

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 133  
5455986

BETWEEN SHANE CLODE  
Applicant  
AND NEW ZEALAND POST  
LIMITED  
Respondent

Member of Authority: P R Stapp  
Representatives: Greg Lloyd Counsel for Applicant  
Steven Fraser Advocate for Respondent  
Investigation Meeting: 2 December 2014 at Wellington  
Memorandum received 4 December 2014  
Determination: 19 December 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Clode claims his dismissal was unjustified. He has claimed that the reasons given by New Zealand Post Limited (New Zealand Post) do not justify a finding of serious misconduct.

[2] Mr Clode is seeking reinstatement. He claims the reimbursement of lost wages and \$10,000 compensation for humiliation, loss of dignity and injury to feelings.

[3] New Zealand Post denies all the allegations. It seeks to justify the dismissal and claims that it is not practicable and reasonable to reinstate Mr Clode.

[4] The parties have agreed that should the Authority determine that Mr Clode has a personal grievance and is entitled to compensation for lost wages under s 123 (1) (b) of the Employment Relations Act 2000 the sum should be calculated on the basis of 37.5 hours per week, at an hourly rate of \$21.26.

[5] The applicant makes no claim in relation to any loss associated with his superannuation.

### **Issues**

[6] Mr Clode was dismissed for serious misconduct for failing to deliver 29 circulars. The issue is whether or not his conduct was serious misconduct. If he has a personal grievance there is an issue as to whether or not it is practicable and reasonable to reinstate him.

[7] The statutory test of justification is contained in s 103A of the Employment Relations Act 2000 (the Act). That section provides that the question of whether a dismissal or action was justifiable must be determined, on an objective basis, having regard to whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[8] In applying the test the Authority must consider the non-exhaustive list of factors outlined in s 103A(3) of the Act, which are as follows:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[9] In addition to the factors described in s 103A (3) of the Act, the Authority may consider any other factors it thinks appropriate. A dismissal or action must not be found to be unjustified solely because defects in the process were minor and did not result in the employee being treated unfairly.

[10] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[11] As the full Court observed in *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26]

*A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.*

[12] In *Harris v The Warehouse* [2014] NZEmpC 188 the Court considered remedies and contributory fault, and said

*[174] I begin by analysing the components of s 124. The logical sequence to the application of the section begins with the word “must”. This means that in every case where the Authority or the Court finds that an employee has a personal grievance, the Court will apply the subsection (a) and (b) considerations in deciding “both the nature and the extent” of the remedies to be provided in respect of that personal grievance.*

*[175] The “nature” of the remedies addresses those different remedies set out in s 123 which include reinstatement (subs (1)(a)), reimbursement of lost earnings (subs (1)(b)), what is commonly referred to as distress compensation (subs (1)(c)(i)), compensation for loss of other benefits (subs (1)(c)(ii)) and the other remedies set out in s 123(1) which are less commonly applied.*

*[176] The “extent” of the remedies to be provided for in the personal grievance that the Court must consider in every case addresses the amount or duration of any of those particular remedies. So, in practice, the “extent of the remedies” may include how much of the remuneration lost as a result of the grievance will be compensated for under s 123(1)(b), how much compensation under s 123(1)(c) will be awarded, and the like.*

[177] *The Authority or the Court must consider “the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance”. Working backwards from the end of that phrase, “the personal grievance” is the Authority’s or Court’s finding of an unjustified dismissal from, or unjustified disadvantage in, employment, and the other varieties of statutory grievance.*

[178] *Next, “the situation that gave rise to” that personal grievance is the series of relevant events which caused the employee to have been dismissed or disadvantaged unjustifiably. Longstanding case law establishes that there must be more than simple cause and effect shown. The employee’s actions must be culpable or blameworthy or wrongful actions which must have contributed, for example, to a complaint of serious misconduct which, following investigation, brought about the dismissal of the employee.*

[179] *Finally, in this process of consideration of s 124(a), the Authority or the Court is required to “consider the extent” to which those employee actions contributed to the situation that gave rise to the grievance. That connotes a proportionate analysis reflecting the common sense experience that, on many occasions, an employee will have been at fault but the circumstances did not justify that employee’s dismissal or disadvantage. There are, also, many cases in which the Court will find that there is no element of (culpable) contributory conduct by an employee, in which case neither the nature nor the extent of the remedies to be provided will need to be reduced.*

[180] *Next, the Authority and the Court are left with a broad discretion even if they find that the actions of the employee contributed towards the situation that gave rise to the grievance. That is because of the opening words of s 124(b) (“if those actions so require”). In each case, therefore, even if there were blameworthy or culpable actions or omissions of the employee that contributed to the situation that gave rise to the grievance, it will still be necessary for the Court or the Authority to consider whether those will “require” a reduction of the remedies.*

## **The facts**

[13] Mr Clode has worked for New Zealand Post Limited for 22 years. He was a postie at the Te Puni delivery centre at Petone. He was a member of the New Zealand Amalgamated Engineering Printing and Manufacturing Union Inc (the EPMU or the Union) at the material time (the Union is standing behind him in his claim). His terms and conditions of employment were contained in the EPMU and New Zealand Post Limited collective agreement.

[14] He was paid under Post’s Postie Paid Model (PPM), which determines the way posties are paid based on the calculation of workloads and allows for flexibility in regard to decisions extra work in certain parameters.

[15] New Zealand Post Limited is a state owned enterprise which runs a postal service business. It operates throughout New Zealand. As part of its business New Zealand Post delivers circulars for businesses. At the New Zealand Post mail centre at Te Puni branch the rule supposedly is that circulars on “cut-up rounds” must be delivered on the same day, usually a Monday. A “cut up round” is an assigned

workload usually forming part of another round and where the postie has not volunteered for the extra work. There is a Team Rule in writing that reads as follows

*Circulars Delivery on Required Cut Ups*

- *Circulars will be delivered by all Posties on all parts of a required cut up on a day that is agreed by the team, usually a Monday*
- *It is the responsibility of the Posties who is away to inform the Team Leader if they do not want the circulars to be delivered (i.e that they will deliver them when they return)*
- *It is very important that all Posties record the progress of their circular deliveries accurately on the whiteboard to avoid double delivery*
- *Note that if leave occurs on a Friday all remaining circulars must be delivered on that day*

[16] Mr Clode denies seeing this written rule.

[17] On 16 December 2013 Mr Clode received a final written warning in regard to the non-delivery of deliverable mail. On 13 January 2014 he was issued with a letter of expectation in regard to an unrelated matter. On the former he accepts that he did not properly apply the process. The warning has not been challenged. He has not commented on the letter of expectation. Nor has Post relied upon it for anything in this case.

[18] On 3 March 2014 he was instructed to do what is called a “cut-up round” by Mr Ron Steele team leader, in addition to his normal delivery round. This included 29 circulars for the Naenae shops. Mr Clode at first decided not to deliver any of the circulars that he was requested to deliver by Mr Steele. He says that he informed Mr Steele that he would not deliver any of them, and that Mr Steele walked away and ignored him. Mr Clode says that he changed his mind and decided to deliver most of the circulars anyway, except for the 29 circulars for the Naenae shops. He left the 29 circulars at the depot. He did not inform Mr Steele about his change of mind. Instead, his co-workers complained in writing to his Team Leader (team 3), Deslys Tredrea, about what had happened.

[19] Mr Clode was informed by Ms Tredrea of New Zealand Post’s concerns in a letter dated 11 March 2014. He was requested to provide a response.

[20] There was a meeting held on 17 March 2014 at which Mr Clode was represented by the EPMU. Mr Clode acknowledged that he was requested to deliver the circulars and that he did not do so, and he says that he did not deliver them for genuine reasons including at first that the businesses would be closed. Mr Clode

accepted that only 3 businesses were actually closed on the day when this was checked by New Zealand Post. In his opportunity to explain he also claimed:

- a) That he was unhappy and that this related to him not having a car when an allowance is paid for posties who own and use their own car for deliveries.
- b) That New Zealand Post's reaction was disproportionate when he had delivered 500 circulars.
- c) That he did not take the circulars out as he considered that they were "not deliverable mail". Mr Clode asserted that he believed that he had 5 days to get the circulars delivered because of PPM.

[21] The circulars were delivered by another postie in the team the next day.

[22] Mr Clode's explanations were rejected by Ms Tredrea, the decision maker, primarily because of the team rules that applied at Te Puni. Mr Clode claims he cannot recall seeing the notice of the team rules on deliveries at Te Puni on any whiteboard where Post claims they were. Further he says he did not see a copy of the notice during the disciplinary process, although Post was referring to it. Mr Mark James, the EPMU organiser, says the notice was discussed, but not produced at the disciplinary meetings. Mr Clode accepts that each branch has its own rules in managing workloads, and different rules on cut up round deliveries apply elsewhere at Te Puni. He could not recall any meeting where a decision on delivery was made by the team. Ms Tredrea had no evidence to contradict what Mr Clode had to say.

[23] Ms Tredrea says that she consulted Karen Taylor, Wellington Operations Leader, in regard to the decision and Ms Tredrea made a tentative decision to dismiss Mr Clode. Mr Clode was given an opportunity to comment on the tentative decision and the reasons for it. She adamantly denies saying to Mr James that if it was her decision she would not have made it.

[24] The final decision was put in writing on 2 April 2014 that confirmed the summary dismissal. Ms Tredrea has relied on concluding that Mr Clode deliberately failed to follow a directive in accordance with the cut out round and deliberately

failed to deliver the circulars. However, there has been no explanation about what the findings were to reach the conclusion that his behaviour was deliberate. There was nothing in the letter of dismissal, the notes and the evidence. I conclude that Ms Tredrea must have rejected his explanations, but there are no reasons given for that. She relied on the Te Puni house rules for circulars to be delivered the same day, but there is no proof that Mr Clode had seen the notice and that he was clearly made aware of his obligations in this respect.

[25] New Zealand Post's final conclusion was that Mr Clode could no longer be trusted. His dismissal was immediate with effect on 2 April.

[26] The parties have not been able to settle the matter and it falls on the Authority to determine the matter.

### **Determination**

[27] Mr Clode's dismissal was not the action that a fair and reasonable employer could take on the following basis:

- a) That Mr Clode says he never had seen the written notice of any delivery rules for the same day and usually on Monday. There was no proof from New Zealand Post that Mr Clode had seen the notice.
- b) That Mr Clode genuinely believed that he had 5 days to deliver the circulars and that there would not be any impact on the businesses that were shut for the day.
- c) That although New Zealand Post referred to serious misconduct there is also provision for the same matter to be dealt with as a lesser offence for misconduct.
- d) That there is an issue that the matter relates to Mr Clode's performance as an alternative to serious misconduct in that there is provision under the conduct and performance expectations in the collective employment agreement for non-delivery of deliverable mail as minor misconduct.

- e) That there was no evidence of any reasons for New Zealand Post determining that Mr Clode had deliberately refused to deliver the circulars when there were three shops closed, the mail was delivered by a colleague, there were no public complaints, Mr Clode says he did not know of the delivery policy at Te Puni, and his colleagues' complaint was not put to him in the context of a serious matter.
- f) That there was an issue about both Mr Clode's and Mr Steele's communication with each other. New Zealand Post did not rebut Mr Clode's evidence that Mr Steele walked away from Mr Clode and ignored him.
- g) That Mr Steele as the team leader could have been expected to respond to Mr Clode's intemperate comment that he would not deliver the circulars to reinforce what he required Mr Clode to do.
- h) That there was no complaint from any of New Zealand Post's customers and/or clients about the 29 circulars being delivered the next day by another postie.
- i) That the complaint was never put to Mr Clode that he had upset his colleagues. I have noted New Zealand Post's evidence for not putting the complaint to him was that Mr Clode admitted that he had not delivered the circulars. He was telling the truth.
- j) That there was no basis for New Zealand Post to conclude that Mr Clode's performance meant that New Zealand Post could come to the conclusion that he could not be trusted. He delivered the majority of the circulars and believed the rest could be delivered within 5 days.

[28] I hold that New Zealand Post has not been able to justify the decision to dismiss Mr Clode on the grounds of serious misconduct. It is more likely than not that Mr Clode's explanation was that he genuinely believed that there was a five day period available to deliver the circulars was correct. It was not open to a fair and reasonable employer to make such a serious finding against him in these circumstances, I hold.

[29] It was incumbent on New Zealand Post to undertake a sufficiently full investigation given its resources. It did purport to do this, but given that Mr Clode had an explanation, a fair and reasonable employer could be expected to interview the people directly involved including the team members who complained about Mr Clode; and Mr Steele who walked away from him and ignored him when the matter started. Any information and concerns from them in light of Mr Clode's explanation could have been taken into account and may have influenced the decision. Post's omission means it did not fully investigate the matter.

[30] New Zealand Post has not provided any evidence that supports reinstatement not being practicable and reasonable. There was no evidence from any of his colleagues or Mr Steele. Ms Tredrea had no particular issues except that Post says that he cannot be trusted. I hold that assertion has not been established. I therefore reinstate Mr Clode to his former position or a position no less advantageous to him as soon as it is practicable to do so. The letter of expression has no bearing in the matter. Neither party has made any submission on reinstatement being implemented with Mr Clode being put on another warning. Mr Clode has been on a final warning in regard to not delivering deliverable mail on another occasion and he accepted that without challenging New Zealand Post's action. Although the warning has applied I hold that it does not impact on the current situation and that the circumstances are separate matters.

[31] Mr Clode is entitled to remedies. His lost wages are for the period 2 April 2014 until the investigation meeting date. Mr Clode is entitled to lost wages. Mr Clode accepted that he had been selective in looking for alternative work, and therefore I am not satisfied that he did enough to mitigate his loss in the amount of time that there has been since he was dismissed. Thus I have restricted the lost wages to the 13 weeks under the Act.

[32] I hold that Mr Clode has contributed to the situation because of his intemperate comment not to deliver any circulars because he was unhappy and then did not communicate that he had changed his mind with his other supervisor or any supervisor for that matter. His action in the matter was unreasonable even in the circumstances where Mr Steele did not respond, that he says he has never seen the team rule and believed that he had 5 days to deliver the circulars. He is a long

standing employee and should have asked. Given that Mr Steele did not assist by walking away and ignoring Mr Clode, I hold that any contribution is at the lower end of the scale and reduce the wages by 10%. I therefore award him 13 weeks lost wages reduced by 10%. His lost wages are \$9,327.82.

[33] I assess his claim for compensation for hurt and humiliation in the sum of \$5,000 less a reduction of 10% for contribution; \$4,500. This has regard to how he describes his feelings and the impact of the dismissal on him without any other independent evidence.

[34] New Zealand Post Limited is to

- 1) Reinstatement Mr Clode to his former position or a position no less advantageous to him as soon as it is practicable to do so; and
- 2) Pay \$9,327.82 lost wages; and
- 3) Pay \$4,500 compensation under s 123 (1) (c) (i) of the Act.

[35] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority