

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 397  
3070272

BETWEEN                      LANCE GUSH  
   Applicant  
  
AND                                NEW ZEALAND STEEL  
   LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Garry Pollak, counsel for Applicant  
   Carter Pearce, counsel for Respondent  
  
Investigation Meeting:      26 June and 2 July 2020  
  
Submissions Received:      7 and 9 July 2020 from Applicant  
   7 and 9 July 2020 from Respondent  
  
Additional Information      27 July 2020 from Applicant and Respondent  
Received:                      11 September 2020 from Applicant  
   18 September 2020 from Respondent  
  
Determination:                2 October 2020

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**DETERMINATION OF THE AUTHORITY**

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- A.      Mr Gush has established personal grievances. To resolve his grievances New Zealand Steel Limited is ordered to pay the following sums to Mr Gush within 28 days of the date of this determination:**
- a)      Lost wages of \$5,850 under s 123(1)(b) of the Employment Relations Act 2000;**

**b) Compensation of \$5,400 under s 123(1)(c)(i) of the Employment Relations Act 2000.**

**B. Costs are reserved.**

**Employment relationship problem**

[1] Mr Gush has worked for New Zealand Steel Limited (NZ Steel) since 2006. Throughout his employment Mr Gush has been a member of E Tu Incorporated, one of three unions who have members working for NZ Steel.

[2] NZ Steel operates a large steel mill at Glenbrook in South Auckland. Its business is unique compared with other steel manufacturers around the world, in that it makes its own iron from iron sands mined at NZ Steel's Waikato North mine. NZ Steel is the only iron making facility in the world that uses 100% iron sand as its raw product.

[3] The Melter Plant is part of the production process for the manufacture of steel. Its environment is unique and has been described as unforgiving. The melter plant contains two furnaces, referred to as melters, which produce molten steel to be used further on in the manufacturing plant.

[4] The melters operate continuously 24 hours per day, seven days of the week. The plant is staffed by two 12-hour shifts. The day shift starts and finishes at 7 am and 7 pm respectively, while the night shift starts and finishes at 7 pm and 7 am respectively.

[5] Historically the melters operated with six Tappers per shift. Over the years NZ Steel increased mechanisation and improved safety in the melters. Following a trial in 2016 NZ Steel and the union agreed to reduce the manning levels to five Tappers per shift. NZ Steel wanted to reduce the level to four Tappers per shift but following a second trial the union would not agree to the reduction based on genuinely held concerns about fatigue and safety.

[6] Currently there are four crews, each working a four days on, four days off pattern. They work two night shifts then two day shifts and have four rest days.

[7] With five Tappers on each shift, the duties are split among crew members to ensure each person gets adequate rest and respite from the hot conditions. In a typical

12-hour shift, each Tapper is working for around eight hours and resting for around four hours.

[8] Working in the melters offers financial benefits for employees. For example Mr Gush told me he could earn about \$500 more a week working in the melters than he was earning as a Pipe and Light Plate Operator.

[9] It was common ground that during his employment Mr Gush expressed a desire to be appointed to a role in the melters and that such positions are highly sought after.

[10] Under the terms of a mediated settlement agreement dated 31 May 2017 Mr Gush was appointed to a temporary position in the melters at the end of 2017. Since that appointment ended Mr Gush has unsuccessfully applied for other temporary and permanent full time positions in the melters.

[11] In October 2018 Mr Gush was issued with a written warning as a result of taking leave without approval.

[12] Mr Gush claims one or more conditions of his employment have been affected to his disadvantage as a result of the unjustified actions of NZ Steel when it failed to appointment him to a vacancy in the melters and issued him with a warning. He claims a personal grievance for discrimination and alleges NZ Steel has breached its statutory duty of good faith.

[13] NZ Steel denies the claims.

### **Appointment as Site Convenor**

[14] NZ Steel is a party to a collective agreement between it, E Tu, First Union, and the Amalgamated Workers Union. The collective agreement refers to the three union parties as the “combined union” and records an agreement for regular meetings of the combined union “site committee” to take place.

[15] The site committee is made up of delegates from each of the worker groups within the business. A Site Convenor is elected by the site committee at its annual general meeting. The position is referenced in the collective agreement and is responsible for chairing meetings, heading feedback sessions with the company after site committee meetings and authorising all written communications on behalf of the site committee.

