IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 456
5426671

	BETWEEN	TYRONE WAYNE UNDERHILL Applicant
	A N D	NEW ZEALAND POST LIMITED Respondent

Member of Authority:	T G Tetitaha
Representatives:	Applicant in person L Willson, Counsel for the Respondent
Investigation Meeting:	15 August 2014
Submissions Received:	15 August 2014 oral submissions from Applicant 15 and 20 August 2014 from Respondent
Date of Determination:	10 November 2014

DETERMINATION OF THE AUTHORITY

A. Tyrone Wayne Underhill was unjustifiably dismissed by New Zealand Post Limited.

B. There is an order that New Zealand Post Limited pay to Tyrone Wayne Underhill three months wages at the rate he was earning when dismissed less PAYE and reduced by 50% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

C. There is an order that New Zealand Post Limited pay to Tyrone Wayne Underhill compensation of $2,500 including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

D. I order costs to be paid by the New Zealand Post Limited to Tyrone Wayne Underhill of $71.56.

Employment relationship problem

1. Tyrone Wayne Underhill was employed by New Zealand Post Limited (NZ Post) until he was dismissed on 5 April 2014. Tyrone submits he was unjustifiably disadvantaged and dismissed by various warnings and actions of his employer.

Facts leading to dismissal

2. Tyrone Underhill was employed as a postie in 2010. The parties employment relationship was governed by a collective employment agreement[1].

3. On 10 September 2011 Tyrone broke his finger playing rugby. He attended hospital where he was told he would need time off for recovery. He applied for compensation from the Accident Compensation Corporation (ACC) and was placed upon sick leave.

4. Issues arose between NZ Post and ACC about payment of his wages for his first week away from work. Tyrone was in some financial strife as a consequence.

5. On 30 September 2011 he obtained a medical certificate from his doctor stating he was unfit to return to work until 10 October 2011. He then spoke to

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[1] Postal Workers Union of Aotearoa and New Zealand Post Collective Employment Agreement 2011-2012

his ACC Case Manager. She asked if he was able to come back to work earlier. He confirmed he could but needed to obtain a medical certificate from his doctor.

6. The ACC Case Manager then advised his manager at the Papakura Branch, Raewyn Turei, Tyrone would be fit to return to work on 3 October 2014. Ms Turei organised her work roster to include Mr Underhill as a consequence.

7. On 3 October 2011 Tyrone did not return to work. Ms Turei rang him and left a message asking him to contact her. Tyrone returned her call and left a message saying he was *"chasing up ACC."*

8. On 4 October 2011 Ms Turei was advised by the applicant's brother, Kaine Underhill, that Tyrone would not be attending work. She phoned him and received no reply.

9. That same day, Tyrone had obtained a doctor's appointment and went to collect his medical certificate until 4 October 2011. The medical certificate was unsigned but confirmed he was fit to return to work on 3 October 2011. There is some dispute about the validity of this medical certificate.

10. On 5 October 2011 Tyrone returned to work and provided Ms Turei with copies of both his medical certificates – the first signed medical certificate stating he was not fit to return to work until 10 October 2011 and the second unsigned medical certificate stating he was fit to return to work on 3 October 2011. Ms Turei handed him a letter asking him to attend a meeting on 7 October 2011 regarding his absenteeism on 3 and 4 October 2011.

11. On 7 October 2011 Tyrone met with Ms Turei and wrote out his explanation of what occurred. Ms Turei consulted Michael Fenton, the respondent's then Auckland Area Branch Manager. A decision was made to issue Tyrone with a verbal warning.

12. A letter confirming the issue of a verbal warning was given to Tyrone on 12 October 2011.[2] The verbal warning was issued for *"not following the correct process to communicate with [Ms Turei] when [he] did not attend work on 3*

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[2] Letter R Turei to T Underhill dated 12 October 2011 Appendix 6 Bundle of Documents

and 4 October 2011." The verbal warning was placed on his personal file for up to six months.

13. On 7 November 2011 a team briefing was held covering matters including unauthorised assistance upon postie runs. The team were told there was to be no more helping out on the postie runs. Tyrone attended the briefing.

14. On 26 November 2011 Tyrone was assisted on his run by his brother, Kaine Underhill. Kaine is another postie employed by NZ Post. Tyrone did not seek permission for this.

15. On 1 December 2011 Ms Turei wrote to Tyrone inviting him to a meeting on 2 December 2011 about concerns he used his brother to assist him and did not notify his managers about this.[3] At the meeting Tyrone took responsibility for his actions. Ms Turei determined he would be issued with a written warning.

16. A letter confirming the issue of a written warning was given to Tyrone on 6 December 2011 for unauthorised assistance during his delivery round. It also referred to the verbal warning and was valid for 12 months.

17. On 13 January 2012 Tyrone was absent from work. The same day he received a letter raising concerns about his being absent from work without authorisation on 13 January 2012. NZ Post had attempted to contact him and spoken to his brother, Kaine Underhill, who advised they were both up north at a tangi. The letter referred to the verbal warning as well.[4]

18. Tyrone met with Ms Turei on 17 January 2012. He gave an explanation that he had intended to ring but had no reception. Ms Turei determined he would be issued with a final warning.

19. On 20 January 2012 Tyrone was issued with a final written warning for his failure to notify his branch leader/team leader of his intended absence and an unauthorised absence.[5] The final written warning referred to the verbal warning and the first written warning. The final warning was valid for 12 months effective from 17 January 2012.

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3 Letter R Turei to T Underhill dated 1 December 2011 Appendix 8 Bundle of Documents
4 Letter R Turei to T Underhill dated 13 January 2012 Appendix 11 Bundle of Documents
5 Letter R Turei to T Underhill dated 20 January 2012 Appendix 13 Bundle of Documents

20. On 17 March 2012 Tyrone did not attend work. He had contacted his manager, Jazma Taituha about his absence. There is some dispute about this conversation.

21. On 22 March 2012 Tyrone was sent a letter from Leeann Jellyman, Team Leader requesting he attend a formal investigation meeting about concerns he was absent from work without authorisation on 17 March 2012. NZ Post stated Tyrone had been advised by Ms Taituha, amongst other things, he was required at work and she would let management know on Monday.

22. The decision about further disciplinary action was made by Michael Fenton, the then Auckland Area Branch Manager. Mr Fenton obtained a statement from Ms Taituha dated 20 March 2012.

23. On 4 April 2012 Mr Fenton and Ms Jelleyman met with Tyrone. Tyrone gave various explanations. The meeting was adjourned.

24. On 5 April 2012 Mr Fenton, Ms Jelleyman and Tyrone met again. He was advised NZ Post intended to dismiss him and asked him for further comment. The meeting was adjourned to consider his reply for five minutes. The dismissal decision was subsequently confirmed.

25. On 16 April 2012 a letter was sent to Tyrone confirming the decision to dismiss.

26. On 26 April 2012 Tyrone dropped off a *"Memorandum of Appeal Against Unfair Dismissal"* setting out his view of the events on 17 March and the meetings on 4 and 5 April 2012. On 3 May 2012 Mr Fenton replied.

27. On 25 May 2012 r Tyrone sent a facsimile to NZ Post submission setting out further concerns about the warnings he was given and alleging "unfair dismissal". On 29 May 2012 Mr Fenton replied to the facsimile.

28. On 5 June 2012 Tyrone faxed a further response to Mr Fenton. On 8 June 2012 Mr Fenton replied. The matter was unable to be resolved at mediation.

29. This matter was scheduled for hearing in January 2014. Due to the (then) presiding Member's unexpected illness, the hearing had to be adjourned for hearing. It has now come before me for determination.

Issues

30. The following issues arise:

(a) Were the concerns about the verbal and written warnings in 2011 and 2012 raised with the employer within 90 days?

(b) If no, are there any exceptional circumstances for which leave should be granted to extend the time for hearing those personal grievances?

(c) Were the actions of the employer what a fair and reasonable employer could have done in all the circumstances?

(d) What remedies (if any) should be awarded?

Were the concerns about the verbal and written warnings in 2011 and 2012 raised with the employer within 90 days?

31. Tyrone conceded he did not raise a personal grievance about the warnings with his employer until 25 May 2012 when he sent the above facsimile. The facsimile was prepared and sent by his father who believed that there was some wrong committed by those warnings. The respondent submits these grievances are out of time and it does not consent to any extension of time.

32. Section 114 of the Employment Relations Act 2000 requires employees to raise a personal grievance with their employer within 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee.

33. The verbal warning was given on 12 October 2011. The last day for Tyrone to raise a personal grievance about that warning with NZ Post was 10 January 2012. The date he raised his concerns about the verbal warning was 25 May 2012. This is 135 days outside of the time limitation.

34. The first written warning was given on 6 December 2011. The last day for Tyrone to raise a personal grievance about that warning with NZ Post would

have been 12 March 2012.[6] The date he raised his concerns about the warning was 25 May 2012. This is 74 days outside of the time limitation.

35. The final written warning was given on 20 January 2012. The last day for raising a personal grievance about the final written warning would have been 19 April 2012. The date he raised his concerns about the warning was 25 May 2012. This is 36 days outside of the time limitation.

36. The evidence shows a personal grievance about the verbal and written warnings was not raised with NZ Post within the 90 day period.

37. He did raise a personal grievance about the unjustified dismissal within the 90 day time limitation. Tyrone was dismissed on 16 April 2012. The last day for raising a personal grievance about the dismissal with NZ Post would have been 15 July 2012. He raised an allegation of unfair dismissal on 26 April 2012. No leave is required for the personal grievance of unjustified dismissal. This grievance may proceed to hearing.

Are there any exceptional circumstances for which leave should be granted to extend the time for hearing those personal grievances?

37. The period for raising a personal grievance may be extended with the employer's consent or by the Authority granting leave if the delay was due to exceptional circumstances and it being just to do so (s114(3).

38. Tyrone gave evidence at hearing that he did nothing about the warnings until his father became involved in May 2012.

39. There are no matters raised by Tyrone which would appear to be exceptional circumstances justifying the grant of leave. Accordingly leave to raise these individual personal grievances about the warnings is declined.

40. This does not mean the previous warnings are not relevant to the dismissal decision. I deal with this further below.

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[6] Section 35(6) provides "A thing that, under an enactment, must or may be done on particular day or within a limited period of time, may, if that day, or the last day of the period is not a working day, be done on the next working day". The 90 day time period expired on 10 March 2012 which was a Saturday. The next working day would have been 12 March 2012.

Were the actions of the employer what a fair and reasonable employer could have done in all the circumstances?

41. Mr Underhill says the dismissal was unfair. He believes the actions of NZ Post, including the issuing of the warnings was unfair and unreasonable in the circumstances. He submitted NZ Post had engaged in conduct in the past where he had been granted time off for similar matters, gave no regard to his good work history and his belief his family should be placed above his work. He also alleged other employees with more unauthorised absences were not dismissed.

42. The respondent submits procedurally and substantively its investigations and disciplinary outcomes were those open to a fair and reasonable employer in all the circumstances.

Collective Employment Agreement

44. Section I of the collective employment agreement sets out the conduct and performance expectations of the parties. An unauthorised absence from work is an example of minor misconduct under the agreement.[7] The disciplinary procedure leading to dismissal to be followed in the case of minor misconduct is set out in clause 12. The disciplinary procedure provides for dismissal upon notice where there have been previous written warnings:[8]

> *12. In the case of misconduct which does not amount to serious misconduct, the employee will be given a written warning in the first instance, a final warning in the second instance and, if there is a further appearance of misconduct, the employee will be dismissed with notice. Each warning may be unrelated matters of misconduct.*

45. Section I also sets out examples of poor performance. Unauthorised absences may also be treated under poor performance. An example of poor performance is that *"employees must not ... absent themselves from work without a genuine reason and must advise their manager of the reason for any absence as soon as possible".*[9] Where an employee exhibited poor

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7 Collective Employment Agreement p53 Examples of Minor Misconduct
8 Collective Employment Agreement p55
9 Collective Employment Agreement p52

performance it set out another process, including oral and written warnings that could lead to dismissal:[10]

> *15. If an oral warning is given, the employee must be told that continued failure to perform in the job in a competent manner could lead to a formal warning, transfer to another job or dismissal.*
>
> *16. A record of the initial assessment and any oral warning will be placed on the employee's personal file and a copy given to the employee.*
>
> *17. If, following the initial assessment, the employee fails to perform their job in a competent manner, the company may decide to give the employee a written warning. The company must:*
>
> - *Give the employee a clear explanation of the area or areas where the employee is not performing in a competent manner;*
> - *Advice the employee of the action required to bring the employee's performance up to the standard required by the company;*
> - *Give the employee an opportunity to explain or deny the allegation and consider that explanation before deciding whether to give the employee a written warning;*
> - *Provide a period of time within which the employee must bring their performance to a competent level;*
> - *Warn the employee that failure to perform the job in the competent manner could lead to a transfer to another job or dismissal.*

Verbal Warning

45. The respondent submits the verbal warning was justified because Tyrone failed to communicate and was therefore absent without authorisation. It submits the medical certificates were not provided to Ms Turei until 7 October 2011 referring to an email from Ms Turei to Mr Fenton dated 7 October 2011. It relied upon the evidence of its employee Juena McKinnon that it would be normal practice for the parties to be in communication. It also referred to the evidence of Michael Fenton and Leanne Jellyman that employee communication when away from work due to long term injury was a minimum

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10 See above.

expectation. It was capable of issuing a verbal warning because this could be viewed as analogous to the Respondent's "Letter of Expectation" under Potential Disciplinary Outcomes Section 1 Appendix 1.

46. The email from Ms Turei to Mr Fenton dated 7 October 2011[11] does not support the proposition Ms Turei received the medical certificates on 7 October 2011. It records she received the "paperwork" on 5 October - the day Tyrone started back at work. However it seems Ms Turei may have been aware of the medical certificates earlier. Ms Turei was rung by the ACC case manager about Tyrone's early return to work. Ms Turei tells ACC *"Tyrone would only be able to come back to work if he had medical clearance."* This infers she may have told by ACC he had a medical certificate to 10 October 2011. Tyrone's conversation with ACC about getting another medical certificate to return to work on 3 October 2011 is recorded. The ACC Case manager calls Ms Turei again to say Tyrone had a medical clearance to return to work on Monday 3 October 2013 and *"would bring his further medical and his medical clearance with him to work on Monday Oct 3."* The reference to a *"further medical and his medical clearance"* may refer to a discussion about both medical certificates. Ms Turei was not produced for examination.

47. No policy was produced showing the process for communication in these circumstances. The respondent relied upon evidence of various managers about their communication expectations. However upon these facts Tyrone had attempted to communicate with Ms Turei on 3 and 4 October 2011. By 5 October 2011 when he returned to work Ms Turei was well aware of his medical circumstances. She does not appear to give any weight to the fact he had a medical certificate justifying his absence and had made some attempts to communicate with her. Ms Turei appears to place the burden upon Tyrone to communicate more effectively when it was clear from the evidence she had relied upon defective information from ACC that he was fit to return to work on 3 October 2011. The blame for communication failures cannot be laid solely at Tyrone's feet.

48. The procedure leading to the issue of the verbal warning was also defective. I do not accept the verbal warning was a letter of expectation. There was no

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[11] Email R Turei to M Fenton dated 7 October 2011 Appendix 5 Bundle of Documents

evidence showing what a letter of expectation was. The verbal warning did not refer to it being a letter of expectation.

50. The only analogous reference in the collective employment agreement to a 'verbal warning' is an oral warning issued for poor performance under clause 15. The verbal warning was issued for *"not following the correct process to communicate with [Ms Turei] when [he] did not attend work on Monday 3 October 2011."* This is consistent with the example of poor performance above. Tyrone was not absent without authorisation. He had a medical certificate stating he was not fit to return to work until 10 October. The email dated 7 October 2011 also refers to Tyrone being paid for the days he was absent. The respondent's conduct and verbal warning is consistent with an oral warning being administered under clause 15 for poor performance not an unauthorised absence.

51. If the verbal warning was an oral warning it was procedurally defective. It did not meet the requirements of an oral warning set out in clauses 15 to 17 above. The verbal warning letter did not record any initial assessment (if one was done at all), or warn him failure to perform could lead to a formal warning, transfer to another job or dismissal.[12]

52. Even if the verbal warning was able to be administered as part of the 'minor misconduct' process leading to dismissal, the invitation letter and verbal warning itself did not refer to or accurately summarise that process. The minor misconduct disciplinary process is set out in clause 12 of the collective employment agreement above. The correspondence states that continued failure to communicate more effectively when absent from work could lead to further disciplinary action without more. Under clause 12 repeated minor misconduct could lead to dismissal. This was not made clear to Tyrone. It may have prompted him to take earlier action about his previous warnings as a **consequence.**

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12 Letter NZ Post to T Underhill dated 12 October Appendix 6 Bundle of Documents

53. The above defects were not minor and did result in Tyrone being treated unfairly.[13] The oral warning was relevant to the two written warnings and dismissal. The letter inviting Tyrone to the meeting about his first written warning for unauthorised assistance[14] refers to the verbal warning, the first written warning itself[15] refers to the verbal warning and the final written warning[16] refers to the verbal warning. At hearing, Mr Fenton admitted he relied upon the warnings as part of his decision making process. This shall impact upon the fairness and reasonableness of the dismissal decision below.

First and Final Written Warnings

55. The respondent submits these warnings were substantively justified because Tyrone admitted he had unauthorised assistance leading to the first written warning and conceded at hearing he was not at a tangi as he had led the employer to believe prior to the issue of the final warning. It submits its processes in respect of the investigation carried out and the resulting disciplinary action were fair and reasonable in all the circumstances. It encouraged the applicant to have support or representation at the meetings, put him on notice of its concerns and the potential consequences should the allegation be substantiated, gave him a full and fair opportunity to respond, genuinely considered his responses, carried out its investigation in a fair and reasonable manner, had evidence that was relevant and reliable and the disciplinary outcome was a decision a fair and reasonable employer could make in all the circumstances.

56. I accept there were acts justifying the engagement of the disciplinary process leading to first and final warnings and the dismissal based upon Tyrone's admissions of the acts giving rise to those warnings. The acts constituted minor misconduct namely *"failure to comply with any direction from the company"* and *"unauthorised absences"*.[17]

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[13] s103A(5) states *"The Authority ... must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were ... minor and ... did not result in the employee being treated unfairly"*

[14] Letter R Turei to T Underhill dated 12 October 2011 Appendix 6 Bundle of Documents

[15] Letter R Turei to T Underhill dated 6 December 2011 Appendix 10 Bundle of Documents

[16] Letter R Turei to T Underhill dated on 20 January 2012 Appendix 13 Bundle of Documents

[17] Collective Employment Agreement p53

57. His admission at hearing he had misled his employer about his unauthorised absence at a tangi was not before the employer at the time it made its decision to issue a final warning. This is contributory conduct which is relevant to the reduction of remedies below.

58. I do not accept the process leading to dismissal including these warnings was what a fair and reasonable employer could have done in all the circumstances. There are errors in the written and final warnings. Both state the verbal warning was *"for your absence without leave and failure to notify branch of absence"*. The verbal warning was issued for *"not following the correct process to communicate with [Ms Turei] when [he] did not attend work on Monday 3 October 2011."* His absence was not the basis for issuing the warning. His failure to properly communicate was.

59. The letter inviting Tyrone to the meeting about his first written warning for unauthorised assistance refers to the verbal warning being for minor misconduct.[18] The verbal warning makes no reference to it being issued for 'minor misconduct'. It appears NZ Post incorporated the verbal warning as part of its disciplinary process for minor misconduct. A verbal warning is not part of the prescribed process for minor misconduct set out in clause 12 of the collective employment agreement. This was unfair and possibly in breach of the employment agreement with Tyrone.

60. The letter inviting Tyrone to the meeting about his first written warning[19] and the final warning[20] do not specify the part of Section I of the collective employment agreement it relied upon to issue either warning. This was important because a written warning could be issued for both minor misconduct under clause 12 and poor performance under clause 17 of the collective employment agreement. The acts leading to the issuing of these warnings could also have fallen under either minor misconduct or poor performance. The requirements for issuing and the content of the written warnings under clauses 12 and 17 are different.

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18 Letter R Turei to T Underhill dated 1 December 2011 Appendix 8 Bundle of Documents

19 Letter R Turei to T Underhill dated 1 December 2011 Appendix 8 Bundle of Documents

20 Letter R Turei to T Underhill dated 20 January 2012 Appendix 13 Bundle of Documents

61. This could have been cured by an accurate summary of the disciplinary clause the respondent was seeking to rely upon in its correspondence with Tyrone. This did not occur. Both warnings invitation letters state *"this allegation will be treated under the minor misconduct provisions of your employment agreement and disciplinary action up to and including final written warning may be taken."* This was inaccurate and misleading. Clause 12 states an employee *"will be given a written warning in the first instance, a final warning in the second instance and, if there is a further appearance of misconduct, the employee will be dismissed with notice."* In respect of the first written warning, he could not have been subjected to a final warning because he had never received a warning before. More concerning is that letter failed to advise he may, for repeated acts of misconduct and two written warnings, be dismissed. If it had he may have taken earlier action about his concerns around those earlier warnings.

62. The written warning[21] and final warning[22] do not identify the relevant part of the collective employment agreement it is seeking to impose the warning under nor accurately summarise the relevant minor misconduct clause 12. The first written warning letter stated *"any reoccurrence of this behaviour or any other incidences breaching the policies and procedures of your employment agreement if substantiated may result in further disciplinary action being taken up to and including a final written warning and dismissal."* The final written warning omitted reference to a final written warning but was otherwise the same.

63. Although the act alleged to give rise to the written warning was minor misconduct, "*any other incidences breaching the policies and procedures of your employment agreement"* may not be misconduct. An act of poor performance would fall within this definition of *"other incidences"* but not result in final written warning or dismissal. This was misleading. The collective employment agreement does not support incidences other than repeated minor misconduct, serious misconduct and incompetency being subjected to written warnings and/or dismissal.

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21 Letter R Turei to T Underhill dated 6 December 2011 Appendix 10 Bundle of Documents

22 Letter R Turei to T Underhill dated 20 January 2012 Appendix 13 Bundle of Documents

64. It cannot be fair and reasonable for an employer in these circumstances to require an employee to read a complex collective employment agreement and be able to ascertain the relevant part being applied to him or her. There was no evidence Tyrone understood what parts of the collective agreement were being applied to him either.

65. This was not minor and did result in unfairness because the respondent relied upon those warnings in its decision to dismiss. If the warnings were defective, they should not have been relied upon in the decision to dismiss.

Dismissal

67. The decision to dismiss was both substantively and procedurally defective. Ms Taituha had made a statement on 20 March 2012.[23] A copy of her statement was not given to Tyrone at the time.

68. The letter inviting Tyrone to about his absence from work on 17 March 2012 did not accurately replicate Ms Taituha's statement.[24] The letter states Ms Taituha advised Tyrone *"he had to come into work"*. Ms Taituha's statement does not record her advising Tyrone that he had to come into work. Her statement says *"I explained to him that we need him at work because we already had 5 cut ups"*. Similarly the letter states Ms Taituha told Tyrone *"you were required at work"*. Her statement records her saying to Tyrone *"I will see you at 7.00 if not you can take it up with Leeann on Monday and left it at that."*

69. The letter gives the impression Ms Taituha had been directed him to attend work and he failed to do so but that is not clear from Ms Taituha's statement. Ms Taituha appears to have told him he was needed then left it to Tyrone to take it up with Leanne Jelleyman on Monday. If he had received a copy of Ms Taituha's statement, he could have disputed the contents of the letter and/or required Ms Taituha to be reinterviewed.

70. The invitation letter did not state what clauses of the collective agreement were being applied. This should have been explicitly stated or accurately summarised. It was not.

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23 Statement J Taituha dated 20 March 2012 Appendix 15 Bundle of Documents

24 Letter L Jelleyman to T Underhill dated 22 March 2013 Appendix 14 Bundle of Documents

71. The invitation letter stated the above behaviour was unacceptable and if substantiated *"this allegation will be treated under the minor misconduct provisions of your employment agreement and disciplinary action up to and including dismissal may be taken."* This again did not accurately summarise the minor misconduct provisions set out in clause 12.

72. Tyrone told the employer at the disciplinary meeting held on 4 April 2012[25] that he thought he had the day off as a result of the exchange with Ms Taituha. This may be the case if Ms Taituha did not direct him to attend work. NZ Post did not go back to Ms Taituha and enquire if it was possible from their exchange that Tyrone may have thought he had been given the day off. It was important to check this possibility because NZ Post was aware of a past practice at this branch of allowing employees days off if they phoned in early. Ms Taituha was not called to give evidence.

73. The dismissal decision was made by Michael Fenton. Mr Fenton relied upon Tyrone's previous warnings for unauthorised absences including the verbal warning and the final written warning. The verbal warning was not for unauthorised absence. It was for poor performance namely a failure to communicate. The warnings were also defective - substantively in the case of the verbal warning and procedurally in respect of all three verbal and written warnings. Given those warnings were imperative to the decision to dismiss, this created unfairness for Tyrone.

74. **Tyrone alleged disparity between himself and other employees for unauthorised absences.** Where there is alleged disparity of outcome with another employee, the Authority must consider:

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If no, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?[26]

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[25] Interview notes meeting 4 April 2012 Appendices 16 and 17 Bundle of Documents

[26] *Chief Executive of the Dept of Inland Revenue v Buchanan* [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA) at para 45

75. If there is an adequate explanation for the disparity, it becomes irrelevant. Even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered[27].

76. Evidence was given of about the treatment of other employees with similar incidences to Tyrone. One employee had been given unauthorised assistance and received a warning. There were five other employees found absent without authorisation. This included one employee with up to three unauthorised absences who was given a final warning. Others with two absences were also on final warnings. These employees with 2 - 3 unauthorised absences appear to have been treated more favourably then Tyrone.

77. The explanation for disparity was sparse – the employee with up to 3 unauthorised absences was on maternity leave and may not return. The remaining employees had little if any reason for disparity.

78. Even if the explanation was insufficient, the dismissal of an employee for similar misconduct does not demonstrate disparate treatment. An employer cannot forever be bound by over-generous treatment of a particular employee on a previous occasion.[28] Upon these facts the respondent was aware of the widespread problems within this branch of unauthorised absences. It was undertaking disciplinary action against several employees for repeated incidences of this misconduct at the same time or within the same period as Tyrone's disciplinary action. It appeared to have the knowledge and opportunity to turn its mind to a consistent approach with all employees at the time it determined dismissal as the outcome for Tyrone, but failed to do so. Mr Fenton's evidence was that he was aware of these unauthorised absences at this branch but did not appear to make any enquiries about treatment of those employees at that time. I determine there was disparity of treatment and it was an unfair and unreasonable action of this employer in all the circumstances.

79. Having regard to the above, I determine the decision to dismiss was not what a fair and reasonable employer could have done in the all the circumstances.

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27 *Samu v Air New Zealand Ltd* (1995) 4 NZELC 98,334; [1995] 1 ERNZ 636 at 639

28 *Fuiava v Air New Zealand Ltd* [2006] ERNZ 806 at paras 62, 67

Tyrone Wayne Underhill was unjustifiably dismissed by New Zealand Post Limited.

Remedies

What remedies if any should be awarded?

81. Tyrone has a personal grievance and is therefore entitled to remedies under s123 of the Employment Relations Act 2000 including lost wages of up to 3 months and damages for hurt and humiliation. The respondent submits that there is no evidence of hurt and humiliation, Tyrone has gained better employment than what he had with NZ Post and his conduct contributed to the entirety of the personal grievance. It seeks the reduction of remedies either entirely or substantially.

82. Tyrone had an obligation to mitigate loss by seeking alternative paid employment.[29] An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.[30] Tyrone gave evidence at hearing he had found a job one year later. He looked online for jobs 4 out of 7 days per week and filled in 40 to 50 applications. Many prospective employers did not like the fact he had been fired by NZ Post. He says he would have done anything. He was supported during this period by his parents and partner. Although he has now found a job paying more than his job with the respondent, he is still entitled to the remedy sought subject to contributory behaviour.

83. In the circumstances I would award three months lost wages at the rate he would have been earning when dismissed less PAYE and subject to any reduction for contributory behaviour below.

84. There was evidence of Tyrone's hurt and humiliation. He displayed anger and frustration at the way he has been treated. He was required to rely upon his parents and partner to support him and his child for a year. He was refused work due to being dismissed. It was evident to me he was hurt, humiliated and

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29 *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

30 *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

angry about what had occurred. An award of $5,000 is appropriate in the circumstances.

85. I am required to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if those actions require a reduction in remedies (s.124).

86. Given my findings a reduction of 50% in Tyrone's remedies is appropriate. The applicant's unauthorised assistance, unauthorised absences and lying about his attendance at a tangi were causative of the personal grievance and blameworthy. However Tyrone was not wholly at fault. The respondent's actions also contributed to the personal grievances.

87. There is an order that New Zealand Post Limited pay to Tyrone Wayne Underhill three months wages at the rate he was earning when dismissed less PAYE and reduced by 50% for contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.

88. There is an order that New Zealand Post Limited pay to Tyrone Wayne Underhill compensation of $2,500 including a reduction of 50% for contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

Costs

91. The applicant was self-represented. Therefore no costs should be awarded except recovery of his filing fee of $71.56.

92. Accordingly, I order costs to be paid by New Zealand Post to Tyrone Wayne Underhill of $71.56.

T G Tetitaha
Member of the Employment Relations Authority