IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 310/10
5293823

	BETWEEN	ANTHONY ROBERT GROSSART, applicant
	AND	LINFOX LOGISTICS (NZ) LTD, respondent

Member of Authority:	James Wilson
Representatives:	Tony Grossart in person Geoff Bevan for the respondent
Investigation Meeting:	23 April 2010 at Auckland
Submissions received:	23 April 2010 from the respondent.
Determination:	2 July 2010

DETERMINATION OF THE AUTHORITY

Anthony Grossart's employment relationship problem

[1] On 11 March 2010 Tony Grossart was dismissed from his employment as a truck driver with Linfox Logistics (NZ) Ltd (Linfox). Mr Grossart says that his dismissal, and a final written warning which preceded it, were unjustified. Mr Grossart is asking that the Authority order that he be reinstated to his position, that the final warning be rescinded, that Linfox reimburse him for all of the wages he has lost since his dismissal and pay him compensation for the hurt and humiliation he has been caused. Mr Grossart also asks that, if he is reinstated, the Authority order that the company's driver/coach -- JE -- not be scheduled to assess his driving without his prior consent.

[2] In response Linfox say that Mr Grossart was dismissed, after a full and fair inquiry, for serious misconduct i.e. *failing to follow a lawful and reasonable instruction* (failing to attend a meeting) and *for using disrespectful language and/or tone in e-mails to and about Linfox management*. Linfox also say that the final written warning given to Mr Grossart on 17 November 2009 was also justified and was for serious misconduct including:

- *Failing to be at the assigned place of work during work hours without the permission of management.*
- *Absenteeism without approval and notification within the time required.*
- *Refusal or failure to abide lawful and reasonable instructions given by those who are authorized and had a right to do so (relating to the assessment and the absence 6 November)*
- *Inappropriate language in e-mails sent to the company 6 November 2009*

The issues for determination

[3] The issues for determination in this matter are:

- Was the final written warning issued to Mr Grossart justified?
- Was Mr Grossart's dismissal justified?
- If either the final written warning or the dismissal were unjustified what remedies, if any is Mr Grossart entitled to?

[4] In considering these issues it is necessary to determine whether *the actions of the employer (Linfox) and how the employer acted* (in issuing the final warning and dismissing Mr Grossart) were, in the words of section 103(A) of the Employment Relations Act (the Act) *what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action took place.* If they were not then the final warning and dismissal were unjustified and Mr Grossart has a personal grievance against Linfox.

Background events

[5] Before determining whether Mr Grossart was unjustifiably dismissed it is this necessary to briefly outline the events which eventually led to his dismissal.

[6] About a year before Mr Grossart was dismissed he successfully applied for the position of driver/coach. One of the unsuccessful candidates, JE , another driver, wrote to the company's management saying, among other things, that as far as he was concerned *the appointed applicants have no driving skills they are just steering wheel attendants.* For reasons which are a little unclear a copy of this letter was given to Mr Grossart.

[7] Over the next few months Mr Grossart withdrew from the position of driver/coach and returned to being a driver. JE was subsequently appointed as driver/coach.

[8] On or about 5 November 2009 Mr Grossart was advised that he was to be assessed by JE. There is some dispute regarding how Mr Grossart learned of this assessment but in any event Mr Grossart immediately requested that the driving assessment be undertaken by one of the other three qualified coaches because he had been offended by JE's comments in the letter several months before. Mr Grossart's request was referred to Mr Louis Buckingham, Linfox's Safety and Compliance Manager. At about 8.30 am on Friday, November 6, 2009 Mr Buckingham wrote to Mr Grossart saying:

> *This e-mail will be short and final.*
> *There will be no further discussion on this from me as my clear view and instruction is below.*
> *The company has designated and trained employees who are driver coaches and has assigned tasks for them to complete.*
> *All Linfox Heavy Vehicle Operators are to be assessed whenever the company decides to do so, so at least annually and preferably more frequently.*
> *You will be assessed by whoever is assigned to you at the time. In this case for scheduling reasons it is, and will remain, J E.*
> *Further your assessment is to continue on the date as planned.*
> *Non conformance with this may be viewed as Serious Misconduct, i.e. refusal to obey a lawful instruction.*

Mr Grossart replied to Mr Buckingham's e-mail at 10:45 am and copied his e-mail to several other Linfox managers. In this e-mail Mr Grossart said:

> *A pissing competition it is then.*
> *I have not refused to be assessed, only refused to be assessed by JE, and have outlined my concern that putting us together has potential to become an inflammatory situation.*
> *Despite this, my employer states that I have no choice but to be put in this situation today, and if I do not agree, I will face disciplinary proceedings for serious misconduct.*
> *As you have made your position quite clear, I have no choice other than to consider myself suspended (paid of course!), effective immediately, until this issue can be resolved appropriately, as I am not prepared to put myself in the situation my employer should be avoiding, frankly!*
> *So yet again, I am forced to fight the "big fight", just to get a little common sense!*
> *I recommend urgent mediation is the most logical medium to address this issue, but please, feel free to take your time!*

Mr Grossart says that he was so apprehensive and incensed about going to work that day that he felt sick. He says that he felt there was no point in attending work and that he had made his position clear. Linfox managers apparently made several unsuccessful attempts to contact Mr Grossart, and left telephone messages for him. Mr Grossart did not attend work that day.

[9] Following a formal disciplinary investigation Linfox issued Mr Grossart with a final written warning (see paragraph [2] above) to remain on his file for 12 months. In late January 2010 Mr Grossart filed a statement of problem in the Authority seeking to have the final written warning rescinded and the Authority order that the company not schedule JE to conduct his driving assessment. In its statement in reply Linfox advised that it was willing to attend mediation but that it had initiated a review of Mr Grossart's final warning by an independent manager and requested that mediation be delayed until after that review was complete. On 12 February 2010 the parties were referred to mediation.

[10] On 24 February 2010 Mr Nick Snelling, Linfox's Operations Manager - Retail arranged for a handwritten note to be left at the dispatch office, inviting Mr Grossart to attend a meeting with Mr Snelling and Ms Sue Griffin, Linfox 's HR Manager. In response Mr Grossart e-mailed Mr Snelling at 1:41 am on 25 February saying:

> *I understand that I am "required" to attend a meeting today at 12:15 pm with yourself, and Sue Griffin?!*
> *If this is in relation to the matter now before the ERA, the matter has been referred to mediation by the ERA, and in light of how I have been "dealt with" by the company so far in this matter, I would not be comfortable attending any discussion held outside that forum.*
> ….…
> *If this meeting is not in relation to that matter, I will naturally require some information as to what it is about, and suitable time to prepare and arrange my support, which will not be possible today.*
> *Please advise.*

Mr Snelling responded by e-mail at 10:17 am:

> *Tony*
> *Thanks for your response; however I am disappointed by the tone of your e-mail.*
> *I accept, particularly in the circumstances, that you will want to know what the meeting today is about (and clarify that it is not about the matters before the ERA). I want to meet with you today to discuss the way in which you raised the incidents relating to the support poles on trailer unit Q.103, and particularly your disrespectful attitude towards Linfox's compliance manager in your e-mail of 19 February 2010. I intended to send a supporting note regarding the nature of the meeting (in conjunction with the note I left with the dispatchers), however other priorities prevailed last night.*
>
> *I am requiring you to attend. I am not impressed with your use of quote marks around the word required in the first paragraph of your e-mail early this morning. That signals to me that you challenge our ability to require you to attend meetings at times we set.*

If I have concerns that I wish to raise with you, and I ask you to be somewhere at a certain time, you must attend. To be clear, this meeting is not a disciplinary meeting. You will not be issued any formal warnings but I wish to clarify my expectations and instructions with you. After the meeting I would do that in writing so there was no uncertainty.

The law does not give you the right to have a support person for that type of meeting, or ask for a suitable time to prepare. You simply must attend when the company asks you to. We cannot manage a business if we have employees who refuse to meet with us to hear our instructions. In contrast, if disciplinary action is possible, we will of course give you the time to arrange support and prepare.

…

We are going to undertake an independent review of your final warning. I strongly encourage you again to participate in that review with an open mind. However at the moment you remain on a final warning which was given (in part) because you refused to follow instructions. Again I need to be clear that failure to attend this meeting may be construed as serious misconduct and may result in your dismissal.

I look forward to seeing you at 12:15 PM today…

Kind regards

Nick Snelling

To ensure that Mr Grossart was aware that the meeting was to go ahead Mr Snelling sent him a text at 10:21 am saying:

Tony, mtg today is not related to the issue in front of mediation, it is regarding your conduct towards management of late. I require you to attend.

Nick

At 10:57 a m Mr Grossart again e-mailed Mr Snelling saying:

I cannot believe what I have just read.

So we are clear, I will NOT be at your meeting at 12:15 PM, and I STRONGLY suggest you take legal advice from Mr Bevan BEFORE you sack me.

This just gets better and better!

"Respectfully"

Tony Grossart

12 15 pm - Mr Snelling to Mr Grossart;

Tony,

Your reply is unacceptable.

Please either advise me why you will not attend, or confirm your attendance.

I repeat that you might be dismissed if you do not attend this meeting without good reason.

I also regard your reference to "respectfully" as intentional, flagrant and unnecessary disrespect. In light of my comments below, I view this seriously.

You should be aware that the company is taking legal advice about all aspects of this matter.

I look forward to hearing from you urgently.

Mr Grossart did not attend the meeting as requested and at 1:17 am on February 26 e-mailed Mr Snelling:

Nick,

I will tell you what is unacceptable.

What is unacceptable, is being told by a senior manager that I MUST attend a meeting outside my normal hours of work, at short notice, and with no opportunity for a support person to attend, and only being told what the meeting is about two hours before hand, and only after I asked!

THAT is unacceptable!

Just who do you people think you are, that you can make up the rules as you go along?

[11] On 26 February 2010 Mr Snelling wrote to Mr Grossart inviting him to attend a meeting on Wednesday 3 March and advising that the purpose of the meeting was to *discuss his failure to attend the meeting on 25 February* and his *use of disrespectful language and/or tone in e-mails to and about Linfox management.* The letter also advised Mr Grossart that:

> *We will not make any decision until we have had an opportunity to fully consider your views. However, we are required to inform you that a possible consequence of this meeting could be disciplinary action up to and including dismissal.*
>
> *As well as myself, Sue Griffin will be present at the meeting. You have the right to bring a representative to the meeting and we encourage you to do so.*

[12] On 3 March 2010 Mr Grossart attended the meeting as requested. He was accompanied by his wife. Following the meeting Mr Grossart was advised that a further meeting would be held on Monday 8 March to allow the company time to consider his explanations and to formulate a view on what action should be taken. At the end of the meeting on 8 March in the company handed Mr Grossart a letter advising him that they had reached a preliminary decision to terminate his employment for serious misconduct. This letter also noted that it had come to the company's attention that Mr Grossart had set up a website on which he was making derogatory comments about Linfox management staff and practice. However the company also a suggested that:

> *Before we finalise our decision we invite you to attend mediation, in the hope that we can find a better way of resolving this situation. This will also have an opportunity for us to complete the review of your final warning.*

In a subsequent e-mail Ms Griffin advised Mr Grossart *that mediation will need to take place this week because of Mr Snelling's departure,* that a Labour Department mediator was not available until 13 April and suggesting that company pay for a private mediator if required.

[13] On 9 March Mr Grossart advised that he was happy to attend mediation in mid-April and remain suspended on full pay until that date. He also indicated that should he be dismissed in the meantime he would immediately challenge that decision in the Authority. Mr Snelling then advised Mr Grossart that if mediation was not able to be held before his departure on an overseas trip the company would go ahead and make a final decision on Mr Grossart's dismissal. Mr Grossart immediately advised that he was not prepared to attend mediation outside of the Department of Labour.

[14] On 11 March 2010 the company wrote to Mr Grossart dismissing him effective immediately.

Discussion and determination

[15] It is well established that employees have an obligation to comply with any lawful and reasonable instruction of their employer. In his submissions on behalf of Linfox Mr Bevan has cited the test proposed by Professor Szakats in his text "Introduction to the Law of Employment" (second edition). That test suggests that an instruction given will be lawful and reasonable if it

- is not illegal in the sense of requiring the employee to perform any act contrary to the law;
- is within the scope of the employee's contractual obligations; and
- does not demand the performance of any possibly dangerous task.

Mr Bevan points out that this test has been applied by the Employment Court and the Authority in a number of cases including *Northern Industrial District Distribution Workers etc IUOW v. The Whenuapai Bus Company 1980 Ltd* [1989] 1 NZILR, 612. I accept Mr Bevan's submission that it is appropriate to use Professor Szakats' test when considering whether Mr Grossart had legitimate grounds for refusing the instructions given to him.

Was the final written warning justified?

[16] Mr Grossart could have been in no doubt that his employer was instructing him to submit to the driving test under the supervision JE and that to refuse to do so left him open to the risk that the company would take disciplinary action. The instruction was not illegal and making himself available for assessment was clearly within Mr Grossart's contractual obligations. Despite Mr Grossart suggesting that requiring him to undertake the test with JE was *nothing more than a malicious power play* and

completely contradicted the safe driving practices vigorously insisted on by the company I do not accept that Mr Grossart was being asked to perform *a possibly dangerous task.* He is an experienced and professional driver, well used to dealing with all manner of driving hazards. I must conclude that the instruction that Mr Grossart undertake the driving assessment by JE was both lawful and reasonable.

[17] Following his refusal to undertake the assessment the company carried out a proper disciplinary investigation before deciding to issue Mr Grossart with a final written warning. Contrary to Mr Grossart's assertion that this warning was unjustified it is arguable that in fact the Company behaved leniently in not dismissing Mr Grossart on that occasion. **The final written warning issued to Mr Grossart was what fair and reasonable employer would have done in all circumstances and, in terms of section 103A of the Act, justified. Mr Grossart does not have a personal grievance in respect to the final written warning.**

Was Mr Grossart dismissal justified?

[18] Again Mr Grossart could not have been in any doubt that in refusing to attend a meeting with Mr Snelling he was risking dismissal. Even after Mr Grossart's belligerent response to the original request Mr Snelling, tolerantly in my assessment, wrote to Mr Grossart explaining the reason for the meeting, accepting his reluctance to attend without information, confirming that the meeting was not about the matters awaiting mediation (the final warning) and not a disciplinary meeting, and reminding Mr Grossart that he was on a final warning and that refusal to attend could result in dismissal.

[19] The request, and subsequently the instruction, that Mr Grossart attend the meeting was certainly not illegal and, especially once the nature of the meeting was explained, was within Mr Grossart's contractual obligations. Mr Grossart was not being asked to undertake a possibly dangerous task. The instruction to attend the meeting on 25 February was lawful and reasonable.

[20] Once again Linfox carried out a meticulous disciplinary investigation before making a preliminary decision to dismiss Mr Grossart. They then offered to discuss the matter under the chairmanship of a neutral mediator. Regrettably Mr Grossart's somewhat surprising refusal to accept the company's offer to pay for a private mediator resulted in the company proceeding with his dismissal without the benefit of mediation It should be noted however that the parties subsequently attended mediation provided by the Department of Labour but without success.

[21] Mr Grossart had already received a final warning for refusing to obey a lawful and reasonable instruction. I have found that that warning was justified. He then refused a further lawful and reasonable instruction knowing the potential consequences. Linfox carried out a full and fair investigation before deciding that dismissal was the appropriate sanction**. Mr Grossart's dismissal *was what a fair and reasonable employer would have done in all circumstances* and was therefore justified. Mr Grossart does not have a personal grievance in respect to his dismissal.**

Summary

[22] By way of summary of the findings set out above: I have found that **the final written warning issued to Mr Grossart, and his subsequent dismissal, were justified and he does not have a personal grievance against Linfox. It follows that he is not entitled to any of the remedies he seeks.**

Costs

[23] Costs are reserved and the parties are requested to attempt to resolve this issue between themselves in the first instance. If they are unable to do so, Linfox may file and serve a submission in respect to costs within 28 days of the date of this determination. Mr Grossart will then have 14 days in which to file and serve a response.

James Wilson
Member of the Employment Relations Authority