[16] The terms of settlement for the 2018 collective agreement sets out the agreed arrangements for the employee who fulfils the role of site convenor. The 2018 terms of settlement made minor alterations to previously already agreed provisions. The parties have agreed the site convenor may undertake their duties for up to two days on pay on a Tuesday and Thursday each week. These days may be altered by agreement to reflect the roster pattern applying to the person undertaking the role.

[17] The site convenor is supported on-site by a team of approximately 40 union delegates. In addition to the provision of a site convenor, the collective agreement provides for all union delegates to take paid time away from their work duties to attend to their delegate duties.

[18] Mr Gush became the site convenor on 15 September 2017.

[19] In his role as an operator in the Pipe & Light Plate plant Mr Gush was rostered to work eight-hour shifts, Monday to Friday inclusive. The roster provided for a week to be worked on day shifts from 8 am to 4 pm followed by a week of afternoon shifts starting at 4 pm and finishing at 12 midnight.

[20] It was agreed that Tuesdays and Thursdays would be a day shift every week for Mr Gush irrespective of whether he was rostered to work days or afternoons that week. That was to allow him to dedicate Tuesdays and Thursdays each week to attend to site convening duties.

[21] When Mr Gush took up the fixed term position in the melters in November 2017 he decided not to take up the option of taking two days out of his roster. Instead it was agreed Mr Gush would organise any time away from his duties in the melters, with advance being made to his manager, Mr Dayne Travers, the Melter Superintendent notification to Ms Lisa Berry, Employment Relations Manager New Zealand and Pacific Islands.

## **Issues**

[22] In order to resolve Mr Gush's application I must determine:

- a) Whether one or more conditions of his employment were affected to his disadvantage by the unjustified actions of NZ Steel when it:

- i. failed to appoint him to a vacant position in the melters; and/or
  - ii. issued Mr Gush with a written warning.
- b) Whether Mr Gush has a personal grievance as a result of being subjected to discrimination on the basis of his union activities;
- c) What, if any remedies should be awarded;
- d) Whether NZ Steel has breached its statutory duty of good faith.

[23] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

### **The law**

[24] Under s 103(1) of the Act an employee may commence a personal grievance claim if one or more conditions of the employee's employment have been affected to the employee's disadvantage by an unjustifiable action by the employer and/or where an employee has been discriminated against in the employee's employment.

[25] The onus will initially be with the employee to establish that their employment condition(s) have been affected to their disadvantage or that the employee has been discriminated against.

[26] The burden then shifts to the employer under s 103A of the Act to establish their actions, and how they acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. This will usually involve establishing that there was good cause for the employer's actions and that the employer conducted itself in a procedurally fair manner.

### **Personal grievance for unjustified disadvantage**

[27] There are two elements to this claim. Mr Gush says one or more conditions of his employment were affected to his disadvantage when NZ Steel:

- a) breached the terms of the collective agreement and failed to appoint him to a position in the melters; and

b) issued a written warning in October 2018.

[28] Mr Gush also claims a personal grievance that NZ Steel discriminated against him as a result of his involvement in union activities. I have dealt with this aspect of his claim independently to my findings on breaches of the collective agreement.

***Did NZ Steel breach of the collective agreement?***

[29] Mr Travers told me that over the last 2-3 years there has been a significant turnover of staff. In that time 19 staff have left the melters, some for different roles with NZ Steel, some as retirees or resignations. Some were on fixed term agreements that were not renewed.

[30] Since July 2017 Mr Travers has recruited 21 temporary employees into the melters. These temporary employees were hired to allow existing Tappers to be trained for more senior roles within the melters and to cover personnel who were unable to work for medical reasons. Of those 21, 11 went on to become permanent employees.

[31] Mr Gush claims NZ Steel has breached and continues to breach the terms of the collective agreement which he says requires NZ Steel:

- a) to seek and obtain the union's agreement on the use of all temporary employees;
- b) to consult with the union over his applications to work in the melters; and
- c) to appoint permanent staff in preference to all other applicants to a temporary role.

***Applications for appointment to the melters***

[32] Mr Gush applied for the following melters roles from 2016 to 2019:

- a) 8 December 2016 – one of two temporary roles as a Tapper;
- b) 8 May 2017 – permanent role;
- c) 10 September 2017 – permanent Controller role;
- d) 2 November 2017 –fixed term role as a Tapper;

- e) April 2018 – permanent Tapper role;
- f) 2 December 2018 – permanent Tapper role;
- g) 31 March 2019 – permanent Tapper role;
- h) 9 April 2019 – 2 x fixed term Tapper roles;

[33] Mr Gush has previously raised a personal grievance with NZ Steel. The parties attended mediation and resolved their differences which were recorded in a record of settlement. The terms of the record of settlement signed on 31 May 2017 included settlement of all matters between Mr Gush and NZ Steel arising out of their employment relationship up to that date. I have therefore not determined any issues arising from the non-appointment of Mr Gush prior to 31 May 2017.

[34] In accordance with the terms of the settlement agreement signed by NZ Steel and Mr Gush on 31 May 2017, Mr Gush was appointed to the fixed term Tapper role advertised on 2 November 2017.

*Relevant terms of the collective agreement*

[35] The appointment of permanent employees is dealt with in clause 62 of the collective agreement which confirms that unless an employee is categorised as a temporary employee, an apprentice, a casual or part time employee, or a contractor, the employee will be deemed to be permanent full time. The clause records that the terms and conditions for permanent employees are those set out in the collective agreement. The collective agreement does not set out any other requirements for the appointment of employees to permanent roles.

[36] In contrast, the appointment of temporary employees is dealt with comprehensively in clause 63 of the collective agreement which states (my emphasis):

63.1 DEFINITION

63.1.1 A 'Temporary Employee' is a person on a fixed term agreement of no less than two weeks and longer than 52 weeks, after consultation with the appropriate plant/department Union delegate. Terms and conditions of employment are those expressed in this Collective Agreement except for the provisions relating to Redundancy, Medical Insurance & Pension benefits.

63.2 CONSULTATION

63.2.1 For all engagements of temporary employees the appropriate Union delegate will be consulted prior to the offer of employment. A temporary employee engaged for peak work load may be moved to a different plant, within the term of employment. The appropriate Union delegate at that plant to which the employee is transferred shall be consulted.

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63.9 EMPLOYMENT REQUIREMENTS

63.9.1 For Temporary employees to be considered for employment they must:

- Be a resident in the company's Employment catchment area;
- Undergo a medical examination by the Company's Medical Advisor and be cleared for employment;
- Be qualified to the same entry level as deemed sufficient to gain employment on a permanent basis;
- Not be a Contractor or a permanent employee of a Contractor.

...

63.11 REGISTER

63.11.1 A list will be given to the Site Union Delegate on a regular basis detailing the reason, duration and location of the temporary employees.

63.15 TEMPORARY JOB VACANCIES

63.15.1 Management shall consult with the appropriate delegate to determine the possibility of placing a permanent employee in the job that is temporarily vacant and in doing so employ a temporary to replace the employee that has moved as a result of the initial vacancy. Where a temporary position is to be filled, first option shall be given to the permanent employee.

[37] The parties have defined "consultation" at clause 8 of the collective agreement in the following terms:

8.1.1 'Consultation' means to seek information or advice from; and to talk with and listen to each other's objectives, opinions and ideas (it is accepted that negotiation may follow consultation).

*Did NZ Steel breach the collective agreement when it failed to appoint Mr Gush to a permanent role?*

[38] I have accepted the evidence from NZ Steel that the successful candidates for the permanent roles were working at the melters under fixed term agreements and were considered to be the best applicants for the advertised role at the time of their appointments.

[39] Mr Gush has not established any breaches of the collective agreement by NZ Steel when it did not appoint him to a permanent role.

*Did NZ Steel breach the collective agreement when it failed to appoint Mr Gush to a temporary role?*

[40] Applying the principles of contract interpretation on the face of it, the language contained in clause 63 suggests the parties have agreed:<sup>1</sup>

- a) Temporary employees may be employed for no less than two weeks and no more than twelve months;
- b) Prior consultation with the plant delegate is required before an appointment is made;
- c) A temporary employee may be moved to another plant after consultation with the delegate at the plant to which the employee is to be moved;
- d) For a person to be considered for appointment to a temporary role they must meet specified criteria including:
  - i. be qualified to the same entry level as deemed sufficient to gain employment on a permanent basis; and
  - ii. not be a contractor or a permanent employee of a contractor;
- e) A list is to be provided regularly detailing the reason, duration and location of the temporary employees;
- f) The appropriate delegate will be consulted with to determine the possibility of placing a permanent employee in the job that is temporarily vacant;
- g) Where a temporary position is to be filled, the first option is to be given to a permanent employee.

[41] Based on the evidence I heard, it is plain from the context that clause 63 was intended to provide certainty for employees and NZ Steel that the use of temporary

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<sup>1</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432; *New Zealand Airline Pilot's Association Inc. v Air New Zealand Ltd* [2017] NZSC 111, (2017) 1 NZLR 948.

employees was genuine and to provide opportunities for upskilling for current employees.

[42] Further relevant contextual factors include:

- a) A strong culture of consultation exists within the relationship between NZ Steel and the union parties to the collective agreement and that culture is reinforced throughout clause 63 and other provisions of the collective agreement;
- b) Clause 63.15 was the subject of bargaining in 2013 when NZ Steel sought to amend the clause by removing the last sentence, a claim that was withdrawn during the bargaining and has not been raised in subsequent bargaining;
- c) The parties intended that consultation required more than exchanging written information. They have defined consultation to require the parties to talk and listen to each other.

[43] Following his appointment to the temporary role in 2017 Mr Gush applied for another temporary role. This was the vacancy in April 2019.

[44] Mr Gush was interviewed for the role but was not successful. Mr Travers told me he does not know why he was not successful because when he completed the application seeking approval for the appointments he recorded his view that Mr Gush would be ideal.

[45] Instead the role was offered and accepted by a candidate external to NZ Steel. He was a permanent employee of a contractor to NZ Steel at the time he was considered for appointment to a temporary role.

[46] From the evidence before me and for the following reasons I find NZ Steel did not meet its obligations under clause 63 when making the appointment to the temporary role:

- a) While information was provided to the appropriate delegate there is no evidence that consultation, as defined by the parties in clause 8 of the collective agreement, took place;

- b) There does not appear to have been any discussions either about the need to make the temporary appointment or prior to engaging the successful person into the temporary role;
- c) NZ Steel considered a person who was a permanent employee of a contractor to NZ Steel for appointment to the temporary role.
- d) NZ Steel failed to give the first option of appointment to Mr Gush in April. Mr Gush was a permanent employee of NZ Steel and was entitled to first option on any appointment to a temporary role.

[47] I find one or more conditions of Mr Gush's employment were affected to his disadvantage when he was not appointed to a fixed term role in the melters. As noted earlier, appointment to the melters is highly sought after and has financial benefits for an employee.

[48] NZ Steel's actions in breaching the terms of clause 63 of the collective agreement were not the actions a fair and reasonable employer could have taken in all the circumstances at the time.

[49] Mr Gush is entitled to a consideration of remedies for his personal grievance.

***The written warning***

[50] The leave policy applying to employees working in the melters, states that only two people are allowed planned leave per shift. This is because of the required manning levels. NZ Steel told me that on rare occasions the policy may be extended to three at the supervisor's discretion but only if there would be no impact on training and production and it does not create unnecessary overtime. This is because someone has to be brought into the shift to cover the absence.

[51] On 15 August 2018 Mr Gush applied for leave for the period 24 – 27 September 2018 inclusive. That same day he was informed that all dates except 27 September could be approved because two operators had already booked time off on 27 September. Mr Gush was advised that in these circumstances only the Plant Superintendent could approve the leave.

[52] A month later, and three days before Mr Gush was to fly to Sydney on holiday, he emailed Mr Travers and advised him he was flying to Sydney on 21 September and arriving back on 29 September. At the time he sent the email Mr Gush was on rostered days off and not due back to work until after his leave. Mr Gush requested he be approved the leave for 27 September because it was for an unveiling.

[53] On 20 September 2018 Mr Travers declined Mr Gush's request on the basis that two others had booked their leave earlier in March and May.

[54] Despite being declined the leave on two separate occasions, Mr Gush did not attend work for his shift on 27 September 2018. Upon making enquiries NZ Steel discovered Mr Gush was still in Australia and had not yet returned to New Zealand.

[55] On 1 October 2018 Mr Gush was invited to attend a meeting to discuss his unauthorised absence on 27 September 2018.

[56] At the meeting on 5 October 2018 Mr Gush explained that he had not had time to catch up with Mr Travers before leaving the workplace and commencing rostered days off followed by his leave. Mr Gush apologised for the incident and proffered as part of his explanation that according to the head tapper and others in his team he would have been surplus to requirements that day anyway.

[57] Mr Gush explained that he had not managed to seek the appropriate approval because of his involvement in the collective bargaining and having worked day shifts through the weekend.

[58] NZ Steel did not accept Mr Gush's explanations. NZ Steel was of the opinion that Mr Gush had ample time after 15 August 2019 to seek the appropriate approvals.

[59] Despite considering the conduct of unauthorised absence to constitute serious misconduct, NZ Steel took into account Mr Gush's admission of wrong doing and determined the appropriate penalty was a warning which would be valid for a period of 12 months.

[60] Mr Gush says the warning was an 'over the top' reaction, unreasonable and inconsistent with how NZ Steel usually treats its employees. He says there was a cultural element to his request as it was the unveiling of his Aunty's headstone. The

collective agreement requires consent for such occasions to not be unreasonably withheld.

[61] I have concluded the decision to issue Mr Gush with a written warning for his unauthorised absence was a decision an employer acting fairly and reasonably in all the circumstances, could make. Mr Gush left on his holiday to Australia in the full knowledge that his leave for 27 September had not been approved. He took no steps to take this up with his Manager until three days prior to his flight departing on 21 September and at a time when he was not rostered to work and so was not on site.

[62] After sending the email to Mr Travers, he then took no steps to check whether any response had been made to his request. Had he done so, he would have known on 20 September that his leave was not approved.

[63] In response to Mr Gush's complaint that he was treated differently to others Mr Travers gave evidence of situations where employees have been treated the same and in one case the employee was issued with a final written warning. Mr Gush provided an example of one employee who he says was treated differently. NZ Steel has established the different treatment of the employee was justified in the circumstances applying to that employee.

[64] Mr Gush's application for remedies relating to this aspect of his claim is declined.

### **Discrimination**

[65] Mr Gush alleges he was discriminated against when NZ Steel refused to appoint him to temporary or permanent full time roles in the melters. Section 104 of the Act defines the circumstances in which an employee is discriminated against in the employment relationship. If an employee has been discriminated against on one of the Act's grounds and has been adversely affected in that employment, this constitutes a personal grievance.<sup>2</sup>

[66] An employee is discriminated against if the employer, by reason directly or indirectly of involvement in the activities of a union:<sup>3</sup>

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<sup>2</sup> *Go Bus Transport v Hellyer* (2016) 15 NZELR 752 at [63].

<sup>3</sup> Employment Relations Act 2000, s 104(1).

- a) refuses or omits to afford the same opportunities for promotion and transfer as are made available for other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances, or
- b) subjects the employee to any detriment, in circumstances in which other employees employed by the employer on work of that description would not be subjected to such detriment.

[67] Detriment is defined as including anything that has a detrimental effect on the employee's employment or job satisfaction.<sup>4</sup> Involvement in union activities includes officers or members of the committee of management of a union or an official or representative of a union and those involved in bargaining or work as a delegate dealing with the employer on matters relating to the employment of those employees.<sup>5</sup>

[68] The phrase "by reason ... of" in s 104(1) of the Act refers to a material factor in, or ingredient for, the adverse consequence of disadvantage.<sup>6</sup> The protection from discrimination does not make the union member bullet-proof. Rather, it ensures that an employee's past or present union activities are not held against the employee.<sup>7</sup>

[69] Discrimination involves one person being treated differently from someone else in comparable circumstances. This is likely to be a person in exactly the same circumstances as Mr Gush but without the involvement in union activities.<sup>8</sup>

[70] There is no dispute that Mr Gush was involved in union activities. It is for NZ Steel to show that its actions were not the result of those union activities.<sup>9</sup>

[71] NZ Steel categorically denies discriminating against Mr Gush. It says, and I accept, that NZ Steel has good relationships with the unions on site. It supports union membership and activities to an extent rarely seen on worksites in New Zealand.

[72] NZ Steel told me it had been reluctant to deploy Mr Gush into a full time role at the melters because of the way he managed his site convenor role during his fixed

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<sup>4</sup> Ibid, s 104(2).

<sup>5</sup> Ibid, s 107.

<sup>6</sup> Ibid at [39]; cited in *Go Bus Transport v Hellyer* (2016) 15 NZELR 752 at [78].

