



# New Zealand Employment Relations Authority Decisions

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## Behan-Kitto v New Zealand Post Limited [2011] NZERA 343; [2011] NZERA Auckland 182 (5 May 2011)

Last Updated: 22 June 2011

Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 182 5326167

BETWEEN

AND

DOUG BEHAN-KITTO Applicant

NEW ZEALAND POST  
LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Robin Arthur

Paul Blair for Applicant  
Penny Swarbrick for Respondent  
24 and 25 February 2011 in Rotorua  
5 May 2011

- A. **The disciplinary investigation conducted by New Zealand Post Limited (Post) into complaints about Doug Behan-Kitto was not full and fair and its decision to dismiss him was unjustified.**
- B. **Post is ordered to reinstate Mr Behan-Kitto to his former position or one no less advantageous and to pay him \$2000 compensation for injury to his feelings, a sum reduced for contribution.**
- C. **Costs are reserved.**

**Order for non-publication of certain information**

**DETERMINATION OF THE AUTHORITY**

Act) I order that the names of two women who made complaints to New Zealand Post Limited (Post) about Doug Behan-Kitto not be published. The Authority investigated Post's disciplinary inquiry into those complaints and this determination necessarily makes some findings about whether Post should have been done more to examine the reliability of those complainants. However as neither woman gave evidence to the Authority - nor otherwise had the opportunity to respond to concerns about the *bona fides* of their complaints - I do not consider it would be fair for them to be named. The woman who made complaints on 12 and 27 July 2010 is referred to in this determination as Ms A. The woman who made a complaint on 2 August 2010 is referred to as Ms B.

[2] Ms A's sister is also referred to in the evidence regarding a written statement taken during an interview with a Post investigator. This determination refers to her as Ms C. A further order is made for the non-publication of Ms C's name as necessary to support the non-publication order regarding Ms A's name.

[3] I decline Mr Behan-Kitto's application for permanent continuation of a previous order for non-publication of his name.<sup>[1]</sup> Instead I make a further interim order for non-publication of his name for 28 days from the date of this determination unless renewed either by the Authority or the Employment Court. That period is provided to allow Mr Behan-Kitto to file a challenge in the Employment Court if he considers the Authority determination regarding publication of his name is wrong.

[4] In providing only a further limited period of non-publication of Mr Behan-Kitto's name, I determined the interests of open administration of justice outweighed his concerns regarding his reputation being negatively affected by the content of the evidence. To some extent his concerns are dealt with by findings made in this determination that Post's decision to dismiss him was unjustified, including that Post had not properly substantiated its conclusion that he sent two offensive texts to Ms A.

### **Employment Relationship Problem**

1 AA 516/10 (17 December 2010).

[5] New Zealand Post Limited ("Post") dismissed Mr Behan-Kitto on 1 November 2010 from his job as a postal delivery worker or 'postie' in Rotorua. At the time he was working on sorting and other office-based duties, having been removed from his normal postal round during the Post inquiry into allegations about his conduct.

[6] On 17 December 2010 the Authority ordered his reinstatement on an interim basis until his personal grievance application was investigated and determined. Post exercised an option provided in that order to place Mr Behan-Kitto on 'garden leave' for that period.

### **The investigation**

[7] Written witness statements were lodged by Mr Behan-Kitto, the Postal Workers Union Rotorua branch delegate Wendy Cox, Post Rotorua delivery leader Jen Nikora, Post security risk team leader Kevin Flynn, and Post human resources consultant Emma Brown. Ms Nikora, Mr Flynn and Ms Brown were Post representatives involved in its inquiry into the complaints about Mr Behan-Kitto and disciplinary meetings with him. Ms Nikora was the manager responsible for the decision to dismiss him.

[8] Each witness attended the Authority investigation meeting. Under oath or affirmation, each one confirmed their witness statement and answered questions from the Authority member and the parties' representatives. The representatives also provided oral closing submissions.

[9] As permitted by s174 of the Act, this determination has not set out all the evidence and submissions received but has recorded only relevant findings of fact and law and expressed conclusions on the issues for determination.

