**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 252
5417770

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| | BETWEEN | LYNDA HUNT<br>Applicant |
| | AND | NEW ZEALAND POST LIMITED<br>Respondent |

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| Member of Authority: | David Appleton |
| Representatives: | Phil Yarrall, advocate for Applicant<br>Laura Willson, Advocate for Respondent |
| Investigation Meeting: | 16 and 17 October, 27 November 2013 at Christchurch |
| Submissions received: | 27 November 2013 from Applicant<br>29 November 2013 from Respondent |
| Determination: | 10 December 2013 |

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## DETERMINATION OF THE AUTHORITY

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**A. The applicant's personal grievances for unjustified disadvantage in her employment are partially successful and compensation in the sum of $4,000 is awarded.**

**B. Costs are reserved.**

### Employment relationship problem

[1] Ms Hunt raises personal grievances that she has been disadvantaged in her employment. The disadvantage claim relates to:

a. aspects of the conduct of a Performance Improvement Plan (PIP) by the respondent, as detailed in paragraph [34a] below;

b. being given a first written warning for not wearing correct uniform;

c. allegedly being bullied by her team leader;

d. an allegedly inadequate investigation into her complaint of bullying being conducted; and

e. being given a final written warning in respect of 25 minutes unauthorised absence.

[2] Ms Hunt also originally raised a personal grievance in respect of alleged discrimination by reason of her involvement in the activities of a union (being a union delegate) but withdrew this claim on the second day of the investigation meeting.

[3] Ms Hunt seeks an order from the Authority that the warning letters in respect of her alleged uniform breach and alleged unauthorised absence be removed from her file, and that she be awarded $10,000 compensation pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act). Ms Hunt originally also sought an order that she be placed in a team outside the control of the team leader who she says bullied her (Ms Dwyer) although, by the time the Authority's investigation meeting took place, Ms Dwyer had been transferred to another branch for reasons unconnected with the allegations.

[4] The respondent denies that Ms Hunt had been subjected to any unjustified disadvantage in her employment.

**Brief account of the facts**

[5] Ms Hunt has worked for the respondent as a postie for around 35 years. She worked at the Christchurch St. Asaph Street branch in a team headed up by Ms Dwyer between January 2011 and around the beginning of September 2013, when Ms Dwyer moved to another branch. On 26 November 2010, Ms Hunt received a letter from her then team leader telling her that she had to wear the correct uniform. The evidence from the respondent was that, from time to time, the respondent updates its uniforms and expects its delivery staff to wear the latest uniforms whilst working in public, once the items of apparel become available.

[6] Around September 2011, Ms Dwyer started to have discussions with Ms Hunt relating to her overtime, which the respondent regarded as excessive and unjustified, and which it believed was caused by Ms Hunt *wasting time*. At that time, the

respondent paid overtime to posties if they took longer than a specified period to finish their particular rounds. Therefore, the respondent was anxious to ensure that the posties completed their rounds effectively and efficiently. Posties' time appears to have been measured from the point when they started their *inside work*, which was mainly processing (sorting mail), to when they finished their *outside work*, which was making deliveries. The respondent no longer pays posties in accordance with this system.

[7] In order to keep track of the work carried out by each postie during the material time, every day they had to complete a docket which recorded their activities, both inside and outside. It was the evidence of Ms Dwyer that, in order to work out why Ms Hunt had consistently higher overtime than most of her colleagues, she needed to scrutinise Ms Hunt's activities. This entailed looking at her daily dockets and, Ms Dwyer said, ensuring that the dockets were completed correctly by Ms Hunt.

[8] The evidence before the Authority was that Ms Dwyer had several meetings with Ms Hunt to discuss her daily activities and how she completed her dockets. Some of the notes of these meetings indicate that Ms Hunt was criticised by Ms Dwyer for spending excessive amounts of time talking. Ms Hunt's evidence was that she felt that she was being excessively monitored and *micro-managed* and being prevented from talking to her colleagues. This put her under pressure which caused her to feel stressed.

[9] In December 2011, Ms Hunt attended a meeting with Ms Dwyer (and support personnel for both parties) at which Ms Hunt was told that she was continually undermining Ms Dwyer. In a separate meeting one week later, she was accused of having a negative attitude. Other meetings took place in December and January in which Ms Hunt's work speed and completion of documents were discussed. In mid-January 2012, Ms Hunt told Ms O'Neill, the delivery group leader to whom Ms Dwyer reported, that she felt that she was being bullied by Ms Dwyer.

[10] Further meetings took place in January 2012 about the respondent's concerns about Ms Hunt's *excessive and unjustified overtime* and, in February 2012, Ms Dwyer told Ms Hunt that she was being put on a PIP. This was confirmed in a letter to Ms Hunt from Ms Dwyer dated 7 February 2012. The letter explained that the goal of the PIP was *to consistently achieve a level of performance which results in no unjustified overtime levels, and no undue monitoring or assistance to achieve this*

*level*. It stated that Ms Dwyer and Ms Hunt would work together to improve Ms Hunt's performance and that training, direction and support would be provided, where required, to assist her to perform her job in a competent manner.

[11] The letter also stated the following:

> ***Please note****: If you do not meet the targets as outlined on your PIP, you will be subject to the Poor Performance Procedure, under Section 1 of the PWUA Collective Employment Agreement (CEA) attached, of which you are party to. The possible outcome of failing to meet a target may include disciplinary action up to and including a warning. Continued failure to meet targets may result in a disciplinary action up to and including a final written warning or dismissal.*

[12] This letter was accompanied by a plan which set out the standards to be achieved, the action steps to achieve them and the dates of 11 weekly meetings scheduled to review Ms Hunt's progress.

[13] On 11 February 2012, Ms Hunt was told by a member of the management team (Ms Blazey) not to wear items of the old NZ Post uniform and, on 18 February 2012, Ms Dwyer briefed her team that by Monday, 20 February 2012, all posties had to wear the correct new uniform. The briefing (a copy of which was shown to the Authority) stated that all posties had to wear the new uniform while on delivery, that all old uniforms should be returned for destruction and that exceptions to the rule might apply while processing, but that they would need to be dealt with on a one-to-one basis with the team leader. It reiterated that it was unacceptable for the old uniform to be worn on delivery and that all old items needed to be returned as soon as possible. The notice finished with the sentence *posties must be in correct and current uniform when leaving the branch*.

[14] Upon hearing this briefing, Ms Hunt approached Ms Dwyer, according to her evidence, and told her that she had given her newly issued fleece to a colleague (Darren) several months ago when the zip on his fleece had broken. She had been wearing her old fleece as a consequence. Ms Hunt's evidence was that she had also asked Darren's brother (Chris) to get the new fleece back. She was told a couple of days later by Chris that, as Darren had worn the fleece all winter, he would order a new one for her. It appears that Ms Hunt accepted this explanation and carried on wearing the old fleece that she had been wearing for several months; namely a fleece that was no longer acceptable to NZ Post.

[15] On 27 March 2012, Ms Dwyer was told by Ms Blazey that she had seen Ms Hunt leaving the branch to start her delivery round wearing the wrong fleece. Ms Dwyer went out to look for Ms Hunt and found her wearing the wrong fleece on her round. Ms Hunt's evidence is that Ms Dwyer asked her to remove the fleece, which she did, and continued on her round wearing the top she had been wearing underneath. Ms Hunt said in evidence that Ms Dwyer acknowledged that Ms Hunt had told her that she had given her fleece to Darren. Ms Dwyer's evidence is that she offered alternative uniform options to Ms Hunt, which she declined, and that Ms Hunt biked off without the conversation having finished. Ms Dwyer stated that she reapproached Ms Hunt to advise her that the incident could result in disciplinary action to which Ms Hunt replied that Ms Dwyer was using *bullying tactics*.

[16] Ms Dwyer states that she advised HR of the incident and that it was decided that a disciplinary investigation meeting should take place. This meeting was headed by another team leader, Mr Gutchlag. Mr Gutchlag investigated the matter as Ms Dwyer had been a witness to Ms Hunt wearing the incorrect uniform. As a result of the disciplinary meeting, Mr Gutchlag issued Ms Hunt with a first written warning by way of a letter dated 16 April 2012, which was to remain on Ms Hunt's personal file for 12 months. The letter concluded with the following paragraph:

> *Please note that any recurrence of behaviour such as that covered in this process or any other incidents of misconduct, if substantiated, may result in further disciplinary action up to and including a final written warning or dismissal. I encourage you to read Sections A and I of your Collective Employment Agreement for further clarification.*

[17] On 5 April 2012 Ms Hunt had also been given an oral warning by Ms Dwyer under the PIP for failing to meet performance expectations. This followed a Mid Term Goal Meeting held under the PIP and related to *ongoing issues with the accurate completion of your time dockets*. In her letter, Ms Dwyer stated that she:

> *… concluded that your inability to accurately complete your dockets is not because you can't do it but rather because you do not make a conscious effort to do it, which is unacceptable.*

[18] The letter stated that Ms Hunt would remain on her current PIP until its conclusion on 23 April 2012 and that:

> *any further instances of unacceptable performance will be reviewed and may result in disciplinary action. Additional failure to meet your performance expectations could lead to a formal warning, transfer to another job or your dismissal*.

[19] On 22 April 2012, Ms Dwyer reprimanded Ms Hunt for undermining her authority (after Ms Hunt joked with a colleague about having had her leave denied) and on 23 April 2012 Ms Hunt wrote a letter to Ms O'Neill complaining about bullying by Ms Dwyer. Ms Hunt attached a letter from a colleague who also complained about bullying by Ms Dwyer, together with a letter from Ms Hunt's GP which stated that the GP was concerned that Ms Hunt's health had been affected by harassment by her team leader, asked for the claims to be investigated and asked to consider moving Ms Hunt to a different team.

[20] In Ms Hunt's letter, she complained that Ms Dwyer was *seizing any opportunity no matter how trivial to report, reprimand or threaten me with warning letters*. She referred to a threat by Ms Dwyer that she would raise with HR the giving of a written warning to Ms Hunt for not signing her dockets. She also referred to the oral and written warnings she had received. Ms Hunt also complained about the reprimand for undermining Ms Dwyer's authority and complained that, during her last day at work before starting out on her overseas trip, Ms Dwyer had approached her asking her to explain time differences on a *toilo record sheet* from a year ago. She stated that she believed that Ms Dwyer was attempting to upset or worry her.

