

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Michael Paterson (Applicant)
AND New Zealand Post Ltd (Respondent)
REPRESENTATIVES Mike Treen, for Applicant
Penny Swarbrick, for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 6 October 2005
DATE OF DETERMINATION 13 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

The applicant asks the Authority to hear and determine his claim alleging unjustified disadvantage relating to a final written warning¹ given to him on 1 March 2005. To remedy his alleged grievance the applicant seeks removal of the final written warning from NZ Post's records and the removal from its records of the substituted warning. He also seeks compensation of \$7000 pursuant to s.123 (1) (c) (i).

The respondent submits it was justified in issuing the final written warning to the applicant and even if the Authority were to find the respondent's actions unjustified (which is denied) there is no live issue (the warning having expired) and this is relevant to the question of remedies.

Background

Prior to the incident that gave rise to the warning under consideration, Mr Paterson was employed by New Zealand Post as a postie for 15 years. He was at the time the events in question employed at the New Lynn delivery branch. It was his practice, as I understand the evidence, to store his bike in the shed at the branch and to ride or walk it across the car park at the branch to load it onto his car prior to departing the branch with his bike and mail for his delivery round. It is noted that Mr Paterson is a member of the Postal Workers Association (PWA) which is a party to the 2004-2006 New Zealand Post Collective Employment Agreement. Mr Paterson is covered by that agreement.

¹ On 2 August 2005 the final written warning was reduced to a first written warning with application for 6 months.

On 23 February 2005 Mr Paterson was observed by the Health and Safety delegate for the branch, Earle Dennis, riding in the car park without his helmet on. Mr Dennis told Mr Paterson to put his helmet on to which Mr Paterson replied “fuck off”.

Mr Dennis reported the incident to the Acting Branch Manager (Ms Horne) who was managing the branch in the absence of Mr Buchan the Branch Manager who was on leave. Mr Dennis advised Ms Horne that Mr Paterson had previously been spoken to about cycling without his helmet in the car park (July 2004). Ms Horne and Mr Dennis discussed the fact there had been at least two team briefings since July 2004 where the issue of wearing helmets in the car park had been brought up and where it had been made clear that posties must wear their helmets when cycling in the car park.

Ms Horne was also aware that another postie had recently been given a final warning for not wearing his helmet whilst out on delivery. She was aware of the need for consistency.

Ms Horne took advice from NZ Post’s HR staff and on 25 February Mr Paterson was given a letter requesting that he attend a formal disciplinary meeting on 1 March. The letter spelt out the allegations against the applicant, advised that the allegations, if substantiated, would be treated as serious misconduct and informed Mr Paterson that disciplinary action including dismissal could be a possible outcome. Mr Paterson was strongly advised to obtain representation and was advised that he would be given a clear and open opportunity to provide an explanation.

The meeting proceeded as planned on 1 February. Mr Paterson’s delegate Michael Hunter, who is also the Secretary of PWA, attended in support of Mr Paterson. The respondent was represented at that meeting by the New Lynn management team, Kathy Horne and Terry Buchan. Rebekah Blake, HR Consultant for the company also attended to provide advice to the management team. After hearing Mr Paterson there was an adjournment whilst the management team further investigated some of the submissions made on Mr Paterson’s behalf. Subsequently the management team considered all the information available to it and decided that there had been serious misconduct on Mr Paterson’s part and that a final written warning was warranted in all the circumstances. This was conveyed to Mr Paterson and followed up in writing on 3 March.

On 7 March 2005 PWA raised a personal grievance on Mr Paterson’s behalf. The issue has been the subject of mediation on two occasions. Mediation was unsuccessful. Following the second mediation the company decided (in an attempt to bring an end to litigation in the matter) to commute the final written warning to a first written warning with the effect that the warning lapsed on 1 September. This was a pragmatic decision on the part of NZ Post and not an acceptance that the original warning should not have been given.

Unfortunately, the reduction of the final written warning to a first written warning did not resolve the problem and the matter now must be determined following an investigation meeting which took place on 6 October 2005.

The Collective Agreement and other Contractual & Contextual Considerations

I have noted Mr Paterson is a member of PWA and covered by the collective agreement negotiated between NZ Post and that union and related associations. Part A of the collective confirms NZ Post’s commitment to providing a safe and healthy workplace for its employees and specifically that it will make every reasonable effort to prevent accidents and protect employees from injury. (A/13).

This is consistent with legislative obligations imposed on the company under health and safety legislation.

I note that consistent with this commitment by NZ Post the PWA has committed its members to acting in ways that keep themselves and others safe at work. (A/27) and that with respect to health and safety they are specifically required to take all practical steps to look after their own health and safety and that of others and to comply with all directions given by the company and to identify and report accidents (F/3).

Employees issued with a uniform are to wear it in the correct manner at all required times (F/37 & G/12).

It is compulsory for bicycle helmets to be worn on a cycling delivery (G/13).

The Conduct and Performance Expectations section of the CEC (I) provides a that a failure to observe safety rules is an example of minor misconduct but may in some circumstances amount to serious misconduct.

I also note that on 31 July 2000 Mr Paterson signed a Declaration for Wearing of a Cycle Helmet.

In that declaration he acknowledged that he was required “*to wear a cycle safety helmet while undertaking cycle delivery duties, cycling to or from my delivery duties or while riding a company bicycle when in the company uniform*”. He acknowledged this was a condition of his employment under the CEC. He also acknowledged the failure to wear his helmet in circumstances where it was required would be investigated as serious misconduct.

The evidence also shows to that in March 2003 Mr Paterson completed a training programme covering Cycle Safety Rules and the Road Code. At the completion of this course Mr Paterson is recorded as having been able to identify when and how he was to wear his helmet.

I find that in July and August 2004 Mr Buchan gave an instruction at team briefings that helmets were to be worn when cycling in the car park. A reminder of the importance of wearing helmets and wearing them correctly was given at a team briefing early in February 2005.

The Legal Framework

The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

103A Test of justification

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s action, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

In determining this matter I must make an objective assessment of the employer’s actions and weigh those actions against those of **a fair and reasonable employer ...in all the circumstances ...at the time....**

Discussion and Findings

Prior to making specific findings I must make findings of credibility.

Unfortunately I find the evidence for the applicant was attended with sweeping and florid statements that were contrary to the weight of the evidence including that of the applicant. Great liberty was taken with the detail of the words of the collective and the declaration signed by applicant and the specific instruction given by Mr Buchan on more than one occasion that helmets were to be worn in the car park. This did not impress me. In fact I am dismayed at the extent to which the applicant and his witnesses and representatives went to undermine the clear commitment given by the union and its members to a safe and healthy workplace and the specific obligations that give effect to that commitment.

On the contrary the evidence for the respondent was consistent and supported by its documentary evidence. On balance where there are disputes in the evidence I prefer that of the respondent's witnesses.

I find that Mr Paterson was well aware of the requirement that he was to wear his helmet on all occasions when he was in uniform, on his way to or from and during delivery duties. Further, Mr Paterson was on notice from 2000 that a failure to do so would be treated and investigated as serious misconduct. (Declaration). The collective confirms that a failure to observe safety rules may be treated as serious misconduct.

I find that only 2-3 posties regularly had occasion to ride their bikes in the car park. It is not the case that *all* posties ride in the car park without their helmets on and that this is known and condoned by management personnel at the branch.

I also find that in July and August 2004 Terry Buchan confirmed at team briefings attended by Mr Paterson that helmets were to be worn when cycling in the car park. This instruction was never rescinded.

The Health and Safety delegate Mr Dennis was diligent in addressing the requirement to wear helmets and I find that when infringements came to his attention he raised them with the person concerned and brought them to the attention of management personnel where appropriate.

I find that on 20 July 2004 Mr Paterson was seen by Mr Dennis and spoken to about not wearing his helmet in the car park. Mr Dennis raised the matter with Mr Paterson. The *Find it and Fix it Form* completed by Mr Dennis in relation to this incident and submitted to Mr Buchan records that Mr Paterson responded negatively to Mr Dennis' request that he put his helmet on.

I find this incident occurred only one day after the instruction to wear helmets in the car park was communicated at a team briefing. I also find it is more probable than not that Mr Buchan did take the matter up with Mr Paterson given Mr Buchan's fears regarding the car park and the fact that Mr Paterson had disregarded the instruction the very day after it was given. That explains the fact that the instruction was reiterated at the team briefing on 3 August 2004.

At the disciplinary meeting of 1 March 2005 certain explanations and factors in mitigation were made by or on behalf of Mr Paterson. Essentially these explanations went to the fact he was not aware of the rule or in any event he was not aware (and disputed) that the rule applied to the car park or if it did that it no longer applied. An issue regarding inconsistency in the application of the rule was raised - specifically that Kathy Horne and another management employee had spoken to Mr Paterson when he was not wearing a helmet and had done nothing about it and that another employee had specifically confronted Mr Dennis riding without a helmet.

I find that during the adjournment that along with other submissions made for Mr Paterson the management team further investigated the examples given of inconsistent application of rules. They

were satisfied there had been no inconsistency in application of the rule. On the evidence they were entitled to arrive at this view.

The management team also considered matters going to Mr Paterson's knowledge of the rules including the obligations contained in the collective, Mr Paterson's declaration in 2000, the instructions given at team briefings attended by Mr Paterson and the fact he had demonstrated in training an understanding as to where and how he must wear his helmet.

I find the employer weighed these things along with Mr Paterson's admission that he was not wearing his helmet on the day and his admission that he was aware of the instruction relating to the wearing of helmets in the car park given in at least one team briefing in mid 2004. In making its final decision the employer disregarded the fact that Mr Paterson had abused Mr Dennis when he had approached Mr Paterson and told him to wear his helmet. I note it was not taken into account in making the final decision not because Mr Paterson did not abuse Mr Dennis but because of Mr Dennis's intercession that he was more concerned about the safety issue than the abuse.

The company concluded as a result of its deliberations that the serious misconduct allegation against Mr Paterson had been substantiated. The respondent also took into account Mr Paterson's long service and the fact he had not previously come to the company's attention with respect to misconduct. Weighing everything in the balance it was determined that a final written warning was an appropriate penalty.

In concluding this matter I must address the main submissions made for Mr Paterson. Firstly, I find that allegations of disparity of treatment must be dismissed. The company specifically considered those examples that were raised in mitigation by and for Mr Paterson prior to the decision being taken. The management team satisfied itself that there was no inconsistency in respect of the examples raised. Further, the ex post facto examples put before me do not even reach the standard of a prime facie case that the respondent would be called on to explain. I am also sceptical of a number of the claims made given my overall findings of credibility.

Secondly, it was submitted for Mr Paterson that the warning was unjustified because he was not put on notice that he was considered to be a second time offender and that this was to be weighed in the mix by the respondent in coming to a decision in the matter.

I have carefully considered this submission. My conclusion is this. Mr Paterson was on notice that a single instance of failure to wear his helmet when required would be addressed as serious misconduct. I also find the question that he had been spoken to before essentially went to the question as to whether or not Mr Paterson was aware of the rule that he must wear his helmet when cycling and specifically that he was required to wear it in the car park. The fact he had been spoken to before was just one element in that matrix. Mr Paterson was clearly made aware of the rules via a number of avenues e.g. the collective, the declaration, the team brief that specifically addressed the rules re the car park and the training. These avenues by which the rules were imparted to Mr Paterson and (in respect of the declaration) specifically confirmed by him were alone sufficient to establish that he was well aware of the requirement to wear his helmet whilst riding in the car park. Given Mr Paterson's knowledge of this important safety rule and the fact that the employer was entitled to approach a breach of this rule as serious misconduct which could result in dismissal I cannot find that the final written warning given to Mr Paterson is unjustified for the reason argued. On the contrary, in deciding on an appropriate penalty and after weighing all the circumstances, including Mr Paterson's tenure and employment history, the respondent pulled back from the most serious consequence – dismissal. And that was not the final word in this matter. In an effort to resolve the concerns raised by Mr Paterson's the employer has further commuted the warning to a first written warning. The respondent has acted most reasonably in all the circumstances of this case.

Determination

The respondent's actions in this matter satisfy the test described in s.103A of the Act and I must decline Mr Paterson's claim.

One final note. In the event I am wrong in my analysis in this matter I must say that had I found the employer's conduct unjustified no remedy would followed. On the evidence before me Mr Paterson's contribution to the events that gave rise to the disciplinary action against him was total. I note too, that up to and including the investigation meeting, Mr Paterson demonstrated a dismissive attitude to his obligations to observe the sensible safety precautions attending the job and the efforts of Mr Dennis and Mr Buchan to ensure he is kept safe on the job.

Costs

Costs are reserved. The parties are to attempt to resolve the matter of costs between them. If they cannot do so they are to file and serve submissions on the subject and they will be determined.

Janet Scott
Member of Employment Relations Authority