

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 65/10
5131065

BETWEEN

PETER REWITI
Applicant

AND

LINFOX LOGISTICS (NZ)
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: A McKay, advocate for applicant
G Bevan, counsel for respondent

Investigation Meeting: 16 September 2009

Submissions received: 21 and 25 September 2009

Additional information provided: 18 December 2009, 19 and 26 January 2010

Determination: 12 February 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Peter Rewiti says his former employer, Linfox Logistics (NZ) Limited (“Linfox”) dismissed him unjustifiably. The stated grounds of dismissal concerned Mr Rewiti’s misuse of a company-provided hand held cell phone, withholding of information and misleading a company representative during an investigation into allegations of theft, and failing to follow a lawful instruction regarding his continued use of the cell phone.

[2] In addition Mr Rewiti believes the dismissal was for stealing, and says he did not steal anything.

[3] Linfox says the dismissal on the grounds it gave was justified, and that Mr Reweti was not dismissed for stealing.

[4] Linfox also seeks an order that Mr Reweti pay to it the sum of \$779.18, being the cost of the personal calls made on the company cell phone.

Background

[5] Mr Reweti's permanent employment with Linfox began on 10 March 2008, continuing from a temporary engagement through an employment agency. He was employed as a vehicle operator under a written employment agreement. His duties were to deliver orders to customers of Carter Holt Harvey ("CHH"), and he was based on the CHH site.

[6] The truck he used was equipped with a mobile phone fixed permanently in the driver's cab. However the fixed phone was faulty, and another employee provided him with a hand held cell phone for his use. Company policy was that the phones be used for work purposes only, and were not for personal use.

[7] On 22 May 2008 it came to the attention of Jamie Matangi, who at the time was the Linfox manager responsible for the CHH site, that the April account for the cell phone Mr Reweti was using included a high charge for non-Linfox calls and a high charge for mobile internet game playing and ring tones. Mr Matangi spoke to Mr Reweti about the matter the same day, advising that the cost of personal usage would be deducted from his wages and instructing that the phone be returned the next morning.

[8] Another matter arose on Friday 23 May 2008. Allegations that Mr Reweti had been involved in selling building supplies stolen from CHH came to Mr Matangi's attention. There was to be an investigation into the theft, and Mr Matangi arranged to meet with Mr Reweti at the end of his daily run.

[9] The meeting was preliminary in nature. It was also attended by Louis Buckingham, Linfox' safety and compliance manager. Mr Buckingham advised Mr Reweti of the allegations, and that private investigators had been engaged and would

wish to speak to him that afternoon. He was asked to wait. The private investigators telephoned shortly afterwards to reschedule the meeting, and Mr Reweti went home.

[10] While waiting for the private investigators Mr Matangi had taken the opportunity to ask Mr Reweti to return the cell phone. Mr Reweti replied he did not have it with him, so Mr Matangi instructed him to return it the following Monday, 26 May. Mr Reweti was instructed to switch it off, and not use it, in the meantime.

[11] The private investigators met with Messrs Matangi and Buckingham on 26 May during which they sought, among other things, records for the company phones Mr Reweti used. Although the records had been sought for other reasons they showed a number of calls had been made from the hand held cell phone during the preceding weekend despite the instruction that it be turned off. The May accounts also showed that earlier in May the very high usage for non-Linfox calls and for internet games had continued.

[12] Mr Reweti met with the private investigators on 28 May. The investigators reported the outcome to Mr Buckingham on 29 May, and provided their handwritten notes of the interview. They believed Mr Reweti had lied about knowing, contacting or associating with a CHH employee also under investigation in respect of the thefts. There was a second matter about which Mr Reweti was thought to have lied, but it was not a ground for dismissal and I do not refer further to it.

[13] At or about the same time Mr Matangi spoke to Mr Reweti about arrangements for a second drug screening test. Mr Reweti had failed a pre-employment screening test. At the time Mr Matangi had accepted that drugs were no longer part of Mr Reweti's life but had advised that a further test would be necessary. Mr Matangi said that, during the conversation regarding the necessary arrangements, Mr Reweti advised he would fail the test because stress at home had caused him to have 'a smoke' of cannabis.

[14] On the basis of the material then available, Messrs Matangi and Buckingham decided to begin a disciplinary investigation in respect of Mr Reweti's alleged: misuse of the cell phone; provision of misleading information to the private investigators; conduct in the course of the investigation into the theft; and misuse of class C drugs.

The suspension

[15] On 29 May 2008 Mr Matangi handed Mr Reweti a letter of the same date, advising Mr Reweti he was suspended on full pay pending an investigation into the above allegations of serious misconduct. The letter sought a meeting the next day, which Mr Reweti did not attend. A similarly worded letter dated 30 May sought a rescheduled meeting on 4 June.

[16] Mr Reweti raised a personal grievance concerning his dismissal in a letter dated 20 June 2008. Since the letter did not make any mention of the suspension, it cannot be said to have raised a grievance in that respect. While the statement of problem recorded the fact of suspension, it did not correctly record the reason for the suspension and did not refer to the matter as a grievance in its own right. It referred only to the unjustified dismissal. The contents were not adequate to identify to the Authority that a separate grievance had been or was being raised in respect of the suspension. Finally, nothing in Mr Reweti's written statement of evidence indicated he was pursuing the suspension as a separate grievance.

[17] In short, nothing before the Authority showed a grievance had been or was being raised in respect of the suspension. Nevertheless, it was addressed in both parties' submissions as if it had been raised and was properly before the Authority. I assume from this that the matter had at least been discussed between the parties. Otherwise I would have declined to address it on the ground that no leave to proceed with a grievance in respect of the suspension had been sought or granted.

[18] If I accepted that a grievance in respect of the suspension was properly before the Authority, and if I found the suspension amounted to an unjustifiable action on the part of Linfox (which is unlikely), the evidence about Mr Reweti's conduct at the time means I would make no order for a remedy. Accordingly there will be no order.

The decision to dismiss

1. The employer's investigation

[19] The disciplinary meeting went ahead on 4 June 2008.

[20] Mr Reweti was very concerned to address allegations of theft he believed were being made against him, but the investigation into the theft had not been completed and Mr Reweti was not being asked to address any allegations of theft. Mr Buckingham explained very carefully that the purpose of the meeting that day was to address the concerns identified in the letters, namely that Mr Reweti:

- a. misused the company phone provided to him;
- b. provided materially misleading and inaccurate information during the investigation of the thefts at CHH;
- c. undermined and damaged Linfox' relationship with CHH by his conduct and his inconsistent statements during that investigation, to the point that his removal from the CHH site had been sought; and
- d. had admitted using drugs.

[21] Despite this explanation Mr Reweti insisted on addressing his view that he was being accused of theft. The decision to take that approach was his. There was no lack of clarity in the explanation Mr Buckingham gave regarding the purpose of the meeting.

[22] During the meeting Mr Reweti admitted responsibility for the misuse of the cell phone and offered to repay the necessary amount.

[23] The alleged lies or misleading statements arose out of the private investigator's interview notes. They concerned in particular whether Mr Reweti ever telephoned the CHH employee and whether he had an association with the employee outside work.

[24] Relevant passages from the interview notes were put to him, showing first that he said he did not telephone the employee at home and minimised the frequency of other calls. Later passages set out that the phone record, showing otherwise, was put to him. His response to further questioning on the matter was, in effect, that he did not keep records of his calls.

[25] The notes showed there were also exchanges about whether the employee had been to Mr Reweti's house. At first Mr Reweti said the employee had never been to

his house and did not know where he lived. When a statement from the employee concerning a visit to collect some oysters was put to him, he said he did not know how the employee had obtained his address, was not at home at the time of the visit and his wife must have dealt with the matter. When it was put to him that the employee said he was the one who had made the arrangement to collect the oysters, Mr Reweti did not deny it saying only that he was not at home when the employee called at his house and he did not know of the visit. When it was put to him that the employee said he was present when the employee visited his home, he denied it.

[26] Mr Reweti's answer to these concerns during the disciplinary meeting was to say he did not lie, and that the notes were inaccurate. He did not identify the inaccuracies but focussed again on his concern that he was being accused of theft. No further progress was made on that matter.

[27] As to the final concern about possible misconduct, when he was asked during the disciplinary meeting about his drug use, Mr Reweti said it had occurred during the weekend, and because of stress at home.

2. The decision to dismiss

(a) the alleged misconduct

[28] The disciplinary meeting was adjourned while Messrs Buckingham and Matangi considered what had been said, and what action to take.

[29] They decided not to take the concern about drug use any further. They accepted that the use had been outside work and had not impacted on Mr Reweti's work. In addition the screening test had returned a negative result.

[30] The admitted and plainly excessive private use of the hand held phone, as well as the conclusion that misleading statements had been made to the private investigator, were considered serious.

[31] Further to the damage to Linfox' relationship with CHH, Mr Matangi said that he was in communication with a manager at CHH during the investigation into the

theft. That manager saw the private investigators' notes, and the passages of concern, expressed disappointment that an employee would conduct himself as Mr Reweti had, and asked that Mr Reweti be removed from the site. He told Mr Matangi the matter raised questions about the type of employee Linfox employed and said his own managers were 'across the issue'. As Mr Matangi said in evidence, 'we undertook damage control'. The CHH contract was a large one, subject to quarterly reviews, and the incident was likely to be brought up at the next review.

[32] These matters, together with Mr Reweti's brief period of service as their own employee, led Messrs Buckingham and Matangi to decide dismissal was appropriate.

[33] Redeployment was not seen as an appropriate alternative to dismissal. This was in part because Mr Reweti's licence was a class 4 licence. Only a small proportion of the Linfox fleet were class 4 trucks, few of those were based in Auckland, and the Auckland based trucks were already fully utilised. Accordingly there were no opportunities for redeployment. Mr Reweti pointed out that he had worked at other Linfox sites in South Auckland during his temporary engagements at the company, and had done so from time to time after his permanent appointment. I accept, however, that this was on a relatively ad hoc basis and no alternative full time permanent employment as a class 4 driver was available.

[34] Mr Reweti also said he could have been assisted to obtain a class 5 licence, as the company had done for other staff members. Regarding the latter, while plans to implement a class 5 training programme were made during a shortage of class 5 drivers, no formal retraining programme was put into effect. Mr Matangi said further that Linfox usually looks for a minimum of 3 – 5 years' experience when recruiting class 5 drivers. Retraining Mr Reweti to the required standard would have required a considerable ongoing investment in terms of time and resources.

[35] Even so, the over-riding consideration was a loss of trust and confidence in Mr Reweti because of his conduct. This affected the decision not to redeploy him.

(c) the decision is conveyed to Mr Reweti

[36] The disciplinary meeting was re-convened on 5 June 2008. Mr Buckingham advised of the conclusions that Mr Reweti had misused the cell phone, and continued to use it during the weekend of 24 and 25 May despite the instruction not to do so. He also advised of the conclusion that Mr Reweti had given false or misleading information during the investigation into the theft allegations, and that this had caused both Linfox and CHH to lose trust in him. Further, CHH had advised they no longer wanted Mr Reweti on its premises.

[37] Because he still believed he was being accused of theft, Mr Reweti became aggressive and angry and walked out of the meeting. As a result Linfox was unable to complete arrangements for the repayment of money owed on the cell phone account, which had been under discussion.

Whether the dismissal was justified

[38] The test of the justification for a dismissal is whether the dismissal was the action a fair and reasonable employer would have taken in all the circumstances at the time.

(a) misuse of the cell phone

[39] While I accept that the personal use of the cell phone was excessive, I did not understand Linfox to dispute that Mr Reweti's children were responsible for much of the misuse. By the same token, and despite the exchanges about whether Mr Reweti was aware of company policy on personal use of the phone, Mr Reweti was aware and admitted that the use made of it was unacceptable.

[40] Nine further calls were made during the weekend of 24 and 25 May. All were very brief, but they were made in breach of the instruction that the phone not be used. Mr Reweti admitted this.

(b) misleading statements to the private investigator

[41] On a bare reading of the private investigator's interview notes Mr Reweti's answers to the relevant matters were capable of appearing at least evasive, and were

of concern. Mr Reweti's explanation amounted to a denial that the notes were accurate. In effect he denied saying what he was recorded as saying. In the circumstances at the time, Linfox was entitled not to accept the denial.

(c) conclusion

[42] Linfox had reasonable grounds for concluding that the misconduct relied on occurred, and amounted to serious misconduct. It conducted a fair and reasonable investigation prior to reaching those conclusions, and balanced fairly Mr Reweti's length of service and whether redeployment was an appropriate alternative.

[43] For these reasons I find the dismissal was justified.

[44] I repeat for Mr Reweti's benefit that none of this amounts to an accusation or a finding that he was involved in any theft.

Repayment of phone charges

[45] It was common ground that the amount owed was \$779.18. Mr Reweti agreed to repay it. I am unaware of whether any payment has been made.

[46] In the event that no payment has been made, or payment has not been made in full, Mr Reweti is ordered to pay to Linfox the sum of \$779.18, or any unpaid balance of that amount.

Summary of orders

[47] Mr Reweti is ordered to pay to Linfox:

(a) \$779.18, or any unpaid balance of that amount.

Costs

[48] Costs are reserved.

[49] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority