

open the locker and took from it a cellphone and other things, which have never been recovered.

[4] Mr Flynn immediately reported the break in to his employer and laid a complaint of theft with the Police.

[5] He then began using a locker located in an upstairs part of the plant, where he considered there would be greater security because access to that place was available only with a swipe card. He needed access to get to a control room he was required to go to from time to time, passing by the upstairs lockers on the way.

[6] Mr Flynn has claimed that he was given permission by the employer's production manager, Mr Nick Ruby, to use an upstairs locker instead of one in the downstairs changing rooms where his had been broken into.

[7] Mr Flynn used an upstairs locker for about six months, and did so without protest or objection from his employer or anyone else. GDL concedes that nothing was said to Mr Flynn about him using the locker. It was one of several in the upstairs area, the rest being used by other employees working in the facility.

[8] At the end of August 2006 Mr Flynn was asked to empty his upstairs locker and move back to one downstairs. He did not comply as he remained concerned about the security of the lockers in that part of the plant. Several other employees were also asked to shift their lockers from that part of the building and they did comply with the employer's request.

[9] The upstairs locker was required by management because GDL intended to appoint team leaders who would have greater need than Mr Flynn, a 2IC, to be in the upstairs part of the building where the control room was. Management intended that upon appointment new team leaders would be offered the use of an upstairs locker.

[10] The requests were made to Mr Flynn by several people in positions senior to him, and they were repeated over some time. He came to regard this as a form of harassment and stand-over behaviour. He rejected the requests each time.

[11] I find that GDL's Operations Manager, Mr Doug Stewart, on about 5 September 2006 once again asked Mr Flynn to relocate his locker to the general changing rooms downstairs and to do so within 24 hours. When Mr Stewart checked

to see if this had been done he found that Mr Flynn had not complied with this instruction. He therefore asked again for this to be done, by 7 September, but once again Mr Flynn did not comply.

[12] An adviser from the employer's HR department became involved and on 11 September tried to persuade Mr Flynn to remove his belongings from the upstairs locker. He had no success either, as Mr Flynn insisted he did not want to move because he thought the downstairs locker location remained insecure. He also resisted the instruction because he felt he had not been asked politely enough and had been harassed over the issue.

[13] After a further request and a further refusal of it, Mr Stewart wrote to Mr Flynn on 18 September 2006, confirming that a disciplinary meeting was to be held the following day to discuss Mr Flynn's failure to carry out instructions.

[14] The letter advised that he could have a representative at the meeting and that he would be given an opportunity to give his explanation or view of events surrounding the matter. The letter concluded with the advice that the matter was serious and could result in disciplinary action, which could include dismissal.

[15] Mr Flynn did not attend the meeting scheduled for 19 September 2006. Mr Stewart wrote again, confirming that he had failed to do so. He advised Mr Flynn that his refusal to attend made it difficult for the employer to hear any explanation he might have. Mr Stewart advised Mr Flynn that another meeting would be held for this purpose on 21 September 2006, and he also advised;

It is important that you attend otherwise we will have to draw our own conclusion from the facts we have.

[16] Again Mr Flynn was advised that he could have a representative at the meeting and he was warned that the allegation to be discussed related to failure to carry out instructions, a matter he was being offered an opportunity to give his explanation about. He was also warned again that the allegation was a serious one that could lead to disciplinary action which could include dismissal.

[17] Mr Flynn did not attend the meeting on 21 September. It is clear that he chose not to go and that there was no other reason why he could not attend if he had wanted to.

[18] The employer concluded, reasonably I find, that Mr Flynn did not want to participate in any investigation into his conduct or actions.

[19] On 22 September Mr Stewart together with Mr Ruby the production manager cut the padlock off the upstairs locker Mr Flynn had been using. They took everything they found inside and put it in Mr Stewart's office. Mr Flynn's possessions in the locker were returned to him and he was supplied with a new padlock. The upstairs locker he had been using was padlocked shut by the employer.

[20] On 26 September 2006 a final written warning was issued to Mr Flynn by Mr Stewart. It referred to the employer's Work Rules relating to carrying out instructions. The warning noted with reference to the Disciplinary Procedure in the Rules that where the employer has determined dismissal without notice is inappropriate, the employee could be given a final warning. The warning given to Mr Flynn also noted the following:

You have been provided with opportunities to respond to the allegations however have been uncooperative through this investigation and equally have displayed no remorse or willingness to change your behaviour.

The company's decision is that serious misconduct has occurred in that you failed to carry out reasonable instructions by a person authorised to give such instructions. It is concluded that your actions constitute serious misconduct and accordingly the decision is to issue you with this final written warning. This final written warning will remain on your file and should no further misconduct occur this warning will expire in nine months. Please be advised that any further breach of the rules and procedures may result in termination without notice as per your employment agreement.

[21] Mr Flynn remains employed by GDL. The final written warning, on its express terms, expired at the end of June 2007. Therefore having the warning expunged will not be an effective remedy. A second remedy sought by Mr Flynn, an apology from his employer, is not within the jurisdiction of the Authority to grant.

[22] In principle the issue of a final warning can amount to an unjustified action taken to the disadvantage of an employee and can therefore be the foundation for a personal grievance. Harassment and intimidation in the way Mr Flynn complains GDL acted towards him can also be grounds for a grievance claim. The remedy of compensation is available for hurt feelings, humiliation and distress arising from a disadvantage personal grievance.

[23] I accept that Mr Flynn with good cause was genuine in expressing his concern about the security of his possessions if he placed them in a locker in the downstairs changing room, where his locker had been broken into in January 2006. I also accept that the employer too was concerned about security for its employees' possessions while stored on the premises. By about the end of September, after Mr Flynn had been issued his final warning, security cameras had been installed in the area where his locker was broken into at the beginning of the year.

[24] I accept that the installation of security cameras was not simply a matter of GDL giving approval for that work to be done. Because of concerns among employees about their privacy while using their changing room where the lockers were, consultation with the employees and their union was required before the go-ahead could be given and the cameras installed. I accept that GDL did not try to resist installing the cameras and did not unreasonably delay that work being done.

[25] The final warning, or any warning, would not have been justified if it was based on Mr Flynn's failure to comply with an unreasonable or unlawful instruction in the first place.

[26] I find there was nothing unlawful about the employer requiring Mr Flynn to shift his possessions from one locker to another in a different part of GDL's building. I also find that there was nothing unreasonable about that instruction in the circumstances, particularly when Mr Flynn was asked several times and given several opportunities to comply with the instruction. The provision of a locker was not, I accept, pursuant to a term or condition of his employment in the sense that there was an entitlement to it under the employment agreement. It was a benefit or advantage offered to Mr Flynn by his employer but there was no responsibility taken by the employer for security if the locker was used. Mr Flynn had to bear the risk in doing that.

[27] However, there appears to have been some customary aspect about the use of lockers and it seems there were occasions when the employer's own equipment issued to employees might become stored in those lockers. Also, Mr Flynn had used the upstairs locker for some months without objection from his employer, and after his possessions were forcibly removed from it the locker remained unused by any other employee for a while.

[28] The use of lockers seems to be an aspect of employment in this workplace that may well benefit from clearer rules being made, or from the negotiation of terms or conditions in the work rules and/or employment agreements applying in this workplace.

[29] Although Mr Flynn genuinely believed that there was some unreasonableness about the requirement for him to shift his locker, he did not avail himself of the two clear opportunities to present his views and explain his actions to the employer. He chose of his own free will not to take those opportunities. He has claimed that he had been permitted by Mr Ruby to use the locker. Mr Stewart on the other hand had been told by Mr Ruby that was untrue. The time and place to discuss these differences was the meetings Mr Stewart asked to have with Mr Flynn. Mr Stewart might not have issued the warning if he considered that Mr Flynn genuinely thought Mr Ruby had allowed him to use the upstairs locker. Unfortunately Mr Flynn stubbornly rejected the opportunity to talk the matter over with Mr Stewart. Whatever might now be said in favour of his stand, at the time he was unresponsive and uncommunicative, which is contrary to good faith obligations he had to his employer.

[30] I do not accept that Mr Flynn was harassed or intimidated to a point where it became unreasonable for him to have to meet with his employer and present his views or explanation as requested.

[31] Neither do I accept that GDL breached its own work rules by entering the upstairs locker without Mr Flynn and a witness being present. Rule 4 is clearly directed at situations where the employer requires to search the contents of a locker. In this case there was no interest in what Mr Flynn had in his locker. GDL' objective was to resume control over who used the locker, not examine what was in it.

[32] The justification for the complained of actions taken by the employer must be assessed under s 103A of the Employment Relations Act 2000. The Authority must consider, on an objective basis, whether what the employer did, and how the employer did it, was what a fair and reasonable employer would have done in all the circumstances at the relevant time.

[33] I am satisfied that objectively the requests made to Mr Flynn to remove his possessions from the upstairs locker and the decision to issue the final warning to

Mr Flynn for a nine month period, were the actions of a fair and reasonable employer in the circumstances as they existed at that time.

[34] Accordingly, I find that Mr Flynn does not have a personal grievance and he is not entitled to recover compensation as claimed by him.

[35] Mr Coyle in the Statement of Problem used an apt expression when he referred to this matter as having been capable of resolution “*with a less dogmatic stance*” by the company. In my view, however, it was Mr Flynn who displayed dogmatism in the face of his employer’s repeated and reasonable requests to move his locker or to explain why he would not.

[36] Under an employment relationship the employer does have authority to give instructions or make requirements, provided they are not unreasonable or unlawful, and it has a legitimate interest to see that those are taken notice of and complied with. It is in the interests of the employer to discourage the attitude that instructions or requirements can be ignored at will. A battle of wills in this case was in the end won by the employer.

[37] Only a small award of costs is justified, as an investigation meeting of about two hours was all that was required and no preparation by the parties for it was requested by the Authority. I order Mr Flynn to pay a contribution to the costs of GDL of \$500.