

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 223/10
5293673

BETWEEN MARC WILLIAM SANGER
Applicant

A N D NEW ZEALAND POST
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: David Beck, Counsel for applicant
Andrew Shaw, Counsel for respondent

Investigation Meeting: 29 July 2010 at Christchurch

Submissions Received: 4 and 9 August from applicant
4 and 11 August from respondent

Date of Determination: 6 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Marc Sanger says that he has been unjustifiably disadvantaged in his employment and induced to resign from his employment as a postal delivery officer (postie) by New Zealand Post Limited in a manner that amounts to a constructive dismissal during a disciplinary process. Further, Mr Sanger says that the disciplinary process was conducted in breach of good faith obligations.

[2] Mr Sanger seeks a declaration that his resignation and agreement not to pursue a personal grievance is a nullity. He also seeks an order for compensation, lost wages, reinstatement and a penalty for breach of good faith.

[3] New Zealand Post Limited (NZ Post) says that Mr Sanger resigned from his employment of his own free will and did not do so as the result of any inducement,

misleading behaviour or deception. NZ Post does not accept that its actions, in terms of the suspension of Mr Sanger or the disciplinary process, were unjustified or disadvantaged Mr Sanger and/or that it breached obligations of good faith.

Issues

[4] The issues for determination by the Authority are:

- Were there unjustified actions by NZ Post that disadvantaged Mr Sanger when he was suspended on 28 October 2009;
- Was Mr Sanger's resignation induced or coerced by the actions of NZ Post so as to amount to an unjustified constructive dismissal or was the resignation given of his own free will;
- If it is found that Mr Sanger did not resign of his own free will and his resignation was therefore in the nature of an unjustified constructive dismissal, then what remedies is he entitled to, are there issues of contribution and mitigation and is reinstatement practicable;
- If it is found that Mr Sanger did resign of his own free will, then was he unjustifiably disadvantaged during the disciplinary process, and was such process conducted in breach of good faith obligations;
- If such unjustified actions causing disadvantage or good faith breaches are established, then what remedies is he entitled to and should a penalty be imposed.

Were there unjustified actions by NZ Post in terms of Mr Sanger's suspension that caused him disadvantage?

Meeting 28 October 2009

[5] On 28 October 2009, the delivery business leader for NZ Post, Duncan Burman, asked Mr Sanger to attend a pre-disciplinary meeting at about 7.15am. Cathy O'Neill is the delivery group leader for NZ Post and also attended this meeting. She took the notes that were subsequently typed up (document 8 respondent's bundle).

[6] Mr Sanger advised Mr Burman that he wanted Union organiser Phil Yarrall present at the meeting. Mr Burman, whilst not advising Mr Sanger of the nature of the meeting, said that there was no need to have a Union official available and Union site delegate, Richard Matheson, attended with Mr Sanger.

[7] At the meeting, Mr Sanger was advised that there were four disciplinary allegations. There was a dispute in the evidence as to whether Mr Burman said, as Mr Sanger recalled him doing, that each of the allegations was a small matter but together they were potentially serious enough for dismissal to be a possibility. Mr Matheson, in his evidence, could not recall such a statement having been made. Mr Burman and Ms O'Neill denied such a statement was made.

[8] In circumstances where it was clear NZ Post viewed in particular one of the allegations, the falsification of timesheets, as potentially serious I consider such a statement unlikely.

[9] The four allegations were a customer complaint, talking angrily to a team leader, passing wind in circumstances where there had been a formal complaint and signing off incorrect times on time dockets. These allegations were also set out in the letter dated 28 October 2009 that was provided to him at the end of the meeting.

[10] The notes record and I accept that Mr Sanger was asked if he had any feedback on the suspension. Mr Matheson responded to that question to the effect the suspension was not justified and compared Mr Sanger's case with another employee.

[11] Mr Burman proceeded to suspend Mr Sanger on pay and the letter he was given at the end of the meeting advised that he was to attend a formal disciplinary meeting the following day, 29 October 2009, at 8.30am whereby he would be given an opportunity to provide an explanation for the allegations. Mr Sanger was invited in the letter to bring a representative with him and also advised that the potential outcome could be up to dismissal.

The collective agreement

[12] At the material time, Mr Sanger was a member of the Postal Workers' Union of Aotearoa (PWUA) and his work was covered by the collective employment agreement 2008-2011 between NZ Post and PWUA.

[13] Page 52 of the collective employment agreement sets out a disciplinary procedure where an employee's conduct does not meet the company's expectation under the potential consequences of misconduct or failure to meet performance requirements.

[14] Clause 6 on that same page deals with suspension and provides:

If the initial explanation indicates that serious misconduct may have occurred, the employee involved may be suspended whilst the matter is investigated. During the period of suspension, the employee will be paid for the standard hours that the employee would have worked if they had not been suspended.

[15] Mr Beck accepts that notwithstanding Mr Sanger was not permitted a representative of his choice, he notionally had an opportunity to comment on the suspension and had access to a capable union organiser in Mr Matheson. He was also advised of the allegations. I am satisfied that, after an initial examination, in terms of the collective employment agreement NZ Post had concluded that serious misconduct may have occurred.

Conclusion

[16] Mr Burman says that the main reason he suspended Mr Sanger on pay was because of his irrational behaviour arising out of the incidents and that Mr Sanger became agitated when confronted with even minor queries and allegations and became disruptive and volatile. He said this was confirmed by Mr Sanger's behaviour during the suspension meeting.

[17] I find that the evidence supports that Mr Sanger was upset and somewhat excitable at the meeting and after he left he accepted he voiced his view of the suspension to some employees outside the meeting and he waved the notice around. He put the number at three or perhaps four employees.

[18] I am satisfied that the actions of NZ Post in making a decision to suspend Mr Sanger were what a fair and reasonable employer would have done in all the circumstances at the time. These circumstances were the potential seriousness, particularly of the timesheet allegations, and Mr Sanger's reaction to such matters being raised that could have impacted on others if he had been left in the workplace as well as impacting on his own wellbeing. It was also appropriate for NZ Post to

take into account an earlier occasion when Mr Sanger, confronted with a customer complaint, visited the customer – first written warning 6 September 2008.

[19] In terms of the process itself, Mr Beck placed significance on the fact that Mr Sanger was not entitled to a representative of his choice. He was also not advised about the nature of the meeting. Even if both of those matters could be seen as unjustified, I am not satisfied that Mr Sanger was disadvantaged from the evidence I heard. Mr Matheson competently represented Mr Sanger at the meeting and Mr Sanger had an opportunity to make a comment or give feedback with respect to the suspension.

[20] The other matter raised by Mr Beck in terms of the process was whether suspension had in fact already been predetermined.

[21] Mr Burman does not accept that there was predetermination to suspend and explained that he had three letters prepared for Mr Sanger, one that dealt with suspension only, one with an invitation to an investigation meeting and a third combined letter that was, in the end, given to Mr Sanger.

[22] I accept there was a degree of inevitability about suspension and my view on this is strengthened with the notes taken by NZ Post at the first disciplinary meeting on 2 November when Mr Yarrall raised the issue as to why he was not permitted to attend the suspension meeting. The notes reflect Mr Burman responding: *We allowed Richard Matheson as a PWUA delegate to join the discussion, we did not want to wait for Phil to come in when the suspension was inevitable.*

[23] Mr Burman said in his evidence that he was looking for a reaction from Mr Sanger at the suspension meeting to reassure him that it was all right for Mr Sanger to return to the floor. He said that he moved to suspension on the basis that Mr Sanger's reaction justified suspension with health and safety concerns if he returned to normal duty. I am not satisfied that had the meeting gone differently Mr Burman would not have been persuaded to allow Mr Sanger to return to work pending the disciplinary meeting.

[24] In *Graham v. Airways Corp of NZ* [2005] ERNZ 587 para.[104], it was held that there was no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to

persuade the employer not to do so. It was held in *Graham* that the test in each case was the fairness and reasonableness of the employer's conduct.

[25] The test in s.103A requires an objective inquiry into what a fair and reasonable employer would have done in all the circumstances at the time Mr Sanger was suspended. I have already found that the suspension itself was not unjustified and that whilst the process may not have been perfect initially, there was no evidence of disadvantage to Mr Sanger with respect to the earlier matters.

[26] I am not satisfied, when carefully assessed, that the process adopted and the decision to suspend, was not what a fair and reasonable employer would have done in all the circumstances that existed at the time. Mr Sanger was on full pay during the period of suspension and had Mr Yarrall been available for a disciplinary meeting on 29 October 2009, such suspension would only have lasted one day. I find no grievance is made out in terms of Mr Sanger's suspension.

Provision of information

[27] Mr Yarrall wrote to NZ Post by email on 28 October 2009 expressing concern that Mr Sanger was told there was no need for him to be available and requesting a copy of the customer complaint referred to in the letter of 28 October 2009 and the employee complaint.

[28] I am satisfied that information was provided. I accept there was a measure of caution required in terms of the customer complaint because of Mr Sanger's earlier reaction when he confronted a customer directly that was justified.

First disciplinary meeting, 2 November 2009

[29] Mr Sanger attended this meeting with Mr Yarrall and Mr Matheson. Mr Burman attended with Ms O'Neill and Katherine (Katie) Aitkin, a human resource adviser with NZ Post. Mr Yarrall took handwritten notes of the meeting. For NZ Post it was Ms O'Neill's role to take notes during the meeting. There were also some notes taken by Ms Aitkin. These notes were subsequently typed up.

[30] At the start of the meeting, Mr Burman talked about the allegations and Mr Sanger had an opportunity to provide explanations for all. The allegations and responses were as set out below.

[31] **Customer complaint** – Mr Sanger accepted that he did remonstrate with a customer after the customer would not move his car to enable Mr Sanger to get past on his bicycle. The complaint that was subsequently investigated by NZ Post was not from that customer. It was from another customer in the same street who heard Mr Sanger yelling opposite her address.

[32] She was concerned that her mail may not be delivered because Mr Sanger, as she said in her complaint, was yelling about *bloody inconsiderate people parking cars* and he would not deliver their mail. The customer who complained said that Mr Sanger kept repeating those words and her concern was about her mail not being delivered. Mr Sanger's explanation was that the driver of the car was in the wrong and inconsiderate and to the effect that NZ Post should *back him*.

[33] **Team leader interaction** – Mr Sanger accepted that he had had an exchange with the Team Leader when advised of this customer complaint. Ms O'Neil it was put to him had heard him yelling toward the end of the exchange with his Team Leader. Mr Sanger said that he was frustrated not angry because the matter was trivial and he felt that he was in the right and management should have been more supportive. The complaint letter from the Team Leader was about the manner in which Mr Sanger talked to him. Ms O'Neill described the Team Leader talking to her after the exchange as visibly upset to the point that he was crying. Mr Sanger denied, as was written in the compliant from the Team Leader, that Mr Sanger had apologised to the Team Leader.

[34] **Passing wind** – Mr Sanger provided a medical certificate in terms of this matter dated 29 October 2009 and this was duly accepted by NZ Post and went no further.

[35] **Timesheets** – Mr Sanger accepted at the Authority investigation meeting that for 10 time dockets between 12 and 22 October 2009 he put an earlier finish time to when he had actually finished. I want to record that the notes taken at the disciplinary meeting from all note takers do not make this acceptance particularly clear but there was no argument in front of me that the allegation was not accepted and the evidence from NZ Post was to the effect that had been their understanding from the disciplinary meetings.

[36] This matter was picked up when there was a complaint from a school that their mail was not delivered prior to the office staff leaving at 3.30pm. Ms O'Neill and Janet Collerton, a NZ Post security adviser, interviewed a staff member at the school on 27 October 2009 following a complaint from the school on 23 October 2009. The staff member said that there had been problems since 12 October 2009 with mail delivered at the school after the staff member had left at 3.30pm. Notes taken at the time reflect Ms O'Neill explaining to the staff member at the school that Mr Sanger was new on the round when the staff member said that the previous postie had delivered mail around 11.30am to 12 noon.

[37] I accept that the notes from this interview were provided to Mr Sanger and Mr Yarrall. The notes reflect that Mr Burman thought they had been provided earlier with the other information requested by Mr Yarrall on 28 October 2009. In any event, an adjournment was taken during the first disciplinary meeting for those notes and the customer complaint to be considered by Mr Sanger and his representative. Having dealt with the complaint from the school, it then became apparent that the finish times that had been recorded by Mr Sanger could not square with the delivery times to the school. Mr Sanger's finish times as recorded on his time dockets were as follows:

- 12 October 2009 – 11.55am
- 13 October 2009 – 1.30pm
- 14 October 2009 – 11.35am
- 15 October 2009 – 2.05pm
- 16 October 2009 – 2.05pm
- 19 October 2009 – 1.05pm
- 20 October 2009 – 2.35pm
- 21 October 2009 – 12.30pm
- 22 October 2009 – 3.10pm

[38] On 22 October 2009 Ms O'Neill had seen Mr Sanger delivering the mail because she had gone to talk to a customer about a complaint. Ms O'Neill said that she waved out to Mr Sanger as he was completing his round at about 3.50pm. On

that date, his finish time was later than the other days. This was put to Mr Sanger during the investigation meeting.

[39] By way of further explanation for the earlier finishing times put on his time docket, Mr Sanger explained that he had to make more frequent toilet stops and had he put down his actual finishing times that would have affected his performance and that the results would therefore be present on the board for all to see at work. Mr Burman is recorded as saying in the notes that it would not affect performance if his time during which he stopped to use the toilet was taken as lost time and that Mr Sanger knew this. As I understand the evidence, periods of lost time would be disregarded in terms of assessing the total time taken to undertake the run. Mr Sanger also raised an issue that his shoulder was hurting him from an earlier work injury and he was feeling under some pressure.

[40] Mr Matheson is recorded as stating that falsification of time dockets was a regular event. Mr Burman also put to Mr Sanger that in relation to the time dockets and the discrepancy between the finish and actual time of finish, he was disappearing for a smaller or larger chunk of each day. Mr Matheson in response suggested an alternative scenario that a child may have taken the mail from the school and then returned it. That explanation though did not seem to take the full period of time into account.

[41] After Mr Sanger had provided his explanations and there had been some discussion in terms of each of the allegations, the meeting was adjourned and a meeting arranged for the next day, 3 November 2009, at 8.30am.

Discussion re superannuation entitlements

[42] After the meeting ended, Mr Yarrall approached Mr Burman who was with Ms O'Neill and Ms Aitkin. He asked whether Mr Sanger would lose the employer's contributions to his superannuation entitlement if he was dismissed. Mr Yarrall's evidence, which was not supported by the evidence of Mr Sanger or Mr Matheson, was that Mr Burman told him that Mr Sanger would lose the company contributions to superannuation in the event of dismissal.

[43] The evidence of Mr Burman, Ms O'Neill and Ms Aitkin was that Mr Burman advised Mr Yarrall that he did not know but that it was a possibility and he would have to look into it.

[44] I prefer Mr Burman's evidence that he only referred to a possibility. That was supported by the evidence of Ms O'Neill and Ms Aitkin. The evidence of Mr Sanger and Mr Matheson albeit about an exchange the next day make such a finding inherently more likely. I shall refer to that shortly.

[45] The evidence does not support that there was any mention of a resignation during the discussion. I find that it is more likely that Mr Yarrall advised Mr Burman that he should take the possible loss of the company contribution to Mr Sanger's superannuation entitlement into account in terms of any disciplinary outcomes.

[46] The evidence does not support Mr Burman giving any assurance to follow the matter up although I do not accept Mr Shaw's submission that the evidence goes so far as saying that Mr Burman was not going to look into superannuation. It is more correctly put that he said he did not know, it was a possibility and he would have to look into it.

Meeting 3 November 2009

[47] At the start of the meeting on 3 November 2009, Mr Burman went over the allegations, Mr Sanger's responses and clarified some other matters. It was further raised with Mr Sanger that he had been given an expectation in terms of accurately completing timesheets some 18 months prior (document 8 respondents bundle).

In regards to the allegation of falsifying time docket, we acknowledge that this ties in with your response above and will not be taking the matter any further. Again we would like to clarify our expectations in that time docket must be filled in accurately as per New Zealand Post policy.

[48] After a brief discussion, an adjournment was taken so that NZ Post could consider any responses. On return, Mr Burman again went through the allegations and conclusions. After summarising the matters, and indicating the time docket issue was particularly serious, Mr Burman advised that NZ Post had concluded there was serious misconduct and that the only option was dismissal.

[49] The notes taken by Mr Yarrall reflect that immediately on being advised of the outcome, which included the payment of two weeks' wages, Mr Sanger offered his resignation. Mr Burman is recorded as saying that he would not accept the resignation.

[50] The discussion then turned to a comment made by Mr Sanger I find to the effect *are you sure you want to do this*. Mr Sanger was asked if this was a threat. This seems to have preoccupied those present for some time in terms of a debate.

[51] Mr Yarrall and Mr Matheson are recorded as questioning why NZ Post would not accept the resignation as part of the discussion around whether Mr Sanger's comment amounted to a threat. Mr Yarrall's notes reflect Mr Yarrall stating that the punishment did not fit the crime and that Mr Burman had advised him that Mr Sanger could not keep his company contribution to superannuation but could lose that money for not even a dismissible offence.

[52] In sharp contrast to Mr Yarrall's notes, neither Mr Burman, Ms O'Neill or Ms Aitkin could recall any discussion about superannuation at that time. Mr Sanger and Mr Matheson, on the other hand, do recall a discussion to the effect that Mr Burman said *he did not know* whether Mr Sanger would lose the company contribution to superannuation. The company notes do not reflect any statements made in relation to superannuation and Mr Burman said he was unaware that that was a reason for Mr Sanger resigning.

[53] NZ Post took an adjournment to consider the resignation. Mr Burman, Ms Aitkin and Ms O'Neill said that the matters they took into consideration were that although they thought they had a strong case for dismissal, defending a grievance takes time and money. Mr Burman said it was decided to accept a resignation if Mr Sanger signed an agreement that he would not bring a personal grievance and that the matter was not confidential. Mr Burman said that he concluded Mr Sanger wanted to have a clean record and that was why he was resigning.

[54] Having preferred the evidence of NZ Post about the discussion on 2 November 2009 about superannuation, I am less inclined to consider Mr Yarrall's notes accurately reflected what was said about superannuation. I accept that Mr Yarrall may well have mentioned, in trying to persuade NZ Post to accept Mr Sanger's resignation, the issue of superannuation. I am quite clear that the only mention of this was after Mr Sanger had offered his resignation. I am less inclined to accept Mr Yarrall's notes as accurate where they state Mr Burman returned and advised that Mr Sanger would resign to enable him to keep his superannuation. I find that statement less likely when both Mr Sanger and Mr Matheson recalled comments

made by Mr Burman that he was not sure whether Mr Sanger would lose his superannuation or not.

[55] There is a further dispute that is required to be resolved and that is whether Mr Burman read the resignation letter that Mr Sanger retrieved from his car. Mr Burman said that the only time he read the resignation letter was when it was provided as part of the Authority process. Mr Sanger's resignation letter that he retrieved from the car provided:

New Zealand Post management

I Marc Sanger feel I have no alternative but to resign because of the mental stress I am experiencing through the constant bullying of management. The management has not supported me in any way with my mental illness, and have caused me more mental anguish with their unrealistic expectations with my work and have ignored my obvious and constant pain I suffer on a daily basis caused by my accident on the job. As of today I will no longer be employed by New Zealand Post.

[56] Mr Sanger's evidence was that he gave the letter to Mr Burman before the second adjournment. Mr Yarrall could not be certain that Mr Burman actually read the resignation letter and neither could Mr Matheson. The letter was not in NZ Post's possession before the Authority's process and Mr Sanger's explanation for that was that he had taken it back after Mr Burman had read it. I accept that whilst Mr Sanger may well have had his resignation letter in his hand, the resignation letter was not in fact given to Mr Burman to enable him to read it.

[57] The resignation letter that Mr Sanger eventually signed provided:

Duncan

I put forward my resignation from NZ Post Ltd effective immediately and formally declare that I have no personal grievances against NZ Post Ltd of any nature relating to my employment and have no intention of initiating any such grievances.

*Regards
Marc Sanger*

[58] After signing the resignation letter, Mr Sanger left his employment, receiving two weeks' pay in lieu of notice and as a gesture of goodwill a week's long service leave was also paid out to him. Mr Sanger was paid his full superannuation entitlement. He said that it was very shortly after this that he was advised by

Mr Yarrall that he had been tricked into thinking he would lose his superannuation and on 18 December 2009 Mr Beck raised a personal grievance on his behalf.

Did Mr Sanger resign of his own free will?

[59] The Court of Appeal in *Auckland etc Shop Employees etc IUOW v. Woolworths (NZ) Limited* (1985) Sel Cas 136 stated that one of the categories of constructive dismissal was where an employer gives an employee a choice between resigning or being dismissed.

[60] In *Waugh v. Commissioner of Police* [2003] 1 ERNZ 236, the then Chief Judge Goddard in para.[102] of the judgment referred to the Court of Appeal judgment in *Woolworths* and the explanation by the Court of Appeal that dismissal may cover cases where, in substance, the employer has dismissed a worker although technically there has been a resignation. The employer's conduct must be such that a substantial risk of resignation was foreseeable.

[61] In *Waugh*, Chief Judge Goddard concluded that the Commissioner of Police, through his agents, knew that Mr Waugh was contemplating resignation and was likely to resign if left with the impression that, by so doing, he could secure a significant financial advantage that would not be available if he were later to be dismissed. As in Mr Sanger's case, the financial advantage in *Waugh* was the employer's contribution to superannuation. Chief Judge Goddard held that to mislead Mr Waugh on that score would amount to a breach of duty of trust and confidence.

[62] I accept Mr Shaw's submission that Mr Sanger's situation was distinguishable from that of Mr Waugh. At the time of the discussion between Mr Yarrall and Mr Burman on 2 November 2009, there was no evidence so as to conclude Mr Burman had any knowledge that Mr Sanger was contemplating resignation. Mr Burman considered any discussion about superannuation in the context of what he had been investigating, the disciplinary allegations and any disciplinary outcome.

[63] I have found Mr Burman only advised Mr Yarrall of a possibility of Mr Sanger not receiving the company superannuation contribution if dismissed and that he would have to look into it. It was clear from this response that Mr Burman was unclear and indeed that is what both Mr Sanger and Mr Matheson recall Mr Burman saying. At no time when Mr Sanger and Mr Matheson gave their

evidence did their recollection of Mr Burman's response go further than *didn't know* or *wasn't sure*.

[64] Mr Sanger said that in reaching his view that he could lose the company contribution to superannuation he relied on Mr Yarrall for information and his own knowledge about another employee who had been dismissed and had lost his employer contribution.

[65] Mr Matheson said in his evidence that he conveyed to Mr Yarrall and Mr Sanger during the disciplinary process that he thought it unlikely that Mr Sanger would lose the company contribution to his superannuation as Mr Sanger's situation was quite different from that of the other employee whose case he knew something about.

[66] Mr Beck has submitted that Mr Burman, Ms Aitkin or Ms O'Neill should have looked into the superannuation matter. I have turned my mind to this. If Mr Yarrall considered that Mr Burman had agreed to do this then I find, in all likelihood, he would have asked for the answer during the meeting of 3 November 2009. He did not.

[67] Assessing the matter carefully I have considered the likely reason Mr Yarrall did not ask for a response from Mr Burman. Mr Yarrall said in his evidence as I have recorded in my minute book that even if Mr Burman had come back and said Mr Sanger would not lose his employer's contribution to his superannuation if dismissed then it is likely he would still have advised Mr Sanger to sign the resignation proffered by NZ Post because the risk was too great to take with a large amount of money at stake. I should note that Mr Shaw attributed this statement incorrectly to Mr Matheson in submissions.

[68] In those circumstances, I do not find that the failure by Mr Burman to follow up the superannuation matter and ascertain whether Mr Sanger's employer contribution would be affected if he was dismissed can be laid at NZ Post's door.

[69] I accept Mr Shaw's submission that NZ Post did nothing to encourage or invite a resignation from Mr Sanger. The first it knew about a resignation was after the disciplinary outcome was provided. Mr Burman, far from offering resignation as an option, initially said no to it and that it was too late for resignation. Immediately Mr Sanger made a comment that NZ Post took as a threat and there was what

Mr Matheson described as a robust discussion. I have accepted that part of that robust discussion may well have included Mr Yarrall making a statement about superannuation. In terms of the threat itself, Mr Sanger in evidence said the statement was made because it had been decided that if Mr Sanger was dismissed he would take a personal grievance.

[70] The matter is complicated further, because although Mr Sanger said in his evidence at the Authority's investigation meeting that the reason he resigned was to get his superannuation, that is not what he wrote in his letter of resignation. In that letter, Mr Sanger says nothing about superannuation but refers to stress and bullying. Likewise, there is nothing about superannuation being the reason for resignation in a later obtained doctor's certificate dated 16 July 2010. That medical certificate provides an outline of Mr Sanger's mental health issues referred to as anxiety and depression and states that Mr Sanger resigned from his job because of the stress related to his job and ongoing arguments from management.

[71] I am not certain that the superannuation issue was the sole reason that Mr Sanger resigned. For completeness, I am not satisfied that a substantial risk of resignation on the grounds of bullying and stress would have been foreseeable by the employer once the disciplinary outcome was advised.

[72] Ms Aitkin gave evidence that it was not until the disciplinary meeting on 2 November 2009 that Mr Sanger formally disclosed to NZ Post that he suffered from a mental illness. Mr Beck in his submission was critical of NZ Post for not having more regard to this and indeed he suggested that the company should have taken a different path.

[73] In terms of this matter I place most weight on the medical report of Dr Christopher Strack provided to NZ Post in September 2009 about Mr Sanger's shoulder. The report was provided to NZ Post about six weeks before the disciplinary meeting on or about 18 September 2009. That report provides amongst other matters that Mr Sanger said he did not feel that he was depressed, distressed or stressed. He did say that he had previously experienced significant stress due to workload. The report records there is *no history of previous mental health problems, depression etc.* There is no recording of any medication Mr Sanger may have been taking for mental health issues.

[74] I accept that Mr Sanger may, for whatever reason, have chosen not to disclose his illness. NZ Post was however entitled to rely on the report in that regard.

[75] In those circumstances the submission by Mr Beck of Ms O'Neill and Ms Atkin denying actual knowledge of Mr Sanger's anxiety and depression as arguably incredulous is somewhat overstated. I am satisfied that NZ Post reflected on the medical concerns as raised in the context of the allegations during the disciplinary process.

[76] In all the circumstances, I find that Mr Sanger resigned of his own free will in circumstances that do not amount to a unjustified constructive dismissal.

[77] The statement of problem in this matter was particularly widely drafted and includes whether Mr Sanger was unjustifiably disadvantaged by the disciplinary process or whether the process was conducted in breach of good faith.

[78] I am satisfied that the disciplinary process conducted by NZ Post into the four allegations was in accordance with that set out in the collective agreement on p.52.

[79] Mr Sanger was represented, he was provided with information about the allegations and he knew that the disciplinary outcome could be dismissal. Mr Sanger had an opportunity to provide an explanation to the allegations over two days and there were adjournments taken to consider his responses. Clarification was sought where it could sensibly have made a difference. NZ Post considered the explanations overnight and there was a further opportunity on 3 November 2008 to make any further comment and confirm earlier answers given.

[80] There was some emphasis placed on a draft dismissal letter that the evidence supports as having been prepared prior to the 3 November meeting. Ms Aitkin explained in her evidence that in her human resource role she had prepared the letter in draft. She was not the decision maker and had the dismissal actually been implemented the letter would have had to be changed. That is because the draft included the allegation about passing wind as having been made out. The letter was undated. Ms Aitkin prepared a draft letter no doubt to be of assistance and said she had asked for advice from the employment relations people within NZ Post. Preparing a dismissal letter in advance is with the benefit of hindsight, a step probably best left in a disciplinary process until the outcome is clear. Mr Beck is

quite right to put it forward as a concern. In all the circumstances however I do not draw a finding of pre-determination from preparation of that letter and there is nothing else to suggest that the outcome of dismissal was predetermined.

[81] I accept Mr Beck's analysis that the most serious allegation that Mr Sanger was facing was that of falsification of timesheets. Mr Beck suggests that even if such action was viewed as serious misconduct, then the harshest penalty would be that of a final written warning.

[82] Mr Sanger accepted when he gave his evidence in the Authority that he knew he should fill out his timesheets correctly and he had previously been given a written expectation (an expectation is not a disciplinary outcome) that he should do this in September 2008. Regardless of whether that was a disciplinary outcome or not, the importance of filling out time records correctly had been drawn to his attention.

[83] Time dockets and filling them out correctly had also been reiterated at team briefing meetings. NZ Post concluded that Mr Sanger's explanation of frequent toilet stops was not accepted because such stops could have been recorded as lost time and not reflected in his overall performance result. If Mr Sanger's shoulder was sore it was important that NZ Post knew this was causing him pain. The effect of putting his finish time as earlier than the round was actually finished prevented his concerns becoming apparent to NZ Post in this regard.

[84] Mr Burman gave evidence on the importance of such time dockets to NZ Post in monitoring employees' whereabouts in terms of start and finish times. There was also the issue of the security of the mail. There were periods of time when Mr Burman concluded there was no knowledge of Mr Sanger's whereabouts. NZ Post did not accept, and there was no evidence to satisfy me otherwise, that a failure to record start and finish times accurately was commonplace amongst posties for an extended period of time. I accept that there may have been occasions for a range of reasons when a change may be made to a timesheet and the explanation for that may be acceptable to NZ Post. This matter however concerned a deliberate decision by Mr Sanger not to put down the correct finish time for ten time dockets when he knew that he should have.

[85] Mr Burman took into account, and in my view fairly, from the contents of the disciplinary meetings that Mr Sanger's actions in terms of his time dockets were not viewed by him, or indeed Mr Matheson and Mr Yarrall, as serious.

[86] The other matter that Mr Beck relied on was the fact that there was no time between concluding that the actions amounted to serious misconduct and an opportunity for a discussion as to penalty. The collective employment agreement did not provide for a specific time to make submissions on penalty. There was always some focus from Mr Sanger and his representatives in terms of outcome and Mr Yarrall in fact in the first meeting made a comment that the worst Mr Sanger should get was a letter of expectation saying *not to do it again*.

[87] In any event, Mr Sanger, I have found, once the outcome was delivered, resigned of his own free will.

[88] I am not satisfied that the actions of NZ Post during the disciplinary process were unjustified and disadvantaged Mr Sanger.

[89] I am also not satisfied that there were any breaches of good faith on the part of NZ Post and I do not therefore go on to consider the issue of penalty. I have not found NZ Post misled Mr Sanger as to his superannuation claim.

[90] In conclusion, I am not satisfied that any of Mr Sanger's claims have been made out. There is nothing further I can do to assist him.

Costs

[91] I reserve the issue of costs. Mr Shaw has until 22 December 2010 to lodge and serve submissions as to costs and Mr Beck has until 26 January 2011 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority