



Act) I order that the following names and evidence not be published:

- (i) The name of the Applicant and the town or region in which he was employed; and
- (ii) The names of two women who made complaints to New Zealand Post Limited about the Applicant. The woman who made complaints on 12 and 27 July is referred to in this determination as Ms A. The woman who made a complaint on 2 August is referred to as Ms B.

[2] This order is to be reviewed at the opening of the Authority's investigation meeting, now notified for 24 and 25 February 2011, and at which Ms A is expected to give evidence, under witness summons if necessary.

### **Employment Relationship Problem**

[3] New Zealand Post Limited ("Post") dismissed Mr Z on 1 November 2010 from his job as a postal delivery worker or 'postie' in a North Island city. At the time he was working on sorting and other office-based duties, having been removed from his normal postal round during a Post inquiry into allegations about his conduct.

[4] Mr Z applied to be reinstated on an interim basis until the Authority has heard and determined his personal grievance application. He provided the required undertaking as to damages.

### **Procedure**

[5] Mediation, directed on an urgent basis, did not resolve this matter. The investigation meeting on the substantive claim is set for ten weeks away. Meanwhile the parties have lodged affidavits and submissions regarding the interim reinstatement application. By consent this application was determined on the papers. I have read the statement of problem, statement in reply, the representatives' submissions and affidavits from Mr Z, Post delivery leader Jenny Nikora and Post security advisor Kevin Flynn.

[6] I did not read a copy of an affidavit from Postal Workers Union delegate and

Wendy Cox that Mr Blair lodged with his submissions. The Authority's directions, agreed earlier with the representatives, did not provide for such additional affidavits. Further it appears the affidavit was not properly taken as it records Ms Cox as swearing the document before Mr Blair. The general rule is that an affidavit is not taken by a lawyer acting for a party in the proceedings (see, for example, Rules of Conduct 4.6.1 and s56 of the District Courts Act 1947).

### **Principles on interim reinstatement**

[7] Section 127 of the Act requires the Authority to apply the law relating to interim injunctions having regard to the object of the Act. Accordingly Mr Z must first establish that he has an arguable case, both that the dismissal was unjustified and that reinstatement would likely be ordered as a remedy once his substantive claim is investigated and determined.

[8] Secondly, the Authority must assess how best to regulate the positions of the parties until that subsequent determination of the substantive issues. That assessment is made on the balance of convenience between the parties. Whether effective remedies, other than interim reinstatement, are available to Mr Z is considered as part of that assessment.

[9] Finally, the Authority is to take a global view of the justice of the case and decide what should be done to attain that. Throughout the objects of the Act are considered, including under s3 for employment relationships to be built on good faith behaviour and under s101 to recognise the importance of reinstatement as a remedy.

[10] As noted by the learned authors of *Personal Grievances*, (Brookers, Wellington, 2002) at 11.3.06:

*the Court ha[s] drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula. In reality the considerations of whether there is an adequate alternative remedy, where the balance of convenience lies, and the overall justice of the case will often overlap.*

[11] The investigation is confined to the untested evidence given in the affidavits of

various witnesses, considering the parties' submissions and reaching a determination after weighing the available information and applying the relevant principles. This may require some commonsense assessment of inherent possibilities regarding unanswered or disputed assertions in the affidavit evidence to determine the respective justices of the situation in the period before the investigation meeting rather than focussing unduly on the merits of the substantive proceedings.<sup>1</sup>

[12] If an order for interim reinstatement is to be made, it may be subject to any conditions the Authority thinks fit.

### **The facts**

[13] In July 2010 Ms Nikora informed Mr Z of a complaint received from Ms A. Ms A's house was near a carport Post used as an overflow depot or "bag stop" for the postal round in her suburb. A bag stop is where some of the mail for the round is stored while the postie delivers other mail.

[14] Ms A complained that while she did talk with Mr Z when he began collecting bags from the address, she was "*now finding it over the top*". She said he had made sexual remarks such as "*hi sexy*" and had come into her house and helped himself to food.

[15] On 15 July Ms Nikora interviewed Ms A at her home. Notes of that interview record Ms A saying she had got along well with Mr Z after he has introduced himself as her new postie. She had invited him for a drink one afternoon but she felt uncomfortable with his behaviour and asked a friend who was also at her house to take him home. She said Mr Z had one day come into her home and helped himself to her baking. She said that in one conversation Mr Z had "*started bad mouthing*" her partner, which her partner overheard because he was home and sick in bed. Ms A also said Mr Z had told her of a rumour that she and he were having an affair.

[16] Ms A explained that she did tattoos and had given Mr Z her telephone number because he had friends interested in getting tattoos done by her. She had told him to tell his friends to look on her Facebook page at some of her work.

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<sup>1</sup> *Wellington Free Ambulance Service v Adams* [2010] NZEMPC 59 (EC, Colgan CJ) at [17]-[18].

[17] Ms A said Mr Z knew her cousin, her aunty and her uncle.

[18] Ms A also told Ms Nikora of four abusive texts she received on 14 and 15 July from a number she did not know. She provided the number and the content of those text messages. The texts referred to her partner and warned her not to make accusations against Mr Z.

[19] Ms Nikora gave Mr Z a letter requiring him to attend a formal disciplinary meeting. She also gave him a copy of Ms A's complaint and the notes of her interview on 15 July. He was advised of five allegations which "*could possibly amount to sexual harassment*". The allegations referred to unwanted sexual remarks made towards Ms A, uninvited entry to her house, spending an unwarranted amount of time collecting mail from her address, and changing his delivery round so he returned to her address more than once a day.

[20] On 27 July Ms A made a further written complaint to Post about Mr Z's behaviour since 15 July. She said he had stared at her when he stopped at her neighbour's mail box, had knocked at her kitchen door, yelled at her from her doorstep, and sent texts to her while sitting in the carport when she did not answer the door. She said he was in the carport sorting mail.

[21] According to Post notes of a disciplinary meeting held on 28 July, Mr Z's union representative Paul Blair criticised Ms A as a "*nut bar*" and disagreed with Post representatives, including Ms Nikora, over whether Mr Z should have to respond to "*ridiculous allegations*".

[22] Mr Z said he had developed a friendship with Ms A by having his smoko break at the address and through Facebook contact. He admitted whistling at Ms A to get her attention and saying Hey Sexy because that was something he did all the time.

[23] Mr Blair advised that he had transcripts of communication between Ms A and Mr Z on Facebook and MSN (instant electronic messaging via computer). When a Post representative asked to see copies of text and Facebook exchanges Mr Z said he did not want that because the communication was outside work hours and personal.

He also said he had deleted texts after Ms A said she was cutting all ties with him.

[24] Mr Blair read some excerpts from what was said to be a ten page transcript of Facebook and MSN exchanges between Ms A and Mr Z. When asked by a Post representative to provide that documentation Mr Blair said the information would only be shown once there was a “*roundtable investigation with [MsA]*”.

[25] On 10 August Post advised Mr Z of a complaint from another customer, Ms B, received on 2 August. The complaint was that he had approached Ms B on her driveway rather than delivering her mail to her letterbox and had also sent her a message on an internet site called ‘NZ Dating’ asking how her “*mail was going*”. He was asked to attend a further disciplinary meeting at which his explanations about those allegations would be sought along with any further explanation for the original allegations. He was also asked to provide information relating to Facebook, MSN and text message conversations between him and Ms A. He was told: “*You need only provide the information relevant to the current allegations and may black out any sensitive information or images*”. Post also noted that if he did not provide that information, a decision could be made without seeing it.

[26] On 12 August Mr Z made a complaint to the Police about being attacked by two men outside Ms A’s house while delivering mail that day. His statement to a Police constable said two men rushed out of the driveway. One man punched and kicked him. He fell over. His helmet was broken and his ear was cut. The other man told him to come and apologise to Ms A at her house. Mr Z said that he had asked if he could apologise from the road and Ms A came out of her house and he apologised to her. He said one man told him “*You’ve been fucking with my Mrs*” but Mr Z said he had seen Ms A’s partner and the man did not look like him. The man wore a blue bandana and a leather jacket which Mr Z said was “*perhaps like a gang member would wear but I didn’t see a patch*”.

[27] Ms A was interviewed by the Police and denied being at home when the attack occurred. She said a member of her family may have been involved and Police confirmed a car parked outside her house at that time belonged to a relation of Ms A.

[28] Mr Z was off work for around four weeks while recovering from injuries. On

his return to work Ms Nikora assigned him to duties at the Post branch premises rather than delivery round work.

[29] Prior to Mr Z's return to work Post security advisor Kevin Flynn had made further inquiries about the complaints.

[30] During those inquiries Mr Flynn interviewed Ms A's sister. He took a statement from her on 20 August in which Ms A's sister recounted an incident on 23 June when Ms A visited her house between 9 and 10am:

*When [Ms A] was here her phone beeped with a text. She read the text and was shocked and then passed me the phone. I read the text which said he wanted to get a tattoo of a horse like the National Bank on his penis and would [Ms A] do the tattoo. She text back saying she doesn't do tattoos in that area but before she had a chance to send the text she got another one from him which said: "Do you want a horsey ride".*

[31] The statement of Ms A's sister says she had not met Mr Z and does not say how she knew the texts to her sister were from him.

[32] Mr Flynn also spoke by telephone to a friend of Ms A's about the evening that Mr Z was invited to Ms A's house for drinks. He said her friend described Mr Z as acting "weird" and "over the top".

[33] Mr Flynn interviewed Ms B on 19 August about her written complaint received by Post on 2 August. She said she was made to "feel real uncomfortable" when Mr Z had come up her driveway and handed her mail while she had two friends and their children visiting. Ms B's original complaint said she believed the person delivering her mail with Mr Z's first name. Her statement to Mr Flynn said she had known Mr Z for more than a year as a friend was dating him. She had also met him at the wedding of a friend who was a postie and had seen him at the funeral of a friend's father. She also explained that her sister was a postie and "I know of him through her". Mr Flynn's report noted that Ms B's sister was a postie and stated that Ms B had no connection with Ms A.

[34] Mr Flynn's report of his inquiries, dated 25 August 2010, also noted a complaint from another woman received in March 2010. The woman knew Mr Z

“from years ago” at school and reported that he had come up the driveway of her house, said “hey long time no see”, and handed her the mail rather than putting it in the roadside mail box.

[35] The report by Mr Flynn, copied to Ms Nikora and a Post human resources advisor, included the following conclusion:

*We firmly believe that the above complaints and witnesses are just the tip of the iceberg and that there are more than likely others out there with a similar story to tell.*

*[Z] displays a behaviour trend to make contact with females and including vulnerable single females at home with children. His behaviour is not that of a normal person and includes offensive and at times sexually explicit content.*

[36] Post was delayed from continuing its investigation firstly because Mr Z had time off due to his injuries and secondly because Mr Blair believed Post should do more to test the veracity of the complainants’ allegations and also wait for a Police report on the assault.

[37] In letters on 3 September and 22 October making arrangements to continue the disciplinary investigation, Post reminded Mr Z of the original five allegations and summarised a further six allegations being investigated. These additional allegations were:

- (i) inappropriate behaviour as alleged in Ms A’s 27 July statement; and
- (ii) sending sexually explicit text messages from his mobile phone to the mobile phone of Ms A on 23 June between 9 and 10am, a time at which he was working for Post; and
- (iii) acting inappropriately towards Ms A on 9 July (when he had been invited for drinks at her house); and
- (iv) acting inappropriately in October 2008 by leaving a parcel on a backdoor step of a home when ordinarily he was required to deliver to the mail box; and
- (v) inappropriate behaviour by approaching Ms B in her driveway on 5 June; and
- (vi) inappropriate contact with Ms B by asking her on the NZ Dating website about mail.

[38] The letters referred to four other “*similar, historical complaints*” – including two of delivering mail to the customers or their front doors rather than their mail boxes (20 August 2008 and March 2010). The letters said those complaints might be relied on in Post’s decision-making process.

[39] At the disciplinary meeting then held on 28 October there was further debate between Mr Blair and Post representatives on whether Mr Z would provide information from the Facebook, MSN and text messages between him and Ms A.

[40] Post notes of the meeting record Mr Flynn asking Mr Z if he had ever sent a text message about a tattoo on a penis. He answered: “*No*”.

[41] Mr Z explained that he had taken Ms B’s mail down her driveway as “*a kind gesture*” as he could see her sitting outside on the deck and did this “*all the time*”.

[42] He was also questioned about the other complaints and a further meeting was scheduled for 1 November.

[43] At the 1 November meeting Mr Z was dismissed. Post’s reasons for his dismissal were detailed in a seven-page letter from Ms Nikora dated 2 October (but clearly meant to be 2 November).

[44] Post found seven of the allegations were substantiated and amounted to minor misconduct: inappropriate comments to Ms A, entering her house without permission, spending too long at the bag stop, changing the round and repeatedly visiting Ms A’s property, delivering mail directly to Ms B, and contacting Ms B through the NZ Dating website.

[45] Three allegations were taken no further due to inadequate or inconclusive information or relating to events that were too long ago.

[46] Post found the allegation of sending sexually explicit text messages to Ms A on 23 June was substantiated. Post decided this was serious misconduct because it was during work time and amounted to sexual harassment of a customer.

[47] The letter stated Ms Nikora's conclusion that summary dismissal was the appropriate outcome because of the nature of Mr Z's conduct, and his previous history.

[48] The Facebook and MSN communication which was not made available to Post included comments, said to have been made by Ms A, which described a photo of Mr Z as "*looking damn good*", invited him to "*come partake with me sometime*", and saying he "*shld have yelled out or cum got me*" on an occasion when he visited the carport but Ms A did not hear him. It included a comment from Ms A saying: "*I wana know all about [Mr Z's first name], dirty lil secrets n all webbed toes, third nipple u name it*" and, in messaging about body piercing, Ms A writing that she "*wantd my girlie bit pierced*". In response to Mr Z writing "*u hvnt left my mind since we met*", Ms A replied: "*I know the feeling its been the same for me*". These particular exchanges occurred between 7 and 10.30 pm on 28 June and 1.30 and 11pm on 29 June.

### **The parties' positions**

[49] Mr Z's application to the Authority stated the allegation of sending a sexually-explicit text on 23 June was false and alleged Ms A gave false information to Post and the Police. It said records of Facebook and MSN messages between him and Ms A showed a "*mutually flirtatious 'texting' and 'facebooking' relationship*". It said the minor misconduct findings on other allegations were mostly to do with a company rule about delivering only to mail boxes and not customers' doors or hands and the rule either did not exist or was often breached. He sought orders for interim reinstatement, permanent reinstatement, and orders for lost wages and compensation for hurt and humiliation.

[50] Post replied that its dismissal decision was justified in all the circumstances known to its managers at the time. Despite requests for it, Post was not given the information about Facebook and MSN communication between Ms A and Mr Z.

[51] Post opposed the remedies sought including interim reinstatement.

[52] The parties' submissions on interim reinstatement are considered below.

**Is there an arguable case?**

[53] Assuming Mr Z can prove all the facts he alleges, he must persuade the Authority he has some real or serious, but not necessarily certain, prospect of establishing both that he was unjustifiably dismissed and that he would be reinstated rather than only be compensated monetarily. His case is not, under this aspect of the applicable principles, weighed against any defence which Post may have except for fundamental issues such as jurisdiction (which is not an issue here).<sup>2</sup> In a personal grievance application of this type, the onus is on Post to justify the decision to dismiss and how it was made. The threshold of 'arguable case' is usually accepted as reached once Mr Z disputed the basis of the purported justification for the dismissal and sought to put Post to the proof of it.

[54] Post submitted Mr Z had no arguable case because:

- (i) the investigation was fair, he was represented, he was given all necessary information about the allegations and Post's conclusions were justified; and
- (ii) he withheld information on which he now relies; and
- (iii) his conduct shows little respect for Post customers and processes so that there is no reasonable prospect of successful reinstatement.

[55] Those submissions go to the heart of the substantive case but mere assertion does not establish that Mr Z has no real or serious prospect of success in his claim of unjustifiable dismissal and for permanent reinstatement.

[56] Rather I accept he does have an arguable case on a number of the circumstances leading to his dismissal, including that:

- (i) there were serious evidential deficiencies in reaching the conclusion that he sent sexually-explicit text messages on 23 June; and
- (ii) the evidence of Ms A, her sister and her friend was not sufficient to substantiate other allegations; and
- (iii) Facebook or other internet-based contact between a Post employee,

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<sup>2</sup> See *X v Y Ltd & NZ Stock Exchange* [1992] 1 ERNZ 863, 872-873.

- in his or her own time, with people who are also Post customers is not necessarily inappropriate or misconduct in employment; and
- (iv) Handing mail directly to a customer, if known to be the lawful recipient of the mail, is not misconduct.

[57] Accepting these are arguable issues is not saying Mr Z's submissions are correct or will certainly succeed. It does say they have some serious prospect of doing so once the evidence is thoroughly tested and legal arguments fully heard in the Authority investigation. If some or all of these and other issues were established as shortcomings in Post's disciplinary inquiry and conclusions, Post's loss of trust and confidence in him would also lack foundation and Mr Z would have an arguable case for permanent reinstatement.

### **The balance of convenience**

[58] Identifying the balance of convenience – in the sense of detriment or injury – requires likely financial or other loss to Mr Z to be weighed against risks and costs to Post and the extent to which these might be managed or minimised.

[59] I have considered nine factors submitted by Post as relevant to where the balance lies in this particular case.

[60] I do not accept its submission that the evidence establishes Post was right to lose trust and confidence in Mr Z. Whether Post was right is, simply put, the substantive issue and cannot properly be determined at the interim stage, although some assessment of the relative strengths of each parties' case is relevant and considered elsewhere in this determination.

[61] I do not accept there is no long term prospect of reinstatement for Mr Z. Declarations of a lack of trust and Mr Flynn's view expressed in his affidavit that Mr Z's actions might damage Post's business are not sufficient to establish the impracticability of reinstatement, either on an interim or, potentially, permanent basis.

[62] Similarly a suggestion that there might be an impact on third parties – customers and other employees – depends on as-yet-to-be-determined findings on

whether Post was justified in concluding he had acted improperly. Meanwhile the risk can be minimised by Mr Z being reinstated on a garden leave basis or to do depot-based work as he was up until 1 November. Ms Nikora has deposed as to the inconvenience to her and cost to Post of such arrangements but that does not amount to impracticability. I do not accept Ms Nikora's indirect evidence of "*comments and feelings of tension*" from other staff is sufficient to say reinstatement would be unworkable.

[63] The ten week delay to the Authority investigation meeting (and some weeks for a determination thereafter) puts a burden and cost on Post but I consider this is less than that of the loss of income and opportunity to work for Mr Z.

[64] Neither do I accept Post's submission that Mr Z's undertaking as to damages, given in the standard statutory form, is inadequate. Evidence is not usually required of an ability to pay damages, if they were to be ordered, and, if his grievance claim failed, Post could not normally seek reimbursement of his wages if it has had the benefit, or opportunity to benefit, from his labour while reinstated on an interim basis.

[65] The potential for Mr Z to eventually gain an award of lost wages and compensation is not sufficient to tip the balance of convenience against him in circumstances where the primary remedy he seeks is reinstatement.

[66] I find the balance of convenience favours Mr Z.

### **Overall justice**

[67] Standing back from the detail and making an assessment of the overall justice of the matter, for interim purposes, included an opportunity to consider the strengths and weaknesses of the parties' case.

[68] In reading the documents, submissions and affidavits I identified some concerns for further inquiry about the justification for Post's actions and decision. I do not list all of them but mention the following for present purposes:

- (i) Mr Flynn's "tip of the iceberg" conclusion – in his report provided to Ms Nikora before she made the dismissal decision – was

essentially a very serious allegation that Mr Z's behaviour showed a pattern of sexual predation. As is well known in employment law, the onus was on Post to establish the facts asserted on the balance of probabilities consistent with the gravity of the facts and potential consequence of dismissal.

- (ii) There is a puzzling difference between the statements of Ms A and Ms A's sister about the most serious allegation, concerning the "horse" texts. Ms A's sister stated on 20 August that Ms A received and was upset by these texts on 23 June. However Ms A's complaints of 12 and 27 July made no apparent reference to the 23 June texts. Instead she referred to texts about "*rumours of us having an affair*" and texts sent from the carport on a day after 15 July.
- (iii) It is not clear from the presently available evidence how Post decided or accepted that these and other texts came from Mr Z. Ms A's sister's statement suggests they did but does not explain the basis on which she reached that conclusion. The four texts shown by Ms A to Ms Nikora on 15 July refer to Mr Z in the third person (rather than as their author).
- (iv) Ms A appears to have given Post no indication of the nature of the Facebook and MSN exchanges on 28 and 29 June which may have had a bearing on Mr Z's conduct and contact with her.

[69] However Mr Z's case is not without difficulties of its own. His refusal – either personally or by Mr Blair – to provide relevant portions of the Facebook and MSN exchanges, despite Post's repeated requests, undermines his ability to challenge its actions based on the information available to it. Even if Post's actions or how it went about making its decision were found to be unjustified, his withholding of information is a factor that goes to contribution under s124 of the Act and could reduce remedies available to Mr Z.

### **Determination**

[70] Against this background I consider that the overall justice of the case favours interim reinstatement of Mr Z.

[71] Section 127(5) of the Act allows for such an order to be subject to any conditions that the Authority thinks fit. In the particular circumstances of this case, given Post's submissions on what its representatives consider to be a risk in Mr Z having unsupervised contact with customers on a postal delivery round, I consider that the interim reinstatement need not be to his previous role as a postie. Rather Post is to have the option of reinstating Mr Z, for the meantime, either on a 'garden leave' basis only (that is effectively just to the payroll) or to a role similar to the inside or branch duties arranged by Ms Nikora which he was doing at the time of his dismissal.

[72] Mr Z is reinstated to the pay roll (for his usual part-time hours) from 20 December 2010 and should be available to work as directed by Post from that time or, if required, from a later date.

[73] Leave is reserved to the parties to revert to the Authority for further directions regarding the operation of these interim reinstatement conditions but they should seek mediation assistance in the first instance.

[74] Costs on this application are reserved.

Robin Arthur  
Member of the Employment Relations Authority