

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 243
5077763

BETWEEN MAREE EILEEN HOWARD
Applicant

AND NEW ZEALAND POST
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: J Howard, Advocate for Applicant
S Hornsby-Geluk, Counsel for Respondent

Investigation: On the papers

Determination: 9 June 2011

DETERMINATION OF THE AUTHORITY

Background

[1] Relevant to the matters in dispute, Mrs Howard was employed by New Zealand Post Limited (NZ Post) as the manager of the Picton Post Shop from 2003 to 2006.¹

[2] On 5th July 2006, Mrs Howard suffered a work related fall, while assisting a postal delivery worker on a bicycle, during windy conditions. On 7th August 2006, Mrs Howard twisted her back while turning to access a towel after washing her hands at work. It appears that the latter incident was directly related to the former. Mrs Howard completed a health and safety injury/incident report in regard to both incidents. A doctor's certificate was issued on 24th August 2006. It refers to the fall on 5th July 2006 and a "*lumbar spine injury*." However, the respective incidents did

¹ Mrs Howard had been employed by NZ Post since 1991 but not on a continuous basis.

not result in Mrs Howard being absent from work, and accident compensation was not an issue during her employment with NZ Post.

[3] On 5th September 2006, Mrs Howard presented a written resignation to her manager and it was subsequently agreed that Mrs Howard's employment would cease 4th November 2006. On 19th October 2006, Mrs Howard sought to withdraw her resignation. The withdrawal was not accepted by NZ Post. Mrs Howard ceased her employment on 4th November 2006, as had been earlier agreed.

[4] On 9th November 2006, via a comprehensive document (22 pages), Mrs Howard raised a personal grievance with NZ Post claiming that she had been constructively dismissed. Among other things, Mrs Howard "pleaded" nine causes of action and relevant to the matters now before the Authority, she informed that:

There is a distinct overlap in the grounds supporting each cause of action. It is alleged that NZ Post Ltd failed to exercise statutory powers conferred or imposed on it; that it fettered the exercise of the discretionary powers available to it; that it failed to comply with the provisions in the Collective Employment Agreement (CEA) and its Health and Safety Manual and; on an objective test, namely, what NZ Post Ltd did, and how it did it, did not meet the standard of a fair and reasonable employer in all the circumstances.

[5] The grievance document then states:

That following the events described further, NZ Post Ltd has still not issued a "decision" either declining or granting cover for a reported accident and injury suffered by Maree on 5 July 2006 and a reported 7 August 2006 medically diagnosed reagravation [sic] of the fall and injury suffered by Maree on 5 July 2006.

[6] There then follows several pages of submissions related to the two injuries incurred by Mrs Howard, the actions and/or inactions of NZ Post, and a reference to Mrs Howard's resignation letter:

"In light of events over the last few weeks surrounding my accident and injury, regretfully, I no longer have trust and confidence in NZ Post Ltd and I intend to seek a better work/life balance elsewhere perhaps in a part time employment role."

Settlement of the personal grievance

[7] The parties attended mediation on 19th March 2007. A settlement was reached, the details of which must, as agreed, remain confidential. However, it can be revealed that the *Record of Settlement* contains certain standard provisions. Firstly, (at clause 4) that:

This is full and final settlement of all matters between the parties arising out of the employment relationship between the applicant and the respondent.

And further:

We also confirm that before the Mediator signed the agreed terms of settlement the mediator explained to us that:

1. These terms of settlement are final and binding on and enforceable by us; and
2. Except for enforcement purposes, neither of us may seek to bring those terms before the Authority or Court whether by action, appeal, and application for review, or otherwise.

We confirmed to the Mediator that we understood that explanation and affirm our agreement.

Accident Compensation Matters

[8] Following the termination of her employment with NZ Post on 4th November 2006, Mrs Howard was able to obtain accident compensation (ACC) coverage relating to her accidents on 5th July and 7th August 2006. The ACC coverage appears to have been effective from 17th November 2006 and Mrs Howard was paid at the rate of 80% of the pay (for standard hours) that she had been receiving whilst working for NZ Post. The Authority understands that Mrs Howard continues to be paid at this rate as she has been medically certified as fully unfit to work.