[21] Ms Hunt complained in the letter that Ms Dwyer:

> *… is obsessive to the point of following me at a distance to record if I talk to anyone in the bullring as I leave the building; getting other team leaders to tell her if I approach or am approached by anyone in their team and following me to the toilet if I take more than 2 - 3 minutes and haven't returned.*

[22] Ms Hunt also complained that, up until December 2011, Ms Dwyer had made 82 pages of notes about her and that Ms Dwyer counted her *letters, parcels and L.F's* after she had counted them and that she did this for six weeks. Ms Hunt stated in her letter that she found Ms Dwyer's behaviour *discriminating, vindictive, obsessive and frankly quite creepy*. She said that in her (then) 34 years of working for NZ Post she had *never had to endure such unpleasant and intolerable behaviour* as she had had working in Ms Dwyer's team. She asked that the matter be given Ms O'Neill's urgent attention.

[23] An HR consultant, Mr Collings, who was an employee of NZ Post, was tasked with investigating the allegation of bullying by Ms Hunt, and he met with Ms Hunt on 14 June 2012. Mr Collings also interviewed Ms Dwyer, Ms O'Neill, two colleagues

of Ms Hunt called Ms Austin and Mr Mikaera, and engaged by email correspondence with Ms Blazey. Ms Hunt gave evidence that she had asked Mr Collings to also speak to other posties about other staff who did not wear correct uniform whilst on duty but that he had failed to do so. He also did not ask Ms Austin about her having heard Ms Dwyer say that Ms Hunt would be subject to disciplinary action for not having signed her dockets.

[24] Mr Collings issued his investigation report at the end of June 2012. In it, Mr Collings found that the allegations against Ms Dwyer of bullying and harassment had not been substantiated but he recommended that independent mediation between both parties take place to establish if the working relationship was reparable; that reporting lines between Ms Hunt and Ms Dwyer be reviewed and that leadership training be reviewed around dealing with poor performance, conflict and communication.

[25] On 10 August 2012, Ms Hunt was told by Ms O'Neill that she would be returning to work in Ms Dwyer's team on 24 August (having been reporting to another team leader during the investigation into bullying and harassment). Ms O'Neill said in evidence that Ms Hunt had been extremely upset by this and had stated that she hated Ms Dwyer for the way she had treated her.

[26] The parties did attend mediation after the publication of the investigation report, but this was not because of Mr Collings' recommendations but because of Ms Hunt's personal grievance. Ms O'Neill gave evidence that she had met with Ms Hunt and Mr Yarrall on 23 August 2012 to discuss the investigation report, but that she had not had a chance to discuss it because they had both walked out of the meeting when she had refused to order a new investigation. It was for this reason that the *open mediation* recommended by Mr Collings did not take place, Ms O'Neill says.

[27] In late August 2012, Ms O'Neill wrote to Ms Hunt stating that she had failed to maintain her previous improvement in her rate and overtime and that a second PIP would be instituted. It is the evidence of the respondent that, at the end of the first PIP process, Ms Hunt had significantly improved her performance but that it had begun to slip again, which resulted in the institution of the second PIP process. Because of the allegations of bullying against Ms Dwyer, the respondent decided that Ms Dwyer should not take part in this second PIP process.

[28] On 12 September 2012, Mr Yarrall raised a personal grievance on behalf of Ms Hunt alleging harassment by Ms Dwyer and what he called a *soft investigation* by Mr Collings. On 13 September 2012, Ms Hunt was given a written warning under the PIP by Ms O'Neill, who also responded to a letter that Ms Hunt had written in April 2012 effectively appealing against the oral warning she had been given under the first PIP. Ms O'Neill declined to overturn the oral warning. The reason for replying to this letter five months later was that, according to her evidence, Ms O'Neill had not realised until September that Ms Hunt's letter had been addressed to her.

[29] On 27 September 2012, Ms Hunt took a day off sick, for what she called stress leave, but returned to work the following day. Immediately after finishing her processing on 28 September, instead of immediately commencing her round, which included travelling to the street where the deliveries started, she went to a health food shop in the Ferry Road, off her route, and bought some rescue remedy, because she believed it would assist her as she was still feeling stressed. She recorded this on a docket as *NW – personal errand*. NW means non-working. Ms Hunt would not have been paid for that period, which amounted to 25 minutes.

[30] This period of non-working was noticed during one of the PIP review meetings by Ms O'Neill and it is Ms Hunt's evidence that Ms O'Neill simply told her that, in future, she had to get the prior permission of Ms Dwyer before she went and carried out personal errands during the working day. Ms Hunt regarded this matter as closed therefore. However, on 8 October 2012, Ms Hunt received a letter from Ms Dwyer advising her that she was going to have to attend a misconduct investigation meeting for unauthorised absence.

[31] Ms Hunt responded to Ms Dwyer saying that she regarded that she was being treated inconsistently and that a reprimand should have been enough. An investigation meeting took place on 19 October 2012 and, on 24 October 2012, Ms Hunt was told that she would receive a final written warning for unauthorised absence. At this meeting, Mr Yarrall raised a personal grievance in respect of that written warning on behalf of Ms Hunt. The written warning was confirmed in writing on 26 October 2012. The warning was to remain on Ms Hunt's personal file for 12 months with effect from 26 October 2012.

[32] It was Ms Hunt's evidence, as she had explained during the disciplinary investigation meeting, that she believed that writing *personal errand* on her docket

would be sufficient and that she did not know she had to have prior permission to go and buy some Rescue Remedy. It was the evidence of Ms Dwyer that she treated this as unauthorised absence because Ms Hunt chose to go off her route to buy the Rescue Remedy instead of going to one of the pharmacies which were on her route. Ms Dwyer explained that NZ Post regarded it as a serious matter for a postie not to remain on their route without permission because, first, they are in charge of mail belonging to customers and, secondly, because of health and safety concerns. Ms Dwyer cited the February 2011 earthquakes, implying that, if a postie on duty were injured during an incident when they were not on their route, NZ Post could have difficulties locating them.

[33] It is Ms Hunt's position that she did not regard herself as being off route when she bought the Rescue Remedy because, in her view, she had not yet started her route. She regarded herself as starting the route only once she went on her bike in the streets which were part of her delivery route. She did not regard herself as being on route whilst travelling to the commencement of it. Ms Hunt did concede, however, that she could see why NZ Post would regard her as being on route immediately she left the branch office because she understood that the NZ Post treated the route as beginning as soon as the postie left the branch office for the purposes of measuring performance.

**Issues**

[34] The Authority has to decide the following issues:

(a) Was Ms Hunt subjected to an unjustified disadvantage during the first PIP process?

i. when she was threatened with disciplinary action for not signing her dockets;

ii. because Ms Hunt had 82 pages of notes on her during the period up to December 2011; and

iii. because of *excessive micro-management*?

(b) Was Ms Hunt subjected to unjustified disadvantage in her employment by having been given a written warning in respect of her failing to wear the correct uniform?

(c) Was Ms Hunt subjected to an unjustified disadvantage in her employment because of an inadequate investigation into her allegations of bullying?

(d) Was Ms Hunt subjected to an unjustified disadvantage in her employment when she was given a final written warning for going to buy rescue remedy?

[35] The legal test against which the allegations of unjustified disadvantage must be tested is set out in s. 103A of the Employment Relations Act 2000 (the Act). This states as follows:

> *(1) 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 applying the test in subsection (2).*
>
> *(2) The test is 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.*
>
> *(3) In applying the test in subsection (2), the Authority or the court must consider—*
>
> > *(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.*
>
> *(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*
>
> *(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*
>
> > *(a) minor; and*
> > *(b) did not result in the employee being treated unfairly.*

**Was Ms Hunt subjected to an unjustified disadvantage during the first PIP process?**

[36] It is my finding that, overall, the respondent was justified in instigating a PIP process in respect of Ms Hunt. Indeed, I do not believe that Ms Hunt contests that. Briefly, NZ Post had concerns about Ms Hunt's overtime, which Ms Dwyer attributed to Ms Hunt's methods of working, and it was entitled to use its established PIP process to attempt to rectify the issue. I do not believe that there were any breaches of the PIP process (and none have been alleged).

*The threat of disciplinary action for not signing her dockets*

[37] Ms Hunt is particularly aggrieved at the statement from Ms Dwyer during a PIP meeting that Ms Hunt would face disciplinary action for not signing her dockets. Ms Hunt says she had never signed her dockets. The docket does have a space on it for the postie to sign it, and another postie who gave evidence for Ms Hunt conceded that she herself did sign them. The evidence of Ms Hunt was that, after the union had investigated the matter, NZ Post was satisfied that there was no contractual basis upon which to force a postie to sign the dockets. There is nothing in the governing collective agreement that obliges posties to sign dockets, although I have not investigated whether there may be a custom and practice in accordance with which posties are obliged or expected to sign the dockets, as this was not argued by the respondent.

[38] I accept that the statement made by Ms Dwyer created a disadvantage in Ms Hunt's employment because it put her in fear of further disciplinary action which could adversely affect the security of her employment. I also accept that it caused Ms Hunt distress.

[39] On balance, whilst I do not believe that Ms Dwyer deliberately set out to intimidate or bully Ms Hunt by saying what she did, I do accept that Ms Dwyer's threatening disciplinary action for not signing the docket without having first checked with HR whether such a threat was appropriate, was not the action that a fair and reasonable employer could have done in all the circumstances. Threatening disciplinary action should not be done lightly, and the grounds for making such a threat should be ascertained before the threat is made.

[40] I therefore agree that Ms Hunt suffered an unjustified disadvantage in her employment when Ms Dwyer threatened that she would face disciplinary action for not signing her dockets.

*82 pages of notes*

[41] The 82 pages of notes taken by Ms Dwyer consisted largely of records of conversations with Ms Hunt. They did not appear to be anything other than neutral accounts of conversations. Ms Dwyer stated that she took notes of conversations with her team members which she believed were important enough to record.

[42] Whilst I can understand Ms Hunt's consternation at learning that Ms Dwyer had accumulated so many notes about her, she did not complain about the contents of any of the notes. It appears to be the mere fact of the volume of notes that distresses her. Any reasonable employer will keep notes of conversations with staff. It is a wise practice, and can protect both the manager and the staff member. The volume of notes in Ms Hunt's case appears to derive from the fact that Ms Hunt and Ms Dwyer had a lot of conversations, many instigated by Ms Hunt.

[43] In these circumstances, I do not accept that the fact that Ms Dwyer kept notes about Ms Hunt constituted a disadvantage in Ms Hunt's employment.

*Excessive micro-management*

[44] Ms Hunt felt that she was being closely scrutinised by Ms Dwyer. The evidence of both parties support a finding that Ms Hunt was closely scrutinised, at least while she was working inside prior to and during the PIP. The question is, whether that scrutiny was to Ms Hunt's disadvantage, and whether it was unjustified.

[45] Literally speaking, the scrutiny was to Ms Hunt's disadvantage, because the scrutiny uncovered working practices of Ms Hunt that met with disapproval from Ms Dwyer, and which resulted in meetings in which Ms Dwyer communicated her disapproval and tried to get Ms Hunt to change her performance. There is no doubt that Ms Hunt felt under increasing pressure as the scrutiny and performance improvement plan progressed.

[46] However, the respondent had a legitimate reason for scrutinising Ms Hunt's activities. It was concerned at Ms Hunt's overtime, which was consistently amongst

the higher levels compared to other posties, and which the respondent attributed to Ms Hunt's working practices. Ms Dwyer needed to scrutinise those practices to help Ms Hunt improve. It is unfortunate that, at the commencement of the process, Ms Dwyer and Ms Hunt misunderstood each other regarding what Ms Dwyer wanted Ms Hunt to record on her dockets. However, this was not solely the fault of Ms Dwyer in my view.

[47] Eventually, a mutual understanding was reached and Ms Hunt was seen to have improved to an acceptable level. Whilst Ms Dwyer was clearly assiduous in her monitoring of Ms Hunt, it does not appear to have been unnecessary or to have amounted to a breach of the duty of good faith. That is to say, I am satisfied that the actions complained of by Ms Hunt, when she complains of *micro-management*, were actions which a fair and reasonable employer could have done in all the circumstances at the time the actions took place.

[48] This finding is not to underestimate the pressure felt by Ms Hunt, but feelings of pressure do often ensue when an employee is being closely performance managed. That management and the consequential feelings of pressure often result in an improvement in performance, which evidently occurred in this case.

**Was Ms Hunt subjected to unjustified disadvantage in her employment by having been given a written warning in respect of her failing to wear the correct uniform?**

[49] There are three elements to Ms Hunt's claim. The first is that Ms Dwyer should have taken steps to ensure that Darren's original fleece was repaired, so that he could return Ms Hunt's fleece to her. The second is that other posties, both before and after Ms Hunt's written warning, continued to wear incorrect uniform. The third is that Ms Dwyer had been informed on 18 February 2012 that Ms Hunt had lent her fleece to Darren.

*Ms Dwyer's responsibility*

[50] Whilst Ms Dwyer admitted that she should have followed up to ensure that Darren's fleece was repaired and returned to him, I do not accept that she can be blamed for Ms Hunt not wearing the correct uniform several months later. The causal connection is just too remote. Ms Hunt chose, as an act of kindness, to lend Darren her new fleece, but it was her choice. Knowing the expectations of the respondent relating to the wearing of correct items of uniform, especially after the February 2012

briefing, Ms Hunt should have asked Darren to have chased up on the return of his fleece so he could give Ms Hunt hers back. Alternatively, she could have asked Darren to have ordered a new fleece, or she could have ordered a new fleece herself. Ultimately, it was Ms Hunt's responsibility to wear the correct uniform when outside on duty.

*Other posties continued wearing wrong uniform*

[51] Evidence was presented that a number of posties wore old uniform items or non-issue items before and after the written warning given to Ms Hunt. Ms Hunt did refer to this fact during the disciplinary investigation meeting on 3 April 2012, when she stated *A member of staff here is wearing non regulation shorts all summer. Trish had a black non regulation top on recently and there are other people not wearing regulation but it's me you're focussing on.* The notes indicate that Mr Gutchlag ignored this statement, referring to the team brief.

[52] However, during his evidence to the Authority Mr Gutchlag said that he did speak to the person referred to by Ms Hunt who she said had been wearing non NZ issue shorts, that he had told that person to stop doing so, and that the person had complied. He said that, up to then, no one in management had spotted that the person had been wearing non regulation shorts. He had also spoken to the postie identified as Trish, and had established that she had not been wearing a non-issue top outside, in public.

[53] Mr Gutchlag, and the other witnesses for the respondent all said in their respective evidence that the difference between Ms Hunt's position, and other staff who had been wearing non regulation uniform items, was that, when they had spotted other posties wearing incorrect items, these posties had only needed to be told once, whereas Ms Hunt had been told before, and had not heeded the advice.

[54] The written warning for the uniform issue was issued on 17 April 2012, and on 23 April 2012 Ms Hunt raised a personal grievance accusing Ms Dwyer of bullying her, although she made only a passing reference to the written warning. However, on 26 April 2012 a letter was produced by another postie (Ms Williamson) essentially saying that she had never worn NZ Post issued trousers or shorts but that Ms Dwyer had never approached her. It seems that this letter had not come to the attention of the respondent until some time later.

[55] On 10 May 2012 Mr Yarrall raised a complaint about the written warning on behalf of Ms Hunt, but does not make mention of other posties wearing old uniform. However, during the interview of Ms Hunt by Mr Collings in his investigation into bullying, Mr Yarrall did refer to another woman (presumably Ms Williamson) *who has consistently worn non-latest uniform since she's been here, going in and out every day past Rachel* [Ms Dwyer], *in her team, and Rachel's said nothing to her.*

[56] The findings of the bullying investigation report dated 29 June 2012 do not address the alleged disparity in treatment of Ms Hunt compared to other posties in respect of the uniform issue, and concentrate on the performance management aspects of the complaint.

[57] On 11 July 2012 Mr Yarrall wrote to Ms O'Neill asking for Ms Hunt's written warning to be withdrawn, because of a disparity of treatment. Ms O'Neill replied on 13 July 2012 saying simply *Post will not be withdrawing the written warning for Lynda so I'm sure we'll hear back from you.*

[58] In *Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd* (1985) ERNZ Sel Cas 156 (CA), the Court of Appeal accepted that the issue of disparity of treatment is significant enough in some cases to allow the Court to hold that a dismissal is unjustified unless an adequate explanation is forthcoming.

[59] As far as the issuing of the first written warning was concerned, I am satisfied that it was an action that a fair and reasonable employer could have done in all the circumstances at the time the warning was issued. The posties working in the branch where Ms Hunt worked had all been told unequivocally in February 2012 that they had to start wearing the correct uniform, and that was a fair and reasonable instruction. As Mr Gutchlag put it, the grace period was over. Ms Hunt must reasonably have known that continued failure to wear the uniform without reasonable cause could have resulted in disciplinary action being taken. Despite this, Ms Hunt was caught wearing incorrect uniform on her round on 25 March 2012.

[60] Whilst Ms Hunt had an explanation for not having the correct fleece, there were a number of actions she could have taken to ensure that she had the correct item of uniform on when in public. Mr Gutchlag saw a difference between Ms Hunt's situation, in which she had been spoken to before about wearing of correct uniform, and the situation of other posties who, once spoken to, corrected their behaviour. In

conclusion, I believe that the first written warning issued to Ms Hunt was both proportionate and reasonable in all the circumstances.

[61] However, s. 4(1A) (b) of the Act provides that the duty of good faith requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative. I am satisfied that the respondent was made fully aware that Ms Hunt felt her written warning was unfair because of disparity of treatment but, despite this, and its duty under s.4(1A)(b) of the Act, the respondent did not advise Ms Hunt that it had investigated that allegation of disparity and did not explain why her case was felt to be different. This failure created a feeling of unfair treatment in the mind of Ms Hunt and, I have no doubt, led at least partially to the personal grievance being raised by Ms Hunt. Therefore, the failure created a disadvantage in Ms Hunt's employment.

[62] That failure to explain to Ms Hunt why she was being disciplined when other posties seemingly were not is not the action that a fair and reasonable employer could have done in all the circumstances given that the respondent was clearly made aware both by Ms Hunt and by Mr Yarrall that she felt unfairly picked on. I therefore conclude that the disadvantage was unjustified.

*Ms Dwyer had been informed on 18 February 2012 that Ms Hunt had lent her fleece to Darren*

[63] Whilst I accept that Ms Dwyer had been told by Ms Hunt on the day of the briefing that she had lent her new fleece to Darren, that does not excuse Ms Hunt in my view for not having regularised her position in the ensuing five weeks. Therefore, I do not accept that the fact that she told Ms Dwyer that she did not have her fleece played any part in the fairness of the disciplinary process and the issuing of the warning.

*Conclusion*

[64] Overall, I am satisfied that the warning received by Ms Hunt was not unjustified, although the respondent should have advised Ms Hunt why she was being disciplined whilst others were not.

**Was Ms Hunt subjected to an unjustified disadvantage in her employment because of an inadequate investigation into her allegations of bullying?**

[65] Ms Hunt alleges that Mr Collings' investigation was inadequate, and had asked for it to be done again, which was refused. Having perused the investigation report, in the absence of taking evidence from Mr Collings, who has left the employment of NZ Post, there is no striking unfairness in his conclusions. He had been asked to investigate a complaint of bullying, evidenced by a series of allegations, most of which related to the performance monitoring that Ms Hunt had been subject to under the management of Ms Dwyer. He did not address each and every allegation separately and in detail, but appears to have looked at the overall picture and the context of the PIP against which the complained of actions took place. His conclusion that there had been no bullying of Ms Hunt is not a conclusion that no fair and reasonable employer could have come to in the circumstances.

*Disparity regarding the wearing of correct uniform*

[66] However, Mr Collings does not address in his findings the allegation that Ms Hunt was picked on with respect to her wearing of incorrect uniform whilst other posties were not disciplined. As I have found above, Mr Gutchlag did not explain the apparent disparity and Mr Collings appears not to have investigated that allegation of disparity of treatment. I believe that he should have done, and that no fair and reasonable employer could have failed to have done so in the circumstances, given that a perception of being picked on was what was partially behind Ms Hunt's perception of being bullied. I find that this failing did cause Ms Hunt a disadvantage and that the disadvantage was unjustified.

