

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 191/10
5302516

BETWEEN THE POSTAL WORKERS'
UNION OF AOTEAROA
Applicant

A N D NEW ZEALAND POST
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Phil Yarrell, Advocate for Applicant
Naomi Jones, Advocate for Respondent

Investigation Meeting: 16 July 2010 at Christchurch

Date of Determination: 8 October 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant union (the Union) seeks a determination about whether a particular instruction given to its member postal workers was a lawful one or not. The instruction in question was given on 9 April 2010 and was an instruction to members to perform a *cut-up*. A cut-up is a process where a postal worker is given additional work on top of their usual round. It is called a cut-up because it involves cutting up another postal worker's usual round because that other worker is unavailable for whatever reason. In addition to the primary concern about the performing of a cut-up, the Union also alleges a breach of good faith both in relation to the instruction and in respect of subsequent disciplinary action.

[2] The respondent (New Zealand Post) denies wrongdoing and contends that the collective employment agreement provided it with the contractual right to instruct postal workers to perform a cut-up and that the actions of New Zealand Post after the instruction was given were also the actions of a fair and reasonable employer.

[3] On 9 April 2010, at the St Asaph branch of New Zealand Post in central Christchurch, the supervisor in charge of mail delivery made her assessment about workload for the day and the staff available to her. The essence of the evidence heard by the Authority on the point was that New Zealand Post endeavoured to marry the workload to the available human resources so as to ensure that there was sufficient gainful work for postal delivery workers (posties) to complete within their allotted span of paid hours. Various mechanisms in the collective employment agreement were designed to facilitate this approach.

[4] When the relevant supervisor concludes that the workload is insufficient to meet the hours that posties are rostered on for, New Zealand Post will ask posties to perform a cut-up. As I previously noted, the effect of a cut-up is to distribute over the existing workforce extra workload that would otherwise be delivered by additional staff. New Zealand Post's aim is to ensure that all mail received in branch is delivered the day it is received, and that all posties rostered on for duty have sufficient work to occupy them for their rostered span of hours.

[5] The relevant provisions in the collective employment agreement are contained in section N: Specific Conditions – Delivery. It is appropriate to set out in full the relevant clauses 10, 11 and 12:

N. Specific Conditions – Delivery

10. *There is a direct relationship between the volume of mail for delivery, the number of delivery employees available in the branch on a given day, and the actual hours required to deliver that mail.*

11. *Rounds may be allocated or reallocated (including cross cuts and/or cut-ups) according to business need and best utilisation of staffing to meet delivery volumes.*

12. *The company may use cross-ups and/or cut-ups to ensure the most effective utilisation of rostered hours within the following guidelines:*

- *Cut-ups will principally be used when an employee is absent (whether planned or unplanned) and mail volumes are below rostered hours. Best endeavours will be made to ensure appropriate resources are available and used to meet daily requirements.*
- *Cross-cuts and cut-ups will not be used on an ongoing basis as an alternative to filling, on a timely basis, a vacant position or recasting delivery rounds.*

[6] While New Zealand Post's position is that, on 9 April 2010, the mail volumes were insufficient to justify bringing extra staff (which is specifically foreshadowed in the quotation from the collective employment agreement above), the position of the posties was that they were already at full capacity on that day and that New Zealand Post had other staff available who could have performed the extra work without the necessity for a cut-up. Accordingly, the posties refused to perform the cut-up.

[7] Subsequently, New Zealand Post sought to proceed against the posties who had refused to perform the cut-up, alleging that, in refusing a lawful and reasonable instruction, they had been guilty of misconduct.

Issues

[8] The Authority will need to consider:

- (a) Whether the instruction to perform a cut-up was lawful; and
- (b) Whether the disciplinary process that followed was itself lawful.

Was the cut-up request lawful?

[9] New Zealand Post's position is that its supervisor on 9 April 2010 made her usual assessment of the volume of mail at the beginning of the working day and concluded that there was less volume of mail for delivery than would be enough to occupy posties for their rostered shift. Essentially, the evidence before the Authority was that the New Zealand Post supervisors made these sorts of calls every day and decided these questions based on a visual examination of the mail for delivery.

[10] The supervisor who made the decision on the day in question, Ms Blazey, emphasised to me in her oral evidence that her decision was *volume-based*. By this, she meant that the decision she had made was a decision about the total amount of mail to be delivered on that day when set against the total number of posties available to deliver it. I was told that the assessment of mail volumes was a matter of experience. Ms Blazey also made clear her view that volumes for this day (and the week) were not particularly heavy. In particular, Ms Blazey denied the Union's evidence that this week was the busiest mail week of the year. 9 April 2010 was the Friday after Easter, Easter Monday having fallen this year on Monday, 5 April 2010.

[11] Mr Matthew Riordan, the General Manager of Postal Delivery for New Zealand Post, readily conceded in his oral evidence that the information on which New Zealand Post's supervisors made their delivery calls was never complete on any given day and that it was *never a perfect science*.

[12] The Union, both in its submissions to the Authority and in the evidence given on its behalf, sought to focus the Authority's attention on clause 12 of the collective employment agreement and in particular the second sentence under the first bullet point which reads as follows:

Best endeavours will be made to ensure appropriate resources are available and used to meet daily requirements.

[13] The posties' evidence was that, in respect of some of them anyway, their view was that there was already sufficient mail volume for them to deliver and that, as a consequence of that, they should not be asked to perform a cut-up.

[14] In an email dated 29 March 2010 from Mr Riordan to Graeme Clarke, the advocate for the Union, Mr Riordan notes that cut-ups should not be required where workloads are over rostered hours and there are staff available to deal with the extra work. That memorandum was referred to by the posties during the dispute with New Zealand Post on 9 April 2010. It is referred to in the brief of evidence of Blair Wilkie, for example, as in support of the position adopted by the posties in refusing to undertake the cut-up.

[15] However, the real difficulty is not a disagreement about the parameters in which a cut-up may be required, but a disagreement about volumes. New Zealand Post's evidence was that volumes were not exceptional and in particular would not be above the daily rostered hours for posties. Conversely, the posties say that some of their volumes were greater than their rostered hours. It is common ground that there was a *spare* postie available who could have been asked, at first instance, to perform the additional work and who was in fact asked to perform the additional work when the posties refused to do the cut-up.

[16] Much of the evidence from the Union centred on the posties' experience that, on previous occasions when a cut-up was requested, New Zealand Post provided *information and data to justify ...the cut-up*. One of the posties who gave evidence,

Richard Griffiths, made this very point in his brief of evidence and went on to indicate:

To my knowledge this [the provision of information by New Zealand Post] has occurred on all previous occasions when requested by posties.

[17] Another postie, Richard Matheson, told me:

The current practice when posties believe their volumes are above rostered workload is to advise the team leaders who have then counted the mail and then calculated the workload. Where the calculations showed volumes were above rostered hours they have not been required to do a cut-up. On this occasion, the acting branch manager [Ms Blazey] refused to follow that precedent and procedure.

[18] But Ms Blazey denies that evidence is an accurate statement of the position because, while she agrees it would be common practice for a complaint from an individual postie to have his or her mail recounted by a team leader, the position on 9 April 2010 was that Ms Blazey was told by the Union delegates that the whole branch was refusing to do the cut-up. That information (although erroneous) made it impossible for a recount by the various team leaders, to be performed. I accept Ms Blazey's evidence on this point; in effect, what she says is that the two situations were simply not analogous.

[19] Clearly the dispute between the parties centres on the volume of mail to be delivered on the day in question. I am satisfied on the evidence before the Authority that the measuring of mail volume is not an exact science. In Mr Riordan's brief of evidence, he helpfully sets out information about a number of different ways that New Zealand Post managers have endeavoured to measure volume of mail. However, he concedes that all of them are no more than a guide and that, in the main, experience of an individual manager or supervisor is the best guide. In fact, there is, according to Mr Riordan, no scientific basis for absolute certainty about mail volumes until after the event. Every day, New Zealand Post produces information which identifies mail volumes accurately for the previous day. But of course that information is of no real use in predicting future mail volumes.

[20] I am satisfied that the evidence discloses that there are a variety of informal processes for reviewing mail volumes where a cut-up is sought and that those informal arrangements work well where there are small numbers of posties involved. The difficulty in this case, I think, was the prospect that all of posties at the St Asaph

branch of New Zealand Post were refusing to do the cut-up and, as a consequence, the possibility of a count being done by the team leaders was simply not practicable. It would have taken too long and would have meant the commencement of mail deliveries would have been unreasonably delayed.

[21] I conclude that, because of the significant belief by New Zealand Post's management that the whole of the branch was refusing to do a cut-up, it became impossible for it to adopt any of its informal strategies for reassuring posties that a cut-up was, in fact, *within the rules*. All that the parties were left with then was the implementation of the relevant provisions in the collective employment agreement and because that relied on a belief about the actual volume of mail to be delivered, and about which there was dispute, the disagreement erupted.

[22] In considering the contractual provisions, the first point I wish to emphasise is that I am satisfied that clauses 10, 11 and 12 ought to be read together. Clause 10 sets out to describe the nature of the relationship between three variables, namely the volume of mail, the number of employees available to deliver that mail in the branch, and the hours available for that mail to be delivered.

[23] Next, clause 11 gives New Zealand Post the right to allocate and reallocate posties' rounds, including cut-ups *according to business need* There can be no doubt that this clause gives the employer the right to determine the structure of the posties' rounds and to request a cut-up (in principle) if the needs of the business and the nature of the three principles referred to in the previous clause, require it.

[24] Then, in clause 12, the basis on which New Zealand Post may ask for a cut-up is set out. First of all, the general principle is established that New Zealand Post may request a cut-up *to ensure the most effective utilisation of rostered hours*. Then there are two succeeding bullet points. The first of those identify that cut-ups will principally be used where an employee is absent and mail volumes are below rostered hours. These provisions are, of course, conjunctive, that is there must be an absence and there must be an existence of mail volumes below rostered hours. Then there is the sentence that the Union sets store by which reads as follows:

Best endeavours will be made to ensure appropriate resources are available and used to meet daily requirements.

[25] The Union says that this provision, the requirement that New Zealand Post will use its best endeavours, was breached by New Zealand Post's action on 9 April 2010. The final bullet point simply makes the point that cut-ups will not be used on an ongoing basis instead of the recruitment of appropriate additional staff.

[26] I am satisfied that this provision makes it clear that it is available to New Zealand Post to apply a cut-up so as to achieve ... *best utilisation of staffing to meet delivery volume* (clause 11) and so as to *ensure the most effective utilisation of rostered hours* ... (clause 12).

[27] Having established that the right to seek a cut-up exists and that that right may be exercised by New Zealand Post so as to best marry the available staff to the delivery volume within the rostered hours available, the only remaining question is when New Zealand Post may proceed to seek a cut-up. And the answer to that question appears clearly from clause 12 and the various interpretations of clause 12 in the documents produced by New Zealand Post such as Mr Riordan's memorandum of 29 March 2010 when mail volumes are below rostered hours.

[28] I am satisfied that it is available to New Zealand Post to lawfully ask posties to perform cut-ups where, for whatever reason, there is an absence of labour to make deliveries and mail volumes are below rostered hours. The critical issue, of course, remains the question of mail volumes and, as I have already noted, the ability to measure volumes is a vexed question.

[29] As I have already made clear, I accept that in the normal course of events, there are processes by which posties can satisfy themselves their mail volume is below their rostered hours (particularly by having their supervisor count their mail) but where, as in this case, it appeared to New Zealand Post that the whole branch was refusing the cut-up, such an arrangement is just not practicable.

[30] In the particular circumstances of this case, I must conclude that it is available to New Zealand Post to manage its business in reliance on principles set out in "Section N: Specific Conditions- Delivery" of the collective employment agreement which contemplates a broad discretion for New Zealand Post to change posties' rounds (including cut-ups) at Clause 11, and then does not mandate the circumstances in which cut-ups may be used at Clause 12.

[31] Indeed, it seems to me that a proper construction of clause 12 is to allow cut-ups when required for operational purposes, except that they can not be used “on an ongoing basis” as an alternative to filling a vacant position: second bullet point Clause 12. The limitations on cut-ups in the first bullet point to Clause 12 are not absolute. That provision makes clear that cut-ups will be used “principally” when an employee is absent and when mail volumes are below rostered hours. Usually it will be possible for the parties to agree there is someone absent and that mail volumes are below rostered hours even if the latter step requires a manual count by a supervisor. However, even where those steps can not be agreed for whatever reason, I hold that the use of the word “principally” makes it clear that New Zealand Post has a wider discretion to employ cut-ups provided they are not used on an ongoing basis.

[32] I am not satisfied the Union is right to rely on the second sentence of the first bullet point of Clause 12 to require New Zealand Post to “man up” to meet peak requirements. It will be remembered that the second sentence reads:

“Best endeavours will be made to ensure appropriate resources are available and used to meet daily requirements”

The Concise Oxford Dictionary defines “endeavour” as “try earnestly” or “strive” and “best” as amongst other things “ the most outstanding.....of a kind”. It follows that New Zealand Post has, by this sentence an obligation to try its hardest to ensure that resources equal requirement, on a daily basis. Given the infrequent number of cut-ups requested, the evidence suggests that New Zealand Post is reasonably successful. But the evidence also disclosed that mail volumes are notoriously variable and I am satisfied a requirement that New Zealand Post try its hardest to match resource to demand does not require the company to always confidently and accurately predict the correct outcome, nor to automatically deploy additional labour should that happen to be available.

[33] I am satisfied then that the instruction given by New Zealand Post on 9 April 2010 was a lawful instruction and that, in disobeying that instruction, staff were potentially putting themselves in breach of the misconduct provisions of the collective employment agreement.

Did the refusal constitute misconduct?

[34] I have already decided that the request by New Zealand Post to posties to perform a cut-up on 9 April 2010 at the St Asaph branch of its operations in Christchurch was a lawful and reasonable request for New Zealand Post to make and in consequence, as a matter of principle, the failure by posties to undertake that additional duty might constitute simple misconduct in terms of Part I of the collective employment agreement which provides, amongst other things, that employees must *accept directions from the company ...* .

[35] As New Zealand Post notes in its closing submissions, there was much evidence from the posties about an alleged *right* to refuse a cut-up and New Zealand Post goes on to suggest that the Union was unable to demonstrate the existence of such a right. That may be so, but New Zealand Post's own evidence clearly identifies procedures which it suggests itself where posties feel they are being asked to perform *cut-ups on a regular basis when they aren't warranted*, as for instance in Mr Riordan's memorandum to Graeme Clarke on 29 March 2010. So while it may be true that the Union has failed to demonstrate the so-called right to refuse a cut-up, New Zealand Post itself recognises that there is a process that may be used by staff to raise a legitimate concern.

[36] The point is that, in the present case, I am satisfied that New Zealand Post was able to request that staff perform a cut-up, that such a request was therefore a lawful and reasonable instruction and that a failure to accept that instruction (as happened in this case in respect of posties who refused to perform the duty), had the potential to create disciplinary consequences.

[37] The Union maintains that New Zealand Post was being heavy handed in its application of the disciplinary procedure. The Union says that this was clearly a case where there was dispute between the parties about the application of a particular provision in the collective employment agreement and that the process of disciplining members of the Union who refused to perform the cut-up was an inappropriate exercise of management prerogative. I agree.

[38] While there can be no criticism of the process used by New Zealand Post in implementing the disciplinary consequences to workers (clearly on the evidence, New Zealand Post followed the terms of the collective employment agreement strictly),

there can be criticism of the judgment in implementing the disciplinary approach at all. This was not a situation where staff were deliberately and mischievously challenging the employer's right to manage. It was a situation where they were genuinely (but erroneously) concerned about work volumes and they sought to raise that concern with the employer. There was criticism of the employer in terms of its communication strategies on the day and although that criticism is rejected by New Zealand Post as being inaccurate, it must be said that insofar as New Zealand Post was unable to carry its staff with it on that particular day, whatever its communication strategy, it plainly was unsuccessful. Of more moment from the Authority's perspective is the fact that the evidence discloses that both unions involved (members of the Engineering, Printing and Manufacturing Union also rejected the cut-up but are not involved in this present Authority application), acted on the advice of their national office whose view was that there was a legitimate basis on which the cut-up could be resisted, namely the failure of New Zealand Post to satisfy the staff that mail volumes were indeed below rostered hours.

[39] So by virtue of members having relied on the advice of their respective national offices, I hold that it ought to have been in New Zealand Post's contemplation that this was not a matter which appropriately should have attracted a disciplinary response. At the very least, it would have been evident to New Zealand Post that precisely because, for instance, Graeme Clarke of the Union was involved, that the Union was, in effect, treating the matter as some sort of *test case*.

[40] In those circumstances, it seems to the Authority axiomatic that a fair and reasonable employer would not seek to impose disciplinary sanctions on workers who, while undoubtedly in breach of their employment obligations, were in breach precisely because they had been encouraged to take that stance by their union to make a point about the interpretation of the collective employment agreement. The fact that the Authority has not found in favour of the Union in respect of the interpretation issue does not alter the position at all. Clearly, it was because the Union formed the view that it did, a view which the Authority considers was reasonable but erroneous, that members of the Union were encouraged to act in the way they did.

[41] Having made that point clear, I have to say that I accept New Zealand Post's submission that it is not available to the Authority to undo a disciplinary consequence that New Zealand Post has already visited on staff. I am satisfied that New Zealand

Post ought not to have taken the disciplinary steps that it did, but the fact that it has now done so is, in my opinion, not able to be undone by the Authority. However, New Zealand Post may think it appropriate, given the Authority's view, to cancel the warnings that were given to staff.

Determination

[42] I have concluded that it was available to New Zealand Post to propose a cut-up in terms of the relevant provisions of the collective employment agreement and that, in consequence, a request to posties to perform the cut-up was a lawful and reasonable instruction. It follows that I do not conclude that posties or their union can have any quarrel with the decision made by New Zealand Post which, in my opinion, is within the terms of the relevant provision in the collective employment agreement.

[43] Conversely, because it would have been self-evident to New Zealand Post that the issue on that particular day was controversial, New Zealand Post's decision to discipline members of the Union who failed to perform the cut-up was not, in my opinion, the decision of a fair and reasonable employer and although I agree with New Zealand Post that it is outside of the ambit of the Authority's jurisdiction to remove those warnings from Union members' files, I encourage New Zealand Post to take that step in conformity with the decision of the Authority.

[44] Finally, if the issue of attendance at mediation and the rights of the parties pursuant to the collective employment agreement are still in issue, there is no need for me to reconsider that matter as my colleague Member Anderson has dealt with the issue comprehensively in his decision in *Postal Workers' Union of Aotearoa & Doug Beham-Kitto applicants v. New Zealand Post Ltd* AA208/10 although I note that decision has gone on challenge.

Costs

[45] Costs are reserved.

James Crichton
Member of the Employment Relations Authority