

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number: WA 146/07
File Number: 5077436

BETWEEN PETER GRIFFITHS
 Applicant

AND NEW ZEALAND POST LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Graeme Ogilvie, for Applicant
 Derek Broadmore and Melanie Brewer, for Respondent

Investigation Meeting: 6 September 2007 at Wellington

Determination: 30 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Peter Griffiths is employed by New Zealand Post Limited (New Zealand Post) and has been employed as a postal worker delivering mail since 1983.

[2] The parties are bound by the collective employment agreement. The relevant provisions under the collective employment agreement, as they relate to these proceedings, are as follows:

Section A: New Zealand Post employment philosophy

12. *We want New Zealand Post to be a great place to work and to support this we are committed to:*

- *Providing safe and healthy workplaces.*

To provide safe and healthy workplaces

13. *We care about and are committed to promoting the health, safety and well-being of Post people.*

14. *We will provide safe and healthy workplaces. We will make every reasonable effort to prevent accidents and protect*

employees from injury. If an employee is injured at work we will work proactively to support their rehabilitation.

New Zealand Post's expectations of its people

28. *Management needs the support of their people to help the company achieve its vision. This means the people who work for New Zealand Post need to be committed to:*

- *Keeping themselves and each other safe at work ...*
- *Being co-operative and working well as a team member.*
- *Being willing to learn and adapt to changes as they happen.*

Section F: Work environment

Health and safety

1. *New Zealand Post is committed to striving to achieve excellence in the management of health and safety in the workplace.*
2. *New Zealand Post will:*
 - *Comply with all legal requirements;*
 - *Train employees to do their jobs safely;*
 - *Provide safety equipment and clothing where appropriate ...*
3. *The employees will:*
 - *Take all practicable steps to look after their own health and safety ...*
 - *Comply with all directions given by the company.*

Work related harm ...

21. *If an employee is unable to work, the company will pay the difference between their earnings-related compensation and their average taxable earnings for the first week away from work. The company will not make this payment if the person's employment was due to terminate on the day of the accident or within six days of the accident.*
22. *If an employee is away from work for more than one week, the company will make up the difference between the earnings-related compensation and the payment they would have received if they had worked their standard hours of work. The employee will be paid the standard hours at the appropriate hourly rate, industry payments and allowances for the job they performed prior to the accident.*

Section N: Specific conditions – delivery

10. *... Rounds may be allocated or reallocated ... according to business need and the best utilisation of staffing to meet delivery volume....*
11. *Unless otherwise directed by their manager:*
 - *Employees must use a bicycle or motor cycle to deliver mail, unless the terrain is unsuitable ...*
12. *It is compulsory for bicycle helmets to be worn on a cycling delivery ...*

[3] During the course of his employment, Mr Griffiths was diagnosed with two conditions; systemic mastocytosis and erythromelagia.

[4] Systemic mastocytosis involves a certain type of body cell known as a mast cell which results in symptoms ranging from a burning sensation of the head and face, palpitations, headaches, sweating and outbursts of temper. Medical advice is that these symptoms would be brought on by Mr Griffiths' wearing a helmet for any length of time.

[5] Erythromelagia is a psychological condition. It is associated with a personality trait of anxiety and probably an obsessional and anxious response to the symptoms resulting from systemic mastocytosis. Medical advice has been that this condition is as distracting and disabling as an intense headache.

[6] New Zealand Post has always accepted that Mr Griffiths suffers from these conditions.

[7] In the period 1993 to 1994, New Zealand Post grappled with the question of whether it could or would permit Mr Griffiths to cycle without a helmet.

[8] On 13 July 1993, Mr Griffiths signed a declaration to the effect that he would wear a safety helmet and that he understood failure to do so would be a breach of OSH regulations and could lead to disciplinary action. There were two further clauses in the declaration that were:

- Mr Griffiths has a medical condition, systemic mastocytosis. Medical certificate on file. Union contacted; and
- OSH has been contacted for further opinion.

[9] New Zealand Post received medical opinions on 18 August 1993 and 10 September 1993 about Mr Griffiths' condition. On 29 September 1993, New Zealand

Post received from New Zealand Police a statement that Mr Griffiths had undergone advanced bicycle training and that Police were aware that he rode his bike without a helmet. New Zealand Post obtained from the applicant a declaration that it had taken all practicable steps to ensure his safety and that if he took his helmet off it was at his own risk.

[10] OSH was advised on 4 October 1993 of Mr Griffiths' training and it sought clarity as to whether all practicable steps had been taken. On 6 October 1993, OSH stated that New Zealand Post had satisfied, at a prima facie level, taking all practical steps to ensure Mr Griffiths' safety, given his medical condition. It noted, however, there was a calculated risk.

[11] Further discussions held between Mr Griffiths and his supervisors explored options in regard to the contractual requirement for Mr Griffiths to wear an approved safety helmet given his medical condition. There were three options:

- Mr Griffiths' condition improve to the extent that he could wear a helmet;
- Agree to a walking delivery run;
- Medical retirement.

[12] In the meantime, New Zealand Post tried to obtain further advice and information on whether it was taking all practical steps to provide a safe working environment for Mr Griffiths.

[13] On 18 November 2003 New Zealand Post received another letter from OSH stating that it was unable to answer whether or not New Zealand Post had taken all practical steps in a categorical way.

[14] On 31 January 1994, Mr Griffiths received a certificate of exemption from the requirement to wear a cycle safety helmet from the Land Transport Safety Authority.

[15] In April 1994, New Zealand Post decided that it would permit him to do so because he had the exemption from the Land Transport Safety Authority. However, Mr Griffiths was required to have a helmet with him at all times and wear it when he could.

[16] It was not until early 2006 that the issue was addressed again.

[17] Mr Joseph Canon, who was employed at the time as the delivery group leader in Post's North City branch, became aware that Mr Griffiths was cycling without a helmet. He understood at that time it had been an outstanding issue for some time. He says he was concerned about it. He says that he approached Mr John Murchison, the National Health and Safety Manager for the delivery side of the business, to discuss the matter with him. He says that he was advised that Mr Griffiths cycling without a helmet was not an acceptable business risk and that the company had to act quickly to deal with it. He says he also spoke to Suzanne Cameron, one of the Wellington delivery branch leaders, about Mr Griffiths' situation.

[18] As a result, Mr Canon says he approached Mr Griffiths to discuss with him the issue of his continuing to cycle without a helmet and to discuss what other options there were. He says he was very conscious of how big an issue it was for him. So rather than coming straight out and saying that the company could no longer accept the risk of him cycling without a helmet, he decided to first talk to him about his concerns, and work through some of the options he saw for him. He says he explained to Mr Griffiths on at least three occasions why he could not go back to cycling without a helmet. He says he could not see, therefore, how Mr Griffiths could say that he thought this was an option that was open to him.

[19] There was discussion on a walking delivery run. Another option discussed was doing what is called a *C motor* round that existed in Mana and had become available. Mr Griffiths did not have a vehicle licence but New Zealand Post offered to pay for him to get a licence. Mr Griffiths said that he would consider it but did not go back to Mr Canon on this option.

[20] Another option involved whether or not Mr Griffiths was interested in doing internal administration at the North City branch but Mr Canon says Mr Griffiths was not interested.

[21] A letter records what Mr Canon understood of the situation. This letter(dated 19 January 2006) from him to Mr Griffiths, is as follows:

I am writing to confirm our conversation this morning about you changing rounds from a cycling round to walking rounds 1 and 12.

My sole reason for requesting that you consider changing rounds was not wanting to place you at any further risk by asking you to carry out a cycling round when you were unable to wear a helmet. I confirm that

no way am I questioning the reasons why you are unable to wear a helmet and accept this simply to be the case.

We agreed that you would carry out a trial for two weeks on rounds 1 and 12 and that you would then let me know your thoughts. The Team Leaders will not communicate to anyone else the reason's behind requesting that you move other than to say that you have been rostered onto rounds 1 and 12.

I also confirm that because we have agreed a trial period of walking 1 and 12, we will not ask you in the future to carry out a walking round in the Mana area.

I would like to take this opportunity to thank you for the understanding and patience you have demonstrated given the circumstances and the long periods of time that have surrounded this issue. Please let me know your thoughts about walking rounds 1 and 12 after you have begun the trial and do not hesitate to let me know if I can be of any further assistance.

[22] It is at this point that the parties took a different view on what happened. Mr Canon says that Mr Griffiths took up his suggestion of giving a walking delivery a go. He could not remember the exact words he used when this was discussed between them, but in his mind he says at the time he made it clear to Mr Griffiths that he was prepared to consider a range of options with him but all of them were around Mr Griffiths carrying his role without cycling if he was not able to wear a helmet. Mr Canon says he never agreed, whatever they discussed, that if it was not successful Mr Griffiths could return to cycling without a helmet.

[23] Mr Griffiths says that Mr Canon is not correct. First, he says it was only ever put to him as a trial to undertake the walking round. Second, he says he would never have agreed to the trial if he thought returning to the bike was not an option. He says it was only after the trial that he was told he could not go back on the bike.

[24] Messrs Griffiths and Canon agree that Mr Canon went out with Mr Griffiths for a couple of hours on one of the walking runs where they had a discussion about the options. Mr Canon says that they discussed a range of subjects relating to safety aspects of the postie role and that he also reiterated the health and safety implications of Mr Griffiths not wearing a helmet while he was cycling.

[25] It is agreed that after the trial, Mr Canon understood that Mr Griffiths wanted to continue cycling as a postie. He says he did discuss why Mr Griffiths could no longer do this if he was not prepared to wear a helmet. It appears after this meeting nothing

much further happened until approximately March 2006 when Mr Griffiths informed Mr Canon that he wanted to go back to cycling without a helmet. At this point, Mr Canon says he clearly told him he could not do that for the reasons he had already previously stated.

[26] Mr Canon left the role in the branch in April 2006. Mr Griffiths has continued on the walking rounds ever since.

[27] The issue resurfaced again when Suzanne Cameron became involved. Mr Griffiths had made his then manager (Glennys Feist) aware that he was very unhappy about being required to walk on delivery and that he felt aggrieved at what he believed had been a trial rather than a permanent move. Mr Griffiths wrote to New Zealand Post's CEO, John Allen. This letter (dated 13 June 2006) read as follows:

Up until recently, I have been a cycle postie for 24 years and doing a cycling round with a helmet dispensation. For the last three months I have been forced to do a job I am not happy with. I now wish to be reinstated back to my normal working duties.

I have exhausted all means of communication with my team leaders and discussions with Joe Canon over this matter. I feel I have been treated unfairly and it is causing me a great deal of stress. I look forward to this matter being dealt with as soon as possible.

[28] The next development in this matter was that on 15 August 2006, Mr Griffiths' representative, Mr Ogilvie, wrote to the Chief Executive raising an issue of dispute over the operation of the employment agreement and claiming that Mr Griffiths had a personal grievance for unjustified action and for "*prohibited discrimination*". He made a claim for \$6,000 compensation for humiliation, loss of dignity and injury to feelings.

[29] New Zealand Post denied the claims. It denied that Mr Griffiths had been put on a permanent walking delivery masquerading as a trial when options have been put before him and been rejected. It requires Mr Griffiths to wear a helmet if he uses a bicycle.

Issues

[30] First there is an issue in regard to the application of the employment agreement as to whether or not New Zealand Post can require Mr Griffiths to wear a helmet if he is working on a bicycle delivery run. Secondly a personal grievance has been raised to resolve the problem and a claim for compensation for an unjustified action causing the

applicant disadvantage. This is over what the parties understood the trial meant and New Zealand Post's action in regard to Mr Griffiths' current walking delivery run.

Determination

[31] It is my decision to dismiss the claim entirely. My reasons are.

[32] First, although Mr Griffiths has an exemption from the LTA that enables him to ride a bicycle without a helmet, that does not prevent his employer exercising its discretion about health and safety under the collective employment agreement. Under the terms of that agreement wearing a helmet is compulsory.

[33] The agreement is clear that it is compulsory for employees to wear a helmet on a cycling run. However Mr Griffiths can not wear one for health reasons and New Zealand Post understands that. It has endeavoured to provide alternative options. It has that right under the terms of the employment agreement.

[34] Secondly, New Zealand Post has acted as a fair and reasonable employer would act by providing Mr Griffiths with options in his employment to try and meet his circumstances. New Zealand Post permitted Mr Griffiths not to wear a helmet for some considerable period, but he was on notice of its decision would be subject to review. It has acted cautiously to protect itself in regard to its health and safety obligations and ACC provider status. It is entitled to do so and is acting reasonably.

[35] Thirdly, although the process followed by Mr Canon was not ideal in being as clear as he should have been and would have liked to have been with Mr Griffiths he has not acted deliberately to put Mr Griffiths on a walking delivery by masquerading it as a trial.

[36] Fourthly, the claim that somehow there has been "*positive discrimination*" to base a grievance on has simply not been established. There is no evidence to support such a claim. Indeed not even a submission was made to pursue it.

Conclusion

[37] I conclude that there is nothing that New Zealand Post has done that enables me to make a compliance order as claimed to resolve the problem. There has been no unjustified action causing disadvantage for personal grievance remedies to be applied to resolve the problem.

[38] The applicant's claims are dismissed.

[39] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority