

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Joanne Cherrington (Applicant)  
**AND** New Zealand Post Limited (Respondent)  
**REPRESENTATIVES** Michael Treen, Advocate for Applicant  
Penny Swarbrick, Counsel for Respondent  
**MEMBER OF AUTHORITY** Leon Robinson  
**INVESTIGATION MEETING** 26 May 2004  
**SUBMISSIONS RECEIVED** 15 June 2004  
**DATE OF DETERMINATION** 22 June 2004

DETERMINATION OF THE AUTHORITY

**The Employment Relationship Problem**

- [1] This is an Investigation into an employment relationship problem arising out of an alleged unjustifiable dismissal.
- [2] The employee Ms Joanne Cherrington (“Ms Cherrington”) was dismissed from her employment with New Zealand Post Limited (“NZ Post”) following a disciplinary meeting on 6 November 2003. She was dismissed for serious misconduct specified as “*non-delivery of deliverable mail*”.
- [3] The employment relationship problem between Ms Cherrington and NZ Post relates to her dismissal. She claims that her dismissal was unjustifiable.
- [4] By an application dated 12 March 2004, she asks the Authority to Investigate and resolve her employment relationship problem by granting her orders for reinstatement, reimbursement, compensation, reinstatement of accumulated leave and reimbursement of her superannuation contributions.
- [5] NZ Post says that Ms Cherrington does not have an employment relationship problem because its decision to terminate her employment was justified.
- [6] The Authority has concluded its Investigation of Ms Cherrington’s employment relationship problem and renders this Determination in resolution of that problem.

## The evidence

- [7] Ms Cherrington was employed at NZ Post's North Shore Delivery Branch as a mail deliverer or "postie". She had been employed in that position for seven years at the time of her dismissal.
- [8] Ms Cherrington's terms and conditions of employment were those set out in the *Postal Workers Federation - New Zealand Post Collective Employment Agreement 2002 - 2004* ("the Agreement").
- [9] On Monday 20 October 2003, Ms Cherrington started a round known as Walk 34 for the first time on her own. She failed to deliver mail to three business addresses at 13, 15, & 17 Shea Terrace. Her prepared statement to the Authority says that she had Saturday business mail for delivery as well. She explains that she had thought she would drive out and deliver the mail for these businesses at the end of her run, but it had slipped her mind and she did not realise she had left it behind until the following day.
- [10] On Tuesday 21 October 2003, the team leader Ms Jodi Ngamu ("Ms Ngamu") spoke to Ms Cherrington about her failure the previous day. Ms Cherrington apologised. Her prepared statement to the Authority states that she explained to Ms Ngamu that she had been so busy it had slipped her mind. She said Ms Ngamu responded that it was not a problem. Ms Ngamu's evidence is that Ms Cherrington said she had intended to deliver it separately in her car. Ms Ngamu further says Ms Cherrington told her she had realised she had left the mail while she was out on her run but had not had time to return. Ms Ngamu denies that she told Ms Cherrington that it was "ok" or anything like that. She says the words she used were "*don't let it happen again.*" The Authority prefers Ms Ngamu's evidence and finds that Ms Ngamu did chastise Ms Cherrington. Ms Cherrington obviously appreciated she had erred because she apologised.
- [11] On Wednesday 22 October 2003, Ms Cherrington again failed to deliver mail to the same three business addresses. According to Ms Ngamu, there were apparently a total of 72 mail items not delivered although Ms Cherrington's written explanation indicates 85 items (as does a letter of 3 November 2003). Ms Ngamu says she had to make alternative arrangements for delivery. Advisedly the non-delivered items comprised some 10% of Ms Cherrington's total delivery items that day which was not challenged and the Authority accepts. Ms Ngamu said she expected to hear from Ms Cherrington during the day about this mail but she did not.
- [12] Ms Ngamu says that she spoke to Mr Zac Te Maro North Shore Delivery Leader ("Mr Te Maro") about the matter. He told her to get a written explanation from Ms Cherrington.
- [13] The following day on Thursday 23 October 2003, Ms Cherrington says that she saw Ms Ngamu and apologised. She says in her prepared statement that Ms Ngamu "*gave her no indication this was a problem*". Ms Ngamu's evidence is different. She says she gave Ms Cherrington a form to complete by way of explanation for the non-delivered mail the previous day. Ms Cherrington handed the completed form back to Ms Ngamu that same day and stated:-

*"There was heaps going to each business so I thought I'd pull out last. When I had finished the boxes and redirects these businesses looked part of it. Didn't realize till the end of my run (I was to deliver them) would've rung but had no phone. Had a doctors appt so couldn't come back to collect. Sorry!"*

- [14] Ms Ngamu says that she is confident Ms Cherrington knew the matter was being treated seriously. The Authority accepts this because the request for a written explanation would have made that clear enough to her. Ms Ngamu says Ms Cherrington was fully aware that she (Ms Ngamu) was taking the matter to Mr Te Maro and that if her explanation was not satisfactory, disciplinary action could follow. She says that is what she told Ms Cherrington.
- [15] On Wednesday 29 October 2003 and Thursday 30 October 2003 written complaints were received about mail on Ms Cherrington's run. The complaints alleged Ms Cherrington had not inserted the mail all the way into the customer's letterbox. In relation to the complaint of 29 October 2003, Ms Cherrington's explanation recorded on a Customer Assistance Request was noted as "*careless delivery by the postie. Not pushing the mail right in to the box. Sorry she will take more care.*" In relation to the complaint of 30 October 2003, Ms Cherrington explained to Ms Ngamu that the letter box needed to be checked to see if mail could slip out the back. She suggested Ms Ngamu make further enquiries of a co-worker Mel.
- [16] By letter dated 3 November 2003, Ms Cherrington was given notice of a disciplinary meeting to be held on 4 November 2003. The letter confirmed that in relation to the non-delivered mail of 20 October 2003, "*Jodie Ngamu, Team Leader, Takapuna gave you the benefit of the doubt and verbally reminded you not to do it again*". It further advised that the non-delivered mail on 22 October 2003 was "*the same mail*" undelivered in the space of two days and that non-delivery of deliverable mail is considered serious misconduct. The letter further referred to the customer complaints of 29 and 30 October 2003 and advised that reckless failure to secure mail is considered serious misconduct. Ms Cherrington was required to provide further explanation to the allegations. She was advised that should her explanation not be satisfactory, disciplinary action including dismissal might occur. Finally she was advised to attend the meeting with a representative or support person.
- [17] Ms Cherrington attended the meeting at 7.15 am on Tuesday 4 November 2003 with her union delegate Mr Greg King ("Mr King"). Also present were Mr Te Maro, Ms Ngamu and Mr Terry Buchan, the Acting Delivery Business Leader ("Mr Buchan").
- [18] In relation to the undelivered mail on 20 October 2003, Mr Te Maro's notes record that Ms Cherrington had replied that she had realized out on the round that she had forgotten the mail. At the Investigation Meeting Ms Cherrington denied this response. The Authority finds however, that Mr Te Maro's notes are reliable and therefore accepts this was Ms Cherrington's response.
- [19] In relation to the undelivered mail on 22 October 2003, Ms Cherrington explained that because she had sorted the mail next to the outward mail, she had mistaken it for outward mail and left it behind. She said she had not attempted to contact the branch when she realised her error because she had a doctor's appointment. When she was asked why she had not contacted the branch from the doctor's office, she offered no reply. Mr Buchan asked her whether the reason she had attended the doctor had prevented her from calling the branch. She replied "*No*".
- [20] In relation to the customer complaints on 29 and 30 October 2003, Ms Cherrington was reminded by Mr Te Maro that she had received regular complaints of careless delivery to letterboxes. She had been presented with two Customer Assistance Requests which specified the customers' concerns. Ms Cherrington was asked if the letterbox which had been modified had met NZ Post standards. She replied "*Yes*" and "*No problems with the box.*" She was asked to describe how she delivered mail to the address. She stated "*I rode up to the box, without stopping, I placed the letter in the box. The letter was halfway in the box, when I let*

*go. I watched as the letter dropped to the ground and blew into the garden*". The account was repeated back to Ms Cherrington and she confirmed it as correct. When asked by Counsel, Ms Cherrington denied that she had said she had watched the letter drop to the ground. The Authority accepts that Ms Cherrington did make that statement. Her statement at the disciplinary meeting was specifically confirmed with her and her affirmation additionally recorded.

- [21] Mr Te Maro's notes further record that Ms Cherrington was asked why she did not stop and pick up the letter and place it in the box. She is recorded as then saying "*I was going to go back after the end of my round to pick it up.*" She was asked whether she did go back. She replied "*No*". She was asked "*why not?*" and she replied she did not know and apologised. Ms Cherrington was reminded of previous discussions over her inability to secure mail. She had received a final written warning in relation to a previous incident. The warning had lapsed.
- [22] Mr Te Maro advised Ms Cherrington he wished to consider her explanations more fully and that she was suspended on pay for two days pending a further meeting to be held on Thursday 6 November 2003. This advice was confirmed in writing.
- [23] On Thursday 6 November 2003, a further meeting was held with Ms Cherrington. Present were Mr Te Maro, Mr King and Mr Buchan.
- [24] Ms Cherrington was asked if she had anything further to add. Mr King reminded Mr Buchan and Mr Te Maro that Ms Cherrington's previous final warning had lapsed and that because the section of businesses was sorted next to where the outward mail it was easily forgotten. He referred to the Delivery Service Operating Procedure manual and asserted that a person in authority should have checked Ms Cherrington's case before she had left for her round. Mr Buchan replied that the checking of cases was the Team Leader's discretion. Mr Te Maro said that he had never checked cases in five years. It is the Authority's concluded view, the fact that others may have contributed does not render the alleged misconduct any less serious. The Authority therefore disregards such other conduct in assessing Ms Cherrington's conduct. Mr King also requested NZ Post take into account Ms Cherrington's length of service.
- [25] The employer decided that Ms Cherrington's actions constituted serious misconduct under the Agreement. Ms Cherrington was advised that she was dismissed. She was informed that she would receive her final pay within 24 hours.
- [26] A dismissal letter dated 6 November 2003 was later personally delivered to Ms Cherrington's residence.
- [27] The above narrative sets out the facts established by the Authority in Investigating Ms Cherrington's employment relationship problem.

## **The Legal principles**

- [28] In Investigating the employment relationship problem, the Authority is guided by established legal principles. It must first be satisfied that there was a dismissal. It then examines whether the employer's decision to dismiss was justified<sup>1</sup>.

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<sup>1</sup> *Wellington Drivers IUOW -v- Fletcher Constructions Co Limited* [1982] ACJ 663, *Wilson & Horton Newspapers Ltd v Oram* [2000] 2 ERNZ 448 (CA)

[29] There is a legal test of justification set out in a Court of Appeal decision *BP Oil v Northern Distribution Union*<sup>2</sup> where the President of that Court said that the test was “essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances”. Cooke P (as he was then) further continued and added that it was a question of fact and degree in each case.

[30] More recently, that test has been reformulated by the Court of Appeal in another decision *Wilson & Horton Newspapers Ltd v Oram*<sup>3</sup> as follows:

*“The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of “could” rather than “would” used in the formulation expressed in the second BP Oil case ([1992] 3 ERNZ 483 (CA) at p 487) . . . The burden on the employer is not that of proving to the Court the employee’s serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.”*

[31] On the question of what will constitute serious misconduct, the Court of Appeal in *North Island Wholesale Groceries v Hewin*<sup>4</sup> said:-

*Regard must be had to the nature and degree of the alleged misbehaviour and so to its significance in relation to the business of the employer and to the position held by the employee. In making the factual assessment, the Court must weigh the question of conduct and, viewing the matter objectively, its effect on the maintenance of the confidential relationship between them as against the severe consequences of immediate dismissal. If it is to warrant that response behaviour must go to the heart or root of the contract between them.*

[32] The Authority is guided by these legal principles in conducting its Investigation.

## **Discussion**

[33] The Authority determines the merits of Ms Cherrington’s employment relationship problem by assessing whether NZ Post’s decision to dismiss accords with established legal principles.

### ***A dismissal***

[34] There is no doubt that Ms Cherrington was dismissed. That is evidenced by the letter of dismissal dated 6 November 2003 and it is not denied. Ms Cherrington was summarily dismissed for serious misconduct - namely “*non-delivery of deliverable mail*” in respect of the mail that was not delivered on 22 October 2003.

[35] The Authority then enquires as to the justification for the dismissal. It looks to see whether NZ Post carried out a full and fair investigation which disclosed conduct by Ms Cherrington capable of being regard as serious misconduct.

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<sup>2</sup> [1992] 3 ERNZ 483, at 487 (CA)

<sup>3</sup> [2000] 2 ERNZ 448 at 457 (CA)

<sup>4</sup> [1982] 2 NZLR 176 (CA)

**Medical evidence**

- [36] It is convenient at this juncture to deal with particular evidence given by Ms Cherrington at the Investigation Meeting before proceeding further. Much was made of medical certificates and her visits to National Womens Hospital and her own doctor. Her prepared brief to the Authority stated that on Monday 20 October 2003 she had given Ms Ngamu a medical certificate from National Womens Hospital in relation to an operation she was to have on Friday 24 October 2003. That certificate was this one:-

S070

HOSPITAL National Womens Hospital

This is to certify that

Mr R Cherrington  
Mrs  
Miss

attended this hospital as an **In/Out** patient  
on 24/10/03

and was **transferred/discharged**  
on 24/10/03

~~He~~ She is **unfit for work** for about 2 days  
..... weeks

**fit to resume work** on 27/10/03

**to return to Emergency Department**  
..... Clinic  
on .....

A.C.C. Form Completed  
Not completed

Medical Officer WHITE  
STAFF NURSE

Date 24/10/03

- [37] Ms Cherrington says she was told by Ms Ngamu that Mr Te Maro did not accept the certificate and had said he would ring the hospital directly. Ms Cherrington did not want him doing that. She said she told Ms Ngamu to tell Mr Te Maro that she would have her doctor confirm the operation with him. She asked Ms Ngamu to get back to her before she (Ms Cherrington) left work to confirm the arrangement but Ms Ngamu did not revert to her.

- [38] It was Ms Cherrington's further evidence that on Wednesday 22 October 2003, Mr Te Maro told her he had phoned the hospital and he was advised there was no operation scheduled. He was not satisfied with the certificate because it was not stamped. She said he implied that she had lied in order to get a long weekend off. She said she was upset by this and because he had ignored her request for the matter to be dealt with through her doctor. She said Mr Te Maro demanded she get another certificate to prove the hospital appointment and she told him she would get one from her doctor.
- [39] She says that it is because she was upset with Mr Te Maro's accusations and because she needed to make a doctors appointment and finish her run, that she failed to deliver the mail in question that same day.
- [40] Mr Te Maro and Ms Ngamu denied Ms Cherrington's evidence relating to this certificate. It is obvious that it is dated 24 October 2003 and it is difficult to accept that it was given to Ms Ngamu on 20 October 2003. Even were the Authority to accept that it was "*predated*" at Ms Cherrington's request, that was not the evidence she gave having been specifically asked about it at length at the Investigation Meeting and fully appreciating the Authority's stated difficulty with the date endorsed on it. In the result however, the Authority concludes that it is irrelevant and no findings need to be made since Ms Cherrington conceded when questioned by Counsel, that she had not proffered the explanation she now does to her employer during its investigation of matters. Nor is there any mention of it in the advice in which her personal grievance is raised.
- [41] NZ Post did not have that information before it when it came to consider her conduct and the circumstances in which it occurred. She told the Authority too, she did not tell her employer the nature of the operation she was to have. Neither of those matters could have been considered by her employer in mitigation as they properly may well have been by a fair and reasonable employer.
- [42] Perhaps Ms Cherrington misconceived the focus of the Authority's enquiry. She may have understood that she was required to explain her conduct to the Authority. The Authority is not concerned to find whether the alleged misconduct is actually proved. Its focus is on the employer's enquiry and in that sense, what Ms Cherrington did is not relevant. The Authority concerns itself with what the employer did<sup>5</sup>. Ms Cherrington's proved conduct is however relevant in terms of the law relating to contributory fault.
- [43] No more need be said about this aspect of the evidence before the Authority.

### ***A full and fair investigation***

- [44] Mr Te Maro notified Ms Cherrington of the allegations against her by letter dated 3 November 2003. That advice gave full particulars of the precise allegations. It specified the relevant contractual provisions in the Agreement and made it clear that the issues were serious. She was directed to attend a meeting on 4 November 2003 to offer an explanation. She was informed that in the event her explanation was unsatisfactory, disciplinary action including dismissal may occur. She was advised to attend the meeting with a representative or support person.

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<sup>5</sup> See *Glass v National Bank of New Zealand Limited*, unreported, ARC47/02, 29 September 2003, Travis J

- [45] Ms Cherrington was provided an opportunity to be heard and offer her explanation at a disciplinary meeting on 4 November 2003. She did so with the assistance of her union delegate Mr Greg King (“Mr King”).
- [46] At the meeting at 7.15 am on Tuesday 4 November 2003, Ms Cherrington attended with Mr King. Also present were Mr Te Maro and Ms Ngamu.
- [47] In relation to the undelivered mail on 20 October 2003, Ms Cherrington did not deny she had not delivered the mail. NZ Post was entitled to find that she had realised when she was out on her round that she had forgotten that mail. It was entitled to find that she had failed to deliver deliverable mail, and had not taken any steps to remedy the situation.
- [48] In relation to the undelivered mail on 22 October 2003, some 85 items or 10% of her mail, Ms Cherrington explained that because she had sorted the mail next to the outward mail, she had mistaken it for outward mail and left it behind. She said she had not attempted to contact the branch when she realised her error because she had a doctor’s appointment. When she was asked why she had not contacted the branch from the doctor’s, she offered no reply. Mr Buchan asked her whether the reason she had attended the doctor had prevented her from calling the branch. She replied “No”.
- [49] Ms Cherrington was suspended while NZ Post made further enquiries. It considered the responses Ms Cherrington made during this time.
- [50] There was then a further meeting on 6 November 2003. Ms Cherrington was asked if there was anything further she wished to say. Mr King raised matters with the employer.
- [51] The Authority is satisfied that Ms Cherrington was given notice of the specific allegations against her and of the seriousness of those allegations. It is further satisfied that she was afforded a real opportunity to explain and deny the allegations and that NZ Post gave full consideration to her explanations. The Authority therefore finds that there was a full and fair investigation into the allegations against Ms Cherrington.

### ***Serious misconduct***

- [52] The real controversy in this problem, is whether the conduct disclosed in NZ Post’s investigation was capable of amounting to serious misconduct.
- [53] NZ Post says Ms Cherrington’s conduct is serious misconduct because it amounts to “*non-delivery of deliverable mail.*” In that regard, it refers to the Agreement where at *Part I. Conduct and Performance Expectations*, one “example” of serious misconduct is specified as:-

*“deliberately or recklessly failing to secure the mail or non-delivery of deliverable mail.”*

- [54] It is Counsel’s submission that mere non-delivery of deliverable mail is sufficient to constitute serious misconduct because it is defined as such in the Agreement. Counsel pointed out to the Authority at the Investigation Meeting and makes a submission that the allegation of “*non-delivery of deliverable mail*” is not qualified by the opening words “*deliberately or recklessly*”. It had appeared to the Authority that those opening words qualified both conduct. Counsel submits too, that this interpretation is correct because the two concepts are separated by the disjunctive “*or*” and because it does not make grammatical sense to say

“*deliberately or recklessly ... non-delivery of deliverable mail*”. In reply, Mr Treen submits that if Counsel’s interpretation is correct, the allegation ought to be a separate, distinct or stand-alone “*example*” of serious misconduct.

- [55] Mr Treen might well be correct, because it is the Authority’s view any grammatical controversy is the result of construction of the clause in both an active tense and a passive tense. The words “*failing*” and “*non-delivery*” are probably equivalent in context. The opening qualifications “*deliberately or recklessly*” can properly apply where the conduct in question is phrased in the active sense “*deliver deliverable mail*”.
- [56] The Authority notes too, that each of the examples of serious misconduct listed are qualified in some way such as “*unauthorized*”, “*deliberate*”, “*misappropriation*”, “*falsification*” and “*use ... for private purposes*”. The only example that is without any qualification is “*a criminal conviction*” but the Authority does not accept that in itself is sufficient to constitute serious misconduct.
- [57] If the interpretation NZ Post’s Counsel urges is correct, that would render mere inadvertence i.e. negligence, oversight or forgetfulness as sufficient. NZ Post’s employees would be justifiably horrified if it was suggested to them that forgetting to deliver one letter constitutes serious misconduct under their Agreement rendering them liable for dismissal. NZ Post might then respond by an assurance it would use its discretion. The issue is not a simple one, as the Chief Judge recognized when His Honour said in *Makatoa v Restaurant Brands (NZ) Ltd*<sup>6</sup>:-

*“The case is never easy when the serious misconduct relied on is negligence, the more so when it consists of a single incident without other circumstances.”*

- [58] And later where His Honour said:-

*“There is also a rule of law that negligence on its own cannot ordinarily justify a dismissal unless it is gross, or amounts to recklessness, or is repeated after warnings and despite training or, as in the Jupiter<sup>7</sup> case, where the employee refuses to accept guidance.<sup>8</sup>”*

That may be of some comfort to the Postie who forgets to deliver one letter or drops one accidentally leaving the mail centre. It ought to be no comfort to the Postie who dumps the *Skywatch* magazines in a ditch or who takes the mail home to catch *Oprah* leaving it for delivery the next day.

- [59] Counsel’s submission is to be contrasted with NZ Post’s evidence. Having rejected Ms Cherrington’s explanation, Mr Te Maro told the Authority he considered Ms Cherrington had “*deliberately forgotten*” to deliver the mail on 22 October 2003 whereupon the Authority questioned the logic of that assessment. Mr Buchan told the Authority “*Yes - I felt it was deliberate 72 items. I felt she had deliberately left the mail behind.*” Perhaps that indicates NZ Post accepts that something more than mere inadvertence is required, or even that the misconduct must be deliberate or reckless. It establishes however, that NZ Post in rejecting Ms Cherrington’s explanation inferred she had a deliberate intent. That is inconsistent with the submission its Counsel makes. The evidence then is that NZ Post concluded that Ms Cherrington acted deliberately. When it wrote to her confirming the reason for her dismissal,

<sup>6</sup> [1999] 2 ERNZ 311, Goddard CJ at page 317.

<sup>7</sup> *Jupiter General Insurance Co Ltd v Shroff* [1937] 3 All ER 67 (PC)

<sup>8</sup> *Makatoa*, ibid at page 318

it did not specify that qualification. It presents itself before the Authority, justifying its decision to dismiss Ms Cherrington without that qualification. The Authority proceeds accordingly.

- [60] It is the Authority's view that the proper construction of the clause as it is ordinarily understood and interpreted is to require the "*non-delivery of deliverable mail*" be deliberate or reckless. That is borne out by Messers Te Maro and Buchans' evidence and indeed the Authority's initial interpretation. It is also the Authority's view that that is the interpretation that would be generally understood.
- [61] While the above discussion may be demonstrative of an apparent ambiguity entitling the Authority to then look beyond the words themselves to ascertain the intention<sup>9</sup>, the Authority inclines to the view that the application of established legal principles is decisive. The Authority need not rewrite the Agreement. That is the prerogative of the parties themselves. Ascertaining the motives of the employee may in the end be unhelpful and indeed unnecessary.
- [62] The Authority finds persuasive the legal principles set out in *Click Clack International Ltd v James*<sup>10</sup>. The Court in that decision adopted the observations of the Court of Appeal in *BP Oil NZ Ltd v Northern Distribution Workers Union*<sup>11</sup> where Hardie Boys J said:-

*"For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court's judgment in BP Oil Ltd v Northern Distribution Workers Union [1989] 3 NZLR 580. Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship. In the context of a personal grievance claim under the Labour Relations Act, questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances. (See also Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd [1990] 3 NZLR 549, 555.)"*

- [63] Palmer J in *Click Clack* accepted a submission he said had compelling force, that while motive and intention on the part of the employee may be important factors in deciding serious misconduct, they are not conclusive of the matter. The essential issue is whether the actions may have undermined the necessary trust and confidence of the employer in the employee. The employee's actions may be entirely well-intentioned. His Honour found equally compelling the submission that the nature of serious misconduct is that it is conduct which undermines the trust and confidence essential for the employment relationship to continue. The Court of Appeal in *Oram* approved the decision in *Click Clack*.
- [64] The Authority accepts that the question of whether conduct amounts to serious misconduct is a question of fact and degree. It is not only the fact of not delivering deliverable mail that is pertinent, but it is also the degree or extent of that conduct. The particular circumstances are relevant such that the considerations of the employee and the employer's business are put in context. NZ Post is in the business of delivering mail. That is its core business. Ms Cherrington was employed to deliver that mail. That was the essence of her service with NZ Post. The essential issue is whether the employee's actions may have undermined the necessary trust and confidence of the employer in that employee.

<sup>9</sup> *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA)

<sup>10</sup> [1994] 1 ERNZ 15

<sup>11</sup> [1992] 3 ERNZ 483 at page 487

- [65] The Authority asks whether it was reasonable for NZ Post to conclude that Ms Cherrington's actions on 22 May 2003 undermined the necessary trust and confidence it had in her.
- [66] NZ Post rejected her explanation about mistaking the mail in question for outward mail. She was an experienced postie with seven years service. It did so on the basis that this explanation was implausible having regard to the physical sorting of outward mail on the postie's case. The case Ms Cherrington used was not materially different from that used for any other run. There was also a well-established clear "*floor policy*" within the branch. Ms Cherrington had herself sorted the mail on the case. She was aware of it having just sorted it and would have appreciated the physical difference in her delivery bags when she left the branch. It was reasonable for NZ Post to reject her explanation and it was therefore entitled to find that she had again failed to deliver deliverable mail and additionally, that she had not taken any steps to remedy the situation.
- [67] As a matter of fact, she had not delivered the deliverable mail. As a matter of degree, it was not insignificant and comprised 10% of her run. Critically, the misconduct does strike at the very heart of her service - she was employed to deliver mail. The circumstances were such that she had only two days previously, committed the same misconduct and chastised only the day before not to do it again. The conduct was thus repeated and it is that fact which is particularly distinguishing.
- [68] When considered in this way, it matters not whether the conduct was deliberate or reckless or inadvertent. The effect of it is the same - in the result, it undermines NZ Post's trust and confidence in Ms Cherrington. It could not, as a fair and reasonable employer, have any trust and confidence in her to do what she was employed to do.
- [69] That conclusion finds some corroboration in the other evidence. The Customer Action Requests of 29 and 30 October 2003 occurring not long after the conduct for which she was dismissed, would not have instilled any confidence in NZ Post either. As well, Ms Cherrington had no explanation despite her agreement that she had in the past, why she had not called the branch to make arrangements for the non-delivered mail or returned to the branch to deliver it. Her written explanation of 23 October 2003 acknowledges this because Ms Cherrington says that she "*would've rung but had no phone*". That admission is but further support why NZ Post could not continue to repose any confidence and trust in her. Perhaps if she had done so, she might have mitigated her misconduct and NZ Post might not then be in a position to question her faithfulness of service and maintain her conduct as serious misconduct. The Authority finds, it was reasonable for NZ Post to have honestly concluded that it had lost trust and confidence in her.
- [70] The conclusion reached as to serious misconduct is significantly influenced by the particular circumstances which provide the context for the principal misconduct. The seriousness of Ms Cherrington's misconduct on 22 October 2003 takes its flavour from the circumstances surrounding it and most particularly, from the misconduct which immediately preceded it. She had only two days before behaved in precisely the same way and only the previous day been chastised for that conduct. The conduct of 22 October 2003 is serious in that context. The Authority would not have considered the conduct of 22 October 2003 serious had it occurred in isolation without more - as Ms Ngamu did not, in relation to the single incident of 20 October 2003. The good faith in her forbearance on that occasion however, turned out to be misplaced.

- [71] For these reasons, the Authority finds, Ms Cherrington's conduct of "*non-delivery of deliverable mail*" in these particular circumstances was conduct capable of amounting to serious misconduct.
- [72] Once that position was reached it is for NZ Post to then decide the appropriate penalty. While dismissal might seem harsh, especially having regard to the medical evidence revealed in the Authority's investigation but not to NZ Post, it is not for the Authority to substitute its view for the penalty to be imposed. That is the law following the decision in *Oram*.

## Determination

- [73] As a matter of fact and degree, the Authority considers NZ Post was justified in its assessment that Ms Cherrington's conduct in not delivering deliverable mail on 22 October 2003 and having failed to do so previously on 20 October 2003, and having failed to take any steps to remedy her actions, deeply and destructively impaired the basic/necessary level of confidence and trust which underpinned her employment with NZ Post as a Postie or mail deliverer.
- [74] Put in another way, after its investigation which the Authority finds was full and fair, NZ Post, having regard to the nature of its core business of delivering mail and the need to rely on its posties to deliver that mail, reached the conclusion that Ms Cherrington's conduct in the circumstances meant that she had lost the confidence of her superiors that she could be relied upon in the future. The Authority considers that a fair and reasonable employer could form that view.
- [75] The Authority finds that NZ Post's decision in all the material circumstances of the case to summarily dismiss Ms Cherrington on 6 November 2003 was a decision which a fair and reasonable employer could make in the particular circumstances.
- [76] **The Authority finds that Ms Cherrington does not have a personal grievance and does not consider the remedies sought by her are appropriate to resolve her employment relationship problem. The Authority cannot assist Ms Cherrington any further.**

## Costs

- [77] The parties are encouraged to resolve the question of costs between them, but failing such agreement, NZ Post's Counsel is to file a memorandum as to costs within 14 days of the date of this determination. Ms Cherrington's Advocate is to file a memorandum thereafter but within 28 days of the date of this determination.

**Leon Robinson**  
**Member of Employment Relations Authority**