IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2015] NZERA Christchurch 113
5455884

	BETWEEN	ERROL WALKER Applicant
	A N D	VULCAN STEEL LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Lou Yukich, Advocate for the Applicant Chris Patterson, Counsel for the Respondent
Investigation Meeting:	25 June 2015 at Christchurch
Submissions Received:	29 June and 5 August 2015 from the Applicant 29 July 2015 from the Respondent
Date of Determination:	6 August 2015

DETERMINATION OF THE AUTHORITY

A. Mr Walker was unjustifiably disadvantaged by having been refused payment of a profit share bonus for the 2013/14 year, and is awarded $3,000 in respect of the unpaid bonus payment, plus interest, together with a further $3,000 compensation for humiliation, loss of dignity and injury to his feelings.

B. There was no breach of the settlement agreement dated 26 March 2014.

C. Costs are reserved.

Employment relationship problem

[1] Errol Walker, who remains an employee of the respondent, claims that he has suffered unjustified disadvantage in his employment by not having been paid a profit share bonus for the 2013/14 year.

[2] In his statement of problem Mr Walker asserts that this failure to pay him the bonus amounts to:

a. a breach of the respondent's duty of good faith towards him;

b. disparity of treatment compared to most of his colleagues who did receive a profit share bonus payment in the year in question;

c. unlawful discrimination on the basis of his Union activities;[1] and

d. breach of a mediated settlement.

[3] Mr Walker seeks payment of the bonus in the sum of $4,000, together with compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[4] The respondent denies that Mr Walker was entitled to a bonus in the 2013/14 year claiming that the bonus is discretionary and that Mr Walker did not meet the necessary criteria for the award of a bonus.

Background

[5] By way of the Authority's determination dated 15 October 2014,[2] the Authority found that Mr Walker had suffered unjustified disadvantage in his employment, and discrimination by reason directly of his involvement in the activities of a Union, and was awarded remedies in relation to those findings.

[6] At paragraphs [116] to [118] of the Authority's determination, the Authority made a finding in respect of the payment of the profit share bonus as follows:

> *[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*

[1] This claim was withdrawn during the Authority's investigation meeting.
[2] [2014] NZERA Christchurch 160.

> *was heard to ascertain why Mr Walker was perceived as not being a team player, and to what extent that led to a zero profit share.*
>
> *[118] In short, the Authority has not heard sufficient evidence to consider to what extent 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.*

[7] The present proceedings, therefore, constitute the Authority's inquiry into the amount that should be awarded to Mr Walker in respect of the non-payment of the profit share bonus. However, by way of the statement of problem that was lodged with the Authority on 24 October 2014, Mr Walker has introduced new elements into the inquiry, namely that he suffered unjustified disadvantage, that there has been a breach of good faith by the respondent, that there has been a breach of a settlement agreement and that he was discriminated against on the basis of his Union activities (since withdrawn). Therefore, my inquiry into loss reserved in the Authority's determination dated 15 October 2014 is subsumed into this wider investigation.

[8] It is also necessary to briefly recite some further history in respect of this matter before considering the evidence. As was its right, the respondent challenged the Authority's determination dated 15 October 2014 in the Employment Court. On the basis of that *de novo* challenge, the Authority then ordered the removal of the current proceedings to the Employment Court by way of its determination dated 2 December 2014.[3]

[9] Unfortunately, the Employment Court did not become aware of the Authority's removal due to an administration error within the Christchurch office of the Authority until after the respondent had subsequently notified the Employment Court that it was withdrawing its *de novo* challenge against the Authority's determination dated 15 October 2014. The notice of discontinuance was formerly noted in the judgment of the Employment Court dated 20 April 2015.[4]

[10] Some confusion then ensued as to whether or not the Court's judgment encompassed the Authority's removal to it of the current proceedings. However, in reliance upon a communication from the Registrar of the Employment Court to the Authority dated 21 April 2015, in which the Registrar confirmed that there remained

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3 [2014] NZERA Christchurch 200
4 [2015] NZEmpC 49

no active aspect of the relationship problem before the Court, I proceed on the basis that, notwithstanding the Authority's earlier removal of this matter to the Court and the fact that the Employment Court's judgment referred to above does not make specific mention of the removal, the Authority has the jurisdiction to determine the matter now before it.

Brief account of the events leading to the non-payment of the profit share bonus

[11] A full account of the events leading to the disputes between Mr Walker and his employer is set out in the Authority's determination dated 15 October 2014. However, a brief account is that, a few weeks after Mr Walker was issued with a final written warning for having turned up to work smelling of alcohol on 14 March 2014, the respondent carried out its review of, inter alia, staff working in the coil production area (which included Mr Walker) for consideration of their eligibility to receive a profit share bonus for the 2013/14 year.

[12] It is the evidence of the respondent that it offers all employees the opportunity to achieve an additional, discretionary bonus of profit share awarded on an annual basis. The respondent says that it is the decision of the shareholders of the respondent company to determine whether the discretionary profit share will be offered to employees in any given year and, if so, the quantum of that profit share. Having made that decision, managers then decide which staff members will be awarded a profit share based on their performance during the preceding 12 months.

[13] The respondent says that the discretionary profit share is not awarded to employees who simply perform the job that they were hired to do. Rather, it will be awarded to those employees who are seen to have performed over and above their obligations and who have contributed to the company in a positive way.

[14] The criteria that are used by the company to determine whether coil production staff should receive a profit share bonus are as follows:

- attendance/time keeping;
- work productively;
- co-operative attitude;
- customer service;

- health and safety conscious.

[15] The profit share period runs from 1 July to 30 June each year and employees are generally advised in early July whether they are going to receive a profit share bonus in respect of the preceding profit share year.

[16] The Authority heard evidence from Salend Nath on behalf of the respondent. Mr Nath is the national coil processing manager for the New Zealand wide company, and Mr Walker is employed under Mr Nath's management, although he reports directly to Dwayne Kelman, the Christchurch site manager of coil processing.

[17] Mr Nath said in evidence that each national manager makes the decision regarding profit share for their employees only. There is no discussion across the different groups of national managers and each manager reports to the board of directors with their individual decisions. It is Mr Nath who makes the decisions regarding the payment of profit share for all employees in the coil division, North and South Islands. For 2013/14 this comprised 38 staff. Of those 38 staff, 25 received a full bonus of $4,000 each, eight received 90% of a full bonus, one received 75% and four received no bonus. Mr Walker and Selwyn Cassidy, a union delegate who worked in the same area as Mr Walker and who has represented Mr Walker, were two of those four.[5]

[18] Mr Nath says in evidence that Mr Walker has not received a payment for the full discretionary profit share every year as he did not receive any profit share for the 2011/12 year on the basis of his poor attendance at work, although Mr Walker says that this was because he had not been employed for long enough in that year to have been eligible.

[19] Mr Nath says that, although Mr Walker received a discretionary profit share for the 2012/13 year, this was because discretion was applied in respect of his poor attendance given his attitude, health and safety record and performance, all of which Mr Nath considered to be outstanding at the time.

[20] The Authority heard that Mr Kelman reported incidents to Mr Nath, who is based in Auckland, about each staff member as they arose during 2013/14. At the end of the 2013/14 profit share period, Mr Kelman also sent a summary of the attendance

[5] Mr Cassidy has also issued proceedings in the Authority in respect of his non receipt of a profit share bonus in 2013/14, which will be investigated on 14 September 2015.

record of each staff member to Mr Nath to assist him decide who should receive a profit share bonus. Mr Nath also visited the Christchurch site regularly and spoke to the staff. All in all, therefore, according to Mr Kelman and Mr Nath, the latter should be in a good position to know the merits of each staff member for the purposes of ascertaining who should receive a profit share bonus payment.

[21] It was also the evidence of Mr Nath and Mr Kelman that if a staff member displayed conduct or poor attendance which could jeopardise their receipt of a profit share bonus, then a review meeting would be held with that staff member to warn them. These meetings would occur on a quarterly basis as required, and Mr Nath gave the example of a staff member whose attendance did improve after the first quarter of 2013/14, having been warned of the risk of not receiving a bonus payment, and who therefore received a 75% bonus payment.

[22] However, it emerged in evidence that, when an issue arises during the last quarter of the profit share year (March to June) then there is no such review, and any effect of the issue appears to occur without any warning to the employee. This was the issue with Mr Walker in the 2013/14 profit share year.

Circumstances taken into account by Mr Nath with respect to Mr Walker's 2013/14 profit share bonus

Coming to work smelling of alcohol

[23] Mr Nath's evidence is that, in deciding not to give Mr Walker a profit share bonus for 2013/14, he took into account what he called Mr Walker's attendance at work under the influence of alcohol. Mr Nath's evidence is that by attending work under the influence of alcohol, in breach of the company's then zero tolerance policy, Mr Walker was also acting in breach of the respondent's health and safety policy.

[24] This issue was traversed in detail by the Authority in its determination of 15 October 2014 and the Authority found that, at that point, the respondent had never communicated clearly to employees what it meant by *being under the influence of alcohol* and at what point it would regard an employee as being in breach of its zero tolerance policy. Therefore, the Authority found that the respondent had been unjustified in issuing Mr Walker with a final written warning in respect of attending work under the influence of alcohol.

[25] It must follow from the Authority's finding that this element of the respondent's rationale in not awarding a profit share bonus to Mr Walker renders that decision unjustified. What is important, therefore, is to determine the extent to which these findings of Mr Nath led to the decision to award Mr Walker zero profit share bonus.

[26] Mr Nath's evidence is that he also took into account two other issues when deciding not issue Mr Walker with a profit share bonus. This was Mr Walker's poor attendance at work and his poor attitude towards work.

Attendance

[27] Mr Nath says that Mr Walker had approximately nine days off work because he was sick during the 2013/14 profit share year. He states that, on the face of it, Mr Walker only had four days sick leave but that Mr Kelman had allowed Mr Walker to take five days as annual leave as Mr Walker had exhausted his sick leave entitlement.

[28] Mr Kelman said that Mr Walker was allowed to take annual leave instead of sick leave because he had exhausted his sick leave entitlement and because the company was acting in good faith. He said that, normally, an employee needs to give seven days' notice of annual leave, implying that this was why this particular leave was counted as poor attendance.

[29] Mr Walker disputes that he took five days' sick leave as annual leave, and that one of these days was bereavement leave. Mr Nath said that bereavement leave was not counted as poor attendance. The respondent's record of Mr Walker's sick leave in the profit share year in question does only show eight days' sick leave in total, and so I accept that figure as definitive.

[30] However, it is clear that four of the eight days' sick leave only occurred in the final quarter of the 2013/14 profit share year. Mr Nath acknowledged that, up to April 2014, Mr Walker's attendance record had been satisfactory, and I understand that if it had remained at four days' sick leave, it would not have counted against him in the decision to award him a profit share. However, no meeting was held with Mr Walker to warn him that his four days sick leave in April 2014 would count against him in the award of a profit share bonus.

[31] Mr Nath also says in his brief of evidence that Mr Walker unilaterally took most of a day off work to prepare for his Authority investigation meeting which resulted in the Authority's determination dated 15 October 2014, although during the Authority's investigation meeting of the current proceedings, Mr Nath said that he did not take this into account at all.

Attitude

[32] With respect to Mr Walker's alleged poor attitude towards work, Mr Nath says that Mr Walker had *demonstrated on a number of occasions a poor attitude towards work*. Mr Nath states in his brief of evidence that, on 6 September 2013, Mr Walker made a comment to his supervisors that, because he had only received 70% of the 2012/13 discretionary profit share bonus (the respondent having decided that the quantum of the profit share for that year for all employees would be reduced from the previous year's quantum) Mr Walker was only intending to put in 70% effort. Mr Kelman gave oral evidence that he heard Mr Walker say this and reported it to Mr Nath.

[33] Mr Walker denies this allegation, and says that he had been speaking to his colleagues, not supervisors, and had said that they (the staff) could only have put in 70% effort to have only been paid a 70% bonus. Whatever was said, is clear is that this allegation was never put to Mr Walker, and he was never told that this comment showed an attitude that could result in him being paid a lower or zero profit share bonus.

[34] Mr Nath also says that Mr Walker has refused to follow instructions on a number of occasions, has acted aggressively towards his supervisors and has become progressively more difficult to manage since the incident on which he arrived at work smelling of alcohol.

[35] Mr Kelman gave oral evidence of Mr Walker's attitude, and said that problems started in late March 2014 when Mr Walker had been issued with a final written warning in relation to the alcohol issue. Mr Kelman said that Mr Walker's whole attitude changed and that Mr Walker started to *yell* at him. When questioned about this, Mr Kelman referred to an aggressive tone that Mr Walker had started to adopt. He said he felt a little threatened by Mr Walker and was hesitant to go to talk to him as they always ended up having an argument. Mr Kelman said that he had not

experienced anything like that before. He also said that Mr Walker had accused his managers of being a pack of assholes, an allegation that Mr Walker denies. Mr Nath said in his oral evidence that he had told Mr Kelman to keep his distance from Mr Walker.

[36] Mr Walker says in evidence that he was feeling very stressed in April and May 2014 because he had received a final written warning for having come to work smelling of alcohol, which he regarded as unfair, and had then later been given a warning letter on 22 May 2014 regarding mistakes allegedly made by him in the course of his work. This letter was found by the Authority in its determination dated 15 October 2014 as having been unjustifiably issued to Mr Walker and that it amounted to an unjustified disadvantage in his employment.

[37] Mr Walker said in evidence that, by late May, he was feeling very stressed and had asked the respondent about its policy on stress leave. In his evidence to the Authority on 23 September 2014 Mr Walker had said that he had attended his GP and had been put on stress-related sick leave until 2 June 2014. He also gave evidence that, on the evening of 4 June 2014, he had experienced chest pains and had felt 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 can also be caused by stress and anxiety. Mr Walker's evidence was that, as he had had no accident, he believed his symptoms had been caused by stress and anxiety as a result of the things happening to him at work.

[38] He said that his tone, which Mr Kelman had complained about, may therefore have had to do with the stress he had been feeling at the time.

[39] Again, what is plain, is that Mr Walker had never been warned that this perceived shift in his attitude between March and June 2014 was jeopardising his right to receive a profit share bonus payment.

Issues

[40] The Authority must consider the following:

a. Was the respondent not being awarded a profit share bonus payment for the 2013/14 period an unjustified disadvantage in his employment?

b. If so, what loss arises out of that unjustified disadvantage?

c. Should compensation be awarded to Mr Walker pursuant to s.123(1)(c)(i) of the Act?

d. Did the respondent act in breach of a mediated settlement in failing to award to Mr Walker a profit share bonus payment for the 2013/14 period?

Was the respondent not being awarded a profit share bonus payment for the 2013/14 period an unjustified disadvantage in his employment?

[41] I should first address the argument made by the respondent that the payment of a profit share bonus is discretionary, and so the scheme was not part of Mr Walker's conditions of employment.

[42] Whether to pay out a bonus to staff at all in any given year, and how much should be made available to the bonus pool are, I accept, matters of the respondent's discretion. However, once the decision has been made to make profit share bonus payments to staff, the question of whether or not the respondent pays a bonus to any given employee, and how much, must be determined by the respondent in accordance with principles of good faith, and not in a capricious or arbitrary way, or in a way that is unfair to employees.

[43] In 2013/14, the company decided to make profit share bonus payments to most of its staff, and apparently made those decisions by reference to various criteria. Any decision by the respondent to treat some staff differently from others must be made in accordance with principle and good faith. Therefore, Mr Walker was entitled to expect the same criteria to have been applied to him, and for them to have been applied fairly. I now go on to determine whether that occurred.

[44] The Authority has already found in its determination of 15 October 2014 that Mr Walker suffered a financial loss arising out of the unjustified disadvantage he suffered (in relation to the respondent's action when Mr Walker came to work smelling of alcohol) when the respondent decided not to pay Mr Walker any profit share bonus. Mr Walker also asserts, however, that the non-payment of the bonus itself constituted an unjustified disadvantage in his employment.

[45] It is necessary to consider this question because only one of the three factors which were relevant in the decision not to pay Mr Walker a profit share bonus for 2013/14 has already been found by the Authority to have been unjustifiably applied; namely the purported health and safety breach in coming to work smelling of alcohol which the Authority has already determined was not justified.

[46] The respondent may well have been justified in treating the other two factors (attendance and attitude) as relevant in deciding not to pay any profit share bonus to Mr Walker. If it was, then it may be that no, or only a proportion of the $4,000 bonus paid to other staff should be awarded him as a remedy for the unjustified disadvantage which the Authority has already found.

[47] Therefore, a separate enquiry is necessary to determine whether the respondent was justified in applying the factors of attendance and attitude in deciding not to award Mr Walker a profit share bonus, and the extent to which they justified no payment at all.

[48] In determining the question, I must take account of ss.4 and 103A of the Act, which provide as follows:

> ***4 Parties to employment relationship to deal with each other in good faith***
> *(1) The parties to an employment relationship specified in subsection (2)—*
> *(a) must deal with each other in good faith; and*
> *(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
> *(i) to mislead or deceive each other; or*
> *(ii) that is likely to mislead or deceive each other.*
> *(1A) The duty of good faith in subsection (1)—*
> *(a) is wider in scope than the implied mutual obligations of trust and confidence; and*
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
> *(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*
> *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> *(ii) an opportunity to comment on the information to their employer before the decision is made.*

> ***Section 103A Test of justification***
> *(1) For the purposes of section 103(1)(a) and (b), the question of whether a 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 thinks 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.*

[49] When I consider the requirements of ss.4(1A)(b) and 103A(3)(b), it is clear that the respondent failed to forewarn Mr Walker that his attendance in March to June 2014 would have an impact upon his right to receive a bonus share bonus payment.

[50] In addition, the respondent also failed to forewarn Mr Walker that his perceived bad attitude in March to June 2014 would have an impact upon his right to receive a profit share bonus payment. Indeed, Mr Nath instructing Mr Kelman to keep his distance from Mr Walker, whilst possibly meant in good faith, only resulted in unfairness, as Mr Nath's instruction made it impossible for Mr Walker to know how his attitude was being perceived.

[51] Taken together, these failures amounted to unfair treatment of Mr Walker, as he was given no opportunity to adjust his attendance and attitude, a chance that had been given to other staff. I conclude that no fair and reasonable employer could have failed to have warned Mr Walker that his attendance and attitude would have resulted

in a withholding of the profit share bonus payment in all the circumstances. These failings were not minor and did result in unfairness to Mr Walker.

[52] It is my clear understanding of Mr Nath's evidence that, despite the assertion that no employee receives a bonus just for doing their job, but for the concerns he harboured about Mr Walker in the last quarter, Mr Walker would have received a bonus payment. The withholding of the profit share bonus self-evidently constituted a disadvantage for Mr Walker. That disadvantage was unjustified because of the failure to forewarn Mr Walker of the risk he was running of foregoing the bonus.

[53] Therefore, I find that Mr Walker was unjustifiably disadvantaged in his employment by the manner in which the respondent determined that Mr Walker was not entitled to receive a bonus payment.

What loss arises out of that unjustified disadvantage?

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

> ***123 Remedies***
> *(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:*
> ...
> *(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;*

[55] Dealing first with the loss of any benefit which Mr Walker might reasonably have expected to obtain if the personal grievance had not arisen, it is necessary to attempt to quantify what bonus payment Mr Walker would have received had he not been unjustifiably disadvantaged. It is not possible from Mr Nath's evidence to precisely quantify what proportions of the decision not to pay any profit share bonus related respectively to Mr Walker's attendance, attitude and coming to work smelling of alcohol.

[56] It is certainly the case that Mr Walker coming to work smelling of alcohol should have played no part in the decision, for the reasons set out in the Authority's determination dated 15 October 2015. I estimate that this amounted to at least 50% of

the reason for Mr Walker not getting a bonus payment. Therefore, he should be entitled to at least 50% of the payment made for 2013/14.

[57] Turning to Mr Walker's attitude, whilst I do not accept all of Mr Kelman's evidence of aggression on the part of Mr Walker, I do find that Mr Walker was not happy and probably was not entirely co-operative in his dealings with Mr Kelman. I find that there was a 50% chance that he would have been able to have changed his approach in dealing with Mr Kelman had he known that he was jeopardising his bonus payment.

[58] Regarding his attendance, I find that there was a 50% probability that Mr Walker's poor attendance in the last quarter of the 2013/14 profit share bonus period was due directly or indirectly to unfair treatment by the respondent. In other words, whilst Mr Walker probably would not have been able to have improved his attendance if the respondent had warned him of their concerns in respect of it during the final quarter, if Mr Walker had not been treated the way he had, there is at least a 50% chance that he would not have been absent from work in the last quarter of 2013/14 due to sickness in the first place.

[59] All in all, I believe that it is just to order the respondent to award Mr Walker $3,000 in respect of his 2013/14 profit share bonus. I award this sum as compensation under s.123(1)(c)(ii) of the Act.

Interest

[60] Mr Walker seeks interest on the payment of the profit share bonus payment. Clause 11 of Schedule 2 of the Act provides as follows;

> ***11 Power to award interest***
> *(1) In any matter involving the recovery of any money, the Authority may, if it thinks fit, order the inclusion, in the sum for which judgment is given, of interest, at the rate prescribed under section 87(3) of the Judicature Act 1908, on the whole or part of the money for the whole or part of the period between the date when the cause of action arose and the date of payment in accordance with the determination of the Authority.*
> *(2) Without limiting the Authority's discretion under subclause (1), in deciding whether to order the inclusion of interest, the Authority must consider whether there has been long-standing and repeated non-compliance with a demand notice.*
> *(3) Subclause (1) does not authorise the giving of interest upon interest.*

[61] The wording *recovery of any money* is drafted widely enough to permit interest to be awarded in any matter where money is awarded as a remedy. Therefore,

there is no barrier to the Authority awarding interest on the award of $3,000 compensation under s123(1)(c)(ii) of the Act.

[62] However, Mr Yukich submits that interest should be awarded at the rate of 7.5%. Section 87(3) of the Judicature Act 1908 provides that the term *the prescribed rate* means the rate of 7.5% per annum, *or such other rate as may from time to time be prescribed for the purposes of this section by the Governor-General by Order-in-Council*. Clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 prescribes for the purposes of s.87 of the Judicature Act 1908 the rate of 5% per annum. Therefore, the correct rate of interest is 5% and not 7.5% as submitted.

[63] The Authority does not know the exact date when payments of profit share bonus for the year 2013/14 were received by Mr Walker's colleagues. However, interest should run from that date, until payment is made in full.

Compensation for humiliation, loss of dignity, and injury to feelings

[64] Having found that there was an unjustified disadvantage in the manner in which Mr Walker's entitlement to a profit share bonus was assessed for the 2013/14 period, I must now consider what effect that had on Mr Walker.

[65] In his brief of evidence Mr Walker states that he felt he had been ambushed and that he found the allegations about his behaviour that have since emerged as hurtful and offensive. He also says that he has found them very stressful and humiliating. He also states that he felt left out at hearing about how his colleagues would spend their bonus.

[66] I accept that Mr Walker would have felt humiliation, loss of dignity, and injury to feelings at not having been awarded a profit share bonus when most of his co-workers had done so. I also accept that Mr Kelman not forewarning Mr Walker of the perceived problems with his attitude in March to June 2014 meant that Mr Walker felt ambushed when he found out those perceptions later. Those feelings arose out of the unjustified disadvantage.

[67] I believe that an award of $3,000 under s.123(1)(c)(i) of the Act is just.

[68] Where the Authority determines 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 (s.124 of the Act).

[69] Mr Patterson suggested in his cross examination of Mr Walker that he had contributed to the non-payment of his bonus by coming to work smelling of alcohol. However, the Authority had already found in its 15 October 2014 determination that Mr Walker's actions were not sufficiently blameworthy to merit a reduction in the remedy that it awarded. I have not changed my view and do not accept that it is just to reduce Mr Walker's remedies by reason of him having come to work smelling of alcohol.

[70] With respect to Mr Walker's attendance, whilst his attendance was relatively poor in the last quarter of the 2013/14 profit share year, I do not consider that Mr Walker was sufficiently blameworthy to justify a reduction in his remedies as a result.

[71] With respect to Mr Walker's attitude, whist I accept that Mr Walker's attitude may have genuinely caused concern to Mr Kelman and Mr Nath, they did not discuss those concerns with him, and I cannot be sufficiently sure that the perceived attitude concerns were not as a result of Mr Walker's stress, which would not be a blameworthy reason. In those circumstances, I decline to reduce Mr Walker's remedies.

Has the respondent acted in breach of a mediated settlement agreement?

[72] Mr Walker relies upon a record of settlement that was entered into on 26 March 2014 between Mr Walker and Mr Cassidy on the one hand and the respondent on the other hand. In this settlement agreement the respondent agreed to withdraw a final written warning issued to Mr Walker and Mr Cassidy on 20 December 2014 which the Authority understands was issued in relation to Mr Walker and Mr Cassidy refusing to undergo a random drug test.

[73] In this record of settlement, which was entered into pursuant to s.149 of the Act, the respondent agreed to the following:

> *Furthermore, Vulcan Steel Ltd provides an assurance that this matter will not disadvantage either Errol Walker or Selwyn Cassidy in their ongoing employment.*

[74] Mr Walker asserts that he was not awarded a profit share bonus in breach of that clause of the record of settlement.

[75] On this particular point, it is clear from the wording of the clause in question that *this matter* refers back to the issuing of the final written warnings to Mr Walker and Mr Cassidy on 20 December 2013.[6]

[76] Therefore, I do not accept that the record of settlement could have been breached if the respondent failed to award Mr Walker a profit share bonus for the 2013/14 bonus year, partly or wholly as a result of Mr Walker raising a personal grievance in respect of the final written warning that was issued to him on 26 March 2014, as that raising of a grievance was not the matter referred to in the settlement agreement. I therefore dismiss that part of Mr Walker's claim.

Orders

[77] I order the respondent to pay to Mr Walker the following:

a. The gross sum of $3,000 in respect of the 2013/14 profit share bonus payable under s.123(1)(c)(ii) of the Act;

b. Interest on $3,000 calculated at the rate of 5% per annum from the date when Mr Walker's colleagues received payment of their 2013/14 profit share bonus payments[7] until payment to Mr Walker of the sum of $3,000; and

c. A compensatory sum of $3,000 under s.123(1)(c)(i) of the Act.

Recommendation

[78] Pursuant to s.123(1)(ca) of the Act, if the Authority finds that any workplace conduct or practices are a significant factor in the personal grievance, it may make

[6] In the text of the record of settlement it refers to a final written warning dated 20 December 2014. However, I believe that this is an error in dating.

[7] If these colleagues received their payments on different dates, then the default date of 31 July 2014 should be used as the date from which interest is to accrue.

recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring.

[79] I recommend that the respondent makes arrangements to ensure that, where practicable, any concerns that arise during the final quarter of a profit share year with respect to any employee who may otherwise be eligible to receive a profit share bonus payment are raised without undue delay with that employee in sufficient detail that the employee will reasonably be aware:

a. What the concerns are;

b. That those concerns may adversely impact upon his or her right to receive a full or partial profit share bonus; and

c. What actions he or she should take to rectify the concerns.

Observation

[80] In its determination dated 15 October 2014, the Authority observed as follows;

> *[152] It is my observation that there are clearly difficulties in the relationship between Mr Walker and the respondent company. 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 company 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 company taking a far less confrontational stance towards one another in my view.*

[81] I am pleased to note that the parties commented during the current proceedings that Mr Walker and the respondent have made good progress in repairing their relationship since September 2014. I urge them to continue that positive work and for the progress not to be derailed by the tenor and content of parts of the Authority's investigation meeting in the current proceedings, in which the representatives made statements in cross examination and oral submissions which could have caused tensions to increase.

[82] I do not criticise either Mr Yukich or Mr Patterson when I make these points but it is often the case that professional advocates acting in the best interests of their clients make statements in the litigation process (in which, for present purposes, I include an Authority investigation meeting) which are not always conducive to positive on-going employment relationships.

[83] A fully contested investigation meeting in which both parties are professionally represented is a somewhat artificial process, and any hurt feelings that may linger from that process should be put aside, as far as possible, so that the day to day working relationship between the parties may continue in a positive way.

Costs

[84] 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.

David Appleton
Member of the Employment Relations Authority