New Zealand Employment Relations Authority Decisions

Eruera-Morrison v New Zealand Post Ltd AA 314/06 (Auckland) [2006] NZERA 853 (5 October 2006)

Last Updated: 6 December 2021

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Pixie Eruera Morrison

AND New Zealand Post Limited

REPRESENTATIVES Paul Blair for Applicant

Penny Swarbrick for Respondent

MEMBER OF AUTHORITY Y S Oldfield

Determination: AA 314/06 File Number: 5032795

INVESTIGATION MEETING SUBMISSION

7 August 2006

23 August 2006

DATE OF DETERMINATION 5 October 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Morrison was a 'postie' who was dismissed on 22 February 2006 after thirty years service. Her manager, Waikato Delivery Business Leader Brendon Coker, says that this dismissal was justified for serious misconduct, namely that she deliberately took a cell phone from the counter at a fast food outlet in a Hamilton mall while delivering mail on the morning of Monday 13 February.

[2] It was argued on Ms Morrison's behalf that the employer did not conduct a fair investigation into the allegations against her and that the investigation did not uncover enough evidence for it to conclude that serious misconduct (such as to justify dismissal) had occurred. NZ Post considers that the dismissal was both procedurally and substantively justified. The issues for determination therefore include:

- whether the procedure which led to the dismissal was fair, and
- whether the information the employer had gathered was enough to establish that serious misconduct had occurred;

[3] Section 103A sets out the test for justification for dismissal as follows:

"...the question of whether a dismissal...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...occurred."

[4] The third issue is therefore:

- whether the overall test for justification as set out in Section 103 A of the Employment Relations Act 2006 has been met.

[5] The investigation of this matter by the Authority had an unusual feature in that Mr Blair advised (at the timetabling conference) that Ms Morrison would not be giving any evidence to the Authority. This stance was subsequently supported by a memorandum. I advised by way of

Minute that I would not proceed with an investigation into Ms Morrison's employment relationship problem without hearing from her. After receiving my Minute Mr Blair provided an affidavit for Ms Morrison, but confirmed that she would not take an oath or give an affirmation or give "live voice evidence" before me and that she refused to answer questions from either the Authority or the respondent's representative.

[6] Having received the affidavit, I decided to proceed with the investigation meeting and took evidence from other witnesses including Ms Morrison's support person, Mr Koroheke. Ms Morrison attended but did not speak and declined to take the oath or give an affirmation. In coming to the determination which follows I have had regard to all the information available to me, including Ms Morrison's affidavit.

Was the employer's procedure fair?

[7] On Tuesday 14 February 2006 Mr Coker received a complaint about one of his staff. It was from a fast food outlet located in a Hamilton mall. It was alleged that a cell phone had gone missing from the shop counter the day before and that CCTV footage indicated that a NZ Post employee had taken it. Mr Coker notified an in-house security consultant, Garth Taylor, and the two of them visited the mall to view the footage. They identified the person concerned as Ms Morrison and decided further investigation was warranted.

[8] On 16 February Mr Taylor spoke with Ms Morrison in what the respondent says was not a disciplinary meeting but simply a preliminary inquiry into what had happened. Mr Coker was briefly present at the beginning of the meeting. Ms Morrison was not advised in advance of its purpose but was invited to have a support person with her. She called in her co-worker Mr Koroheke. Mr Taylor told Mr Koroheke that his role was simply to support Ms Morrison and not to participate in the meeting otherwise. I am satisfied that in these circumstances Mr Koroheke could not be described as a representative.

[9] The inquiries by Mr Taylor took up much of the morning. They included a "question and answer" session with Ms Morrison, a visit to the mall to view the CCTV footage, stopping off at Ms Morrison's home on the way back, and a further interview in Mr Taylor's office. At the end of this process Mr Taylor formed a view that serious misconduct may have occurred and told Mr Coker so. Mr Coker suspended Ms Morrison pending a formal disciplinary process. Mr Coker gave Ms Morrison written confirmation of her suspension and of the specifics of the allegation against her. At the same time Mr Coker advised Ms Morrison's union, the PWA, of the suspension and disciplinary proceedings.

[10] A formal disciplinary meeting was conducted on 22 February, having been delayed for a few days at Ms Morrison's request. Mr Paul Blair of PWA was in attendance as Ms Morrison's representative with Mr Koroheke and another co-worker, Luci Kokaua, as additional support people.

[11] Mr Coker opened the meeting by explaining that it was disciplinary in nature. He outlined the allegation (that "*while on her round on Monday 13 February...[*she*] uplifted a cellphone from...* [the fast food outlet] *counter.*) He told her that this was being regarded as alleged serious misconduct that could potentially result in dismissal.

[12] Neither Ms Morrison nor Mr Blair denied that she had taken the phone. Ms Morrison claimed that she did not notice she had it until she returned to her car after her round on the day in question. Mr Blair argued on Ms Morrison's behalf that there was not enough evidence to support the allegation that she took it deliberately. Mr Blair and the others present then viewed the CCTV footage. Afterwards, Mr Blair asserted that he did not consider the video enough to establish that the alleged serious misconduct had occurred. There was further discussion of

what the video showed, with Mr Coker explaining why, after seeing the video, he thought it unlikely that the phone could have been picked up and carried around inadvertently. Mr Coker also stated that the respondent was concerned because there had been three days between the incident (13 February) and the interview between Ms Morrison and Mr Taylor, yet in that time she had made no attempt to report what had happened.

[13] Mr Coker adjourned to consider his decision. During the course of the next day (23 February) he decided,principally from what he had seen on the video, that it was unlikely that Ms Morrison had been unaware she had the cell phone. He told me:

- it looked to him as though Ms Morrison had used a bundle of mail to conceal the phone before scooping it up;
- the mail did not leave her hand, making it unlikely the phone could have got caught up amongst the mail;
- even if it had, its presence amongst the mail would have been apparent since it weighed 150 grams (he tried doing it himself and formed the view it was not possible to keep hold of the phone accidentally);
- overall, he was satisfied that Ms Morrison's actions amounted to serious misconduct.

[14] Mr Coker deferred the decision whether to dismiss Ms Morrison until he had heard from Mr Blair on the issue. Mr Blair did this by written submission on the morning of 24 February. In it he reiterated the points he had already raised (asserting that the video was "*highly ambiguous*") and expressed concerns about the process with regard to the meeting of 16 February.

[15] After reading the submission, and discussing it with his Human Resources Advisor, Mr Coker decided to proceed to dismiss Ms Morrison. He told me that he took into consideration her long service and generally satisfactory record with the company, however he said that the respondent had to have the utmost trust in its "Posties" who work remotely from their supervisors for much of their working day. He considered it could no longer have that trust in Ms Morrison because her actions had completely contravened the Company's standards of behviour and code of conduct.

[16] Later that day Mr Coker met with Ms Morrison to advise her of his decision.

Determination

[17] Mr Blair says the meeting of 16 February was procedurally unfair because:

i. There was no prior notice of the meeting or time for Ms Morrison to seek the assistance of the union;

ii. Her support person was told to remain silent.

[18] These are valid points. Because Ms Morrison had no notice and no representation it would, I accept, have been unfair for the employer to treat the meeting of 16 February as part of the disciplinary process. Information gathered at that meeting could not legitimately be taken into consideration when decisions were being made about Ms Morrison's conduct.

[19] However, the respondent does not attempt to do so. It says that the information gathered there is relevant only insofar as it justifies the commencement of disciplinary proceedings (including the suspension.) It says that the dismissal is justified on the basis of the information gathered at the meeting of 22 February and afterwards.

[20] Mr Blair has not raised any concerns about the process after the meeting of 16 February, and I am satisfied that it was fair and competent. Ms Morrison was represented, the allegations against her were explained, she was given all the information under consideration (specifically, she and her representative were able to run the video through as many times as they wished) and she had a full opportunity, both in person and through her representative, to respond.

[21] Mr Blair also put forward a further reason why the the meeting of 16 February should be excluded from the employer's consideration in deciding whether dismissal was justified. He argues that by putting questions to her about a matter which was the subject of potential criminal prosecution, the respondent breached Ms Morrison's rights under the Bill of Rights Act

1990. If I have understood him correctly, Mr Blair's submission is that Ms Morrison was entitled to rely on the right to remain silent, not just to prevent prejudice to herself in any possible criminal proceedings which might eventuate, but also to prevent prejudice to her employment. This is because NZ Post is a state owned enterprise which is itself bound by the Bill of Rights Act. On this basis, he says the employer should have "*cautioned the employee and advised the employee with adequate notice to obtain legal advice and representation.*"

[22] I reject Mr Blair's argument for the following reasons. First of all, although disciplinary proceedings may be stayed where an employee invokes the right to remain silent,1 the purpose of such a stay is to protect against self incrimination in relation to future criminal proceedings, not in relation to the employment in general or the disciplinary process in particular.

[23] In addition, in any event, Ms Morrison did not invoke the right to silence. As for the proposition that employers have an obligation to caution employees, I am aware of no authority for this. On the contrary, Goddard CJ has noted that an employee is not entitled as of right to have a disciplinary process stayed.2

Was it reasonable for the employer to conclude that serious misconduct had occurred?

[24] Mr Blair argues on Ms Morrison's behalf that the information available to the employer did not establish, to a sufficiently high degree of probability that Ms Morrison had done as alleged.

[25] As I have already explained, Mr Coker placed great reliance on what he saw in the CCTV footage in coming to the decision to dismiss. He felt that it was not consistent with the suggestion that the phone was picked up by accident, for the reasons set out in paragraph

[13] above. At my investigation I was shown the footage. I agree entirely with Mr Coker's assessment of it. From what can be seen there, it does not appear at all credible that the phone was somehow accidentally picked up. I am satisfied, on the strength of that footage, that it was establised to a high standard that Ms Morrison deliberately picked up the phone and took it from the counter. It was reasonable for Mr Coker to reach the conclusion he did.

Has the overall test for justification as set out in Section 103 A of the Employment Relations Act 2006 been met?

[26] Since it was open to Mr Coker to conclude that Ms Morrision took the cellphone deliberately, the next question for determination is whether, having reached that conclusion and in all the circumstances, he was justified in proceeding to dismiss her.

[27] Against a background of long and satisfactory service, a reasonable employer would have given the benefit of the doubt to any ambiguous conduct or conduct which might reasonably have been the result of inadvertence. Unfortunately, her conduct is not in that category.

[28] "Posties" are charged with the role of safeguarding the mail. A very high standard of trust is required of them. For Ms Morrison to lose her job after 30 years with the respondent is tragic, but I accept that in these circumstances, a reasonable employer would have dismissed her.

[29] Ms Morrison's dismissal is justified and there is nothing more I can do to assist with her employment relationship problem.

Y S Oldfield

Member of Employment Relations Authority

1 *Russell v Wanganui City College [1998] NZEmpC 254; [1998] 3 ERNZ 1076*

2 *Russell v Wanganui City College [1998] NZEmpC 254; [1998] 3 ERNZ 1076, p. 1082*

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