

compensation, an agreement that NUPE allegedly reneged on. Mr Drummond is seeking an order against NUPE to enforce that alleged agreement but he has an alternative claim if that is unsuccessful. He says that the circumstances nonetheless amount to a redundancy situation in accordance with his employment agreement so he is entitled under that agreement to redundancy compensation. There is also a claim for \$5,000.00 distress compensation related to this aspect of the problem.

[3] The next part of the problem relates to NUPE's subsequent decision to dismiss Mr Drummond for alleged serious misconduct. NUPE formed the view that Mr Drummond was involved in the establishment of a new union (Reunited Employees Association Inc) and dismissed him. Mr Drummond says that the dismissal is procedurally and substantively unjustifiable. As a result, Mr Drummond is claiming reimbursement of lost remuneration for 18 months and compensation for distress.

[4] The final part of the problem is Mr Drummond's claim for arrears of holiday pay he says he was entitled to during employment with NUPE which was not paid to him when his employment ended.

[5] NUPE says that Mr Drummond is not entitled to any redundancy compensation because there was no agreement to pay him compensation and because there was no redundancy situation as defined by the employment agreement. However, if the Authority determines that there was an agreement or that Mr Drummond is entitled to redundancy compensation under the employment agreement, NUPE says it is entitled to damages against Mr Drummond under the Contractual Remedies Act 1979 by way of a set-off. NUPE says that Mr Drummond misrepresented NMWCU's membership numbers, the costs of providing service and his own salary inducing it to enter into an employment relationship with Mr Drummond.

[6] As for the dismissal, NUPE says it justifiably dismissed Mr Drummond for good reason amounting to serious misconduct following a fair investigation. If, contrary to that assertion, the Authority finds the dismissal unjustifiable, NUPE says that information that has come to light after the dismissal together with Mr Drummond's contribution to the circumstances giving rise to any grievance must result in a significant reduction in any remedies.

[7] To resolve these issues I must first set out more fully the events leading to Mr Drummond's employment by NUPE. There are some evidential disputes which I will resolve at the same time. Next I will expand on the circumstances out of which Mr Drummond says an agreement to pay compensation was reached or alternatively his entitlement to redundancy compensation under his employment agreement arises. As above, evidential disputes will need to be resolved. Next, I will describe what NUPE did leading up to the decision to dismiss Mr Drummond and assess that against the standard expected of a fair and reasonable employer. Other issues about remedies will be considered after that if necessary. First, though, it will be helpful to say something about the people and organisations involved.

The people involved

[8] Mr Drummond is a very experienced union official. He worked for NMWCU from November 1997 until May 2005. He also worked for that Union earlier under its previous name. His role with the Union was as an organiser and industrial consultant. Mr Drummond has also worked for Nelson Marlborough Institute of Technology in an HR management role and was involved with the regional Employers' Association. Mr Drummond's wife (Kathy Drummond) was secretary of NMWCU for many years.

[9] NUPE is a union whose membership mainly comes from those employed in the public sector. NUPE's secretary is Nadine Marshall. It is governed by an Executive Committee chaired at the time by Martin Connole. John Kerr was a NUPE organiser and Martin Cooney is still a NUPE paid official.

[10] Reunited Employees Association Inc (REA) is a society incorporated on 4 April 2006. Its initial members are (or were) mostly employees who had formerly belonged to NMWCU, then to NUPE before the formation of REA.

NUPE employs Mr Drummond

[11] Mr Drummond's evidence is that NMWCU made a decision to wind up its affairs in the face of legal proceedings against it by a solicitor who had acted in a dispute between some NMWCU members and their employer. The Companies Office website shows an application for dissolution on 21 June 2005 and the appointment of a liquidator on 7 April 2006. The latter event is the result of the solicitor's attempt to have his bill paid. Mr Drummond disputes that NMWCU owed the solicitor any

money. It appears that proceedings to enforce the disputed bill were commenced in late February or early March 2005.

[12] Ms Marshall's evidence, which I accept, is that NUPE received (in early 2005) an approach from Mr Drummond asking if NUPE would be interested in considering amalgamating with NMWCU. There followed various discussions and exchanges which need not be set out at present. What eventuated was a proposal for NUPE to amend its membership rule allowing NMWCU members to join, for NUPE to employ Mr Drummond and contract for the services of Mrs Drummond and for NMWCU and the Drummonds to facilitate former NMWCU members joining NUPE. Ms Marshall was given to understand by Mr and Mrs Drummond that the reason for the approach was because of Mrs Drummond's ill health and Mr Drummond's desire to retire in the near future. Those matters may have been relevant but so too were proceedings against NMWCU threatening its liquidation. Nothing was said about this latter matter to Ms Marshall.

[13] On 30 May 2005, Ms Marshall sent by email to Mr Drummond a letter confirming the offer of employment and an employment agreement. Amendments were made to the electronic version of the letter and the employment agreement after their receipt. They were printed, Mr Drummond signed the printed documents which were then returned by post to Ms Marshall who also signed them. Ms Marshall did not notice that the documents she signed were materially different from those that she had originally sent by email. Who made the changes is a matter of some controversy in the evidence.

