

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2014] NZERA Christchurch 200  
5455884

BETWEEN           ERROL WALKER  
Applicant  
  
A N D                VULCAN STEEL LIMITED  
Respondent

Member of Authority:   David Appleton  
  
Representatives:        Phil Yarrall, Advocate for Applicant  
Chris Patterson, Counsel for Respondent  
  
Investigation Meeting:   Determined on the papers by consent of the parties  
  
Submissions Received:   18 November 2014 from Respondent  
25 November 2014 from Applicant  
  
Date of Determination:   2 December 2014

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**DETERMINATION OF THE AUTHORITY**

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- A.     I order removal of this matter to the Employment Court, for the Court to hear and determine, without the Authority investigating it.**
- B.     Costs are reserved.**

**Employment relationship problem**

[1]     Mr Walker has lodged a personal grievance with the Authority claiming that he has been unjustifiably disadvantaged in his employment, having suffered disparity of treatment in relation to not receiving what he calls a bonus payment, which has been paid to other employees by the respondent.

[2]     He also claims that the respondent has breached the terms of a mediated settlement.

[3] The respondent denies that it has breached any of its obligations to Mr Walker. It says that Mr Walker has not been unjustifiably disadvantaged in his employment, has not suffered disparity of treatment in relation to the non-payment of a discretionary bonus payment, and that the respondent has not breached the terms of a mediated settlement.

[4] The present determination deals solely with an application made by the respondent for the matter to be removed to the Employment Court pursuant to s.178 of the Employment Relations Act 2000 (the Act). Mr Walker opposes removal.

### **Background**

[5] In order to understand the respondent's motivation for seeking removal of this matter to the Employment Court, it is necessary to set out briefly the recent history of Mr Walker's employment relationship with the respondent.

[6] The respondent designs and manufactures steel building systems for the construction industry. Mr Walker is employed by the respondent in the coil store at one of its Christchurch sites as a storeman and machine operator. In March 2014 Mr Walker was issued with a final written warning for having attended work with alcohol in his system. Mr Walker raised a personal grievance in relation to that final written warning, which was the subject of an investigation by the Authority on 23 September 2014.

[7] By way of its determination dated 15 October 2014<sup>1</sup> the Authority determined that Mr Walker had suffered unjustified disadvantage in his employment and discrimination by reason directly of his involvement in the activities of a union. He was awarded remedies in relation to those findings.

[8] One of the findings of the Authority was that, on the balance of probabilities, Mr Walker suffered some, as yet unquantifiable, financial loss arising out of a personal grievance for unjustified disadvantage when he was not awarded a profit share payment for the financial year 2013/2014 because, according to his line manager 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.

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<sup>1</sup> [2014] NZEA Christchurch 160

[9] This profit share payment is, it is understood, the same *bonus* that is the subject of Mr Walker's present application to the Authority.

[10] In its determination dated 15 August 2014 the Authority found that, as several factors are apparently taken into account when a decision is made whether any profit share should be paid to an employee, it was not possible to ascertain during the investigation on 23 September 2014 whether the unjustified disadvantage led to a loss of \$4,000 (the total amount paid to each employee, it appears) or some lesser amount. Accordingly, a further investigation meeting was going to be convened to determine what award, if any, should be made to Mr Walker in respect of him not being issued with any profit share for the 2013/2014 year.

[11] After the release of the Authority's determination dated 25 October 2014 the Authority was advised by the Employment Court that the respondent had lodged a *de novo* challenge to the Authority's determination on 7 November 2014.

[12] The subject matter of the application lodged by Mr Walker on 24 October 2014 in relation to the \$4,000 bonus/profit share overlaps significantly with the subject matter of the investigation meeting that was to be convened by the Authority following on from its determination of 15 October 2014. Since the filing of the respondent's challenge on 7 November 2014, it was clearly no longer appropriate for the Authority to convene that investigation meeting into the loss of profit share/bonus. This is, of course, because it is possible that the Employment Court will find that Mr Walker was not unjustifiably disadvantaged by not being awarded a bonus/profit share payment for the financial year 2013/2014.

[13] The grounds set out by the respondent in support of its application for removal of the matter in relation to the profit share/bonus to the Employment Court are expressed as follows:

2.1 *The Employment Court already has before it proceedings which are between the same parties and which involve the same, similar or related issues as follows:*

- (a) *The Authority investigated a related matter at an investigation meeting held on 23 September 2014.*
- (b) *The Authority issued its determination on 15 October 2014 (“**The Authority’s determination**”).*
- (c) *As a result of the Authority’s determination, the Applicant filed new but related proceedings in the Authority under the file number [5455884].*

(d) *As a result of the Authority's determination, the Respondent has filed a challenge by way of a Statement of Claim dated 5 November 2014 in the Employment Court.*

2.2 *Accordingly the Respondent relies on section 178(2)(c) of the Employment Relations Act 2000 in support of this application.*

[14] Section 178 of the Act provides as follows:

***178 Removal to court***

*(1) The Authority may, on its own motion or on the application of a party to a matter, order the removal of the matter, or any part of it, to the court to hear and determine the matter without the Authority investigating it.*

*(2) The Authority may order the removal of the matter, or any part of it, to the court if—*

*(a) an important question of law is likely to arise in the matter other than incidentally; or*

*(b) the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the court; or*

*(c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or*

*(d) the Authority is of the opinion that in all the circumstances the court should determine the matter.*

*(3) Where the Authority declines to remove any matter on application under subsection (1), or a part of it, to the court, the party applying for the removal may seek the special leave of the court for an order of the court that the matter or part be removed to the court, and in any such case the court must apply the criteria set out in paragraphs (a) to (c) of subsection (2).*

*(4) An order for removal to the court under this section may be made subject to such conditions as the Authority or the court, as the case may be, thinks fit.*

*(5) Where the Authority, acting under subsection (2), orders the removal of any matter, or a part of it, to the court, the court may, if it considers that the matter or part was not properly so removed, order that the Authority investigate the matter.*

*(6) This section does not apply—*

*(a) to a matter, or part of a matter, about the procedure that the Authority has followed, is following, or is intending to follow; and*

*(b) without limiting paragraph (a), to a matter, or part of a matter, about whether the Authority may follow or adopt a particular procedure.*

**Determination**

[15] Mr Yarrall on behalf of Mr Walker opposes the removal of the matter to the Employment Court on the grounds that:

*The Applicant's filing in the Employment Relations Authority is based on a different set of circumstances and while some of the facts are similar the Applicant believes they should be judged on their merits and not tied to the court action.*

[16] It is incontestable that the Employment Court already has before it proceedings which are between the same parties and which involve the same or similar or related issues. The Authority has already found that one of the reasons for the non-payment of the bonus/profit share was the respondent's unjustified action in deciding that Mr Walker was in breach of its *zero tolerance* policy. If the Employment Court finds that the respondent did not act unjustifiably in that respect, then the very basis upon which the Authority will proceed to investigate the current grievance would be undermined.

[17] Accordingly, I am completely satisfied that it is appropriate to remove to the Employment Court the current matter in relation to Mr Walker's personal grievance for disadvantage and his claim of a breach of a mediated settlement in relation to the non-payment of the \$4,000 bonus.

### **Order**

[18] I order the removal of this entire matter to the Employment Court to hear and determine the matter without the Authority investigating it.

### **Costs**

[19] Costs are reserved. The parties should seek to agree how costs are to be dealt with between them within 14 days of the date of this determination. However, if the parties are unable to agree, the respondent should serve and lodge a memorandum of counsel seeking costs no later than 28 days from the date of this determination, and the applicant will have a further 14 days within which to serve and lodge any response.

David Appleton  
Member of the Employment Relations Authority