

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 471  
5518051

BETWEEN                      BREEZE TUHIMATA  
   Applicant

A N D                              NEW ZEALAND POST  
   LIMITED  
   Respondent

Member of Authority:      Rachel Larmer

Representatives:            Wayne Newson, Advocate for the Applicant  
   Steven Fraser, Counsel for the Respondent

Investigation Meeting:      13 November 2014 at Auckland

Date of Determination:      19 November 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.      New Zealand Post Limited’s (NZ Post’s) dismissal of Ms Tuhimata was unjustified.**
- B.      NZ Post is ordered to reinstate Ms Tuhimata to its payroll from the date of this determination and back into her previous position within 14 days of the date of this determination.**
- C.      NZ Post is also ordered to pay Ms Tuhimata:**
- (a)      \$5,557.25 lost remuneration;**
  - (b)      \$2,000 distress compensation; and**
  - (c)      \$71.56 to reimburse her filing fee.**

## **Employment relationship problem**

[1] Ms Breeze Tuhimata worked as a postie for New Zealand Post for approximately nine years until she was dismissed for misconduct on 10 September 2014.

[2] NZ Post formed the view that a “*significant drinking session*” (the incident) had occurred on the afternoon of Friday 15 August 2014 at the Papakura Delivery Branch Office (the Branch). This situation was of serious concern to NZ Post because the Branch was a “*dry site*” which means the presence and/or consumption of alcohol was prohibited.

[3] On Saturday 16 August Ms Thompson, the Branch Manager, was alerted by Ms Jelleyman, the Branch Team Leader<sup>1</sup> that drinking had occurred the previous afternoon. When Ms Thompson visited the Branch on Saturday 16<sup>th</sup> August she smelt alcohol and discovered approximately 50 empty cans and bottles in the Branch’s recycle bin. She also saw empty alcohol cartons in the wastepaper bin.

[4] NZ Post disciplined Ms Tuhimata for “*participating and/or condoning*” the following activities which it said could be viewed as “*disorderly conduct and/or minor misconduct*”:

(a) *Access to workplace after hours for non-work related purposes; and/or*

(b) *Bringing alcohol onto company premises; and/or*

(c) *The consumption of alcohol on a dry site.*

[5] NZ Post also alleged that Ms Tuhimata “*misrepresented and/or concealed facts to management*” when questioned about what had occurred on Friday. This was based on NZ Post’s concern that Ms Tuhimata must have known alcohol was present/being consumed but had denied that when questioned by management about the Friday incident.

[6] NZ Post interviewed and disciplined 12 staff as a result of the 15 August incident. None of the staff who were interviewed and later disciplined admitted to

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<sup>1</sup> Ms Jelleyman was not at the Branch on Friday but became aware of alleged drinking in the Branch when a former employee told Ms Jelleyman that she ( the former employee) had been invited by a rural delivery contract driver to attend the Branch for drinks when she walked past the Branch on the way to visit a neighbouring business.

bringing alcohol onto the premises and/or drinking alcohol at the Branch. Ms Tuhimata was the only employee who was dismissed.<sup>2</sup>

[7] Ms Tuhimata claims her dismissal is unjustified.

[8] Ms Tuhimata says that she left work at around 1.50pm to collect her daughter from daycare at 2pm and then returned to the Branch to get some things out of her locker and to wait until her son finished school nearby at 3pm before she went to pick him up. She says because of the distances involved it was easier for her to wait at work rather than go home and then back to collect her son.

[9] Ms Tuhimata says although she was present at the Branch for approximately 45-50 minutes she did not see any alcohol present or anyone drinking alcohol. She says she was watching her child, talking to other staff and smoked a few cigarettes outside while at the Branch.

[10] Ms Thompson concluded that there was insufficient evidence to establish who brought the alcohol onto the site and/or who participated in the drinking session but she concluded that Ms Tuhimata must have been aware of the incident and had engaged in misconduct by not reporting it to management.

[11] Ms Thompson also concluded that Ms Tuhimata was “*repeatedly dishonest*” about not having witnessed staff drinking at the Branch. Ms Thompson told the Authority that if Ms Tuhimata had just admitted that she had known alcohol had been present and/or had been consumed then she would not have been dismissed.

[12] Ms Thompson says she dismissed Ms Tuhimata because she had lost trust and confidence in her. Ms Tuhimata was dismissed on 10 September 2014 and was paid two weeks’ pay in lieu of notice. She seeks reinstatement together with lost remuneration and distress compensation. NZ Post says that Ms Tuhimata’s dismissal was justified and that even if it is not justified NZ Post says it still opposes her reinstatement.

## **Issues**

[13] The issues to be determined by the Authority include:

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<sup>2</sup> NZ Post did not advise the Authority of what if any sanctions had been imposed on other staff who had been disciplined as a result of the incident.

- (a) Was Ms Tuhimata’s dismissal justified?
- (b) If not, what if any remedies should be awarded?
- (c) What if any costs should be awarded?

### **Was Ms Tuhimata’s dismissal justified?**

[14] Justification is to be assessed in accordance with the justification test in s.103A of the Employment Relations Act 2000 (the Act). This requires the Authority to objectively assess whether how NZ Post “acted, and its actions”, were what a fair and reasonable employer could have done in all the circumstances<sup>3</sup>.

[15] A fair and reasonable employer is expected to comply with its statutory obligations which include the good faith obligations in s.4(1A) and the four procedural fairness tests in s.103A(3) of the Act. The Authority may also consider any other factors it considers appropriate<sup>4</sup>. A dismissal cannot be held to be unjustified merely because of minor procedural errors that did not result in unfairness to the employee<sup>5</sup>.

[16] Mr Newson advised at the outset of the Authority’s investigation that Ms Tuhimata did not take any issue with NZ Post’s compliance with its good faith obligations or with the procedural fairness test in s.103A(3)(b)-(d) of the Act. He confirmed that NZ Post’s compliance with one of the procedural fairness tests (see s.103A(3)(a) regarding whether or not NZ Post’s concerns were “sufficiently investigated”) was being challenged.

#### *Did NZ Post comply with its good faith obligations?*

[17] Section 4(1A) of the Act requires an employer who is considering making a decision that may adversely impact on an employee’s ongoing employment to provide that employee with information relevant to the employer’s decision and an opportunity to comment on that information before a final decision is made. I find that did not occur and that failing undermines NZ Post’s ability to justify Ms Tuhimata’s dismissal.

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<sup>3</sup> Section 103A(2) of the Act.

<sup>4</sup> Section 103A(4).

<sup>5</sup> Section 103A(5).

[18] Although Ms Tuhimata did not challenge NZ Post's compliance with its good faith obligations that concession was based on the information available to her at the outset of the Authority's investigation. It became clear after hearing from Ms Thompson that she had information which influenced her conclusions but which she had not shared with Ms Tuhimata, who therefore had no opportunity to respond to it.

[19] Ms Thompson had spoken to the two cleaners on the Saturday following the incident. I find the information she received from them coloured her view of what had occurred. However no notes were taken of this discussion and Ms Tuhimata was unaware of it until Ms Thompson gave her evidence to the Authority. I find that was unfair as Ms Tuhimata had no opportunity to respond to the information supposedly given by the cleaners.

[20] Ms Thompson says the cleaners told her that when they arrived at work around 3.15pm on Friday they heard music playing and saw about 10 posties "*drinking around the table at the end of the branch*". NZ Post disciplined 12 people for the incident so the cleaners suggestion that there were 10 people around the table seems on the face of it to support Ms Tuhimata's explanation that she was not present when alcohol was consumed because there are two people unaccounted for. Ms Tuhimata could have explored that as information supporting her explanation if she had been aware of it.

[21] The supposed reference by the cleaners to seeing "*drinking*" was also relevant because Ms Tuhimata's explanation was that she was not aware of alcohol being consumed. She says she saw V energy drinks being consumed. It is not clear why Ms Thompson concluded that the cleaners saw alcohol being consumed when that was not specifically referred to by them.

[22] However questioning by the Authority on this point elicited vague information in terms of the cleaners having referred to a "*green box*" being on the table. It appeared from Ms Thompson's evidence that the cleaners had not specifically referred to alcohol but that Ms Thompson had assumed the green box was a beer box so had interpreted their information as them having seen "*drinking.*" The observation of "*drinking*" was an assumption Ms Thompson made but which Ms Tuhimata was unable to challenge because she was unaware of it.

[23] When asked if the cleaners had said anything about what was in the green box or whether it was open or closed or whether people were putting things into or taking things out of the box Ms Thompson said no information was given about these matters. If Ms Tuhimata had been aware of Ms Thompson's discussion with the cleaners then she could have explored these issues and may have been able to challenge Ms Thompson's assumption that "*drinking*" had occurred.

[24] A further breach of good faith arises because Ms Jelleyman apparently phoned the Acting Team Leader who had been in the Branch during the incident and it is alleged he admitted that drinking had occurred in the Branch that afternoon. This was not disclosed to Ms Tuhimata.

[25] Ms Thompson says that Ms Jelleyman told her she had run through the names of all of the posties in the Branch with the Acting Team Leader allegedly responding "yes" or "no" in answer to each of the names. He apparently responded "yes" when Ms Tuhimata's name was mentioned. Ms Thompson concluded from this that the Acting Team Leader had "*identified*" that Ms Tuhimata was involved in the alleged drinking session.

[26] No notes were taken of Ms Jelleyman's telephone conversation with the Acting Team Leader or of what Ms Jelleyman subsequently told Ms Thompson about it. This information was not disclosed to Ms Tuhimata who was therefore unable to respond to it. No detail of what was allegedly said by either person was ever provided to Ms Tuhimata so she was unable to challenge Ms Thompson's view that the Acting Team Leader had "*identified*" her as being involved in the incident. I find this omission fundamentally prejudiced her.

[27] Ms Thompson says that on 19 August 2014, she also had a phone conversation with the Acting Team Leader while two Human Resource Advisors were with her. Ms Thompson says one of the Human Resource Advisors took notes but these have not been provided to the Authority and they were not given to Ms Tuhimata during the disciplinary process.

[28] In the absence of any information about what the Acting Team Leader was asked or said Ms Tuhimata was unable to respond to this information at all. Ms Tuhimata was unaware of this second conversation with the Acting Team Leader. These are further breaches of good faith.

[29] Ms Thompson also made her own inquiries with an unnamed Labtests receptionist and “*Foot Mechanics*” (the people she spoke to were not identified by name). Ms Thompson did not share the full details of these inquiries with Ms Tuhimata who therefore did not know what was asked or what information was given in response to Ms Thompson’s questions.

[30] This was unfair because it led Ms Thompson to make assumptions that she produced to Ms Tuhimata as facts. An example is that the purported ‘notes’ Ms Thompson gave of her inquiries say that “*Foot Mechanics [...] saw a group drinking outside – looked like alcohol*”.

[31] When questioned about what evidence the reference to alcohol was based on, Ms Thompson said that the people she spoke to said it looked like a farewell gathering as people were gathered outside and appeared happy. Nothing was said about alcohol – that was something Ms Thompson assumed herself but then recorded as if it was information from a witness. Because Ms Tuhimata was unaware of this she had no opportunity to challenge the assumptions and conclusions Ms Thompson was making, which I find were not supported by evidence.

[32] Ms Thompson also had a second discussion with the cleaners during which Ms Li, Human Resources Advisor took notes. Ms Li’s original notes were not produced to the Authority and were not disclosed to Ms Tuhimata. This deprived Ms Tuhimata of knowing what the cleaners had actually said when that information was available to the decision maker (Ms Thompson) who relied on it to Ms Tuhimata’s detriment. This is a breach of good faith.

[33] The ‘notes’ that were produced were clearly Ms Li’s brief overview of what she considered had occurred. They were paraphrased in a way that I find was misleading to Ms Tuhimata. For example the notes say “*did not see any food, “just beer”*” and “*identified Bud, Breeze, Sone, Will and Bill*” when that was not in fact what the cleaners had actually said.

[34] When questioned by the Authority Ms Thompson admitted that the cleaners actually said they saw a green box on the table, they had not specifically referred to “*beer*”. It was Ms Li’s own assumption/conclusion that the green box on the table was a beer box. It could maybe have been a green V energy drink box because Ms Tuhimata said she saw people drinking V energy drink. However, because she was

not aware the cleaners had reported seeing a “*green box*” she could not explore that information which potentially supported her explanation.

[35] Likewise Ms Thompson admitted that although the notes say the cleaners had identified named people they had not actually done so. Questioning from the Authority elicited that the cleaners apparently said they saw two Maori men, women (no description or number given) and two young children.

[36] It turns out that Ms Thompson and Ms Li had assumed from this limited information that the cleaners were referring to the named individuals. They then recorded the named individuals in the notes as if they had been identified by the cleaners when they had not. That was misleading and fundamentally unfair and unreasonable to tell Ms Tuhimata she had been identified by two witnesses when she had not.

[37] When pressed to explain how she had identified Ms Tuhimata from what the cleaners had supposedly said, Ms Thompson told the Authority that she had identified Ms Tuhimata because the cleaners said there were two little girls present. That was another assumption Ms Thompson made. She admitted she had not made an inquiries to find out who else may have had a child present (one employee admitted their child was there on Friday but no other staff were asked about the presence of children).

[38] Ms Tuhimata’s evidence was that her child was playing with another child so even if the second child had been her daughter that did not mean that Ms Tuhimata was one of the people the cleaners supposedly saw at the table and even if she was there was no reliable evidence that the cleaners had seen alcohol present or being consumed whilst Ms Tuhimata was at the Branch.

[39] Ms Tuhimata’s representative specifically asked Ms Thompson during the disciplinary process to explain how cleaners who had never met or spoken to Ms Tuhimata “*identified*” her but no response was forthcoming. That left Ms Tuhimata in a position where she was unable to challenge the basis for Ms Thompson concluding that the cleaners had “*identified*” her when clearly they had not.

[40] Ms Thompson concluded that Ms Tuhimata had breached NZ Post’s Alcohol and Other Drugs in the Workplace Policy and Programme (the Policy). However that was never put to Ms Tuhimata to respond to and she was never even given a copy of

the Policy. This deprived her of an opportunity to explain why she believed she had not breached the Policy. This is yet another breach of good faith.

[41] I find that NZ Post did not comply with its s.4(1A) good faith obligations which undermines its ability to justify Ms Tuhimata's dismissal.

*Were NZ Post's concerns "sufficiently investigated" as required by s103A(3)(a) of the Act?*

[42] I find that there were a number of deficiencies with NZ Post's investigation which undermines its ability to establish that it complied with the requirements of s.103A(3) of the Act.

[43] Ms Thompson obtained information during her investigations which she did not share with Ms Tuhimata but which I find influenced her decision-making. Not sharing this relevant information was a fundamental breach of natural justice. It also means that NZ Post failed to "*sufficiently investigate*" its concerns because it did not allow Ms Tuhimata to respond to information which it had obtained, which it considered was adverse to her, and which influenced its final decision to dismiss her.

[44] On 19 August 2014, Ms Thompson, assisted by two Human Resources person, questioned the cleaners. The original notes were not available to the Authority and have not been provided to Ms Tuhimata. The 'notes' that were produced were scant bullet points which had been rephrased by Ms Li to reflect her own view of the matters discussed rather than an accurate record of what the cleaners actually said.

[45] A sufficient investigation would involve accurately recording what witnesses actually said and then obtaining the employee's response to the information which was actually given by witnesses particularly when the employer intends to rely on such information to justify dismissal. NZ Post's failure to do so means it is unable to discharge its onus of establishing it complied with its obligations under s.103A(3)(a) of the Act.

[46] I also consider it unfair for the decision maker (Ms Thompson) to conduct her own inquiries without keeping accurate notes of who she spoke to or what was actually said by those she had made inquiries of. This failure meant Ms Thompson was influenced by information that Ms Tuhimata was not even aware existed meaning Ms Thompson cannot have "*sufficiently investigated*" NZ Post's concerns.

[47] Ms Thompson told the Authority that one of the Human Resources Advisors spoke to two liquor stores in the vicinity and that “*a summary of what staff in these businesses did or did not witness was prepared*”. The original notes from these interviews were not provided to the Authority and were not given to Ms Tuhimata during the disciplinary process. No details of the information obtained have been provided.

[48] I am also concerned at the manner in which NZ Post conducted its investigations. Full notes were not taken of interviews. Ms Thompson considered that the cleaners had provided a “*statement*” when in fact they had not. They had been spoken to informally by Ms Thompson who made no record of that conversation and then had been spoken to again with a Human Resources Advisor present.

[49] Accurate notes were not taken. The Human Resources Advisor paraphrased the gist of the information that she believed had been obtained and put her own interpretation on it, then presented the ‘notes’ as if it was information given by the cleaners when it was not.

[50] For example, what it is described as a “*statement from cleaners*” was not a statement at all – it was Ms Li’s summarised views of what had been discussed. The ‘notes’ say “*did not see any food, ‘just beer’*” and “*identified Bud, Breeze, Sone Will and Bill*”. However, when questioned Ms Thompson (who was present while this “*statement*” was taken from the cleaners), she told the Authority that the cleaners did not say they saw beer, they just said that they saw a green box on the table. The cleaners did not give any specific information about the box (I have discussed this already). Nor did the cleaners identify anyone but the way the notes are written makes it look as if they did.

[51] At no point during the disciplinary investigation or even during the Authority’s investigation was any evidence given about why Ms Tuhimata had been “*identified*” by the cleaners although Ms Thompson proceeded on that basis and it was a fundamental part of her decision-making. Ms Tuhimata did not deny being at the premises for about 45 or 50 minutes between 2pm and 3pm. However, there was no information from the cleaners, or indeed anyone else apart from her, about what she was doing or where she was over that period.

[52] Likewise, Ms Thompson proceeded on the basis that the Acting Team Leader had “*identified*” Ms Tuhimata as being present. That is not what the very limited available information was. The most that can be established is that the Acting Team Leader said yes when Ms Jelleyman mentioned Ms Tuhimata’s name. However, we do not know what he was asked or what he was supposedly saying “*yes*” to.

[53] A fair and reasonable employer would have made further inquiries about this before dismissing Ms Tuhimata. No information was given about what times Ms Tuhimata was supposedly present, what the Acting Team Leader said and did and observed, who was involved in drinking alcohol, who had brought it on to the premises and whether Ms Tuhimata was aware of that and/or involved in that and if so what that view was based on. None of these basic inquiries were made so I find NZ Post’s investigation was fundamentally deficient.

[54] Furthermore, the Acting Team Leader’s supposed “*identification*” was not disclosed to Ms Tuhimata before she was dismissed so she had no opportunity to respond to it. There is no statement by the Acting Team Leader (or indeed anyone else) identifying Ms Tuhimata as bringing alcohol onto the premises, participating in the consumption of alcohol or even being aware that alcohol was present and/or being consumed.

[55] There is also a timing issue that a fair and reasonable employer would have properly investigated. Ms Tuhimata says she returned to the Branch for 45-50 minutes between 2 and 3pm. The cleaners told Ms Thompson they got to the Branch at 3.15 on Friday. Ms Li’s ‘notes’ of the second time Ms Thompson spoke to the cleaners say there were there at 3pm. This timing discrepancy was never inquired into.

[56] Ms Thompson did not investigate the possibility that Ms Tuhimata had left before the cleaners arrived so could not have been one of the ten staff the cleaners say were gathered at a table in the Branch on the Friday afternoon. Instead Ms Thompson assumed that Ms Tuhimata was present.

[57] Ms Li’s ‘notes’ record the cleaners referring to there being “*about 10 people there*” although the notes do not record exactly what “*there*” means. However, given there were 12 staff disciplined for this incident, this leaves the question of where were the other two staff if there were only ten staff inside when the cleaners were there?

[58] Ms Tuhimata's evidence was that she was inside for a short time at her locker talking to others and that she was also outside smoking cigarettes. This discrepancy in the numbers is another issue that a fair and reasonable employer would have looked into as part of its investigation into what occurred and when.

*Could a fair and reasonable employer have concluded that misconduct had occurred?*

[59] Ms Thompson concluded that Ms Tuhimata had breached NZ Post's Policy. This was not a finding a fair and reasonable employer could have reached in all the circumstances.

[60] The disciplinary letter did not refer to an alleged breach of the Policy. Ms Tuhimata was never given a copy of the Policy. The Policy came into effect many years after Ms Tuhimata started work for NZ Post. There was nothing to contradict Ms Tuhimata's evidence that she had not received a copy of the Policy and had not been given any training on it. She did not have ready access to the Policy which was on the intranet because as a postie she did not have a computer to access the intranet.

[61] Ms Thompson concluded that Ms Tuhimata had "*condoned*" access to the workplace after hours for non-work related purposes and bringing alcohol onto the premises. I find neither of these conclusions were ones that were open to a fair and reasonable employer in all of the circumstances.

[62] Ms Thompson accepted that there was nothing inherently wrong in staff staying on after their shift to talk or have lunch or even (as Ms Tuhimata did) to pass time between attending to other commitments if that was more efficient to do than going home. NZ Post never told staff that it would be misconduct to stay on at the Branch after their shift ended. Staff were never told they had a certain amount of time to leave the Branch or would be disciplined for misconduct.

[63] I find that the evidence did not support Ms Thompson's conclusion that allegation 1(a) had been established to the required standard of the balance of probabilities.

[64] Ms Tuhimata was not accessing the workplace after hours. The Branch had not shut. She was there during normal business hours. I do not consider a fair and reasonable employer could conclude Ms Tuhimata engaged in misconduct by

spending 45-50 minutes at the Branch between picking up her daughter and picking up her son after school.

[65] There was absolutely no evidence at all of Ms Tuhimata “*condoning*” anyone else accessing the premises after hours. Ms Tuhimata left around 3pm so she cannot be held responsible for what may have occurred many hours after she left work.

[66] There was also no evidence that Ms Tuhimata had brought alcohol onto the premises or that she had condoned someone else doing so. This allegation needed to be established by Ms Thompson on the balance of probabilities. I find that the evidence available to Ms Thompson fell far short of that required standard so it was unfair and unreasonable for her to conclude that allegation 1(b) had been proven.

[67] In terms of allegation 2 – that Ms Tuhimata “*misrepresented and/or concealed facts*” to management I also find that this conclusion was not open to a fair and reasonable employer from the information that was available. Ms Tuhimata has consistently denied knowing anything about the presence of alcohol. There was not a shred of reliable evidence to contradict that.

[68] Ms Thompson’s reliance on unreliable ‘evidence’ fundamentally undermines her conclusion that misconduct had occurred. Ms Thompson in the outcome letter refers to Ms Tuhimata’s evidence being contradicted by “*independent external evidence.*” None of that ‘evidence’ amounts to reliable evidence against Ms Tuhimata.

[69] For example, I have discussed the deficiencies in the information supposedly given by the cleaners. Ms Thompson also relied on “Foot Mechanics.” Leaving aside the obvious problem that we don’t know who Foot Mechanics is because it is a business not a person and Ms Thompson had to have spoken to a person or people not a business we also don’t know what questions were asked, what answers given or other information exchanged.

[70] I consider it significant that whatever Foot Mechanics said the timing of this information (5pm) means it cannot have had anything to do with Tuhimata who had by then been gone for two hours or more. It was therefore unfair and unreasonable to rely on that information to conclude that Ms Tuhimata had engaged in misconduct.

[71] Likewise Ms Thompson relies on ‘evidence’ by Lab Test’s.’ Again leaving aside the obvious we don’t know who this is, what they were asked or what they said,

this information relates to what was occurring around 1.30-1.45pm on the day of the incident. It cannot have been relevant to Ms Tuhimata as she was not at the Branch at this time.

[72] Finally Ms Thompson refers to ‘evidence’ from a former employee that they were invited by a rural delivery contract driver to have a ‘drink’ in the Branch. Leaving aside that Ms Tuhimata was given no information about this at all during the disciplinary process, there is nothing in this supposed statement (which was not supported by any notes, or interview or statement) which is relevant to Ms Tuhimata. NZ Post did not even attempt to find out when this so called invitation was issued to the former employee who reported it to Ms Jelleyman.

[73] Ms Thompson does not appear to have considered Ms Tuhimata’s explanation that any drinking that may have occurred may have happened while she was not there. Ms Thompson’s view was that Ms Tuhimata “*could not explain where the 50 empty alcohol bottles came from.*” However in the absence of any evidence linking Ms Tuhimata to the bottles she could not reasonably be expected to explain the presence of them. Ms Tuhimata says she did not know anything about them which is consistent with her explanation that she did not see and was not aware of alcohol being consumed.

[74] Ms Thompson also concluded that “*independent internal evidence*” supported her conclusions that misconduct had occurred. I consider that was an unfair and unreasonable conclusion. Ms Thompson specifically cites the Acting Team Leader’s acknowledgment that he was drinking premixes. However this information was never given to Ms Tuhimata during the disciplinary process so she could not address it.

[75] Furthermore there is no information about how long the Acting Team Leader was at the Branch drinking and there was absolutely no evidence that Ms Tuhimata knew about his alcohol consumption. NZ Post failed to ask the obvious question of the Acting Team Leader – was Ms Tuhimata aware he had been drinking and if so how and why does he believe she was aware of that? In the absence of such basic inquiries there was no reasonable basis to conclude that the Acting Team Leader’s information contradicted Ms Tuhimata’s explanation.

[76] Ms Thompson also specifically refers to the presence of alcohol bottles in the recycle bin as contradicting Ms Tuhimata’s version of events. The bottles could have

been placed in the bin any time over a 48 hour period. At least 30 people had access to the bins, possibly more if there were visitors to the Branch. Ms Tuhimata says she was there for 45-50 minutes only and there is nothing to contradict that. I find that it was unreasonable and unfair to attribute responsibility and/or knowledge of the contents of the recycle bin to Ms Tuhimata in the face of her denials without evidence to support that conclusion.

[77] Ms Thompson says it was unlikely that Ms Tuhimata did not see alcohol being consumed but she did not consider that if alcohol was being illicitly consumed then the people doing so may have concealed their actions from Ms Tuhimata who was only present at the Branch for less than an hour.

[78] Ms Thompson concluded Ms Tuhimata could not have not seen alcohol being consumed so it follows that Ms Tuhimata must have been dishonest in her responses during the disciplinary meeting. I find that conclusion was not open to a fair and reasonable employer which had not first established when alcohol was being consumed and who was present at that time.

[79] NZ Post was certainly suspicious that a drinking session had occurred on Friday afternoon but it did not have reliable evidence as to when that had started or finished or even who was involved in it. It was unfair to pin responsibility on Ms Tuhimata in the absence of evidence about this.

#### *Predetermination*

[80] Ms Thompson appears to have predetermined the outcome of the disciplinary process. She assumed that the cleaners had “*identified*” Ms Tuhimata as present and drinking when they had done neither. Ms Thompson also assumed the Acting Team Leader had “*identified*” Ms Tuhimata as present and aware of alcohol being consumed when he had not.

[81] Ms Thompson also assumed that the former employee’s information to Ms Jelleyman implicated Ms Tuhimata by contradicting her account of events when it did not in fact do so. These incorrect assumptions suggest that Ms Thompson had a predetermined view about the matters she was investigating.

[82] Ms Thompson relied on accounts given by “Lab Test’s” and “Foot Mechanics” as implicating Ms Tuhimata when the timing of the information given

related to events that occurred before or after Ms Tuhimata was present in the Branch. This information therefore was not relevant to Ms Tuhimata so could not reasonably be relied on as supporting disciplinary conclusions against her.

[83] Ms Thompson also drew an adverse inference (that I find was quite unfair) that because Ms Tuhimata could not explain the presence of alcohol bottles in the recycle bin she must have been responsible for and/or aware of them.

[84] From the limited information that Ms Thompson had available to her whatever festivities were occurring may have occurred from around 1.30pm to possibly 5pm which is a significantly longer period of time than Ms Tuhimata was on the premises. It is quite possible that any drinking which occurred happened before or after Ms Tuhimata was there. That is something that a fair and reasonable employer would have turned its mind to but which I find Ms Thompson did not consider.

[85] Ms Thompson also failed to ask basic inquiry questions of potential witnesses. For example the cleaners should have been asked to explain what they saw in terms of bottles or drinking or alcohol if indeed they had seen anything. The former employee should have been asked when she was invited over for a drink and the person who did so should have been interviewed. The Acting Team Leader should have been asked who brought the alcohol onto the premises, who was drinking alcohol, who was aware of the presence of alcohol and how they knew or must have known that.

[86] Ms Thompson should also not have allowed 'notes' of interviews to record as facts information that had not in fact been given by the person being spoken to. Examples of this are the notes Ms Li took of what the cleaners supposedly said and the notes Ms Thompson took which recorded "*looked like alcohol*" when the person she spoke to had never said that. They said it looked like a farewell function because people were happy but Ms Thompson somehow translated to into "*looked like alcohol*". I consider that suggests predetermination by her.

[87] I consider that Ms Thompson did not properly assess or consider Ms Tuhimata's response but instead appears to have simply rejected it out of hand. This is another example of unfairness which undermines the justification of NZ Post's decision to dismiss Ms Tuhimata.

[88] I find those are not the actions of a fair and reasonable employer. I am satisfied on the balance of probabilities that Ms Thompson did not approach Ms

Tuhimata's disciplinary process impartially or with an open mind. I consider it more likely than not that Ms Thompson had predetermined the outcome which fundamentally undermines NZ Post's ability to justify its dismissal.

*Does s.103A(5) of the Act apply?*

[89] Section 103A(5) of the Act precludes the Authority from concluding that a dismissal was unjustified solely because of minor procedural defects which did not result in unfairness to the employee. I find that the procedural defects were serious and resulted in significant unfairness to Ms Tuhimata so section 103A(65) does not preclude a finding of unjustified dismissal.

*Outcome*

[90] I am not satisfied that how NZ Post acted, and its actions, were what a fair and reasonable employer could have done in all the circumstances at the time Ms Tuhimata was dismissed. Therefore NZ Post cannot satisfy the requirements of the justification test in s.103A(3) of the Act.

[91] I find NZ Post is unable to discharge its onus of justifying Ms Tuhimata's dismissal. Accordingly, I find that Ms Tuhimata's dismissal was procedurally and substantively unjustified.

### **What if any remedies should be awarded?**

*Reinstatement*

[92] Ms Tuhimata seeks reinstatement. I acknowledge that reinstatement is no longer the primary remedy, it is just one of a smorgasbord of remedies that may be awarded to a successful employee who has been unjustifiably dismissed.

[93] However, I consider that there is benefit to Ms Tuhimata in obtaining reinstatement to her previous role. She was a postie for nine years. She is well qualified to do the job and her other employment opportunities appear to be limited. There was no credible evidence presented by NZ Post which suggests that reinstatement is unreasonable or impracticable.

[94] NZ Post's objection to reinstatement was based on its conclusion that Ms Tuhimata had been dishonest during its disciplinary process because she

misrepresented and/or concealed knowledge of alcohol being consumed at the Branch when questioned by management.

[95] I find that was not a conclusion that a fair and reasonable employer could have reached in all the circumstances so it is not a factor weighing against reinstatement. I do not accept NZ Post's submission that there are trust and confidence issues between the parties which would make reinstatement unreasonable or impracticable.

[96] NZ Post is ordered to reinstate Ms Tuhimata to its payroll from the date of this determination. NZ Post is also ordered to reinstate Ms Tuhimata to her former position (i.e. return her to her usual work and duties) within 14 days of the date of this determination. This slight delay in actually being back at work is to give the parties time to facilitate a smooth and orderly return to work.

#### *Mitigation*

[97] I accept that Ms Tuhimata has mitigated her loss. She has worked eight hours a day for 11 days as a casual employee since her dismissal on 23 September 2014.

#### *Lost remuneration*

[98] I accept that Ms Tuhimata has lost remuneration of \$5,557.25 (being what she would have earned from NZ Post less her earnings from casual employment) up until the date of the Authority's investigation meeting. I consider it appropriate for her to be reimbursed for that.

[99] NZ Post is ordered to pay Ms Tuhimata the sum of \$5,557.25 under s.128(2) of the Act.

#### *Distress compensation*

[100] The evidence regarding the effects of the dismissal on Ms Tuhimata was minimal. I recognise that she has the sole care of two young children so the loss of her job caused her financial anxiety stress and worry and put her family under considerable financial pressure.

[101] I also accept that she has a good relationship with her team members and had worked for NZ Post for nine years so the loss of her job has been a major blow to her. She has also struggled financially.

[102] NZ Post is ordered to pay Ms Tuhimata the sum of \$2,000 under s.123(1)(c)(i) of the Act.

*Contribution*

[103] Having concluded that Ms Tuhimata has a dismissal grievance, s.124 of the Act requires me to consider the extent to which Ms Tuhimata contributed to the situation which gave rise to her grievance and if so reduce remedies accordingly. Contribution denotes blameworthy conduct which must be established on the balance of probabilities.

[104] I am not satisfied that the evidence established blameworthy conduct to the required standard so no reduction is made to the remedies which have been awarded to Ms Tuhimata.

**What is any costs should be awarded?**

[105] Mr Newson advises that Ms Tuhimata has not incurred any actual legal costs herself. Costs may only be awarded to a successful party who has actually incurred costs so it is not appropriate to award Ms Tuhimata costs when she has not incurred any. However, NZ Post is ordered to reimburse Ms Tuhimata the sum of \$71.56 for her filing fee which I am satisfied she has incurred.

**Rachel Larmer**  
**Member of the Employment Relations Authority**