IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 65
5586113

	BETWEEN	BRIAN NORRIS Applicant
	AND	AUTO LOGISTICS (NZ) LIMITED Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Ross Jamieson, Advocate for Applicant Russell Walker, Counsel for Respondent
Investigation Meeting:	24 and 25 May 2016 at
Submissions Received:	12 May and 25 May 2016, from Applicant 23 May and 25 May, from Respondent
Determination:	3 June 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Norris was employed as a driver by Auto Logistics (NZ) Limited from 27 July 2009 until his dismissal on 18 September 2015. Mr Norris claims he was unjustifiably dismissed. He also claims he was disadvantaged in his employment by his employer's action of unilaterally removing him from line haul driving to metro driving. He seeks financial remedies for his claims, comprising compensation, loss of wages and reimbursement of costs.

[2] Auto Logistics (NZ) Limited (Auto Logistics) denies Mr Norris' dismissal was unjustified. It says he was dismissed following his refusal to obey reasonable requests made by his employer on two separate occasions. It also denies he was unjustifiably disadvantaged and says his employment agreement described his role as a "*Metro and LineHaul Driver*". It maintains it had the right to utilise Mr Norris in either role depending on the requirements of the business.

Relevant events leading to dismissal

[3] Until 2014 Mr Norris transported mainly cars and small vehicles between various locations in the North Island for his employer. From some time in 2014 he was also tasked from time to time with transporting bus chassis. He made frequent complaints to his employer over health and safety issues he perceived arising from this work. In June 2015 Mr Norris experienced particular difficulties involving bus chassis which resulted in his voicing concerns to his employer over unsafe practices and equipment that was inappropriate for the tasks.

[4] In early July 2015 Mr Norris suffered severe back pain and was certified to be off work on ACC between 8 and 19 July. When he returned to work on 20 July he was told by his employer's Wellington Operations Manager, Barry Murison, he was now to be a metro driver. This meant his driving duties would be confined to the local Wellington area instead of the long distances driving he had previously been undertaking. Mr Norris was unhappy about the change and regarded it as a demotion which, in his estimation, reduced his earnings by approximately 30%.

[5] He sought an explanation from his employer, noting his awareness that two new line haul drivers had recently been employed. Chris Connor, the National Group Manager of Auto Logistics, responded that Mr Norris' individual employment agreement described his position as a Metro and LineHaul Driver. He said this meant the company could determine where an individual's skills were best utilised.

[6] Mr Connor informed Mr Norris this option had always been at the company's discretion. In different emails sent in July and August he said the company considered the configuration of the vehicle Mr Norris had been driving on line haul was unsuitable due to its limited carrying capacity and that it was better suited to metro-regional deliveries. He informed Mr Norris the company had considered giving Mr Norris a differently configured vehicle. However, Mr Norris' lack of experience on larger vehicles and the level of accidents he had been involved in were influencing factors in the company's decision to have him drive locally.

[7] Mr Norris was dissatisfied with this response and believed he had been singled out and subjected to bullying by his employer. He consulted his General Practitioner (GP) who advised him to take work-related stress leave from 1 to 12 August. He took

that advice and, on his return to work around 13 August 2015, continued to work as directed on metro driving duties.

[8] On 3 September 2015 Mr Norris was asked by his employer's Wellington Manager, Craig Blackler, to do some gardening around the yard as there was insufficient driving work available. He declined to do this stating he was a driver and was fearful, given what had recently happened to him, that he would be required to clean toilets next. Nothing eventuated from his refusal at the time. The following day he was asked to unload and reload trucks in the yard as, once again, there was little driving work available. Mr Norris willingly did this because he considered that work to be related to driving.

[9] On 7 September 2015 Mr Norris was asked to take a random drug test in an NZDDA drug testing van. Mr Norris refused saying he was happy to undergo a drug test taken by a registered medical practitioner as provided for in his employment agreement. He did not agree to have the test done by a laboratory technician. He was suspended from his employment without pay, although his employer later informed him it would pay him for the period of his suspension, and did so.

[10] He attended a disciplinary meeting on 18 September 2015, at the conclusion of which he was summarily dismissed. The parties have since attended mediation without success.

Issues

[11] The issues for determination are:

(a) Whether Auto Logistics was entitled to remove Mr Norris from line haul driving and deploy him to metro driving; and

(b) If Auto Logistics was not so entitled, whether Mr Norris was unjustifiably disadvantaged by his employer's action;

(c) Whether Auto Logistics' instruction to Mr Norris to perform gardening duties was reasonable;

(d) Whether Auto Logistics' instruction to Mr Norris to undertake a drug test in the NZDDA van was reasonable; and

(e) If either/both of those instructions was/were not reasonable, whether Mr Norris was unjustifiably dismissed.

Legal principles

[12] The test for whether a dismissal or other action by an employer is justifiable is to be determined on an objective basis. The test, which is specified in the Employment Relations Act 2000 (the Act), is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal or action occurred.[1]

Was Auto Logistics entitled to change Mr Norris from line haul to metro driving?

[13] Auto Logistics relies for its decision to move Mr Norris from long distance to local driving on the individual employment agreement he signed in 2009, in which his role was described as a *Metro and LineHaul Driver*. Auto Logistics maintains it has the discretion to make commercial decisions about where to place its drivers.

[14] Mr Norris says he has consistently been employed on line haul driving since the early days of his employment with Auto Logistics. He estimates that he spent only one to two percent of his working time on metro driving until 20 July 2015. Scott Miers, Auto Logistics' National Transport Manager, disputes that estimate. He believes Mr Norris had spent approximately 80 percent of his time on line haul driving and 20% on metro throughout his employment with Auto Logistics. Regardless of the differences between Mr Norris' estimates and those of his employer, it is clear he spent most of his working time on line haul driving.

[15] The parties to an employment relationship have an obligation to deal in good faith with each other.[2] This includes the requirement to be active and constructive in establishing and maintaining a productive employment relationship in which they are, amongst other things, responsive and communicative.[3] I find Auto Logistics did not meet that obligation of good faith in moving Mr Norris from line haul driving to metro driving without prior discussion with him.

[16] Mr Miers' evidence was that Mr Norris' move to metro driving was a temporary measure and that the company's intention was that he would return to line

[1] Section 103A
[2] Section 4 of the Act
[3] Section4(1A) of the Act

haul driving when a new vehicle that was under construction, which was better suited to the work Mr Norris undertook, was completed. Mr Norris had a clear understanding that a new vehicle was being constructed and that he would be using it on line haul. However, the employer decided the need for that vehicle was greater in the South Island and it was allocated there instead.

[17] Mr Norris and Mr Miers agreed that, after Mr Murison had told Mr Norris on 20 July 2015 he was now to be a metro driver, Mr Norris had telephoned Mr Miers about this. Mr Miers had assured him the move was temporary and that he would be returning to line haul on completion of the new truck's construction. Mr Norris said he accepted that arrangement and on that basis carried out his metro driving duties.

[18] His acceptance of the situation changed when he discovered that a new line haul driver had been hired in Wellington. Additionally, an employee who was returning from several months' leave of absence was resuming line haul work. Both men had been allocated trucks. When Mr Norris sought an explanation from Mr Murison, who did not attend the Authority's investigation, he said he was told he should accept he was now a metro driver.

[19] Mr Norris then attempted to contact Mr Miers who did not return his call. When asked why he had not done so, Mr Miers said he received many phone calls in a day and there was insufficient time to respond to them all. He could not specifically recall a message from Mr Norris but did not deny he may have received one. Mr Miers said the company was always hiring new drivers and he had nothing to do with the decision to hire new drivers in Wellington. I found his evidence unsatisfactory. Having given an assurance to Mr Norris that his move to metro work was temporary, he should have communicated with him if the situation had changed and explained the reasons.

[20] Mr Norris then contacted Mr Connor who, as noted above, told him the company had considered giving Mr Norris a differently configured vehicle for long haul driving. However, among the reasons it had decided he should drive locally rather than line haul were Mr Norris' lack of experience on larger vehicles and the level of accidents he had been involved in. Mr Miers claimed to have had no knowledge of Mr Connor's communication with Mr Norris.

[21] The sum and tenor of the communications, and the mixed messages he was given regarding his return to line haul driving lead me to find Mr Norris was treated poorly by his employer. Notwithstanding his job title, which included metro driving, he had spent the great majority of his employment with Auto Logistics as a line haul driver. If any permanent change to that was contemplated that should have been a matter for discussion with him. If his accident rate was of concern, this should have been brought to his attention in order that he could provide an explanation, and have that explanation taken into account, before any decision was made regarding such a significant change to his employment.

[22] I find Auto Logistics movement of Mr Norris from line haul to metro driving was not, in all the circumstances, the action a fair and reasonable employer could take.

Was Mr Norris unjustifiably disadvantaged by his employer's action?

[23] It was Mr Norris' evidence that he loved line haul driving and relied on the income resulting from the hours he habitually worked. He was prepared to work as a metro driver on a temporary basis only, as Mr Miers informed him was the company's intention. However, he was very unhappy to be subsequently told by the manager he directly reported to that he had now to accept his lot as a metro driver.

[24] Mr Norris was financially disadvantaged by his employer's action in deciding he would not return to line haul driving. There was some discrepancy between his evidence of the hours he worked and the evidence of Brent Norrish, Auto Logistics' Financial Controller. Mr Norris claimed to have worked an average 70 hour week while on line haul, which changed to a 40 hour week on metro driving duties. Mr Norrish, who had analysed Mr Norris' hours for the months leading up to 20 July 2015, said he averaged 56 hours a week while a line haul driver, and 43 hours a week once he moved to metro driving duties.

[25] I accept Mr Norrish's evidence as more likely to be accurate. The loss of 13 hours a week on average at his hourly rate of $20 resulted in a $260 a week drop in Mr Norris' weekly remuneration. While his employment agreement did not guarantee more than 40 hours work per week, the constancy with which he worked many more hours per week cannot be ignored.

[26] The disadvantage Mr Norris experienced went well beyond the financial. His disappointment at his employer's treatment of him, combined with Mr Miers' silence

after Mr Murison had told him to accept he was now a metro driver, and Mr Connor's communication of the factors he considered relevant to the company's decision soured Mr Norris towards the employer he said he had enjoyed working for over the last six years. As he put it, he "*didn't feel the love*" for Auto Logistics because he felt so let down by his employer's treatment.

[27] This coloured his attitude towards requests made of him by his employer and ultimately led to his dismissal. For this reason, and the loss of remuneration, I find Mr Norris' employment was affected to his disadvantage by the unjustifiable action of his employer.

Was it reasonable for the employer to request Mr Norris to do gardening?

[28] Auto Logistics submits that it was an entirely reasonable request given that there was no driving work for Mr Norris to undertake on 2 September. Mr Blackler's evidence was that the other employees he asked to undertake the work all did it and Mr Norris was the only one to refuse. He made the request of all the employees for whom there was no work, with the exception of one who was exempted because of his age (77).

[29] The employer relies on the job description attached as a schedule to Mr Norris' employment agreement. This specifies six "*tasks/duties*", the first four of which are related to driving and the loading and unloading of goods. The fifth duty concerns presentation and entails the employee presenting himself and the company in the best possible light. The final task/duty is "*Any other tasks that may be requested from time to time*" and it is this upon which Auto Logistic relies.

[30] Mr Blackler said he asked the employees at around 11 am to do the gardening work as the yardman had requested assistance. At the time the employees were sitting around the smoko table. He said the work took them approximately 15 to 20 minutes to do and they then went back to the smoko room.

[31] Mr Norris said he may have agreed to do the gardening as requested if it had not been for what he perceived to be his employer's bullying and unfair treatment of him over moving him to metro driving duties. He said that treatment made him fearful of what other degrading work his employer might ask him to do next.

[32] I find Mr Blackler's request was reasonable in the circumstances and does come within the "*any other tasks*" referred to in Mr Norris' employment agreement.

Was the employer's request for Mr Norris to undertake a drug test reasonable in the circumstances?

[33] Mr Norris' evidence was that he had no objection to submitting to random drug testing. He said he was very safety conscious and agreed with the necessity for drug testing truck drivers. His objection was not to being tested as such, but to being asked to undergo testing at the worksite by the New Zealand Drug Detection Agency (NZDDA). The situation had not arisen before as this was the first time in his six years of employment with Auto Logistics that random drug testing had been carried out in the company's Wellington branch.

[34] When asked to undertake a drug test Mr Norris inquired whether the person administering the test was a registered medical practitioner. He was informed the person was an NZDDA technician, not a medical practitioner. Mr Norris objected to submitting to a test administered by a technician. He informed his employer that his employment agreement provided that random drug testing was to be carried out by a registered medical practitioner. He was unwilling to undergo testing by a person who was not so qualified.

[35] Mr Norris said he had a particular reason for insisting on his contract being strictly adhered to, which related to a particular prescription medicine he was taking which he did not wish to share with his employer. He said he told Mr Blackler he wanted a medical practitioner to conduct the test because he believed that person could screen the results so the prescription drug remained private to him. Mr Norris said Mr Blackler reacted aggressively and told him the company was entitled to know all the prescriptions he was taking.

[36] Mr Blackler said in evidence that he had taken advice from Mr Norrish who, as well as being Auto Logistics' Financial Controller, is also its *de facto* Human Resources officer. He had telephoned him throughout three times throughout his requests to Mr Norris to take the drug test. Mr Norrish, who in turn had taken advice from an employers' advisory organisation, had told Mr Blackler he must let Mr Norris know that the employer regarded the request to take the drug test as a reasonable

request and that any refusal would be regarded as a failure to comply with a reasonable request.

[37] As well as informing Mr Norris of the employer's view, Mr Blackler drafted a form recording the request made to Mr Norris to submit to a random drug test, and Mr Norris' refusal. The form included the statement that failure to comply with a reasonable request could result in disciplinary action. Mr Norris was asked to complete the form stating whether he did or did not agree to comply with the request, and to sign it. He refused to do so.

[38] Mr Blackler said he had also telephoned five medical practitioners who had all informed him they no longer did drug testing, and that they advised employers to use the NZDDA van that undertook testing at worksites. Mr Blackler had not passed this information on to Mr Norris at the time. He said he did not do so because he was confident that NZDDA was the appropriate organization to do the testing. He did inform Mr Norris of his phone calls to the five medical practitioners at the disciplinary meeting on 18 September.

[39] In Mr Walker's submission the request to undertake a test administered by the NZDDA was a lawful and reasonable instruction and Mr Norris' refusal did not demonstrate good faith. He submitted Mr Norris had adopted a belligerent and combative attitude in the matter because of perceived grievances about being unfairly treated and/or demoted and "*singled out and bullied*".

[40] Mr Jamieson submitted that Mr Norris was entitled to refuse to undertake a drug test that was not in accordance with the provision for such testing in his employment agreement.

[41] I agree with Mr Jamieson's submission. While an employee generally has an obligation to follow lawful and reasonable instructions given by their employer, in this instance there was a specific provision in Mr Norris' employment agreement relating to random drug testing. That provision modifies the general obligation by imposing an explicit direction about who is to administer the random drug tests Mr Norris was required to undertake. The Employment Court considered drug testing in *Parker v Silver Fern Farms Ltd (No 1)* where Chief Judge Colgan stated:

> *Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and*

> *their application meet the legal tests of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the employer, these should be interpreted and applied strictly. A fair and reasonable employer in all the particular circumstances of a case is unlikely to have insisted justifiably on compliance with an unlawful and/or unreasonable direction to an employee.*[4]

[42] In that instance the Chief Judge was referring to the requirement for an employer's policies for drug testing to be lawful and reasonable and to be strictly interpreted and applied. His words are equally applicable to the drug testing provisions in Mr Norris' employment agreement. I find Auto Logistics was required to interpret and apply the provision strictly. I therefore find the instruction given to Mr Norris to undertake a random drug test that did not comply with the provisions of his employment agreement to be unreasonable.

Was Mr Norris unjustifiably dismissed?

[43] The letter of dismissal signed by Mr Blackler cited two reasons for the employer's decision. These were firstly, that he had refused to obey a reasonable request to take a drug test with the NZDDA and, secondly, that he had refused to obey a reasonable request to assist with yard duties on a quiet day.

[44] In the course of the investigation meeting Mr Blackler acknowledged that, although he had told Mr Norris there could be consequences from his refusal to assist with gardening, he did not tell him his employment may be in jeopardy. He also said it had been a mistake to include the gardening matter in the dismissal letter, and that he had not regarded Mr Norris' refusal to assist with gardening as serious misconduct. With that concession, Mr Norris' failure to submit to a drug test is the only matter Auto Logistics relies on to justify its dismissal of him.

[45] I have found that request to have been unreasonable. It follows that I find Mr Norris' failure to comply with the request to submit to a random drug test that did not comply with the explicit provisions in his employment agreement does not justify his dismissal.

Remedies and contribution

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[4] [2009] ERNZ 301 at [26]

[46] It was Mr Norris' evidence that he started looking for work immediately after his dismissal but was unable to find permanent employment for three months. He did obtain temporary employment through a driving recruitment company. That work started one month after his dismissal. He is entitled to receive three months' ordinary time remuneration less any earnings from his temporary employment during that period.[5]

[47] Mr Norris also gave evidence about the effect on him of the loss of his employment at Auto Logistics. He referred to the total shock he felt and to feelings of being degraded and losing concentration. He had not received any form of warning during his working life of more than 30 years. I have no doubt that Mr Norris was adversely affected by both his dismissal and by his forced move from line haul to metro driving. I find the latter action was particularly distressing because he was initially led to believe the change was temporary, but was then informed it was not.

[48] Mr Norris seeks $20,000 in compensation for the hurt and humiliation he has suffered from his personal grievances. I do not consider that sum to be warranted, but find it appropriate to award $10,000 in total for both grievances.

[49] I am required to consider the extent to which Mr Norris' actions contributed to the situation that gave rise to his personal grievances and, if those actions so require, reduce accordingly the remedies I would otherwise have awarded.[6] I do not consider he contributed to the situation that led to his personal grievance for disadvantage.

[50] With regard to his dismissal, I find Mr Norris' attitude likely to have been truculent after Mr Murison told him he had to accept that he was now a metro driver. Mr Norris referred on more than one occasion to "*not feeling the love*" for his employer after being informed this. His disappointment is likely to have led to his refusal to comply with Mr Blackler's reasonable request for him to help with gardening in the yard for a short time when there was no driving work available.

[51] However, as Mr Blackler conceded it had been a mistake to include the refusal to undertake gardening as a reason for Mr Norris' dismissal, I will not take Mr Norris' poor attitude into account in relation to his dismissal. I am not persuaded that his disappointment over his employer's actions played a major part in his refusal to

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[5] Section 128 of the Act
[6] Section 124 of the Act

submit to the random drug test. It may have been a background factor but I accept Mr Norris' evidence that he had a real concern that submitting to a drug test administered by a person who was not a registered medical practitioner was not in accordance with the provisions of his employment agreement.

[52] I therefore find Mr Norris' actions did not contribute to either of his personal grievances.

Determination

[53] I have found Mr Norris was unjustifiably disadvantaged in his employment and was unjustifiably dismissed. Auto Logistics (NZ) Limited is ordered to pay Mr Norris the following sums:

a. Under s. 123(1)(b) of the Act the sum of $2,080 gross, being eight weeks' lost remuneration (20 July to 18 September 2015) as a result of his employer's unjustifiable action;

b. Under s. 128 of the Act the sum of $4,731.62 gross, being three months' remuneration at his ordinary weekly rate of $1,120 gross less earnings of $9,928.38 gross; and

c. Under s. 123(1)(c)(i) of the Act the sum of $10,000 without deduction.

Costs

[54] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority