

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 9  
5321174

BETWEEN

VIANNEY TUALA  
Applicant

A N D

LINFOX LOGISTICS (N.Z.)  
LIMITED  
Respondent

Member of Authority: Eleanor Robinson

Representatives: Sione Fonua, Counsel for the Applicant  
Vonda Hodgson, Counsel for the Respondent

Investigation Meeting: 3-5 December 2014 at Auckland

Submissions Received: 5 December 2014 from the Applicant  
5 December 2014 from the Respondent

Date of Determination: 13 January 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The Applicant, Mr Vianney Tuala, claims that he was unjustifiably dismissed by the Respondent, Linfox Logistics (N.Z.) Limited (Linfox) on 20 August 2009.

[2] Linfox denies that it unjustifiably dismissed Mr Tuala and claims that Mr Tuala's employment was terminated justifiably on the basis that he had falsified timesheets and log books contrary to Linfox policies and the applicable legislation, and he had failed to comply with his obligations under the Health and Safety in Employment Act 1992.

**Issues**

[3] The issue for determination is whether or not Mr Tuala was unjustifiably dismissed by Linfox on 20 August 2009.

**Background facts**

[4] Linfox is Australia's largest privately owned logistics company which operates throughout Australia and Asia with an operation based in New Zealand. It employs

approximately 900 people in New Zealand which increases over the Christmas period with the addition of approximately 200 temporary employees.

[5] Mr Tuala commenced employment with Linfox in November 1995 as a Class 5 Truck Driver and was employed pursuant to the Linfox Logistics (N.Z.) Limited Auckland Drivers Collective Agreement (the CEA) between the National Distribution Union (NDU) and Linfox.

[6] Clause 20 of the CEA is entitled Health and Safety and states the following:

(a) *The parties to this contract are committed to health and safety and will work together to ensure there are comprehensive injury prevention and health protection programmes in place. We recognise that our health is an important ingredient in a productive and efficient workplace.*

*The promotion of good health and safety practices is preferable to dealing with illness and accidents.*

(b) *Linfox Logistics will:*

- *Provide a safe working environment ...*

(c) *The employee will:*

- *take care for their own safety and that of others who may be affected by what they do or do not do;*
- *Cooperate with Linfox Logistics on health and safety matters; ...*
- *Report any accidents, hazards or sub-standard conditions arising in the workplace to the supervisor or manager.*

*Note that if the employee suffers an injury from an accident at work they must report it straight away. If they don't this may lead to a disagreement over liability for payments relating to any absence.*

(d) *A Health and Safety Committee comprising of management and employee representatives will operate. The purpose of this Committee is to make recommendations on health and safety policy.*

[7] Schedule 4 of the CEA contains the work rules and disciplinary procedures schedule.

Under the paragraph headed ***Serious Misconduct*** it states the following:

*Linfox Logistics (NZ) Limited has rules that are required of its staff in order to provide a safe and acceptable working environment for others. The following therefore constitute matters that may be considered serious misconduct and may result in dismissal without notice from Linfox Logistics (NZ) Limited. This list is for the purpose of illustration and is not exhaustive*

...

- *Failure to observe safety rules and operational procedures or any other irresponsible actions which result in injury to self or other persons and/or damage to company property or to the property of others. ...*
- *Falsifying any Linfox Logistics (NZ) Limited's records or documentation including timesheets, or other time records. ...*
- *Refusal or failure to obey any lawful and reasonable instruction, including, walking off the job, without authorisation, ...*

[8] From the commencement of his employment Mr Tuala was employed by Linfox on the Progressive Enterprises contract based at Favona Road (the Progressive site) and was employed to deliver goods to Progressive supermarkets.

[9] During the course of his employment Mr Tuala drove 40 ton trucks and had been issued with a copy of the Linfox Logistics (N.Z.) Ltd Drivers Manual (the Drivers Manual). Section 3 of the Drivers Manual is entitled *Driver Standards* and states the following:

*Linfox sets high standards for safe driving. No operational urgency overrides this in terms of taking risks with people or equipment.*

...

*The company encourages all drivers to take responsibility for the vehicle they are operating. This responsibility is clearly outlined in further sections of this manual. Any breach of LTSA Transport Laws or Regulations will be considered as a sign of loss of commitment. This may have significant impact on ones future as a commercial vehicle operator.*

[10] Section 4 is entitled *Drivers Rules* and contains a sub-section entitled *Vehicle Maintenance* and states:

*Your responsibilities for the care and maintenance of your vehicle are set out in this document. They form part of your daily routine. As a driver you must ensure your workplace (your truck) is safe, in good working order and not a danger to the community around you. If your vehicle is defective report it using the appropriate documentation (Vehicle Condition Report – VCR). All vehicle problems should be reported immediately on a 'Vehicle Condition Report Form' VCR-Attachment 1).*

*Your supervisor will decide on the action to be taken. If repairs are completed whilst on the road, complete a VCR on your return.*

[11] Under a sub-section entitled *Accidents or delays* it states:

...  
*If you are unable to complete the trip in the scheduled time, please contact your despatcher immediately. Schedules are important; however, **no job is as important as to take risks.** Fatigue will affect each person differently. Recognise these signs and stop for a break.*

[12] Section 5 of the *Drivers Manual* outlines the daily vehicle check and the pre-trip procedures the drivers are expected to carry out in addition to on-trip procedures and vehicle fault reporting.

[13] Section 6 of the *Drivers Manual* is entitled *Log Book – Maintenance and Responsibilities*. It states:

*The driving hour regulations specify the maximum number of hours behind the wheel and the required rest breaks. It is vital that all operators know and comply with the regulations.*

*Drivers are to carry their log book with them at all times when driving.*

*All log book entries are to be clear and legible as a log book is a legal document that may be required as evidence ie should the driver be involved in an accident. Any driver who falsely makes entries into the log book has broken the law and will be disciplined accordingly.*

### ***Legislative changes 2007***

[14] Mr Louis Buckingham, Safety and Compliance Manager, said it was a fundamental requirement that all Linfox drivers maintained accurate log books. It was both a Linfox requirement and a legal requirement. It was also a Linfox requirement that the driver's runsheet (timesheet) and log book matched the GPS data from the vehicle.

[15] Mr Buckingham explained that in 2007 the laws regarding the log books and runsheets were significantly changed. It was at this time that Linfox removed the distinction between driving hours and on duty time and all hours spent working were recorded as work time.

[16] The previous limit of 11 hours driving, 14 hours on duty, with a minimum 9 hours break between working days was changed. It was replaced by a limit of 13 hours of work time in a working day and a break between working days of a minimum of 10 hours. This reduced the length of the working day by one hour, but provided more flexibility about work that could be done inside that timeframe.

[17] He said that drivers were required to take a half hour break after 5.5 hours work time no matter what work was performed, as opposed to the previous regime where the drivers were only required to take a half hour break after 5.5 hours driving.

[18] With the new law change Mr Buckingham said Linfox also implemented a second break allowance. The first break was traditionally the drivers' unpaid lunchbreak. However, Linfox did not think it was fair that drivers had to take a second unpaid lunch break and therefore had introduced the second break allowance. The allowance was payable if the driver was required to work more than 11 hours a day and was to be noted on the drivers front sheet at the time of their break.

[19] The second break allowance was incorporated into the CEA operative from 1 October 2008 until 30 September 2009 by a new clause which stated:

**Second break allowance**

*A second break allowance will be paid to a driver who completes a minimum of twelve and one half hours (12 ½ ) of duty after their start time, such time to include their existing or current unpaid meal break. Refer to Schedule 1.*

*Once eligible, the second break of half an hour (30 minutes) must then be documented on the drivers run sheet and in the drivers log book for that date. The supervisor shall then approve the second break allowance by signing off the run sheet before the run sheet leaves the despatch area.*

[20] Mr Buckingham said that the 2007 legislative changes were highlighted to employees in a number of ways including:

- Training sessions;
- Tool box updates; and
- New Policies issue.

[21] The changes had been delivered in a number of ways including face to face meetings with drivers, as well as by being posted as memorandums. On 21 October 2007, a memorandum was attached to all driver pay slips. It was headed *Commercial Drivers New Log Book and Work Time Rules* and set out the new legislative Work Times and Logbook rules for commercial drivers. It stated:

*Linfox will not tolerate any intentional breaches of driver hours by either vehicle operators or Dispatchers. If you are going to exceed*

*your hours on any given run you must notify your Dispatcher as soon as possible. If a Dispatcher assigns you a run which will breach your driver hours then you must refuse the run. It your responsibility to manage your driving hours correctly.*

[22] Mr Buckingham said that all drivers were also provided with a copy of the new rules and regulations. These were set out in guidelines published by the NZTA (*New Zealand Transport Agency*)-*The Work Time and Log Books Guide*. The Guide stated:

- 1. A requirement that drivers have at least a thirty minute break after five and a half hours driving;*
- 2. The maximum working time of thirteen hours with a minimum ten hours continuous rest between shifts;*
- 3. Specific log book requirements including need to record start and finish times for all periods of work done and rest breaks;*
- 4. A requirement that a driver produce their log book without delay and demand by an enforcement officer; and*
- 5. The penalties for breaching the log book and work-rest time requirements.*

[23] During 2007 Mr Tuala was based at the Progressive site where he was a Union delegate. Mr Tuala confirmed that as a delegate he understood that health and safety was paramount in the workplace and that he had been, as a delegate, part of the Progressive site Health and Safety Committee in which capacity he had tried to maintain health and safety standards not only of himself, but for other drivers who were both members and non-members of the NDU.

[24] He confirmed that he was aware of the procedures that drivers were expected to adhere to and that he was familiar with the *Drivers Manual* and responsibilities that he as a driver had as regards vehicle maintenance and the daily vehicle checks.

[25] Mr Tuala also confirmed that he was aware of his responsibilities in regards to the log book and he was aware that the outcome of any log book falsification would be disciplinary action and possibly termination of employment. As a delegate he had attended disciplinary meetings with NDU members.

[26] He further confirmed that in 2007 he had attended the training sessions about the legislative and rule changes. He had also been aware of the toolbox updates and he recalled new policies being delivered. He confirmed he was familiar with the NZTA Drivers Guide and that he had no confusion whatsoever about what was expected of him in regards to his

responsibilities for his vehicle and as regards log books and runsheets. He also confirmed that he had attended the briefing by Snr Sgt Brian Locke from the Commercial Vehicle Investigation Unit on 18 February 2008 in which Senior Sgt Locke explained drivers' obligations regarding driving hours and the recording of hours.

[27] Mr Buckingham said that he carried out random logbook and runsheet checks on an ongoing basis but emphasised that trust in the drivers to adhere to policies was essential.

### ***Events July 2009***

[28] In July 2009 following a final written warning, Mr Tuala was transferred by agreement from the Progressive site to work under the Linfox Foodcap Contract which was based at Verissimo Drive. Foodcap was a Linfox contract and involved distributing fresh meat through the North Island for Progressive supermarkets.

[29] The final written warning letter dated 25 June 2009 and signed by Mr Nick Snelling, Operations Manager – Retail, concluded:

*The company would ask you in future you observe the Linfox policies and procedures; ... You understand that that any further incident which results in the use of the Linfox disciplinary procedures may place your future employment with Linfox in jeopardy.*

[30] On the first day Mr Tuala came to work at Foodcap Ms Rene Reynolds, at that time Transport Manager for the Foodcap Contract, said she had made it clear to him that she was strict on health and safety matters. She also stated that she had reiterated the requirements regarding log books and that she expected him to abide by them.

[31] Ms Reynolds said that Mr Tuala was buddied up with an experienced Foodcap driver for the first four days work at Foodcap, during which training Mr Tuala would have been taught how to safely use the equipment in the trucks and how to proceed safely should the lifting device installed on the truck not function. Ms Reynolds said it would have also been explained to Mr Tuala that should there be any lifting device malfunction that would hinder him progressing safely with the delivery run; the standard procedure was to return to the depot.

[32] Mr Tuala said that he had not had a buddy on his first day at Foodcap. Ms Reynolds could not recall whether or not this was correct, but agreed that this might be correct given that Mr Tuala was an experienced driver with over 14 years' experience, who was familiar with the Progressive supermarket and delivery runs, and therefore it would not have been necessary for her to have buddied him on the first day.

[33] Ms Reynolds explained that she had always prioritised health and safety for the drivers under her management. If a vehicle broke down, equipment malfunctioned, a driver got injured, or exceeded the driving hours, it was the driver's responsibility to call the supervisor or manager as soon as possible. The manager would then arrange for a relief driver and arrange to deal with the problem.

[34] It was not uncommon for drivers to call a manager when they reached their maximum 13 hours driving limit, and that she personally would often pick drivers up from somewhere out of Auckland when they reached their maximum driving hours.

[35] As a result of the legislative changes in June 2007 Ms Reynolds said that she had re-evaluated how the runs were set out in Foodcap and this had resulted in an overall shortening of all short haul and long haul runs. When organising the drivers runs Foodcap would allow for a one hour cushion at the start and end of the run to allow for any delays. Her expectation was that drivers would always take the prescribed break even if it meant that they could not then make a delivery time.

[36] Ms Reynolds said the Foodcap drivers were well aware of the requirement to take breaks and correctly record their breaks and driver hours in the log books and runsheets. She commented that two drivers had been dismissed at Foodcap as a result of drivers not obeying the policy on driving hours and breaks.

[37] Mr Tuala said that on 15 July 2009 he had hurt himself and had telephoned Mr Paul Corbett, the supervisor on duty, and told him that the stacker had broken, however Mr Corbett had asked him to carry on with the delivery, as a result of which he had injured himself.

[38] He said he had called Mr Corbett again to report the injury but received no response and had returned to the Foodcap site. As Mr Corbett had not been present at the Foodcap site, he had left the premises and sought medical attention, following which he had telephoned Mr Corbett and reported the workplace injury.

[39] Ms Reynolds said that all employees are required to immediately advise their supervisor of any injuries, and that on 15 July 2009 Mr Tuala's supervisor, Mr Corbett, was not aware of Mr Tuala's workplace injury until Mr Tuala called him 90 minutes after leaving the Foodcap site when Mr Tuala had said to Mr Corbett that he was: "*off on ACC*" and so would not be coming into work the following day.

[40] Ms Reynolds said that if Mr Tuala had called his supervisor immediately as was expected of him, Mr Corbett would have gone to Mr Tuala at the delivery site and taken him

to get medical attention, or called her to do so. Mr Corbett would also have sent a relief driver to cover Mr Tuala's run.

[41] Mr Tuala was expected to complete an accident report as soon as possible, and also expected to complete the dedicated section for recording injuries on his run sheet. These were standard Linfox policies of which she said Mr Tuala had full awareness, but with which he had not complied.

### ***Log book falsification***

[42] As part of her investigation into the incident involving Mr Tuala on 15 July 2009, Ms Reynolds said that she looked to see if Mr Tuala had noted his injury on his runsheet where there was a dedicated section for so doing.

[43] She noted that Mr Tuala had recorded his finish time on his runsheet as 00:30 and in his log book at 00:00 but the CCTV footage recorded him leaving the depot at 23:07. On the runsheet for that particular day Mr Corbett had written: "*in yard 23:05*" and signed it, but he had not signed off the supervisor's signature on the runsheet.

[44] As a result Ms Reynolds then said she checked other entries in Mr Tuala's run sheet and log book documentation, where she found more inconsistent entries:

- (i) On 7-8 July 2009 Mr Tuala had recorded a finishing time of 01:00 on his run sheet, and signed off his log book at 01:00 but according to CCTV footage he had left the depot at 00:02, thereby effectively having added 58 minutes to his hours worked;
- (ii) On 8-9 July 2009 Mr Tuala had recorded his finishing time as at 01:30 on his run sheet and 00:30 in his log, but CCTV footage showed him leaving work at 00:50, he had therefore effectively added 40 minutes to his hours worked.

[45] Ms Reynolds said that when Mr Tuala returned to work on 17 July 2009, she had asked him to complete an incident report and see Linfox's doctor but he did not do so. He had eventually seen the company doctor on 24 July 2009. He had never completed an incident report despite her having asked him to do so several times.

### ***Warning disciplinary procedure and dismissal***

[46] Ms Reynolds said she had been very concerned that Mr Tuala was falsifying his log books and runsheets and not taking breaks. Not only was this contrary to company policy and the law, but Mr Tuala had been remunerated for hours not worked.

[47] She had informed Ms Sue Griffin, Linfox HR Manager, and together they had carried out an investigation and disciplinary meetings.

[48] Mr Tuala was sent a letter dated 28 July 2009 and signed by Ms Reynolds which set out the allegations of serious misconduct made against him, and invited him to a disciplinary meeting to be held on 31 July 2009. The disciplinary letter stated:

*Dear Vianney*

*I am writing to invite you to disciplinary hearing regarding serious misconduct, specifically the falsification of Linfox Logistics (N.Z.) Limited documentation; in this case your timesheets and log book, on the following dates:*

- 1. On your delivery run commencing 07 July, 2009, you documented your finish time on your run sheet as 01:00 and signed off your log book at 24:00. According to GPS reports, the truck were assigned on the day in question stopped its engine at the Food depot in Portage Road, Otahuhu at approximately 23:47. Based on CCTV footage, you vacated the premises at 00:02.*
- 2. On your delivery run commencing 08 July, 2009, you documented your finish time on your run sheet as 01:30, and signed off your log book at 00:30. According to GPS reports, the truck you were assigned on the day in question stopped its engine at the Foodcap depot in Portage Road, Otahuhu at approximately 00:38. Based on CCTV footage, you vacated the premises at 00:50.*
- 3. On your delivery run commencing 15 July, 2009, you documented your finish time on your run sheet as 00:30, and signed off your log book at 24:00. Based on CCTV footage, you vacated the premises at 23:07.*

*In addition to the previous allegations, there are also allegations of serious misconduct surrounding health and safety issues, specifically:*

- 1. On 15 July, 2009, it is alleged that you suffered a work related lost time injury, which was not reported at any point during your rostered delivery run, nor upon your return to the Foodcap depot. Neither is it recorded on your time sheet.*
- 2. You have failed to fill in an incident report recording the nature and circumstances of the injury.*

*As previously stated these allegations are considered to be serious misconduct by Linfox Logistics (N.Z.) Limited, and as such can result in the termination of your employment with Linfox Logistics (N.Z.) Limited.*

*Please be available for this disciplinary hearing on Friday, 31 July 2009 at 12:00. This hearing will take place at Head Office at Linfox Verissimo Drive. Sue Griffin, Linfox HR Manager will also be in attendance. You may bring a support person with you, and I encourage you to do so.*

[49] Prior to the meeting taking place, Mr Tuala was provided with a copy of the relevant log book and run sheet entries, GPS records and prints from the CCTV footage showing the times when he left the building each day.

***First meeting – 31 July 2009***

[50] Ms Griffin explained that the purpose of the first meeting held on 31 July 2009 was to hear Mr Tuala's responses to the allegations.

[51] Mr Tuala had attended the first disciplinary meeting with Ms Reynolds and Ms Griffin accompanied by Mr Barry Donaldson, NDU Organiser, and two NDU delegates, including Mr John Keogh, another driver.

[52] Mr Tuala said that he had been asked for his explanations to the allegations and he had explained that during the runs in questions he did not have time to have lunch breaks or other breaks in order to maintain the schedule which he had been set. As a result he had added one hour after his arrival time back at the depot to compensate him for not having had the breaks.

[53] He had explained he had been doing this for many years without Linfox making an issue of it and that it was common practice amongst all of the drivers.

[54] During the meeting Mr Tuala had become unwell because he did not have his medication to assist with his breathing with him. As a result the meeting was adjourned and rescheduled for 5 August 2009.

***Second meeting - 5 August 2009***

[55] On 5 August 2009 there was a second meeting held with Mr Tuala who was again accompanied by Mr Donaldson and the two NDU delegates. During the meeting Ms Griffin said that Mr Tuala and his support persons commented that they accepted company policy, and that Mr Tuala knew his log books, runsheets and GPS records must match, however they had not.

[56] Again Mr Tuala had explained his reasons for altering the timing on his log sheets and runsheets.

[57] The latter part of the meeting was adjourned because Mr Tuala had again not been feeling well and Ms Griffin suggested that Mr Tuala visit his doctor.

[58] Following the 5 August meeting Ms Griffin and Ms Reynolds said that they took time to consider Mr Tuala's responses and to consider what disciplinary outcome, if any, was appropriate.

[59] A further meeting was arranged to take place on 14 August 2009 however this meeting did not take place as Mr Tuala provided a medical certificate dated until Monday 17 August 2009.

***Final meeting - 20 August 2009***

[60] The final meeting was held on 20 August 2009. Ms Griffin explained that during the meeting the importance of the runsheets and log books was covered and Mr Tuala had been asked if he needed an opportunity go over it again with his support persons.

[61] Mr Donaldson had stated that everything had been: "*thrashed out*" and had told them that Mr Tuala and his representatives accepted the log book requirements, and for drivers taking responsibility by keeping within the rules.

[62] Mr Tuala had confirmed that he knew the rules and that he knew he had a personal responsibility to keep himself and others safe at work.

[63] Ms Griffin said that once she and Ms Reynolds had had the opportunity to consider Mr Tuala's final responses they formed the view that Mr Tuala's actions constituted serious misconduct and his employment should be terminated. She explained that her usual process was to advise the employee of the preliminary view and ask for their feedback before making the decision. On this occasion she could not recollect due to the passage of time whether or not she had done so and Mr Tuala similarly could not recall.

[64] Mr Tuala's employment had been summarily terminated at the meeting on 20 August 2009 and Ms Reynolds followed up the meeting with a letter explaining the reasons for his dismissal. The letter which was dated 4 September 2009 set out in full detail the allegations and the findings in response to those allegations.

[65] Ms Reynolds concluded the letter by stating:

*... I considered all of your explanations and I have also taken into account all points raised by your representative and support people. I do not find however, that these explanations mitigate or lessen the allegations raised. Specifically:*

- *Your falsification of your time sheets;*
- *Your falsification of your log book;*
- *Your personal responsibility to keep yourself safe in the workplace is required under the H&S Act.*

*It should be noted that the company has dismissed several employees, including a Foodcap driver previously, for falsification of company and legal documents. Neither does Linfox condone claiming for hours not worked.*

*With regards to your responsibility to keep yourself safe in the workplace, as a senior professional driver, you are fully aware of Linfox's vision zero programme, and the expectation around your taking responsibility for your safety. As a senior driver and Union delegate for some years, you are also fully aware of the procedures and policies surrounding the completion of company and log book paperwork and immediate reporting of a workplace injury.*

*Your disregard of the established procedures outlined by Linfox Logistics (N.Z.) Limited has led to a breach in the trust and confidence implicit in and underpinning the employment relationship. This breach was exacerbated by your request of the site manager to allow you to accompany drivers out on their runs while having a medical certificate stating that you were off work at the time, in order to obtain 'evidence' without my knowledge or permission.*

*I am confident that I completed a thorough process in investigating and addressing these issues and understanding any mitigating explanations. As such, you were summarily dismissed for serious misconduct at the conclusion of this process.*

[66] On 21 September 2009, Linfox received a letter explaining that Mr Tuala was raising a personal grievance for unjustifiable dismissal. Mr Tuala filed a statement of problem in the Authority on 30 September 2010 and an amended statement of problem on 21 July 2014. The parties attended mediation but this did not resolve the issues.

### **Determination**

[67] Mr Tuala was dismissed on 20 August 2009 therefore it is the Test of Justification as set out at s 103A of the Employment Relations Act 2000 (the Act) prior to the amendment on 1 April 2011 which is applicable in this case. This states:

*For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred"*

[68] The decision must be both substantively and procedurally fair. The test as set out in s103A requires the employer to establish both limbs of the test and adheres to the principles of natural justice.

**Did Linfox have substantive justification for finding that Mr Tuala had committed serious misconduct?**

[69] The test for serious misconduct is set out in *Northern Distribution Union v BP Oil New Zealand Ltd*<sup>1</sup>. In that case the Court of Appeal in defining what constituted conduct justifying summary dismissal stated:<sup>2</sup>

*Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*

[70] The reasons for Mr Tuala's dismissal were that:

- i. He had failed to comply with Linfox's health and safety policies; and
- ii. He had falsified his logbooks and runsheets

[71] Mr Tuala had been a union delegate and confirmed that he had been familiar with the contents of the CEA, including Schedule 4, which sets out a non-exhaustive list of examples of behaviour constituting serious misconduct. The examples include failure to observe safety rules and falsification of documentation including timesheets or other time records.

[72] During the Investigation Meeting Mr Tuala confirmed that:

- he was aware of his responsibilities in regards to logbooks and runsheets, and was aware that the outcome of any log book falsification would be disciplinary action and possible termination of employment;
- he had attended the training sessions provided about the legislative and rule changers in 2007;
- he had received the toolbox updates;
- he had attended the briefing by Snr Sgt Locke on 18 February 2008; and
- he had been aware that he could face legal action if he falsified his logbook.

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<sup>1</sup> [1992] 3 ERNZ 483

<sup>2</sup> Ibid at p.487

[73] Mr Tuala had been a union delegate and part of the Progressive site Health and Safety Committee. He confirmed during the Investigation Meeting that:

- he understood health and safety was paramount in the workplace;
- he had been aware of the expectation as set out in clause 20 of the CEA about the reporting of accidents;
- he had been aware of the expectations of drivers in regards to Linfox policies as set out in the Drivers Manual; and
- he had understood that it was a health and safety requirement to take breaks.

[74] I find that during the period of Mr Tuala's employment, Linfox undertook rigorous training and notifications to drivers in order that they were fully aware of the company and legal requirements of them.

[75] Whilst Linfox carried out random checks that its drivers were adhering to the expectations in regards to the taking of breaks and correct logbook and runsheet maintenance, I note that it relies upon the drivers complying with its policies and procedures in order to ensure compliance with health and safety standards and the legal requirements.

[76] Mr Tuala, despite having been fully aware of the Linfox policies and procedures and the expectations that he would comply with these, knowingly breached them, thereby placing himself at risk of disciplinary action, and himself and Linfox at risk of legal sanctions. Additionally I note the risk to the general public of fatigued drivers in charge of 40 ton vehicles.

[77] I note that in the final written warning issued to him shortly before his dismissal, Mr Tuala had been reminded of the consequences of not adhering to Linfox policies and procedures.

[78] In the circumstances I find that Linfox lost trust and confidence in Mr Tuala and had substantive justification for finding that he had committed serious misconduct.

**Was the process carried out by Linfox procedurally fair and reasonable?**

[79] Mr Tuala had claimed during the disciplinary process that his actions had been common practice amongst the Linfox drivers. I find that Linfox carried out a fair investigation and process. In particular in regards to the investigation:

- Ms Griffin and Ms Reynolds had reviewed and checked all documents and other information available to Linfox employees to ensure that all employees would have been aware of the expectations regarding logbook practices;
- Ms Reynolds had spoken to the supervisors and other drivers at Foodcap to check that the logbook procedures were being followed and that incorrect logbook entry was not a widespread practice; and
- Ms Reynolds had spoken to Mr Buckingham to ensure that he had not been aware of the practice of incorrect logbook entries, and it had not presented as an issue during his random logbook and runsheet checks;

[80] In regards to the disciplinary process:

- Mr Tuala had been advised of the allegations against him and the possible outcomes,
- He had been advised of his right to have representation and in fact had a union organiser and two union delegates with him at each of the disciplinary meetings;
- The meetings were adjourned when it became clear Mr Tuala had health problems and subsequently resumed;
- Mr Tuala had been given full opportunities to present explanations; and
- Full consideration had been given to his explanations prior to the final decision being made.

[81] I determine that a fair and reasonable employer would have dismissed Mr Tuala in all the circumstances at the relevant time. I determine that Mr Tuala has not been unjustifiably dismissed by Linfox.

## **Costs**

[82] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson  
Member of the Employment Relations Authority