### **The issues**

[10] The issues for determination by the Authority were:

(i) Did Post conduct a full and fair inquiry from which a fair and reasonable employer would have concluded Mr Behan-Kitto committed one instance of serious misconduct and seven instances of minor misconduct which, taken together, broke the relationship of trust and confidence to an extent which warranted his dismissal?

(ii) If Post's actions were unjustified, was Mr Behan-Kitto entitled to remedies of reinstatement (if practicable), lost wages (subject to evidence of mitigation) and distress compensation (subject to necessary evidence of humiliation, loss of dignity and injury to his feelings)?

(iii) Should any remedies awarded be reduced for blameworthy conduct by Mr Behan-Kitto contributing to the situation giving rise to his personal grievance?

### **How the problem arose**

[11] In July 2010 Ms Nikora informed Mr Behan-Kitto of a complaint received from Ms A. Ms A's house was near a carport that Mr Behan-Kitto used as a "bag stop" on his delivery round. A bag stop is where some of the mail for the round is stored while the postie delivers other mail.

[12] Ms A complained that, although she did talk with Mr Behan-Kitto when he began collecting bags from the address, she was "*now finding it over the top*". She said he had made sexual remarks such as "*hi sexy*" and had come into her house and helped himself to food.

[13] On 15 July Ms Nikora interviewed Ms A at her home. Notes of that interview record Ms A saying she had got along well with Mr Behan-Kitto after he had introduced himself as her new postie. She had invited him for a drink one afternoon but she felt uncomfortable with his behaviour and asked a friend who was also at her house to take him home. She said Mr Behan-Kitto had one day come into her home and helped himself to her baking. She said that in one conversation Mr Behan-Kitto had "*started bad mouthing*" her partner, which her partner overheard because he was home and sick in bed. Ms A also said Mr Behan-Kitto had told her of a rumour that she and he were having an affair.

[14] Ms A explained that she did tattoos and had given Mr Behan-Kitto her telephone number because he had friends interested in getting tattoos done by her. She had told him to tell his friends to look at some of her work on her Facebook page.

[15] Ms A said Mr Behan-Kitto knew her cousin, her aunt and her uncle.

[16] Ms A also told Ms Nikora of four abusive texts she received on 14 and 15 July from a mobile telephone number she did not know. She provided the number and the content of those text messages. The texts referred to her partner and warned her not to make accusations against Mr Behan-Kitto.

[17] Ms Nikora gave Mr Behan-Kitto a letter requiring him to attend a formal disciplinary meeting. She also gave him a copy of Ms A's complaint and the notes of her interview on 15 July. He was advised of five allegations which *"could possibly amount to sexual harassment"*. The allegations referred to unwanted sexual remarks made towards Ms A, uninvited entry to her house, spending an unwarranted amount of time collecting mail from her address, and changing his delivery round so he returned to her address more than once a day.

[18] On 27 July Ms A made a further written complaint to Post about Mr Behan-Kitto's behaviour since 15 July. She said he had stared at her when he stopped at her neighbour's mail box, had knocked at her kitchen door, yelled at her from her doorstep, and sent texts to her while sitting in the carport when she did not answer the door. She said he was in the carport sorting mail.

[19] According to Post notes of a disciplinary meeting held on 28 July, Mr Behan-Kitto's union representative Paul Blair criticised Ms A as a *"nut bar"* and called her allegations *"ridiculous"*.

[20] Mr Behan-Kitto said he had developed a friendship with Ms A by having his smoko break at the address and through Facebook contact. He admitted whistling at Ms A to get her attention and saying *"Hey Sexy"* because that was something he did all the time.

[21] Mr Behan-Kitto told Ms Nikora and Ms Brown that he had transcripts of communication between him and Ms A on Facebook and MSN (instant electronic messaging via computer). When Ms Brown asked to see copies of the Facebook and MSN messages Mr Behan-Kitto said he did not want to provide them because the communication was outside work hours and personal. He also said he had deleted texts after Ms A said she was cutting all ties with him.

[22] During the meeting Mr Blair did read out some excerpts from what was said to be a ten page transcript of Facebook and MSN exchanges between Ms A and Mr Behan-Kitto. When a Post representative asked for a copy of that document Mr Blair said the information would only be shown once there was a *"roundtable investigation with [Ms A]"*.

[23] On 10 August Post advised Mr Behan-Kitto of a complaint from another customer, Ms B. The written complaint - dated 30 July 2010 and received by Post on 2 August - was that Mr Behan-Kitto had brought Ms B's mail down her driveway to her on 5 June 2010 rather than delivering it to her letterbox. The item was a magazine. He later sent her a message on an internet site called 'NZ Dating' asking *"how was the mag???"*. He was called to a further disciplinary meeting at which his explanations about those allegations would be sought along with any further explanation for the original allegations. He was also asked to provide information relating to Facebook, MSN and text message conversations between him and Ms A. He was told: *"You need only provide the information relevant to the current allegations and may black out any sensitive information or images"*. Post also noted that if he did not provide the information about the messages, a decision about the allegations could be made without seeing it.

[24] On 12 August Mr Behan-Kitto made a complaint to the Police about being attacked by two men outside Ms A's house while delivering mail that day. His statement to a Police constable said two men rushed out of the driveway. One man punched and kicked him. Mr Behan-Kitto fell over. His helmet was broken and his ear was cut. The other man told him to come and apologise to Ms A at her house. Mr Behan-Kitto said that he had asked if he could apologise from the road and Ms A came out of her house and he apologised to her. He said one man told him *"You've been fucking with my Mrs"* but Mr Behan-Kitto said he had seen Ms A's partner and the man did not look like him. The man wore a blue bandana and a leather jacket which Mr Behan-Kitto said was *"perhaps like a gang member would wear but I didn't see a patch"*.

[25] Ms A was interviewed by the Police. She denied being at home when the attack occurred. She said a member of her family may have been involved and Police confirmed a car parked outside her house at that time belonged to a relation of Ms A.

[26] Mr Behan-Kitto was off work for around four weeks while recovering from injuries. On his return to work Ms Nikora assigned him to duties at the Post branch premises rather than delivery round work.

[27] Prior to Mr Behan-Kitto's return to work Mr Flynn had made further inquiries about the complaints.

[28] During those inquiries Mr Flynn interviewed Ms A's sister, Ms C. He took a statement from Ms C on 20 August in which she recounted an incident on 23 June when Ms A visited her house between 9 and 10am:

When [Ms A] was here her phone beeped with a text. She read the text and was shocked and then passed me the phone. I read the text which said he wanted to get a tattoo of a horse like the National Bank on his penis and would [Ms A] do the tattoo. She text back saying she doesn't do tattoos in that area but before she had a chance to send the text she got another one from him which said: "Do you want a horsey ride".

[29] Ms C's statement, as recorded by Mr Flynn, said she had not met Mr Behan-Kitto. It did not say how she knew the texts to Ms A were from him.

[30] Mr Flynn also spoke by telephone to a friend of Ms A's about the evening that Mr Behan-Kitto was invited to Ms A's house for drinks. He said her friend described Mr Behan-Kitto as acting "weird" and "over the top".

[31] On 19 August Mr Flynn interviewed Ms B about her complaint. She said she was made to "feel real uncomfortable" when Mr Behan-Kitto had come up her driveway and handed her mail while she had two friends and their children visiting. Ms B's original complaint was made about "the person delivering her mail" and said in parentheses, "I believe his name is Doug". Her statement to Mr Flynn said she had known Mr Behan-Kitto for more than a year as a friend was dating him. She had also met him at the wedding of a friend who was a postie and had seen him at the funeral of a friend's father. She also explained that her sister was a postie and "I know of him through her".

[32] Mr Flynn's report of his inquiries, dated 25 August 2010, also referred to an incident in March 2010 reported by a woman who did not want to provide a written statement. The woman knew Mr Behan-Kitto "from years ago" at school and said he had come up the driveway of her house, said "hey long time no see", and handed her the mail rather than putting it in the roadside mail box.

[33] The report, copied to Ms Nikora and Ms Brown, included the following conclusion:

*We firmly believe that the above complaints and witnesses are just the tip of the iceberg and that there are more than likely others out there with a similar story to tell.*

*Behan-Kitto displays a behaviour trend to make contact with females and including vulnerable single females at home with children. His behaviour is not that of a normal person and includes offensive and at times sexually explicit content.*

[34] Post's investigation was then delayed because, firstly, Mr Behan-Kitto had time off due to his injuries and, secondly, Mr Blair believed Post should do more to test the veracity of the complainants' allegations and wait for a Police report on the assault.

[35] In letters on 3 September and 22 October making arrangements to continue the disciplinary investigation, Post reminded Mr Behan-Kitto of the original five allegations and summarised a further six allegations being investigated. These additional allegations were:

- (i) inappropriate behaviour as alleged in Ms A's 27 July statement; and
  - (ii) sending sexually explicit text messages from his mobile phone to the mobile phone of Ms A on 23 June between 9 and 10am, a time at which he was working for Post; and
  - (iii) acting inappropriately towards Ms A on 9 July (when he had been invited for drinks at her house); and
  - (iv) acting inappropriately in October 2008 by leaving a parcel on a backdoor step of a home when ordinarily he was required to deliver to the mail box; and
  - (v) inappropriate behaviour by approaching Ms B in her driveway on 5 June; and

(vi) inappropriate contact with Ms B on the NZ Dating website by asking about her mail.

[36] The letters referred to four other "similar, historical complaints" - including two of delivering mail to the customers or their front doors rather than their mail boxes (20 August 2008 and March 2010). The letters said those complaints might be relied on in Post's decision-making process.

[37] At a disciplinary meeting held on 28 October 2010 there was further debate between Mr Blair and Post representatives on whether Mr Behan-Kitto would provide information from the Facebook, MSN and text messages between him and Ms A.

[38] Post notes of the meeting record Mr Flynn asking Mr Behan-Kitto if he had ever sent a text message about a tattoo on a penis. He answered: "No".

[39] Mr Behan-Kitto explained that he had taken Ms B's mail down her driveway as "a kind gesture" as he could see her sitting outside on the deck and did this "all the time".

[40] He was also questioned about the other complaints and a further meeting was scheduled for 1 November.

[41] At the 1 November meeting Mr Behan-Kitto was dismissed. Post's reasons for his dismissal were detailed in a seven-page letter from Ms Nikora dated 2 October (but clearly meant to be 2 November).

[42] Post found eight allegations were substantiated. One - allegedly sending sexually explicit text messages to Ms A - was found to be serious misconduct. Seven were found to be minor misconduct: inappropriate comments to Ms A, entering her house without permission, spending too long at the bag stop, changing the round and repeatedly visiting Ms A's property, delivering mail directly to Ms B, and contacting Ms B through the NZ Dating website.

[43] Post's findings - set out in detail in the letter - were, in summary that Mr Behan-Kitto:

- (i) Acted unprofessionally and inappropriately by making the comment "*hi sexy*" to Ms A, who was a customer and the comment was made on her property during his working hours. This was found to be minor misconduct.
- (ii) Acted unprofessionally and inappropriately by entering Ms A's house uninvited on 5 July, with Post preferring Ms A's version of events because Mr Behan-Kitto gave contradictory evidence on whether it was Ms A or her daughter who invited him in for some fritters. This was found to be minor misconduct.
- (iii) Changed the amount of time he spent at the bag stop - resorting mail there rather than just picking up a bag - which was an inefficient and unapproved method of working and resulted in him spending an unwarranted length of time at the address. This was found to be minor misconduct.
- (iv) Prolonged the time taken to collect the bags, including taking breaks on Ms A's property, making her feel uncomfortable and unsafe. This was found to be minor misconduct.
- (v) Changed how he did the round so that he returned to the bag stop at Ms A's property more than once a day. This was done without consultation or approval of Post management and caused Ms A to feel harassed. This was found to be minor misconduct.
- (vi) Sent Ms A "*sexually explicit text messages*" from his mobile phone on 23 June 2010 between 9am and 10am. This was found to be sexual harassment that was serious misconduct.
- (vii) Was told on four occasions - three in 2008 and once earlier in 2010 - about delivering mail directly into mail boxes rather than directly to customers. Consequently it was unacceptable to deliver mail directly to Ms B on 5 June. This was found to be minor misconduct.
- (viii) Asked Ms B on the NZ Dating internet site on 12 June how her mail was going. Contact with a customer on an internet dating site was inappropriate. This was found to be minor misconduct.

[44] The letter stated Ms Nikora's conclusion that summary dismissal was the appropriate outcome because of the nature of Mr Behan-Kitto's conduct, and his previous history.

### **Was Post's inquiry full and fair?**

[45] I have concluded that the inquiry on which Ms Nikora's decision to dismiss was made was neither full nor fair. Post's actions in how it made that decision were not justified - that is it was less than what a fair and reasonable employer would have done in all the circumstances at the time of conducting its inquiry into the complaints and making a decision on disciplinary consequences. I reached this conclusion because of apparent inadequacies in the inquiries made by Mr Flynn and because of Ms Nikora's subsequent reliance on the content of his report.

[46] Central to these concerns is Post's finding that Mr Behan-Kitto sent sexually explicit texts to Ms A on 23 June 2010 between 9am and 10am - the texts which were referred to in evidence as "*the horsey texts*". Particularly because this was said to have occurred during Mr Behan-Kitto's working hours, this was found to be serious misconduct.

[47] A fair and reasonable employer would have had more doubt about the reliability of the complaints made by Ms A and Ms C than is apparent from the evidence of Mr Flynn and Ms Nikora and would have taken greater care to establish the evidential basis for its finding of serious misconduct.

[48] The dismissal letter said that Ms A had identified the mobile phone from which those texts had come as being that of Mr Behan-Kitto and that Ms C had seen the texts at the time.

[49] Mr Flynn's written report on his interview with Ms A on 19 August made no reference to her saying anything about those texts. Neither did the notes he wrote in his diary at the time of interviewing her. That was surprising given such an allegation would be a very significant piece of information to emerge in an interview. The first written reference to those texts is made in his report of a subsequent interview of Ms C later on 19 August. There is nothing in Ms C's written statement taken by Mr Flynn which satisfactorily identified how she knew that the texts she said Ms A showed her on 23 June were from Mr Behan-Kitto.

[50] In his oral evidence Mr Flynn said Ms A had referred to those texts at the end of his interview with her but he had not made a note of the allegations. He said he did ask to see the texts but Ms A had said she deleted them. He said he asked her to assist with a request to Telecom to have those texts provided and she agreed. He did not ask for or check the number from which she said the texts were sent but relied solely on her saying they were from Mr Behan-Kitto. He checked with Ms A later and was told she had not been able to get any information from Telecom. That is not surprising. As noted in Mr Flynn's diary, Ms A's mobile telephone number began with the numbers 022 - the prefix used for subscribers to Two Degrees rather than Telecom. While such phone numbers can be transferred to different service providers under number portability arrangements, there is nothing to suggest that this happened here and it was not something Mr Flynn checked. He said he

had checked with Telecom about what information he might be able to get from it but was told the content of deleted texts could not be provided. He made no further inquiries after Ms A told him she could not get the information either.

[51] Even if Mr Flynn were correct that Ms A did tell him about the 23 June texts during his interview of her on 19 August, he had no satisfactory explanation for not asking Ms A why she had not mentioned those supposed offensive texts during her earlier interview with Ms Nikora on 15 July - more than a month earlier - or in her further complaint to Post on 27 July. (I note too that other evidence established that in the week after Ms A said she had got those unwelcome texts, she invited Mr Behan-Kitto to her house for drinks.)

[52] Mr Behan-Kitto's evidence at Post's disciplinary meetings and to the Authority was that he did not send those texts. At the time of its inquiry or since Post did not establish to anywhere near the necessary standard of proof that his answer was not correct.

[53] Post's conclusion about Mr Behan-Kitto's authorship of those texts was based solely on - at best - the word of Ms A and the corroboration of his sister Ms C. It has no direct information from either of them about the actual phone number from which the texts were sent, and in Ms C's case, how she knew the source of the texts. Mr Flynn's attempt to get corroboration from the phone provider foundered on Ms A's report that she could not get information about the texts from Telecom when she, most likely, knew that her phone service came from a different provider.

[54] There was a similar lack of rigour in considering the reliability and motivation of Ms B's complaint. It was made two days after the first disciplinary meeting with Mr Behan-Kitto. By the time Mr Flynn interviewed Ms B, Mr Behan-Kitto was off work due to injuries incurred during the 12 August assault.

[55] Her letter of complaint referred to believing that the postie's name was Doug. However according to the statement that Mr Flynn took from Ms B on 19 August, she had known Mr Behan-Kitto for more than a year when he had dated a friend of hers. She said she "*thought he was arrogant and annoying*" when she first met him. She had since met him at a wedding and a funeral and said she knew of him through her sister working as a postie in Rotorua. Mr Flynn made no inquiry as to why Ms B's letter of complaint pretended she was not sure of Mr Behan-Kitto's name when she knew much more about him, why she had not made a complaint about the 5 June incident until 55 days later, and whether her sister had told her anything of Mr Behan-Kitto being under investigation at work.

[56] Instead Mr Flynn reached the conclusion that the complaints of Ms A and Ms B were "*just the tip of the iceberg*" and that Mr Behan-Kitto's behaviour was "*a very serious risk*" to Post and its customers.

[57] In the October 28 disciplinary meeting, according to Post's notes, Mr Blair asked whether Post was suggesting Mr Behan-Kitto was a "*sexual predator*". No answer is recorded from the Post representatives and Ms Brown could not recall if any answer was given to that question. However three Post representatives in that meeting - Ms Nikora, Ms Brown and Mr Flynn - knew Mr Flynn's report expressed a 'firm belief about Mr Behan-Kitto's behaviour that was, in effect, exactly the kind of accusation that Mr Blair asked if Post was making. Post never disclosed to Mr Behan-Kitto and his representative the existence of that highly prejudicial written opinion. It was a clear breach of its obligations under s4(1A)(c) of the Act to disclose information relevant to the continuation of his employment and to give him an opportunity to comment on it before the decision was made.

[58] Ms Nikora's evidence was that she ignored this particular conclusion in Mr Flynn's written report as merely his opinion. She did not accept that it was such a potentially prejudicial view that it should have been disclosed to Mr Behan-Kitto for his comment or response. Neither did she accept that she relied heavily on Mr Flynn's conclusions in reaching her own findings and making the decision to dismiss Mr Behan-Kitto.

[59] Post, in closing submissions, submitted that, as an experienced manager, Ms Nikora was able to ignore Mr Flynn's opinion and rely solely on the facts in front of her. It is a proposition that - having heard Ms Nikora give her evidence - I find less than likely. Answering a question from the Authority member, she accepted that she regarded Mr Flynn - who is a former Police officer with extensive experience in criminal investigation - as an expert in making inquiries on Post's behalf. And it was largely the findings of facts that he made that she relied on in reaching her conclusions on what had happened in relation to each allegation - and particularly the one reached about serious misconduct. That would be clear to any objective reader of his report and Ms Nikora's letter of dismissal drafted with the assistance of Post's human resources advisors. Ms Nikora accepted that she had relied on Mr Flynn's opinion that Ms A was credible. That is an opinion, for the reasons given above, I have found was not based on a full and fair investigation.

[60] She stated that the influence of Mr Flynn's "*tip of the iceberg*" opinion, given in his August report, had "*faded into the background*" by the time she made her decision about Mr Behan-Kitto's dismissal in late October. I consider that unlikely given Mr Flynn attended the 28 October disciplinary meeting, opened the meeting on Post's behalf and then put most of the questions then asked of Mr Behan-Kitto.

[61] However, even if Ms Nikora's decision was not significantly influenced by Mr Flynn's "*iceberg*" theory, it was nevertheless flawed by its reliance on the factual conclusions he reached from interviews with Ms A, Ms B and Ms C. That

inquiry was inadequate for reasons already given and her decision - based on assumptions made but not fairly or fully investigated - was unjustified.

[62] I find a fair and reasonable employer could not, on the information available to Post and without further inquiry, have concluded that Mr Behan-Kitto did send the 'horsey texts'. To do so, at the very least, would have required the very simple exercise of checking the number of Mr Behan-Kitto's mobile phone with that from which Ms A said the texts came.

[63] However I have not concluded Post was unjustified in its decisions that the other allegations were substantiated and amounted to minor misconduct. This is largely because Mr Behan-Kitto did not dispute the fact of contact with Ms A and Ms B on the alleged times and dates but rather the context or content of those exchanges. However - but for the 'horsey text' allegation and Mr Flynn's prejudicial 'iceberg' theory - I consider it more likely than not that a fair and reasonable employer would have dealt with those incidents and its findings about them under the applicable collective employment agreement provisions for written warnings rather than a decision to dismiss. In that respect I also accept that such an employer may have reached different conclusions than Post did in this instance based on (i) the applicability of its general policy regarding deliveries being made only to mail boxes only and (ii) whether the incidents involving other people were really work-related interactions.

[64] I accept the evidence of Ms Cox that the policy on delivery to mail boxes was not consistently applied by Post managers as posties were sometimes praised for instances where they hand-delivered certain postal items (such as parcels) to the door of customers rather than leaving them at the mail box. However in Mr Behan-Kitto's case, Ms Nikora's evidence did establish that he had been previously cautioned to use the mail-box rather than ride onto a customer's property.

[65] I also accept that a fair and reasonable employer would acknowledge that the line between a customer and a person known socially is not necessarily as clear as Post's approach in this case would suggest. The evidence regarding Ms B showed that. Ms A had not previously known Mr Behan-Kitto but Post was aware throughout that their contact in the weeks prior to her complaint was not solely work-related. Post had sought further information from Mr Behan-Kitto to clarify that aspect - specifically the electronic messages to which he referred but would not disclose - and Post was entitled to proceed without that information when repeated requests for it were declined by him on his representative's advice. However its other actions in conducting an inadequate investigation were not justified.

## **Remedies**

### *Contributory conduct*

[66] In the event of his dismissal being found unjustified, Mr Behan-Kitto sought remedies of reinstatement, lost wages and compensation for hurt and humiliation. In exercising the discretion to award remedies in this case I considered elements of Mr Behan-Kitto's conduct were blameworthy, contributed to the situation giving rise to his grievance, and warranted some reduction of remedies: s124 of the Act.

[67] Having accepted that, to some degree, a fair and reasonable employer would have reached the same conclusion about misconduct (but not serious misconduct) as Post had, Mr Behan-Kitto's conduct was blameworthy in two respects - firstly, failure to comply with some previous instructions regarding delivery to mail boxes and, secondly, his participation in the disciplinary investigation. The first element is discussed under the reinstatement heading below. The second element concerned Mr Behan-Kitto and his representative withholding information from Post.

[68] The content of the electronic messages exchanged between Mr Behan-Kitto and Ms A during June 2010 was highly relevant to how her subsequent complaint should be considered. In his application to the Authority Mr Behan-Kitto provided a full copy of the ten or so pages of transcribed messages that he and his representative had at the first disciplinary meeting. His representative read out a few lines in that meeting but refused - in a tactic with which Mr Behan-Kitto told me he agreed - to provide more until a "roundtable" meeting was held with Ms A. It was a demand that Mr Behan-Kitto was not entitled to make and was not consistent with his own good faith obligations as an employee.

[69] Reading the full text of their electronic exchanges casts a different light on the social relationship between Mr Behan-Kitto and Ms A, and the extent to which conversations and contact of which she subsequently complained were unlooked for on her part. For example she described a photo of Mr Behan-Kitto as "*looking damn good*", invited him to "*come partake with me sometime*", and saying he "*shld have yelled out or cum got me*" on an occasion when he visited the carport but Ms A had not heard him. It included an unsolicited comment from Ms A saying: "*/ wana know all about Doug, dirty lil secrets n all webbed toes, third nipple u name it*" and, in messaging about body piercing, Ms A wrote that she "*wantd my girlie bit pierced*". In response to Mr Behan-Kitto writing "*u hvnt left my mind since we met*", Ms A replied: "*/ know the feeling its been the same for me*".

[70] It was material Post properly asked for the opportunity to view and proposed that any sensitive personal information could be blacked out. I consider it more likely than not that had the Post representatives seen the full text of those messages (as later provided by Mr Behan-Kitto to the Authority), they would have had serious reservations about the extent to which they should act on Ms A's complaint. His refusal to provide it consequently contributed to the situation that gave rise to his

grievance. If he had provided it, things may well not have gone so badly for him.

### *Reinstatement*

[71] At the time Mr Behan-Kitto lodged his application in the Authority (12 November 2010) reinstatement was the primary remedy under the Act. By the date of this determination the 2010 amendments to the Act had come into effect so the relative status of reinstatement was changed. It is no longer the primary remedy. However neither is reinstatement now a secondary remedy. Its statutory priority is now neither greater nor lesser than other remedies. Rather reinstatement - if sought - is one item in the basket of remedies which s123 of the Act gives the Authority a discretionary power to provide in appropriate circumstances. Under the provisions of s125, those circumstances are where reinstatement is "*practicable and reasonable*".

[72] Post submitted reinstatement of Mr Behan-Kitto was neither practicable nor reasonable for two reasons - other workers at the postal delivery branch were reported to oppose his return and Ms Nikora no longer trusted Mr Behan-Kitto to carry out a role which involved mostly working unsupervised on a delivery round.

[73] Ms Nikora's indirect evidence about the views of delivery branch staff was disputed by Mr Behan-Kitto and Ms Cox. Neither perspective was persuasive as the practicability of reinstatement is not simply decided on the basis of a popularity contest and is not particularly relevant for a postie working alone on a delivery round rather than in a constant team environment.

[74] Ms Nikora's evidence about her lack of trust and confidence in Mr Behan-Kitto was more relevant. This related to incidents where Mr Behan-Kitto had not complied with her directions to make deliveries only to mail boxes. While not directly supervised while on his round, Mr Behan-Kitto's role as a postie is performed largely in public view on public streets. It is an element going to practicability of his reinstatement that Post, as evidence in the present matter showed, would get complaints if he did not perform his job satisfactorily. Because the collective employment agreement includes disciplinary and performance procedures which provide for warnings for instances of misconduct, I conclude Post and the Postal Workers Union accepted these were practical and reasonable means of dealing with such matters. Having those means available should Mr Behan-Kitto fail to meet required standards in future supports the practicability of his reinstatement.

[75] I was not persuaded reinstatement was impractical or unreasonable because of evidence that Mr Behan-Kitto had, while on garden leave, investigated the prospect of a job with a Rotorua courier firm. There was nothing improper about investigating options if he were not permanently reinstated and, as his Post job was part-time, he could consider courier work at other times.

[76] Within 14 days of the date of this determination, Mr Behan-Kitto is to be reinstated to his role as a postie or placed in a position no less advantageous to him. He remains on the pay roll during that 14 day period due to the existing interim reinstatement order. During that 14 day period Post may require him to attend training or induction sessions and carry out any other ordinary duties. The parties are directed to mediation in the first instance if there are any difficulties implementing this order for reinstatement.

### *Lost wages*

[77] To the extent Mr Behan-Kitto lost wages in the period between his dismissal on 1 November and his interim reinstatement from 17 December 2010, no order is made for reimbursement. That element of his loss from his unjustified dismissal is subject to 100 per cent reduction for contribution.

### *Compensation for hurt and humiliation*

[78] There was limited evidence from Mr Behan-Kitto in support of his claim for compensation for emotional distress arising from Post's actions. He described the experience of the disciplinary inquiry and dismissal as "*stressful*". He said that while a story published in the *New Zealand Herald* about his interim reinstatement did not name him, he was embarrassed that his mother deduced that it was him who had been dismissed. As evidence of injury to feelings, it was at the lower end of the scale. However I accept his submission that there was a link established between his dismissal and that distress, which arose from being labelled a sexual harasser on the basis of inadequate evidence. I consider his distress should be compensated for by an award of \$3000 under s123(1)(c)(i) of the Act, reduced by one third for contribution, so Post is to pay him \$2000.

### **Costs**

[79] Costs are reserved. The parties are encouraged to resolve any issues as to costs between themselves. If they are not able to do so and an Authority determination of costs is required, Mr Behan-Kitto may lodge and serve a memorandum as to costs by no later than 28 days from the date of this determination. Post would then have 14 days to lodge a reply memorandum. No application will be considered outside this timetable without prior leave being sought and granted.

Robin Arthur

Member of the Employment Relations Authority

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[1] Under clause 10 of Schedule 2 of the [Employment Relations Act 2000](#) (the

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