

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 363
5406782

BETWEEN PETER JACK MILNE
 Applicant

A N D NEW ZEALAND POST
 LIMITED
 Respondent

Member of Authority: Rachel Larmer

Representatives: Wayne Newson, Union Delegate for Applicant
 Laura Wilson, Counsel for Respondent

Investigation Meeting: 07 August 2013

Date of Determination: 14 August 2013

DETERMINATION OF THE AUTHORITY

- A. New Zealand Post Limited (NZ Post) unjustifiably disadvantaged Mr Milne in his employment by:**
- (i) concluding he had engaged in serious misconduct; and**
 - (ii) issuing him with a final written warning.**
- B. NZ Post is ordered to pay Mr Milne \$500.00 distress compensation together with \$71.56 to reimburse his filing fee.**

Employment relationship problem

[1] Mr Peter Milne is employed by NZ Post as a Mail Officer. He had been employed for approximately four years and had a clean disciplinary record before he was issued with a final written warning for serious misconduct on 11 September 2012.

[2] Mr Milne is a member of the Postal Workers Union of Aotearoa (PWUA) which is party to the 2011-2013 Collective Employment Agreement with NZ Post. Mr Milne is a full time employee who works from 10pm until 5.35am Mondays to Fridays at the NZ Post Auckland Mail Service Centre (AMSC) located in the Highbrook Business Park.

[3] On Saturday 18 August 2012 Mr Milne finished his shift at around 5.35am and duly left the AMSC building. He went to the NZ Post staff car park which adjoins the AMSC where he had parked his car. The car park location is out doors although it comprises part of the AMSC premises and is within view of the AMSC closed circuit television.

[4] Instead of leaving the car park immediately Mr Milne remained there for five hours talking to six other team members who had also just finished the same shift as him. Mr Milne left the car park at 10.40am.

[5] On Monday 21 August a team leader noticed a box of Cody's alcohol dumped in the parking lot up against the fence. The Cody's box had some empty bottles inside and some empty cans were scattered around the corner. This was reported to management who reviewed the CCTV footage and discovered the gathering in the car park.

[6] NZ Post could not determine from the CCTV footage who all of the individuals in the car park were but they worked out they must have been members of Team 19 (Mr Milne's team). All members of Team 19 were interviewed and as a result of that management identified the seven employees who had stayed on in the car park after their shift had ended, one of whom was Mr Milne.

[7] Each individual who had been in the car park was interviewed and from that management determined at least one person had been drinking alcohol in contravention of AMSC's "*dry site*" policy which prohibited the possession or consumption of alcohol on the premises.

[8] When interviewed Mr Milne said he was not aware of anyone drinking alcohol. Other participants acknowledged to NZ Post that alcohol had been consumed but they declined to identify by whom. One person admitted to drinking in the car park. There was no evidence that Mr Milne had consumed alcohol and he was not disciplined for alcohol-related concerns.

[9] NZ Post disciplined Mr Milne for remaining in the car park for five hours after his shift ended. It concluded Mr Milne's actions amounted to serious misconduct because they involved "*disorderly conduct that may bring the company into disrepute*". NZ Post issued Mr Milne with a final written warning on 11 September for "*engaging in disorderly conduct that may bring the company into disrepute by congregating in the car park after your shift had ended*".

[10] Mr Milne claims the finding of serious misconduct and the final written warning unjustifiably disadvantaged him in his employment. Mr Milne also seeks reimbursement of the two days annual leave he used to attend mediation over this grievance.

[11] NZ Post says it was justified in concluding that Mr Milne had engaged in serious misconduct by remaining in the car park and socialising with other members of his team for five hours after his shift ended on Saturday morning. It further says the decision to impose a final written warning was within the range of responses available to a fair and reasonable employer.

[12] NZ Post says Mr Milne has no contractual right to be paid for attending mediation with it so should not be reimbursed for the two days annual leave he used.

Issues

[13] The following issues are to be determined:

- (i) Was Mr Milne disadvantaged in his employment?
- (ii) If so, is the disadvantage justified?
- (iii) If not, what if any remedies should be awarded?
- (iv) Should Mr Milne be reimbursed two days annual leave for attending mediation?
- (v) What if any costs should be awarded?

Was Mr Milne disadvantaged in his employment?

[14] NZ Post's conclusion that Mr Milne had engaged in serious misconduct and its decision to impose a final written warning disadvantaged him in his employment

because it has made his ongoing employment less secure should a disciplinary issue arise in future.

Is the disadvantage justified?

Justification test

[15] Justification is to be determined in accordance with the s.103A justification test in the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess “*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 [...] action occurred*”.

[16] Mr Milne does not take issue with the disciplinary process. The focus of the Authority’s investigation is therefore on whether the finding of serious misconduct is justified and if so, whether the final written warning is a justified response in all of the circumstances.

Did Mr Milne engage in disorderly conduct?

[17] NZ Post submits that by socialising for five hours with colleagues, at least one of whom consumed alcohol, in its car park which was identifiable by the public as part of NZ Post’s premises Mr Milne engaged in disorderly conduct. I do not accept that.

[18] There was no evidence Mr Milne or those he was socialising with had conducted themselves in a disorderly manner. They had not engaged in any loud, obnoxious or disruptive behaviour. Mr Milne’s unchallenged evidence was that the staff in the car park were just talking and laughing. No complaints or concerns were raised by NZ Post employees, members of the public or other businesses in the area.

[19] The time of the gathering (in the early hours of Saturday morning) meant others were unlikely to be disturbed or disrupted by seven people talking to each other in a private car park notwithstanding they may have been visible from the road to others.

[20] Mr Milne and the others with him did not engage in any behaviour which disturbed the peace or which involved offensive threats or behaviour. I find that their actions did not endanger the safety of others or even annoy others. The manner in

which they socialised did not cause a disturbance to anyone else. There was also no disruption to the workplace or to NZ Post's work because the gathering occurred after the employees' shift had ended.

[21] I consider that a fair and reasonable employer could not have concluded in all of the circumstances, that by remaining in a car park talking to colleagues for five hours at the end of his shift, Mr Milne had engaged in disorderly conduct. I therefore find that NZ Post's conclusion that Mr Milne had engaged in disorderly conduct was unjustified.

Did Mr Milne engage in serious misconduct?

[22] I do not accept NZ Post's evidence that it was a matter of common sense that staff knew they were not to remain in the car park after their shift. Mr Milne's actions did not breach any NZ Post policy or procedure. Nor had NZ Post issued any instructions or directions that staff had to leave the car park immediately after their shift finished. I do not consider a fair and reasonable employer could conclude Mr Milne's actions amounted to serious misconduct.

[23] NZ Post says that remaining in the car park for more than 20-30 minutes after the shift ended would be viewed as a disciplinary matter. I consider it unfair for NZ Post to discipline staff in this situation without first clearly communicating its expectations, and the associated sanctions, to them. It is not so self-evident that staff can reasonably be expected to know that remaining in the car park after their shift is likely to result in a disciplinary sanction.

[24] Even if Mr Milne had engaged in disorderly conduct whilst in the car park (and I have already concluded he did not) the Collective Agreement lists disorderly conduct as an example of "*minor misconduct*" although I acknowledge that it also expressly records that in some circumstances it could amount to serious misconduct. NZ Post says this was one of those situations where the alleged disorderly conduct amounts to serious misconduct.

[25] I disagree. This was a first instance of Mr Milne remaining on NZ Post's premises to socialise with six other team members. Serious misconduct is conduct which fundamentally undermines the trust and confidence inherent in the employment relationship. A fair and reasonable employer could not have concluded Mr Milne's actions amounted to serious misconduct.

[26] Mr Milne's conduct was not of a sufficiently serious nature, particularly without any prior warnings, directions or instructions regarding the need to leave the car park immediately after his shift, to strike at the heart of the employment relationship.

Did Mr Milne's conduct bring NZ Post into disrepute?

[27] Mr Glenn Faithful, Operations Leader, was the main decision maker. I do not accept Mr Faithful's evidence that NZ Post was brought into disrepute because members of the public who were passing by between the hours of 5.35am and 10.40am would have seen the group in the car park and concluded that they were NZ Post employees and from that drawn an adverse view about NZ Post as an organisation.

[28] I do not accept that a passer-by who saw the seven employees in the car park could be deterred from using NZ Post's services because of concern that its employees were engaging in unprofessional or irresponsible activities. I doubt whether any of the passers-by gave a second thought to seeing people standing and talking in the car park.

[29] The vehicles that passed would probably not have seen the employees and even if they did would have only done so fleetingly. No-one would have known how long the staff were talking in the car park for and even if they did I doubt they would have cared, much less have decided not to use NZ Post's services because of it.

[30] I find that a fair and reasonable employer could not in all of the circumstances have reached the conclusion NZ Post did that Mr Milne's actions created a risk to its reputation and/or brand.

Did Mr Milne's actions compromise the safety and well-being of others?

[31] Nor do I accept NZ Post's evidence that Mr Milne's "*loitering and socialising in the car park*" on 18 August compromises the safety and well-being of its staff. I accept that the consumption of alcohol by one of the people in the group that Mr Milne was talking to after a shift ended was contrary to the dry site policy. However there was no evidence Mr Milne knew about this or that he had been a party to or involved with it. I also note that Mr Milne was not disciplined because one of the people in the car park admitted they had consumed alcohol.

Concerns about Mr Milne's honesty

[32] Mr Faithful in his statement said that “*it was of great concern that Peter had not been honest throughout the investigation*”. When I discussed this with Mr Faithful he said that when Mr Milne had initially been spoken to when management had interviewed all of his team he had said he could not recall what he was doing, yet when he attended a disciplinary meeting a couple of weeks later he could recall being in the car park with colleagues. Mr Faithful was also concerned Mr Milne denied knowing that alcohol had been consumed in the car park gathering.

[33] I consider this lack of memory can be explained because when Mr Milne was first interviewed he did not know that management were concerned about the car park gathering. By the time he got to his disciplinary meeting NZ Post had put specific disciplinary concerns to him and it had disclosed information relevant to those concerns, including the CCTV footage. It is perhaps not surprising that enabled him to recall the events with greater clarity than he had when first informally spoken to.

[34] No disciplinary concerns regarding honesty were raised with Mr Milne. Mr Faithful acknowledged to the Authority that his concerns about Mr Milne's honesty did not play a role in his conclusion that Mr Milne had engaged in serious misconduct or that a final written warning was the appropriate sanction. Mr Faithful also admitted that even if Mr Milne had been completely honest the outcome would have been the same.

Conclusion

[35] NZ Post is unable to discharge the burden of establishing that its finding of serious misconduct and the imposition of the final written warning on Mr Milne were justified in all of the circumstances. I therefore find that Mr Milne was unjustifiably disadvantaged in his employment.

What if any remedies should be awarded?

[36] The Authority's finding that NZ Post's conclusion that Mr Milne had engaged in serious misconduct and its imposition of a final written warning was unjustified means Mr Milne once again has a clean disciplinary record.

[37] Although claiming distress compensation in his Statement of Problem Mr Milne's evidence in support of it was minimal. Mr Milne did express shock and distress at having a final written warning imposed on him when he had not been involved in disciplinary action previously. I consider that an award of \$500 is sufficient to compensate Mr Milne for any distress he suffered.

[38] NZ Post is ordered to Mr Milne the sum of \$500 under s.123(1)(c)(i) of the Act to compensate him for the humiliation, loss of dignity, and injury to feelings he has suffered as a result of his unjustified disadvantage grievance.

Should Mr Milne be reimbursed two days' annual leave for attending mediation?

[39] The Collective Agreement does not provide for an employee who is attending mediation with NZ Post to be paid for that time. In the absence of any specific contractual term requiring NZ Post to pay union member employees for attending mediation, Mr Milne has no right to have the two days annual leave he claims restored.

What if any costs should be awarded?

[40] It is not clear whether Mr Milne has incurred any actual costs because he was represented by his local union delegate. If Mr Milne has incurred actual costs then as the successful party he is entitled to costs.

[41] The parties are encouraged to resolve costs by agreement. If agreement is not reached Mr Milne has 14 days to file a costs memorandum and NZ Post has 14 days within which to respond. Any application for costs must be supported by proof that costs have been incurred.

[42] NZ Post is ordered to pay Mr Milne \$71.56 to reimburse his filing fee.

Rachel Larmer
Member of the Employment Relations Authority