<sup>7</sup> Above n 2 at [73].

<sup>8</sup> *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153 ERNZ 410 at [51] and [52].

<sup>9</sup> Ibid, s 119.

term appointment, not because he held the role. NZ Steel was concerned about Mr Gush's actions during his temporary appointment and explained to Mr Gush the reasons why he was not being successful. This included setting out in writing the factors it was taking into account when considering Mr Gush for appointment and meeting with Mr Gush to reiterate NZ Steels concerns.

***Actions by Mr Gush during his temporary appointment to the melters***

[73] When Mr Gush took up the temporary position in the melters in November 2017 he advised Mr Travers that he would not be utilising the Tuesday and Thursday time allowance for the site convenor duties. He advised that while he would remain as the site convenor, his deputy and E Tu organiser, Mark Palmer should be included in communications so that they could assist as and when necessary.

[74] Ms Berry told me that during his temporary appointment to the melters, Mr Gush had disappeared from his workplace without giving advance notice and was unable to be located. These disappearances were during shifts outside of his allowance of two days. The sudden absences put pressure on other team members in the plant. With no advance communication to his supervisor or manager, making arrangements to cover for his absence was very difficult.

[75] Ms Berry said Mr Gush frequently claimed for additional time spent on site convenor duties outside his normal rostered hours. Because these hours fall outside his normal roster, Mr Gush claimed for them at double time. Ms Berry told me Mr Gush seemed to find opportunities to deal with issues outside his normal hours so that he could use the role as a vehicle to increase his weekly earnings.

[76] Ms Berry told me the claims for the hours outside his normal sifts created difficulties for the payroll staff who had to spend considerable time establishing whether the additional hours Mr Gush claimed had been approved by management.

[77] Mr Travers told me that between April and October 2018 Mr Gush was heavily involved in the collective bargaining process. Mr Travers told me that his absences during that time put pressure on the team and put the training of new Tappers behind schedule. As a result of Mr Gush's absences Mr Travers required a second temporary employee to cover Mr Gush's work.

[78] Mr Travers told me that the melters' roster of four days on and four days off with the mix of day and night shifts was not an easy fit for the site convenor role. When Tuesdays or Thursdays are rest days, it was not ideal having Mr Gush attend the worksite because he needed to take the time for rest.

[79] On a positive note, Mr Travers told me that it was actually convenient having Mr Gush working at the melters and also filling the site convenor role because when he had to deal with issues that required involvement of the site convenor he could schedule meetings for times when Mr Gush was working on shift.

### *Unsuccessful applications*

[80] NZ Steel says Mr Gush has not been successful in his applications because of his conduct during the period in 2017 and 2018 when he held the fixed term position in the melters. Mr Travers provided examples of the conduct he took into account when considering Mr Gush for appointment to the melters including:

a) 3 July 2018 incident

On 3 July 2018 Mr Gush enquired about being paid for attendance at a meeting regarding an annual leave dispute in the melters. Mr Gush claimed a payment equivalent to 5 hours. NZ Steel declined to pay him for the five hours on the basis that the meeting reportedly took about 20 minutes with approximately one hour for preparation.

b) 16 July 2018 incident

On 16 July 2018 Mr Gush was rostered to work a 12 hour shift from 7 am to 7 pm. Mr Gush arrived at work before 7 am and told his supervisor that his wife was sick and he needed to go home to care for her and would be claiming sick leave. Mr Gush also advised his supervisor that he had a meeting to attend with HR at 10 am relating to a pay issue. However, Mr Gush did not leave the workplace until around 4.15 pm.

In addition to the meeting with Human Resources Mr Gush attended two more meetings that day. The meetings occupied about 2.5 hours of his time in total. Mr Gush claimed payment of 12 hours sick leave for that day.

c) Written warning

Mr Travers took into account that Mr Gush was subject to a written warning when giving consideration to whether he should be appointed to a position in the melters.

d) Other factors

Other factors taken into account included Mr Travers' concerns about the number of personal grievances raised by Mr Gush in respect to his employment including:

- i. On 22 February 2017 Mr Gush raised a personal grievance regarding his failure to obtain the temporary role for which he had made an application on 8 December 2016. That personal grievance was resolved on 31 May 2017.
- ii. After being appointed to the temporary role on 26 November 2017, Mr Gush raised a personal grievance in relation to his pay. This grievance was ultimately withdrawn.
- iii. On 8 November 2018 Mr Gush raised a personal grievance in relation to his temporary role coming to an end.
- iv. On 14 December 2018 Mr Gush raised a personal grievance in relation to the written warning issued to him on 8 October 2018.

***25 October 2018 letter***

[81] On 25 October 2018 Mr Travers advised Mr Gush in writing that his temporary appointment would end on 9 November 2018 and he would return to his position in the Pipe and Light Plate plant on 12 November 2018.

[82] Mr Travers referred to a recently advertised position for a permanent tapper role in the melters. Mr Gush had applied for the position but his application was incomplete. Mr Travers reminded Mr Gush that permanent positions in the melters were keenly sought after and attitude and behaviour are key competencies taken into account during the recruitment process.

[83] Mr Travers advised Mr Gush that the following points that would be taken into account when considering any applications made by him:

- a) Claiming sick leave for a full 12 hours shift when Mr Gush had actually been on site attending meetings for the majority of the day (16 July 2018);
- b) Having an active written warning on his file for unauthorised absence (October 2018);
- c) Lack of communication to supervisors and Mr Travers when leaving the plant for union duties;
- d) Claiming more hours than Mr Gush was entitled to when attending meetings.

[84] Mr Gush responded by raising a personal grievance relating to the ending of his fixed term agreement. Mr Gush took the 25 October 2018 letter as a rejection of his application for a permanent role. Mr Gush asserted that there continued to be a need for temporary cover at the melters and sought immediate redeployment back to the melters for the duration of the temporary cover requirement.

[85] Mr Gush also requested the opportunity to correct the information set out by Mr Travers and a fresh and fair consideration of his application for a permanent appointment to the melters.

[86] In December 2018 two further letters were written on behalf of Mr Gush reiterating the raising of his personal grievance and requesting NZ Steel to desist in using the points set out in the 25 October 2018 letter when considering his applications for appointment to the melters. Mr Gush raised concerns that he was being singled out because of his role as site convenor.

[87] NZ Steel denied the 25 October 2018 letter was a rejection of Mr Gush's application for a permanent role but confirmed it would continue to take into account the points set out in the letter when considering applications by Mr Gush for appointments to the melters.

[88] NZ Steel denied Mr Gush was being singled out because of this role as site convenor. It advised Mr Gush that the issues raised in the 25 October 2018 letter did not relate to his role as site convenor but rather were the result of his own behaviour and choices.

### ***Meeting on 25 June 2019***

[89] Mr Gush met with Mr Travers on 25 June 2019 to discuss NZ Steel's refusal to appoint him to the melters. Mr Gush told me that during this meeting Mr Travers told him there were no issues relating to his performance in the melters and all of the supervisors spoke highly of him. However, Mr Gush says Mr Travers told him he was too heavily entrenched in the union and he did not see how his role as site convener could be accommodated. Mr Gush offered to give up the role but Mr Travers repeated he was too entrenched.

[90] Mr Travers denies telling Mr Gush that he was too heavily entrenched in the union or that Mr Gush's role as site convenor could not be accommodated. Mr Travers denies Mr Gush offered to give up his role as site convenor.

[91] Mr Travers says he told Mr Gush his supervisors had reported that when he worked in the plant he was a good employee. However, his previous attendance and timekeeping issues did not reflect well on him. Mr Travers also told Mr Gush that dealing with disciplinary issues and the numerous personal grievances raised by him, including attendance at mediations, meant that he was diverted from his own duties of running the melters plant.

[92] The 16 July 2018 incident was discussed with Mr Gush on 25 June 2019 as well as general unauthorised absences from his rostered work in the melters. Mr Gush was told his unauthorised absences resulted in his supervisors, payroll, human resources and Mr Travers spending time trying to account for his hours correctly. In addition Mr Travers noted that Mr Gush had not completed or made himself available for any of his pre-paid overtime and this was having an impact on the rest of the crew.

[93] Mr Gush was instructed to obtain prior authorisation if he planned to take time away from his rostered duties.

[94] Following this meeting other issues relating to discrepancies between the time Mr Gush spent in meetings and claims he made for payment for attendance at those meetings outside his usual shift hours continued to be raised with him for clarification.

### ***Conclusion***

[95] Mr Travers and Ms Berry clearly became highly frustrated with the way Mr Gush was managing his site convenor duties while employed at the melters. Ms Berry

told me NZ Steel was reluctant to appoint Mr Gush to a permanent position at the melters, not because of his site convenor role but because of the way he managed the role.

[96] I am satisfied Mr Gush's involvement in union activities were a material factor in NZ Steel's decisions not to appoint him to a role in the melters. NZ Steel's concerns were directly related to the way Mr Gush managed his site convenor role. These concerns could have been addressed with him formally or through the site committee. They were not.

[97] Mr Gush has established to my satisfaction a personal grievance that he was discriminated against because of his involvement in union activities. NZ Steel's decision not to appoint him had a detrimental effect on his job satisfaction.

### **Remedies**

[98] I have found one or more conditions of Mr Gush's employment were affected to his disadvantage by the unjustified actions of NZ Steel when it breached the terms of the collective agreement relating to temporary appointments and when Mr Gush was discriminated against because of his involvement in union activities.

[99] On 27 July 2020 the parties advised the Authority Mr Gush had been offered and accepted a permanent role in the melters. This affected the remedies Mr Gush had sought in his statement of problem. The Authority invited Mr Gush to clarify the remedies being sought, which he did on 11 September 2020.

[100] Mr Gush has informed the Authority he seeks the following remedies in resolution of his personal grievances:

- a) Reimbursement of the difference in wages between his role in the Pipe Plant and that in the melters if he had properly been appointed to a temporary position in the melters under s 123(1)(b) of the Act;
- b) Compensation of \$10,000 under s 123(1)(c)(i) of the Act;

[101] In his email dated 11 September 2020 Mr Gush says his claim for the wage differential between the role he held in the Pipe plant and the role in the melters amounts to \$813.02 per week. The amount claimed in the 11 September 2020 correspondence is higher than the amount Mr Gush claimed in his statement of problem and the amount

set out in closing submissions. Given the lack of notice to NZ Steel of the change in position by Mr Gush I have preferred the claimed amount of \$500 per week as the basis for calculating lost wages.

[102] In awarding lost wages I have taken into account that on the balance or probabilities Mr Gush would have been appointed to a temporary role in the melters by at least April 2019 when Mr Travers recommended his appointment. Mr Gush seeks payment of three months loss amounting to \$6,500. Subject to my findings on contribution Mr Gush is entitled to reimbursement of lost wages of \$6,500.

[103] In relation to his claim for compensation Mr Gush says he has been embarrassed by NZ Steel's continued refusal to appointment him to work in the melters and it is a standing joke on site that others will always be preferred ahead of him due to his union activities. I am not satisfied the evidence supports an award at the level sought by Mr Gush. I have assessed the level of harm at a low level which I have quantified as \$6,000.

### **Contribution**

[104] Section 124 of the Act provides for the Authority to reduce remedies to reflect culpable contributory conduct to the situation that gave rise to the grievance. I have found the written warning issued to Mr Gush in October 2018 was justified. NZ Steel was entitled to take that warning into account when making decisions about appointments to roles in the melters.

[105] I also find Mr Gush's conduct during his temporary appointment to the melters when he disappeared without following the agreed process for gaining approvals and when he has claimed hours over and above what he should have claimed have contributed to the actions giving rise to his grievances.

[106] I accept Mr Gush's actions have contributed in a blameworthy way and his remedies should be reduced. Accordingly the remedies will be reduced by 10 per cent to take into account his blameworthy conduct.

[107] New Zealand Steel Limited is ordered to pay to Mr Gush the following sums within 28 days of the date of this determination:

- c) Lost wages of \$5,850 under s 123(1)(b) of the Act;

d) Compensation of \$5,400 under s 123(1)(c)(i) of the Act.

**Breach of good faith**

[108] Mr Gush alleges NZ Steel acted in breach of its obligations of good faith when it failed to appoint him to any of the positions he applied for between November 2018 and 2020. I am not satisfied Mr Gush has established any breaches of good faith on the part of NZ Steel.

[109] NZ Steel genuinely believed it was acting in accordance with the provisions of the collective agreement. It has been open and constructive in its communications with Mr Gush as to the reasons for his non-appointment and has provided him with relevant information when requested.

**Costs**

[110] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Gush shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. NZ Steel shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[111] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority