

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 130/10  
5292409

BETWEEN                      POSTAL WORKERS UNION  
   OF AOTEAROA AND KARL  
   OAKES  
   Applicants

AND                              NEW ZEALAND POST  
   LIMITED  
   Respondent

Member of Authority:      P R Stapp

Representatives:           Graeme Clarke for Applicants  
   Naomi Jones for Respondent

Investigation Meeting:    17 June 2010 at Wellington

Determination:             4 August 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]      Mr Oakes was given a first written warning dated 18 October 2009 for minor misconduct for repeatedly failing to wear the correct uniform and for repeatedly refusing a reasonable instruction to remove a piece of incorrect uniform. Mr Oakes has requested the Authority to remove the warning from his record. He claims that the warning was unjustified and the request to undress and remove clothing was unreasonable.

[2]      The PWU (the Union) has claimed that New Zealand Post's uniform policy is in breach of the provisions of the Collective Agreement. It further claimed that New Zealand Post has breached the consultation requirement of the Collective Agreement.

[3]      New Zealand Post denied the claims.

[4] The parties attended mediation services provided by the Department of Labour. Mr Oakes took a day's annual leave because New Zealand Post would not pay him. Mr Oakes has claimed that his annual leave be reinstated.

## **Issues**

[5] Was the first written warning given to Mr Oakes justified on reasonable grounds?

[6] Is New Zealand Post's uniform policy in breach of the Collective Agreement?

[7] Has New Zealand Post failed to consult the Union under any requirements for consultation under the Collective Agreement?

[8] How should the employment relationship problem be resolved? Is Mr Oakes entitled to be paid to attend mediation and get his annual leave reinstated?

## **The facts**

[9] Mr Oakes is employed by New Zealand Post as a postal delivery worker at New Zealand Post's Johnsonville branch. He has been employed by New Zealand Post since 18 December 2006. He is a member of the Union and covered by the Collective Agreement.

[10] There have been some issues between Ms Suzanne Cameron Wellington Business Delivery Leader and Karen Taylor Johnsonville Delivery Branch Leader, and Mr Oakes over what he was wearing. First, there was an incident with him wearing a blue hooded sweatshirt instead of the proper uniform. He removed it when requested to do so and he accepted that it was not part of the correct uniform. Second, he was caught wearing a visible blue t-shirt under his uniform and was requested to remove it. He refused to remove the sweatshirt so that it could not be seen. Ms Taylor claimed that it could still be seen hanging out and not tucked in. He denied that.

[11] Mr Oakes was advised to attend a disciplinary meeting. This was held on 12 October 2009. He provided explanations as follows:

- (i) At training no comment was made about him wearing a comfortable cotton t-shirt;
- (ii) There was no explanation about what was meant by wearing the uniform correctly;
- (iii) On the first occasion he was inside and sorting mail and complied with a request to remove a sweatshirt, but at the same time there was no comment made about wearing a t-shirt he had on;
- (iv) On the second occasion he zipped up his sweatshirt so that the t-shirt could not be seen;
- (v) Adjusting his clothing to be comfortable;
- (vi) If his t-shirt was hanging out that was never raised with him prior to the company's investigation meeting;
- (vii) The instruction to remove "underwear", as he called the t-shirt, in the sorting room, was unreasonable;
- (viii) He wanted to wear cotton underwear for comfort;
- (ix) This was the first time there had been any discussion on wearing the uniform correctly.

[12] It is common ground that Mr Oakes started to read out at the meeting a definition of "*underwear*" that he had obtained from Wikipedia, and that Ms Cameron intervened to stop him because she did not like the references he was making to women's underwear which were inappropriate, unnecessary and did not

provide a genuine explanation for his actions. He has denied that. He says that he wanted to wear his t-shirt for comfort; his explanation was rejected; they refused to listen; and that he was not allowed to explain his opinions and actions. His explanations were rejected by New Zealand Post.

[13] On 18 October Mr Oakes was issued with a first written warning for misconduct because he:

- a. Failed to wear the correct uniform.
- b. Refused to follow a reasonable instruction.
- c. Behaved belligerently.

[14] The verbal notice was followed up in writing and formalised on 18 October. In addition he was informed that New Zealand Post required him to wear the correct uniform, abide by the authority of his branch leader, and to behave appropriately, co-operatively and professionally. New Zealand Post relied on Mr Oakes' previous conduct giving rise to the final decision for a first written warning. It relied on clause F 37 of the Collective Agreement requiring him to wear the correct uniform. Also, New Zealand Post relied on section 1 of the Conduct and Performance Expectations under the Collective Agreement to abide by the authority of his branch leader and to behave appropriately and professionally after refusing to remove non uniform items.

[15] Arising from the incident the Union has challenged New Zealand Post's uniform policy because of the provision that there are no medical exceptions to the requirement to wear the uniform, that there has been no discussion with the Union over this, and the provision is unreasonable.

[16] New Zealand Post and the PWU are parties to a Collective Agreement (1 July 2008-31 March 2011). The Collective Agreement makes provision for:

***N 14 Uniform***

*Uniforms and waterproof clothing will be supplied at the company's expense to delivery employees. Those issued with a uniform are*

*required to ensure that the uniform is worn in the correct manner, at all required times.*

***Commitments to the people of Post***

11. *We want New Zealand Post to be a great place to work and to support this we are committed to:*

- *Providing safe and healthy workplaces*
- *Treating people fairly*
- *Helping people develop their abilities*
- *Equal Employment Opportunities*
- *Rewarding and recognising people's efforts*
- *Keeping people informed*
- *Consulting people on important issues.*

***To treat people fairly***

15 *We believe in:*

- *Treating people fairly and with respect*
- *Ensuring people are given clarity as to what is expected of them and how their role and skills contribute to the organisation's goals....*

***To keep people informed***

20 *We are committed to keeping people well informed about what is happening in the company, to being honest and to being as open as possible with them.*

21 *Good communications is a two way process and management knows people are keen to contribute. Management is committed to listening to people and to giving them feedback on their thinking and ideas.*

***“To consult people on important issues***

22 *We are committed to consulting employees and their Unions on important issues that affect their work.*

[17] These provisions are relevant in regard to the Union's claim that New Zealand Post has not consulted the Union.

### **The test of justification**

[18] The Employment Relations Act 2000 (the Act) requires the Authority to scrutinise the employer's actions on an objective basis what a fair and reasonable employer would have done in all the circumstances: s 103A of the Act.

### **Good faith**

[19] The Act also makes provision for good faith. Section 4(1A) of the Act states:

*The duty of good faith in subsection (1)-*

- (a) *is wider in scope than the implied mutual obligations of trust and confidence; and ...*
- (b) *Requires the parties to an employment agreement to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...*

[20] Section 4(4) sets out the matters to which good faith applies and states:

*The duty of good faith in sub-section (1) applies to the following matters:*

- (a) *Bargaining for a collective agreement or for a variation of a collective agreement including matters relating to the initiation of bargaining;*
- (b) *Any matter arising under or in relation to a Collective Agreement while the Agreement is in force:...*

### **Determination**

[21] New Zealand Post provides a uniform for posties to wear. The terms of the policy have been prescribed by agreement in the Collective Agreement. A written policy produced goes further than the terms of the Collective Agreement (document H). In this regard the postie training and induction manual policy on uniforms states:

*“...Those issued with a uniform must wear it in the correct manner at all required times. There are no exceptions from this rule on medical or other grounds”...*

[22] The second sentence is clearly unreasonable and contradicts the evidence that New Zealand Post treats each case on a case by case basis if a comfort safety and health problem arises. Also, New Zealand Post has indicated that the reference to “[T]here are no exceptions from this rule on medical or other grounds” in the postie training and induction manual (last updated in 2002) will be reviewed (Kim Gray National Delivery Product Manager, written statement paragraph 16).

[23] The existence of this policy conflicts with the provisions of the Collective Agreement and the practice considering the evidence produced where there has been allowance made for individual circumstances and the use of personal underwear that relates to comfort. Indeed the uniform allows for individual choice so long as it is not seen. However, I accept the witnesses’ evidence from New Zealand Post that in the final incident Mr Oakes’ t-shirt could be seen: (visible at his neck area). My reasons are:

- a. Mr Oakes had previously worn a blue hooded sweatshirt that was easily noticeable. He did remove it when requested.
- b. Mr Oakes agreed he zipped up his uniform sweater for it not to be visible. Doing that he did not regard it as necessary to remove it. Furthermore he says he did comment at the time to Ms Taylor “*now it is not necessary*” [to remove it].
- c. Mr Oakes never denied wearing the t-shirt.
- d. Mr Oakes tried to provide a number of explanations.

[24] Mr Oakes was advised that there was an issue in regard to wearing his uniform correctly as an issue for a meeting held on 25 September. This was confirmed in a letter dated 29 September 2009 by Karen Taylor. Also, Ms Taylor reminded Mr

Oakes of the expectations and she set them out in her letter dated 29 September to ensure Mr Oakes was not confused.

[25] Was the t-shirt hanging out as claimed in 2.10 of the SIR? The first mention of this was in the letter dated 18 October. Mr Oakes did not think that it was hanging out and he suggested in his evidence that New Zealand Post has made a mistake. Ms Cameron did not mention it directly. There was no record of the details of Ms Taylor's allegations before the meeting. There was no mention in the statement of problem that the t-shirt was hanging out. A letter dated 6 October 2009 does not make any mention of it as a specific allegation, except that Mr Oakes was asked to remove the t-shirt that he was wearing. Thus, I am not able to conclude with any certainty that Mr Oakes' blue t-shirt was not tucked in.

[26] I conclude that Ms Taylor's and Ms Cameron's complaints related to Mr Oakes wearing a blue t-shirt that they considered was not part of the standard issue uniform, that it could be seen at the neck area, he was asked to remove it and did not do so. They were entitled to raise these matters given the term for the uniform in the Collective Agreement.

[27] Was his behaviour belligerent? This was not raised as an independent and new disciplinary allegation. Instead it was first articulated as a finding following the meeting and put in the letter dated 18 October 2009, where the company's expectations were pointed out to Mr Oakes. It clearly forms part of the disciplinary first written warning. I am supported in my finding by union organiser David Thompson's evidence where he expressed his opinion that he did not believe Mr Oakes was belligerent. I am certain if the union officials had picked up the significance of this they would have commented more about it. Clearly without Mr Oakes being informed that some action would be taken on his alleged belligerency, if proved, the warning can not be justified. A fair and reasonable employer would not have included this issue without proper notice and details being relied upon for comment to include it in the first written warning. There would have been clear implications arising from that meeting about the conduct of any further disciplinary meeting and the decision makers.

[28] Was the employer's action what a fair and reasonable employer would have done in all the circumstances? I conclude that in all the circumstances the warning was unjustified because:

- a. The matter of Mr Oakes behaving belligerently was not raised properly as an allegation and was included in the warning without Mr Oakes being put on proper notice to comment and mitigate his action. It was clearly an influencing factor in the employer's decision, I hold.
- b. There was an underlying acceptance of wearing "underwear" for comfort and where there is some discretion.
- c. The details of the allegations were not properly raised to ensure that Mr Oakes understood what he had to respond to, comment on and mitigate, especially in regard to whether or not his t-shirt was hanging out.
- d. There is an element of uncertainty and conflict on the uniform policy between the provision of the Collective Agreement and the postie training and induction manual.
- e. There are no guidelines on the wearing of the uniform correctly, except in absolute terms and by implication from the items of uniform clothing provided.

[29] Next I have to be satisfied that the employer's action has caused Mr Oakes disadvantage; and to the extent that the warning put his employment in jeopardy in the future on any reoccurrence of the issues covered by the first written warning, he has been disadvantaged, I hold. I conclude that Mr Oakes has a personal grievance of unjustified disadvantage because his employment was put at risk. I will turn to the remedy claimed shortly.

[30] The next matter relates to the Union's claim that New Zealand Post has failed to be open and active and communicative and there has been a breach of the

Collective Agreement. New Zealand Post's policy of "*There are no exceptions from this rule on medical or other grounds*"...is clearly unreasonable. It adds to the provision of the Collective Agreement and if New Zealand Post is reviewing the policy it has an obligation to consult the union because the policy is linked to the provision negotiated in the Collective Agreement.

[31] The employment relationship problem between Ms Taylor and Mr Oakes has highlighted the application and operation of the uniform policy and highlighted the existence of the postie training and induction manual, which New Zealand Post says will be reviewed. The Union can reasonably expect to be consulted.

[32] Also, I hold that the outcome of the personal grievance part of the employment relationship problem is sufficient to highlight that there is an issue about how the uniform should be worn correctly and the use of t-shirts as underwear and applying the comfort criteria. In this regard any issue relating to such matters should involve consultation and inclusion of the Union because there is an underlying provision on uniforms in the Collective Agreement; and s 4 of the Act:

*Requires the parties to an employment agreement to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative ...*

And

*The duty of good faith in sub-section (1) applies to the following matters:..*

(b) *Any matter arising under or in relation to a Collective Agreement while the Agreement is in force:...*

[33] This is not a matter to be resolved by way of any penalties because I have not been satisfied that any action of New Zealand Post has been deliberate and wilful with the aim to breach the Collective Agreement and the Act.

[34] I now turn to remedies. Mr Oakes wants his leave restored for attending mediation. He has not claimed any other remedies. I do not intend to restore his leave taken to attend mediation. This is because I hold that his behaviour contributed to the situation giving rise to the personal grievance. His action of zipping up his

sweat shirt to hide his t-shirt was confrontational bearing in mind he had been asked to remove it. There had been prior instances and I conclude that he had an issue about his uniform without taking the matter up through proper channels. Instead he clearly was prepared to take Ms Taylor on over the issue. Ms Taylor was entitled to ensure that the uniform that is provided was being worn and any other clothing was not visible. Her request to remove the t-shirt should have been better qualified and sensitive to ensure there was no doubt that the removal was to be done privately and not necessarily in the work room. Given that there was an issue about the wearing of underwear Mr Oak's comment at the time that "*now it is not necessary*" [to remove it] was not helpful because of the ambiguity of his comment in regard to how his behaviour was interpreted by Ms Taylor.

[35] Also, there is no express provision entitling Mr Oakes to be paid to attend mediation under the Collective Agreement. The requirements of the Act can not be converted to provide a specific term requiring New Zealand Post to pay employees attending mediation. New Zealand Post officials would be attending to do their job. What Mr Oakes decided to do when he knew that New Zealand Post would not pay him attending mediation was his choice. In the alternative he could have taken leave without pay. He was not required or forced to take annual leave, but I can understand how he might think its unfair when he has not paid and New Zealand Post people were paid. However the statutory provisions do not confer a statutory right or enable a term to be implied as a necessary ingredient in the Collective Agreement for New Zealand Post to pay its employees raising employment relationship problems to attend mediation. It is a matter for negotiation.

### **Conclusion**

[36] The first written warning was unjustified. Mr Oakes has been unjustifiably disadvantaged in his employment. I award no remedies. His remedy to have his leave restored is denied.

[37] The Union's claims for breach and any penalties are dismissed.

[38] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority