

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 59/09
5107507

BETWEEN NICK CORLETT
 Applicant

AND TRANSFIELD SERVICES
 (NEW ZEALAND) LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Ian Davidson, advocate for Applicant
 Gillian Service, counsel for Respondent

Investigation Meeting: 1 October and 12 December 2008

Submissions Received: 23 January, 10 and 20 February 2009

Determination: 23 February 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated a final warning given to Mr Nick Corlett by his employer Transfield Services (New Zealand) Limited, and also the summary dismissal of Mr Corlett merely two weeks later.

[2] He raised grievances about the warning and dismissal, complaining that both actions of Transfield were unjustified.

[3] He seeks remedies available under the Employment Relations Act 2000, where it has been determined by the Authority that an employer has acted unjustifiably and caused disadvantage to the employee's employment or conditions of employment, or has unjustifiably dismissed an employee.

[4] Before fully embarking on an investigation by the Authority, the parties attended mediation and attempted through that process to resolve the employment relationship problem.

[5] Mr Corlett was employed by Transfield as a Horticulturist to manage waste under a contract the company had with EnviroWaste Services Limited.

[6] As Mr Corlett has described it, his job was essentially self managing, requiring him to be responsible for garden and park maintenance. In the course of his work he needed to collect waste and take it in his work vehicle to a Transfer Station at Pukekohe operated by EnviroWaste.

[7] There is no dispute that Mr Corlett went to the Transfer Station on Sunday 22 April 2007 to leave material which had accumulated from his work. He was driving his Transfield vehicle.

[8] Mr Corlett's visit there led EnviroWaste to write a letter of complaint to Transfield about Mr Corlett's conduct, particularly his behaviour towards an employee of EnviroWaste who was operating the plant that day.

[9] The complaint was about the failure of Mr Corlett to co-operate with instructions given by the employee and about swearing, including addressing "*fuck*" at him several times. EnviroWaste's letter referred to a complaint made previously about Mr Corlett. The letter concluded with advice that because he had twice gone to the Transfer Station and failed to follow rules, EnviroWaste had no option but to ban Mr Corlett from entering there again.

[10] In response to the complaint and ban Transfield's Contract Manager, Mr Mark Roberts, and another Transfield manager, went immediately to the Transfer Station to investigate. They spoke to the author of the letter and to the EnviroWaste employee who had allegedly been abused by Mr Corlett.

[11] Transfield then wrote to Mr Corlett, requesting that he attend a meeting on 14 May 2007 to discuss the complaint and his ban from the Station. The letter signed by Mr Roberts advised of several specific allegations against Mr Corlett.

[12] He was recommended to bring a support person to the meeting and was expressly advised that the issues to be raised were considered serious and could result in termination of his employment.

[13] At the request of Mr Corlett's representative, an organiser of his union, Mr Roberts agreed to reschedule the meeting to a week later on 21 May 2007.

[14] At the meeting Mr Roberts put to Mr Corlett the allegations against him arising from EnviroWaste's letter of complaint. Mr Corlett took the opportunity to give an explanation for his behaviour during the visit to the Transfer Station. Amongst other things, he said his actions had been justified because of concerns he had had about the safety of people using the Transfer Station.

[15] His explanation was not accepted by Mr Roberts, who decided that the complaint against Mr Corlett had been substantiated and that his conduct towards the Transfer Station operator was misconduct serious enough to warrant the issue of a final written warning. Although regarded as well founded, a particular allegation of misusing his work vehicle was not relied on in giving the warning.

[16] Mr Roberts delivered the final warning to Mr Corlett at the end of the meeting and told him not to go back to the Transfer Station. Written confirmation of the warning was given the following day.

[17] I accept the evidence of Mr Roberts, corroborated by others who were present at the 21 May disciplinary meeting, that he told Mr Corlett if he disobeyed EnviroWaste's ban it could possibly result in all Transfield employees being banned from using the Transfer Station. I also accept that Mr Roberts explained to Mr Corlett that as he was on a final written warning, breaching the ban would lead to instant dismissal. Further I accept that Mr Roberts advised Mr Corlett of alternative arrangements that would be made for him to dispose of waste, so that he could carry on doing his work without needing to go the Transfer Station.

[18] I find that the advice and instruction given by Mr Roberts to Mr Corlett at the end of the disciplinary meeting on 21 May 2007 was then reiterated in large part by the Employee Relations Manager of Transfield, Ms Carole Moodie, who had been present during that meeting. Some of what she said was in response to Mr Corlett disputing the final writing warning and indicating that he would visit the Transfer Station to sort out the problem and clear his name.

[19] I accept that Ms Moodie emphasised to Mr Corlett that as long as he obeyed the instruction to stay away from the Transfer Station and was not involved in other unacceptable incidents, he would have no difficulty.

[20] Despite the ban by EnviroWaste from going to its Transfer Station and despite the final written warning Mr Corlett had received, and notwithstanding the express instructions and advice of Mr Roberts and Ms Moodie, he went to the Transfer Station. On 28 May 2007 he drove there in his Transfield vehicle wearing his Transfield company uniform.

[21] Predictably that visit led to a further complaint, made the next day. In a letter EnviroWaste advised Transfield that Mr Corlett was not welcome at the site due to the ban placed earlier on him. EnviroWaste noted that Mr Roberts had previously given assurances that Mr Corlett would not go to the Transfer Station again.

[22] EnviroWaste's letter of 29 May 2007 outlined Mr Corlett's actions during his latest visit and the objection that was raised with him then about his being there, and also the instruction given to him to leave which he had not complied with. The letter concluded with advice that any further disruptions from Mr Corlett might result in Police intervention. Transfield was asked to discuss the complaint with Mr Corlett and to make clear the resolve of EnviroWaste not to tolerate any further behaviour as had been complained of.

[23] Mr Roberts required Mr Corlett to attend a meeting to address the new allegations of misconduct.

[24] Again Transfield acceded to a request made on his behalf to defer a meeting, and the 31 May meeting was rescheduled to 5 June 2007. Transfield also offered Mr Corlett paid leave over the day before the meeting to allow him to arrange for a representative and prepare for it. He had already been allowed a half day for that purpose on 30 May.

[25] Over the weekend, on 2 June, Mr Corlett rang Mr Roberts to request an even further deferment of the meeting, suggesting 26 June as the new date. He mentioned his mother in law's illness, which had worsened and which could require him and his wife to leave Auckland to visit her.

[26] The request for an adjournment of the meeting was considered but turned down by Mr Roberts, as he believed that Mr Corlett had provided excuses for the rescheduling that were not genuine and that the three week delay he sought was an indication that Mr Corlett had failed to grasp the seriousness of the situation or was attempting to downplay that.

[27] On 5 June at the notified time and place of the meeting, two union representatives were present on behalf of Mr Corlett but he was not there. Mr Roberts had had no further contact with Mr Corlett since advising him that the meeting was going to proceed. A few minutes after the notified start time Mr Roberts received a phone call from Mr Corlett who gave several reasons why he was not at the meeting. I accept Mr Roberts evidence that the reasons given by Mr Corlett were that he was getting legal advice, that he was on annual leave and that his mother in law was ill.

[28] After Mr Corlett's call there was brief discussion before Mr Roberts decided the meeting would proceed without Mr Corlett.

[29] Mr Roberts concluded that Mr Corlett's actions amounted to serious misconduct, as they had occurred only seven days after a final written warning had been given and notwithstanding EnviroWaste's ban from visiting its Transfer Station known to Mr Corlett.

[30] Mr Roberts concluded that Mr Corlett had flagrantly disregarded his employer's instructions, as well as those of its client or customer Enviro Waste, and had thereby destroyed the trust and confidence Transfield needed to have in him.

[31] A decision was made at the conclusion of the meeting on 5 June to terminate Mr Corlett's employment immediately. He was told of it by Mr Roberts over the telephone shortly afterwards and given a letter the following day confirming the dismissal.

[32] The grounds for the dismissal were expressed in the letter to be;

Deliberate disobedience of a lawful and reasonable instruction.

Unacceptable behaviour towards an EnviroWaste operator initiated by Mr Corlett.

Acting to the detriment of Transfield's business, and bringing the company into disrepute.

Making a false entry on a timesheet.

[33] Transfield concluded the dismissal letter by stating that Mr Corlett's serious misconduct had irreparably damaged the company's trust and confidence in him.

[34] On 5 June after his dismissal, Mr Corlett was given a Trespass Notice taken out by EnviroWaste as the occupier of the Transfer Station. The notice required Mr Corlett not to enter those premises for two years.

Justification under s 103A of the Act

[35] Having regard to the evidence and the legal submissions made on behalf of the parties, the Authority must determine whether the final warning given to Mr Corlett on 21 May 2007 was justified and whether his dismissal on 5 June 2007 was justified.

[36] As provided by s 122 of the Employment Relations Act, the Authority is not prevented from determining that a personal grievance is of a type other than that alleged.

[37] The legal test of justification to be applied by the Authority is provided by s 103A of the Act. How that test may be met was explained by the Employment Court in *Air New Zealand Limited v. Hudson* [2006] 3 NZELR 155.

[38] In its decision the Court noted that under s 103A justification must be determined on an objective basis, the Authority being required to judge all of the relevant circumstances as they were at the time the action occurred.

[39] Accordingly, the Authority must objectively assess whether Transfield's actions and how Transfield acted in relation to the final warning given to Mr Corlett and to his dismissal a short time later, were what a fair and reasonable employer would have done.

The final warning

[40] In principle a final warning, or any disciplinary warning, can amount to a disadvantage in employment or to the conditions of employment of an employee. But to found a sustainable claim of grievance the disadvantage must also be one that is caused by an unjustified action of the employer.

[41] In this regard the Authority determines that Transfield was justified in giving Mr Corlett the ultimate warning, as it did on 21 May 2007 at the conclusion of the disciplinary meeting.

[42] I find that the decision to give the warning was reached only after Mr Roberts and others of Transfield management had thoroughly enquired into the complaint received from EnviroWaste. Their investigation included a visit to the plant on the same day the complaint was received, where they spoke to the manager and to the plant operator who had complained of being verbally abused by Mr Corlett.

[43] The conduct of Mr Corlett in speaking and acting towards that employee as he was found by Transfield to have done, was all the more serious because the operator was an employee of a client or customer of Transfield, and the company was also naturally concerned about damage to its business reputation. Also relevant is the fact that Transfield considered it a possibility the ban on Mr Corlett might be applied to others employed by it.

[44] Transfield management had viewed for itself and had found out from EnviroWaste what the operating conditions had been at the Transfer Station during Mr Corlett's visit. Transfield had put itself in a position to decide whether Mr Corlett's conduct may have been justified by any concerns he had genuinely held about safety. The rejection of Mr Corlett's explanation in this regard was therefore reasonably open to Transfield.

[45] I find it was a reasonable conclusion of Transfield that Mr Corlett's conduct in relation to the employee at the EnviroWaste Transfer Station amounted to serious misconduct. Transfield investigated that conduct by speaking to the people most directly involved, including the EnviroWaste operator himself. Transfield had then had a meeting with Mr Corlett, on notice, with an opportunity given for a representative to be present, to discuss with him the information it had been given by EnviroWaste and to hear Mr Corlett's explanation.

[46] I consider that Transfield gave that explanation due weight with an open mind before concluding that the complained of conduct was likely of have occurred.

[47] It is clear that from previous interaction with Mr Corlett the decision maker, Mr Roberts, was wary and distrustful of him. He was regarded as being tricky to deal

with, although Transfield had no complaints about Mr Corlett's work performance as a Horticulturalist.

[48] I find it unlikely that Mr Roberts made any decision about disciplinary action according to an agenda to see Mr Corlett dismissed. Care was obviously taken by Mr Roberts to have other managers from Transfield involved in the process as well as Mr Corlett's union representatives, and I accept that Mr Roberts was careful to consult people such as Ms Moodie and others before reaching his decisions.

[49] In his evidence Mr Corlett acknowledged that he had "*signed up*" to Transfield's written House Rules that were part of his collective employment agreement. He acknowledged that the definition of serious misconduct at clause 2.1 (f) of those Rules included the following:

Intimidating, harassing or assaulting other employees, customers or clients or members of the public while travelling to and from a work site in a company vehicle or while at a work site.

