

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 308/09
5274655

BETWEEN BARBARA WHITNEY
 Applicant

AND NEW ZEALAND POST
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: P Blair, advocate for applicant
 P Greene and L Wilson, advocates for respondent

Investigation Meeting: 24 August 2009

Determination: 28 August 2009

**DETERMINATION OF THE AUTHORITY ON APPLICATION FOR
INTERIM REINSTATEMENT**

Employment relationship problem

[1] New Zealand Post Limited (“NZ Post”) employed Barbara Whitney as a postie, commencing in 2007. It dismissed her in July 2009 after being made aware that she had recently been convicted of an offence of theft under the Crimes Act 1961.

[2] Ms Whitney says the dismissal is unjustified and seeks reinstatement.

[3] Ms Whitney also seeks an order for interim reinstatement. The parties attended mediation, but were unable to resolve the substantive problem or reach an arrangement in respect of the application for an interim order. Accordingly this determination addresses the application for an order for interim reinstatement.

[4] The issues to be addressed in determining the application are:

(a) whether there is an arguable case of unjustified dismissal;

- (b) whether the balance of convenience favours Ms Whitney or NZ Post;
and
- (c) where overall justice lies.

Background

[5] The following account of the facts is based on the parties' affidavits filed for the purpose of the interim application. The account does not amount to findings for the purpose of any final determination of the substantive claim.

[6] Ms Whitney has had two period of employment with NZ Post. The first of these lasted between 1986 and 1996. It ended with Ms Whitney's dismissal in relation to charges - to which she pleaded guilty - that she received undeclared income from NZ Post while also receiving the domestic purposes benefit.

[7] She deposed that she was told at the time she could wait 10 years, and NZ Post would re-employ her. NZ Post denied telling her this.

[8] Between 2001 and February 2007 Ms Whitney was employed elsewhere as a casual on-call bar worker and bar manager. In about August or September 2006 she had a dispute with her then-employer about her entitlement to wages and holiday pay. She believed she was owed \$5,000. When she could not reach agreement with her employer, she took that amount out of the employer's safe.

[9] In February 2007 she admitted taking the money and was dismissed. Pursuant to an arrangement not detailed in her affidavit, she repaid \$1,500.

[10] Ms Whitney's second period of employment with NZ Post began on 3 July 2007. The pre-employment documentation included questions about whether any charges were pending against her and whether any relevant convictions had been incurred in the preceding seven years. Ms Whitney responded 'no' to both questions. At the time those answers were true.

[11] In or about December 2007 the Police contacted Ms Whitney, seeking to interview her about the theft. No charges were laid until April or May 2009 when Ms

Whitney was charged under the Crimes Act 1961 with the theft from her former employer of \$3,500. On 13 July 2009 she pleaded guilty, was sentenced to a period of community work and ordered to pay reparation of \$1,750.90. The balance of the sum ordered by way of reparation is accounted for in that the former employer had acknowledged some holiday pay was owed.

[12] The next day Ms Whitney informed her team leader, Jenn Nikora, of the conviction. She was required to attend a disciplinary meeting on Friday 17 July 2009, to discuss the matter further.

[13] The meeting went ahead on 17 July. The parties attended with their representatives, the convictions were discussed and an explanation sought. At the end of the meeting Ms Whitney was advised that she was suspended while NZ Post considered its decision.

[14] On Monday 20 July 2009 Ms Whitney was given a letter of dismissal. The copy Ms Whitney filed was dated 17 July 2009, which is part of the reason why she says the decision was predetermined. The letter informed Ms Whitney she was dismissed, with two weeks' pay in lieu of notice. It pointed out that Ms Whitney had previously been dismissed from NZ Post in relation to a criminal conviction for a dishonesty offence, and had now received a second conviction for a dishonesty offence.

[15] The letter also referred to a provision in the applicable collective employment agreement ("the cea"), namely that 'receiving a criminal conviction relevant to the employee's employment'¹ was deemed to be serious misconduct. The cea also contained a provision setting out NZ Post's expectations of its employees, including that they take good care of the material its customers trusted to it, and be reliable and trustworthy.²

[16] NZ Post balanced Ms Whitney's good performance as an employee against the two convictions for dishonesty offences and its expectations of its employees, concluding that trust and confidence in Ms Whitney was broken beyond repair.

¹ Section I Conduct and Performance Expectations, in the cea.

² Section A, cl 27.

Arguable case

[17] The submission that Ms Whitney has an arguable case for unjustified dismissal relied principally on a decision of the Employment Court in **Murray v Attorney General in respect of the Chief Executive of the Inland Revenue Department**.³ During the pre-employment process in that case the Murrays had responded truthfully that they had no convictions, but failed to disclose that they had been charged with benefit fraud. The matter came to the employer's attention when the Murrays sought leave to attend their Court hearing, where they planned to plead guilty. They were dismissed, and challenged their dismissals on the ground that the misconduct occurred before they became employees.

[18] The Employment Court found the serious misconduct which can be a ground for summary dismissal must be misconduct occurring temporally while the employment contract was on foot.⁴ It also commented on obligations regarding disclosure, and to avoid misleading conduct. No issue has been taken with Ms Whitney's pre-employment disclosure here, and nor has there been an allegation of misleading conduct in that respect.

[19] Mr Blair submitted Ms Whitney has an arguable case because her offending occurred before her entry into employment with NZ Post. Thus the submission focused on the timing of the conduct underlying the conviction – said to be the relevant misconduct - rather than on the timing of the conviction.

[20] Mr Greene, in effect, distinguished **Murray**. He relied on the terms of the cea regarding actions that may constitute serious misconduct to disagree with Mr Blair's submission. On the proper interpretation of the cea the receipt of the conviction qualifies as the serious misconduct in question, and Ms Whitney's conviction was received while the employment relationship was on foot.

[21] The correct interpretation of the cea, and its bearing on the application of **Murray**, gives rise to arguable issues.

³ [2002] 1 ERNZ 184

⁴ At [37]

[22] However the decision in **Murray** went further in a way Mr Blair recognised may not assist Ms Whitney even if the above issues are determined in her favour. That is, the Murrays' dismissals were found in all the circumstances to be fair and reasonable, and therefore justified. The court applied its equity and good conscience jurisdiction, finding the Murrays could not complain about the termination of their employment when their earlier wrongdoing came to light. It referred, too, to the positions of high trust and complete discretion which they held, and the need for the outside world to perceive this.

[23] Mr Blair submitted that an application of equity and good conscience – or a test of fairness and reasonableness – to Ms Whitney's circumstances would lead to a different conclusion. He said: the slate had been 'wiped clean' in relation to the earlier conviction, relying on a decision of the Employment Court in **Ashton v Shoreline Hotel**⁵; the conduct underlying the second conviction had occurred over two years before the dismissal; and that Ms Whitney was entitled to hope either that she would not be charged or would be discharged without conviction. Meanwhile her service had been good and she was widely respected.

[24] I consider the extent to which the circumstances in **Ashton** are comparable to Ms Whitney's, and therefore of the extent to which the decision assists the above argument, to be barely arguable at best. Mr Blair quoted in support a passage from p 429 of the decision, which on my reading of that page is:

“In the absence of any reservation of position as to previous conduct, ... the new contract wiped the slate clean. It was not open to the respondent from then inwards ... to rely on such conduct. ...

It is well established that an employer who discovers misconduct committed by its employee, yet overlooks that conduct and continues the employee's employment, must be taken to have affirmed the employment and cannot subsequently dismiss the employee in reliance on that conduct: ...”

[25] The relevant facts there concerned the employer's offer to Mr Ashton of a new employment agreement, knowing of allegations of certain misconduct and without the misconduct having been investigated or addressed. The dismissal followed a further incident which occurred after the offer, with the employer seeking subsequently to

⁵ [1994] 1 ERNZ 421

rely directly on the earlier alleged misconduct as grounds for the dismissal. It did not treat the earlier alleged misconduct as part of the background bearing on the approach it took to the further incident.

[26] I do not accept that Ms Whitney's earlier conviction can be viewed in the same way as Mr Ashton's earlier alleged misconduct. Ms Whitney was dismissed in 1996 in association with the first criminal charge. NZ Post did not fail to address it at the time it arose, and I do not accept that the indication regarding employment in 10 years amounted to affirmation of the kind found in **Ashton**. Secondly, Ms Whitney was dismissed in 2009 because she had received a conviction for theft, with the fact of an earlier conviction for an offence of dishonesty being part of the background circumstances and not itself a reason for the dismissal.

[27] Accordingly I have difficulty in finding that the decision in **Ashton** applies to save Ms Whitney from the effect of the decision in **Murray**.

[28] Finally, Mr Blair submitted that the decisions to suspend and to dismiss were predetermined. He did not rely heavily on the point. While it may be arguable, it is not arguable to the extent that outweighs the difficulty just identified.

[29] The threshold for an arguable case is low. While I find there is an arguable case here, the argument is weak.

The balance of convenience

[30] Ms Whitney says the balance of convenience favours her because of her financial circumstances.

[31] NZ Post says the balance of convenience favours it because of the importance of retaining the trust and confidence of the public in the integrity of its service. It says there is a significant commercial risk arising from negative public reaction to the reinstatement of a person who has twice been convicted of dishonesty offences. For her part Ms Nikora deposed to her loss of trust and confidence in Ms Whitney, and her view that extra supervision would be required if Ms Whitney were reinstated.

[32] Both parties raised important considerations. However Ms Whitney's financial losses are more likely to be recoverable in the event she is successful in the substantive matter, while the loss to NZ Post is significantly less tangible and less likely to be recoverable. There is also a public interest in maintaining confidence in the publicly-owned New Zealand postal service, which I accept would be at risk if a postie with two convictions for offences involving dishonesty was re-employed on an interim basis.

[33] The balance of convenience tends to favour NZ Post.

Overall justice

[34] Assessing overall justice involves stepping back and assessing the relative strength of the parties' cases, as well as taking account of the matters just addressed and any other relevant matters.

[35] I have found that Ms Whitney's case, though arguable, is weak. I have also found that the balance of convenience tends to favour NZ Post. In the absence of any other relevant matters, the overall justice of the case also favours NZ Post.

Conclusion

[36] For the above reasons the application for an order for interim reinstatement is declined.

Costs

[37] Costs are reserved pending a final resolution of this matter.

R A Monaghan

Member of the Employment Relations Authority