IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 215/07
5073727

	BETWEEN	POSTAL WORKERS ASSOCIATION Applicant
	AND	NEW ZEALAND POST LIMITED Respondent

Member of Authority:	Robin Arthur
Counsel:	Simon Mitchell for Applicant Penny Swarbrick for Respondent
Investigation Meeting:	15 June 2007 at Auckland
Submissions received:	20 June 2007 from Applicant and Respondent
Determination:	23 July 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant seeks a declaration on whether the Respondent is entitled to withhold pay from some of the Applicant's members in relation to a strike during bargaining over a collective employment agreement last year.

[2] The strike comprised some postal delivery workers ("the Posties"), who are members of the Applicant, delivering only some of the mail assigned to them and placing the rest of their allocated mail in public post boxes along their delivery routes ("reposting").

[3] The parties agree that this activity was in breach of the Posties' employment agreement and comprised a strike under s81 of the Employment Relations Act 2000 ("the Act").

[4] This reposted mail had to be returned to the Respondent's Mail Sorting Centres where it was again sorted and sent to delivery branches.

[5] The reposting action was a surprise to the Respondent. It was not notified that the Posties intended to take that action or when the action would start. Its evidence was that had it known of the intended action, suspension notices would have been issued immediately – that is before the Posties went out on their rounds that day.

[6] On discovering the next day that Posties had reposted mail, the Respondent took steps to suspend those workers. In the examples provided in evidence to the Authority investigation, Posties who reposted were suspended at some time during their next working day and did not work again until the bargaining issues were resolved between the parties.

[7] The Posties were notified of suspension under s87 of the Act. The Applicant claims the Posties were entitled to be paid for the hours worked on the days when they undertook partial delivery and reposting and up until the time that they were issued with their suspension notices. The respondent says it is entitled to refuse to pay for those hours because the workers were striking.

[8] The suspension notices were "backdated" to the beginning of the day on which the Posties undertook partial delivery and reposting in breach of their employment agreement.

Issues

[9] The issues for resolution are:

(i) Whether an employer is entitled to 'backdate' a suspension notice to when the strike activity occurs (either to the time of the specific activity or to the beginning of the working day or shift on which a strike activity occurs); and

(ii) Whether an employer is entitled, in any event, to refuse to pay wages to a worker engaging in a strike comprising partial performance of their duties and breaking their agreement to perform all duties?

The investigation

[10] Witness statements were provided by Michael Hunter, the Applicant's secretary and a working Postie and Matthew Nant, the Respondent's General Manager – Postal Delivery. Mr Nant was not able to attend the investigation meeting but Peter Fenton, the Respondent's Chief Executive – Postal Services attended. Mr Fenton also provided a witness statement adopting Mr Nant's statement and setting out additional information on how the Respondent saw the Posties' action. Also attending were Garth McCullough and Terri Williams – both officers of the Applicant and working Posties; Mike Treen, an organiser for the Applicant; Rowena O'Neill, an area manager for the Respondent; and Chris Fitzgerald, a senior human resources manager for the Respondent. Additional information was provided by several of the attendees, either under oath or affirmation, however, as there is no real disagreement between the parties on the essential facts I need not set out much more detail of the evidence than already outlined above. Rather it is issues of law, not fact, that require resolution in this determination. In that task I was assisted both by oral arguments presented by counsel at the meeting and then written submissions lodged a few days later.

The statutory framework

[11] The Applicant accepts that the Posties who made part-deliveries and reposted the remainder of their assigned mail broke their employment agreements in such a way as to amount to a strike under s81 of the Employment Relations Act 2000 ("the Act"). The Respondent accepts that those actions were related to bargaining for a collective agreement and did not fall within any of the circumstances which would amount to an unlawful strike (ss 83 and 86). At issue is the application of provisions of s87 and s89 of the Act to the particular circumstances of this dispute. The relevant provisions are:

> *87 Suspension of striking employees*
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> *(1) Where there is a strike, the employer may suspend the employment of an employee who is a party to the strike.*
> *(2) Unless sooner revoked by the employer, a suspension under subsection (1) continues until the strike is ended.*
> *(3) The suspension under this section of all or any of the employees who are on strike does not end the strike and those employees do not, by reason only of their suspension under subsection (1), cease to be parties to the strike.*

> *(4) An employee who is suspended under subsection (1) is not entitled to any remuneration by way of salary, wages, allowances, or other emoluments in respect of the period of the suspension.*
> *(5) …*
>
> *89 Basis of suspension*
>
> *Where an employer suspends an employee under section 87 or section 88, the employer must indicate to the employee, at the time of the employee's suspension, the section under which the suspension is being effected.*

The Applicant's submissions

[12] The Applicant accepts that the Respondent was entitled to suspend the Posties and from the time of that suspension the Respondent was entitled not to pay them until the strike ended or, if sooner, the suspension was revoked by the Respondent.

[13] However the Applicant says the Respondent was not entitled to "backdate" the suspension notices and refuse to pay the Posties for the day that reposting was done.

[14] It accepts that the present issue does not arise in the usual 'all out' strike because there is no work, no pay and no need to suspend. It does arise in circumstances were there is only part performance of normal duties – such as reducing output (a 'go slow') or refusing to do certain activities (a 'ban'). Part performance – that is refusing to do all normal duties – breaks a term of those workers' employment agreement, so as to amount to a strike. However the employer need not tolerate such partial performance and may choose to exercise the statutory right under s87 to suspend those workers and to stop paying them. But without such a suspension, the Applicant submits, the right to payment continues.

[15] It points to the evidence of Respondent witnesses that productive work was done in the hours for which the Respondent will not pay – that is mail sent from the mail sorting centres to local branch 'delivery' offices was sorted by Posties for delivery, taken out on the street rounds, and some of it was delivered to some addresses before the remainder was "reposted" in the public post boxes. For that reason it says, absent a valid suspension for that day, the Posties are entitled to be paid for all the hours they spent at work that day.

[16] The Applicant denies the doctrine of abatement – found in the common law and discussed further below – can be applied to the present situation to reduce the amount of pay that could be paid to Posties doing some but not all of their duties on the day in question. It says that authority for the application of this doctrine, found in English case law, cannot be applied because it is inconsistent with the statutory scheme in New Zealand.

[17] It says that statutory scheme – through the s89 requirement that the worker much be told of the basis of the suspension at the time of being suspended – involves notice to each worker of his or her suspension, and the suspension is only effective from the time of proper service of that notice. For that reason the suspension cannot be "backdated" to the start of whatever act of part performance amounted to the strike.

The Respondent's submissions

[18] The Respondent says the Posties' action of deliberately failing to deliver deliverable mail would normally be treated as serious misconduct for which summary dismissal was a potential outcome.

[19] It took steps to suspend the Posties as soon as it discovered the strike action undertaken by them. It says it was entitled to make the suspension "retrospective" by dating the notices of suspension, issued the next day, from the start of the shifts during which the Posties took the action on the previous day. It says the Posties are not entitled to pay for the day in question because, even if not suspended, they failed to carry out normal duties.

[20] Section 87 does not specify the suspension may not be retrospective. Rather, the only two preconditions – existence of a strike and participation by the worker in that strike – were met. It accepts there is no case law on the point but says that, applying a literal construction, no additional words should be read into the section as preventing retrospective suspension.

[21] The Respondent submits that the doctrine of abatement, although not unequivocally stated in case law as applicable in New Zealand employment law, is available to be applied to the particular circumstances of this case: *PSA v SSC* [1987]

NZILR 681 (wage deductions for meat inspectors refusing to do certain trials); *Bickerstaff v Hawkes Bay Healthcare Ltd* [1996] 2 ERNZ 680 (obiter on possible abolition of right to abate) and *Kelly v Tranz Rail* [1997] ERNZ 476.[1]

[22] It relies on *Miles v Wakefield Metropolitan District Council* [1987] 1 All ER 1089 where the House of Lords found the employer need not pay a registrar of births, deaths and marriages for working on Saturdays when he carried out all other duties but refused to conduct marriage ceremonies. The refusal was in support of a union campaign for a pay rise. The doctrine of abatement was applied to prevent the registrar suing for his wages for those Saturdays.

[23] The Respondent submits that the Authority should also apply its equity and good conscience jurisdiction to find that the Posties are not entitled to any pay for the day on which they "reposted". That submission is based largely on Mr Fenton's evidence that the "reposting" action destroyed all the "added value" of work already done by the Respondent in having that mail sorted at its large sorting centres and delivered to branch offices for sorting into ordered bundles for street delivery. He described the reposting as an act of sabotage. He contrasted it with the value lost by a painter suspended half way through painting a wall. Once the suspension ended, the painter could paint the other half. By contrast, he said the "reposting" was the equivalent of having to start the painting from the beginning.

Discussion

[24] I accept the submissions of both counsel, during oral argument, that I need not deal with the issue of when the strike began or what portion of the Posties' actions amounted to a strike on the day that they undertook sorting, part delivery and reposting. The Respondent's argument was that the whole of the working day was a strike. For the Applicant it was arguable that the strike occurred during the limited time of reposting. However, for reasons given below, that issue need not be resolved in order to determine the present issues between the parties.

[1] *Witehira v Presbyterian Support Services* [1994] 1 ERNZ 578 (EC) at 600 and 602 also discusses whether abatement is open to an employer in New Zealand law.

Issue 1: Timing of the suspension notice

[25] The proper starting point is the statutory scheme. Section 87 of the Act re-enacts provisions which have remained essentially unchanged for more than 30 years through four regimes of industrial relations legislation – from the present Act to the Employment Contracts Act 1991 s65, the Labour Relations Act 1987 s39 and the Industrial Relations Act 1973 s127A.

[26] This remarkable legislative continuity is part of a careful balancing by successive Parliaments of the freedoms of workers and employers to pursue their rights and interests in bargaining through, respectively, strikes and lockouts. However it goes beyond providing these "mirror" rights.[2]

[27] While workers have the freedom to promote their position in bargaining by attacking their employers' economic interests through lawful strikes, the means provided to employers to defend those interests include the power under s87 of the Act to suspend striking workers.

[28] However suspension is not an automatic process. It only results, lawfully, from a particular employer exercising the statutory discretion.

[29] The power to suspend, and the decision of an employer to use it, becomes particularly important where workers are engaged in part performance of duties. It is not necessary in the case of an 'all out' strike as there is no work and no right to pay. However in the case of a strike which involves actions such as a 'go slow' or a 'ban', the employer has an important calculation to make – can it live with the disruption of less productivity or service being provided by the workers (who are still to be paid for all the hours they attend work doing the remainder of their normal duties) or is the cost too great? Sometimes an employer will 'tough it out' (and the workers will have literally 'banked' on that calculation so they keep getting paid) or will 'up the ante' by suspending those workers, and, with that suspension, any entitlement to pay. For that reason it is a powerful discretion but is one that must be exercised within the scheme of the Act.

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[2] See *Witehira*, supra at fn 1, at 590-1 and 600 on limits to this metaphor, analysis of respective rights of strike and lockout, and description of suspension provisions.

[30] That scheme requires there must firstly be a strike, then secondly a decision by the employer to suspend and thirdly, arising from that suspension, a lack of entitlement to wages for "the period of the suspension". Under s89 the basis of the suspension must be indicated to the worker "at the time of [his or her] suspension".

[31] The scheme is inherently linear. That is it contemplates events – strike, notice of suspension, no entitlement to wages – happening along a time line. It expressly contemplates a time of suspension and a change in rights (entitlement to wages) occurring at a point in time and then continuing for a period of time, that is throughout the suspension. The suspension itself can then only end (s87(2)) by the occurrence of one of two events – earlier revocation by the employer or the end of the strike.

[32] For that reason I do not accept the Respondent's submission that the statutory provision is open to the prospect of being imposed retrospectively. If it were, the form of words in the relevant section – essentially unchanged for more than 30 years – would allow for the disentitlement to wages to apply from the event of the strike occurring rather than – as it does under s87(4) – on the event of suspension.

[33] Neither do I accept the Respondent's other argument about the surprise nature of the Posties' strike action as a justification for retrospective suspension. Put shortly, the Respondent suggests that it was denied a proper opportunity to exercise its statutory power of suspension because the Posties deliberately set out to catch it unawares of the reposting action. It argues that, in such circumstances, it should be able to impose the suspension notices from the time that it would have been aware of the intended action.

[34] That argument fails, I find, because of its reliance on the notion that an employer is entitled to notice of intended strike action. That is clearly not the case under the Act. Only employers in essential services are entitled to such notice. An employer's rights in respect of a 'secret strike' were addressed directly by a full bench of the Employment Court in *Fogelberg, Vice-Chancellor of the University of Otago v Association of University Staff* [2003] 2 ERNZ 112. In that case university teachers refused to deliver certain lectures but failed or refused to inform the university of the nature of the strike action or even the fact that it was occurring. The action had the

declared intention of "minimising notice and maximising disruption of employer activities". The Court rejected the employer's claims that it was entitled to be told of the strike and who participated in it, and that failure to do so was a breach of the union members' obligation of good faith to their employer. Rather the Court held that:

> *[38] … There is no requirement in the Act compelling anyone to provide the employer with such information.* ***The argument that the absence of the information rendered it impossible to suspend employees*** *or report the strike* ***do not seem to us to have any merit****. We do not accept the argument that the statutory provisions allowing suspension … would be or have been rendered nugatory.*
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> *[39] Coming to good faith, s80)a) makes it clear that departures from good faith are to be expected in situations of strike and lockout.*
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> ***(emphasis added)***

[35] Accordingly I find that the Respondent was not entitled to backdate the suspension notices as a means of disentitling the Posties to their pay during the shift in which they reposted mail.

Issue 2: Is abatement available if a "backdated" suspension is not?

[36] I have carefully considered the Respondent's independent argument that, because the Posties were failing to carry out their normal duties, it is entitled to abate their wages for the whole of the working day on which the reposting action occurred, and up to the time that they were told of their suspension.

[37] Lord Templeman in his speech in *Miles* (supra), the leading English case on the doctrine of abatement, stated (at 1099) that:

> *A worker who, in conjunction with his fellow workers, declines to work efficiently with the object of harming his employer is no more entitled to his wages under the contract than if he declined to work at all.*

[38] Refusing to work efficiently is the phrase their lordships use in *Miles* to describe strike action comprising part performance of normal duties. The approach to non-payment for part-performance during industrial action as stated in *Miles* remains good law in England, and other jurisdictions: see for example *Fuller & Ors v Minister for Agriculture and Food* [2005] IESC 14 (Supreme Court of Ireland).

[39] The *Miles* case was referred to in *Rockhouse v A-G* [1998] 1 ERNZ 598 at 600 – one of a number of cases about the application of suspension provisions arising out of a strike in the prison service in 1996, but which do not directly assist with the present issue. There the Court stated that the authorities, including *Miles*, provided that if an employer accepts something less than full performance of normal duties, that is adequate performance of contractual obligations. That acceptance in turn requires the employer to pay the worker's usual wages. However I note that this principle does not apply to the present case as the Respondent cannot have been said to have accepted part performance by the Posties until it became aware of that action, or could reasonably have become aware of it, which in this case was when the reposted mail was collected from the public post boxes and returned to the central Mail Sorting Centres. And, at that point, when it did become aware of the strike action, it expressly rejected part performance by issuing suspension notices.

[40] However the Respondent properly acknowledges in its submissions that the status of the doctrine of abatement in New Zealand employment law has not be unequivocally stated in case law. I would put it more strongly, noting the Employment Court's observation in *Kelly* (supra at 500) that apart from the "*specific remedies of self help*" provided in several statutes (including that of suspension now found at s87 of the Act), "*it is difficult to accept that employers were in addition in intended to have other remedies of self-help*". That was an observation of the Court under the Employment Contracts Act but given the continuity of these provisions under the present legislation I take it to have no less weight today.

[41] Applying abatement would also appear inconsistent with the principle underlying the provisions of s85(1)(c)(i) of the Act whereby a worker cannot be sued for damages for a breach of an employment agreement. If the abatement doctrine – which operates as a remedy for breach of contract – were applied, part of the benefit of what is otherwise an immunity for striking workers from civil suit would be lost.

[42] The Respondent has nevertheless urged the Authority to apply the doctrine of abatement stated in *Miles* on the basis of its jurisdiction in equity and good conscience (s157(3)). Mr Fenton's evidence was that the surprise reposting strike action was "not fair play" and destroyed the "added value" of the sorting work done at the central sorting centre and the local delivery branch. He suggested it was unconscionable for

the Respondent to have to pay the Posties for work on that day which included what he described as “sabotage”.

[43] I cannot accept that submission, whether or not I accept that Mr Fenton’s suggestion is true. The Authority’s equitable jurisdiction is expressly limited by s157(3) to actions which are not inconsistent with the Act or the relevant employment agreement.

[44] Applying the abatement doctrine in *Miles* – assuming it was open to me to do so, which I doubt – would be inconsistent with the integrity of the legislative provisions for suspension of employees engaged in a lawful strike.

[45] I am strengthened in that view partly by the express exception noted by the House of Lords in *Miles* in respect of a New Zealand case cited in argument on the basis that it turned on the construction of a New Zealand statute: *McClenaghan v Bank of New Zealand [1978] 2 NZLR 528* (Wages Protection Act).

[46] New Zealand legislation has a clear provision of many decades standing ensuring that an employer can protect itself against the burden of wage costs if it is not satisfied with workers striking by providing less than their normal performance. That an employer is vulnerable to a sudden strike amounting to surprise or ‘guerilla’ tactics is permitted by the legislation – and workers engaging in them risk suspension as happened here, or in other circumstances, are equally vulnerable to a sudden lockout, about which (applying the principle set out in *Fogelburg* equally) they could no more complain than an employer subject to a secret strike.

[47] There was some discussion during the investigation meeting whether another remedy available to the Respondent was to initiate disciplinary investigations for serious misconduct, with the risk of dismissal as a result. Mr Fenton, very fairly, advised that the Respondent had considered that course early in this matter but opted not to act against individual workers as they had, as he understood it, acted on advice of their union that their actions were lawful and believed that what they were doing did not amount to misconduct. He could not say that the Respondent would take the same view if it were faced with the same situation in the future.

[48] *Larsen & Ors v Ford Motor Co Ltd* (1988) ERNZ Sel Cas 215 (CA), at 218-19 accepted that there was a prima facie case for an employer to dismiss workers who had repudiated their employment contracts by striking and not following dispute procedures (in that case, an illegal strike) but held that those workers were entitled to pursue personal grievances which would be decided on their merits. *Beesley v NZ Clerical Workers Union* [1991] 2 ERNZ 616 also supports the proposition that disciplinary action, up to and including dismissal, is open to an employer in the case of an illegal strike. However those cases did not concern circumstances such as the present matter where there is no dispute that the strike was lawful. Whether a worker could properly be subject to disciplinary action for participation in a lawful strike is not a matter for resolution in the present case.

[49] Disciplinary action may not be open to the employer, or civil suits (s85(1) of the Act applies) but there are, of course, still limits to the scope of permissible strike activities. For example, extreme activities such as theft or assault would be subject to criminal prosecution.

Determination

[50] For the reasons given above the present employment relationship problem is resolved by the following declarations:

(i) The Respondent was not entitled to backdate suspension notices issued to the Posties in July 2006.

(ii) The Posties are entitled to pay for all hours worked on the day of the strike action and for hours on the next working shift up to the time that they were issued with suspension notices.

Costs

[51] This matter was in the nature of a test case about the application of a statutory provision. For that reason I would expect that the parties are content to let costs lie where they fall. If that is not the case the Applicant may lodge and serve a memorandum on costs within 28 days of the date of this determination and the

Respondent will have 14 days from the date of the Applicant's lodging for its own memorandum in reply. No application will be considered outside that timeframe.

Robin Arthur
Member of the Employment Relations Authority