[9] Some time towards the end of September 2010, Mrs Howard had her attention drawn to a provision of the NZ Post *Collective Employment Agreement 2006-2008* (the CEA). This agreement provided the terms and conditions of employment for Mrs Howard when she was employed by NZ Post. The clause that Mrs Howard now draws the attention of the Authority to, is clause F: 22. It provides that:

If an employee is away from work for more than 1 week, the company will make up the difference between their earnings-related compensation and the payment they would have received if they had worked their standard hours of work. The employee will be paid the standard hours at the appropriate hourly rate, industry payments and allowances for the job they performed prior to the accident.

[10] In October 2010, Mrs Howard contacted NZ Post and requested that the company engage in discussions and/or mediation with her pertaining to her claim that she is entitled to be paid a “makeup” of a further 20% of her earnings, consistent with the clause F: 22 (above). NZ Post rebutted Mrs Howard’s overtures, principally, it seems, on the grounds that:

(a) Mrs Howard was no longer employed by NZ Post, having ceased her employment with the company on 4th November 2006. Therefore, she was no longer an employee of NZ Post, hence the CEA no longer applied to her; and

(b) All matters were fully and finally settled with Mrs Howard as an outcome of mediation and this is recorded in the *Record of Settlement* dated 19th March 2007.

Determination

[11] It appears that Mrs Howard sought advice from various sources and as a consequence now brings the issues involved to the Authority. Effectively, the primary question Mrs Howard poses to the Authority is:

Whether or not section 149 of the Employment Relations Act 2000 (the Act) and the associated terms of the *Record of Settlement*, prevent Mrs Howard from pursuing a claim for additional payments pertaining to the operation of clause F: 22 of the CEA?

[12] However, the matter is not as simple as that. For as has correctly been submitted by Ms Hornsby-Geluk, for NZ Post, firstly and primarily, there is a jurisdictional issue to be resolved. It is submitted for NZ Post that pursuant to s.161 of the Act, the Authority does not have jurisdiction to investigate the matters raised by Mrs Howard. While the submissions for NZ Post are rather more comprehensive, what they come down to is; the Authority does not have jurisdiction simply because at the time that Mrs Howards claim is alleged to have arisen, she was not in an employment relationship with NZ Post, as her employment ended prior to the alleged loss arising.

[13] I accept the overall substance of the submissions for NZ Post, as they apply to the circumstances of this case. This is because at the time that Mrs Howard ceased her employment with NZ Post (4th November 2006), there were no issues relating to the payment of accident compensation and/or the operation of clause F: 22 of the CEA. While it is commonly acknowledged that Mrs Howard incurred two apparently related accidents,² at no time was she absent from work and hence she did not attract ACC payments. It appears that her medical status and her entitlement to ACC payments was not established until on or about 17th November 2006. And it was not until October 2010 that Mrs Howard raised an issue about the operation of clause F: 22 of the CEA.

² In July and August 2006.

[14] Therefore, it follows, that at the time that Mrs Howard raised a dispute pertaining to her view of the application of the above clause, apart from the very significant fact that Mrs Howard was not: “*away from work for more than 1 week*” with a work related accident, there was not an employment relationship between her and NZ Post. Therefore, not only did the CEA not have any application to her circumstances, but more importantly, because an employment relationship did not, (and does not exist) at the relevant times, the Authority does not have jurisdiction to investigate the matter brought by Mrs Howard and I am bound to dismiss her claim according.

[15] While emphasising my primary conclusion that I do not have jurisdiction in regard to the question that Mrs Howard seeks an answer to in regard to the *Record of Settlement*, in order to give her some understanding about the status of that document, I add the following. In the event that had I reached an alternative conclusion in regard to the jurisdiction of the Authority, given the comprehensive reference to Mrs Howard’s medical concerns, as set out in the personal grievance document dated 9th November 2006, I would have found that the *Record of Settlement* was full and final settlement of all matters, including any possible application of clause F: 22 of the CEA; and that pursuant to the terms of the record of settlement and s. 149(3) of the Employment Relations Act 2000, Mrs Howard would be barred from pursuing any further claims relating to the application of clause F: 22 of the CEA.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority