letter then conveys to Mr Fifita the outcome of the meeting held the day before:

> Given the feedback from the meeting with you 18 March 2010 that you accept your non-performance issues 1.1 to 1.5, and as a result of your poor performance we no longer have trust and confidence in you as an employee of the Company. Therefore, we are terminating your employment with the Company. This decision has been approved by management of the Company.

Was the dismissal of Mr Fifita what a fair and reasonable employer would have done in all the circumstances?

[16] It is submitted for Mr Fifita that the bad driving allegation was not properly investigated because the employer failed to obtain "sufficient corroboration and verification" of the allegation. But the evidence from Mr Taylor is that the

[3] Mr Taylor did not attend the meeting on 18th March 2010.

complainant had provided a number of details, including the licence plate number of the van that Mr Fifita was driving and a description of the driver; wearing an American sports shirt. And that the driver of the van had cut in front of another vehicle, "jumped" a red light and then cut in front of the complainant's vehicle. When the allegation pertaining to his driving was put to Mr Fifita he simply denied it but did not give any alternative version as to why the complainant was wrong or even possibly mistaken. Given Mr Fifita's response to the driving allegation and in the absence of any tangible alternative evidence or explanation, I conclude that while it would have been prudent to have obtained a written statement from the complainant, given the detail of the information that had been provided, it was reasonable in the circumstances for the employer to act on the information that was before it without further investigation.

[17] Mr Fifita provided evidence to the Authority by way of an explanation regarding the American sports shirt having the number 58 and not 55 on it. But he does not deny wearing the shirt rather than a uniform as required. Mr Fifita also denies driving carelessly and he says that in regard to the failure to obtain a signature for the receipt of one particular delivery to Compass, he says he waited 15 minutes for a supervisor to be available and then could not wait any longer as he had other deliveries to make. But there is no evidence that he gave any such explanation to his employer when the opportunity arose. Furthermore, apart from the fact it is not the role of the Authority to conduct a new enquiry into Mr Fifita's actions, he has not presented any evidence that suggests that the investigation into the latter matter was deficient. The evidence for FCL is that there was more than one occasion when Mr Fifita failed to obtain a signature for produce delivered to Compass and that FCL had been informed that if a signature was not obtained then payment for the goods may not be forthcoming.

[18] I have closely considered all of the evidence, including the fact that Mr Fifita was in receipt of two recent warnings. I have also taken into account the further allegations, as set out in the letter of 25th February 2010, which Mr Fifita failed to provide any mitigating explanation against, and I find that the dismissal of Mr Fifita was the action of a fair and reasonable employer in the all the circumstances.

Determination

[19] For the reasons set out above, I find that:

(1) Mr Fifita was not disadvantaged in his employment by an unjustified action by his employer.

(2) The dismissal of Mr Fifita was not unjustified. He does not have a personal grievance and his claims are dismissed.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority