IN THE EMPLOYMENT COURT
WELLINGTON

[2014] NZEmpC 209
WRC 18/14

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MURRAY MCLENNAN Plaintiff
AND	NEW ZEALAND POST LIMITED Defendant

Hearing: 10 October 2014
(Heard at Wellington)

Appearances: P Cranney, counsel for plaintiff
G Service, counsel for defendant

Judgment: 13 November 2014

JUDGMENT OF JUDGE B A CORKILL

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[1] Murray McLennan was at all material times a motorcycle postie, employed by New Zealand Post Limited (NZ Post) for 17 years.

[2] On 9 May 2013, NZ Post wrote to Mr McLennan alleging that he had breached safety requirements when riding his motorcycle on 29 April 2013. He had been observed by Toby Beaglehole, then NZ Post's General Manager, Delivery. Mr Beaglehole had followed Mr McLennan whilst riding his own motor-scooter.

[3] In the course of the subsequent investigation, it was alleged that Mr McLennan had been seen driving down Petone Esplanade:

(a) not wearing the correct uniform while out on delivery;

(b) with his mail unsecured;

(c) driving erratically, specifically weaving across the road, riding one-handed in blustery conditions, tailgating and stopping abruptly; and

(d) using his mobile phone while riding his motorcycle.

[4] The investigative process took until 13 May 2013, when Mr McLennan was informed of NZ Post's provisional findings. He was advised that no further action would be taken with regard to the issue of not wearing a standard uniform, but that all other allegations were established. He was advised that NZ Post was considering dismissing him. After hearing from him as to that possibility, on 14 May 2013 Mr McLennan was verbally advised that he would be dismissed with immediate effect; written confirmation of the dismissal was provided by letter of 27 May 2013.

[5] Mr McLennan raised a personal grievance seeking reinstatement, lost wages and compensation. NZ Post stated that the dismissal was justified because of his unsafe behaviour, and that a thorough investigation had been carried out.

[6] These issues were considered by the Employment Relations Authority (the Authority). In its determination of 13 May 2014 the Authority found that NZ Post's investigation was insufficient to support the conclusions reached regarding the allegation that Mr McLennan had been riding with his mail unsecured on his motorcycle; nor was the allegation that he was riding one-handed appropriately established.[1]

[7] However, the Authority found that Mr McLennan had used his cell phone when stopped at a set of traffic lights. This constituted an offence under r 7.3A of the Land Transport (Road User) Rule 2004 (the Land Transport Rule). The Authority considered the use of a cell phone while driving warranted disciplinary action, but did not justify dismissal.[2] The personal grievance was accordingly established.

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1 *McLennan v New Zealand Post Limited* [2014] NZERA Wellington 46 [Authority determination] at [52].

2 At [60].

[8] When considering remedies, the Authority assessed Mr McLennan's contribution to the situation that led to his personal grievance at 30 per cent.[3] Reinstatement was declined. Lost wages were fixed in the sum of $7,300, less 30 per cent, being $5,110 less PAYE; compensation was assessed at $7,000, less 30 per cent, being $4,900.[4]

[9] Mr McLennan subsequently instituted a non-de novo challenge in respect of remedies only. NZ Post defends the challenge. Counsel for Mr McLennan submitted that the Authority should not have concluded that the facts as found warranted a reduction in remedies and a denial of reinstatement. The Court was informed in a joint memorandum of counsel dated 29 July 2014 that the Authority's findings of fact were agreed and not challenged by either party. Initially it was proposed that the parties would provide submissions only at the hearing with reference to the Authority's determination. Following discussion with counsel, however, I considered that in order to fully appreciate the Authority's determination, it was necessary for the documentary evidence and witness statements which the Authority Member had before her to be produced. These documents were provided and admitted by consent for the purposes of providing context in respect of the Authority's findings.

The facts

[10] It is necessary to have a full appreciation of all the facts considered by the Authority at the investigation meeting, because only then can an accurate assessment of remedies be undertaken.

[11] The first factual issue considered by the Authority related to Mr McLennan's suspension. It was held that Mr McLennan was verbally advised by his direct manager on 30 April 2013 that he was required to meet Trent Butchart, the Wellington Regional Delivery Manager for NZ Post, that morning when some allegations would be put to him. Mr McLennan raised the fact that he had no representative with him; Mr Butchart responded that he would not need one.[5]

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[3] At [63].
[4] At [68].
[5] At [7].

[12] At this meeting he was suspended on pay and informed that a disciplinary investigation would take place. The Authority found that NZ Post was unwise to ignore Mr McLennan's concern as to a lack of representation at the suspension meeting.[6]

[13] The Authority went on to find that it was not until 9 May 2013 that Mr McLennan was informed of the specifics of the allegations which were contained in a letter given to him that day.[7] The letter set out the breaches to which reference has already been made. Enclosed was a copy of an email from Mr Beaglehole. In the email, Mr Beaglehole stated:

> Basically, I was horrified at this Posties behaviour, astonished that he was working for us, and deeply relieved when he finally stopped, albeit temporarily.
> …
> Based on my observations there are serious safety and behavioural questions to be addressed.

[14] Mr McLennan was asked to attend an investigation meeting the following day, and was strongly encouraged to bring a support person. The Authority concluded that this gave Mr McLennan a very short timeframe in which to organise a support person, consider Mr Beaglehole's email, and respond to the allegations. He was able to contact a representative from the Postal Workers Union of Aotearoa, Mr David Thomson, and have him attend the meeting; however, the short timeframe provided may have accounted for Mr McLennan omitting to inform Mr Thomson of the email from Mr Beaglehole. Mr Thomson told the Authority that had he known of the email, he would have wanted to read it before the meeting with NZ Post and would have conducted some inquiries himself.[8]

[15] The meeting was held on 10 May 2013. Mr McLennan was supported by Mr Thomson. Mr Butchart conducted the meeting. Also in attendance was Mr McLennan's direct manager, Nigel Burton, and Lisa Whooley from Human Resources (HR).

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[6] At [12].
[7] At [13].
[8] At [18].

[16] The Authority recorded Mr McLennan's responses to the four allegations, as follows:

(a) With regard to the assertion that he was driving while not wearing the correct uniform, he had previously worn that item without comment from management. It had been supplied to him by the company.[9]

(b) Regarding the allegation of riding with insecure mail, Mr McLennan said the flaps of his panniers had come loose in very blustery weather conditions. He had secured the mail before leaving the branch by placing two rubber bands around each bundle and securing the pannier flaps.[10]

(c) With regard to the various allegations as to the manner in which he had been riding:

- When riding he was weaving because the heavy wind caused his motorcycle to be blown about.[11]

- He had taken one hand from the handle bars while riding, because grit from the beach blew into one eye which required immediate action. Further, after the incident with the grit in his eye, he became aware of someone riding close to him on his blind side which caused him to take evasive action.[12]

- He also took evasive action when a car in front of him made an illegal turn.[13]

(d) In respect of the allegation of driving whilst using a mobile phone, Mr McLennan admitted he had taken his mobile phone out of his pocket when he had stopped at a red light. He had done this because he had been aware of his phone beeping while he was riding and he wished to check it. When the lights changed to green, the mobile

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9 At [21].
10 At [22].
11 At [23].
12 At [24].
13 At [23].

phone was still in his hand and he indicated his intention to go to the side of the road to stop safely to check his phone. He said he had been unaware that the law did not permit a driver of a stationary vehicle to use a cell phone.[14]

[17] Following the meeting, further investigations were carried out by Mr Butchart. These were followed by another meeting at which Mr McLennan was informed of the employer's provisional findings. Apart from his explanation regarding the wearing of a non-standard uniform, NZ Post did not accept any of his other explanations. Mr Butchart said it was accordingly necessary to consider dismissal.[15] After receiving submissions from Mr McLennan and his representative, on 14 May 2013 he was verbally informed that he would be dismissed with immediate effect; this was subsequently confirmed in a letter provided to Mr McLennan dated 27 May 2013.[16]

[18] The Authority, when considering this chronology, reached the following conclusions as to justification:

(a) Mr Butchart had relied heavily on information from Mr Beaglehole about his observations of Mr McLennan's conduct.

(b) Mr Beaglehole, as complainant, had acknowledged he had expressed himself in forceful language in his email report of the incident, and further acknowledged this could have put pressure on Mr Butchart, who reported to him.[17]

(c) It was likely that Mr Butchart had been influenced by Mr Beaglehole's observations in his emailed report. He appeared to accept Mr Beaglehole's comments of Mr McLennan's explanations without due scrutiny.[18]

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[14] At [29].
[15] At [33]-[34].
[16] At [35].
[17] At [39].
[18] At [54].

(d) This was unfair to Mr McLennan whose explanations were not sufficiently investigated or considered. Mr Beaglehole acknowledged he was not a motorcycle rider. It would have been helpful to Mr Butchart's investigation if he had checked other motorcycle posties' experiences to test the reasonableness of Mr McLennan's explanations.[19]

(e) The Authority was not satisfied that NZ Post's investigation was sufficient to justify all the conclusions it reached regarding Mr McLennan's conduct. A fair and reasonable employer would have carried out a more thorough investigation into the explanations regarding the flapping panniers and his apparently erratic riding in the weather conditions of the day.[20]

(f) Given the exposed nature of the Petone Esplanade, a simple inspection of the condition of the Velcro could not justify the finding that the pannier flaps would not have blown open. Mr Butchart should not have relied solely on the inspection. An inspection combined with evidence from other motorcycle posties of what actually happens with pannier fastenings in a Wellington southerly would have been more reliable.[21]

(g) Mr Butchart's basis for rejecting Mr McLennan's explanation of driving one-handed in order to remove grit from his eye was also unreasonable. Mr Butchart had formed the provisional view that if Mr McLennan did have grit in his eye he should have pulled over to address it rather than ride one-handed in blustery conditions. The Authority found that Mr Butchart's reliance on the ideal response and his discounting of an instinctive reaction in that situation was unreasonable.[22]

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19 At [44] and [54].
20 At [48].
21 At [49].
22 At [52].

(h) A related issue arose from Mr Butchart's view that since motorcycle posties wore gloves and a helmet with a visor, it seemed implausible that Mr McLennan would have been riding one-handed in order to remove grit from his eye. He acknowledged to the Authority, however, that this concern had not been put to Mr McLennan. Mr McLennan said that if he had, he would have responded that he was wearing fingerless gloves supplied by the company and that he pushed the visor up a little with his hand as he cleared his eye.[23]

[19] The Authority found in short that Mr Butchart appeared to accept Mr Beaglehole's comments without due scrutiny, which was unfair to Mr McLennan whose explanations were not sufficiently investigated or considered.[24]

[20] The Authority Member then turned to the cell phone allegation. She said:

> [55] Mr McLennan admits checking his cell phone when stopped at traffic lights, and I do not question that aspect of Mr Butchart's investigation. Mr McLennan submits that the instruction in the NZ Post policy specifically relating to cell phone use prohibits using a cell phone to answer or make a call or text. He says it does not cover his situation of checking a cell phone at traffic lights and therefore he did not breach the policy.
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> [56] I do not accept that submission. While it may be desirable for the wording explicitly to cover any use of a cell phone, I note that the policy requires employees to "*obey all road rules*". It is an offence in New Zealand to use a mobile phone while operating a motor vehicle, including reading text messages, and the onus was on Mr McLennan to be aware of this rule.
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> (footnote omitted)

[21] The Authority went on to consider whether the decision to dismiss Mr McLennan was justified by his use of his cell phone while riding. In considering that issue, the Authority found:

(a) Mr Butchart had acknowledged that no health and safety concerns had previously been raised with Mr McLennan.

(b) Mr McLennan was the subject of a current warning. It was held that as a general rule it is problematic for an employer to rely on unrelated

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[23] At [51].
[24] At [53]-[54].

warnings, but the 2011-2013 collective agreement between NZ Post and the Postal Workers' Union of Aotearoa provided for this.[25]

(c) Another employee, Gerard Dobson, gave evidence of motorcycle refresher training received after Mr McLennan's dismissal, where there was a comment on the use of cell phones. Having attended a number of previous refresher courses, this was the first time that such a comment had been made. This evidence affected the reliance Mr Butchart was entitled to place on Mr McLennan's attendance at a previous motorcycle refresher course.[26]

(d) The collective employment agreement referred to the fact that a "failure to observe safety rules" is an example of how minor misconduct could in some circumstances amount to serious misconduct. The Authority held that the use of a cell phone while driving, including while stationary at traffic lights, is a traffic offence at the lower end of the scale, attracting a fine of $80 and 20 demerit points. The Authority determined that Mr McLennan's admission of such use warranted disciplinary action and raised valid concerns over the safety of his riding but that it did not justify his dismissal.[27]

[22] The Authority accordingly found that dismissing Mr McLennan without sufficient investigation into the allegations against him was not an action that a fair and reasonable employer could have taken in all the circumstances at the time.[28]

[23] The Authority Member then turned to consider remedies. On this topic the Authority stated:

> [63] As noted above, Mr McLennan's conduct on 29 April 2013 warranted some disciplinary action. I assess his contribution to the situation that led to his personal grievance at 30% and his remedies will be reduced accordingly.
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> [64] In view of the level of contribution I have assessed as appropriate, I do not consider reinstatement to be practicable. I have also taken into account the emphasis NZ Post appropriately places on safety, and the nature of Mr

[25] At [58].
[26] At [59].
[27] At [60].
[28] At [61].

> McLennan's conduct on 29 April. His use of a cell phone at traffic lights breached traffic rules and raised concerns over safety.

[24] Finally, the Authority determined what financial remedies should apply,[29] as already mentioned.

Submissions for the plaintiff

[25] In the plaintiff's written submissions:

(a) Reference was made to s 124 of the Employment Relations Act 2000 (the Act), which deals with the reduction of remedies if there is contributing behaviour by an employee. It was submitted that there are two mandatory steps which must be decided when determining the nature and extent of the remedies to be provided:

- First there is an obligation to consider the extent to which the actions of the employee contributed "towards" the "situation" that gave rise to the personal grievance.
- Secondly if those actions so "require" it is necessary to reduce the remedies that would otherwise be awarded.

(b) It was submitted that the situation which gave rise to the claim of unjustified dismissal in the present instance was its consideration of allegations that were not investigated fairly. Those were clearly identified by the Authority in its determination,[30] as set out above.

(c) The Authority had stated the cell phone incident warranted some disciplinary action; however, the offence was minor. The breach was at the "lower end of the scale". It was less serious than the close following of Mr McLennan on his blind side by Mr Beaglehole. It was a low end example of a low end offence. Mr McLennan did not know it was unlawful to look at a cell phone screen when stopped

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[29] At [65]-[68].
[30] At [36]-[54].

with traffic. The provision of a letter of expectation was all that needed to be considered.

(d) The Authority failed to properly consider the phrase "if those actions so require" in s 124. The phrase must mean something like "require in the overall context of the matter". A minor offence of the present kind did not require a significant reduction in remedies.

(e) Turning to reinstatement, the only issue was future practicability and reasonableness. A relatively minor offence does not raise any serious or substantial issues as to either practicability or reasonableness. There was no disqualifying evidence of unreasonableness or impracticability.

(f) In oral submissions, counsel submitted that the cell phone incident was in reality a health and safety issue; it should have been dealt with as such and not bound up in the more serious allegations which were appropriate for a disciplinary process.

(g) All Mr McLennan had done was look at his phone when he should not have done so. That was simply a misdemeanour; a contribution finding was not required.

(h) The Authority did not consider future issues such as the risk of such conduct occurring again. There was no evidence of a poor attitude on the part of Mr McLennan.

(i) The consideration by the Authority of the remedy of reinstatement was expressed only briefly. There were three factors. The first (level of contribution) and the third (breach of a traffic rule raising concerns over safety) were in essence the same. The second which related to the emphasis which NZ Post appropriately places on safety and the nature of Mr McLennan's conduct, was a matter that should have been dealt with constructively.

(j) No reference was made by the Authority to NZ Post's Training Manual where the only guidance given on this issue was:

- Operate the motorcycle safely and obey all road rules and observe speed limits.
- Stop in a safe place *before* using a cell phone to answer or make a call, or text.

There was no reference in the Training Manual to any other use of a cell phone, such as checking it while stationary.

Submissions for the defendant

[26] In the defendant's submissions it was argued:

(a) The Authority did not err in its application of the legal principles which apply to contribution and reinstatement under ss 124-125 of the Act. Given the factual findings made by the Authority, the conclusions reached were open to it.

(b) With regard to the contribution finding, the Authority's reference to Mr McLennan's conduct on 29 April 2013 warranting disciplinary action included the following uncontested findings:

- Mr McLennan checked his cell phone when stationary at the traffic lights; this was admitted by Mr McLennan.
- NZ Post's Training Manual included a policy which required employees to "obey all road rules".
- It is an offence under the Land Transport Rule to use a mobile phone while operating a motor vehicle, including reading text messages.
- A prior warning for disorderly behaviour could be taken into account as part of the decision to dismiss.

- Mr McLennan's conduct warranted disciplinary action.
- Mr McLennan's conduct raised valid safety concerns.

(c) Reference was made to relevant legal authorities on the topic of contribution. This included the necessity of:

- considering whether the employee has a valid personal grievance;
- assessing to what extent there is a causal link between the employee's actions and the situation giving rise to the dismissal;
- determining whether these actions are sufficiently capable or blameworthy to reduce any award that might otherwise be made;[31] and
- determining whether these actions are "blameworthy" as a broad inquiry.

(d) The majority of the Court of Appeal in *Salt v Fell* held that s 124 operates as a "contributory negligence" provision.[32]

(e) Examples were given of blameworthy conduct that had required the reduction of remedies, including for breach of traffic regulations[33] and a lack of concern for safety.[34]

(f) Mr McLennan's actions were causative of the situation that gave rise to his dismissal. Specifically, there were the following findings which were not challenged:

- Mr McLennan was driving one-handed during blustery conditions;

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[31] *Panovski v Marine Trimmers & All Awnings 2004 Ltd* (2008) 5 NZELR 739 (EmpC) at [58]-[62]; *Goodfellow v Building Connexion Ltd* [2010] NZEmpC 82 at [49].

[32] *Salt v Fell* [2008] NZCA 128, [2008] 3 NZLR 193 at [79] per Chambers and Robertson JJ.

[33] *Philpot v Green Waste Recycling Ltd* [2013] NZERA Auckland 577 at [34], where 25 per cent of a traffic infringement notice fee was factored into a contribution finding.

[34] *Villegas v Visypak (NZ) Ltd* [2010] NZEmpC 154, (2010) 8 NZLER 362 at [59].

- He checked his phone contrary to the Land Transport Rule;
- This was a breach of NZ Post policy; and
- This conduct warranted disciplinary action.

(f) But for this conduct, NZ Post would not have commenced its investigation. It led to the decision to dismiss. These actions were clearly causative of the outcome.

(g) Mr McLennan's action in using his cell phone while driving was not lawful, and not reasonable. This amounted to an infringement offence for which a person could be fined $80 and liable to 20 demerit points. While Mr McLennan stated that he did not know that his actions were unlawful, he accepted the Authority's finding to the effect that the onus was on him to be aware of the rule.

(h) It was also a breach of the NZ Post Training Manual not to obey all road rules.

(i) The Authority's determination to reduce remedies by 30 per cent is consistent with other decisions of the Court.

(j) Turning to reinstatement, the assessment under s 125 of the Act requires a balancing of interests to determine whether reinstatement is feasible or can be carried out successfully.[35] As was recognised by the full Court in *Angus v Ports of Auckland Ltd* reasonableness requires the Court to undertake a broad inquiry into the equity of the parties' cases.[36]

(k) Section 124 does not limit the effect of a contribution finding to financial remedies. The Court of Appeal in *White v Auckland District Health Board* held that the statutory scheme of the Act confines the

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[35] *Lewis v Howick College Board of Trustees* [2010] NZCA 320, (2010) 7 NZELR 539 at [2], citing *New Zealand Education Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 461.

[36] *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [65]-[67].

issue of contributory conduct to remedies under s 123;[37] but reinstatement is a remedy provided for under s 123(1)(a).

(l) Although decided when reinstatement was the primary remedy, Judge Travis held in *Villegas* that his findings as to contributory conduct in relation to financial remedies also led him to the conclusion that contribution should impact on the nature and extent of the remedy of reinstatement, which was declined. Judge Travis in that case also considered that the Court should be slow to reach a different conclusion to that of the employer on safety issues.[38]

(m) The effect of the Court reinstating Mr McLennan as a motorcycle postie at NZ Post would be to insert him into a safety-conscious environment, recognising that he:

- breached the Land Transport Rule;
- accepted he was unfamiliar with those rules;
- breached NZ Post's Training Manual;
- accepted the finding his actions warranted disciplinary action by NZ Post; and
- accepted that his actions constituted a valid safety concern for NZ Post.

(o) In her oral submissions, counsel for NZ Post submitted:

- That the defendant takes health and safety matters seriously, as is demonstrated by the details contained in the NZ Post Training Manual;
- Employees work away from oversight, so the defendant needs to be confident that its staff are acting safely;

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[37] *White v Auckland District Health Board* [2008] NZCA 451, [2008] ERNZ 635 at [40].
[38] *Villegas*, above n 34, at [66].

- Staff should have been able to understand, from the express reference to the use of cell phones in the manual, that a cell phone should not be used whilst riding. It is of concern that he was apparently unaware of the obligation to do so at the time;

- Checking a cell phone on a blustery day was a very serious issue;

- A 30 per cent deduction for contribution is a not uncommon finding;

- The real question in the case was whether there should have been both a 30 per cent reduction for contributory conduct, as well as a decision not to order reinstatement. Because reinstatement would have potential health and safety implications, if the Court was to determine the outcome as too harsh, full financial remedies should be given, and reinstatement should be declined.

The relevant traffic rule

[27] Rule 7.3A of the Land Transport (Road User) Rule 2004 states:

> **7.3A Ban on use of mobile phones while driving**
> (1) A driver must not, while driving a vehicle,—
> (a) use a mobile phone to make, receive, or terminate a telephone call; or
> (b) use a mobile phone to create, send, or read a text message; or
> (c) use a mobile phone to create, send, or read an email; or
> (d) use a mobile phone to create, send, or view a video message; or
> (e) use a mobile phone to communicate in a way similar to a way described in any of paragraphs (b) to (d); or
> (f) use a mobile phone in a way other than a way described in any of paragraphs (a) to (e).

[28] The Land Transport (Offences and Penalties) Regulations 1999 provide that the maximum penalty in respect of an infringement of r 7.3A is $80 and 20 demerit points.

Discussion

[29] At the hearing there was discussion with counsel as to precisely what the Authority found as to the use of the mobile phone by Mr McLennan when he stopped at traffic lights. Mr McLennan said in written statements he provided at the investigation meeting that he had "heard a text message or phone call coming through while he was riding", and that the same ring tone applied to both. He said that because he was stopped at the lights he took the phone out from his breast pocket to see who had been trying to contact him. On this evidence the Authority Member found that he was "checking his cell phone".[39] That is, he was not using it either to make, receive or terminate a telephone call, or to create, send or read a text message.

[30] Counsel for Mr McLennan correctly accepted that he was nonetheless "on a mobile phone" (to use the language of r 7.3A(1)(f)), other than in a way described in any of the preceding paragraphs; in short, he was in breach of the rule.

[31] The Authority also found that a breach of the rule is a traffic offence at the lower end of the scale attracting a fine of $80 and 20 demerit points. Although the Authority found that the issue warranted disciplinary action and raised valid concerns over the safety of Mr McLennan's riding and did not justify dismissal, there was no finding as to how serious the breach of r 7.3A was.

[32] There are four contextual matters which require consideration. The first relates to the expectations which are placed on a motorcycle postie by NZ Post in the company policy contained in its Training Manual. As submitted by counsel, there is an express requirement to "stop in a safe place before using a cell phone to answer or make a call, or text"; and otherwise to obey all Road Rules. That statement reflects the obligations contained in r 7.3A(1)(a) and (b) of the Land Transport Rule. The statement in the Manual does not reflect the other sub-rules of r 7.3A(1). In particular there is no statement that checking a mobile as to the receipt of a call or text is prohibited. That is not to excuse an employee who should be aware of the

[39] Authority determination, above n 1, at [55].

rule. But the fact that the Training Manual did not refer to this obligation is a factor which must be considered when assessing remedies.

[33] The Authority considered evidence that Mr McLennan had recently attended motorcycle refresher training. However, it also accepted evidence of another motorcycle postie that at a team briefing on safe riding practices soon after Mr McLennan's dismissal, a comment was made for the first time as to the use of cell phones. The extent to which NZ Post had addressed this issue with its motorcycle posties when training them was a further contextual matter relevant to the assessment of remedies.

[34] The next contextual matter relates to the evidence given by Mr Thomson. As already mentioned he attended the investigation meeting held on 10 May 2013 to support Mr McLennan. He was aware of the stance taken by NZ Post in disciplinary interviews. He referred to a comparatively recent instance of alleged unsafe conduct of a postie who had been seen riding the wrong way down a lane, against traffic. He said that no warning was issued; rather NZ Post issued a letter of expectation. His evidence was that this was the normal response by NZ Post to this kind of concern. Although this evidence related to a different offence, it is in my view a comparable one and was relevant when considering parity of treatment.

[35] The final contextual issue relates to Mr McLennan's previous history. The Authority referred to evidence from Mr Dobson who had been employed by NZ Post for 10 years as a motorcycle postie, and 40 years as a motorcyclist. He had been trained for the motorcycle postie role by Mr McLennan who left him with "a lasting impression that safety was paramount".[40] Against that was evidence of a first written warning issued in February 2013 for behaving in a disorderly manner and using inappropriate language. The Authority found that the warning was still in effect and could be taken into consideration when determining the outcome of the current process. Specifically, the Authority referred to the fact that the collective agreement provided that an employee could be dismissed for misconduct after a written warning and a final warning had been issued and that "each warning may be for

[40] At [45].

unrelated matters of misconduct".[41] That statement clarifies that a *final* warning does not have to be of the same kind as an *initial* warning. The warning in this instance was of little relevance when assessing the mobile phone breach.

Contribution

[36] Chief Judge Colgan discussed the correct approach to an assessment of contribution under s 124 in *Harris v The Warehouse Ltd.*[42] He said:

> [176] The "extent" of the remedies to be provided for in the personal grievance that the Court must consider in every case addresses the amount or duration of any of those particular remedies. So, in practice, the "extent of the remedies" may include how much of the remuneration lost as a result of the grievance will be compensated for under s 123(1)(b), how much compensation under s 123(1)(c) will be awarded, and the like.
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> [177] The Authority or the Court must consider "the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance". Working backwards from the end of that phrase, "the personal grievance" is the Authority's or Court's finding of an unjustified dismissal from, or unjustified disadvantage in, employment, and the other varieties of statutory grievance.
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> [178] Next, "the situation that gave rise to" that personal grievance is the series of relevant events which caused the employee to have been dismissed or disadvantaged unjustifiably. Longstanding case law establishes that there must be more than simple cause and effect shown. The employee's actions must be culpable or blameworthy or wrongful actions which must have contributed, for example, to a complaint of serious misconduct which, following investigation, brought about the dismissal of the employee.
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> [179] Finally, in this process of consideration of s 124(a), the Authority or the Court is required to "consider the extent" to which those employee actions contributed to the situation that gave rise to the grievance. That connotes a proportionate analysis reflecting the commonsense experience that, on many occasions, an employee will have been at fault but the circumstances did not justify that employee's dismissal or disadvantage. There are, also, many cases in which the Court will find that there is no element of (culpable) contributory conduct by an employee, in which case neither the nature nor the extent of the remedies to be provided will need to be reduced.
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> [180] Next, the Authority and the Court are left with a broad discretion even if they find that the actions of the employee contributed towards the situation that gave rise to the grievance. That is because of the opening words of s 124(b) ("if those actions so require"). In each case, therefore, even if there were blameworthy or culpable actions or omissions of the

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[41] At [58].

[42] *Harris v The Warehouse Ltd* [2014] NZEmpC 188 (footnotes omitted).

> employee that contributed to the situation that gave rise to the grievance, it will still be necessary for the Court or the Authority to consider whether those will "require" a reduction of the remedies.
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> [181] On the next point, Mr Cranney is correct about how s 124 must be applied. The Court or the Authority will need to consider and determine what remedies would have been awarded but for the existence of culpable contributory conduct which requires their reduction. That is because of the words used at the end of s 124(b), "… the remedies that would otherwise have been awarded …". Mr Cranney is correct that the Court or the Authority is obliged to follow the statute and to assess remedies absent any consideration of contributory fault, before the reduction exercise is applied under s 124.

[37] This dicta makes it clear that the Court or Authority must consider and determine what remedies would have been awarded but for the existence of culpable contributory conduct requiring a reduction.

[38] In the present case, there is no challenge as to the quantum of the financial remedies. What is at issue is the extent to which the actions of Mr McLennan contributed towards the situation that gave rise to the personal grievance.

[39] Apart from the finding that Mr McLennan's conduct "warranted some disciplinary action", the Authority did not express any reasons for the conclusion that 30 per cent was the appropriate assessment of Mr McLennan's contribution to the situation that led to his personal grievance.

[40] The assessment in the present case required an evaluative assessment of the extent to which Mr McLennan's actions contributed to the situation which gave rise to the personal grievance. NZ Post brought four allegations against Mr McLennan. The allegation of driving down Petone Esplanade not wearing the correct uniform while out on a delivery was not proceeded with; the allegation that mail was unsecured could not be upheld because Mr Butchard's investigation was insufficient; and the same conclusion applied to the allegation that Mr McLennan had been driving erratically, weaving across the road, riding one-handed in blustery conditions, tailgating and stopping abruptly. These were the most serious allegations and they were not established. It was these matters that contributed significantly to the situation that led to Mr McLennan's grievance.

[41] As observed earlier, no assessment was made as to the seriousness of Mr McLennan's infringement of the relevant Land Transport Rule. Mr McLennan's actions were potentially risky in that his attention was diverted from controlling his motorcycle. However I consider these actions amounted to a less serious example of an infringement of r 7.3A(1). It was a minor offence.

[42] To that extent only did Mr McLennan's actions contribute to the situation that gave rise to the grievance.

[43] The final stage is to consider whether Mr McLennan's culpable actions require a reduction of remedies. It is this step which is at the heart of the challenge, because contributory conduct was found to affect both the financial remedies and reinstatement.

[44] In reviewing this aspect of the matter the following factors are relevant:

a) Mr McLennan was unaware of the application of r 7.3A in the situation which occurred. That is a matter of concern, since Mr McLennan was employed in a role which involved the regular use of a road vehicle, and company policy required him to have knowledge of and comply with road rules.

b) Against that is the fact that there had been no prior training as to the Rule; and NZ Post's Training Manual did not contain a complete description of the Rule. NZ Post as employer had an obligation to ensure the safety of employees while at work and to take all practical steps to do so under s 6 of the Health & Safety Employment Act 1992. For present purposes that included training and informing its motorcyclists of all aspects of r 7.3A(1).

c) The existence of a previous and unrelated warning did not, when considering the possibility of a contributory finding of this road rule infringement, require a reduction.

d) Relevant to the contribution assessment was the uncontested evidence that in similar situations raising potential safety issues, a letter of expectation had been regarded as appropriate.

e) Also relevant was the uncontested evidence that Mr McLennan was regarded as having a reasonable safety record spanning the 17 years of his employment with NZ Post.

[45] A proportionate assessment of all contributory factors, in my view, is to conclude that a 30 per cent reduction was indeed appropriate in respect of the financial remedies.

Reinstatement

[46] I turn now to the issue of reinstatement. It is on this aspect of the matter that I respectfully disagree with the Authority. It appears that contribution was the primary ground for the Authority's conclusion that reinstatement was not practicable.[43] The Authority then said it was "also taking into account the nature of Mr McLennan's conduct on 29 April", which was in effect a repetition of the primary conclusion as to contribution.

[47] In the case of *Villegas*, which is relied on by counsel for NZ Post, Judge Travis stated:[44]

> My findings as to contributory conduct also led me to the conclusion that these too should impact on the nature and extent of the remedy of reinstatement. At the heart of this matter were safety issues and the Court should be slow in reaching a different conclusion to that of the employer on safety issues. …

[48] The situation in *Villegas* related to negligent use of a fork-hoist. Several breaches were established. The employer considered that when these were considered cumulatively they demonstrated a lack of concern for safety and led to its decision to dismiss.

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[43] Authority determination, above n 1, at [64].
[44] *Villegas*, above n 34, at [66], citing *Air New Zealand Ltd v Samu* [1994] 1 ERNZ 93 (EmpC) at 95.

[49] As I have already explained, the employer in the present case proceeded on the basis that there were safety issues as a consequence of findings it made on three allegations. But two of those were set aside by the Authority. The employer did not make a decision on the basis of one allegation only; it was the Authority which did so. I do not consider the principle which is referred to in *Villegas* is applicable in the present case.

[50] There is no doubt that NZ Post strives to ensure that it conducts a safety-conscious environment. Against that appropriate objective however I must balance:

a) the fact that the NZ Post policy is not as complete on the topic of mobile phone use as it could be;

b) that training on this particular point had not been conducted prior to this incident;

c) the evidence as to how safety issues of this kind have been dealt with in other instances, and

d) Mr McLennan's positive safety record over a long period of time, and the absence of any evidence which would suggest that Mr McLennan is likely to compromise safety standards in the future.

[51] Mr McLennan's breach of the Land Transport Rule is adequately dealt with by a contribution finding with regard to financial remedies only. A contributory finding is not required with regard to reinstatement. I propose to adopt the course adopted in other decisions such as *De Bruin v Canterbury District Health Board*[45] and *X v Auckland District Health Board*[46] where the existence of contributory conduct did not preclude the making of an order of reinstatement. The findings of contribution in each of those instances affected the financial remedies only.

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[45] *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110, [2012] ERNZ 431 at [85].
[46] *X v Auckland District Health Board* [2007] ERNZ 66 (EmpC) at [189].

[52] There is no evidence that reinstatement would not be practicable; and having regard to the matters described in the previous two paragraphs I find it would be reasonable in all the circumstances to order reinstatement.

Conclusion

[53] I agree with the Authority's conclusion as to the extent of Mr McLennan's contribution in respect of financial remedies.

[54] I allow the challenge with regard to the Authority's conclusion as to reinstatement. Mr McLennan is to be reinstated to his former position 14 days after the date of this decision.

[55] I reserve leave to both parties to apply within 14 days of this decision if there are any necessary issues in connection with the implementing of the order of reinstatement.

[56] Mr McLennan's challenge has succeeded. If the parties are unable to reach agreement on the matter of costs and expenses, Mr McLennan may apply for a costs order supported by any necessary evidence 21 days after the date of this decision; NZ Post may respond with any necessary evidence 21 days thereafter.

B A Corkill
Judge

Judgment signed at 3.30 pm on 13 November 2014