[14] Ms Marshall's evidence, which I accept, is that the documents were returned to her without notice of the changes. It follows that I do not accept Mr Drummond's evidence that he told Ms Marshall that changes had been made to the employment agreement. Mr Drummond's evidence in response to my question is that he and Mrs Drummond made the changes to the employment agreement. Despite that evidence, Mr Drummond, when asked by counsel for NUPE, said it was solely Mrs Drummond who made the changes, a position that he maintained when asked the same question later by his counsel. I further accept Ms Marshall's evidence that the first page of the signed letter returned to her could not have been printed at the NUPE office in Christchurch, there being no colour printer there at the time. Mr Drummond dogmatically denied responsibility for printing this document, even though he

accepted that he and Mrs Drummond had access to a colour printer at their home near Nelson.

[15] During the break between the investigation meeting dates, Ms Marshall obtained from NUPE's computer a printout of the 30 May 2005 letter as originally sent. At that point, the differences in the letter as sent by Ms Marshall and the letter as signed by Mr Drummond became apparent. When the investigation meeting resumed, Mr Drummond gave evidence that he did not handle the documents (the letter and the contract) himself and that his assumption during the earlier investigation meeting was that the documents had been printed at NUPE's office. He said he had been *pretty dogmatic* when questioned at the last investigation meeting, but he was not aware then that changes had been made.

[16] From all this, I find as follows. The letter of offer and the employment agreement were printed by either Mr Drummond or Mrs Drummond, either or both of them having first amended the electronic documents sent by Ms Marshall. The printed documents were then signed by Mr Drummond knowing there had been changes. The signed documents were returned to Ms Marshall who signed them both without noticing or having drawn to her attention the changes.

[17] The employment commenced on 30 May 2005. By August 2005, NUPE was concerned about the deficit caused by its increased expenses in the Nelson region outstripping its increased income. A comprehensive review document prepared for the Executive Committee was also forwarded to Mr Drummond. The position worsened and by early October, NUPE had developed specific proposals to address the deficit. In part, the proposals affected Mr Drummond's employment.

[18] By letter dated 6 October 2006, NUPE proposed temporarily reducing Mr Drummond's hours of work from 40 to 32 per week commencing 7 November 2005. A timeframe and method of consultation was proposed in the letter. Ms Marshall later sought to meet personally with Mr Drummond on these matters but he declined. In evidence, Mr Drummond is critical of NUPE saying he had no opportunity to discuss the proposed redundancy because of work commitments. I do not accept that as accurate. NUPE, through Ms Marshall, sought several times to engage Mr Drummond in dialogue about the proposals but he declined to take advantage of those reasonable opportunities.

NUPE reduces Mr Drummond's hours of work

[19] NUPE's Executive Committee met on 25 October 2005 and decided to reduce Mr Drummond's hours of work from 40 to 32 per week from 7 November 2005, with a review on 30 May 2006 or earlier if circumstances permitted. That decision was communicated to Mr Drummond by letter dated 1 November 2005. Mr Drummond responded in a letter dated 3 November 2005. Amongst other things, the letter says that NUPE does not have a contractual right to reduce Mr Drummond's hours of work. It also indicates that Mr Drummond might withdraw the use of his own car for NUPE's business and require NUPE to provide him with a vehicle. Subsequently, Mr Drummond advised Ms Marshall that he remained available to work 40 hours per week. However, NUPE commenced paying Mr Drummond for the reduced number of hours and only required him to work 32 hours per week.

[20] Mr Drummond's solicitor wrote to Ms Marshall on 17 November 2005. The letter characterises the reduction in hours of work as a redundancy dismissal entitling Mr Drummond to compensation in accordance with the applicable provision in the employment agreement. It also characterises the reduced hours as a new position which Mr Drummond was accepting without prejudice to his rights arising from the termination of his original position.

[21] In reply, NUPE disputed any right to redundancy compensation, there being no termination by the employer of the employment. NUPE argued that the reduced hours amounted to a redeployment to a suitable similar position. That view is disputed in the solicitors' next letter which also confirms that Mr Drummond's personal car would no longer be available for use on Union business. I should note at this point that Mr Drummond was on stress leave, an issue to which I will return.

[22] The parties agreed to participate in mediation and there was a meeting on 23 January 2006. Although the matter was not resolved, there was an agreement to keep discussions going. There followed a letter dated 24 January 2006. It is marked *without prejudice except as to costs* and is inadmissible except for the purpose of proving the existence of the settlement agreement said to arise after this letter. The letter says:

[Mr Drummond] is prepared to settle this claim by way of a payment to him of \$8,000. Such payment to be by way of an immediate

reimbursement of his legal costs, subsequent instalment payments of \$2,000 each over the next six months ...

[23] This offer was not actually seen by Ms Marshall until Monday, 20 February 2006 and was considered by NUPE's Executive Committee at a meeting on 7 March 2006. It is Ms Marshall's subsequent communications with Mr Drummond and his solicitor which are said to amount to an acceptance of the offer to settle.

Was a settlement agreed?

[24] In his statement of evidence, Mr Drummond said that he received a phone call from Ms Marshall on 8 March to tell him that NUPE had accepted the settlement proposal. When asked what was actually said, Mr Drummond gave evidence that Ms Marshall said that the Executive Committee had agreed to the proposal and all they had to do was sign off on the proposed payment schedule. However, in an email to his solicitor on 21 March 2006, Mr Drummond described the message from Ms Marshall as the offer having been *received favourably*. In the same email Mr Drummond says that he is concerned that *we have had no confirmation from NUPE that our offer has been accepted. Therefore I request that you commence proceedings through the ERA now*. However in an earlier email to his solicitor on 11 March 2006, Mr Drummond reports Ms Marshall as saying (on 8 March) that *NUPE had accepted our proposal ...*. For her part, Ms Marshall's evidence is that she told Mr Drummond that the *Executive Committee had received his letter favourably* and that they needed to get agreement on matters such as timing of payment and costs. I prefer Ms Marshall's evidence about what was said to that of Mr Drummond.

