IN THE EMPLOYMENT COURT
AUCKLAND

AC 46/07
ARC 79/06

IN THE MATTER OF	de novo challenge to determination
BETWEEN	PIXIE ERUERA-MORRISON Plaintiff
AND	NEW ZEALAND POST Defendant

Hearing: 13 February 2007 (Heard at Hamilton)
Submissions on behalf of the defendant filed 17 April 2007
Submissions on behalf of the plaintiff in reply filed 11 May 2007
Submissions on behalf of the defendant in reply to the plaintiff's filed 14 June 2007

Appearances: Paul Blair, advocate for plaintiff
P A Swarbrick, counsel for defendant

Judgment: 31 July 2007

JUDGMENT OF JUDGE B S TRAVIS

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[1] The plaintiff has challenged a determination of the Employment Relations Authority which found that her dismissal was justified. The plaintiff was dismissed on 24 February 2006 after 30 years as a postal worker ("postie"). The defendant found that she had dishonestly taken a cell phone on 13 February 2006 from the counter of a fast food outlet (McDonalds) in a Hamilton mall whilst employed as a postal delivery worker. The plaintiff sought a full hearing de novo of the matter.

[2] It was common ground that the case was governed by the new test of justification contained in s103A of the Employment Relations Act 2000 which provides:

103A Test of justification

> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*

[3] Because this test places emphasis on the actions of the employer, I shall set out the factual material initially from the point of view of the defendant, then address the plaintiff's approach to the matter.

Background facts

[4] The plaintiff was employed at the defendant's Waikato delivery branch and her conditions of employment were set out in the Engineering Printing and Manufacturers Union Collective Agreement (the EPMU CA), although she was on an individual employment agreement based on the EPMU CA. On about 14 February 2006, Brendon Coker, the defendant's Waikato Delivery Business Leader, received a telephone call from mall security in Chartwell Square in Hamilton asking the name of the postie who had been making deliveries in the mall on 13 February. He declined to divulge the name of the staff member. He was advised that there was closed circuit television (CCTV) footage from McDonalds in the mall which showed that a NZ Post employee who had been delivering mail had removed a mobile phone that did not belong to her from the counter at McDonalds.

[5] Mr Coker arranged to see the CCTV footage that same day together with the defendant's Security Advisor, Garth Taylor. When he viewed the footage he recognised the plaintiff as the postie and noted she had been scheduled to do the run that day. He considered the footage showed her approaching the McDonalds' counter, then covering a cell phone on the counter with mail, raising her hand (which contained the mail) and departing, after which the phone was gone. She did not order food or deliver any mail. They were told by the McDonalds' manager that the phone belonged to one of its employees.

[6] Mr Coker took advice from the defendant's human relations department and was told they should advise the plaintiff of what had occurred as soon as possible and interview her as part of the investigation. He claimed that this was not a disciplinary meeting, but, in accordance with the defendant's security procedures, he ensured that the plaintiff had the opportunity to have someone with her.

[7] He approached the plaintiff on Thursday 16 February 2006 and told her that they wanted to talk to her in the security office, but did not give her any further details at that stage as they were in a busy area.

[8] As they entered the security office the plaintiff said to Messrs Coker and Taylor that she knew what this was about, it was about the cell phone. Mr Coker told the plaintiff there was an incident that had to be investigated and that she had the right to have a support person present at the meeting, but initially she declined, so Mr Coker left the meeting. Shortly afterwards he was contacted by Mr Taylor, who said the plaintiff wished to have Thomas Koroheke, one of her colleagues, present as a support person. Mr Coker went and got Mr Koroheke and then left the meeting so that Mr Taylor could conduct the interview.

[9] When Mr Koroheke arrived at the interview room Mr Taylor explained to him that his role was to be there as a support person for the plaintiff, to observe the procedures and not to say anything unless he was asked direct questions. In substance that is the same as the evidence given to the Court by Mr Koroheke. As a result of that advice Mr Koroheke, who had no prior experience as a support person, said nothing at all throughout the meeting.

[10] Mr Taylor accepted that comments that he may have made to the effect that Mr Koroheke's role was to calm the situation down if matters got out of hand, in hindsight, were unwise but they were intended to be light-hearted and he knew Mr Koroheke. However Mr Koroheke took these remarks seriously and was nervous throughout the meeting.

[11] Mr Taylor conducted the interview by asking questions, obtaining the plaintiff's replies and recording them. He produced for the Court his handwritten notes and a typed version. The notes of the interview indicate that the meeting started at 8.20am and Mr Taylor's evidence was that it was adjourned at about 8.50am so that the plaintiff and Mr Koroheke could visit McDonalds and review the CCTV video footage of the incident. He went with them and the footage was played five times. They also called at the plaintiff's home where she showed them where she had placed the cell phone on a shelf in her bedroom wardrobe. The cell phone was intact but the battery had been removed and was loose on the same shelf.

[12] The interview resumed back at the security office. The plaintiff gave Mr Taylor the following account. On Monday morning, 13 February 2006, she went into Chartwell Square, up the escalator stairs and turned right into McDonalds to deliver mail. The lady at McDonalds asked the plaintiff if she had any mail and she said no. The plaintiff had put the mail she was delivering on the counter but picked it up and walked away and it must have been then that she picked up the cell phone. She carried on with her deliveries but there was not much mail. During this time the cell phone must have been stuck in her hand with the mail. She had one large envelope still in her hand when she went out to where her car was parked in the carpark. She was scared when she realised she had the cell phone because she thought if she took it back someone would say she had stolen it. She claimed not to know where she had picked it up from, that she had carried it around the first floor and did not notice it until she had left the building because she had "*some big mail*" with her. She left the phone in her car and took it home with her later that day and had left it sitting in her wardrobe at home. She had not used the phone and neither had anyone else. She claimed she had not intentionally meant to pick it up and had not returned it because she was scared. She already had a mobile phone. She was sorry she had not returned it. She had heard it ringing, but did not answer it. She also found the battery was loose at the back so she separated it from the cell phone. She told her daughter that she had picked it up by mistake and her daughter told her to take it back to work. She was going to do this but she thought people would think that she had taken it.

[13] At the conclusion of the interview the plaintiff signed a statement containing this material and confirmed it was true and correct. Mr Taylor asked the plaintiff whether she was comfortable with the way in which he had conducted the interview and she replied affirmatively.

[14] After seeing the CCTV footage and it being put to her that her actions were very suspicious and it appeared she had disguised picking up the phone, she denied doing this and said she did not intentionally pick it up. She apologised for not bringing the phone back into work and apologised to the owner as well.

[15] After the meeting Mr Taylor told Mr Coker what had happened at the interview and that the plaintiff had confirmed that the footage accurately reflected

what had happened. He also gave Mr Coker a copy of the statement the plaintiff had signed at the conclusion of the interviews.

[16] Mr Coker's evidence was that given this information, including the admissions made by the plaintiff during the course of the meeting, he formed the view that there had been an apparent breach of the defendant's code of conduct amounting to serious misconduct. He decided it would be appropriate to suspend the plaintiff pending further investigation of the matter and a disciplinary process. He reached this conclusion after discussion with the defendant's HR advisor and notified the plaintiff verbally and by letter dated 16 February.

[17] The suspension letter states that Mr Taylor had informed Mr Coker that in the plaintiff's interview she admitted that she had taken the cell phone on Monday at the McDonalds' counter but claimed it was not deliberate. The letter refers to the EPMU CA and says that her conduct is deemed to be serious misconduct because "*employees must give a fair days work and conduct themselves in a manner that reflects credit upon the employee and the company"*. The letter stated that after the investigation was completed Mr Coker would be requesting the plaintiff to attend a disciplinary meeting in relation to the alleged breach. The purpose of the meeting was to give her the opportunity to explain her behaviour and she was strongly encouraged to bring a support person of her choice to the meeting.

[18] At the same time Mr Coker wrote to the secretary of the Union to which the plaintiff belonged and received a response advising that Paul Blair would be managing the situation for the union.

[19] Mr Taylor completed a report on 17 February which he provided to Mr Coker. Under the heading "*Conclusion*", Mr Taylor expressed the following views:

> *Having viewed the CCTV several times, I am at loss to understand how she could pick up the cell phone in the same hand that is holding a bundle of approx. 15/20 letters and not know that she had done that.*
>
> *Close observation of the CCTV suggests the mail being held in her left hand was never released, which would negate Pixie's assertion of the phone*

being caught up in the mail. I suggest it would be impossible for that to happen.

It defies belief that the cell phone was actually caught up between letters but if it did, one would reasonably expect that the item (weighing approx. 115 gms) would actually "fall out" during the remaining deliveries that Pixie undertook on the first floor.

If the cell phone was not caught up between the letters then it must have been held between the base of the mail and her hand. How could that happen without her knowledge?

…

There was nearly three days between incident and my interview when Pixie could have approached someone in authority but she chose not to do this. Her explanation that she was scared as people may think she took it. This is not acceptable because then she has retained something to which she has no entitlement to. Indeed, her daughter advised her to take it to work but Pixie could not or would not for the reason mentioned above.

When the phone was recovered from the wardrobe the battery was removed. Pixie said she removed the battery because the cover was "hanging down". The way the back plate is attached and locks in to the body of the phone suggests that perhaps the battery was removed to deliberately disconnect the phone. ([The owner] *advised in excess of 20 calls were made to it in an endeavour to locate it.)*

Pixie acknowledges hearing the phone ringing when it was in her mail bag but did not answer it. She did not use the phone at all.

[20] Mr Coker read Mr Taylor's report and took notes from it before the meeting arranged to take place on 22 February 2006. Present at the meeting for the defendant were Mr Coker and Florence Mills, Delivery Systems Leader. The plaintiff was represented by Mr Blair for the union and she also had Mr Koroheke and Luci Kokaua, as support people.

[21] Mr Coker explained that it was a disciplinary meeting and the allegation was that the plaintiff had uplifted a cell phone from the McDonalds counter while on her round on Monday 13 February. The only other incident on the plaintiff's file was a performance issue from about 18 months previously. He said that he made it clear that the defendant was dealing with the issue as a serious misconduct allegation and that she could potentially be dismissed.

[22] Mr Blair responded on the plaintiff's behalf and did almost all the talking for her. In essence he said that there was not enough evidence to support the allegation. After about an hour the meeting was adjourned to allow Mr Blair to see the CCTV footage. The meeting then resumed. Mr Blair said he did not consider the video evidence was enough. He had a cell phone with him and invited Mr Coker to carry out an experiment to show that it could have been inadvertently picked up in the mail. Mr Coker declined to do so.

[23] Mr Coker pointed out that the mail had been in the plaintiff's left hand and had not been released, if the cell phone had inadvertently been caught between the letters she was holding it would have fallen out as it weighed approximately 115 grams. Mr Coker also stated that the defendant was concerned there had been 3 days between the incident on the Monday and the interview with the plaintiff on the Thursday in which she had not reported the matter and had taken the battery out of the phone and placed it in her wardrobe. At the end of the meeting Mr Coker said that he would take on everything Mr Blair had said and would not be making a decision that day but would think about it.

[24] The following day, 23 February, Mr Coker had another discussion with Mr Taylor to confirm his understanding of the sequence of events. Mr Coker was satisfied from what he had seen on the CCTV footage that it was very unlikely that the plaintiff had been unaware that she had the cell phone. In reaching this conclusion he attempted to replicate her actions as seen on the footage by picking up a cell phone while holding a similar amount of mail. He found it quite difficult to do this and therefore was not convinced by the plaintiff's explanation that she had done it inadvertently. He was also concerned that she had not done anything to disclose the taking of the cell phone even though she knew this was wrong and in contravention of the rules.

[25] Mr Coker's evidence was that he was satisfied her actions amounted to serious misconduct and he contemplated at length the appropriate response. He was aware that she had long service, having been a permanent employee since February 1999 and had worked for the defendant for many years as a casual. She had a clean record with the defendant. He formed the view that because of the seriousness of the matter, dismissal was likely to be the outcome as her actions had completely contravened the defendant's standard of behaviour and code of conduct.

[26] The following morning, 24 February, Mr Blair phoned Mr Coker and asked him not to come to a conclusion until he had received an email from Mr Blair as to why the defendant should not terminate the plaintiff's employment. The material described as a "*Submission*" from Mr Blair attacked the investigation process as deeply flawed and unfair and claimed her responses should not be admitted into evidence against her. It was also submitted that no substantive act of dishonesty had been proven beyond reasonable doubt against the plaintiff and, at most, she may have committed an error of judgment in not taking sufficient steps quickly to ensure the return of the cell phone.

[27] Mr Coker took the view that there was no additional information provided by Mr Blair's submission which he needed to take into account. He confirmed in discussions with the HR consultant that they were not dealing with a criminal matter but a breach of the defendant's performance and conduct expectations. Mr Coker telephoned Mr Blair that day to advise him that he had considered the email and had come to a decision. He then rang the plaintiff and said he had made a decision. The plaintiff invited him to come over to her home to convey it to her. He did so that day and told her of his decision and gave her a letter dated 24 February advising her of her dismissal.

[28] The letter states that the allegation against her was that she deliberately took the cell phone. It noted her response that she was unaware that she had picked it up, but once she had realised that she had picked it up she had not returned it or notified the defendant of the situation. It referred to the defendant's expectations of its people who need to be honest, reliable and trustworthy. It referred to the EPMU CA and said Mr Coker had taken into account her previous good service and her explanation of the events but had come to a decision to terminate her employment.

[29] The plaintiff had her uniform all packed up and ready for him to take away. Mr Coker took it from this that she expected to be dismissed and was not surprised by his decision. He then conveyed the decision to Mr Blair who said the matter would be taken further.

[30] Subsequent to the plaintiff's decision, Mr Taylor showed Mr Coker some further footage he had received of the incident from a CCTV camera situated immediately over the till. He said that this footage showed him even more clearly how the plaintiff had picked up the phone and reinforced for him that the conclusions he had reached were correct.

[31] The plaintiff's evidence to the Court gave an account substantially the same as that she gave to the defendants. The plaintiff said she first discovered the cell phone as she was placing a doubled over, large brown envelope into her saddle bag. She felt an object fall out that was not that big or heavy but enough to make her look and she reached in and pulled out a cell phone which was quite small. She did not know where that had come from. She was confused. She thought about retracing her steps in the mall as she was not sure where it had come from. She decided to carry on with her run and deal with it later. She then heard it ringing and went to answer it but by the time she got to it, and found which button to push, it had stopped ringing. When she got home she put the phone in her wardrobe because she did not need a cell phone and did not want to keep it for her own use. The battery part at the back was loose so she released it and put the battery separately with the phone because she wanted to look after it and not keep it. Later that day she phoned her daughter and told her about the phone and asked what she should do. By that time she thought it must have come from one of her stops at the mall but could not figure out how it had got into her mail because she could not remember putting the mail down anywhere. Her daughter told her that if it was not her phone she should take it back to work because if she did not she could be accused of theft. She told her daughter that she was embarrassed or scared, her daughter said something like "*don't be stupid there's nothing to be scared or worried about – look I'll be over on Friday and if you haven't taken it back, then I will take it back for you*". She confirmed she would see her daughter on the Friday and felt relieved. Her

daughter's evidence confirmed this account. She did not go back to Chartwell Square on the following Tuesday or Wednesday.

[32] Her account of the two meetings was also substantially the same as that given by Messrs Taylor and Coker. In cross-examination she could not recall saying as she went into the first investigation meeting that she knew that it was about the cell phone that she had picked up by mistake. It was put to her that one of her answers in the investigation meeting was that she went into McDonalds to deliver mail but that she had told the Court she did not have mail to deliver. She confirmed that she did not have mail and that when she was questioned at the investigation meeting she could not think straight. It was also put to her that she had told Mr Taylor she had placed the mail on the counter and then picked it up and walked away and it must have been then when she picked up the phone. She now accepted that she had not put her mail down at all, as the CCTV footage showed. Again she said it was because the questions were just fired at her at the meeting and she could not think properly. In her cross-examination she confirmed the answers that she had given to the questions asked by Mr Taylor and that she thought she would get into trouble by taking the cell phone back to her house and not telling anyone about it, if the defendant found out.

[33] She accepted she had not acted in a way which had protected her own interests. She knew that she was required to be honest and professional in her dealings with the public and with other employees and that unauthorised possession of other peoples' property could be categorised as serious misconduct. She maintained that she did not intend to take the cell phone deliberately. She accepted in cross-examination that she had never said anything to Mr Taylor or Mr Coker about her daughter intending to bring the phone back for her on the Friday because she said she did not realise that was necessary.

Summary of submissions

[34] The submissions were thorough and extensive. I had the benefit of oral submissions at the hearing and full written submission filed in the months after the hearing. The following is but a brief summary and I shall deal with the salient issues under the subsequent headings.

[35] Mr Blair addressed the standard of proof of serious misconduct in his submissions, citing *Glass v National Bank of New Zealand Ltd* unreported, Travis J, 29 September 2003, AC 53/03 and *Amba Enterprises Ltd (t/a St Andrews Dairy) v Wills* [2003] 2 ERNZ 487 and *Robertson v Waikato Snooker & 8 Ball Club Inc* unreported, Colgan J, 17 April 2002, AC 22/02. In the last case the Judge held that where the investigation of the theft of an employer's money resulted in a complaint to the police and subsequent prosecution, the law expects the employer to be satisfied to a high degree of probability that the grievant stole its money. He argued that in the present case the finding by the defendant of a dishonest taking of the cell phone by the plaintiff had not been made out to a sufficiently high degree of probability for it to have to amounted to serious misconduct and that the plaintiff should have been given the benefit of the doubt. He also submitted that the conduct of the investigation meeting held on 16 February was not fair and reasonable, citing *NZ (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd* (1990) ERNZ Sel Cas 582; [1990] 1 NZILR 35. He submitted the procedure adopted was contrary to the required procedure set out in the EPMU CA.

[36] Ms Swarbrick argued that the allegation of deliberate taking was not part of the defendant's case. The allegation was that the plaintiff had taken a phone that was not hers. She contended the defendant had followed a fair procedure in accordance with the EPMU CA and that as a result it had concluded the plaintiff was guilty of serious misconduct.

Procedural fairness

[37] The EPMU CA upon which the plaintiff's individual employment agreement was based, contains the heading "***DISCIPLINARY PROCEDURE***", and the following relevant provisions:

> *4. This section outlines the procedure that will be followed where an employee's conduct does not meet the company's expectations.*
>
> *5. If there is an allegation of misconduct, the manager (or a person authorised by the manager) will briefly examine the allegation to determine whether or not misconduct is apparent.*

6. *If the initial examination indicates that serious misconduct may have occurred, the employee involved may be suspended whilst the matter is investigated. During the period of suspension, the employee will be paid for the standard hours that the employee would have worked if they had not been suspended.*

7. *If misconduct is apparent, there will be a prompt and thorough formal investigation by the manager (or a person authorised by the manager). Discussions will be held with all persons considered to be able to assist.*

8. *As part of the investigation:*

- *the employee must be given notice of the specific allegation of misconduct and the potential penalty*

- *the employee must be given a real opportunity to explain or deny the allegation and this will be given full consideration.*

...

10. *The employee must be available to attend interviews if required. Before the start of any interview the company must ask the employee whether they wish to have another person present as a witness, representative or support person.*

11. *If the investigation establishes that misconduct has occurred then:*

- *in the case of serious misconduct, the employee could be dismissed*

- *the company may decide to issue a final warning if the circumstances justify a lesser penalty.*

…

[38] Mr Blair contended the defendant had not followed this procedure and had not put all of the allegations and investigative findings it had made, which had influenced its final decision, to the plaintiff for her explanation. In summary the defects are said to be: the failure to give the plaintiff notice of the allegations against

her before requiring her to attend the first investigation meeting; calling her straight from her duties into the investigation meeting which gave her no time for preparation or discussion with a support person (this led her to call upon an inexperienced colleague who had no knowledge of disciplinary procedures to support her); directing Mr Koroheke to sit through the investigation meeting without saying anything and to take no part unless he was either questioned by Mr Taylor or had to intervene if "*things got out of hand*". In the course of that first meeting the plaintiff made what the defendant regarded as "*admissions*".

[39] Ms Swarbrick argued strenuously that the disciplinary procedure set out in the EPMU CA required Mr Coker to briefly examine the allegation to determine whether or not misconduct was apparent. She contended that Mr Taylor's interview of the plaintiff enabled Mr Coker to determine that misconduct was apparent. She submitted Mr Coker then undertook the next part of the process, namely suspension, while the matter was being investigated and that investigation included the disciplinary meeting of the plaintiff on 22 February. She pointed to the acceptance by the plaintiff and Mr Koroheke in cross-examination that the 16 February meeting was not disciplinary and therefore was clearly an investigative meeting at which no allegations were put. She referred to the defendant's policy of ensuring that the individual being interviewed had the opportunity to have a representative or support person present and that this opportunity was extended to the plaintiff.

[40] I do not accept Ms Swarbrick's submissions. Mr Coker was told at the outset by McDonalds that a postie had removed a mobile phone which did not belong to her. He and Mr Taylor viewed the CCTV footage and clearly concluded that it showed the plaintiff removing the cell phone. This footage was relied on by Mr Coker as an essential element of his decision that the plaintiff was guilty of serious misconduct. The actions of Messrs Coker and Taylor, constituted the brief "*initial examination*" of the allegation of misconduct in terms of clause 5 of the EPMU CA. As the "*initial examination*" clearly indicated that serious misconduct may have occurred, in terms of clause 6 of the EPMU CA, this would have justified her suspension at that stage and should have led to the "*prompt and thorough formal investigation*". As part of the investigation the plaintiff was required to be given notice of the specific allegation, the potential penalty, and the right to have another

person present "*as a witness, representative, or support person*. Instead the plaintiff was called into the first meeting without any prior notice of the allegations and without being able to use a representative in a true support and advice role.

[41] I also find that at the 16 February meeting Mr Taylor put allegations of misconduct to the plaintiff in his question and answer interview. One of Mr Taylor's questions was "*so you are telling me you don't know where you picked it up from but you carried it around the 1st floor and didn't notice you had it until you left the building*". After the adjournment to allow the viewing of the CCTV coverage, Mr Taylor asked "*it appears that the cellphone has been picked up intentionally. Do you agree*" and then "*when you realised you did have the phone you made no effort to return it. Why not*". He also asked "*having seen the CCTV do you agree that your actions are very suspicious and it appears you disguised taking the phone*"**.**

[42] There is no evidence that the defendant provided to the plaintiff, or her union representative, a copy of Mr Taylor's report which was given to Mr Coker on 17 February. As I have set out above in paragraph [19], this report contains several conclusions which were adverse to the plaintiff. I find these were not put to her in the subsequent 22 February meeting. However, Mr Taylor's conclusions appear to have influenced Mr Coker who read this report, and apparently made some notes from it, prior to the 22 February meeting.

[43] There is a further difficulty for the defendant. It is common ground that, at the 22 February meeting, Mr Blair suggested that Mr Coker carry out an experiment by holding some items of mail to show it was possible to inadvertently pick up a cell phone like the one in question. Mr Coker declined to carry out that experiment at the meeting. However, after the meeting he says he carried out an experiment himself to attempt to replicate the plaintiff's actions, as seen on the CCTV footage, by picking up a cell phone while also holding a similar amount of mail. He said that he found it quite difficult to do this and hence he was not convinced by the plaintiff's explanation that it had been done inadvertently. This experiment, the result of which was not put to the plaintiff, clearly influenced Mr Coker's conclusion, as set out in his dismissal letter, that she had deliberately taken the cell phone.

[44] I conclude that these failures, either separately or collectively, were not mere technical inadequacies. They were in breach of the defendant's contractual obligations as set out in the EPMU CA. They went to the substance of the enquiry into an allegation of serious misconduct, namely that the plaintiff deliberately took the cell phone. This, in substance, was an allegation of dishonesty which also had the effect of bringing the defendant into disrepute because it was carried out by one of its employees. Having objectively considered the defendant's actions and how it acted, as required by s103A, I conclude the actions were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. At the very least the defendant ought to have followed its own procedures as set out in the EPMU CA.

[45] In view of this conclusion it is not necessary to deal in detail with Mr Blair's submission that the actions of the defendant breached her right to silence, derived from s23(4) of the New Zealand Bill of Rights Act 1990, as applied in *Russell v Wanganui City College* [1998] 3 ERNZ 1076.

[46] I prefer Ms Swarbrick's submissions on this aspect. There was no potential prosecution. Mr Coker had refused to supply the plaintiff's name to McDonalds and instead dealt with the matter as one of internal discipline. Further it was for the plaintiff to assert the right to silence and she appears to have waived it by allowing Mr Blair to speak extensively on her behalf at the 22 February meeting.

[47] Had the right to silence been asserted by the plaintiff because of any perceived potential of a criminal prosecution (as in *Wackrow v Fonterra Co-operative Group Limited* [2004] 1 ERNZ 350), the plaintiff could well have been faced with the difficulties that a grievant in a similar situation had faced where her union representative refused to allow her to answer any questions posed by the employer who was investigating money missing from a till from behind a bar. When the criminal prosecution, which the union representing her had insisted upon, failed, she was met with the answer that she had been given a reasonable opportunity to offer an explanation but had declined to do so. In those circumstances the employer was entitled to conclude that serious misconduct had been proven: see *Wellington*

and Nelson Amalgamated Society of Shop Assistants and Related Trades IUOW v Armed Forces Canteen Council [1981] ACJ 47.

[48] For similar reasons I do not consider that s21 of New Zealand Bill of Rights Act which gives protection against unreasonable search, applied to the interview conducted by Mr Taylor.

Substantive justification/contributory conduct

[49] It is convenient to deal together with the issues of whether there was substantive justification for the dismissal and the defendant's contention that, in any event, the plaintiff's blameworthy contribution to the situation that gave rise to the personal grievance was so extensive that it should deprive her of all the remedies she sought (s124).

[50] I reject Mr Blair's submission that because the EPMU CA does not list "*unauthorised possession of the property of a third party*" as an example of serious misconduct the defendant cannot rely upon the alleged actions of the plaintiff as constituting serious misconduct. Mr Blair also sought to stress that dishonesty was part of the allegation against the plaintiff, namely that she took a cell phone that was not hers. He relied, in part, on the heading of Mr Taylor's report as "*Suspected Theft of Cell Phone*". His contention was that the allegations include an element of dishonesty because the allegation was of deliberately taking the cell phone. I agree.

[51] However, I accept Ms Swarbrick's submission that the matters listed as examples of serious misconduct in the EPMU CA are not exhaustive and include such matters as unauthorised possession of company property and property entrusted to the company. I accept that it is self-evident that unauthorised possession of anybody's property is likely to fall within the category of serious misconduct, for example unauthorised possession of another employee's goods while at work, or, in this case, unauthorised possession of an item acquired in the course of the plaintiff's duties from a customer.

[52] I also accept Ms Swarbrick's submission that this is reinforced by reference to the defendant's policy in the EPMU CA that it expects its employees "*to maintain the highest standards of behaviour and to undertake their duties and responsibilities in an honest and professional manner and in accordance with company policy*".

Further the EPMU CA provides that employees are required to "*give a fair days work and conduct themselves in a manner that reflects credit on both the employee and the company*". The EPMU CA deals with property entrusted to the care of post office employees, by requiring them to be honest and professional in their dealings with the public and with each other. If the defendant was entitled to conclude that the allegation of deliberately taking the cell phone was made out, the fact that this act was committed in the course of the plaintiff's duties on behalf of the defendant would have meant that the allegation of serious misconduct was also made out.

[53] In reaching this conclusion I accept Mr Blair's submission that because of the seriousness of the allegation the defendant was required to be satisfied that the evidence in support must be as convincing in its nature as the charge is grave. In justifying a dismissal, the standard of proof which the employer must attain is the civil standard of the balance of probabilities and not proof beyond reasonable doubt. This involves a finding that proof of the act upon which the employer relies must be convincing because the more serious the misconduct alleged, "*the more inherently unlikely it is to have occurred, and the more likely the presence of an explanation at least equally consistent with the absence of misconduct*" see *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union* [1990] 3 NZILR 23; (1990) ERNZ Sel Cas 855 (CA).

[54] Turning now to the question of contributory conduct for the purpose of s124 of the Employment Relations Act 2000, I must now consider the actions of the plaintiff. In doing so I apply the *Honda* test. The plaintiff in her evidence before the Court admitted that she picked up the cell phone but claimed that it was done inadvertently. I have viewed the CCTV coverage that was viewed by Mr Taylor and the plaintiff on 16 February. I have seen Mr Blair's demonstration in Court of how this might have been achieved inadvertently. Mr Blair's dexterous uplifting of a phone in his demonstration to the Court depended upon it being able to be held in position by some stationary object, and no such object appears in the CCTV footage. I am satisfied from all the evidence I have seen and heard that the cell phone was not uplifted inadvertently by the plaintiff. The way in which the plaintiff described she may have picked it up does not accord with what appears on the CCTV footage. Further, because of the weight of the phone, 115 grams, I do not consider it at all likely for the plaintiff not to have noticed that she had uplifted it accidentally. Had it

been so acquired it is more likely than not that it would have dropped out while she carried out her other deliveries in the mall.

[55] I also note that her explanation to the Court was inconsistent with her statement to Mr Taylor in the initial interview that she had put the mail down on the counter and must have accidentally picked up the phone when she picked the mail up again. The CCTV coverage clearly shows that she never put the mail down.

[56] Even if I was wrong in this conclusion, I find the plaintiff's conduct was blameworthy in not immediately returning to the mall when she says she discovered the cell phone in her bag. She heard the cell phone ring, but claims not to have been able to reach it. Instead of keeping the cell phone in a working state where it would have allowed the owner to have rung it again so that she could have responded and returned it, she took the step of disabling the cell phone, by removing the battery. This could be categorised as dishonestly using the owner's cell phone with intent to deprive that owner of control over it, in the sense that the owner could no longer ring the cell phone in order to ascertain who now had possession of it.

[57] Finally the plaintiff did not follow the excellent advice given to her by her daughter to return the cell phone, because if she did not do so there was a risk that she would be accused of theft. In this regard I observe that she did not advise the defendant that her daughter was intending to return the cell phone the following Friday, if the plaintiff had not already done so. Had this been communicated it might have acted as a mitigating factor.

[58] Even taking into account the lengthy unblemished work record of the plaintiff I find that her conduct has been proven to have been seriously blameworthy, in either deliberately taking the cell phone, or, in the highly unlikely event she inadvertently took it, by not returning it and instead disabling it. Such conduct by a postie while performing her duties clearly carried the real risk of bringing the defendant into disrepute. It created a situation in which the defendant could no longer repose trust and confidence in the unsupervised performance of the plaintiff's duties.

[59] I accept Ms Swarbrick's submissions that the plaintiff's actions in this case were completely causative of her dismissal and that if a fair process had been adopted it is highly likely, if not completely certain, that this would have resulted in a substantively justifiable dismissal. I accept the applicability of the quotation given

to me by Ms Swarbrick from *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at paragraph [81]:

> *…in no circumstances should an award be made which exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed the employee would have been dismissed.*

[60] I find the plaintiff's misconduct to be so serious that it deprives her of all the remedies she sought in her statement of claim, except perhaps costs, as occurred in *Finsec v Australian Mutual Provident Society* [1992] 1 ERNZ 280.

[61] I have reached this conclusion without taking into account the further CCTV footage because this did not become available to the defendant until two days after the dismissal.

[62] The plaintiff led no evidence whatsoever as to her losses or in support of her claim for reinstatement. When this situation was pointed out to Mr Blair, he sought leave to address it by way of an application supported by affidavit evidence. In view of my finding on contributory conduct there is no basis now for the plaintiff to seek leave to admit further evidence on remedies.

Conclusion

[63] The plaintiff's challenge succeeds because the defendant has been unable to discharge the burden of showing that her dismissal was justifiable. However, her contributory conduct has deprived her of any remedies, save, perhaps, for costs.

[64] Costs are reserved. If they cannot be agreed they may be addressed by an exchange of memoranda, the first of which is to be filed and served within 30 days from this judgment with a further 21 days for filing a memorandum in reply.

B S Travis
Judge

Judgment signed at 3.00pm on Tuesday 31 July 2007