

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 160  
5455884

BETWEEN           ERROL WALKER  
                          Applicant

A N D                VULCAN STEEL LIMITED  
                          Respondent

Member of Authority:     David Appleton

Representatives:         Phil Yarrall and Lou Yukich, co-Advocates for  
                                  Applicant  
                                  Chris Patterson and Anneke Reid, co-Counsel for  
                                  Respondent

Investigation Meeting:   23 September 2014 at Christchurch

Submissions Received:   23 September and 10 October 2014 from the Applicant;  
                                  23 and 24 September 2014 from the Respondent

Date of Determination:   15 October 2014

---

**DETERMINATION OF THE AUTHORITY**

---

- A. Errol Walker has suffered unjustified disadvantage in his employment, and discrimination by reason directly of involvement in the activities of a union, and is awarded remedies to the extent set out in this determination.**
- B. Errol Walker is entitled to be paid two hours' pay for attending mediation on 13 May 2014.**
- C. Costs are reserved.**

**Employment relationship problem**

[1] Mr Walker claims that he has suffered an unjustified disadvantage in his employment by having been issued with a final written warning which he says he was forced to accept under duress. He also claims that he suffered an unjustified disadvantage in his employment and an unlawful deduction from his pay when the respondent company deducted two hours' pay from his wages when he attended a mediation meeting with the respondent to discuss the disadvantage grievance referred to above.

[2] Mr Walker also claims that he has suffered an unjustified disadvantage in his employment when he was given a letter which referred to two errors the respondent says he made. Finally, Mr Walker claims that he has suffered unlawful discrimination pursuant to s.104 of the Employment Relations Act 2000 (the Act) by reason directly of his involvement in the activities of a union. Mr Walker seeks remedies under s.123 of the Act and that a penalty be imposed under s.4A of the Act.

[3] The respondent denies all of these claims. It says that Mr Walker is estopped from raising a personal grievance in regards to the final written warning, as he had undertaken not to challenge it. It also asserts that Mr Walker has no right in law to be paid for attending a mediation meeting, and that he has suffered no detriment or unlawful discrimination in regards to the letter he was given.

**Brief account of the events giving rise to the personal grievances being raised**

[4] The respondent designs and manufactures steel building systems for the construction industry. Mr Walker is employed in the coil store at one of the Christchurch sites as a storeman and machine operator. He has worked for Vulcan Steel for around 2½ years.

[5] On Friday, 14 March 2014, Mr Walker arrived at work at around 8.15am and, approximately one and a half hours later, one of the office staff and one of the managers noticed the smell of alcohol on his breath. This was confirmed by one of the supervisors and, as a consequence, Mr Walker was asked, and agreed to undergo an alcohol breath test at the local branch of the New Zealand Drug Detection Agency (NZDDA). Mr Walker took a breath test at 10.15am which resulted in a reading of

134 micrograms of alcohol per litre of breath ( $\mu\text{g/L}$ ). A confirmation reading was taken 15 minutes later, at 10.30am, where the reading was 114  $\mu\text{g/L}$  of alcohol. The current breath alcohol limit for adult drivers in New Zealand aged 20 years and over is 400 $\mu\text{g/L}$  of alcohol.

[6] Upon his return to work, Mr Walker was suspended on pay and the respondent carried out an investigation. The investigation consisted of the respondent taking a short statement from Dwayne Kelman, who holds the position of Coil Manager for the respondent in its Christchurch branch. This statement confirmed that, at around 9.30am, the Site Manager for the respondent in its Christchurch branch, Troydon Lill, asked him to go and speak to Mr Walker as he and another, office-based staff member, Angela Trevarton, had both smelt alcohol on his breath. Mr Kelman confirmed that he could also smell alcohol on Mr Walker's breath and asked him if he had been drinking the night before. Mr Kelman said that Mr Walker told him that he had had a few drinks. Ms Trevarton also gave a short statement which confirmed that Mr Walker came into her office and, when he walked past her, there was a smell of alcohol that lingered in her office.

[7] On Tuesday, 18 March 2014, Mr Walker received a letter from Mr Salend Nath, Coil Processing NZ Manager for the respondent, which requested Mr Walker's attendance at a disciplinary meeting on Friday, 21 March 2014. In his letter, Mr Nath stated, inter alia, the following:

*Vulcan considers that you attended work under the influence of alcohol on Friday 14 March 2014. Vulcan considers that this is:*

- (a) a breach of Vulcan's Zero Tolerance policy;*
- (b) a breach of your obligation of health and safety which you owe both to Vulcan and to your fellow employees;*
- (c) a failure to follow a reasonable and lawful instruction; and*
- (d) amounts to serious misconduct.*

[8] The disciplinary meeting took place on 21 March 2014 as scheduled and, the following Wednesday, Mr Nath wrote a letter to Mr Walker which, amongst other things, stated that during the disciplinary meeting Mr Walker did not accept that he had done anything wrong, that he was not impaired on 14 March 2014, that only some people could smell alcohol on his breath and that the reading was well below the legal driving limit.

[9] The letter went on to say the following:

...

8. *Vulcan is especially concerned because not only did you attend work under the influence of alcohol, but you also do not accept that you did anything wrong. This gives Vulcan reason to believe that you would not see anything wrong with returning to work again when you are under the influence of alcohol.*
9. *Vulcan has made a decision based on your actions in attending work under the influence of alcohol, and also based on your failure to accept that your actions were wrong, that grounds do exist to summarily terminate your employment. However Vulcan is willing to take a lesser course of action and, issue you with a full and final written warning subject to you providing an acknowledgment and undertaking which confirms the following:*
  - (a) *That you accept the full and final written warning and will not seek to challenge it; and*
  - (b) *That you will not attend at the workplace under the influence of alcohol again*
10. *Attached to this letter is a copy of the acknowledgment and undertaking that Vulcan proposes you sign. By signing the acknowledgment undertaking, you would be giving Vulcan comfort that you will not repeat your actions in attending the workplace under the influence of alcohol.*
11. *In the event that you are unwilling to sign the acknowledgment and undertaking, Vulcan considers that it will have no choice but to summarily terminate your employment.*
12. *Vulcan is willing to give you until 5:00pm on Friday 28 March 2014 to consider your options. If you require more time to consider your options, please let me know. If you would like to meet with me (together with your support person of course) to discuss the content of this letter, please also let me know. Until such time as this matter has been decided, Vulcan requests that you remain on special leave without any deductions to your entitlements.*
13. *If you have any questions please do not hesitate to contact me.*

*Yours sincerely*  
**VULCAN STEEL LIMITED**  
*Salend Nath*

[10] Attached to this letter was a separate document headed up *Acknowledgment & Undertaking*. The text of this undertaking was as follows:

*I, ERROL WALKER, of Christchurch, have read and understand the letter from my employer, Vulcan Steel Limited ("Vulcan") dated 26 March 2014 in respect of my actions in attending work under the influence of alcohol on Friday 14 March 2014 and in respect of failing to accept that my actions were wrong (together "my actions"). I acknowledge that Vulcan has a zero tolerance policy in respect of the consumption drugs and alcohol in the workplace while the employee is still working and:*

- 1. I accept that I Vulcan [sic] has decided to issue me with a full and final written warning in respect to my actions and I confirm and acknowledge that I will accept that full and final written warning and I will not seek to challenge it; and*
- 2. I confirm that I undertake that I will not in the future attend work under the influence of alcohol.*

[11] It is Mr Walker's evidence that he was given the letter from Mr Nath dated 26 March 2014 at the end of a mediation meeting that he was attending which related to another matter. He says that his union representative, Phil Yarrall, Branch Secretary of the Manufacturing and Construction Workers' Union, Christchurch branch (the union) protested at the contents of the letter and effectively told Mr Nath that it was unlawful. However, because he had already been suspended for several days and understood the letter to be saying that, if he did not sign it, he would be dismissed for coming to work under the influence of alcohol, Mr Walker said that he had no choice but to sign the undertaking. When asked under cross-examination why he did not write words to the effect that he was signing it under protest, Mr Walker said that, if he had done that, he would have been sacked as that would have constituted a challenge. Accordingly, Mr Walker signed the undertaking on 28 March 2014.

[12] Mr Nath then issued Mr Walker with the final written warning on 28 March 2014. This letter contained the following text:

- 4. We thank you for providing your acknowledgment and undertaking and confirm that this letter serves as your full and final written warning and that no further disciplinary action will be taken against you in respect to this incident. This warning will remain on your file for a period of six months. Any further instances of this nature will likely lead to further disciplinary action taken against you, up to and including summary dismissal.*

5. *I record that you have been on paid special leave for the period of Vulcan's investigation into its concerns. I confirm that your entitlements have not been affected during this period. We welcome your return to the workplace on Monday 31 March 2014 at your usual time.*
6. *Errol, we are pleased with this compromise and look forward to a positive employment relationship with you going forward.*
7. *If you have any questions, please do not hesitate to contact me.*

[13] Mr Walker returned to work on 31 March 2014 but on 11 April 2014 Mr Yarrall sent a letter to Mr Lill raising a personal grievance on behalf of Mr Walker. This stated the following:

*The union alleges that Vulcan Steels action in forcing Errol to sign away his rights under law to challenge a warning letter is tantamount to black mail.*

*It is the union's contention that this agreement was obtained by coercion and economic duress and is of no force. We will seeking it removal [sic] and compensation for humiliation and stress caused by the company's illegal action.*

[14] A Statement of Problem, signed by Mr Yarrall on behalf of Mr Walker, was received by the Authority on 14 April 2014.

[15] On 4 June 2014, Mr Yarrall, on behalf of Mr Walker, lodged a document with the Authority entitled *Amended Statement of Problem* although, strictly speaking, this was a supplemental Statement of Problem, as it raised new personal grievances on behalf of Mr Walker.

[16] The first new personal grievance related to the attendance of Mr Walker on 13 May 2014 at mediation which had been directed by the Authority to try to resolve the issue relating to the final written warning issued on 28 March 2014. Mr Walker's complaint is that, on 16 May 2014, the union received an email from the respondent's representative advising that, as neither Mr Walker nor his union delegate (Selwyn Cassidy), had requested leave to attend the mediation the respondent was reserving its decision on the matter. Subsequently, Mr Walker and Mr Cassidy were approached by their supervisor and asked to sign a paper authorising unpaid leave, which neither man agreed to do. Subsequent to that, both had their pay docked.

[17] The respondent says in reply that, at the conclusion of the mediation meeting on 13 May, Mr Yarrall telephoned Mr Lill to say that Mr Walker would not be back at work for the rest of the day as he was going to work on his brief of evidence and work out who he might call as a witness. Mr Lill did not object as he understood Mr Yarrall's tone left no room for any objections, but Mr Walker had not applied for annual leave to attend the mediation, nor for annual leave with respect to his absence that afternoon. It is the respondent's position that there is no obligation at law for employers to pay employees to attend mediation.

[18] The second new personal grievance raised by the supplemental Statement of Problem is that, on 22 May 2014, Mr Walker was given a letter regarding mistakes allegedly made by him in the course of his work. He says that the letter was given to him by Mr Kelman, who stated that it was a new policy and that every staff member who made a mistake would now get a letter. However, Mr Walker's colleague Rolando Cabunilas, who had also been operating the machine on the day on which the errors were alleged to have occurred, apparently had not been given a letter at the same time. Mr Walker says that Mr Kelman told him that whoever set the cutter took responsibility. Mr Walker's evidence is that the first error referred to in the letter was actually caused by Ms Trevarton in the office (which Ms Trevarton acknowledged in her evidence to the Authority). Mr Walker also said that it was Mr Cabunilas who had set the cutters in relation to the second error, but he did not get a letter.

[19] It appears to be uncontested that Mr Cabunilas did receive a letter but not until 4 June 2014. The Authority saw a copy of this letter to Mr Cabunilas, which was dated 22 May 2014 (like Mr Walker's letter), but only referred to the first error.

[20] Mr Walker's evidence is also that he went to see Mr Kelman on 23 May 2014 to ask if the company had a policy on stress leave as he was getting very stressed by the events that had been occurring. He says that Mr Kelman told him that the company had no such policy but that he could use his sick leave or annual leave. Mr Walker says that, when he asked if Mr Cabunilas and Ms Trevarton had been given their letters in regard to the errors yet, Mr Kelman responded that they had not *as they were not union members*. This is denied by Mr Kelman.

[21] Mr Walker attended his GP and was put on stress-related sick leave until 2 June 2014. He also states that, on the evening of 4 June 2014, he was experiencing

chest pains and feeling very fatigued and stressed and was taken to hospital by ambulance. He was told that he was not suffering a heart attack but a musculoskeletal problem which could be the result of an accident but which could also be caused by stress and anxiety. Mr Walker says that, as he had had no accident, he believed it was caused by stress and anxiety as a result of the things happening to him at work.

### **The issues**

[22] The Authority must consider the following issues:

- (a) Whether Mr Walker has suffered an unjustified disadvantage arising from the circumstances in which he was issued with the final written warning following his signing of the undertaking;
- (b) Whether Mr Walker should have been paid for attending mediation;
- (c) Whether Mr Walker suffered an unjustified disadvantage in being given a letter regarding errors he had allegedly committed at work; and
- (d) Whether Mr Walker was given the letter by reason directly of his involvement in the activities of a union contrary to s.104 of the Act.

### **Was Mr Walker subjected to an unjustified disadvantage in his employment when he was issued with the final written warning on 28 March 2014?**

[23] Section 103(1) of the Act provides as follows:

#### ***103 Personal grievance***

*(1) For the purposes of this Act, personal grievance means any grievance that an employee may have against the employee's employer or former employer because of a claim—*

....

*(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[24] Section 103A of the Act sets out the test of justification that must be applied when the Authority considers whether an action was justifiable. Section 103A provides as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
  - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
  - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
  - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
  - (a) *minor; and*
  - (b) *did not result in the employee being treated unfairly.*

[25] In order to decide whether the respondent's actions in writing to Mr Walker in the terms that it did on 26 March 2014 were the actions that a fair and reasonable employer could have done in all the circumstances, it is necessary to consider whether the respondent was correct in concluding that it had reasonable grounds in law to summarily dismiss Mr Walker. If it did not have those grounds, then the option presented to Mr Walker in that letter was not reasonable as it presented Mr Walker with a stark choice of either accepting a final written warning or being summarily, but

unlawfully dismissed. If, on the other hand, the conclusion that the respondent could summarily dismiss Mr Walker was fair and reasonable, then the offer presented to Mr Walker was a fair and reasonable one as it would have given Mr Walker the chance to retain his employment.

[26] A key part of the respondent's decision that it had the grounds to summarily dismiss Mr Walker was the *zero tolerance* policy contained in its 2012 handbook. When Mr Walker first joined the respondent company, the handbook that was issued to him had been prepared (or updated) in 2007. However, in 2012, amendments to this 2007 handbook were prepared by an external HR consultancy, in conjunction with the company's New Zealand head office in Auckland, and copies distributed to the Christchurch branch in March 2013.

[27] The union argues on behalf of Mr Walker that changes made to the handbook in 2012 were neither discussed in consultation prior to them being implemented nor explained to staff prior to the handbooks being distributed. It is understood that the union is arguing that the amendments to the 2007 handbook should not therefore bind Mr Walker. However, Mr Walker did sign an acknowledgment on 8 April 2013 that he was responsible for reading the handbook and understanding that it described the respondent's general guidelines. The declaration that he signed contains the following text:

*With my signature I indicate that I have read and understood this handbook that reflects Vulcan Steel's culture and policies.*

[28] Mr Walker's evidence is that he and a number of other employees signed a form of protest in or around April 2013 to indicate that they had signed the declaration in relation to the 2012 handbook under duress as they were not given any option to opt out of it. The protest document stated that several people had raised concerns with management about sections of the handbook but had been assured that it would not replace existing employment contracts and collective employment agreements.

[29] This document of protest was not dated and, on balance, I accept the evidence of the respondent that it was not given to the respondent until after the issue with Mr Walker coming to work on 14 March 2014 with alcohol on his breath arose.

[30] Having taken evidence from various individuals, both on behalf of Mr Walker and the respondent, it would appear that there were insufficient guidelines from the

respondent to its managers, supervisors and employees in relation to the changes that had been introduced into the 2007 handbook. This effectively meant that the managers, supervisors and employees of the Christchurch office had to read through the 2012 handbook in its entirety to try to spot the new sections. One of the respondent's witnesses stated that he had explained to some staff that the key differences appeared to be in relation to the company's computer policy. It certainly appears that all of the implications of the amendments to the 2007 handbook were not sufficiently explained to Mr Walker and his colleagues.

[31] However, I believe it is not necessary for me to go so far as to consider whether or not this means that the amendments do not bind Mr Walker and his colleagues because, for the purposes of this investigation, it is only necessary to consider the change relating to the company's zero tolerance policy. This is found on p.15 of the 2012 handbook which is headed up "*Random drug testing*". This page states as follows:

*Under the NZ Health and Safety Act 1992 and Australian Legislation, Vulcan Steel has a legal duty to ensure the safety of Employees while at work. This legal duty requires Vulcan Steel to take all practicable steps to provide and maintain a safe working environment.*

*Vulcan Steel is committed to creating a zero tolerance to drug and alcohol in the workplace, to safely achieve its business objectives. This commitment:*

- *Promotes your wellbeing, health and safety*
- *Creates a work environment where you feel safe and are supported*
- *Recognises the importance of satisfying the client and providing quality services*
- *Improves business performance including management of business risk and associated costs*
- *In the event of a workplace related incident, Vulcan Steel may choose to test for drug and alcohol use immediately with the appropriate accredited alcohol and drug agency.*

*Also due to the nature of the business and the potential safety risk to yourself and others within the work environment, we reserve the right to perform random drug and alcohol testing, which would include prohibited or illegal substances, synthetic cannabis, non-prescribed drugs, stimulants and alcohol. Failure to attend the accredited alcohol and drug agency for such testing shall be treated as serious misconduct.*

*Vulcan Steel reserves the right to search, with reasonable cause, your personal effects or vehicles which are on Vulcan Steel's premises for prohibited or illegal substances, synthetic cannabis, non-prescribed*

*drugs, stimulants and alcohol. Failure to comply shall be treated as serious misconduct.*

[32] It is clear from Mr Nath's letter of 26 March 2014 and his evidence to the Authority that he had concluded that Mr Walker had committed serious misconduct by coming to work with alcohol still in his system, by not accepting that he had done anything wrong, and that he was in breach of the zero tolerance policy and was *under the influence of alcohol*. When questioned by the Authority, Mr Nath stated that, in March 2014, he believed that the respondent's zero tolerance policy meant that employees had to have zero alcohol in their system. He stated *zero means zero*. He however acknowledged that there must be a minimum level below which it would be too difficult to regard someone as being in breach of the zero tolerance policy as, for example, using mouth wash could result in a very low reading. However, when questioned, Mr Nath accepted that the respondent had never explained to staff prior to March 2014 that the words contained in the 2012 handbook in relation to a zero tolerance policy meant zero alcohol in the system or any other particular minimum level.

[33] It is of relevance to note that, since the issue of Mr Walker's attendance at work with alcohol in his system arose, the company has developed a comprehensive drug and alcohol policy, several versions of which were put before the Authority. The latest version it saw (which, apparently, is not the latest one in existence), contains the following statement:

*1.3 Vulcan Steel is committed to creating a zero tolerance to drugs and alcohol in the workplace in order to safely achieve its business objectives. Accordingly, while attending to any Vulcan Steel business, all employees must maintain a blood alcohol concentration below 50 micrograms per litre of breath (50µg/L) and a drug-free level at all times ("the Specified Limit"). For practical applications in respect to testing for alcohol, all test results lower than 50 micrograms per litre of breath (50µg/L) will be treated as zero.*

[34] When Mr Walker was asked by the Authority what he had understood by the words in the 2012 handbook, he said that it sounded like the company was working towards a zero tolerance policy, which meant not coming to work under the influence of alcohol. Mr Walker's understanding of being under the influence of alcohol was not being sober or in control and being impaired or intoxicated, so that his thoughts and actions were influenced.

[35] Mr Walker confirmed that, up until March 2014, the company had never communicated anything to indicate what level of breath reading would be acceptable and what would not. Mr Walker's evidence was also that, on the morning of 14 March 2014, when he left for work at around 8am, he did not feel in any way impaired or under the influence of alcohol. Given that the NZDDA reading of his breath alcohol level at 10.15am was one third of the legal driving limit, this is not an assertion that lacks credibility in my view.

[36] It was the evidence of the respondent that two notices had been put on staff noticeboards prior to March 2014 about drinking. One arose out of a toolbox meeting that Mr Lill had had shortly before the 2013 Christmas break in which he had told staff that they should be aware of tiredness and what they had done the night before, such as drinking at barbecues. However, when questioned by the Authority, Mr Lill accepted that he had not given staff any guidance as to what they could do to understand whether or not they had too much alcohol in their system after having drunk the night before. He rightly pointed out that he was unable to give such guidance as people differed in their reaction to alcohol, and in the circumstances in which they had been drinking. The second notice referred to was a copy of the company's occupational health and safety minutes for December 2013, which were also apparently pinned to the noticeboard. In this, the minutes state the following:

7. *General business/action/responsibility:*

*Troydon restated the company policy on alcohol. That no one is to drive a truck or operate machinery after drinking alcohol on site.*

[37] This, however, is not particularly relevant to Mr Walker's case as he had not been drinking alcohol on site.

[38] One other issue that arose in evidence was that Mr Nath had stated that he had told Mr Walker and Mr Yarrall that the respondent *does not deal with the legal driving limit, that that limit is considered too high by Vulcan and that given the safety sensitive nature of his work (as well as other employees) Vulcan works with a zero tolerance policy.*

[39] However, Mr Nath accepted that the company had never stated to staff prior to March 2014 that it regarded the legal driving alcohol limit as too high.

[40] It is my firm conclusion that the respondent was not justified in reaching the conclusion that Mr Walker acted in breach of its zero tolerance policy on 14 March 2014 when it had never issued any clear guidelines to its staff what those words meant. Mr Nath's evidence was, basically, that the words in the handbook spoke for themselves. However, I reject that assertion. First, as Mr Walker suggested in his evidence, the wording strongly suggests that the company was working towards a zero tolerance policy rather than having already implemented one. Second, the term *zero tolerance* could have different meanings in the absence of a precise explanation. It could, as asserted by Mr Nath, mean zero alcohol in the system. Alternatively, it could mean a zero tolerance of impairment through alcohol, which is a quite different proposition.

[41] In addition, the company had never stated to its staff prior to March 2014 what it regarded as being *under the influence*. If it regarded having any residual level of alcohol in one's system as meaning that an employee was under its influence, it needed to have made this clear.

[42] The fact that the respondent has, since March 2014, set a precise breath alcohol limit above which it will regard the zero tolerance policy as being breached (50µg/L) strongly indicates that it is aware that it was on unsafe ground in March 2014 in deciding that Mr Walker was in breach of that policy.

[43] It is also noteworthy that, up until March 2014, the respondent allowed staff to drink on the premises on Friday afternoons once they had stopped working. Mr Walker's evidence is that staff had been seen working after they had consumed alcohol. He also points out that some problem could have arisen necessitating a supervisor to operate a machine after they had consumed alcohol. This practice, therefore, sent a confusing message to staff in the absence of clear guidelines about the implementation of its zero tolerance policy. The respondent has clearly recognised this because it now no longer allows alcohol to be consumed on its Christchurch premises at all.

[44] Mr Nath's decision that Mr Walker could have been summarily dismissed was not only because he had come to work *under the influence of alcohol* but also because Mr Walker could not see that he had done anything wrong. However, given that Mr Walker did not feel in anyway impaired when he came to work on 14 March 2014,

and he reasonably did not know that his employer regarded having a residual level of alcohol in his system below the legal driving limit as serious misconduct, I do not accept that Mr Walker had done anything wrong. A clear standard against which right and wrong is judged has to be established first.

### **Conclusion**

[45] It is perfectly reasonable, indeed necessary, for the respondent to decide that staff should not come to work under the influence of alcohol, even if they had stopped drinking several hours before. It is also reasonable for the respondent to seek to develop a drug and alcohol policy which sets out clear guidelines for staff. Furthermore, it is reasonable for the respondent to operate a zero tolerance policy. The respondent clearly operates in an inherently hazardous industry and is entitled to take whatever reasonable steps it feels are necessary to protect its staff from accidents, which could have very serious consequences.

[46] However, the respondent concluding that Mr Walker had been in breach of its zero tolerance policy when it had never articulated what that zero tolerance policy meant in terms of residual alcohol in one's system was not an action that a fair and reasonable employer could have taken in all the circumstances. It has since decided that anything over 50mg of alcohol per litre of breath is unacceptable. However, as at 14 March 2014, it had never articulated that policy (and does not appear to have even conceived it). Therefore, it cannot have been justified in concluding that it had the right to summarily dismiss Mr Walker.

[47] The corollary of this conclusion is that, when Mr Nath wrote his letter on behalf of the respondent on 26 March 2014 giving Mr Walker what amounted to an ultimatum that, if he was unwilling to sign the acknowledgment and undertaking, the respondent would summarily terminate his employment, that was also an action that no fair and reasonable employer could have taken in all the circumstances.

### *Duress*

[48] Mr Walker argues that his signing of the undertaking was carried out under duress and that, therefore, it was void. Duress has been defined as *coercion of will, which vitiates consent* *Pao On v. Lau Yiu Long* [1980] AC614 at 636 (PC Hong Kong). In *Shivas v. Bank of New Zealand* [1990] 2 NZLR 327 at 345, Tipping J

stated *The party seeking to avoid the contract must show that his will has been overborne by illegitimate commercial pressure* [345].

[49] These cases were cited with approval in *Pharmacy Care Systems Ltd v. Attorney-General* [2014] 2 NZCCLR 187 (CA) at [89]. At [90] the Court held that

*It is not necessary to show that duress was the sole cause inducing the agreement. It is enough if it was “an” inducement of the requisite character. Moreover, once the fact of duress of some kind is established, the burden is on the party resisting the claim of duress to show that it did not in fact induce the contract (See Barton v Armstrong, para [75]).*

[50] The Court of Appeal in *Pharmacy Care Systems* set out seven elements at [98] that must be established for duress to be established. These are as follows:

- (a) There must be a threat or pressure;
- (b) That threat or pressure must be improper;
- (c) The victim’s will must have been overborne by the improper pressure so that his or her free will or judgment have been displaced;
- (d) The threat or pressure must actually induce the victim’s manifestation of assent;
- (e) The threat or pressure must be sufficiently grave to justify the assent from the victim, in the sense that it left the victim no reasonable alternative;
- (f) Duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action or affirmatively by applying timeously to a court for the avoidance of the agreement; and
- (g) The victim may be precluded from avoiding the agreement by affirmation.

[51] It is my conclusion that, as the threat of summary dismissal was not a lawful one, for the reasons already examined above, Mr Walker was subject to coercion of will which renders his agreement to accept the written warning without challenge voidable. Addressing the seven criteria in more detail, I conclude as follows.

[52] First, there was clearly pressure put on Mr Walker in the form of Mr Nath's letter stating that he faced summary dismissal for coming to work under the influence of alcohol. This is a very serious allegation to make to any employee, especially in a safety-sensitive company such as the respondent.

[53] Second, given that the advice to Mr Walker that the respondent had grounds to summarily dismiss him was incorrect in law, I conclude that that pressure was improper.

[54] Third, Mr Walker was, in my view, overborne by this improper pressure as he was left with the stark choice of either signing the undertaking or being fired for serious misconduct.

[55] Fourth, it is quite clear that the pressure did actually induce Mr Walker's manifestation of assent.

[56] Fifth, I am satisfied that the pressure was sufficiently grave to justify the assent of Mr Walker as it did leave him no reasonable alternative, as being dismissed and then having to challenge that dismissal in the Authority is not a reasonable alternative. Therefore, the duress renders Mr Walker's agreement voidable which, in turn, renders it acceptable for him to challenge the written warning.

### *Estoppel*

[57] The respondent argues that Mr Walker is estopped from raising a personal grievance about the final written warning. Judge Inglis summarised the doctrine of estoppel in *Checkmate Precision Cutting Tools Limited v Tomo* [2013] NZEmp C54, when she stated at [20]:

*The underlying purpose of the doctrine of estoppel is to prevent a party from going back on his/her word (whether express or implied) when it would be unconscionable to do so.<sup>1</sup> There must be clear words or conduct by one party which creates a belief or expectation in the other, and the party to whom the representation or promise was made must have relied on it to such an extent that it would be inequitable to allow the promisor to go back on his/her word.<sup>2</sup> I do not consider that either pre-requisite is satisfied in the circumstances.*

---

<sup>1</sup> *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (CA) at 549 per Tipping J.

<sup>2</sup> John Burrows, Jeremy Finn, and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington) at [4.7.4].

[58] The key words in the passage above are the words *when it would be unconscionable to do so*. Having found that Mr Walker was induced to sign the undertaking by duress, in this case it would not be unconscionable for Mr Walker to seek to retract his undertaking. I therefore reject the respondent's assertion that Mr Walker is estopped from challenging the final written warning. By the same token, Mr Walker's first personal grievance is neither frivolous nor vexatious, contrary to the submissions of the respondent's counsel.

*Unjustified disadvantage*

[59] Finally, I find that, as it was issued under improper circumstances, being the coercion which the respondent subjected Mr Walker to, the final written warning issued to Mr Walker constituted a disadvantage in his employment which was unjustified, as no fair and reasonable employer could have issued him with a final written warning in all the circumstances that prevailed at the time.

[60] What a fair and reasonable employer could have done in the circumstances was to have cautioned Mr Walker about the residual alcohol in his system and then issued him with clear guidelines as to what level of residual alcohol was regarded as acceptable by it.

**Should Mr Walker have been paid for attending mediation on 13 May 2014?**

[61] It was Mr Walker's evidence that he had been paid for attending a previous mediation meeting with the respondent and that he had been paid automatically without having to ask for leave. When I asked Mr Nath, who had made the decision not to pay Mr Walker for attending mediation, why he had treated Mr Walker differently on this occasion, Mr Nath candidly said that, at the first mediation, the employment relationship had been *fixable*. They had achieved a resolution and were able to move along. However, Mr Nath said, by the second mediation, he believed that the relationship had become dysfunctional. Mr Yukich submitted on behalf of Mr Walker that, effectively, the respondent decided not to pay Mr Walker because they were unable to resolve the personal grievance in terms they found acceptable. In light of Mr Nath's evidence, this seems like a fair characterisation.

[62] There are a number of arguments that Mr Walker could seek to rely upon in order to persuade the Authority that he was entitled to have been paid for attending the mediation meeting on 13 May 2014.

*An express contractual right?*

[63] With respect to the collective employment agreement in accordance with which Mr Walker is employed (between Vulcan Steel and the Manufacturing and Construction Workers Union Inc.) it does not contain any express term entitling an employee to be paid for attending a mediation meeting. Its terms cover various categories of leave but not leave to attend mediation.

*An implied contractual right?*

[64] The collective agreement does contain clauses relating to domestic leave, bereavement leave, parental leave, jury service and tuition leave. It also contains the usual plain language explanation of the services available for the resolution of employment relationship problems, required by s.54 of the Act, which includes a section on mediation. However, I do not believe it is possible to extrapolate from any of those clauses a general right to be paid when attending mediation. Such a right would have to be implied from the language of the collective agreement, which I do not believe it is possible to do in accordance with the usual principles governing the implication of terms. The Privy Council case of *BP Refinery (Western Port) Pty Ltd v. Shire of Hastings* [1977] 16 ALR 363 at 376, laid down a five point test for the implication of terms, as follows:

*In [their Lordships'] view, for a term to be implied, the following conditions (which may overlap) must be satisfied:*

- (1) *It must be reasonable and equitable;*
- (2) *It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;*
- (3) *It must be so obvious that it "goes without saying";*
- (4) *It must be capable of clear expression;*
- (5) *It must not contradict any express term of the contract.*

[65] Together, these conditions create a set of high hurdles for Mr Walker to jump over, and I believe he falls at the second hurdle, and possibly the third. In other words, I do not believe that it is necessary to give business efficacy to the collective agreement to imply a term that employees attending a mediation meeting with their

employer are entitled to be paid, as the contract is clearly effective without such an implied term. Furthermore, it is not *so obvious that it goes without saying* that employees should be paid for attending a mediation meeting.

*Was attendance at the mediation meeting "work"?*

[66] An alternative way of looking at this problem is to decide whether attending a mediation meeting constitutes *work* for which Mr Walker would reasonably be expected to be paid. The Authority did not see a job description for Mr Walker but it can be reasonably assumed that it does not expressly refer to a right to attend mediation. However, can the attempted resolution of an employment relationship problem through mediation amount to work?

[67] In my view, there is a distinction between the tasks that an employee is paid to carry out for the benefit of his or her employer on the one hand, and activities the staff and the employer may take part in, in order to either seek to strengthen the employment relationship or to resolve problems with it on the other hand. I do not believe it is possible to reasonably argue that attending mediation amounts to *work*.

[68] It is for this reason that I do not believe, as asserted by Mr Yukich in his submissions, that failing to pay for Mr Walker attending mediation amounts to a breach of s.4 of the Wages Protection Act 1983, as the wages have not *become payable to a worker* when that worker, Mr Walker, attended a mediation meeting.

*Custom and practice?*

[69] In addition, evidence was heard by the Authority that Mr Walker had been paid for attending a previous mediation meeting. However, I do not believe that this is sufficient to enable the Authority to imply into the terms of employment between Mr Walker and the respondent a right to be paid in respect of another mediation meeting. It is a well-established rule that a contract may be subject to terms as sanctioned by custom even if they have not been expressly mentioned by the parties. However, in *Woods v. NJ Ellingham & Co Ltd*, [1977] 1 NZLR 218, the Judge, relying on Halsbury's *Laws of England*, set out the main principles for deciding whether a custom can be implied into a contract. First, the custom must have acquired such notoriety that the parties must be taken to have known of it and intended it should form part of the contract. Secondly, the custom must be certain. Thirdly, in

addition to being certain, it must be reasonable. Finally, the custom must not be inconsistent with the express contract.<sup>3</sup>

[70] I do not believe that having paid Mr Walker for attending mediation on one previous occasion means that the custom has acquired *such notoriety that the parties must be taken to have known of it and intended it should form part of the contract*. There was no cogent evidence given by either party that other employees over a period of time (other than Mr Cassidy on one occasion) have been paid for attending mediation meetings with the respondent.

*A breach of good faith not to pay Mr Walker on this occasion?*

[71] The respondent referred me to the Employment Relations Authority case of *Postal Workers Union v. New Zealand Post* (ERA Christchurch CA20/08, 29 February 2008) in which it says the Authority found that whilst:

- a. the Act promotes mediation as the primary problem solving mechanism in employment relationship problems; and
- b. mutual obligations of trust and confidence in an employment relationship are very important; and
- c. one object of the Act is to address the inherent inequality of power in an employment relationship,

none of the above is sufficient to confer a statutory right of a specific term that an employer must pay employees when they attend mediation.

[72] There is a significant difference in the facts of *Postal Workers Union* and the current case; namely the fact that Mr Walker and the respondent attended the mediation meeting at the direction of the Authority. Section 159(2) of the Act provides that:

*(2) Where the Authority gives a direction under subsection (1)(b) or subsection (1)(c), the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences, and proceedings in relation to the request before the Authority are suspended until the parties have done so or the Authority otherwise directs (whichever first occurs).*

<sup>3</sup> Summarised in *Law of Contract in New Zealand*, 4th ed, Burrows, Finn & Todd, p.210

[73] Section 159A of the Act provides that the Authority must give priority to investigating and determining a matter where an attempt has been made to resolve the matter by mediation over any other matters in which mediation has not been used unless the Authority considers that providing mediation services would be inappropriate having regard to s.159(1) or (1A).

[74] If Mr Walker had refused or failed to attend mediation, the Authority would have had to have treated his application to it as having less priority than all other matters where mediation had been attempted. In practice, this would have delayed the investigation and determination of his application indefinitely.

[75] Section 3(a)(v) of the Act provides that:

*The object of the Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship ...by promoting mediation as the primary problem-solving mechanism.*

[76] Section 143 of the Act provides that the object of Part 10 of the Act is to establish procedures and institutions that:

*(a) support successful employment relationships and the good faith obligations that underpin them; and  
(b) recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves;*

[77] When I consider that the purposes of ss. 159 (2) and 159A are to encourage (arguably, enforce) attendance at mediation, and when I also take into account ss. 3(a)(v) and 143(a) and (b) of the Act, I am of the view that the respective purposes and expressed objects of the Act could well be defeated if an employer exercised its discretion to refuse to pay an employee for attending mediation which had been ordered by the Authority, even if there was no contractual right to be paid, as many employees cannot afford easily to miss out on even a few hours' pay and may choose to forego attendance at a mediation meeting.

[78] Section 4(4) of the Act sets out a list of matters to which the duty of good faith in s.4(1) applies, and s.4(5) makes clear that the matters in the list are examples and do not limit subsection (1). It is reasonable to conclude that a further matter to which the duty of good faith applies is an attempt by an employee and an employer to resolve an ongoing employment relationship problem through mediation. This duty is

arguably wider than that expressed in s.159(2) and encompasses the duty not to take action that discourages or prevents, or is likely to discourage or prevent attendance at a mediation meeting.

[79] In light of these statutory imperatives, I am of the view that an employer who has been directed to attend mediation with an existing employee acts in breach of its duty of good faith when it elects to withhold pay from that employee for attending the mediation meeting, in circumstances where the object of the mediation is to seek to resolve an existing employment relationship problem and to establish (or re-establish) and maintain a productive employment relationship, even if the employee had no strict legal entitlement to be paid while attending the mediation meeting.

[80] This leads me to conclude that the actions of the respondent in exercising its discretion to withhold two hours' pay, which is the duration of the mediation meeting on 13 May 2014, was in breach of its duty of good faith towards Mr Walker. This action has caused a quantifiable disadvantage in Mr Walker's employment. No fair and reasonable employer could have taken that action in all the circumstances that prevailed at the time of the action. Accordingly, Mr Walker has suffered an unjustified disadvantage in his employment in this respect.

[81] For the avoidance of doubt, I find that Mr Walker did not suffer an unjustified disadvantage from his employment when he decided to take off the remainder of 13 May 2014 after mediation without having first sought leave to do so, and which resulted in his pay being withheld for the remainder of that day.

**Was Mr Walker subjected to an unjustified disadvantage in his employment when he was given a letter on 22 May 2014 pointing out errors?**

[82] The text of the letter given to Mr Walker was as follows:

**BY HAND**

*Dear Errol*

*It has come to my notice that a number of mistakes have been made by you in the workshop recently, which I believe are a result of you failing to properly follow instructions. A brief description of the incidents I am referring to are as follows:*

- *Galv job where cuts were not calculated accurately from the office, and picked up by you as commented but decided not to take any action and converting around \$500 worth of material into scrap; side trimming over 100mm where*

*common practice is 10-12mm with upper limit around 30mm;  
and*

- *Colour Steel job for Tascon, where there was clear instructions not to apply Film on the coil and your comments. 'all colour steel you have done before had film' so you applied the film, this has cost the company 2-3 hours of labour to take the film off.*

*The purpose of this letter is to remind you of your legal obligation as an employee of Vulcan Steel to follow instructions and perform all of your tasks and duties with due diligence and reasonable care. Please ensure you properly follow instructions in the future, and if you are ever in doubt of an instruction given or you believe the instruction is not correct, to question the person giving the instruction rather than simply not following it.*

*If you would like to discuss the content of this letter at all please let me know.*

*Regards,  
Dwayne*

[83] The evidence of Mr Kelman was originally that he prepared a letter for both Mr Walker and Mr Cabunilas, but was not able to provide Mr Cabunilas with his letter until 4 June because Mr Cabunilas had been on leave the previous week. However, when the Authority directed the respondent to produce Mr Cabunilas' annual leave records, it turned out that he had only been on leave on 3 June 2014.

[84] Mr Kelman then lodged and served a subsequent brief of evidence which acknowledged that the information in his first brief of evidence was incorrect. His subsequent evidence was that his letter to Mr Walker was prepared first and the letter to Mr Cabunilas prepared a few days later. It then goes on to say that he believed that he had a good reason to treat Mr Walker differently because, when he gives constructive feedback to Mr Walker, he often takes offence to it and he is forced to defend his comments to Mr Walker's union. He decided that it was better to put his comments to Mr Walker in a letter so that they had *a paper trail*. He said the respondent decided to provide a letter to Mr Cabunilas after Mr Walker advised him that Mr Cabunilas had also been involved in the mistake.

[85] Having considered all the evidence, it is my considered view that Mr Kelman in fact only decided to give Mr Cabunilas a letter once he had become aware that Mr Walker had lodged a supplemental Statement of Problem complaining about having been given the letter. The supplemental Statement of Problem was received by the Authority, by email, on 4 June 2014, the day that Mr Cabunilas was given his

letter. The respondent was served with the supplemental Statement of Problem on the same day as the Authority, by email, by way of its legal representative.

[86] The evidence of the respondent is that the letter given to Mr Walker was not intended to be a formal warning. Nonetheless, Mr Walker's evidence is that he regards the letter as a disadvantage because it will go on his record and will be used in deciding whether or not he should get a profit share. Mr Kelman's evidence is that the letter to Mr Walker will not be put on his file. However, this is a direct contradiction to his supplemental evidence that he was trying to create a *paper trail*. This is why a letter was prepared in the first place.

[87] Furthermore, although the letter does not state that it constitutes a formal warning, it still records that Mr Walker made two errors. It is Mr Walker's evidence that he cannot be blamed for the first error, as it originated with the administration department and he and Mr Cabunilas took steps to check that the measurements were right. Second, he says that Mr Cabunilas was solely responsible for the second error. I note that the letter to Mr Cabunilas is in the same terms as the letter to Mr Walker, save that it does not make reference to the second error.

[88] It would appear that the purpose in giving Mr Walker the letter was to create a paper trail which could be used against Mr Walker in the future. Whilst an employer is perfectly entitled to draw to the attention of its staff errors, and may choose to do that in an informal or a formal way, if it is to create a *paper trail* which, by implication, can be referred to in the future for whatever purpose the employer wishes, then a fair and reasonable procedure must be followed. As a minimum, this procedure must comply with s.103A of the Act, together with any additional requirements which the employer sets out in its contractual documentation and its handbook.

[89] I am satisfied that giving to Mr Walker the letter constitutes a disadvantage in his employment, in that a paper trail has been created which Mr Walker can reasonably expect will be referred to in the future, potentially to his detriment.

[90] I am further satisfied that this disadvantage is unjustified, as no fair and reasonable employer could have issued Mr Walker with a letter setting out errors which it says he had committed without having first investigated the circumstances in which those errors occurred in accordance with fair process as is required by the Act.

[91] Accordingly, I find that Mr Walker has suffered an unjustified disadvantage in his employment.

**Was Mr Walker subjected to unlawful discrimination under s.104 of the Act?**

[92] Section 104 of the Act provides as follows:

**104 Discrimination**

*(1) For the purposes of section 103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in section 105, or by reason directly or indirectly of that employee's refusal to do work under section 28A of the Health and Safety in Employment Act 1992, or involvement in the activities of a union in terms of section 107,—*

*(a) refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, 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) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or*

*(c) retires that employee, or requires or causes that employee to retire or resign.*

*(2) For the purposes of this section, detriment includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.*

*(3) This section is subject to the exceptions set out in section 106.*

[93] I do not believe that s.106 is relevant for present purposes. Section 107 of the Act provides as follows:

**107 Definition of involvement in activities of union for purposes of section 104**

*(1) For the purposes of section 104, involvement in the activities of a union means that, within 12 months before the action complained of, the employee—*

*(a) was an officer of a union or part of a union, or was a member of the committee of management of a union or part of a union, or was otherwise an official or representative of a union or part of a union; or*

*(b) had acted as a negotiator or representative of employees in collective bargaining; or*

*(ba) had participated in a strike lawfully; or*

*(c) was involved in the formation or the proposed formation of a union; or*

*(d) had made or caused to be made a claim for some benefit of an employment agreement either for that employee or any other employee, or had supported any such claim, whether by giving evidence or otherwise; or*

*(e) had submitted another personal grievance to that employee's employer; or*

*(f) had been allocated, had applied to take, or had taken any employment relations education leave under this Act; or*

*(g) was a delegate of other employees in dealing with the employer on matters relating to the employment of those employees.*

*(2) An employee who is representing employees under the Health and Safety in Employment Act 1992, whether as a health and safety representative or a site health and safety representative (as those terms are defined in that Act) or otherwise, is to be treated as if he or she were a delegate of other employees for the purposes of subsection (1)(g).*

[94] There is a direct conflict of evidence between Mr Walker, who says that he was told by Mr Kelman that Mr Cabunilas and Ms Trevarton would not get letters because they were not members of the union, and Mr Kelman, who denied he said that.

[95] On balance, I believe that Mr Walker is more likely to be telling the truth. This is because I believe that Mr Kelman's evidence is generally less credible given that he made assertions in his original brief of evidence with respect to the letter given to Mr Cabunilas which turned out not to be true. Mr Kelman's original evidence strongly implies that the two letters were prepared at the same time but that Mr Cabunilas was away on leave for the whole of the previous week which prevented Mr Kelman from giving him the letter. I conclude that this was an attempt to mislead the Authority, as Mr Kelman is very likely to have known that Mr Cabunilas was not on leave that week, given that only seven members of staff work in the coil store, and he is coil manager.

[96] Having concluded that Mr Kelman did say to Mr Walker that Mr Cabunilas was not going to be given a letter because he was not a member of the union, it is necessary to determine whether this leads me to conclude that Mr Walker suffered discrimination contrary to s.104 of the Act. To reach this conclusion, I must consider the following elements:

- a. Did the respondent subject Mr Walker to a detriment?
- b. If so, was Mr Walker subjected to that detriment in circumstances in which other employees employed by that employer on work of that description are not or would not be subjected to such detriment?

- c. If so, was that action by reason directly or indirectly of involvement in the activities of a union in terms of section 107?

*Detriment*

[97] I find that being singled out by being given a letter in the terms described above, which I have already found constituted an unjustified disadvantage in Mr Walker's employment, constitutes a detriment, as it had a detrimental effect on Mr Walker's employment (as it could be used in an adverse way against him in the future, being part of a *paper trail*), and on his job satisfaction, as it created a fear that it could be used in an adverse way against him in the future.

*Were other employees subjected to that detriment?*

[98] In *McAlister v Air New Zealand Ltd* [2009] NZSC 78, [2010] 1 NZLR 153, [2009] ERNZ 410 His Honour Judge Tipping provided the following guidance:

*[51] ... In general terms discrimination by reason of a prohibited ground involves one person being treated differently from someone else in comparable circumstances.*

...

*[52] ... Subject to any applicable statutory provision, the most natural and appropriate comparator is likely to be a person in exactly the same circumstances as the complainant but without the feature which is said to have been the prohibited ground. That feature must be eliminated from the comparator employee in order to make sense of the comparative exercise. (Footnote omitted).*

[99] I conclude that Mr Cabunilas is the correct comparator in this case, as he was working with Mr Walker on the days in question, doing the same job, but was not given the letter dated 22 May 2014 until after the respondent received notice that Mr Walker was raising a personal grievance in respect of the letter.

[100] Although Mr Cabunilas was eventually given a letter, first, it is not known what was said to Mr Cabunilas by Mr Kelman when it was given to him, and second, it is also clear that the letter does not set out the second error which Mr Walker says Mr Cabunilas was subject to. Mr Cabunilas was not called by either party to give evidence to the Authority.

[101] I conclude that there was initially no intention to give Mr Cabunilas a letter, and that he was eventually given a letter in order to divert attention away for the fact that Mr Walker had been the only employee to have been given one. I believe that

this amounts to a disparity of treatment which satisfies the second limb of the three elements set out paragraph [96] above.

*Was the respondent's action by reason directly or indirectly of Mr Walker's involvement in the activities of a union in terms of section 107?*

[102] Mr Walker has not pleaded exactly what part of s.107 of the Act he believes his situation falls under. However, there are only two subsections which could apply to Mr Walker's situation:

- a. Section 107(1)(d), in that Mr Walker sought to be paid for attending mediation on 13 May 2014, which arguably amounts to him making a claim for some benefit of an employment agreement, namely pay; and
- b. Section 107(1)(e), in that he had submitted another personal grievance to his employer, namely the personal grievance challenging the final written warning.

[103] In *McAlister*, Tipping J discussed, at [49], the causal link between the alleged grounds for dismissal and the alleged discrimination in s.104:

*The correct question raised by the phrase 'by reason of' is whether the prohibited ground was a material ingredient in the making of the decision to treat the complainant in the way he or she was treated.*

[104] It is not enough for the Authority to conclude that there has been unlawful discrimination pursuant to s.104 of the Act on the basis only that Mr Kelman stated to Mr Walker that Mr Cabunilas and Ms Trevarton would not receive letters because they were not union members. I have to be satisfied, on balance, that Mr Walker seeking to be paid for attending mediation and/or him submitting another personal grievance were material ingredients in the respondent giving him the error letter.

[105] There is one factor which is particularly relevant in determining whether the fact that Mr Walker raised a personal grievance about being given the final written warning was a material ingredient in him being singled out and being given the letter. When the respondent first lodged its Statement in Reply, it requested urgency on the grounds that Mr Walker's personal grievance was a challenge to the final written warning and that that breach of his undertaking brought into question *whether Vulcan*

*Steel can have the requisite trust and confidence in Mr Walker going forward.* The respondent's counsel stated that Vulcan Steel's concern in that regard needed to be investigated. It stated that Vulcan Steel had suspended its investigation pending the outcome of the Authority's investigation but wanted to continue its investigation as soon as possible.

[106] I also note that, amongst the bundle of documents put before the Authority for the present case, was a letter addressed to Mr Walker dated 22 April 2014 stating that the respondent intended to investigate Mr Walker's breach of his acknowledgment and undertaking and that, depending upon the outcome of Vulcan Steel's investigation, Vulcan Steel may consider terminating his employment for serious misconduct, being the breach of his acknowledgment and undertaking. It stated that once the Authority had determined Mr Walker's claim, Vulcan Steel would immediately continue its investigation into Mr Walker's breach.

[107] This approach of the respondent caused the Authority concern, as it appeared that the respondent wished to treat Mr Walker having raised a personal grievance and having lodged proceedings in the Authority as disciplinary matters. Mr Walker has also said that he has felt harassed in the workplace since he raised his personal grievance.

[108] In the UK Court of Appeal case of *King -v- Great Britain China Centre*, [1992] ICR 516, [1991] EWCA Civ 16, [1991] IRLR 513, a case about racial discrimination under the UK discrimination legislation, it was held that it is unusual to find direct evidence of discrimination, and a case will usually depend on what inferences can properly be drawn. If a claimant can show that he has been less favourably treated than comparable individuals from a different racial group, then the court will look to the alleged discriminator for an explanation. If no explanation is put forward or if the explanation is inadequate or unsatisfactory, it will be legitimate to infer that the discrimination is on racial grounds.

[109] I believe that it is appropriate to adopt a similar approach in the present case, whereby an inference of discrimination can be drawn from relevant evidence available to the Authority in the absence of a satisfactory explanation for Mr Walker being given a letter relating to errors he is alleged to have made, in circumstances where no

formal investigation was carried out, and where the comparator, Mr Cabunilas, was not given a similar letter until Mr Walker raised a personal grievance.

[110] I also take into account the statement made by Mr Kelman about Mr Cabunilas and Ms Trevarton not being union members, and the respondent's stated intention (via its counsel) in April to instigate a disciplinary investigation against Mr Walker for having challenged the final written warning by way of a personal grievance. Taking all these factors into account, I believe that it is more likely than not that Mr Walker raising a personal grievance was a direct material ingredient in the respondent issuing Mr Walker with the letter dated 22 May 2014.

[111] Accordingly, I find that Mr Walker has been discriminated against contrary to s.104 of the Act by reason directly of his involvement in the activities of a union; namely, having submitted another personal grievance to his employer.

### **Remedies**

[112] Section 123(1) of the Act provides as follows:

*(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*

*....:*

*(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*

*(c) the payment to the employee of compensation by the employee's employer, including compensation for—*

*(i) humiliation, loss of dignity, and injury to the feelings of the employee; and*

*(ii) loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.*

### *Section 123(1)(b) of the Act*

[113] During his evidence before the Authority, Mr Walker stated that he was only one of two employees at the Christchurch branch who did not receive a profit share for the 2013/14 financial year. He says that he was told by Mr Nath that he was not getting a profit share because he had come to work under the influence of alcohol. Mr Nath's evidence on this was that he did not award a profit share to Mr Walker because of Mr Walker's attitude and concerns about his compliance with health and safety. With respect to attitude, Mr Nath said that Mr Walker was not a team player

and did not display a cooperative attitude. He confirmed that, with respect to Mr Walker's failure to comply with health and safety obligations, this was him coming to work with alcohol in his system on 14 March 2014.

[114] Mr Walker says that he believes that the other staff at his level who received profit share received sums of \$4,000 each. Consequently, that is the sum he is claiming.

[115] As this alleged loss emerged only during the course of the Authority's investigation meeting, I directed that I would hear evidence on the matter to determine whether or not the failure to pay Mr Walker the profit share constituted money lost as a result of his personal grievance in relation to being given a final written warning, but that I would not hear evidence on the quantum of such loss, if relevant, as the respondent had not had the opportunity in advance to prepare and present evidence on that.

[116] Having heard evidence from Mr Nath, I find, on a balance of probabilities, that Mr Walker suffered some, as yet unquantifiable, financial loss arising out of the personal grievance for unjustified disadvantage when he was not awarded a profit share payment for the financial year 2013/14 because, according to Mr Nath, amongst other things, Mr Walker failed to comply with health and safety obligations by coming to work with alcohol in his system on 14 March 2014.

[117] However, as Mr Nath's evidence suggested that several factors are taken into account when a decision is made about whether any profit share should be paid to an employee, and if so, the amount, it is not possible to ascertain whether the unjustified disadvantage led to a loss of \$4,000 or some lesser amount. For example, no evidence was heard to ascertain why Mr Walker was perceived as not being a team player, and what extent that led to a zero profit share.

[118] In short, the Authority has not heard sufficient evidence to consider to what extent the Mr Walker coming to work with alcohol in his system on 14 March 2014 contributed to no profit share at all being awarded to him. Accordingly, a further investigation meeting will need to be convened to determine what award, if any, should be made to Mr Walker in this respect.

[119] However, Mr Walker has sustained the loss of two hours' pay which was withheld when he attended mediation. That is a loss that must be reimbursed by the respondent as it arises out of Mr Walker's personal grievance in respect of that matter.

*Section 123(1)(c)(i) of the Act*

[120] The next step is to assess what, if any, compensation under s.123(1)(c)(i) Mr Walker is entitled to. First, I accept that Mr Walker suffered humiliation, loss of dignity and injury to his feelings by being given an ultimatum that he had to either accept a final written warning which he could not challenge or be summarily dismissed for having come to work under the influence of alcohol.

[121] However, Mr Walker gave little evidence of the effect on him of that particular event, although he did give evidence that he was under ongoing stress at work which culminated in him having to attend hospital in an ambulance on 4 June 2014. The Authority was not shown any medical evidence to confirm that the stress that Mr Walker was suffering, and the subsequent medical emergency he underwent, were solely and directly attributable to the events leading to the issuing of the final written warning, so I am unable to safely infer that there was a direct correlation.

[122] However, I am satisfied that there was an adverse effect on Mr Walker as a result of this unjustified disadvantage, and I believe that the sum of \$5,000 is a reasonable sum to award in respect of it in light of the evidence I have heard.

[123] Turning to the second unjustified disadvantage which relates to being singled out to be issued with a letter on 22 May 2014 in respect of alleged errors, without an adequate investigation having first been carried out, there was no specific evidence about the effect on Mr Walker of this event. In addition, I do not believe it is possible to separate the effect of this event from the discrimination that I have found occurred contrary to s.104 of the Act.

[124] Again, the only evidence I have is the evidence of Mr Walker relating to the ongoing stress that he says he was suffering. I accept that being given the letter which no other member of staff had been given (until 13 days later) is more likely than not to have caused humiliation, loss of dignity and injury to Mr Walker's feelings. I believe also that these events would have contributed to his feeling that he was being singled

out by the respondent for having raised his personal grievance. I believe that the sum of \$3,000 is an appropriate sum to award under s.123(1)(c)(i) of the Act.

[125] Regarding the unjustified disadvantage relating to the withholding of two hours' pay while Mr Walker attended a mediation meeting, I heard no evidence about the specific effect on him of this decision. I do not believe that it would be just to award any compensation under s123(1)(c)(i) of the Act in respect of this matter.

*Section 124 of the Act*

[126] Under s.124 of the Act, where the Authority has determined that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[127] There is no doubt that Mr Walker contributed to the personal grievance by his action of coming to work on 14 March 2014 with alcohol still in his system. However, in order to justify a reduction in remedies pursuant to s.124 of the Act, the Authority must be satisfied that the employee's actions which contributed to the personal grievance were also culpable, blameworthy or wrongful actions.<sup>4</sup>

[128] If the respondent had had in place sufficiently clear guidelines which forewarned employees exactly what it meant by its zero tolerance policy in terms of an acceptable alcohol/breath reading limit, then Mr Walker's actions could have been regarded as blameworthy by not having either taken more care the night before when he was drinking, or not having checked with his employer upon arriving at work to ensure that he was compliant with that policy and the alcohol/breath limit it set out. However, no such guidelines had been made available to Mr Walker and he was, essentially, left to use his own judgment (which Mr Patterson criticised Mr Walker for in his submissions and cross-examination).

[129] Under those circumstances, I do not consider that Mr Walker's actions were sufficiently blameworthy to merit a reduction in the remedy that I have awarded in respect of this unjustified disadvantage.

---

<sup>4</sup> *Harris v The Warehouse Limited* [2014] NZEmpC 188 at [178]

[130] Turning to the second unjustified disadvantage and the unlawful discrimination that I have found, I believe that there is sufficient lack of clarity surrounding the circumstances which gave rise to the errors which caused the respondent its concerns to prevent me from concluding that Mr Walker had contributed to these personal grievances. I am certainly not able to conclude that Mr Walker's actions were blameworthy. Of course, Mr Walker's involvement in the activities of a union by having raised a personal grievance cannot be deemed to be blameworthy.

[131] Finally, Mr Walker's attendance at the mediation meeting on 13 May 2014 or two hours was in no way a blameworthy act, and so it cannot attract a reduction in the award under s 123(1)(b).

[132] Therefore, I decline to reduce the remedies I have awarded.

*Setting aside of the final written warning*

[133] Mr Walker asks that the final written warning letter be set aside. The written warning is, in fact, no longer live as it has expired. However, I believe that it should not have been issued to Mr Walker in the first place as the basis upon which it was issued was Mr Walker's acknowledgement and undertaking, which I have found was given under duress. Therefore, it is appropriate that all copies of this warning letter be removed from Mr Walker's file and from other company files, and that it not be relied upon in any future disciplinary action against Mr Walker.

*Setting aside the letter dated 22 May 2014*

[134] Mr Walker has not asked for any order setting aside the error letter dated 22 May 2014. However, given that Mr Walker disputes that he was responsible for the two errors referred to in it, but that it was nonetheless issued without a formal investigation process having been carried out, it is appropriate that all copies of this letter be removed from Mr Walker's file and other company files, and that it not be relied upon in any future disciplinary action against Mr Walker.

*Should a penalty be imposed under s4A of the Act?*

[135] Section 4A provides as follows:

***4A Penalty for certain breaches of duty of good faith***

*A party to an employment relationship who fails to comply with the duty of good faith in section 4(1) is liable to a penalty under this Act if—*

*(a) the failure was deliberate, serious, and sustained; or*

*(b) the failure was intended to undermine—*

*(i) bargaining for an individual employment agreement or a collective agreement; or*

*(ii) an individual employment agreement or a collective agreement; or*

*(iii) an employment relationship; or*

*(c) the failure was a breach of section 59B or section 59C.*

[136] I believe that the giving to Mr Walker of the letter on 22 May 2014 was directly due to him having raised a personal grievance. This, in turn, leads me to conclude that the respondent has breached its duty of good faith towards Mr Walker.

[137] Furthermore, such an action was deliberate in my view. It was also serious, as it sought to punish Mr Walker for having raised a personal grievance. However, I cannot find that the breach was sustained, as it was a one off action. I therefore decline to impose a penalty against the respondent.

[138] I do not believe that the giving to Mr Walker of the final written warning was a deliberate act of bad faith, as I believe that the respondent genuinely (but erroneously) believed that it was acting lawfully.

[139] Further, although the withholding of two hours' pay has been found to have been an act of bad faith contrary to s. 4 of the Act, it was a one off event. Also, the respondent acted in reliance on the Authority's determination in *Postal Workers Union*. Although I believe that that determination can be distinguished, in all the circumstances it would not be just to impose a penalty upon the respondent in respect of this matter.

[140] In his submissions, Mr Yukich asks that annual leave should be restored for attendance at the Authority's investigation meeting and reimbursement of any wages lost, *for all in attendance*. However, first, only Mr Walker was a party to the proceedings and so the Authority has no jurisdiction to consider applications made on behalf of anyone else; and second, these matters were not argued at the investigation meeting in respect of Mr Walker, and have only just been raised in Mr Yukich's submissions. The respondent has not had notice of that application. Accordingly, I decline to consider that late application.

**Orders**

[141] I order the respondent to pay to Mr Walker:

- a. Two hours' pay; and
- b. The sum of \$8,000 pursuant to s.123(1)(c)(i) of the Act.

[142] I further order that all copies of the final written warning letter be removed from Mr Walker's file and other company files, and that it not be relied upon in any future disciplinary actions against Mr Walker.

[143] I further order that all copies of the error letter dated 22 May 2014 be removed from Mr Walker's file and other company files, and that it not be relied upon in any future disciplinary actions against Mr Walker.

**Observations**

[144] Mr Yukich asked that the Authority make recommendations pursuant to s.123(1)(ca) of the Act. This provides as follows:

*if the Authority or the court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring.*

[145] I do find that a workplace practice was a significant factor in the personal grievance in relation to the issuing of the final written warning; namely, an unclear policy on zero tolerance to alcohol in the workplace. However, since March 2014, the company and the union have been working together to create a comprehensive drug and alcohol policy. It would not be appropriate for the Authority to comment upon the efficacy of that new policy, about which very little evidence was heard. Therefore, I decline to make any recommendations pursuant to s.123(1)(ca) of the Act.

[146] However, given the stated object of the Act, including to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship,<sup>5</sup> and the role of the Authority of, amongst other things, aiming to promote good faith behaviour,

---

<sup>5</sup> Section 3(a) of the Act

supporting successful employment relationships and generally furthering the object of the Act,<sup>6</sup> I find it is necessary to make the following further observations.

[147] Mr Walker remains an employee of the respondent, but I harbour some concerns about the stated intentions of the respondent towards him. First, the respondent stated in its application for urgency, lodged via its counsel, that it would *immediately continue its investigation into Mr Walker's breach* once the Authority had determined Mr Walker's claim. For the avoidance of any doubt, my firm finding is that Mr Walker has not committed the breach referred to by the respondent.

[148] Second, on 17 September 2014, the respondent lodged an amended supplementary Statement in Reply which, amongst other things, stated that, since Mr Walker had lodged his claim in the Authority, the employment relationship between the parties had become increasingly dysfunctional. The amended supplementary Statement in Reply sought a declaration that the relationship had become dysfunctional due to Mr Walker's actions and that Mr Walker has repudiated the relationship and destroyed all trust and confidence.

[149] The actions the respondent relied on in seeking this declaration were:

- a. Mr Walker attending work under the influence of alcohol on 14 March 2014;
- b. breaching his acknowledgment and undertaking by raising a personal grievance and filing a Statement of Problem in the Authority in respect of the warning;
- c. raising a personal grievance on 23 May 2014 for Vulcan Steel refusing to pay him for attending mediation on 13 May 2014 and his subsequent absence from work for the balance of that day;
- d. raising a further concern on 28 May 2014 in response to a letter sent to him on 22 May 2014; and
- e. alleged threatening actions towards Mr Kelman on 6 August 2014.

---

<sup>6</sup>

[150] The Authority advised the respondent through its counsel that it did not intend to issue the declaration sought on the basis that the applicant and his representatives had had insufficient notice of the application and, more significantly, the respondent was effectively asking the Authority to step into the shoes of the employer and carry out what is the employer's role; namely to initiate a disciplinary investigation against one of its employees. An alternative view is that the respondent was asking the Authority to determine that the employment relationship had broken down, dispensing with the need for the respondent to carry out a disciplinary investigation. On either analysis, these actions would not constitute functions that the Authority can properly carry out in these circumstances.

[151] For the avoidance of doubt, it is of great concern to me that the respondent is of the view that raising a personal grievance and lodging a Statement of Problem in the Authority constitute actions that justify disciplinary action and/or the conclusion that the employee has repudiated his contract with the employer. The raising of a personal grievance is a statutory right of a fundamental nature which cannot be contracted out, of save where a settlement pursuant to s.149 of the Act has been entered into. Mr Walker also has a right under the collective agreement to raise a personal grievance. It offends against the principles of natural justice to seek to discipline an employee for having raised a personal grievance.

[152] It is my observation that there are clearly difficulties in the relationship between Mr Walker and the respondent. However, pursuant to s.4(1A) of the Act, the parties are required to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative.

[153] I therefore strongly urge Mr Walker, his union and the relevant managers of the respondent to take urgent steps to seek to repair the relationship. This may involve the parties meeting to agree a strategy to diffuse the current tensions that exist between them and to work constructively and effectively going forward. These objectives will be considerably assisted by the union and the respondent taking a far less confrontational stance towards one another in my view.

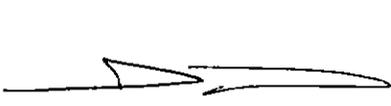
**Directions**

[154] I have found that there appears to be a prima facie case that Mr Walker suffered financial loss arising out of the personal grievance for unjustified disadvantage when he was not awarded any profit share payment for the financial year 2013/14. However, as Mr Nath's evidence suggested that several factors are taken into account when a decision is made about whether any profit share should be paid to an employee, and if so, the amount, it is necessary to investigate this matter further.

[155] Accordingly, a telephone conference shall be convened by the Authority in due course to set down a timetable for this further investigation.

**Costs**

[156] I reserve costs in this matter. The parties are to seek to agree how costs are to be dealt with between them but, in the absence of such agreement within a period of 28 days from the date of this determination, any party seeking costs should serve and lodge a memorandum of costs within a further 14 days with any response being served and lodged no later than 14 days thereafter. The costs of attendance at any subsequent investigation meeting in relation to the profit share shall be considered separately.

  
David Appleton  
Member of the Employment Relations Authority