[50] The House Rules also stated that the actions or conduct defined in the rules as "*Serious Misconduct*" could result in instant dismissal.

[51] I conclude that Transfield's actions and how Transfield acted in issuing the final warning were what a fair and reasonable employer would have done in all the circumstances at the time that the action occurred.

[52] Therefore the determination of the Authority must be that Mr Corlett has no sustainable unjustified action grievance arising out of the issue to him of the final warning.

The dismissal

[53] The strong point of Mr Corlett's challenge to the justification for his dismissal is the fact that the disciplinary meeting of 5 June had proceeded without him being there.

[54] In the circumstances as known to Mr Roberts and Transfield management at the time, it was in my view a fair and reasonable action for the company to continue with the meeting despite Mr Corlett not being there.

[55] I accept Mr Robert's evidence that after speaking to Mr Corlett over the weekend before the meeting and considering and rejecting his request to reschedule it for three weeks later, Mr Corlett finished the conversation with words indicating that he would be at the meeting. He said something like "*See you there.*"

[56] At the start of the 5 June meeting, after Mr Roberts had found out from Mr Corlett's union representatives and then from Mr Corlett himself that he was not coming to it, I accept that the attitude of Mr Todd Douglas of the union in particular as expressed to Mr Roberts was that the meeting would go ahead anyway. Mr Douglas in evidence said he regarded the decision to proceed with the meeting as Transfield's to make, although he had agreed to it going ahead. Certainly the union representatives did not protest about the meeting continuing in the absence of Mr Corlett.

[57] Mr Corlett's representatives have said that they believed the company had already made up its mind anyway, but they put forward no basis for believing there was pre-determination on the part of the company in that way. Their belief may have simply been a natural one for anyone knowing that in the circumstances Mr Corlett had little if anything to defend himself with against the allegation of serious misconduct. The claim of pre-determination in my view is simply based on what was reasonably obvious from the circumstances Mr Douglas was well aware of, that any reasonable employer faced with the same would conclude there had been serious misconduct.

[58] In the case of an employee other than Mr Corlett the company might have decided not to proceed with a disciplinary meeting in the absence of the employee, out of an abundance of caution. That however does not help Mr Corlett, who had to expect that he would be considered on the basis of the person he had been assessed by his employer to be. Transfield, Mr Roberts in particular, clearly was wary of Mr Corlett from his previous behaviour and was critical and disapproving of certain aspects of his character. Because of that he had a measure of disbelief as to whether Mr Corlett had genuine reasons for not being at the meeting after indicating that he was going to attend and after allowing his representatives to go, and also after they had not opposed the continuation of the meeting. There was room for Mr Roberts to view the absence as just another diversionary tactic of Mr Corlett.

[59] It was for the employer to reach a decision whether to proceed or not proceed in the circumstances, and I find that Mr Roberts made a reasonable call from all the circumstances, including the multiple reasons given by Mr Corlett for not attending.

[60] It was Mr Corlett's decision not to attend a meeting that his own actions had necessitated. It seems that even his representatives were surprised by that decision, since one of them had seen Mr Corlett at his home in the morning before the meeting and had been expecting to go with him to the meeting. Later that day Mr Corlett was seen out strolling with his dog.

[61] Even without Mr Corlett being at the 5 June meeting, it was open to Transfield to find that he had deliberately disobeyed the instructions and advice given to him by Mr Roberts and Ms Moodie. At the same time that Mr Corlett was issued with the final warning, which he had protested was unwarranted and would be challenged, he was plainly and clearly instructed not to return to the Transfer Station from where, as he well knew, EnviroWaste had banned him. He was also clearly told that he risked dismissal if he disobeyed that instruction which, I find, was a lawful and reasonable one in the circumstances.

[62] To the extent that Mr Corlett may have felt it necessary to try and clear his name from what he regarded as an unwarranted attack on him by EnviroWaste, that provided no excuse or justification for disobeying a lawful and reasonable instruction of his employer. It should have been obvious to Mr Corlett that he would be the last person likely to be able to "*sort it out*" with EnviroWaste. Those best placed to do that were his employer, through Mr Roberts, or his union representatives who were fully entitled to visit to the site if they wished to.

[63] In his evidence Mr Corlett accepted that he had been told not to use the Transfer Station for work and not to go there at all. He agreed that he had visited the Station contrary to that instruction of his own accord and that he had done so in a Transfield vehicle and wearing his Transfield uniform. Further, he accepted that his actions amounted to disobedience of his employer. He accepted, with hindsight, that what he had done was "*rash*," and that although he had regarded the employer's instruction as being unreasonable he recklessly decided to go back to the Station.

[64] His union representative Mr Douglas, who had been present at the disciplinary meeting of 21 May and had heard Mr Roberts tell Mr Corlett that he was not to go to

the site, sardonically observed to the Authority that one did not have to be a “*rocket scientist*” to understand the message Transfield had given to Mr Corlett. Mr Douglas’ appraisal of the situation was that Mr Corlett had gone to the site after being told not to do that and this was the conduct the decision to dismiss was based upon. Mr Douglas had been present at the meeting on 5 June when that decision was reached by Mr Roberts.

[65] I consider that even in Mr Corlett’s absence from the disciplinary meeting, Transfield had a strong and clear basis for properly concluding that he had disobeyed a lawful and reasonable instruction or direction and that his actions amounted to serious misconduct under the House Rules. Mr Corlett acknowledged in his evidence that those rules were part of his employment agreement. In particular Rule 2.1(a), which expressly provides that refusing to obey a lawful and reasonable instruction is a type of action which may constitute serious misconduct and which, if proven, may result in instant dismissal.

[66] For the above reasons I conclude that Transfield’s actions and how Transfield acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal of Mr Corlett occurred. Accordingly, the determination of the Authority is that Mr Corlett’s dismissal was justified under s 103A of the Act.

[67] I have found no basis for any other grievance separate from the unjustified disadvantage and dismissal claims. Mr Corlett has no sustainable grievance in any respect.

Contributory fault

[68] Mounting employment challenges such as this one carries a risk for grievants that they will not see the wood for the trees. While Mr Corlett has gazed intently at the final warning he received and at the decision made to dismiss him after a meeting at which he had not been present, he has not looked too hard at his own culpability in all the circumstances of this case.

[69] While Transfield issued the final warning to Mr Corlett and made the decision to dismiss him, Transfield was not responsible for his being banned from the Transfer Station in the first place. And Transfield had no responsibility for Mr Corlett’s “*rash*” decision to return to the Transfer Station in defiance of that ban. Transfield

had done everything to make sure Mr Corlett complied with the ban; it instructed him to stay away and made alternative arrangements so that his work would not be disrupted.

[70] If Mr Corlett felt he had a grievance about the final warning given to him, he gave Transfield no chance to consider his complaint before taking matters into his own hands to try and resolve it himself with EnviroWaste. He had no need to go back to the Transfer Station, whether to do his job or to pursue any grievance he might have had. He accepted in evidence that he could have tried to communicate by phone or letter.

[71] Had Transfield deferred the 5 June meeting until Mr Corlett was ready to attend, that could not have changed the established and undisputed facts that Mr Corlett had been banned by EnviroWaste from the Transfer Station and had been instructed by Transfield not to go there, and had then disobeyed the instruction. Those plain facts were known to everyone before the 5 June meeting.

[72] Had the Authority found that Mr Corlett was unjustifiably dismissed, in assessing any compensation to which he became entitled, allowance would have had to be made *“for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee’s employment.”* This approach was mandated by the Court of Appeal in *Telecom New Zealand Limited v Nutter* [2004] 1 ERNZ 315, at paragraph [81].

[73] The likelihood was strong that if Mr Corlett had been at the 5 June meeting to give any explanation for his behaviour he would have been dismissed for exactly the same reason, that he disobeyed a lawful and reasonable instruction or direction of his employer.

[74] In the circumstances a finding that Mr Corlett was substantially if not totally to blame for what happened would have been likely, and a successful grievance claim could have at best attracted only minimal compensation.

Costs

[75] Costs are reserved. Application for an order may be made by Transfield provided that is done in writing and filed with the Authority within 21 days of the date of this determination. Any reply on behalf of Mr Corlett is to be made within a further period of 14 days after the 21 day period for application.

A Dumbleton

Member of the Employment Relations Authority