*Threat of a written warning for not signing dockets*

[67] Furthermore, Ms Hunt's complaint about the threat of being disciplined for not having signed her dockets also appears not to have been investigated separately, and seems to have been swept up with the issue that Ms Hunt was seen not to have been completing her dockets adequately, for which she received an oral warning on 5 April 2012. This matter was referred to at the beginning of Mr Collings' interview of Ms Hunt, and it does not appear from the report that Mr Collings' investigated the matter thoroughly. It may be, though, that he regarded the matter as resolved because no written warning eventuated.

[68] As far as this failing is concerned, I believe that, ideally, Mr Collings should have investigated the matter of the alleged threat of disciplinary action more thoroughly, and have recorded his findings in respect of it. However, I do not regard the failing as significant as no written warning did eventuate. On balance, I find that this failing by Mr Collings was minor and did not result in Ms Hunt being treated unfairly.

*Other issues raised by Ms Hunt*

[69] In his submissions, Mr Yarrall also argues that Mr Collings should have investigated and addressed a number of other issues, including a complaint about the recording of time off in lieu, the removal of Ms Hunt's old bike despite an agreement not to, an issue regarding mail counts, being prevented from talking to other union members, and failing to interview named staff members who supported Ms Hunt's contentions.

[70] Certainly, on the face of it, Mr Collings did not address these issues in the investigation report, but without evidence from him, it is impossible to come to any firm conclusion about whether he had investigated these matters and, if so, why he did not address them in his report. I am also unable to reach a firm conclusion whether, had he done so, he would have concluded that Ms Hunt had been bullied by Ms Dwyer. However, stepping back and looking at the overall picture, Mr Collings was investigating allegations that mainly stemmed from Ms Dwyer's conducting of a performance management programme. He did investigate that issue, and concluded that Ms Dwyer's conducting of the performance management programme was not bullying. I do not believe that that conclusion was one that no fair and reasonable employer could have reached in the circumstances.

**Was Ms Hunt subjected to an unjustified disadvantage in her employment when she was given a final written warning when she went to buy Rescue Remedy?**

[71] Ms Hunt contends that the final written warning was unjustified because:

a. The respondent knew that she was self-medicating as a result of work-related stress;

b. Ms O'Neill had already dealt with the matter informally;

c. The respondent would not have known about the matter had Ms Hunt not written NW on her docket; and

d. That Ms Hunt was unaware that she had done anything wrong.

*Respondent knew Ms Hunt was self-medicating for stress*

[72] It was not clear to me from the evidence whether Ms Hunt's supervisors knew about the reason for Ms Hunt's absence the day before, and whether she was *self-medicating for stress*. However, even if they had known, I do not believe that this, in itself, prevented the respondent from investigating the matter or issuing a final written warning. The respondent issued the final written warning because Ms Hunt had not informed her supervisor that she would be going absent (i.e., off route) to buy the rescue remedy. This was no different from disciplining a staff member for going absent without permission to attend a non-urgent medical appointment, which could be justified in certain circumstances.

*Ms O'Neill had dealt with the matter informally*

[73] Mr Yarrall submits that once a higher authority had dealt with a matter, a lower authority should not then *relitigate* that matter. It is certainly the case that, if an employee has been told by a senior manager that a matter has been dealt with, it is unlikely to be fair and reasonable for the same matter to later become the subject of a disciplinary investigation, unless further relevant evidence had come to light.

[74] The notes of the meeting on 3 October 2012, at which Ms O'Neill discussed the 25 minutes of NW time during which Ms Hunt had gone off route to buy the rescue remedy, indicate that Ms O'Neill asked Ms Hunt what she had been doing for the 35 minutes, and that Ms Hunt replied that she had done a personal errand related to her stress leave the day before. Ms O'Neill stated that Ms Hunt should have notified her team leader and Ms Hunt replied that Ms Dwyer had not been there. It was suggested to Ms Hunt that she could have left a note or texted Ms Dwyer. Ms O'Neill then said:

> *Next time you need to ensure that you tell your Manager. So overall you can't specifically tell me what happened on those days you recorded the NW times? For example, Saturday was only 4 minutes. Why only 4 minutes?*

[75] Ms O'Neill's evidence on this point was that she could see why Ms Hunt would think that the matter had been resolved. I can also understand that, taking into

account the wording of the conversation as recorded in the notes of the meeting, as Ms O'Neill did not state that she would refer the matter to HR or consider whether a disciplinary investigation was appropriate.

[76] However, Ms O'Neill did not positively say the matter would not be taken further, and I have to be mindful of the fact that Ms O'Neill had only just learned of the personal errand a few moments before. Just as an employer cannot expect an employee to satisfactorily answer an allegation without warning, and tie the employee down to that answer, it is not appropriate to expect an employer to make an instant decision as to whether a matter should be treated as a disciplinary matter or not.

[77] On balance, therefore, whilst Ms Hunt cannot be blamed for having understood that the matter had been dealt with by Ms O'Neill, I do not believe that the respondent later deciding to treat the matter as a disciplinary matter to be investigated is in itself an unjustified action. In other words, I believe that that decision was one that a fair and reasonable employer could have taken in all the circumstances.

*The respondent would not have known about the matter had Ms Hunt not written NW on her docket*

[78] I am satisfied that this cannot be a reason not to discipline someone. It is not uncommon that the words or actions of an employee lead an employer to investigate further, only to find a potential disciplinary matter. Whilst Ms Hunt clearly did not hide the fact that she went on a personal errand, she was not disciplined for doing so, or even for having bought rescue remedy whilst on her round. The disciplinary action was because Ms Hunt did not seek permission to have 25 minutes' non-working time during her round. I do not accept, therefore, that this factor renders the disciplinary action unfair.

*Ms Hunt was unaware that she had done anything wrong.*

[79] It was the conclusion of Ms Dwyer that Ms Hunt had known that she was to seek permission before taking time out of her round to buy the rescue remedy. Having heard the evidence, I believe that Ms Hunt simply did not turn her mind to it, but the Authority must not substitute its view for that of the employer. It must instead assess whether the action of the employer was what a fair and reasonable employer could have done in all the circumstances. Having analysed the reasons given by Ms Dwyer in her outcome letter dated 26 October 2012 for concluding that Ms Hunt

did know she should have sought permission, I do not believe they are unreasonable conclusions to have reached, and find that they were conclusions that a fair and reasonable employer could have reached in all the circumstances. Therefore, I cannot accept this factor as a reason to find the final written warning unjustified.

*Was it appropriate to have issued Ms Hunt with a final written warning?*

[80] Another factor to consider is whether it was appropriate for the respondent to issue Ms Hunt with a final written warning instead of an oral or first written warning. Ms Dwyer explained in evidence that the reason the respondent took the matter seriously was because Ms Hunt had not told her supervisor where she was going for 25 minutes, and that that created a danger that, in an emergency, the respondent would not have been able to locate Ms Hunt. I believe that this rationale was founded on a reasonable and legitimate concern, especially in the wake of the February 2011 earthquake.

[81] Ms Dwyer states in her outcome letter that, when deciding on the outcome, she took into account Ms Hunt's service, and the first written warning which was still current. The first written warning referred to Ms Hunt having engaged in *misconduct*, as does the final written warning letter.

[82] The respondent's disciplinary procedure is set out in the relevant Collective Employment Agreement. It states that *employees must not absent themselves from work without a genuine reason and must advise their manager of the reason for any absence as soon as possible.* The procedure also states as follows:

> *In the case of misconduct which does not amount to serious misconduct, the employee will be given a written warning in the first instance, a final written warning in the second instance and, if there is a further occurrence of misconduct, the employee will be dismissed with notice. Each warning may be for unrelated matters of misconduct.*

[83] In light of this express statement in the Collective Employment Agreement, the respondent, having established that misconduct had been committed, which I find was a reasonable conclusion to have reached, it was open for the respondent to have issued Ms Hunt with a final written warning.

[84] In light of these factors, I do not find that the issuing to Ms Hunt of a final written warning was an unjustified disadvantage in her employment.

**Conclusions**

[85] I have found that

a. neither of the written warnings issued to Ms Hunt amounted to unjustified disadvantage in Ms Hunt's employment;

b. the respondent's conclusion that Ms Dwyer did not bully Ms Hunt was a conclusion that a fair and reasonable employer could have reached in all the circumstances; and

c. the PIP process did not, on the whole, create an unjustified disadvantage in Ms Hunt's employment.

[86] However, I have found that Ms Hunt was caused unjustified disadvantage in her employment when

a. she was threatened with disciplinary action for not having signed her dockets;

b. she was not told about why she was being disciplined for her uniform breach whilst other posties were not, which appeared to her to be a disparity of treatment; and

c. her complaint about disparity of treatment was not investigated by Mr Collings.

[87] In light of these findings, I must consider what remedies are appropriate.

**Remedies**

[88] I do not find that Ms Hunt has suffered any loss of income as a result of the disadvantage in her employment that she has suffered. I believe that the only remedy that is appropriate is an award under s.123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to the feelings of the employee. I am satisfied that the actions that I have found constituted a disadvantage in her employment would have contributed to the humiliation, loss of dignity, and injury to the feelings of Ms Hunt. Ms Hunt seeks $10,000 compensation, but I find that much of the effects of stress she felt arose from the PIP process, which I have also found was not unjustified. I believe that it is

appropriate to award Ms Hunt $4,000 in respect of the totality of the unjustified disadvantage she suffered in her employment.

[89] I now turn to s. 124 of the Act, which provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[90] I find that Ms Hunt did not contribute in any blameworthy way to the situations giving rise to the unjustified disadvantage personal grievances which I have found. Accordingly, I decline to reduce the award of compensation.

**Order**

[91] I order the respondent to pay to Ms Hunt the sum of $4,000 pursuant to s.123(1)(c)(i) of the Act.

**Costs**

[92] Costs are reserved. The parties should seek to agree between them how their legal costs incurred by taking part in these proceedings shall be dealt with. In the absence of such an agreement, any party seeking a contribution to its legal costs may serve and lodge a memorandum within 28 days of the date of this determination. Any party opposing such an application may then serve and lodge a memorandum in reply within a further 14 days.

David Appleton
Member of the Employment Relations Authority