[25] There was a communication between Ms Marshall and Mr Drummond's solicitor. In an email dated 9 March 2006 Ms Marshall wrote:

The Executive Committee positively received your proposal for settlement at the 7 March meeting. I will be drafting a letter shortly and following approval from the Acting Convenor will get this off to you.

[26] In later correspondence there is a suggestion that there were some communications by Ms Marshall later in March that amount to acceptance of the offer. However, I find that these later communications simply repeated what was communicated on 8 and 9 March.

[27] *Reporoa Stores Limited v. Treloar* [1958] NZLR 177 is authority for the proposition that:

... to bring about a binding contract the offer and the reply accepting must be of and in respect of precisely the same terms. The offeree must unreservedly assent to the exact terms proposed by the offeror.

[28] Applying that approach, I cannot say that either of Ms Marshall's communications amounts to acceptance on the same terms as proposed in the solicitor's letter dated 24 January 2006. What was said to the solicitor was that the proposal had been positively received and there would be a reply in writing. Reading the email as a whole, there was no unequivocal acceptance communicated by Ms Marshall. Before that, Mr Drummond was told that the proposal had been favourably received but there would need to be agreement about the schedule of payments. That too does not amount to communication of an acceptance. It follows that Mr Drummond cannot recover any moneys based on the alleged agreement.

Redundancy under the employment agreement?

[29] It is common ground that NUPE and Mr Drummond agreed at the commencement of the employment to honour Mr Drummond's previous redundancy entitlements. That document defines redundancy as *... where ... employment is terminated by ... [NUPE]. The termination being attributable to, wholly or partly to the fact that the position ... is, or will become surplus to the needs of [NUPE] due to restructuring ...*. The agreement also provides for redeployment. That says *redeployment shall mean with the agreement of the affected ... staff transferred to a suitable alternative position, where appropriate, within the Union or affiliates.*

[30] NUPE did not dismiss Mr Drummond, that termination being wholly or partly attributable to superfluity. Mr Drummond's employment continued for some months after the reduction in his hours of work.

[31] Mr Drummond did not agree to redeployment to a position involving fewer hours of work and less pay. To the contrary, he explicitly rejected NUPE's proposal to reduce his hours of work. There is no right under the redundancy agreement or elsewhere in the terms of employment for NUPE to reduce the salary payable to Mr Drummond without his consent.

[32] Counsel for Mr Drummond referred me to *Westpac Banking Corporation v. Stephen* [2000] 1 ERNZ 566. In that case, an employee's position was disestablished. The employer offered to redeploy him to another position but the employee declined, preferring the contractual payment having secured a job elsewhere. The question was whether an admitted difference of 20% between the two positions was significant enough to allow the employee to decline the offer but retain his right to the compensation. The decision turns on the terms of the redundancy agreement, quite different from the present circumstances, so it is unhelpful as to any principle of broad application here.

[33] What happened should properly be seen as an attempted unilateral variation to the employment agreement. Mr Drummond was entitled to reject the purported variation and insist, as he did, on the proper performance of the agreement. It follows that Mr Drummond is entitled to payment of his full salary from the date it was reduced until the termination of his employment. I treat this as recovery of arrears of salary payable under the employment agreement.

[34] There is a claim for \$5,000 compensation under s.123 of the Employment Relations Act 2000 associated with the problem about the reduced hours of work. Section 123 of the Act sets out remedies for personal grievances. NUPE says that no grievance was raised within 90 days.

[35] The earliest date on which the action said to amount to a personal grievance occurred must be when the reduction in salary took effect, so 7 November 2005. By then, by letter dated 2 November 2005, Mr Drummond had put his objection in writing. Over the next few weeks, Mr Drummond's solicitor wrote two letters objecting both to the process and to the substance of the reduction in hours and salary and demanding a remedy. The problem was first described as a *personal grievance* in the solicitor's subsequent *without prejudice* letter of 24 January 2006, not received until 20 February 2006. It is the delay in receiving this letter that opens up the argument that no grievance was raised within time. However, I find that the letters dated 17 November 2005 and 25 November 2005 presented for NUPE's consideration or decision, Mr Drummond's grievance about the reduction in salary and hours of work. There is no requirement for the person raising a personal grievance to use that label. Accordingly, Mr Drummond's grievance was raised well within time.

[36] Mr Drummond's employment was affected to his disadvantage by NUPE reducing his hours of work and his salary. That action is unjustifiable because it is a breach of the employment agreement. It follows that Mr Drummond has established a personal grievance. The lost remuneration arising is already subject to the recovery order made above. I will return to compensation for distress later.

The first disciplinary investigation

[37] NUPE's intended written response to the settlement proposal was overtaken by the emergence of another matter. On 7 March 2006, Ms Marshall received an unsolicited call from David Kettley. Mr Kettley is a human resources adviser at the Nelson Marlborough District Health Board. There is an evidential dispute between him and Ms Marshall over what he said. Ms Marshall's evidence is that Mr Kettley told her that Mr Drummond was doing groundwork for the formation of a new union. Ms Marshall and Mr Kettley had a second discussion on 10 March 2006. Ms Marshall says that Mr Kettley confirmed his earlier information. There are contemporaneous notes made by Ms Marshall to support her evidence. Mr Kettley, on the other hand, says that he made it clear that he had no specific information but had overheard something suggesting that Mr Drummond may not in the future be representing the hospital staff on behalf of NUPE. He also says that he made it clear that the comments were *off the record* and *without prejudice*. It is not necessary to resolve the evidential dispute at this stage because the phone calls simply provided the starting point of NUPE's concerns.

[38] Coincidentally, Ms Marshall received a phone call on 8 March 2006 from Kay Chapman. Ms Chapman is a senior consultant with EMA Central based in Nelson. Ms Chapman's evidence is that a client contacted her and said that Mr and Mrs Drummond had convened a NUPE-paid stop work meeting of the client's staff to talk about the formation of a new union. There is some evidential disagreement between Ms Chapman and the client about precisely what was said between them, but that is unimportant at present for the same reason as above. Ms Chapman's evidence is that Ms Marshall's contemporaneous notes of their conversation are accurate. Ms Chapman did not tell Ms Marshall the client's name but said that Mr and Mrs Drummond were using NUPE stop work meetings to canvass NUPE members about setting up a new union.

[39] Having heard of these rumours from two sources, Ms Marshall spoke to NUPE's convenor (Mr Connole) and it was decided to initiate a disciplinary investigation. NUPE also sought a legal opinion about whether a settlement had resulted from the exchanges referred to earlier. The opinion confirmed that no settlement had been reached.

[40] Next, NUPE wrote to Mr Drummond on 23 March 2006 setting out Ms Marshall's account of the information received from Mr Kettley and Ms Chapman, identifying that it raised a concern that Mr Drummond had breached his duty of fidelity and detailing a process for the proposed disciplinary investigation. Reference was also made to the settlement proposal. The letter says that NUPE intended to conclude the disciplinary investigation before concluding any settlement.

[41] There is a draft of a letter dated 23 March 2006 from the solicitor to NUPE but I accept the evidence to the effect that this letter was never received by NUPE. The draft is therefore unimportant for present purposes.

[42] When he received the 23 March 2006 letter, Mr Drummond contacted both Mr Kettley and Ms Chapman. There was also further contact between Mr Kettley and Ms Chapman and NUPE. Again, the evidence about what was said is somewhat disputed but it is not necessary to resolve those disputes at this stage.

[43] Mr Drummond's solicitor responded with a letter dated 29 March 2006. That conveys a categorical denial by both Mr Drummond and Mrs Drummond that they had canvassed NUPE members with a view to setting up another union. The quality of the information on which the concerns were based is criticised as rumour and hearsay. The letter defends Mr Drummond's actions in contacting the sources of the information, he having been taken to task for doing so in an earlier email from NUPE. There is a claim that Mr and Mrs Drummond sought to keep members loyal to NUPE. Issue is taken with the person nominated by NUPE to initially investigate the allegations.

[44] The investigator appointed by NUPE eventually reported to the Union on 10 May 2006 that Ms Chapman and Mr Kettley could not or would not substantiate the truth of the allegations based on the information they earlier provided to Ms Marshall. That is as far as the investigation went. It appears that Mr Drummond

was not formally advised of this. In the meantime, other problems loomed large between NUPE and Mr Drummond.

A second disciplinary matter – the car mileage issue

[45] Mr Drummond's former employer had reimbursed him for use of his personal car on Union business. That was discussed as part of the arrangements for NUPE to employ Mr Drummond. The letter of appointment from NUPE to Mr Drummond reads:

Mileage for use of private vehicle on work purposes to be paid at 35c per km. Log book information to be provided to Office Administrator as per IRD requirements.

[46] The employment agreement sent to Mr Drummond reads:

***Private use of motor vehicle** The employee when requested by the employer to use his/her motor vehicle on the employer's business shall be paid a motor vehicle allowance at the rate of 35 cents per kilometre.*

[47] However, that is one of the clauses changed by either Mr or Mrs Drummond before the agreement was signed and returned to Ms Marshall. The amended clause reads:

***Private use of motor vehicle** The employee when using his motor vehicle on the employer's business shall be paid a motor vehicle allowance at the rate of 35 cents per kilometre.*

[48] NUPE was not aware of the change until after proceedings were commenced in the Employment Relations Authority. At the time the issue arose, Ms Marshall assumed the signed employment agreement contained the clause in the employment agreement sent by her to Mr Drummond.

[49] Prior to April 2006, there were discussions between Mr Drummond and Ms Marshall about the reimbursement rate. Mr Drummond then wrote to Ms Marshall on 13 April 2006 asking for an increase to 56.14 cents per kilometre, saying he would withdraw the use of his car forthwith if this was not agreed. Mr Drummond and Ms Marshall had a discussion about that on 18 April 2006 and she sent him an email on 20 April 2006. In response, Mr Drummond sent a further letter dated 21 April 2006. The letter is critical of Ms Marshall's handling of the issue and announced that Mr Drummond's personal car would no longer be available for work

use as from Thursday, 27 April 2006. The letter ends by saying *we will need to discuss arrangements or options for future work related travel.*

[50] Ms Marshall wrote to Mr Drummond's solicitor inviting Mr Drummond to reconsider the position, defending some of the criticisms and cautioning that NUPE would have to consider either disciplinary action and/or legal action if Mr Drummond persisted. There was a discussion between Ms Marshall and Mr Drummond on Thursday, 27 April 2006 when Mr Drummond confirmed his decision about use of his vehicle and declined to discuss the matter further.

[51] By 9 May 2006, NUPE had reached the position of instigating a formal disciplinary process in respect of Mr Drummond's refusal to use his car for work purposes, a stance considered by NUPE as a wilful breach of the employment agreement. That was conveyed to Mr Drummond by letter dated 9 May 2006. A reply to the allegation of serious misconduct was sought by 19 May 2006. In addition, the letter foreshadows the suspension since Mr Drummond would be unable to perform usual work. A response on that point was sought by midday, 11 May 2006.

[52] Mr Drummond's solicitor wrote to Ms Marshall on 10 May 2006. That letter advises that Mr Drummond has seen a doctor and is unfit for work for a month due to work-related stress caused by *various attacks by the employer against him.* Ms Marshall responded by letter dated 15 May 2006. Her letter defends to some extent the complaints about NUPE conveyed in the solicitor's letter and requests Mr Drummond to seek an updated medical report at NUPE's expense. The letter also records NUPE's agreement to put on hold its disciplinary investigation into the allegation of misconduct based on Mr Drummond's refusal to use his car for Union business.

[53] Before anything further happened on this front, another issue arose.

A third disciplinary matter - Reunited Employees Association

[54] On 15 May 2006, Ms Marshall was contacted by Ms Chapman who alerted her to a meeting of the REA scheduled for that evening. Ms Chapman said that she intended to go along to see what support there would be for this new union.

[55] Later on 15 May or 16 May, Ms Chapman told Ms Marshall that she had seen Mr Drummond turn up to the REA meeting and mingle with attendees outside before leaving. Ms Marshall received a copy of the meeting notice. The notice publicises contact details for REA which include an email address used by Mr Drummond and Mrs Drummond and their unlisted landline phone number. A call to the cellphone number publicised on the meeting notice accessed a message in Mr Drummond's voice saying *Hi. This is Kathy's phone. Because it is in the car, I very infrequently use it, so, the best thing is to call John on his number, which is 027 6620333. Thank you. Bye.* NUPE paid the monthly rental for the cellphone number referred to in this message. On 15 May and 16 May, NUPE also received a number of resignations from the Union obviously related to the formation of REA.

[56] Ms Marshall wrote to Mr Drummond on Tuesday, 16 May 2006 setting out the basis of her concern that Mr Drummond had *aided, abetted, procured or been involved in the establishment of a rival union* amounting to serious misconduct justifying dismissal. Mr Drummond was given until midday on Thursday, 18 May 2006 to respond.

[57] NUPE received a written response from Mr Drummond's solicitor. The letter categorically denies that Mr Drummond had any part in REA. There is a denial that Mr Drummond attended the meeting on 15 May 2006. The advertised email address and cellphone number are said to be Mrs Drummond's, not Mr Drummond's. The explanation for the cellphone message is that workers continually tried to contact Mr Drummond on Mrs Drummond's cellphone number so the message directed such callers to Mr Drummond's (NUPE) cellphone. The letter also includes a complaint that Ms Marshall had predetermined to dismiss Mr Drummond given the text of her letter and her *hounding* him over the previous two months. It foreshadows a personal grievance claim.

[58] After receiving this correspondence, Ms Marshall conferred with Mr Connole. As a result, Ms Marshall decided to dismiss Mr Drummond. That decision was put in a letter dated 19 May 2006 sent to Mr Drummond's solicitor. It records Ms Marshall's rejection of the claim about predetermination. It says that Mr Drummond was observed at the meeting so his denial about attending the meeting was rejected. It also records Ms Marshall's conclusion that Mr Drummond was linked to REA as a result of contact details published on the meeting notice and the

cellphone message. There is a rejection of the earlier explanation that Mr Drummond was only very recently involved in REA on the basis that an incorporated society search showed REA's incorporation having occurred on 4 April 2006. The letter concludes that Ms Marshall could no longer have trust and confidence in Mr Drummond.

Justification for the dismissal

[59] Justification for the dismissal must be determined, on an objective basis, by considering whether NUPE's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. It is convenient to start with issues about how NUPE acted at the time.

[60] An aspect of Mr Drummond's complaint is his claim that he was *hounded* by Ms Marshall over the space of several months. This is principally a reference to her initiating several misconduct investigations.

[61] I do not accept that Ms Marshall *hounded* Mr Drummond. It is hardly surprising that an employer would investigate when it receives unsolicited information from two separate sources to the effect that an employee might be involved in establishing a rival organisation. That is even more so in the present case because Mr Drummond was employed and Mrs Drummond was engaged by NUPE to attract and retain the workers who had formerly belonged to NMWCU.

[62] There are criticisms of Ms Marshall for breaching the confidence of Mr Kettley and Ms Chapman. Assuming that the information was provided in confidence, use of it in breach of that confidence is a matter between Ms Marshall and Mr Kettley or Ms Chapman. There is also an attack on the quality of the information and its hearsay nature. However, the point of the first investigation was to enable reasonable conclusions to be made about whether Mr Drummond was acting in breach of his obligations to NUPE. As it transpired, the investigation did not go any further than Mr Drummond's categorical denial because of Mr Kettley's and Ms Chapman's unwillingness or inability to confirm the allegations, they having been approached directly by Mr Drummond.

[63] As against Mr Drummond, NUPE and Ms Marshall handled this first matter in a reasonable and fair manner as far as it went.

[64] The second disciplinary investigation concerned the allegation of breach of contract arising from Mr Drummond's refusal to use his car on NUPE's business. Ms Marshall's evidence, which I accept, is that there was discussion before Mr Drummond's employment to the effect that NUPE might provide a vehicle but Mr Drummond insisted on use of his own vehicle in return for reimbursement at the specified rate. An employment agreement was drafted by Ms Marshall accordingly. It at least implies an obligation on Mr Drummond to use his car for NUPE's business. When initiating the disciplinary investigation, Ms Marshall thought that Mr Drummond was contractually obliged to use his car on NUPE's business in exchange for the specified payment.

[65] I conclude that NUPE reasonably initiated a disciplinary investigation as the result of Mr Drummond's refusal to use his car on NUPE's business. I do not accept that Ms Marshall's attempts to deal with the matter can be reasonably characterised as her *hounding* Mr Drummond. Indeed the correspondence shows a degree of reluctance on her part to escalate the problem in this manner.

[66] The last disciplinary investigation is the matter that resulted in Mr Drummond's dismissal. When initiating this investigation, NUPE had apparently reliable information implicating Mr Drummond in efforts by REA to establish itself and compete with NUPE for Union members. Some NUPE members (formerly NMWCU members) had already announced their resignations. The loyalty of these and other NUPE members to Mr and Mrs Drummond was well known. In such circumstances, any employer is likely to initiate an investigation as a matter of urgency and I do not accept that NUPE can properly be criticised for doing so.

[67] The only aspect where NUPE might be criticised is that it initiated the investigation despite knowing of Mr Drummond's claims about stress and his being on sick leave. Balanced against that is the urgency of the situation given NUPE's financial circumstances and the very real prospect that many NUPE members would follow Mr Drummond to REA. I find that the answer to this criticism lies in the letter dated 18 May 2006 from Mr Drummond's solicitor. It might have been open for Mr Drummond to take the position that any response should be deferred until his health improved. However, he elected to supply a substantive response from which it is clear that he was sufficiently well to adequately defend his position. In these

circumstances, any criticism of NUPE for launching its investigation is not sustainable.

[68] It is said that Ms Marshall predetermined Mr Drummond's dismissal. That is based particularly on her letter dated 16 May 2006. The relevant parts read:

I am provisionally minded to dismiss you summarily for serious misconduct in that you have aided, abetted, procured or been involved in the establishment of a rival union.

*Before I do this, I am giving you until **12pm Thursday** to make any comments you may wish to make on the above matters and any submissions you may wish to make as to penalty. The reason for the short time frame is the impact on membership numbers and the need to communicate directly and promptly with members and other parties about this.*

*Please direct any comments to me direct by midday **this Thursday**. Against the background of resignations and your attendance at last night's meeting, I am not prepared for you to return from sick leave.*

[69] I accept Ms Marshall's evidence that the letter did not amount to her predetermining the decision to dismiss Mr Drummond. The comment about not returning from sick leave must be read in the context of the unresolved suspension in connection with the car mileage issue. As to the other parts, Mr Drummond was put on notice that it appeared he was involved in REA, which could lead to his dismissal. The information available to Ms Marshall when she wrote the letter pointed strongly to the likelihood that Mr Drummond was involved with the formation of REA and dismissal was a definite prospect unless that information was shown to be wrong. The circumstances justified the direct language used by Ms Marshall.

[70] Turning to NUPE's conclusion that serious misconduct had occurred, there is a substantial challenge by Mr Drummond to NUPE's conclusion that he aided or had anything to do with the establishment of REA. In his statement of problem, Mr Drummond says that he had *nothing to do with the [REA] meeting and certainly did not attend at the meeting*. That reflects what was said by Mr Drummond to NUPE that *John Drummond categorically denies that he attended that meeting on 15 May and again it is unbelievable that Nadine Marshall can make these allegations without providing any written statements or other corroborating evidence that her allegations are true*. What NUPE had been told at the time was that Mr Drummond was seen to *turn up to the meeting, mingle with the attendees outside before leaving*. That led to the claim in Ms Marshall's letter that Mr Drummond *attended the meeting* but it was

only a part of the circumstances giving rise to the concerns. As it turns out, the only criticism that can properly be levelled at the allegation is that it understates Mr Drummond's activities at the location of the REA meeting on 15 May 2006, a point to which I will return. In any event, Mr Drummond's attendance at the REA meeting venue is only part of the picture leading to the conclusion that Mr Drummond was aiding the formation of REA.

[71] As noted above, Mr Drummond's unlisted landline phone number was on the meeting flyer as was his personal email address and a cellphone number. Part of Mr Drummond's explanation was that it was not his personal email address. However, NUPE did not accept that explanation. NUPE was correct to reject the explanation. Ms Marshall also knew that the landline phone number was Mr Drummond's personal unlisted phone number. What this and the cellphone message showed was that Mr Drummond was clearly associated at least to that extent with the establishment of REA. Against that, his denials did not ring true. Accordingly, Ms Marshall's conclusion that Mr Drummond's association with the formation of REA in breach of his obligations to NUPE amounted to serious misconduct is a conclusion that any employer acting reasonably would have reached. It follows that NUPE has justified its decision to dismiss Mr Drummond.

[72] What was never said before the dismissal but is put in evidence now is that Mr Drummond learnt of REA and the meeting on Friday 12 May 2005. It is said that Mrs Drummond took Mr Drummond to the meeting on 15 May because she was fearful of his health situation and did not want to leave him at home on his own. Those of course are matters that could have been raised with NUPE in the solicitor's letter before the dismissal. Disclosing this information before the dismissal would have been inconsistent with Mr Drummond's categorical denials.

Further comment on Mr Drummond's involvement with REA

[73] Given the above finding, it is not necessary to fully canvass this matter. However, because it remains controversial I should indicate some conclusions that arise from the evidence.

[74] It seems well established that Mr Drummond was not present so did not actually participate during the course of the REA meeting on 15 May 2006. However he and Mrs Drummond gave a neighbour (until then a NUPE member) a lift to the

meeting in Mr Drummond's car. This evidence emerged eventually from Mr Drummond's responses to questions at the investigation meeting. At the hall on 15 May, Mr Drummond unlocked the door and carried some meeting materials inside. He also helped set up at least one table while inside the hall. Outside the hall, he spent a little time talking to some (now former) NUPE members before leaving to visit a relation. Mr Drummond returned to the hall to collect Mrs Drummond and the neighbour after the meeting. Again, most of this evidence arose in response to questions of Mr Drummond during the investigation meeting.

[75] This evidence provides further support for Ms Marshall's conclusion that Mr Drummond aided REA, contrary to his denials. It is at odds with the categorical denials made at the time by Mr Drummond.

[76] Bronwyn Ward was a NUPE workplace delegate in Greymouth at the relevant time. Her evidence is that Mr Drummond told her about 6 to 8 weeks before his dismissal that he and Kathy Drummond were looking at setting up a new union. There is a note dated 5 April 2006 made by Ms Ward in connection with a NUPE union meeting that refers to this information from Mr Drummond. I accept Ms Ward's evidence about this. This information was not known to NUPE at the time of the dismissal. However, it does undermine Mr Drummond's protestations about knowing nothing of the formation of a new union involving Mrs Drummond until 12 May 2006 or thereabouts.

[77] Ms Chapman's client's staff had held a stopwork meeting on site on 3 March 2006 pursuant to a written notice to the client from Mr Drummond dated 16 February 2006. The site delegate is the person who later made the necessary declaration on 28 March 2006 for REA's incorporation. Mr Drummond's evidence is that he and Mrs Drummond attended that meeting but left before there was any discussion about the formation of a new union. It seems unlikely that there would not have been some discussion with Mr and Mrs Drummond before or after this stopwork meeting about the formation of REA. I note that Mr Drummond visited this site on 20 February 2006. After all, the employer became sufficiently aware of the topic of discussion to contact Ms Chapman soon after the stop-work meeting. However, it is not necessary to make a finding on the point.

[78] The final point that merits mention relates to evidence that emerged quite late during the investigation. Shortly before the last investigation meeting, NUPE became

aware of a domain name registration for *www.rea.org.nz*. An online inquiry entitled *Whois* generated information suggesting registration of that domain name occurred on 12 May 2006. The registrant and administrative contact is identified as John Drummond at his home address and unlisted phone number. However, Mr Drummond denied knowledge of or involvement with the domain name registration. At best from his perspective those steps were taken by another person without his permission but based on a phone account solely in Mr Drummond's name. That demonstrates his (perhaps unwitting) association with the establishment of REA. Given the finding of justification, it is not necessary to extend the investigation further into this matter.

NUPE's counterclaim

[79] NUPE's claim against Mr Drummond for a misleading pre-contractual representation was advanced on the conditional basis should Mr Drummond succeed with his claim for redundancy compensation either under the alleged agreement or in accordance with the employment agreement. Mr Drummond has not succeeded with either claim although there is a finding that he is entitled to his full salary from the date it was reduced until his employment was terminated. I did not understand NUPE to argue that salary properly payable to Mr Drummond should be reduced by way of its set-off claim so the point does not need to be discussed any further.

Holiday pay

[80] Mr Drummond says that he was not paid his full holiday pay entitlement at the termination of his employment. NUPE says that all holidays have been either given or paid.

[81] The disagreement arises from the extent to which NUPE agreed to recognise previous service with the former employer for annual leave purposes. The letter of offer (as sent and as signed) says that the appointment is with effect from 30 May 2005, that there are five weeks' annual leave and that the anniversary date for annual leave and sick leave purposes is 3 November 1997. It also says *Agreement that John takes up to 3 weeks paid leave in addition to his annual entitlement falling due on 3 November 2005. The additional 3 weeks leave will not be carried over.* There is

further provision in the letter making it clear that service is continuous for the purposes of calculating the sick leave entitlement.

[82] The employment agreement as sent by Ms Marshall says that annual holidays are granted in accordance with the Holidays Act 2003 and says that *the employee shall be entitled to five weeks annual leave per annum (prorated)* The agreement as signed similarly refers to then 2003 Act then says that *The employee shall be entitled to five weeks annual leave per annum*

[83] There is no dispute about the additional three weeks leave referred to in the letter of appointment. That leave was taken. The issue is whether there was agreement for a full 5 weeks annual leave to fall due on 3 November 2005 or an agreement for that portion of leave accrued between May and November to fall due on 3 November 2005. That turns on the wording in the letter of appointment. The sick leave provision in that letter explicitly carries over prior service for the purposes of calculating sick leave entitlement in the new employment whereas the annual leave provision does not. Unfortunately, the wording of the appointment letter on annual leave is ambiguous.

[84] I accept the evidence of Ms Marshall that Mr Drummond asked NUPE to honour the 7 weeks annual leave he said he was owed by NMWCU as at May 2005. Ms Marshall declined but offered the extra 3 weeks referred to above because she believed that Mr Drummond needed to take some leave as soon as practicable. For that same reason, NUPE was prepared to allow Mr Drummond's entitlement to annual leave to fall due sooner than the end of 12 months service. However, there was no suggestion during the pre-contract discussions that Mr Drummond would become entitled to a full year's annual leave after about 5 month's service. Nor was there any dispute by Mr Drummond during the employment to the amount of annual leave allocated to him. On that basis I can see no compelling reason to resolve the ambiguity in Mr Drummond's favour and I accept NUPE's evidence that Mr Drummond was allocated and took all the annual leave that was due to him. The claim accordingly fails.

Personal grievance – non pecuniary loss

[85] I refer to the finding above that Mr Drummond has an unjustified disadvantage grievance arising from the reduction in his hours of work and salary. The pecuniary

loss arising from this has been dealt with as recovery of arrears of salary. It remains to determine whether any non-pecuniary loss attributable to the grievance has been established.

[86] There is evidence from a qualified and experienced psychotherapist seen by Mr Drummond from 16 March 2006 onwards. Her evidence is that Mr Drummond at that time was suffering obvious signs of depression and anxiety. Mr Drummond was next seen on 5 April 2006 and was *psychologically far worse*. The change must relate to Mr Drummond's perception that there had been a breach of agreement to pay him compensation and the initiation of unwarranted disciplinary investigations. Because I have found no breach by NUPE in respect of these and subsequent matters, the deterioration in Mr Drummond's condition is irrelevant for present purposes.

[87] There is some other evidence supporting the view that the circumstances as at 16 March 2006 relate to the dispute about hours of work. Mr Drummond saw his GP on 9 September 2005 and 18 November 2005 when he complained of chest pains related to stress at work. The first date is before NUPE initially wrote to Mr Drummond raising the intention to reduce his hours of work. Those symptoms, therefore, cannot be attributed to the established grievance. However, the symptoms apparent during the second consultation cannot be unconnected to the grievance.

[88] The picture that remains is that the obvious signs of depression and anxiety as at 16 March 2006 described by the psychotherapist must have been significantly contributed to by the grievance arising in November 2006. There is a claim for \$5,000 compensation related to this aspect of the problem. In the circumstances, that is a modest claim which, subject to what follows, should be awarded in full.

[89] It is necessary to assess the extent to which Mr Drummond contributed to the circumstances giving rise to the grievance.

[90] Mr Drummond misled NUPE about the salary paid to him by his former employer. The arrangement was for NUPE to employ Mr Drummond on his existing terms and conditions. Mrs Drummond provided a letter dated 26 May 2005 that says that the existing salary was \$53,310.40 per annum. However, Mr Drummond's IRD summary of earnings shows him receiving \$12,994 gross for the year ending 31 March 2005 and \$21,131 gross for the previous year. Unaudited accounts for the year ending 31 March 2004 apparently compiled by Mr Drummond show wages and

PAYE payments for the entire organisation amounting to \$21,287. Similar amounts were paid in earlier years according to the unaudited accounts that are available.

[91] From the material available, it is untenable that Mr Drummond was being paid a salary of \$53,310.40 or anywhere near that level as at May 2005. Mr Drummond claims to be unaware of the amount of salary being received by him. I do not accept that evidence. Mr Drummond also argued that \$53,310.40 was the salary he was entitled to from his former employer. I am unable to confirm that as true but it is not the point. NUPE wanted to know the costs involved in the Nelson operation. The major component of costs was likely to be the salary being received by the paid official (Mr Drummond) so the information sought by NUPE was the amount being paid. Mr Drummond knew that revealing the true position would have caused NUPE to reconsider the financial viability of its intended expansion into Nelson. Certainly NUPE would not have agreed to paying Mr Drummond at a rate higher than NUPE's other organisers. In evidence, Mr Drummond sought to excuse himself by attributing the communications to Mrs Drummond. However, she was his agent for the purpose of the discussion about his employment so he must take responsibility for what was conveyed.

[92] I find that Mr Drummond's misrepresentation about his salary did contribute in a blameworthy way to the circumstances giving rise to the grievance. The reduction in hours of work and salary arose directly as a result of NUPE unexpectedly finding itself in a deficit situation that it could not sustain.

[93] I have considered whether Mr Drummond's contribution was such that any compensation for the distress should be reduced to nil. However, NUPE must share some responsibility for the circumstances giving rise to the grievance because it breached its employment agreement with Mr Drummond. Accordingly, I find that NUPE should pay Mr Drummond compensation amounting to \$2,000.

Summary

[94] Mr Drummond was justifiably dismissed.

[95] Mr Drummond is not entitled to redundancy compensation by reason of any agreement or in terms of the applicable redundancy agreement.

[96] Mr Drummond is entitled to recover arrears of salary arising from the reduction of payments to him from 7 November 2005 until his dismissal. Leave is reserved if there is any difficulty with calculations.

[97] Mr Drummond does have an unjustifiable disadvantage grievance. NUPE is to pay Mr Drummond compensation of \$2,000.00 pursuant to section 123 (1) (c) (i) of the Employment Relations Act 2000.

[98] I note that Mr Drummond's limited success is not based on the way his claims were advanced so it is not obvious who (if anyone) should be seen as having succeeded for the purposes of determining costs. In any event, costs are reserved to be dealt with after an exchange of memoranda if necessary.

Philip Cheyne
Member of the Employment Relations Authority