

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2018] NZERA 198  
3028840

BETWEEN                      KEN LAMBERT  
   Applicant  
  
AND                              NEW ZEALAND POST LIMITED  
   Respondent

Member of Authority:        Helen Doyle  
  
Representatives:              Phil Yarrall, advocate for the Applicant  
   Hamish Kynaston and Shaun Brookes, counsel for the  
   Respondent  
  
Investigation Meeting:        15 and 16 October 2018 at Christchurch  
  
Submissions Received:        16 October 2018 from the Applicant  
   16 October 2018 from the Respondent  
  
Date of Determination:        21 December 2018

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Ken Lambert was employed by New Zealand Post Limited (NZ Post) as a mail officer from 27 November 2000 until his employment was terminated on 18 April 2018.

[2]     On 6 March 2018 there was an incident when Mr Lambert was operating the forklift, also known as a forkhoist, to move four unit load devices (ULDs) that contained mail handling system trays. As Mr Lambert was turning, the two ULDs on the front of the forklift fell off the forks, spilling the mail handling system trays. No-one was hurt in the incident but ULDs when they are empty weigh about 89kgs. The cages and their contents were then cleared away quickly by Mr Lambert and another employee G. The incident was not reported

by Mr Lambert at the time it occurred. His view was that another employee A had seen the incident and would report it. In fact A did not see the incident only the fallen ULDs and trays.

[3] Melanie Croose, who is the Day Processing Manager, was told by A about ULDs tipped over in the Interchange. Ms Croose was with Catherine Beecroft when A reported that she had seen 2 ULDs on their sides with empty mail handling trays scattered on the floor which were being picked up by Mr Lambert and G. Ms Beecroft worked at that time as a Processing Team Leader at the Mail Centre where Mr Lambert worked. She currently works in a new role for NZ Post. Ms Beecroft has been a Postal Workers Union of Aotearoa (PWUA) delegate for two years.

[4] Anthony Burrows is the day-shift Team Leader, which is the team Mr Lambert worked in, and was the decision maker. Ms Croose asked Mr Burrows to look into the incident after being alerted to it by A.

[5] Mr Burrows went and asked Mr Lambert who was in the cafeteria what had occurred. From what Mr Lambert said Mr Burrows concluded he was maintaining there was no incident. Mr Burrows had also approached G who responded along the same lines.

[6] Mr Burrows reported back to Ms Croose. The CCTV footage was viewed by Mr Burrows, Ms Crosse and Ms Beecroft. It showed Mr Lambert driving the forklift, the ULDs falling off the forks and the clean-up. Ms Croose and Ms Beecroft went to talk to Mr Lambert. They also concluded that Mr Lambert denied there was an incident. Ms Croose told Mr Lambert that based on the CCTV footage a process needed to be followed and she wanted him to take a drug and alcohol test. Ms Crosse said that she intended to telephone The Drug Detection Agency (TDDA) that carry out testing for NZ Post.

[7] Ms Beecroft remained with Mr Lambert as his union support and he was provided with copies of the NZ Post Alcohol and other Drugs in the Workplace Policy and Programme (alcohol and drug policy) and the AD03 which is the Authority and Declaration form – reasonable cause.

[8] The TDDA van arrived about half an hour later. Mr Lambert refused to undertake a urine test but offered to do an oral swab instead. He said that he had had advice from his union representative Mr Yarrall by telephone. There was discussion with the TDDA staff member. Ms Croose escalated the matter to the Processing Leader Ross Newton at the Christchurch Mail Centre for guidance about an oral swab.

[9] Mr Newton then took the lead in the process with Ms Croose in support. Mr Newton checked the oral swab suggestion with the Head of Safety and Wellbeing for NZ Post, Peter Taylor and was advised that the urine sample test for drugs was the only method of testing available under the NZ Post policy. Mr Taylor also advised Mr Newton that a refusal to test results in a disciplinary process. Further where the activity involved a safety sensitive area, as this did, it was to be treated as possible serious misconduct and the employee should be stood down on full pay pending the outcome of the investigation and disciplinary process.

[10] Mr Newton returned with Ms Croose to the TDDA van and spent time explaining the advice from Mr Taylor to Mr Lambert. Mr Lambert asked what would happen if the result was positive. Ms Croose and Mr Newton said they would need to understand what the result was and work with Human Resources to determine the next steps. If Mr Lambert thought his test would be positive then Mr Newton advised he should let the tester know and they would work through with Human Resources.

[11] Mr Lambert declined the urine test, offering again to undertake an oral swab. Ms Beecroft had remained with Mr Lambert through this process. Mr Lambert was then given a further 30 minutes to discuss the matter with Mr Yarrall.

[12] After 30 minutes Ms Croose and Mr Newton returned to the van and asked Mr Lambert what his decision was. He confirmed that he could not provide the urine test. Mr Newton told Mr Lambert that if he refused the test he could no longer help him. They would have to work on the available facts and a disciplinary investigation process would follow. He also said that he told Mr Lambert along the lines that if he took the test and explained what he believed was in his system he could assist him through the process and, where possible,

advocate for him. Mr Lambert had made a comment that he had been to a motorcycle rally. Mr Lambert wanted to talk again to Mr Yarrall. He did but did not agree to a urine test.

[13] Mr Lambert was then advised he would be stood down on full pay and invited to a serious misconduct meeting. A disciplinary process then took place. At the conclusion of that Mr Lambert was then dismissed.

[14] Mr Lambert says his dismissal was unjustified. He seeks reinstatement and compensation for humiliation and injury to feelings. There was no specific claim for reimbursement of wages in the statement of problem. In all likelihood that is because dismissal occurred very shortly before the statement of problem was lodged and interim reinstatement sought.<sup>1</sup> The Authority heard evidence about lost wages and mitigation and Mr Kynaston addressed a claim for lost wages in final submissions.

[15] NZ Post disclosed information Mr Yarrall had requested about post incident drug and alcohol testing from 2017 in the Christchurch Mail Centre where there was a forklift incident. Personal identification information was removed from the documents. There was also disclosure of the statistical information from the organisation that carries out NZ Post's drug and alcohol testing for post incident and reasonable cause testing from 2016 to 2018. Following disclosure Mr Yarrall advised that Mr Lambert did not intend to pursue the claim that he was treated in a disparate manner by being required to undergo post incident testing.

[16] Mr Yarrall said there was still an issue about the disparity of treatment between those employees whose work was covered by the Postal Workers Union of Aotearoa and NZ Post Collective Agreement 2017 to 2020 (the PWUA collective agreement) and those whose work was covered by the E tū and NZ Post Collective Agreement 2017 to 2020 ( the E tū collective agreement).

[17] NZ Post says that there was a full and fair investigation into allegations arising from an incident on 6 March 2018. NZ Post says that Mr Lambert was then justifiably dismissed.

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<sup>1</sup> *Lambert v NZ Post Limited* [2018] NZERA Christchurch 94.

**The issues**

[18] The Authority needs to determine the following issues in this case:

- (a) What were the reasons for dismissal?
- (b) What are the material provisions in the employment agreement and alcohol and drug policy?
- (c) Was there a full and fair investigation? The claim lodged was wide ranging and consideration of the following substantive and procedural concerns is required:
  - (i) Was Mr Lambert aware of the alcohol and drug policy?
  - (ii) Did the alcohol and drug policy apply to Mr Lambert? There is no reference in the PWUA collective agreement to the alcohol and drug policy compared to the E tū collective agreement material.
  - (iii) Was the threshold reached for requiring post incident testing and is there a different threshold in the E tū collective agreement for post incident testing?
  - (iv) Was it clear to Mr Lambert what the outcome of a failed test would be?
  - (v) What weight if any should have been given to Mr Lambert offering to do an oral swab test?
  - (vi) Is it material that a failure to undergo a drug test is not serious misconduct under the PWUA collective agreement?
  - (vii) Were the obligations of good faith and privacy met by NZ Post with the opportunity offered for Mr Lambert to view the CCTV footage of the driving incident on 6 March?
  - (viii) Should NZ Post have provided information of all forklift incidents over the previous 12 months when requested during the disciplinary process?
  - (ix) Was a conclusion available to NZ Post that Mr Lambert denied an incident had taken place?

- (x) Was there evidence that the incident on 6 March 2018 was caused by faulty equipment?
- (xi) Did the fit for work certificate provided by Mr Lambert's General Practitioner after he was requested to undertake a drug test satisfy NZ Post concerns?
- (d) Could a fair and reasonable employer have concluded misconduct and serious misconduct on Mr Lambert's part following the investigation?
- (e) Could a fair and reasonable employer have dismissed Mr Lambert in all the circumstances?
- (f) If Mr Lambert was unjustifiably dismissed, is reinstatement reasonable and practicable, what remedies should be awarded, and are there issues of mitigation and contribution?

### **The reasons for dismissal**

[19] After the Investigation Meeting it was found that the three allegations put to Mr Lambert at the outset of the disciplinary process were substantiated. These formed reasons for dismissal. The reasons for dismissal were that Mr Lambert:

- (a) Failed to take reasonable care while operating a forklift found to be minor misconduct.
- (b) Failed to observe safety rules – failing to report an incident, and denying an incident had occurred when questioned by leaders which was found to be serious misconduct.
- (c) Refused to undergo urine drug collection in line with the alcohol and drug policy which was found to be serious misconduct.

[20] It was further recorded both in the provisional outcome letter of 13 April 2018 and the outcome letter of 23 April 2018 that in coming to the decision serious consideration was given to the risk presented by the allegations and:

NZ Post has a fundamental responsibility to provide and maintain safe working environments and your behaviour has seriously compromised our ability to uphold that responsibility. One of these allegations alone would be cause for concern for NZ Post, but collectively they show an overall lack of regard for safety and poor judgement. We have also taken into account previous disciplinary proceedings relating to a forklift incident where you are also refused testing.

[21] It was stated that trust and confidence in Mr Lambert was seriously damaged by the incident.

**What are the material provisions in the employment agreement and drug and alcohol policy?**

*PWUA Collective Agreement 2017 - 2020*

[22] There is no specific reference within the PWUA collective agreement to the alcohol and drug policy.

[23] Section I of the PWUA collective agreement is about conduct and performance expectations. It provides in clause 1 that:

The Company expects its employees to maintain the highest standards of behaviour and to undertake their duties and responsibilities in an honest and professional manner and in accordance with Company policy.

...

Under examples of performance expectations in clause 3, it includes *accept directions from the Company and act in accordance with Company policies and procedures.*

[24] Within the same section about conduct and performance expectations there are examples of minor misconduct and of serious misconduct. There are a number of potential outcomes in the event there is misconduct or a failure to meet performance expectations.

[25] There is a disciplinary procedure for misconduct or serious misconduct set out.

*The E tū collective agreement*

[26] The E tū collective agreement provides the following for post incident testing at clause 56.

An employee who has been involved in any incident resulting in injury, death, significant near miss or serious damage to property or goods in the workplace for which there is no logical explanation for that incident or accident other than behavioural cause, may be required to undergo non-intrusive drug and alcohol testing at the company's expense.

It also provides under reasonable cause testing at clause 57 and 58:

57. An employee who fails a screening test for alcohol or drugs and is deemed as being under the influence of alcohol or drugs at work, or using alcohol or drugs at work or is involved in illegal drug related activities at work may also be subject to reasonable cause testing.
58. "Reasonable cause" has the same meaning as "just cause" which means that when applied by an objective test, an independent person, having observed the situation or demonstrated behaviours and considering all of the information in context, would have reached the same conclusion as the leader, in conjunction with the programme manager.

[27] The Authority's attention was also directed to clause 63 in the E tū Collective Agreement under substance definitions. It provides that being under the influence of alcohol and drugs (other than those prescribed) is classified as misconduct. However, an employee will not be dismissed on the first and second incident provided there are no other disciplinary issues which give just cause for dismissal.

*The Alcohol and Drug Policy*

[28] The alcohol and drug policy provides for reasonable cause testing of employees and when it may be conducted. The wording is slightly different on page 5 and on page 21. The two clauses are 1.3.5 and 2.6.2.

1.3.5 ...reasonable cause testing may be conducted when ...

- A near miss which had significant potential to cause serious harm or significant damage to property or goods; and
- New Zealand Post Limited believe there is sufficient reason to test as no reasonable explanation is apparent from an incident occurring.

2.6.2 Reasonable cause testing of employees may be conducted when:

...

An incident occurs that results in:

- A near miss which had significant potential to cause serious harm or significant damage to property or goods;
- The company believes there is sufficient reason to test;
- An incident occurs for which there is no logical explanation other than a behavioural cause.

### **Was there a full and fair investigation?**

[29] The Authority is asked in this matter to consider whether Mr Lambert was justifiably dismissed. It is required to apply the justification test which is set out in s 103A of the Act 2000 (the Act). The Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test to consider on an objective basis whether the actions of NZ Post and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[30] The Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. These are whether the allegations against Mr Lambert were sufficiently investigated, whether the concerns were raised with him, whether he had a reasonable opportunity to respond to them and whether such explanations were considered genuinely by NZ Post before dismissal. The Authority may take into account other factors as appropriate and must not determine a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly. NZ Post could also be expected, as a fair and reasonable employer, to comply with the good faith obligations set out in s 4 of the Act.

[31] I find that the three allegations were clearly put to Mr Lambert in a letter dated 12 March 2018. He was invited to attend a formal misconduct investigation meeting on 16 March 2018 although the first meeting did not actually take place until 5 April 2018. Mr Lambert was represented during the process by Mr Yarrall. All relevant information was provided including the health and safety incident report, statements from A, Ms Croose and Mr Newton about what they did or saw on 6 March, advice of the existence of the CCTV

footage and confirmation that it could be viewed ahead of the investigation meeting, training certificates, team briefs, a copy of a first written warning and the alcohol and drug policy.

[32] An earlier meeting on 22 March was adjourned on the basis that Mr Yarrall did not wish to view the CCTV footage of the incident in a private meeting room at NZ Post and NZ Post would not agree to simply release the footage to Mt Lambert or Mr Yarrall because it contained images of other employees. A letter dated 17 March 2018 from Mr Burrows to Mr Lambert supports agreement to Mr Yarrall's suggestion that footage be provided to a Wellington lawyer with some conditions about restrictions on copying or releasing copies. It appears no details about the identity of the lawyer were provided.

[33] On 5 April 2018 there was another opportunity for Mr Yarrall and Mr Lambert to view the CCTV footage before the investigation meeting started but they declined. The meeting lasted about two hours. Mr Yarrall attended with Mr Lambert and Mr Burrows with a Human Resource advisor who took notes. Each allegation was discussed and Mr Lambert provided explanations. The notes taken by the Human Resources advisor are not a verbatim record but rather a summary. The notes were then provided to Mr Yarrall by email that same date and a response requested by 9 April 2017. No response was received.

[34] On 13 April 2018 Mr Burrows wrote to Mr Lambert advising of his findings and a provisional outcome that Mr Lambert should be dismissed without notice. The letter set out fully Mr Lambert's explanations to the allegations and NZ Post's provisional conclusions about each allegation.

[35] On 18 April 2018 there was another meeting held with the same participants and also Mr Newton to discuss the provisional outcome. After an adjournment during which the responses were considered there was advice that the points advanced had already been addressed and did not change the proposed decision to dismiss. Confirmation was then given of the decision to dismiss without notice on that same day and then confirmed in writing.

[36] The process as set out above, subject to an assessment of the other substantive and procedural concerns raised by Mr Yarrall, was that of a fair and reasonable employer. It met the requirement of s 103A (3) of the Act and was also consistent with the disciplinary process

in the collective agreement. I agree with Mr Kynaston's submission that Mr Lambert's challenges to process are not directed to the *core* of the process as set out above but of a broader nature.

*Was Mr Lambert aware of the alcohol and drug policy and programme before he was asked to undertake the test?*

[37] For completeness there was no dispute that the Interchange where Mr Lambert worked and the Staging area have been identified as 'Safety Sensitive' due to vehicle traffic, equipment moving around and the use of the forklifts.

[38] The copy of the alcohol and drug policy in NZ Post's bundle of documents is some 42 pages long. It has been in place since 2011 and the Authority was provided with educative material in the NZ Post bundle at that time for leaders and staff. Mr Taylor acknowledged in his affidavit evidence the policy could be shortened and simplified. NZ Post intended to work on this with a review involving both unions and may have commenced that work already. Mr Lambert could not recall any training or information when the policy was first introduced.

[39] Whilst Mr Lambert may not have read the whole alcohol and drug policy I accept Mr Kynaston's submission that Mr Lambert was aware of its existence. In April 2017 he was asked to undergo testing under the policy. He had clipped another employee with a load while operating a forklift although it was found that the other employee was partly responsible. Mr Lambert refused testing however NZ Post was not able to reach anyone from human resources to complete the process so the refusal aspect was taken no further. Mr Lambert says that he only received a two page policy at that time. Mr Burrows in his oral evidence said that he provided the full policy. Mr Newton also discussed testing with Mr Lambert in October 2017 following an incident. Mr Lambert agreed that he had heard rumours from mid-2017 onward about a number of employees being tested. Evidence supported that the alcohol and drug testing policy was applied more consistently from mid 2017.

[40] Mr Burrow said in his affidavit evidence that he believed all of the team members in his team were aware of the drug testing policy. He said that it would be discussed at team meetings and there is access to it with copies on the wellbeing boards and/or he can provide a copy. I am satisfied that information was supplied about the policy to employees after 2011.

[41] I find that Mr Lambert was aware of the existence of the policy and the possibility of testing under the policy. He had opportunities to familiarise himself with it.

*Did the Alcohol and Drug policy apply to Mr Lambert*

[42] The PWUA collective agreement did not specifically refer to the alcohol and drug policy. The collective agreement does contain an obligation for employees to act in accordance with company policy and procedure. There is nothing from the collective agreement to suggest that the alcohol and drug policy is expressly excluded from this general obligation. The E tū collective agreement contains specific reference to the policy and testing. I do not find that means that unless the policy is specifically referred to in the PWUA collective agreement the policy does not apply to PWUA employees.

[43] The full Court of the Employment Court in *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd*<sup>2</sup> stated that Air New Zealand was justified in imposing an alcohol and drug policy outside of the employment agreements and referred to it being no different in principle to other non-contractual policies and manuals.<sup>3</sup> The full Court stated about post-incident testing:<sup>4</sup>

Where there has been an accident or an incident, because of the first defendant's statutory duty to ascertain the true cause of the occurrence and the limited opportunity for obtaining relevant information, it should be able to require employees involved in the accident or incident to submit to testing for the presence of alcohol or drugs.

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<sup>2</sup> *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614

<sup>3</sup> Above n 2 at [4]

<sup>4</sup> Above n 2 at [250]

[44] I find that the obligations under the alcohol and drug policy applied to Mr Lambert. The specific reference to the alcohol and drug policy in the E tū collective agreement and the absence of any reference to it in the PWUA collective agreement does not alter that obligation.

*Was the threshold reached for post -incident testing and is the different threshold in the E tū collective agreement material*

[45] Mr Yarrall submits that this was not a situation under clause 1.3.5 and clause 2.6.2 of the alcohol and drug policy for reasonable cause testing because it was not *a near miss which had significant potential to cause serious harm or significant damage to property or goods*. He submits that there was neither a significant risk of injury or damage to property.

[46] Mr Newton and Ms Croose viewed the CCTV footage and concluded that an incident had occurred that was a near miss with significant potential to cause serious harm or significant damage to property. They agreed that Mr Lambert should be required to undergo a test and Mr Kynaston submits that was a finding that a fair and reasonable employer could have reached.

[47] The area in which the incident occurred was not a working area. The evidence did support that people do enter the Interchange area by foot and without warning on occasion even if they are not meant to. There is some limited evidence of that from the CCTV footage. I accept Mr Kynaston's submission that safety rules should not be interpreted narrowly. If someone had been hit by a falling 89kg metal cage or two of them from the forklift when Mr Lambert was driving then it had significant potential to cause serious harm or significant damage to property. The driving itself was of concern to NZ Post as expressed in its provisional outcome letter of 13 April 2018. Mr Lambert was driving forward and it was considered the ULD load obscured his vision and restricted his ability to operate the forklift safely. NZ Post was of the view that he should have reversed with the load he had. Had a person or object moved into his path NZ Post was concerned that he would not have seen it.

[48] Mr Newton in his evidence to the Authority said that the Interchange during the night shift is a lot more congested and people are at *high alert*. He said that during the day it is not

as busy and people let their guard down more. He referred to team leaders going out and staff going out with electric lifters.

[49] The E tū collective agreement does contain a different post incident test however, to the limited extent it could be seen as relevant, it also refers to a significant near miss.

[50] Mr Kynaston refers to a ground which he accepts was not relied on expressly at the time for reasonable cause testing. The ground is that there appeared no logical explanation, other than a behavioural one, for the incident. The incident was not reported and instead cleaned up. Mr Lambert referred to the incident being caused by the load being unbalanced and that one of the ULDs was damaged. NZ Post did not accept that the ULD was not damaged by the fall. It concluded that the left hand turn made by Mr Lambert was at speed and *sharp*. I find no logical explanation for the incident could have formed another reason to test.

[51] I find that NZ Post could fairly and reasonably have concluded the threshold for testing under its alcohol and drug policy was reached.

*Was it clear to Mr Lambert what the outcome of a failed test would be*

[52] Mr Yarrall submits that Mr Lambert was not told what would happen if he failed a test. He said that this left Mr Lambert in an invidious position whether he should do the test or not. He submits that if Mr Lambert had been aware of the likely outcome then he may well have made a different decision.

[53] Mr Lambert understood that if he did not test then it would be treated as serious misconduct and a process would follow. I accept that Mr Newton could not give an absolute response to a question about the likely outcome. One reason is that Mr Lambert may not have failed a test and another could be that Mr Lambert may not agree to a rehabilitation agreement.

[54] Mr Lambert had the policy with him and was given opportunities, one for 30 minutes, to talk to Mr Yarrall. The policy has a section about what happens when an employee refuses to undergo testing and where there is a positive test.

[55] Mr Newton advised Mr Lambert along the lines that if he told the tester of any substance that may be in his system and took the test where possible he would advocate for him. I do not find in those circumstances that Mr Lambert's decision not to test could be seen as anything other than informed and made over an extended period of time with advice from Mr Yarrall.

[56] Rehabilitation is available in the policy with an emphasis on self- disclosure. Mr Yarrall submits that Mr Lambert was disadvantaged and treated in a disparate manner to E tū members who can fail two alcohol and drug tests under their collective agreement and not be dismissed. Whilst disparity of treatment may have been an argument available to Mr Lambert had he actually undertaken a test and returned a positive test he did not so the circumstances are not sufficiently similar.

[57] I find satisfactory steps were taken to let Mr Lambert know what could happen with a positive test by providing a copy of the policy, allowing time for union advice and a suggestion of some support from Mr Newton by way of advocacy if there was a positive test.

*Should weight be given to Mr Lambert offering to do an oral swab test*

[58] Oral swab was not the method in the NZ Post alcohol and drug policy. Mr Yarrall may consider it to be the most accurate method. I do not find NZ Post was required to place weight on this in the circumstances.

*Is it material that a refusal to undertake a drug test is not serious misconduct in the PWUA collective agreement?*

[59] The PWUA collective agreement contains examples of serious misconduct but not refusal to test. The alcohol and drug policy, however, specifically states that refusal to undergo testing will be viewed as serious misconduct<sup>5</sup>.

[60] The refusal to test was also considered with the other findings about the operation of the forklift, the failure to report the incident and denying it had occurred twice, a previous

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<sup>5</sup> Alcohol and drug policy page 6

warning and refusal and consideration of the conduct overall. The fact that refusal to undertake an alcohol and drug test is not listed as an example of serious misconduct in the collective agreement is not material.

*Were the obligations of good faith and privacy met by NZ Post allowing viewing of the CCTV footage on its premises?*

[61] NZ Post accepts in good faith and under privacy principles Mr Lambert was entitled to be given access to the CCTV footage of the incident. It says that it did that by inviting him to view it with Mr Yarrall in a private room at the Christchurch Mail Centre. Further that it explained the reasons for not providing the footage.

[62] Mr Yarrall says that this limitation to viewing means that the PWUA has to carry out its business on NZ Post premises.

[63] Reliance was placed on s 29(1)(a) of the Privacy Act 2003 that disclosure of the information would involve unwarranted disclosure of the affairs or another individual or deceased person. I am not strongly persuaded that disclosure could be limited for that reason in this case and its circumstances. Objectively assessed it is difficult to see why Mr Yarrall could not have been supplied with a copy of the footage even with the limitations on copying similar to those proposed for the lawyer.

[64] In any event the important matter for current purposes in my objective assessment is that there was an opportunity for viewing and that was declined. To the extent that the failure to provide a copy for Mr Lambert to view elsewhere was a breach of the Privacy Act 2003 then I do not find under s 103A (5) of the Act it was other than a minor defect and it did not result in Mr Lambert being treated unfairly.

*Was the failure to provide information about details of all forklift incidents and outcomes over the previous 12 months unreasonable and unfair?*

[65] NZ Post provided reasons for not providing this information at the time to Mr Yarrall.<sup>6</sup> Firstly it raised an issue of direct relevance as not every incident results in a request to undergo post incident alcohol and drug testing. Additionally a list of incidents would not provide sufficient detail of each case and the outcome. Further full information would undermine an employee's right to privacy. The information has now been provided and 15 tests in Christchurch were undertaken for 19 incidents.

[66] To the extent that the failure to provide the information could be seen as unfair I am not satisfied that it was other than a minor defect and I am further not satisfied that it resulted in Mr Lambert being treated unfairly.

*Was a conclusion available to a fair and reasonable employer that Mr Lambert denied an incident had taken place?*

[67] Mr Burrows, Ms Beecroft and Ms Croose all concluded from their exchanges with Mr Lambert on 6 March 2018 that Mr Lambert denied an incident had taken place. This was discussed during the disciplinary process.

[68] Mr Burrows said in his evidence that when he asked Mr Lambert about the incident in the cafeteria he responded "what incident". Mr Burrows said that Mr Lambert was quite serious when this was said and he did not agree that Mr Lambert was simply being "flippant".

[69] Ms Croose prepared a file note on 6 March 2018 in which she wrote amongst other matters

Mr Lambert commented "what incident" (Again not acknowledging anything occurred) I explained that I viewed footage and based on what I saw we will be following the process. He then responded that the ULD was faulty.

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<sup>6</sup> Page 130 and 139 – 140 of the respondents bundle.

[70] I find that it was available to a fair and reasonable employer to conclude that Mr Lambert denied an incident had taken place to his leaders when he was asked about it. They did not conclude that he was being flippant.

*Was there evidence that the incident was caused by faulty equipment*

[71] It is accepted that there was some evidence that the base of a ULD that fell was damaged. NZ Post did not accept that that damage could not have been caused by the fall given the speed and sharpness of the turn.

[72] There was an incident in October 2017 involving Mr Lambert in which a container he was moving off a stack caught on another cage and partially fell. Mr Newton reviewed the state of the incident. He recalled saying to Mr Lambert on that occasion that he could go either way with the incident and one option was to test him for alcohol and drugs and implement a full investigation. He said he chose to go the other way because he was able to see the person who stacked the containers did so very close together so they could easily catch. He was therefore able to conclude the cause for the incident. The other factor was that the container had fallen into the container below and with care could be taken down safely. Drug testing was not requested on that occasion.

[73] I accept that a fair and reasonable employer could see the incident on 6 March 2018 as different to the October 2017 incident.

*Did the medical certificate provided by Mr Lambert's doctor on 8 March 2018 alleviate any concerns.*

[74] Mr Lambert supplied a medical certificate dated 8 March 2018 that Mr Lambert was seen and examined that day by his doctor. The certificate stated *I consider him fit for work in general health terms.*

[75] It was not clear that any testing for alcohol and drugs had been carried out. I accept that in those circumstances it did not address the concerns and could fairly and reasonably be given no weight.

[76] The Authority asked Mr Lambert what tests had been carried out but he was reluctant to answer. I do note the letter containing the provisional outcome from Mr Burrows refers to confirmation from Mr Lambert that the appointment did not include drug and alcohol testing.

**Could a fair and reasonable employer have concluded misconduct and serious misconduct on Mr Lambert's part following the investigation?**

[77] I find that a fair and reasonable employer could have reached the findings that it did in the circumstances for the failure to take reasonable care when operating a forklift.

[78] I find that a fair and reasonable employer could conclude that Mr Lambert knew that there was a requirement to report an incident but failed to do so. He cleared up after the incident with another employee preventing any ability for NZ Post to investigate and establish the cause or causes of the incident. When asked about the incident by Mr Burrows and Ms Croose Mr Lambert denied that one had occurred. A fair and reasonable employer could conclude this was serious misconduct.

[79] Mr Lambert expressed concerns during the disciplinary process that the alcohol and drug test was an invasion of his privacy and lifestyle choices. NZ Post acknowledged that the test can be intrusive and is only requested in specific circumstances.

[80] I find that a fair and reasonable employer could require a test in the circumstances and conclude that the refusal to undertake testing was serious misconduct.

**Could a fair and reasonable employer have dismissed Mr Lambert in all the circumstances?**

[81] I have found the process was that a fair and reasonable employer could have undertaken. I have found that findings of misconduct and serious misconduct were open to a fair and reasonable employer.

[82] A fair and reasonable employer could also take into account the earlier warning in respect of a forklift incident where testing was also refused by Mr Lambert.

[83] The evidence from Mr Newton and Mr Burrows confirmed that alternative positions were considered for Mr Lambert during the disciplinary process.

[84] I find that a fair and reasonable employer could have dismissed Mr Lambert in all the circumstances.

### **Drug Use**

[85] I want to make it very clear that Mr Lambert denied in his evidence using any drugs. There is no evidence in front of me that he did.

### **Costs**

[86] I reserve the issue of costs. Mr Kynaston and Mr Brooks have until 25 January 2018 to lodge and serve submission as to costs and Mr Yarrall has until 8 February 2019 to lodge and serve submissions in reply.

**Helen Doyle**  
**Member of the Employment Relations Authority**