

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 46
5433253

BETWEEN MURRAY McLENNAN
Applicant

AND NEW ZEALAND POST
LIMITED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Graeme Clarke, for the Applicant
Steven Fraser, for the Respondent

Investigation Meeting: 5 February 2014 at Wellington

Submissions Received: 5 February 2014 from the Applicant and Respondent

Determination: 13 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Murray McLennan was employed as a Postie for 17 years, most recently as a motor cycle Postie. He was dismissed for serious misconduct on 14 May 2013, effective immediately. Mr McLennan claims his dismissal was unjustified and he seeks reinstatement to his position. He also seeks lost wages, compensation and costs.

[2] New Zealand Post Limited (NZ Post) says Mr McLennan's dismissal was justified on the basis of his unsafe behaviour as a motor cycle Postie. It says it conducted a thorough investigation into the incident that resulted in his dismissal before concluding his actions were serious misconduct warranting dismissal. NZ Post says it also took into account a formal warning Mr McLennan had recently received, and the fact he had undertaken motor cycle refresher training two weeks before the incident.

Issues

[3] The main issue for the Authority to determine is whether Mr McLennan's dismissal was justifiable. Mr McLennan has raised procedural issues relating to his suspension from employment which will also be considered.

Test of justification

[4] The test of justification under s.103A of the Employment Relations Act 2000 (the Act) applies. Whether a dismissal or an action was justifiable is to be determined on an objective basis by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[5] In applying the test, the Authority must consider a number of factors specified in s. 103A (3) relating to the process followed by the employer. It may also consider any other factors it considers appropriate.

[6] The Authority must not find a dismissal to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

Was NZ Post justified in dismissing Mr McLennan?*The suspension*

[7] Mr McLennan was verbally advised by his direct manager, Nigel Burton, on 30 April 2013 that he was required to meet Trent Butchart, the Wellington Regional Delivery Manager for NZ Post. The meeting was to take place that morning and Mr Butchart would be putting some allegations to him. Before the meeting began Mr McLennan raised the fact that he had no representative with him. Mr Butchart responded that he did not require a representative.

[8] Mr Butchart says he was acting on advice from Human Resources (HR) when he told Mr McLennan he did not need to have a representative with him. He said he was putting only concerns, not allegations, to Mr McLennan. He needed to ascertain whether the matter was serious and, if so, whether suspension should be considered.

[9] Mr McLennan says Mr Butchart told him someone had made a complaint. He outlined the concerns and told Mr McLennan he was considering suspending him. The name of the complainant, and his position as a senior NZ Post manager, was not disclosed. Mr Butchart says he asked Mr McLennan to comment on the proposed suspension.

[10] Mr McLennan acknowledges being asked if he wished to comment but says he thought he was being asked for comment on the concerns, which he had just heard, and not on the proposed suspension. After a short adjournment during which Mr Butchart sought HR advice, Mr McLennan was suspended on pay and informed that a disciplinary investigation would take place.

[11] The relevant collective agreement between NZ Post and the PWUA contains a disciplinary procedure that provides for suspension¹. The disciplinary procedure stipulates that employees must be available to attend interviews if required, and that before the start of any interview the company must ask the employee whether they wish to have another person present as a witness, representative or support person.

[12] The placement of that requirement in the disciplinary procedure clause makes it unclear whether it relates to interviews held during a formal investigation following suspension, or whether it relates to any interview during the disciplinary process. However, given that suspension is a serious matter that the Employment Court has confirmed “...is a disadvantageous action as far as the employee is concerned”², NZ Post was unwise to ignore the concern Mr McLennan raised about his lack of representation at the meeting at which he was suspended.

The disciplinary investigation

[13] On 9 May 2013, Mr McLennan received a letter from his employer setting out breaches of safety and of New Zealand law that he had allegedly committed on 29 April 2013. The letter informed him these breaches had been observed by a senior NZ Post manager. Enclosed with the letter was a copy of an email from Toby Beaglehole, who was at that time NZ Post’s General Manager Delivery. Mr Beaglehole had witnessed Mr McLennan’s alleged behaviour on 29 April while he was riding his motor scooter on Petone Esplanade. Some documents relevant to

¹ Collective Employment Agreement between New Zealand Post and Postal Workers Union of Aotearoa, 2011 – 2013 Part I (“The collective agreement”).

² *Sefo v Sealord Shellfish Ltd* [2008] 178 at 188 (paragraph 40)

motorcycle safety and NZ Post's expectations of its employees were also enclosed with the letter.

[14] Mr McLennan was required to attend an investigation meeting the following day and was strongly encouraged to bring a support person. The purpose of the meeting was to give him an opportunity to respond to the allegations. He was informed that, if his explanations were unacceptable and NZ Post's investigation found any of the alleged safety breaches to be proven, this could constitute serious misconduct that may result in disciplinary action up to and including dismissal.

[15] The letter reminded Mr McLennan he had been issued with a first written warning in February 2013 for behaving in a disorderly manner and using inappropriate language in the branch. That warning was still in effect and may be taken into consideration when determining the outcome of the current process.

[16] I note there was a nine day delay between the meeting at which Mr McLennan was suspended on 30 April 2013 and the letter signed by Mr Butchart confirming the suspension. The letter of 9 May 2013 was the first time Mr McLennan had seen the allegations in writing and been informed of the specific detail of them.

[17] NZ Post was unable to explain the reason for such a short time frame between the delivery of the letter to Mr McLennan and the requirement to meet the following day. Mr Butchart told me that Mr McLennan had not asked for the meeting to be delayed. Mr McLennan said it did not occur to him to do so. I am not surprised at Mr McLennan's response, as the letter from NZ Post gave no indication that the employer would consider any request for a deferral. It simply required his attendance at the meeting scheduled for 10 May, at a specified time and venue.

[18] This gave Mr McLennan a very short time frame in which to organise a support person, consider Mr Beaglehole's email and respond to the allegations. This may account for his omitting to inform David Thomson, the union representative he contacted, of the email from Mr Beaglehole, in his telephone discussion with him. Mr Thomson noted in his written evidence to the Authority that, had he known of the email, he would have wanted to read it before the meeting with NZ Post and would have conducted some inquiries himself. He did not have the opportunity to do so until after Mr McLennan's dismissal.

[19] Mr Thomson also noted his alarm at reading in the email from Mr Beaglehole that had sparked the disciplinary investigation the statement that Mr Beaglehole was “*astonished that he was working for us*”. He noted his view that this demonstrated prejudice of the issue by NZ Post.

[20] Mr Thomson attended the 10 May 2013 meeting with Mr McLennan. Also in attendance were Mr Butchart, Mr Burton, and Lisa Whooley from HR. Mr McLennan supplied his explanations for each of the four allegations that had been made. These were that, on 29 April 2013, he had been seen:

- driving down Petone Esplanade not wearing the correct uniform while out on delivery;
- with his mail unsecured;
- driving erratically, specifically, weaving across the road, riding one handed in blustery conditions, tailgating and stopping abruptly; and
- using his mobile phone while riding his motorcycle.

[21] Mr McLennan said, in relation to the uniform issue, that he had previously worn the item complained about without comment from management. The item had been supplied to him by the company.

[22] Regarding the allegation of riding with insecure mail, Mr McLennan said the flaps of his panniers had come loose in the very blustery weather conditions of the day. He had secured the mail before leaving the branch by bundling it with two rubber bands around each bundle and securing the pannier flaps. He noted the bundles were below the top of the pannier and there was no risk of it blowing out.

[23] With regard to the erratic driving allegation, Mr McLennan explained that the wind conditions and the weight of the mail caused the bike to be blown about and it was that, rather than his riding, that was erratic. He denied following too closely to other vehicles and said he took evasive action when a car in front of him made an illegal turn.

[24] Mr McLennan acknowledged he had taken one hand from the handlebars while riding. This occurred when grit from the beach blew into one eye. He wore a contact lens in that eye and said rubbing it was effective. He did not pull over to do this as it was not possible to do that in a situation where he needed to take immediate action. Mr McLennan further said that after the incident with the grit in his eye, he

became aware of someone riding close to him on his blind side, which caused him to take evasive action.

[25] Mr Butchart said in his written evidence that Mr McLennan did not make any claim in the 10 May 2013 meeting about Mr Beaglehole's supposed role in his (Mr McLennan's) unsafe riding. At the investigation meeting he said he could not recall Mr McLennan having done so.

[26] Mr Thomson took notes of the 10 May and 13 May meetings. His notes of the 10 May meeting refer to Mr Beaglehole tailgating Mr McLennan, and his notes of the 13 May meeting refer to Mr Beaglehole admitting he may have been following Mr McLennan closely on one occasion.

[27] NZ Post supplied Talking Points notes of the 13 May meeting. I understand these were printed before the meeting as a guide for the discussion, and had some hand written additions made by Ms Whooley, but did not include any detail of what had been said by Mr McLennan. The notes do not refer to Mr McLennan's claim that Mr Beaglehole had been tailgating him on 29 April.

[28] I am satisfied Mr Thomson's notes accurately recorded what had been said at the two meetings and that NZ Post's Talking Points failed to record that part of the 10 May meeting. I note that Mr Butchart's written evidence refers to Mr McLennan telling him, on 30 April 2013, about an incident with another rider. That conversation took place as they were walking to the meeting that resulted in Mr McLennan's suspension. At this time Mr McLennan was aware only that the meeting was to discuss some allegations. He did not become aware that Mr Beaglehole was both the person making the allegations, and the other rider, until he received a copy of Mr Beaglehole's email on 9 May 2013.

[29] In relation to the last allegation, Mr McLennan admitted he had taken his mobile phone out of his pocket when he had stopped at a red light. He had done this because he had been aware of his phone beeping while he was riding and wished to check it. When the lights changed to green, the mobile phone was still in his hand and he indicated his intention to go to the side of the road to stop safely to check his phone. Mr McLennan said he had been unaware the law did not permit a driver of a stationary vehicle to use a cellphone.

[30] Following the meeting of 10 May 2013, Mr Butchart carried out a further investigation. By Mr Butchart's account this mainly consisted of verbally putting Mr McLennan's explanations to Mr Beaglehole, and Mr Butchart considering those explanations. Mr Beaglehole had denied seeing Mr McLennan raising his hand to his eye, and said he had observed Mr McLennan riding with his hand resting between his legs for a prolonged period of approximately 15 seconds before stopping at traffic lights. I note that this differs from Mr Beaglehole's emailed report of the incident in which he recorded that the rider he observed was "*occasionally riding one handed*".

[31] Mr Butchart said he formed the view that, as Mr McLennan had been wearing a visor and gloves, it seemed implausible that he would be riding one-handed to remove grit from his eye. He also formed the provisional view that, if Mr McLennan did have grit in his eye, he should have pulled over rather than riding one-handed in blustery conditions.

[32] A further element to the investigation according to Mr Butchart was that Mr Burton had checked the Velcro on Mr McLennan's motorcycle to ascertain its condition. As it had been in good condition, Mr Butchart thought it unlikely to have been blown undone as Mr McLennan had claimed.

[33] Another meeting took place between NZ Post and Mr McLennan on 11 May 2013, the purpose of which, according to Mr Butchart, was to summarise the situation to date. That was followed on 13 May 2013 by a meeting at which Mr McLennan was informed of his employer's provisional findings. He was told that his explanation regarding the non-standard uniform he was wearing on 29 April 2013 had been accepted and no further action would be taken on that allegation.

[34] NZ Post did not accept any of his other explanations and informed Mr McLennan it was considering dismissing him. He was given the opportunity to add to his earlier explanations. Following further representations from Mr McLennan and his representative, the meeting was adjourned, with NZ Post undertaking to consider the further information.

[35] The following morning Mr McLennan was verbally informed of his dismissal with immediate effect. Written confirmation of his dismissal was supplied by letter dated 27 May 2013.

Discussion

[36] The investigation carried out by NZ Post relied heavily on information from Mr Beaglehole about his observations of Mr McLennan's conduct on 29 April 2013. Mr Clarke submitted on Mr McLennan's behalf that Mr Beaglehole had a predetermined view of what he thought an investigation could find. This was clear from the astonishment Mr Beaglehole expressed in his email report about Mr McLennan being an NZ Post employee.

[37] The report recorded what Mr Beaglehole was able to see from his position behind and to the left of Mr McLennan as they both travelled eastwards on Petone Esplanade. The sentence from Mr Beaglehole's email that was referred to by Mr Clarke is reproduced below:

“Basically, I was horrified at this Posties behaviour, astonished that he was working for us, and deeply relieved when he finally stopped, albeit temporarily.”

[38] Mr Beaglehole also listed a number of questions he wanted answered about the Postie's conduct. He ended his email with a request for confirmation of the Postie's identity, and information about the steps that would be taken noting that *“Based on my observations there are serious safety and behavioural questions to be addressed.”*

[39] Mr Beaglehole stated that he had played no part in the decision to dismiss Mr McLennan. He acknowledged he had expressed himself in forceful language in his email report of the incident on 29 April 2013. He further acknowledged this could have put pressure on Mr Butchart who, as noted earlier, reported to him.

[40] Mr Butchart told me he treated the investigation impartially and did not think that Mr Beaglehole being his manager affected his investigation. Nor did he believe Mr Beaglehole's expressed astonishment at Mr McLennan being an employee of NZ Post affected his judgement. Mr Butchart said the decision to dismiss Mr McLennan had been his own, after talking to Mr Burton and Mr Beaglehole, taking HR advice, and weighing up all factors.

[41] When asked if he had considered options other than suspension on 30 April 2013, Mr Butchart said he had not been prepared to put Mr McLennan on bicycle mail

delivery duties because of concerns over safety. If Mr McLennan was unsafe riding a motor cycle, he was potentially unsafe on a bicycle.

[42] Mr Butchart gave a similar answer when asked if he had considered alternatives to dismissal. When specifically asked whether he had considered putting Mr McLennan on walking postie duties, he responded that he considered Mr McLennan's breaches of policy and health and safety sufficiently serious to warrant dismissal.

[43] Apart from discussions with Mr Beaglehole and an HR consultant, and the meetings with Mr McLennan, Mr Butchart said the other components of his investigation comprised:

- the inspection Mr Burton carried out on the condition of the Velcro on Mr McLennan's panniers;
- reference to the company's motor cycle training and refresher manuals;
- a check of the provisions of the collective agreement.

[44] Mr Butchart said he had not talked to other motor cycle Posties to test the reasonableness of Mr McLennan's explanations. His discussions had been with Mr Beaglehole who rode a motor scooter.

[45] Gerard Dobson gave evidence to the Authority about his 10 years of experience as a motor cycle Postie and 40 years as a motor cyclist. He had been trained for the motor cycle Postie role by Mr McLennan who left him with "*a lasting impression that safety was paramount*".

[46] Mr Dobson supported Mr McLennan's explanations about pannier flaps blowing up in windy conditions and said that had happened to him. It did not affect the security of the mail which was secured by rubber bands vertically and horizontally in large bundles, the weight of which meant that they would not be lost if they were below the top of the pannier.

[47] Mr Dobson also gave evidence about a motor cyclist's movement in a traffic lane in blustery conditions, and about the effect of the blind spot caused by the removal of the left mirror on two out of three of NZ Post's motor cycles. His evidence generally supported Mr McLennan's explanations about his movements on the Petone Esplanade on the day in question.

[48] I am not satisfied NZ Post's investigation was sufficient to justify all the conclusions it reached regarding Mr McLennan's conduct on his motorcycle on 29 April 2013. A fair and reasonable employer would have carried out a more thorough investigation into Mr McLennan's explanations regarding the flapping panniers and his apparently erratic riding in the weather conditions of the day.

[49] It was unreasonable to rely solely on an inspection of the condition of the Velcro to conclude the panniers would not have blown open if they had been secured. Mr McLennan and Mr Beaglehole both gave evidence that a very strong southerly wind was blowing that day, which is consistent with grit being blown from the beach into Mr McLennan's eye. Given the exposed nature of the Petone Esplanade, a simple inspection of the condition of the Velcro could not justify Mr Butchart's finding that the panniers would not have blown open. An inspection combined with evidence from other motor cycle Posties of what actually happens with pannier fastenings in a Wellington southerly would have been more reliable.

[50] Mr Butchart's basis for rejecting Mr McLennan's explanation of driving one handed in order to remove grit from his eye was also unreasonable. He accepted Mr Beaglehole's observation that Mr McLennan's hand was not near his face but appeared to be resting between his legs for approximately 10 to 15 seconds. I find that problematic for two reasons. Firstly, Mr Beaglehole acknowledged that he was travelling behind and to the left of Mr McLennan and could have missed seeing his hand go to his face. Secondly, as noted earlier, Mr Beaglehole's email report of the incident referred to Mr McLennan "*occasionally riding one handed*" and made no mention of his hand resting between his legs for 10 to 15 seconds.

[51] Mr Butchart also said he formed the view after the 10 May 2013 meeting that, given the visor and gloves worn by motor cycle Posties, it seemed implausible that Mr McLennan would be riding one handed in order to remove grit from his eye. Mr Butchart acknowledged in the investigation meeting he had not put that view to Mr McLennan. Mr McLennan says, if he had, he would have responded that he was wearing fingerless gloves supplied by the company and that he pushed the visor up a little with his hand as he cleared his eye.

[52] Mr Butchart said he also formed the provisional view that, if Mr McLennan did have grit in his eye, he should have pulled over to address it rather than ride one-handed in blustery conditions. No doubt that would be the ideal way of dealing with

the situation. However, it fails to take into account the instinctive reaction to intense irritation caused by a foreign object blowing into the eye. I find Mr Butchart's reliance on the ideal response, and his discounting of an instinctive reaction in that situation, to be unreasonable.

[53] For the reasons given above I find Mr Butchart's investigation was insufficient for him to reach all the conclusions he did, and on which he based his decision to dismiss Mr McLennan. In particular, his conclusions that Mr McLennan had been riding with his mail unsecured on his motorcycle; and that his explanation for riding one-handed while trying to remove grit from an eye was unacceptable and that, in any event, he should have pulled over to do so.

[54] I find it likely that Mr Butchart was influenced by the tenor of Mr Beaglehole's observations in his emailed report, and this impacted on his approach to the investigation. He appeared to accept Mr Beaglehole's comments on Mr McLennan's explanations without due scrutiny. This was unfair to Mr McLennan whose explanations were not sufficiently investigated or considered. Mr Beaglehole was riding a very different vehicle and acknowledged he was not a motorcycle rider. It would have been helpful to Mr Butchart's investigation if he had checked other motorcycle Posties' experiences of the effect of a strong southerly wind on control of their vehicles.

[55] Mr McLennan admits checking his cell phone when stopped at traffic lights, and I do not question that aspect of Mr Butchart's investigation. Mr McLennan submits that the instruction in the NZ Post policy specifically relating to cell phone use prohibits using a cell phone to answer or make a call or text. He says it does not cover his situation of checking a cell phone at traffic lights and therefore he did not breach the policy.

[56] I do not accept that submission. While it may be desirable for the wording explicitly to cover any use of a cell phone, I note that the policy requires employees to "*obey all road rules*". It is an offence in New Zealand to use a mobile phone while operating a motor vehicle³, including reading text messages, and the onus was on Mr McLennan to be aware of this rule.

³ Land Transport (Road User) Rule 2004, rule 7.3A

[57] Mr Butchart made the decision to dismiss Mr McLennan on the basis of his findings in relation to three allegations. Having found NZ Post's investigation to be insufficient to support the conclusions reached in relation to two of those allegations, it is necessary to consider whether the decision to dismiss Mr McLennan was justified by his use of a cell phone while riding.

[58] Mr Butchart acknowledged that no health and safety concerns had previously been raised with Mr McLennan. He noted both in written and oral evidence that he had taken into account Mr McLennan's current warning and his recent attendance at motor cycle refresher training. Mr Clarke submitted that a previous unrelated warning could not be taken into account in this situation. I agree that, as a general rule, it is problematic for an employer to rely on unrelated warnings. However, in this instance the collective agreement specifically provides that an employee may be dismissed for misconduct after a written warning and a final warning have been issued. "*Each warning may be for unrelated matters of misconduct*"⁴.

[59] Mr Dobson gave evidence of motorcycle refresher training he had received after Mr McLennan's dismissal in which the briefing included a comment on the use of cell phones. He said he had attended a number of previous refresher courses and this was the first time such comment had been made. Mr Dobson's evidence was not challenged on that point and I have no reason to doubt its veracity. While this does not mitigate Mr McLennan's action, I find it affects the reliance Mr Butchart was entitled to place on Mr McLennan's recent attendance at a motorcycle refresher course.

[60] The collective agreement refers to "*failure to observe safety rules*" as an example of minor misconduct that may, in some circumstances, amount to serious misconduct. The use of a cell phone while driving, including while stationary at traffic lights, is a traffic offence at the lower end of the scale, attracting a fine of \$80 and 20 demerit points. Mr McLennan's admission of such use on 29 April 2013 warranted disciplinary action and raised valid concerns over the safety of his riding. However, on balance I find it did not justify his dismissal.

⁴ Part I (12) of the collective agreement

Determination

[61] For the reasons given above I find that dismissing Mr McLennan without sufficient investigation into the allegations against him was not the action that a fair and reasonable employer could have taken in all the circumstances at the time.

[62] I have noted my reservations concerning his suspension and the inexplicably short timeframe between informing him in writing of the specific allegations against him to requiring him to attend a meeting to respond to those allegations. While these matters were not raised as separate grievances, I have taken them into account when considering compensation.

Contribution and reinstatement

[63] As noted above, Mr McLennan's conduct on 29 April 2013 warranted some disciplinary action. I assess his contribution to the situation that led to his personal grievance at 30% and his remedies will be reduced accordingly.

[64] In view of the level of contribution I have assessed as appropriate, I do not consider reinstatement to be practicable. I have also taken into account the emphasis NZ Post appropriately places on safety, and the nature of Mr McLennan's conduct on 29 April. His use of a cell phone at traffic lights breached traffic rules and raised concerns over safety.

Remedies

[65] Mr McLennan's evidence was that he earned between \$600 and \$700 per week at NZ Post. I have used \$650 per week as his average weekly wages in assessing an award of lost wages under s. 123 (1) (b) of the Act. I accept that he actively sought work but was unemployed for ten weeks before gaining part-time work initially and then full-time work from August 2013.

[66] During his part-time period of employment he earned between \$200 and \$300 per week which increased to \$650 per week once he began working full-time. I have used \$250 per week as his average weekly wage for the period of part-time employment.

[67] I accept Mr McLennan's evidence of the effect his dismissal had on him and award him compensation under s. 123(1) (c) (i) of the Act accordingly.

[68] New Zealand Post is to pay Murray McLennan:

- a. The sum of \$5,110 less PAYE in lost wages (being \$7,300 less 30%);
- b. The sum of \$4,900 as compensation (being \$7,000 less 30%).

Costs

[69] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority