

Background Facts and Evidence

[3] There is little disagreement regarding the facts of this matter. The people involved have been most candid and the evidence is generally consistent overall.

[4] Ms Whitney was employed by NZ Post as a Postal Delivery Worker (more generally known as a “Postie”), at the Rotorua Mail Processing Centre. In this role she was required to sort and deliver mail containing the usual variety of items which come via NZ Post, including cash, credit cards, gift vouchers, driver licences and other items of tangible value.

[5] Ms Whitney had two periods of employment with the Rotorua operation of NZ Post. The first was for almost ten years, from 1986 to 1996. The second commenced 3rd July 2007 and terminated on 20th July 2009. Ms Whitney’s first period of employment with NZ Post was terminated by her dismissal in 1996. This was due to a charge laid against her under the Social Security Act 1964 for receiving undeclared income - wages from NZ Post - while also receiving a domestic purposes benefit. Ms Whitney pleaded guilty and was duly convicted.

[6] Ms Whitney was re-employed by NZ Post on 3rd July 2007 and worked without incident until 13th July 2009, when she was convicted in the Rotorua District Court on a charge under the Crimes Act 1961 relating to the theft of monies from her previous employer. Ms Whitney was sentenced to 160 hours of Community work and ordered to pay reparation of \$1,750.90.

[7] It was on 26th February 2007 that Ms Whitney admitted to her then employer that she had taken the money in question. She was dismissed and her employer lodged a complaint with the Police. However, it was March or April 2009 before the matter was progressed by the Police.

[8] In the ensuing period, Ms Whitney was re-employed by NZ Post (3rd July 2007) following the usual check for convictions, with none being revealed. Ms Whitney was not required by NZ Post at the time to make any declaration relating to previous or pending offences but even if she had been required to do so, as she has said, she did not know whether charges would be pending until April or May 2009.

[9] The day after her conviction on 13th July 2009, Ms Whitney informed the Delivery Leader, Jennifer Nikora. On Friday 17th July, Ms Whitney attended a disciplinary hearing. She was supported by representatives of the Postal Workers Union of Aotearoa (“the Union”) who made a number of submissions on her behalf. The outcome of the meeting was that Ms Whitney was suspended on pay until 10:00a.m. Monday 20th July, pending a decision about whether she would be dismissed.

[10] The evidence of Ms Nikora is that while it was her decision as to what should happen to Ms Whitney regarding her continuing employment; she consulted with the Mail Centre Manager, Ms Trish Adler, and a Human Resources Consultant, Ms Catherine McCarthy. Ms Nikora says that there were a number of factors taken into account. The primary one being that Ms Whitney had received a criminal conviction. Ms Nikora says that a conviction relating to theft was considered to be *highly relevant* to a Postie’s employment given the standards of behaviour, honesty and integrity expected of NZ Post staff.

[11] The terms and conditions of employment which applied to Ms Whitney are set out in the collective employment agreement (“cea”) entered into by NZ Post and the Union. The relevant provisions of the cea are at:

(a) Part I, *Conduct and Performance Expectations* (page 50), which among other things provides that:

An employee may be dismissed instantly where an act of serious misconduct is established, and other disciplinary action is inappropriate.

Examples of serious misconduct are to be found at page 51 and include:

- *receiving a criminal conviction relevant to the employee’s employment.*

And;

(b) Part A, *New Zealand Post Employment Philosophy*, Clause 27 (page 14): *Management needs the support of people to help the company achieve its vision. This means that the people who work for New Zealand Post need to be committed to:*

- *being honest and professional in dealings with the public and each other.*

[12] The further evidence of Ms Nikora is that she knew that Ms Whitney was fully aware that conduct outside of work which led to a conviction, could result in her dismissal. This is because of the circumstances which led to Ms Whitney’s dismissal

in 1996. Ms Nikora says that she was satisfied that Ms Whitney's conduct which led to the conviction on 13th July 2009, amounted to serious misconduct under the relevant terms of the cea and that:

[... the fact that she [Ms Whitney] had been convicted of a crime of dishonesty made it virtually impossible to continue to employ her in a role which not only requires a high level of trust and confidence, but must also be seen by others as being filled by a person of high integrity. Also, this was the second time she had received such a conviction, so this was not just an isolated incident.

[13] Ms Nikora took into account that because Ms Whitney now had two convictions for dishonesty it seemed that she had a propensity to act in a dishonest way. Ms Nikora concluded that she (and NZ Post) were now unable to have trust and confidence in Ms Whitney and therefore, it was unacceptable to retain Ms Whitney in the employment of the company.

[14] A meeting was held on Monday 20th July 2009. Ms Whitney was advised that a decision had been made to dismiss her with immediate effect but with two weeks pay in lieu of notice. This was confirmed via a letter from Ms Nikora dated 17th July 2009. An issue arose regarding the date of this letter, given that the decision to dismiss was not given to Ms Whitney until 20th July. Following the raising of a personal grievance by the Union, a replacement letter dated 20th July 2009 was subsequently sent to Ms Whitney on 27th July. Given the 17th July date on the letter which was given to Ms Whitney at the meeting on 20th July, there was a suggestion by the Union that the decision to dismiss may have been predetermined. This has not been actively pursued before the Authority but in case there remains any doubt, I accept the evidence of Ms Nikora that while the letter was confirmed and signed by her later in the day on Friday 17th July, she still wanted to consider her decision over the weekend, knowing that if she had second thoughts she could change her mind. It happened that she did not change her mind and the letter was duly given to Ms Whitney on 20th July, albeit it was dated 17th July 2009.

[15] In summary, the letter informed Ms Whitney that:

- Receiving a criminal conviction relevant to her employment is deemed to be serious misconduct as outlined in the cea;
- In deciding on the consequences of her actions, account was taken of Ms Whitney's good performance as a Postie balanced against the

breakdown in trust that occurs when an employee has received a conviction;

- Also taken into account was the fact that Ms Whitney had been previously dismissed from NZ Post for a criminal conviction relating to a dishonesty offence and that while this was approximately 13 years ago, it shows that the recent conviction was not an isolated incident;
- The trust and confidence in the employment relationship had been broken to point where it was beyond repair, particularly given the nature of the employment.

Analysis and Conclusions

[16] Before turning to the matter of the dismissal, I note that in his submissions for Ms Whitney, Mr Blair advocates that the issues to be determined include:

- (a) Whether NZ Post conducted its disciplinary and investigation processes unreasonably; and
- (b) Was the suspension fair?

[17] I can find no mention in the *Statement of Problem*, or in Ms Whitney's evidence, that there was ever any issue taken with the investigation and disciplinary process, including the suspension. The overall focus of the proceedings has been on the substance of the dismissal. But in any event, on the evidence before me, I can find no fault on the part of NZ Post in the procedural aspects of the investigation, the disciplinary process used, or the appropriateness of the suspension in the circumstances.

The Dismissal

[18] In circumstances such as this, where the Authority is called upon to determine whether a dismissal is justifiable or not, the test of justification is provided by section 103A of the Employment Relations Act 2000. The Authority must determine, on an objective basis, whether the employer's actions 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 the action occurred.

[19] In summary, the substantive arguments advanced for Ms Whitney are firstly; that she should not have been dismissed because of a conviction which related to a matter outside of her employment and; NZ Post were not entitled to take into consideration the conviction which occurred in 1996.

[20] I have been referred to *Kasey Pou v Alliance Group Limited* CA 96/08, J Crichton, Member, 11 July 2008, as being on point with the circumstances pertaining to Ms Whitney. This case involved a woman working as a quality assurance officer at a meat works. She was convicted of an offence relating to behaviour outside of her employment and was dismissed. The employer reasoned that because Ms Pou was employed in a position of trust, the conviction detrimentally impacted on her suitability for the role of quality assurance officer and it no longer had the required degree of trust and confidence for her to remain in her employment. The Authority held Ms Pou had been unjustifiably dismissed in all the circumstances, particularly given the irrelevance of the offending to the duties required and the lesser standard which could normally be expected in a meat works as compared with, for example; the Inland Revenue Department.

[21] In arriving at its determination in *Pou*, the Authority distinguished the circumstances from those which existed in *Murray v A-G* [2002] 1 ERNZ 184, where Mr and Mrs Murray were dismissed having been charged and pleaded guilty to benefit fraud. The Murrays were employed by the Inland Revenue Department (IRD) in the role of customer service officers. The reason given by the IRD for their dismissal was that it was necessary for the protection of the tax system as the action of fraud by the Murrays, albeit not in their employment role, was behaviour likely to bring the IRD into disrepute. The Employment Court held that in order for serious misconduct to be a ground for summarily dismissing employees, it had to be misconduct that occurred temporally while the employment was on foot. But the Court then exercised its equity and good conscience jurisdiction and upheld the dismissals, as had the Authority in its determination.

[22] The circumstances of Ms Whitney regarding the most recent conviction are similar to the Murrays, except that there is the additional fact that Ms Whitney was dismissed from NZ Post some 13 years ago because of a criminal act. In regard to that matter, Mr Blair points to the decision of the Employment Court in *Ashton v Shoreline*

Hotel [1994] 1 ERNZ 421, where it was held that where an employer waives the right to react to an instance of misconduct, it cannot revive that misconduct at a later point if further reoffending occurs. That principle is well established but as Ms Swarbrick has submitted, Ms Whitney's previous conviction was just part of the overall background taken into account regarding the employer's decision to dismiss. Furthermore, the circumstances prevailing in *Ashton* were quite different than those affecting Ms Whitney. It seems to me that even without the existence of the previous conviction, the decision to dismiss Ms Whitney was an option which was fairly and reasonably available to the employer in all the circumstances.

[23] In reaching this conclusion I am cognisant of the finding of the Court in *Murray* (supra) and its application to Ms Whitney:

To sum up, it is quite correct that the plaintiffs were not guilty of any misconduct during their employment. Their action in admitting charges against them is not misconduct; on the contrary, it is to their credit that they did so without prevarication.

And;

The difficulty for them was and is that they underwent convictions and, on their own admissions, have been guilty of behaviour which they knew disqualified them from their employment.¹

[24] And so it is with Ms Whitney. Having previously been dismissed for a prior illegal act, she knew that under her employment agreement, if she received a criminal conviction relevant to her employment, then her job was going to be at risk.

[25] Mr Riordan, General Manger of Postal Delivery for NZ Post, attests in his affidavit to the Authority for the interim hearing², that the business of NZ Post is based on trust and confidence and a considerable emphasis is placed on protecting and maintaining the company's reputation for honesty. He says that if this reputation was lost, then the company would inevitably lose customers and mail volume.

[26] Mr Riordan attests further that:

In this case the Postie has now had two convictions for dishonesty related offences. Based on my 17 years experience with postal delivery, I firmly believe that if the public was to become aware that the Company continued to employ a Postie who had two dishonesty convictions, the reputation of the

¹ Page 201, para [56].

² *Barbara Whitney v New Zealand Post Ltd*, AA 308/09, R Monaghan, Member, 28 August 2009.

Company would be damaged and the Company would incur commercial damage as a consequence.

[27] Ms Whitney held a position where a high level of trust, honesty and integrity is required. It is recognised and accepted that Ms Whitney was proficient as a Postie and there were no blemishes against her in regard to carrying out this role. Unfortunately, the inescapable facts of the matter are that upon her conviction for theft on 13th July 2009, Ms Whitney had placed herself in position whereby under the provisions of her employment agreement, an act of serious misconduct existed in that she had received *a criminal conviction relevant to the employee's employment*. In these circumstances, dismissal was an option available to her employer. NZ Post also took into account the fact that Ms Whitney had been previously convicted and dismissed and concluded that there was a propensity for Ms Whitney to commit dishonest and illegal acts. She had now done so twice within 13 years. It is my view that this was a conclusion which was fairly and reasonably available to NZ Post.

Determination

[28] I find that the dismissal of Ms Whitney by New Zealand Post Limited was the action of a fair and reasonable employer in the circumstances pertaining to the position of trust held by her. The dismissal was therefore justified. Ms Whitney does not have a personal grievance hence the remedies she seeks cannot be granted.

Costs

[29] Costs are reserved. The parties are invited to resolve the matter if they can. In the event they cannot, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority