IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2011] NZERA Christchurch 131
5333654

	BETWEEN	DOLL MUNDAY, RICHARD GRIFFITHS, LISA REID-DAVIES, BLAIR WILKIE and CHARLOTTE McLEAN Applicants
	A N D	NEW ZEALAND POST LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Phil Yarrall, Advocate for Applicants Naomi Jones, Advocate for Respondent
Investigation Meeting	29 June 2011
Submissions Received:	On the day from Applicants 1 July 2011 from Respondent
Date of Determination:	9 September 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The five applicants are all employees of New Zealand Post Limited (NZ Post) and were at the material time covered by the collective agreement between NZ Post and The Postal Workers' Union of Aotearoa (the Union). Each of the five applicants was issued with a written warning that took effect from a date 17–19 May 2010 after they refused to follow an instruction to perform work known as "cut-up" on 9 April 2010.

[2] A cut-up is when a postal worker is given additional work on top of their usual round from another round. A cut-up should not generally be required where workloads are over rostered hours and there are more people who can be called in to

cover the round. The evidence supports that it was difficult to determine whether workloads were over the rostered hours or not.

[3] The five applicants say that the issue of written warnings to them amounted to an unjustified action on the part of NZ Post and caused them disadvantage. As well as a finding that the warnings were unjustified, the applicants want them to be removed from their files altogether and they also seek costs.

[4] NZ Post says that the written warnings were justified for a refusal by the applicants to perform the cut-up on 9 April 2010.

[5] There is an earlier determination – *The Postal Workers Union of Aotearoa v. New Zealand Post Ltd* (Member Crichton) CA191/10, that is relevant to this matter. Mr Crichton determined that the instruction given by NZ Post to perform a cut-up on 9 April 2010 was lawful and reasonable. The warnings had been issued to the applicants at the time that the Authority member conducted his investigation and there are several paragraphs in the determination referring to the warnings and their appropriateness.

[6] NZ Post say that they understood determination CA191/10 was only going to deal with the issue of the lawfulness of the instruction and accordingly only limited evidence, not of the extent or nature given to the Authority in this current matter, as to the disciplinary outcome was given. Mr Yarrall did not make any concession in that regard. NZ Post did not challenge the determination.

[7] It will be necessary for the Authority to determine whether that determination dealt with the issue of justification. If it did then that is the end of the matter. If it did not then the Authority can determine that matter.

[8] The evidence at this investigation meeting focused solely on the justification for the five warnings and whether a fair and reasonable employer would have issued the warnings.

[9] By agreement with Mr Yarrall and Ms Jones, the Authority only heard from two of the five applicants, Blair Wilkie and Richard Griffiths. The nature of the conduct and the process adopted was essentially the same for all applicants and any variation and explanation was drawn to the Authority's attention and is apparent from the written record taken at each disciplinary meeting by NZ Post.

The Issues

[10] The first issue for the Authority is whether the justification of the warning has already been determined in CA 191/10.

[11] If not then the issue is whether, assessed objectively, the decision by NZ Post to issue the five applicants with a written warning was what a fair and reasonable employer would have done in all the circumstances that existed at the time the warning was issued – s.103A Employment Relations Act 2000.

[12] As a result of the Christchurch earthquakes the investigation meeting that was to be held before the warnings expired was not able to take place. By the time the Authority came to investigate the employment relationship problem the warnings had expired. That there can be disadvantage from an unjustified warning is clearly established – *Alliance Freezing Co (Southland) Ltd v. NZ Amalgamated Engineering etc IUOW* [1989] ERNZ Sel Cas 575. No issue was taken by NZ Post about any question of disadvantage in circumstances where the warnings had expired.

Has there already been a determination about the justification of the warnings?

[13] I have had careful regard to the Determination CA 191/10 and have read it several times. Such considerations have in fact delayed the release of this determination. I accept that it does appear when initially considered that some of the statements made about the warnings are in the nature of findings. Paragraph 41 for example amongst other matters provides; *I am satisfied that New Zealand Post ought not to have taken the disciplinary steps that it did, but the fact that it has now done so is, in my opinion, not able to be undone by the Authority*.

[14] Against that however there is an absence of a finding that the warnings were unjustified and there are no orders regarding the warnings. Importantly the applicants were never named as parties to that matter.

[15] I conclude that what the member did in CA 191/10 was to give an opinion or make a comment in passing albeit strongly and several times about the fairness of disciplinary action having concluded in NZ Post's favour that the instruction given to perform a cut-up was lawful and reasonable. I am not satisfied that the justification of the warnings was a matter directly at issue in that case. I am further strengthened in

my conclusion that what was given was an opinion by the words used in para.43 that fall under the heading *determination*:

> *Conversely, because it would have been self-evident to New Zealand Post that the issue on that particular day was controversial, New Zealand Post's decision to discipline members of the Union who failed to perform the cut-up was not, in my opinion, the decision of a fair and reasonable employer and although I agree with New Zealand Post that it is outside of the ambit of the Authority's jurisdiction to remove those warnings from Union members' files, I encourage New Zealand Post to take that step in conformity with the decision of the Authority.*

[16] Mr Yarrall urged NZ Post to remove the warnings from the files of its members as a result of this and other statements when he received a copy of the determination. NZ Post elected not to follow the opinions expressed and did not remove the warnings.

[17] I do not find that the issue of justification for the warnings was determined in CA 191/10. I have no doubt that will be very disappointing to the Union as the statements in that determination formed the basis for the view the warnings were unjustified. There is however a difference in expressing an observation and reaching a finding and one should not in all fairness prevent proper consideration and determination of the other.

[18] The correct approach having reached that conclusion is to put the statements made in CA 191/10 about the disciplinary outcome to one side and determine this matter on the basis of the evidence and submissions I heard.

The Process

[19] The applicants were amongst a group of twelve in Team 1 who refused to do a cut-up on 9 April 2010.

[20] After it became clear that it was likely there was to be a refusal by posties in Team 1 to do the cut-up, each of the employees was separately instructed to perform the cut-up and refused.

[21] On 10 April 2010 disciplinary letters were issued inviting each of the five applicants and the other posties who had refused to undertake the cut-up to a disciplinary meeting. The disciplinary meetings were to be held on 13 April, however, the five applicants failed to attend the meetings and a further disciplinary investigation meeting letter was issued on 14 April 2010. The allegation in each letter

was refusing to follow a reasonable instruction and to carry out duties as directed by a leader. The letter provided that the conduct breaches the terms of employment and if substantiated, may constitute minor misconduct under the collective agreement. Each applicant was encouraged in the letter to refer to section A being New Zealand Post's Expectations of its People and Section 1, Conduct and Performance Expectations in the collective agreement.

[22] On that same day the Union lodged a statement of problem at the Authority and NZ Post agreed to postpone the disciplinary investigation meeting until mediation had been attempted.

[23] On 23 April 2010 mediation took place but failed to resolve the matter.

[24] On 24 April 2010 a further letter was sent to the applicants to attend disciplinary investigation meetings on 29 April and 30 April 2010. The applicants were recommended to bring a support person/representative and reminded the allegations were as set out in the earlier letter.

[25] On 28 April 2010 being the day before the first of the disciplinary meetings were held, the Employment Relations Authority scheduled an investigation meeting for 16 July 2010.

[26] Each of the five applicants attended at the disciplinary meetings over 29 and 30 April 2010 and discussed the allegation surrounding the refusal to undertake the work and had an opportunity to provide an explanation for their conduct. They all attended with support people and/or union delegates. The process was in accordance with the collective agreement and no issues were raised with it.

[27] The decision maker for NZ Post was Cathy O'Neill and she was present at all meetings. Ms O'Neill is the Delivery Group Leader at the St Asaph Delivery Branch. Ms Blazey who was on 9 April 2010 Acting Team Leader was also present at the meetings. She was initially going to be the decision maker but concerns were raised by Union delegates about her suitability as she was involved with the issues in dispute on the day. Ms O'Neill therefore took over that role and objectively assessed that was appropriate. Katie Atkin was also present at the meetings in her role as a human resource consultant. She provided advice and support to Ms O'Neill throughout the process.

[28] Before I set out each of the applicant's explanations I want to refer to an issue that was discussed at the disciplinary meetings by the applicants. That was that Ms Blazey on the day should have talked to Team 1 posties when they questioned the cut-ups for reason of being over volume and that would have resolved everything. Such a process had been used in the past and there had then been an assessment of the workload made. Ms Blazey responded to these criticisms when and if they were made by each applicant in each disciplinary meeting along the same lines that she did later when questioned by Ms O'Neill – statement 5 May 2010. Ms O'Neill accepted that on the day in question Ms Blazey believed, incorrectly it turned out, that the whole branch of some 60-65 posties and not just the five posties were refusing to participate in the cut-up and that it was only about 10am, about two hours into the workday, when she became aware it was only Team 1 refusing. Ms Blazey concluded not unreasonably that it was not practical for her with widespread action to assess each workload individually.

[29] The other consistent reference was to a memorandum from Matt Riordan the General Manager Postal Delivery on 29 March 2010 about cut-ups and resourcing to Graeme Clarke the Union General Secretary. That set out action that could be taken if the posties felt that they were performing cut-ups on a regular basis. It involved steps such as requesting a report on recent workload trends and if there was a regular occurrence of cut-ups where workload was over rostered hours then an expectation was that team leaders would adjust their resourcing plans. This involved such things such as bringing in available staff, better allocation of cut-ups to posties with lower workloads or recruiting. Mr Riordan set out that he expected the team/branch leader to be discussing the problem with the delivery business leader to review the resourcing levels. The memorandum finished with what was to be done if the posties believed there was still an issue. They were to raise that through the Union for discussion with the relevant delivery business leader.

[30] Notes were taken by NZ Post of each disciplinary meeting and no issue was taken with their accuracy. The first of the five applicants to have a meeting was Blair Wilkie. His meeting occurred at 8.20am on 29 April 2010. Mr Wilkie and another of the applicants Lisa Reid-Davies both presented a written statement that is attached to the statement in reply as document H. It set out Mr Wilkie was attending the meeting under duress and that he believed his mail volume for the day exceeded rostered hours and an instruction to perform a cut-up in addition to delivering his own mail was a

breach of the collective agreement. There were further questions from Mr Wilkie at the meeting about why Ms Blazey did not talk to the team and about the process to use if the volumes were considered too high. Mr Wilkie did not feel the action of refusal was unreasonable.

[31] The second applicant to have a meeting on 29 April 2010 was Charlotte McLean. Her meeting took place at 9.30am. Ms McLean accepted that although initially she had thrown the round up she had then refused to complete the cut-up after a branch meeting and after being told that such refusal could amount to disciplinary action being taken. Ms McLean's explanations were that she knew she was over rostered for the day and that the cut-up for her team did not make economic sense. She referred to Ms Blazey not coming to talk to the team preventing a resolution and that there was no disciplinary action previously when posties refused to perform a cut-up. Ms McLean thought she was being reasonable.

[32] The third applicant to have a meeting on 29 April 2010 was Doll Munday. Her meeting took place at 10.30am. Ms Munday also referred to throwing the round up but agreed that after a branch meeting she then refused to complete the cut-up notwithstanding she was told that it may lead to disciplinary action – she explained she was exercising her right not to perform the cut-up. She said that the team was frustrated that an on-call postie was available but no-one would explain why they were not being used. Ms Munday also referred to Ms Blazey not communicating and that she felt there was no option but to refuse.

[33] The fourth applicant to have a meeting on 29 April was Lisa Reid-Davies who accepted that she had exercised her right to not participate in the cut-up. She did not believe that it was a reasonable direction from the company and read the same prepared statement as Mr Wilkie did.

[34] The fifth applicant Richard Griffiths had his meeting on 30 April 2010 at 8am. Mr Griffiths explained in terms of refusing to undertake the cut-up that he spent the morning trying to find out if they could refuse to do the work and he spoke to Ms Blazey and there was a discussion about getting some information as to volumes but the information is only available the next day. Mr Griffiths said that he still tried to get the numbers; Ms Blazey advised him that she thought he didn't have enough mail and he told the posties to wait for the Union before they took a stand. Mr Griffiths was still unsure if he could refuse so called a meeting of the whole office

and felt safe refusing the cut-up when all posties agreed they could refuse the cut-ups when over rostered volumes. Mr Griffiths said that eventually he refused when he had no answer from the team leader and on Union advice.

[35] Ms O'Neill said that, having heard from the applicants, she then took a further five days to consider the information and considered the following matters:

- The reasons given for refusing to complete the cut-up;
- Length of service and previous work record;
- Whether they started the cut-up;
- The seriousness of taking collective action;
- Attitude to disciplinary process;
- Level of regret about their action;
- That they were advised on the day that refusal to perform the cut-up may result in disciplinary action;
- That they had an alternative course of action available to them – the communication from Matt Riordan dated 29 March 2010;
- How such similar refusals were historically treated;
- That there was full agreement by each employee that they had refused to perform the cut-up.

[36] Ms O'Neill found that the five applicants had breached the terms and conditions of their collective agreement in that they had failed to follow a fair and reasonable directive from the company to perform a cut-up. She said that none of the five applicants had showed any regret for their actions or had a reasonable excuse to refuse to perform normally assigned work and there was a process set out in Mr Riordan's memorandum if there were too many cut-ups and that was not followed. Although the posties believed their work loads were too high that was in fact not substantiated by the posties.

[37] Further meetings were then held with each of the five applicants' on 17 and 18 May 2010 to outline the findings of the investigation of the 9 April 2010 incident. There was an opportunity for further comment. The applicants were then advised that a first written warning would be issued and that was issued in a letter and was for a period of 12 months.

[38] There was a suggestion that NZ Post should have waited until the Authority case. Ms O'Neill said that she decided not to wait until the Authority hearing about the lawfulness of NZ Post's actions because it was some time away and she did not want the matter simply left. Nine employees in total were issued with first written warnings. Section I (12) of the collective agreement provided that for the first instance of misconduct that does not amount to serious misconduct then a written warning will be given.

Determination

[39] The conduct alleged that the five applicants had refused to perform a cut-up was admitted by them. NZ Post considered that such refusal was unreasonable. A refusal to follow a direction or instruction was, as provided for in the collective agreement, conduct that could amount to minor misconduct. Although the communication difficulties with the Team Leader were considered by Ms O'Neill she did not feel that was a justifiable reason to refuse to undertake the work. Objectively assessed that was a reasonable conclusion because of the confusion at the time about who was refusing to undertake work. There was nothing to satisfy NZ Post that the workloads of the five applicants were too high. Although the posties believed they had a right to refuse to perform the work I accept, objectively assessed, this was not the correct position.

[40] There were no criticisms of the process adopted by NZ Post and objectively assessed the process was what a fair and reasonable employer would use. Each applicant was represented at the disciplinary meeting and had an opportunity to give an explanation. The explanations were considered before disciplinary action was imposed.

[41] NZ Post decided to impose the warnings before the Authority investigation meeting scheduled for June 2010. Objectively assessed that decision would not make the warning unjustified. There was always however a risk that the instruction may not

have been found to have been lawful but in this case it was found to have been a lawful and reasonable request by the Authority.

[42] Some emphasis was placed by Mr Yarrall on the Union advising employees to refuse to undertake the cut-up and that changed the nature of the conduct. I agree with the submission of NZ Post though that the evidence supports the applicants were initially influenced in their stance because they believed their work load on the day in question was too high and/or that there was a postie assisting with training on that day who could have done the cut-up and in fact ended up doing so. There was also an all up branch meeting held during the morning where it was the overwhelming view that there was a right to refuse to perform a cut-up in the circumstances that existed and that right was acted on after the meeting. It seemed likely that Mr Clarke's advice directly from the Union came after that all up branch meeting and did not influence most of the applicants in taking the stance that they did.

[43] I have also considered whether refusing to undertake work on the basis of a genuine but incorrect belief that there was such an entitlement means any disciplinary penalty is unjustified. I am not satisfied that *Sky Network Television Ltd v Duncan* [1998] 3ERNZ 917 goes as far as to support that. In that case there was no attempt at a resolution of a dispute between the parties before the ultimate penalty of dismissal. In this matter NZ Post attended mediation before proceeding with disciplinary meetings and then attended at an Authority investigation where the instruction was held to be reasonable and lawful. Further there was a process for dealing with a situation where there were too many cut-ups but that was not followed. I accept that the Union did not feel such a process worked for an issue arising on a particular day and was more directed to the future.

[44] I find in conclusion that the first written warnings issued to the five applicants objectively assessed were the actions of a fair and reasonable employer in all the circumstances that existed at the time where the applicants refused to undertake a lawful direction to perform a cut-up in circumstances that amounted to minor misconduct. I have found the process adopted to be that of a fair and reasonable employer

Costs

[45] I reserve the issue of costs. I would hope in all the circumstances of this case the parties reach an agreement about costs.

Helen Doyle
Member of the Employment Relations Authority