

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2016] NZERA Auckland 50  
5563822**

BETWEEN                      ELISA WALTERS  
   Applicant  
  
AND                                AVIATION SECURITY  
   SERVICES LIMITED  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Barbara Buckett (15-18 August 2016), Counsel for Applicant  
   Applicant in person (6 December 2016)  
   Susan Hornsby-Geluk, Counsel for Respondent  
  
Investigation Meeting:        15 – 18 October & 6 December 2016 at Auckland  
  
Submissions received:        24 January 2017 Greg Bennett on behalf of the Applicant  
   16 December 2016 & 31 January 2017 from Respondent  
  
Determination:                23 February 2017

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The Applicant, Ms Elisa Walters, claims that she was unjustifiably disadvantaged by the Respondent, Aviation Security Service (AvSec) transferring her from the role of Explosive Detector Dog Unit (EDD) Handler to the role of Aviation Security Officer.

[2]     Ms Walters claims that AvSec failed to act in good faith and breached her employment agreement through its actions.

[3]     AvSec denies all claims by Ms Walters.

**The issues**

[4]     The issues for determination are whether or not:

- (a)     Ms Walters was unjustifiably disadvantaged by AvSec commencing a performance management process and transferring her from the role of EDDU Handler to Aviation Security Officer (ASO)

- (b) AvSec failed to act in breach of good faith?
- (c) AvSec acted in breach of Ms Walters's employment agreement?
- (d) Should Ms Walters be reinstated to the role of EDDU Handler?

## **NOTE**

[5] At the Authority's investigation held on 15-18 October and 6 December 2016 the witnesses answered questions on the witness statements they had provided and – under oath or affirmation – answered questions from me and the parties' representatives. The representatives have also submitted closing submissions on the facts and law.

[6] I have considered those submissions and the evidence, including relevant documents provided by the parties, but, as permitted by s.174 of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received. Instead the determination has stated findings of fact and law, expressed a conclusion on the issue necessary to dispose of the matter, and specified orders made as a result

## **Background facts**

[7] AvSec is the official provider of aviation security services in New Zealand. It employs Aviation Security Officers who provide airport screening services. The role of the Explosive Detector Dog Unit (EDDU) of AvSec is to manage the risk of explosive devices being left or placed in or around airport facilities and aircraft.

[8] The EDDU has a close relationship with the NZ Police which operates a national dog training centre in Trentham. All AvSec EDDU Handlers undergo training at the NZ Police Dog Training Centre. To be eligible to work as an EDDU Handler, an employee must have graduated from the NZ Police Dog Training Centre and be certified as operational.

[9] In addition to an annual assessment, all EDDU Handler and dog teams are required to be assessed and certified as meeting the required standard 8 times a year. These assessments are known as Certified Training, and are undertaken either by Ms Monique Masoe, National Manager EDDU, or another designated trainer.

[10] Ms Walters joined AvSec in October 2003 in the role of Aviation Security Officer (ASO) working in Wellington and reporting to Sergeant (Sgt) Glen Turner. Ms Walters was issued with an individual employment agreement but subsequently joined the EPMU (Engineering, Printing & Manufacturing Union) and was issued with the Aviation Security Service Collective Employment Agreement 2003 – 06 between AvSec and the NZ

Amalgamated Engineering, Printing and Manufacturing Union (EPMU), (the Collective Agreement)

[11] In January 2005, Ms Walters applied for the role of EDD Handler based in Wellington and was appointed to the position in March 2005. Following graduation from the NZ Police Dog Training Centre on 27 May 2005, she was appointed an EDDU Handler.

*Terms and Conditions of Appointment as EDDU Handler*

*a. Letter of Appointment*

[12] The letter of appointment dated 4 March 2005 (Letter of Appointment) clarified that Ms Walters would continue to be covered by the Collective Agreement, and stated that the position of EEDU Handler attracted additional allowances which were not covered by the Collective Agreement. The letter set out the additional provisions which were:

- (a) Dog Handler's Allowance (Taxable);
- (b) Dog Handler's Maintenance Allowance;
- (c) Dog Handler's On-Call Allowance.

[13] The allowances were stated as being to provide compensation for the inconvenience and household expenses involved in having a dog, as well as extra tasks involved in maintaining the dogs in the EDDU Handler's own time, and in recognition of the fact that EDDU Handlers were on call. In addition EDDU Handlers were allocated the use of a vehicle: "*for operational purposes and transportation of the dog*".

[14] Under the heading 'Training' the Letter of Appointment stated:

*You are required to complete the training and maintain the standards required of AvSec EDD handlers at all times. Training and standard requirements will be advised to you on an ongoing basis. Failure to provide AvSec EDD handler standards as advised to you, may result in the annulment of your appointment as trainee EDD handler and EDD handler (after graduation).*

[15] The letter also referred to the AvSec Code of Conduct stating: "*the Code applies to all employees at the Aviation Security Service and forms an integral part of each employee's contract of employment*". The AvSec Code of Conduct stated at clause 3.1:

*Employees are required to carry out their duties in an efficient and competent manner, to prescribed standards, and to work as directed.*

*b. AvSec Policy and Procedures Manual*

[16] Ms Walters was also bound by the terms of the AvSec Policy and Procedures Manual which was incorporated by clause 5 of the Collective Agreement. In the section of the AvSec Policy and Procedures Manual headed 'Certification of Aviation Security Explosive Detector Dog Units', it stated under the heading 'Certification and Graduation':

*Aviation Security Explosive Detector Dog teams are certified as "operational" on the successful completion and graduation from their qualifying course at the New Zealand Police Dog Training Centre. ... Where an operational dog handler is assigned a previously operational dog, they must be certified by the National Operations Manager or the National Standards and Training Manager or the New Zealand Police to ensure they meet current certification standards before they deploy as an operational EDD team.*

[17] It also stated:

#### REQUIREMENTS

*Each operational team must undergo a minimum of eight Certified Training sessions, spaced throughout the certification period."*

#### ANNUAL CERTIFICATION

*The recertification of each Explosive Detector Dog team must be completed every 13 months. ... A team that is not recertified in that period is "not operational" until the requirements are met and the certification is completed.*

#### FAILURE IN EFFECIENCY OF EXPLOSIVE DETECTOR DOG TEAMS

*When an Explosive Detector Dog team fails the recertification assessment the dog must be withdrawn from operational service immediately. The National Operations Manager must be informed and further assessment must be carried out after a suitable period of training before the team are returned to operational duty.*

#### FAILURE OF REASSESSMENT

*If an EDDU team fail a reassignment on an issue of safety or control or efficiency the team may be permanently withdrawn from service.*

[18] The Collective Agreement stated at clause 5 under 'Policies and Procedures':

*The employer acknowledges and agrees to comply with the General Manager's policies and procedures as advised and amended in writing from time to time. These policies and procedures are included in and form part of the agreement of employment between the General Manager and the employee.*

[19] Ms Walters also signed agreement to AvSec's EEDU course and NZ Police Dog Training Centre Performance Management standard on 17 December 2011 which provided for a performance management process which provided in bold highlighting:

*Please note that sustained poor performance will result in a handler being removed from the EDDU and returned to their previous rank as Aviation Security Officer.*

[20] Ms Walters signed below the statement:

[21] *... you understand if you do not perform to the standards required for operational deployment, your position as a Trainee/Operational EDD handler will be annulled, and you will revert back to the rank of Aviation Security Officer.*

[22] Clause 26 of the Collective Agreement: "Dog Handler's Allowances" contemplates the ending of an appointment as an EDDU Handler in clause 26.2.iii. which states:

*... Handlers who fail to reach operational status will be removed from the EDDU and the allowance will cease.*

#### *Ms Walters' Performance in Wellington*

[23] Ms Walters was appointed to the EDDU based in Wellington, reporting to Sgt Glenn Turner.

[24] During the seven years that Ms Walters was an EDDU Handler at Wellington, she had a total of four dogs assigned to her which had become operational during that period:

- Ben was assigned to Ms Walters for a period of five years after which time he was retired;
- Poppy was assigned to Ms Walters but was subsequently stood down by AvSec for operational reasons after 10 months;
- Tara was assigned but was subsequently stood down by AvSec for operational reasons after 16 months; and
- Lynx, with whom Ms Walters graduated from the Police Training College in early 2012.

[25] Ms Walters said her performance during the time she was in Wellington had been exemplary.

[26] Mr Geoff Stock, the National Standards and Training Manager until he retired in May 2013, said that although Ms Walters' performance had generally been at an acceptable

standard whilst she was based in Wellington, there were issues identified which became amplified and more obvious once Ms Walters transferred to Auckland. These issues had been documented in Ms Walters' training records from 2006 onwards.

[27] Mr Stock referred to Certified Training notes in which he had noted on 29 January 2010 that there were: “ ... *issues around the interaction between dogs and handler and how this impacts on the search are beginning to resurface.*”

[28] Ms Monique Masoe, at the relevant time National Standards and Training Manager, said she had also noted issues of inconsistencies in Ms Walters' performance during the period 2006 to 2012 when she was based in Wellington. She referred to a note of the Certified Training Record for 7 October 2012 which recorded that on that occasion Ms Walters had 3 false sits and missed a sample twice in exercises with two different handlers.

[29] Mr Stock said that on 12 January 2012 he had undertaken Ms Walters' pre-initial core standard assessment and noted:

*EDDH Walters has had discussions with Sergeant Turner and me. Because of the need to replace her recent operational dogs there is an expectation that she must succeed on this course. Both dogs (assigned to Elisa for the course) show excellent potential for the EDD role. She has been advised if she does not pass the course she will not automatically be allocated another dog and that the normal review process of her position in the EDDU will occur.*

[30] In June 2012, Ms Walters' performance and salary review stated: “*Lisa [sic] immediate and long term “ongoing development” must be concentrated on developing her new operational dog Lynx.*” The form had been completed by Sgt Turner.

#### *Performance in Auckland*

[31] In October 2012 Ms Walters moved to Auckland for family reasons; however she said she had struggled with the general culture of the Auckland EDDU. In particular, she said she had a problem with Ms Masoe, and with Mr Brett Clark, who at the time of her transfer to Auckland was a Dog Handler. Mr Clarke was subsequently appointed as an EDDU Trainer.

#### *Ika incident*

[32] During November and December 2012, the dog Ika was in kennels and not assigned to a particular handler. The dogs in that position were under the care of the EDDU Handler on duty at the appropriate time who would be tasked with exercising the dogs and feeding them. On 3 December 2012, Ika was taken to the vet by Ms Masoe.

[33] Ms Walters said that during a meeting on or about that time, Ms Masoe tasked Mr Clark with Ika's care. She (Ms Walters) said she had volunteered to take care of Ika over the Christmas period.

[34] Ms Masoe said that Ika had not been assigned to a particular EDDU Handler for her care as this was to be shared between the EDDU Handlers who were on duty during a specific day. She did not recall tasking Mr Clark with the management of Ika nor did Mr Clark recollect this event happening.

[35] Ms Walters said that Ika eventually received surgery and the necessary medical attention thanks to her intervention.

[36] Ms Walters said her impression had been that from the time when she had taken Ika to the vet the work dynamic at the Auckland EDDU changed for her and that she perceived that Ms Masoe and Mr Clark intended that she was to: "*face consequences*" for her actions.

[37] Ms Masoe, Mr Clark and Mr Stock all concurred in their view that an EDDU Handler would never be deemed to be at fault in having taken a dog to the vet. They all said that they did not recall the incident and denied that their attitude towards Ms Walters changed from that date onwards.

*Certified Training on 19 January 2013*

[38] Mr Stock said that following a Certified Training on 19 January 2013, which had been the last he had carried out with Ms Walters, he had made her non-operational after a poor performance which included were two false responses and two missed samples .

[39] Mr Stock described a search performed by Ms Walters in a gate lounge at Auckland airport as one of the worst searches he had ever seen carried out by an experienced EDDU team. It had been set at a low level of difficulty; however, the level of performance displayed was more consistent with what he would have expected from an EDDU Handler who had never worked with a dog before.

[40] As a result of her performance he had considered that it would have presented an unacceptable risk for AvSec to allow Ms Walters to continue operational duty.

[41] At that time, Mr Clark was being trained to become an EDDU trainer and accompanied Mr Stock during Ms Walters Certified Training. He was driving Mr Stock and was tasked with setting out the samples as directed by him.

[42] Ms Walters said that during the training session she was subjected to heckling from Mr Clark and she had broken down due to the adverse effect that had on her confidence.

[43] Mr Clark denied heckling Ms Walters during the search and Mr Stock said he had not observed Mr Clark heckling Ms Walters. In particular, Mr Clark said he had very little opportunity to speak to Ms Walters as he was mainly accompanying Mr Stock throughout the Certified Training.

[44] A debrief with the EDDU Trainer immediately following the Certified Training was customary and standard practice. Ms Walters had been offered the opportunity of a support person however she had rejected the suggestion.

[45] Ms Walters said that Mr Clark had made an inappropriate statement during the debrief session, stating to Ms Walters that she could “*always go back upstairs*”, referring to her returning to the ASO position.

[46] Mr Clark said that he now appreciated that it was an inappropriate comment and had not assisted the situation.

[47] Mr Stock said that as Ms Walters was clearly extremely distressed, he had accompanied her in her car during which she had made comments which he noted in the Certified Training Report. Mr Stock had under ‘*Handler response*’:

*Despite the critical nature of the feedback it was well received by Elisa. She agreed that it was all true and stated that this was the third time she had been made non-operational.*

*Elisa volunteered that she was dreading a gate lounge search and that her head was in the wrong place.*

*Recently she had been having issues, that she had been blaming everything and everybody else, when it was in fact her.*

*She volunteered that she was really missing her family from Wellington and that she had some regrets about moving to Auckland. That everything had been going well before the move.*

*She acknowledged that she had had excellent support from the EDDU and that the problem was her – her head was not in the right wrong place and her heart was not in it.*

[48] Mr Stock also recorded that after they had returned to the EDDU base further discussion occurred during which Ms Walters had been told that she would not be given another dog, but must succeed with Lynx and: “*.. there was no option for her to return to Wellington as a handler. If she decided not to continue with EDDU her position was as an ASO in Auckland.*”

[49] Ms Walters did not accept that she had made the comments as set out by Mr Stock in the Certified Training Report other than agreeing that she had said that she was missing her family in Wellington.

[50] Following the Certified Training, Ms Walters' dog had been left in the EDDU kennels over the weekend and Ms Masoe had driven Ms Walters home due to her distressed state.

#### *Training Plan*

[51] On 21 January 2013 there had been a meeting between Sgt Don McKenzie, Ms Masoe, Mr Clark and Mr Stock in order to devise a performance management strategy for Ms Walters. A plan had been documented by Mr Clark who was to conduct or supervise Ms Walters during the performance management process.

[52] Ms Walters did not return to work following the Certified Training as she was medically certified as unfit to do so as a result of a diagnosis that she was suffering from anxiety and depression said to be triggered by work-related stress caused by the members of the EDDU.

[53] Ms Masoe had said she had been very surprised by the information on the medical certificate because despite having had numerous debrief sessions with Ms Walters as part of her ongoing training; she had never raised these issues as impacting on her performance or health.

[54] Ms Walters returned to work on 27 March 2013. She was not operational at that time and Sgt Turner, Sgt McKenzie and Ms Masoe discussed training options with her.

[55] Ms Walters elected to attend a training course at the New Zealand Police Dog Training Centre from 8 April 2013 to 19 April 2013 which she successfully passed and was certified.

[56] Although Ms Walters passed the Police assessment, there were still some issues of inconsistency and lack of confidence as a result of which Sgt Turner and Ms Masoe recommended that she undergo three days of supervised training in Auckland before returning operational status.

#### *Certified Training on 29 June 2016*

[57] After resuming operational status Ms Walters underwent a Certified Training on 29 June 2013. This was conducted by Mr Clark, and although initially there had been three

false responses, Mr Clark had told Ms Walters to restart the training although this was not standard practice because he understood she was nervous.

[58] Ms Walters said after the Certified Training, Mr Clark was debriefing her when suddenly and without warning he grabbed her abruptly on her right shoulder and pulled her along between parked cars by her vest. She said Sgt McKenzie was present and watched but did not take any action. She had found the event frightening. When Mr Clark released his grip he had told her *“this is how Lynx feels when pulled on the lead”*. Ms Walters said she had been very distressed by the event and had gone home immediately afterwards.

[59] Mr Clark said he had not been aware of any concern on the part of Ms Walters, and said that grasping the vest in the manner described was accepted practice at the time. He said he had not pulled Ms Walters along but had taken hold of the seam of her jacket in his fingers and tugged it backwards and forwards firmly but not roughly. He had been standing still at the time and so was Ms Walters and the force was not sufficient to move her from her stationary spot.

[60] Ms Walters said the following day she had reported the incident to the HR department, which suggested a meeting be held between her, Mr Clark and Sgt McKenzie. However, she had declined and left the HR office. She approached the EPMU and asked it to act on her behalf.

[61] The EPMU had informed Mr Peter Pilley, at that time Regional Manager, of Ms Walters' concerns, however there had been no investigation undertaken by AvSec.

[62] Mr Clarke said he had since been made aware by Ms Masoe of Ms Walters' concern at the incident. He said that although he still used that particular training demonstration, he now asked for consent before he did so.

[63] Ms Walters said that following the vest grabbing incident she told Ms Masoe that she was nervous and required an independent witness of her choosing at all of her Certified Trainings. Ms Masoe agreed to Ms Walters' request and agreed that the attendance of the independent witness would be subject to operational availability.

[64] Ms Walters said that from the date when she became fully operational her searches came with conditions changing the dynamic of them. In particular:

- (a) She had been instructed to put her hand up if she believed the dog was sitting on an odour which was not normal practice for an operational handler;

- (b) She was not allowed to speak or engage in meaningless conversation during her searches;
- (c) All of her searches were to be recorded on video; and
- (d) The dynamic of her searching and rewarding was changed on Ms Masoe's and Mr Clark's directive.

[65] Ms Masoe said that the instruction for Ms Walters to raise her hand was not something that only Ms Walters was required to do; it was a common instruction to EDDU Handlers before marking their dog. In Ms Walters' case it was deemed to be necessary because she looked to the EDDU Trainer for assurance before marking the dog and the gesture was needed to show that she was making decisions without being influenced in that way.

[66] Ms Masoe said that Ms Walters would have been allowed to speak or engage in conversation during a search and that usually there was a level of instructional banter passing between the EDDU Trainer and the EDDU Handler with silence never being required.

[67] It was agreed by Mr Stock, Mr Clark and Ms Masoe that videos of searches are kept centrally on the EDDU video camera which sits in the EDDU office so that EEDU Handlers can have ready access to them. EDDU Handlers were encouraged to download and review their searches, and they gained some benefit from doing so.

[68] Ms Masoe explained that occasionally the dynamics of search and reward would be changed, with search parameters changed to test the abilities of the team across a range of situations as 'real world' scenarios were equally random. It was a standard procedure.

#### *Additional Training Provided to Ms Walters*

[69] Ms Masoe stated that Ms Walters attended two 'How Dogs Learn' workshops in June and August 2013 and two training shifts in August 2013. In addition Ms Walters was provided with additional training time to assist her reach a consistent standard of performance, totalling 25 – 30 days of remedial assistance.

#### *Certified Training 12 August 2013*

[70] The Certified Training on 12 August 2013 was conducted by Ms Masoe. Following it Ms Walters and her dog Lynx were made non-operational. One of the issues noted by Ms Masoe was that Lynx had given one correct and six false responses which Ms Walters had been unable to read and deal with appropriately. A training plan had been drafted which stated:

*The issues are serious and pose a risk to AvSec and require EDDH Walters to undergo a period of performance management and recertification.*

*Certified Training 31 August 2013*

[71] A training plan had been developed and carried out by Mr Clark following which, on 31 August 2013, Ms Walters underwent Certified Training. It had been conducted by Ms Masoe who noted on the Certified Training Report:

*This team is operating at a bad base level – on a par with mistakes made by a first year team. Not a handler with this length of experience.*

...

*The level that this team is operating at must not drop below the current standard displayed today as this will pose a risk to the Service.*

[72] Ms Masoe and Lynx had been made operational with limited scope being confined to Auckland Airport. The Certified Training Report stated:

*In consultation with Sgt McKenzie it has been decided that this team must not be deployed off airport or be put in any risk situations, until a marked improvement is seen.*

*Improvements must be seen on or before this teams next Certified Training day.*

*Complaint 7 October 2013*

[73] Ms Walters said that on 7 October 2013, she was called into a meeting with Ms Masoe and firmly reprimanded in relation to a complaint which had been received in regard to her handling of a dog, in particular to an allegation that she had been “*chaining*” the dog. When she had inquired further, she was told that an operations sergeant had complained to Mr Clark and the complaint had happened over a month prior. Ms Walters said she had not been given any information in regard to the complaint or who had made it and the complaint was not investigated. She had inquired of each sergeant in the period and could not identify who had made the complaint.

[74] Mr Clark said that the comment had been made to him anonymously and he had not had an opportunity to pass it on to Ms Masoe until some weeks later.

[75] Ms Masoe said she had seen Ms Walters passing her office and had reminded her that the dog handlers were under constant scrutiny and must behave appropriately. She denied that it was a firm reprimand and said it was in the nature of an informal statement.

*Certified Training 21 November 2013*

[76] Ms Walters completed a Certified Training on 21 November 2013 which was conducted by Mr Clark. Ms Walters and Lynx were certified as operational and fit to be deployed.

*Certified Training 26 February 2014*

[77] The next Certified Training occurred on 26 February 2014. Ms Walters said she had been given no advance notice of the Certified Training. She had asked if the independent witness could be present, however the person she preferred had not been available and Ms Masoe told her that another EDDU Handler would be acting as an independent witness.

[78] Ms Walters said that prior to the training she had made a request to Ms Masoe to do a road clearance as Lynx had an open wound on his paw, however, this had been ignored.

[79] Ms Masoe said whilst Ms Walters was not given advance notice of the Certified Training it was not standard practice to advise an EDDU Handler in advance of a Certified Training. It was fairly common for an EDDU Handler to be notified on the day the Certified Training was to occur, the expectation being that the performance standard assessed in Certified Training should be demonstrable at all times.

[80] Ms Masoe said she recalled Ms Walters advising her that Lynx had cut his back paw, however this should not present a problem. Ms Masoe said Lynx appeared to limp slightly at the beginning of the search, but moved, searched and reacted well for the rest of the day with no further signs of limping. She said that had he demonstrated any behaviour which indicated he was struggling with the search, she would have cancelled the Certified Training.

[81] Following the Certified Training, Ms Walters had been made non-operational due to a failure to locate and identify two samples. In the Certified Training Report Ms Masoe noted:

*The team are now non-operational.*

*This is due to an inability to locate and identify two samples*

*...*

*Elisa's performance is inconsistent.*

*For a doghandler of 7 years of experience she should be able to work the dog to a higher standard than has been displayed.*

*Disciplinary Process*

[82] Following notification of the non-operational status Ms Masoe wrote to Ms Walters by letter dated 26 February 2014. Her letter stated that Ms Walters' performance in the

Certified Training had not met minimum standards and invited her to attend a meeting on 27 February 2014 to discuss concerns relating to her ability to perform her role as an EDDU Handler. The letter stated:

*As you are aware, you have failed your certified training assessment today and also on two previous assessments – on the 19th January 2013, and 12th August 2013. During this period you have been assessed on a number of occasions as being at ‘Basic Level Only’ – this is of concern to the Service.*

*You have been provided with copies of the assessment reports and given further opportunities to perform your role to the standard required following the assessment specified above. I have attached copies of these documents to this letter.*

...

*Elisa you are advised that this is a serious matter. If substantiated your actions may constitute misconduct and a breach of the Aviation Security Service Code of Conduct and Policy & Procedures Manual. This could result in disciplinary action. Possible outcomes may include a recommendation that you should return to general operations as Aviation Security Officer and up to termination of your employment.*

[83] The letter concluded with setting out Ms Walters’ rights in relation to the matter which included the right to be represented and to challenge it through the personal grievance procedure as set out in the Collective Agreement.

#### *Meeting 18 March 2014*

[84] As Ms Walters was absent from the workplace on sick leave and subsequently annual leave, the meeting was delayed and took place on 18 March 2014. It was attended by Ms Walters, Mr Flenskov of the EPMU, Ms Masoe and Ms Nanna Scrafton, HR Advisor.

[85] At the meeting Ms Walters produced a list of issues and Mr Flenskov stated that since a number of the issues to be investigated concerned Ms Masoe, she should not to be involved in the investigation process.

[86] Ms Nichola Mc Kinney, Auckland Station Manager, responded by letter dated 4 April 2014, advising that issues raised by Ms Walters which included training issues, documentation provided to and about her, particular behaviours in the EDDU and issues associated with management practices would be investigated. Whilst this process was taking place, the performance management process would be put on hold.

*Murray French Investigation*

[87] AvSec appointed Mr Murray French to conduct an investigation into the issues raised by Ms Walters. Mr French is an Employment Relations Consultant. Prior to his appointment with AvSec he said he had no knowledge of the matters involved, other than that contained in the email correspondence and notes of the meeting on 18 March 2014 and Ms McKinney's letter to Ms Walters dated 4 April 2014 which had been provided to him. Neither had he met any of the key individuals involved..

[88] Mr French understood that his involvement was to investigate Ms Walters' belief that her work performance had been significantly impacted by particular behaviours in the EDDU and issues associated with management practices. He confirmed his understanding in an email to Mr Dorey, Principal Human Resources Advisor, dated 9 April 2014 that his process: *"is not a substitute commenced on 26 February and thus cannot reach any conclusions about the merit of the concerns held."*

[89] Mr French's email was forwarded to Ms Walters and Mr Flenskov for comment and the parameters of the external investigator's role were agreed.

[90] As part of the process Mr French interviewed Ms Walters on 5 May 2014 and other relevant witnesses over a number of weeks commencing on 23 May 2014. All witnesses were asked a series of common questions based on what he had been told by Ms Walters and in some cases there were individualised questions where particular issues raised by Ms Walters pertained to them.

[91] In total Mr French interviewed 9 EDDU Handlers and also Ms Masoe, Mr Clark, Sgt McKenzie, Sgt Turner, Mr Stock, and Mr Graham Puryer, who was responsible for standards and training of the EDDU.

[92] Mr French said that as he completed the interviews his view had been that the majority of Ms Walters' claims were unable to be substantiated. His conclusion was that examples of behaviours by EDDU Trainers that Ms Walters relied upon as evidence of unfair behaviours were legitimate training strategies.

[93] Mr French completed his report on 23 July 2014 and sent a draft copy to Ms Walters on 29 July 2014 and asked her to provide any feedback by 5 August 2014. Mr Flenskov asked for an extension and provided comments by 11 August 2014, to which Mr French responded on 14 August 2014.

[94] Mr French completed his report and provided it to AvSec on 14 August 2014. He said he had reached the conclusion that one particular incident involving Ms Walters as an

EDDU Handler was unlikely to have helped her situation, and that some behaviour on the part of Mr Clarke was not helpful to the overall culture in the EDDU. However overall he favoured the view that considerable effort had been made to allow Ms Walters to be a successful dog handler.

#### *Resumption of Performance Management Process*

[95] Ms Walters engaged a firm of lawyers. Buckett Law, on 14 August 2014, to act on her behalf.

[96] Mr Mark Wheeler, General Manager, wrote to Ms Walters lawyers on 25 August 2014 confirming his preliminary view after reading Mr French's report, that: "*Elisa's experiences are about her performance development, rather than any improper behaviour at the highest levels of management*". As a result, he was instructing Ms Masoe to recommence Ms Walters' performance management process.

[97] Buckett Law responded by letter dated 29 August 2014 requesting that the AvSec terminate the performance management process or a personal grievance would be filed with the Employment Relations Authority. Mr Wheeler's response was that the performance management process would resume as advised.

#### *Transfer of Lynx*

[98] The dog Lynx was transferred to Christchurch. Ms McKinney explained in a letter to Ms Walters dated 8 October 2014 that there was an operational need for Lynx to be transferred, stating: "*Please be assured that the redeployment of this dog does not in any way pre-empt any future decision ... in regards to your role as an Explosive Detector Dog Handler.*"

[99] Ms McKinney wrote to Ms Walters on 23 October 2014 confirming that as the investigation into Ms Walters's concerns by Mr French had concluded, she had asked Ms Masoe to complete her report on the performance management process and submit her recommendations for her (Ms McKinney's) recommendations. These would be discussed at a meeting scheduled to take place on 6 November 2014.

[100] Ms Masoe explained that the preparation of a full and comprehensive report was a standard practice when AvSec is considering removing an EDDU Handler from their position and returning them to an ASO position.

[101] Ms Masoe completed her report on 29 October 2014. Her conclusion was that Ms Walters' inability to read and work the dog, or consistently apply correct consequences to the

dog, created an unacceptable risk to AvSec. Ms Masoe stated that she believed Ms Walters had been given a number of opportunities to improve her performance; however she had not been able to do so, as Ms Masoe did not believe she had the skills to be a capable and competent dog handler.

[102] Ms Masoe concluded: *“I recommend that she be removed from the Explosive Detector Dog Unit and be returned as an ASO to the general work area.”*

[103] Ms McKinney wrote to Ms Walters by letter dated 18 November 2014. In the letter Ms McKinney stated that she had carefully considered both Mr French and Ms Masoe’s reports and found that Ms Walters’ performance as an EDDU Handler had been unacceptable: *“despite substantial measures being taken by the Aviation Security Service to address that”*.

[104] Ms McKinney stated that her preliminary decision was that Ms Walters be returned to her previous role as an ASO. She invited Ms Walters and her representative to attend a meeting during which the preliminary decision and other information pertinent to that decision would be discussed. Ms McKinney also invited Ms Walters to provide any further information in writing by 28 November 2014.

[105] Ms Walters and Buckett Law met with Ms McKinney and Mr Dorey on 20 November 2014, however no decision was taken at this meeting.

[106] Following an AvSec Executive Leadership Team restructures, Ms Karen Unwin, Group Manager Operations, was appointed in place of Ms McKinney as the decision maker in the process involving Ms Walters.

#### *Ms Urwin’s Involvement*

[107] Ms Urwin said she reviewed all the relevant information and formed the view that Ms Masoe’s report and assessment were technically sound, and there did not appear to be any factors arising out of Mr French’s report which could adequately explain or justify the sustained poor performance that had been identified.

[108] As a consequence, Ms Urwin wrote to Ms Walters on 10 December 2014, advised that her preliminary view concurred with that of Ms McKinney, and proposed a preliminary decision to return Ms Walters to her ASO position.

[109] Ms Urwin noted that no further information had been received from Ms Walters or her lawyers since the meeting on 20 November 2014 and proposed a meeting to be held on 16 December 2014 to receive any further information or comments.

[110] Ms Walters responded requesting to delay the meeting until 2015; however Ms Urwin's response to the request was to reiterate AvSec's expectation that the meeting would proceed on 16 December 2014.

[111] Ms Walters subsequently provided a medical certificate stating that she was unfit to attend work for a 6 week period, and consequently the meeting was rescheduled to 23 January 2015.

[112] Ms Urwin confirmed that the meeting had been rescheduled in a letter to Ms Walters dated 18 December 2014 in which she advised Ms Walters that the rescheduled meeting would be her final opportunity to present any further information prior to a final decision being made. Ms Urwin also stated her concern at the stress referred to in Ms Walters medical certificate, adding:

*... That is additional to what seems to be a history of extended absences from work for reasons described as stress. Without having any details of that stress, or any causes of that, I note that such debilitating stress could itself call into question your ability to remain as a dog handler. ..*

Ms Urwin advised that AvSec would require medical clearance before Ms Walters returned to work.

[113] In addition Ms Walters was advised that the vehicle assigned to her was to be returned to the EDDU for operational use. This was not indicative of a final decision, and Ms Urwin noted that should Ms Walters to remain an EDDU Handler, a vehicle for be provided for operational work.

*Meeting held 28 January 2015*

[114] The meeting eventually took place on 28 January 2015. It was attended by Ms Walters and her lawyer, Mr Dorey and Ms Urwin. During the meeting Ms Walters lawyer raised issues in regard to of bullying, the French report, the alleged assault by Mr Clarke, and a claim of disadvantage in respect of the performance management process.

[115] Ms Urwin said she had considered the issues raised, but the majority of the concerns had been addressed in the French Report, which she was satisfied had been fair and reasonable.

[116] At the conclusion of the meeting Ms Urwin communicated her final decision which was that Ms Walters would be transferred from her role as an EDDU Handler and placed in the role of ASO effective 30 January 2015.

*Confirmation of Decision*

[117] Ms Urwin said that whilst there had been a couple of incidents involving Ms Walters as set out in the French Report which had been unsatisfactory, these incidents had been insufficient to explain Ms Walters' continued inability as an EDDU Handler to perform to the required standard.

[118] Ms Urwin confirmed her final decision in a letter to Ms Walters dated 13 February 2015. Ms Walters was advised that she would return to an ASO position which would mean the loss of the specialist allowances associated with the EDDU, however all other terms and conditions would remain the same.

[119] Ms Urwin explained in the letter that she had based her decision on Ms Masoe's report to Ms McKinney dated 29 October 2014 and Mr French's report. She stated:

*I do find your performance as an EDDU Handler has been unacceptable, despite substantial measures being taken by the Aviation Security Service to address and improve on that.*

...

*The report from Monique Masoe references a performance history that demonstrates inconsistency of performance by you in your role as an EDDU Handler. Based on that history, it seems fairly clear that the Aviation Security Service has provided you with a number of previous opportunities for improvement, but that remedial training only provides a short term improvement that you have are unable to sustain.*

[120] Ms Walters raised a personal grievance in respect of the decision to remove her as an EDDU Handler.

## Determination

### Unjustifiable Disadvantage

[121] Ms Walters is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

*That 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;*

[122] The elements of s103 (1) (b) are twofold:

- a. An unjustifiable action by the employer, which
- b. Affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

[123] Ms Walters must therefore establish that there was some unjustifiable action or actions by AvSec which affected her terms and conditions of employment to her disadvantage. The effect of such disadvantage must be detrimental or harmful as observed by the Employment Court in *Department of Corrections v Harris*<sup>1</sup>

*... To be disadvantageous, the transfer or other impugned action must be detrimental or harmful. No particular kind of harm is envisaged - it need not amount to a breach of contract and it may be enough if there is evidence that the effect of the change is distressing to the respondent on an objectively reasonable reaction to what has been done. Personal preferences and subjective perceptions are relevant but may be insufficient if unaccompanied by at least some harm, on an objective, balanced, view of the realities of the situation.*

### **Was Ms Walters unjustifiably disadvantaged by AvSec commencing a performance management process and transferring her from the role of EDDU Handler to ASO?**

[124] The role of an EDDU Handler is to work with the dog assigned to him or her as part of a team to ensure the safety of the air travelling public. It is a position in which incumbents are subject to ongoing testing to ensure the expected standards of safety are maintained.

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<sup>1</sup> *Department of Corrections v Harris* [2001] ERNZ 426 at [43]

[125] I find that Ms Walters was aware when appointed to the position of EDDU Handler that the position required the incumbent to undergo a minimum of eight Certified Training sessions with recertification to be completed every 13 months.

[126] Failure to perform at the required standard despite being provided with reasonable training results in a decision being made to remove an EDDU Handler from operational duty with immediate effect and he or she reverts to ASO status.

[127] Ms Walters was aware when appointed as an EDDU Handler that she was expected to adhere to the requirements of AvSec policies and procedures. She agreed to the additional terms as set out in the Letter of Appointment in full knowledge of the consequences should she fail to do so:

*You are required to complete the training and maintain the standards required of AvSec EDD handlers at all times. Training and standard requirements will be advised to you on an ongoing basis. Failure to provide AvSec EDD handler standards as advised to you, may result in the annulment of your appointment as trainee EDD handler and EDD handler (after graduation).*

[128] The ending of an appointment as an EDDU Handler was envisaged and set out in clause 26.2.iii of the Collective Agreement which states: “...*Handlers who fail to reach operational status will be removed from the EDDU and the allowance will cease*”.

[129] The requirement to maintain the expected standard and failure to do so was also set out in the AvSec Policy and Procedures Manual which stated: “*If an EDDU team fail a reassignment on an issue of safety or control or efficiency the team may be permanently withdrawn from service.*”

[130] In addition Ms Walters signed her agreement to AvSec’s EDD Course and NZ Police Dog Training Centre Performance standard which states:

*If you do not perform to the standards required for operational deployment, your position as Trainee/Operational EDD handler will be annulled, and you will revert to the rank of Aviation Security Officer.*

[131] I find that Ms Walters was aware that failure to maintain the required standards as an EDDU Handler would result in her being transferred back to an ASO position.

[132] In circumstances in which an employee is not meeting expectations, despite guidance and training, I find that embarking upon a performance management process is a step open to

a fair and reasonable employer, provided that the employer advises the employee of the perceived shortfalls in performance and carries out a fair investigation. As stated by the Employment Court in *Ramankutty v Vice-Chancellor of the University of Auckland*:<sup>2</sup> carries out

*... Just as with misconduct, the employer must carry out a fair investigation with full participation in it by the employee. Having done that, the employer is then entitled to come to a decision whether the employment of the employee is going to be continued, provided always that the employer has not only followed a fair procedure during the investigation of the complaints about the employee but has also previously identified the perceived deficiencies to the employee and given the employee an opportunity that is reasonable to improve his or her performance by means and to a standard both of which are objectively measurable and have been objectively measured. ...*

#### *Identification of perceived deficiencies*

[133] Ms Walters was aware of the necessity to maintain an operational standard as an EDDU Handler.

[134] I have found that Ms Walters was aware of the consequences of not achieving operational status, not only as a result of the documentation supplied to her, but as a result of AvSec discussing the issue with her. Training issues formed part of the debrief after each Certified Training and were recorded with a copy of the Certified Training Summary being provided to Ms Walters from which she would have been aware of the shortfall in her performances on 19 January 2013, 12 August 2013, and 21 January 2014.

[135] Of relevance to the issue of Ms Walters' awareness of the situation regarding her failing to meeting the required standards was her comment to Ms Masoe following the failed Certified Training on 12 August 2013 which she confirmed during the Investigation Meeting, that she was aware she was: "*hanging on by her fingers*".

[136] By the time of the failed Certified Training on 26 February 2014, Ms Walters had been non-operational or operating at base level and unable to be deployed off airport for a significant part of the previous 13 months.

[137] AvSec had tried to institute a performance management process at the beginning of 2013 when Ms Walters had been made non-operational following the Certified Training held on 19 January 2013, and a performance management plan was devised by Mr Stock, Sgt McKenzie, Ms Masoe and Mr Clarke.

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<sup>2</sup> *Ramankutty v Vice-Chancellor of the University of Auckland* AC53B/01 at [23]

[138] Mr Clarke documented the performance management plan and was to have conducted it, but was unable to do so due to Ms Walters' absence on an extended period of sick leave.

[139] When Ms Walters returned to work, there had been training options discussed with her, and she elected to attend further training at the New Zealand Police Dog Training Centre in April 2013.

[140] Although Ms Walters passed the police assessment, AvSec provided 3 days of supervised training when she returned to Auckland. After each Certified Training Ms Walters was provided with more training to assist her with the training plan being discussed with her and recorded in the Certified Training Summary.

[141] In addition to the training provided in April 2013 at the New Zealand Police Dog Training Centre, AvSec provided Ms Walters with two workshops, two training shifts and other remedial assistance, totalling 25-30 days.

[142] I find that AvSec identified the perceived deficiencies in Ms Walters' performance and she was made aware of them.

*Objectively Measurable Standard*

[143] Ms Masoe prepared a report on Ms Walters' performance. This report was provided to Ms Urwin and formed part of AvSec's investigation.

[144] Ms Masoe is highly experienced in the area of EDDU Handlers. Ms Masoe's report was based upon the standards and measures established in the Certified Training programme which applied objective, clear and measurable standards to assess performance. The standards were applied to all EDDU Handlers.

[145] Ms Masoe's report covered Ms Walters' performance over the totality of her appointment as an EDDU Handler. Her conclusion was:

*I believe we have done all we can to help Elisa in relation to training and remedial training. Elisa is unable to progress, be consistent and develop beyond a basic level of a new handler who has just completed an EDD course.*

...

*I recommend that she be removed from the Explosive Detector Dog Unit and be returned to an ASO in the general work area.*

[146] I find that the requirement to maintain an operational standard as an EDDU Handler was not unique to Ms Walters but applied equally to all EDDU Handlers. I find that the performance expectations as applied to Ms Walters were of an objectively measurable standard and they were clearly conveyed to Ms Walters.

*Issues raised with and consideration of Ms Walters' explanation*

[147] A fair process provides an employee with an explanation of the concerns of the employer and a reasonable opportunity to respond.

[148] AvSec met with Ms Walters and her representative on 18 March 2014 with a view to discussing the issues regarding her failure to meet the required standards and the possible outcome.

[149] During that meeting, Ms Walters raised issues which could have the potential of impacting on AvSec's decision. As a result of such issues AvSec engaged Mr French to carry out an investigation into the issues raised by Ms Walters, during which investigation AvSec's performance management process was put on hold.

[150] It was only following the conclusion of Mr French's investigation and its review of his Report that AvSec recommenced the performance management process.

[151] Ms Urwin relied on Ms Masoe's report in making her decision and took into consideration aspects of Mr French's Report, but concluded that any negative experiences Ms Walters may have had in the EDDU were unlikely to have any significant effect.

[152] Ms Urwin wrote to Ms Walters on 10 December 2014 advising her of the preliminary decision, attached Ms Masoe's report and observed that no feedback had been received following the meeting with Ms Walters and her representative on 20 November, and inviting Ms Walters to provide further feedback prior to a decision being finalised.

[153] Ms Urwin considered all the information provided, including Ms Walters' response to the preliminary decision, and it was only at that stage that she made a final decision to return Ms Walters to an ASO position.

[154] I find that AvSec met the requirements of procedural fairness in respect of providing Ms Walters with an explanation of its concerns and an opportunity to provide an explanation which it considered prior to making a decision to return her to an ASO position.

[155] I have considered whether or not the transfer of the dog Lynx to Christchurch was evidence that Ms Urwin had predetermined the decision to revert Ms Walters to the ASO position.

[156] In her letter to Ms Walters dated 8 October 2013 Ms Urwin explained that the deployment of lynx was due to an operational dog being injured and was temporary in nature. She explained that the temporary redeployment of Lynx did not predetermine the decision regarding Ms Walters.

[157] I also note that Ms Walters continued to receive the additional allowances associated with dog maintenance during the temporary redeployment of Lynx.

[158] I do not find that the temporary redeployment of Lynx predetermined the decision to revert Ms Walters to the position of ASO.

[159] I determine that Ms Walters was not unjustifiably disadvantaged by AvSec commencing a performance management process and as a result transferring her from the role of EDDU Handler to ASO.

#### **Did AvSec fail to act in good faith?**

[160] I find that AvSec provided Ms Walters with opportunities for retraining with a view to her reaching the required standards expected of EDDU Handlers. Despite this, she was unable to achieve sustainable performance in order to maintain operational status.

[161] I find that AvSec listened and responded to Ms Walters' concerns as raised at the meeting held on 18 March 2014 by engaging an external independent party, Mr French, to carry an investigation into Ms Walters' concerns.

[162] I find that AvSec acted in good faith by commissioning Mr French to carry out his investigation, which was comprehensive, extending over a period in excess of 4 months during which time a significant number of relevant witnesses were interviewed.

[163] Mr French was an impartial third party, experienced in strategic HR matters and conducting independent investigations.

[164] I find that AvSec was entitled to rely on his investigation report and its conclusions.

[165] The performance management process was not resumed by AvSec until Mr French's investigation was completed, and its conclusions taken into consideration.

[166] I find that AvSec took considerable time to try to ensure Ms Walters could achieve the performance standards expected of an EDDU Handler, providing detailed feedback and additional training.

[167] Upon Ms Walters raising issues which may have had an adverse effect on her performance, AvSec engaged Mr French to carry out a lengthy and extensive investigation. His conclusions were taken into consideration, as was the comprehensive report prepared by Ms Masoe, before any decision was made to return Ms Walters to an ASO position.

[168] The entire process was measured and that AvSec acted throughout in fairness to Ms Walters.

[169] I determine that AvSec did not fail to act in good faith.

**Did AvSec act in breach of Ms Walters's employment agreement?**

[170] The Collective Agreement and associated documents comprising the Letter of Appointment and the AvSec Policies and procedures set out the terms and conditions of Ms Walters appointment as an EDDU Handler, the grounds for transferring her back to an ASO position, and the position as regards the EDDU Handler allowances and use of an AvSec van in that circumstances.

[171] The terms and conditions of employment of an EDDU Handler comprise the same grade and salary level as that of an ASO.

[172] EDDU Handlers are entitled to receive allowances as set out in the letter of appointment dated 4 March 2005. The allowances comprise a Dog Handlers Allowance, a Dog Handlers Maintenance Allowance, and a Dog Handler's On-Call Allowance. The letter of appointment stated clearly that the purpose of the allowances was to compensate the EDDU Handler for the cost and inconvenience of having a dog, the extra tasks involved since the dogs were looked after in the EDDU Handler's personal time, and in recognition of the fact that the EDDU Handler was on call.

[173] EDDU Handlers are also allocated a van as set out in the letter of appointment. The purpose of this is for: "*operational purposes and transportation of the dog*".

[174] I find that the allowances and use of a van were to facilitate the requirements of the EDDU Handler role, and as an ASO there was no disadvantage to Ms Walters in not being provided with the EDDU Handler allowances and the use of a van as the need for them no longer existed.

[175] I determine that AvSec did not act in breach of Ms Walter's employment agreement.

**Should Ms Walters be reinstated to the role of EDDU Handler?**

[176] I have found that Ms Walters has not been disadvantaged as a result of AvSec transferring her back to an ASO position. That decision was made as a result of Ms Walters consistently failing to maintain operational standards.

[177] I observe that the work undertaken by the EDDU is critical to the safety of the travelling public. Whilst incidents involving explosives devices are rare, their results can be catastrophic. AvSec considers that it can only be sure an EDDU Handler is capable of detecting such devices through intensive training and assessment.

[178] AvSec concluded after such training and assessment that Ms Walters was been unable to demonstrate that she had the skills and ability to detect explosive devices.

[179] I determine that Ms Walters should be not be reinstated as an EDDU Handler.

**Costs**

[180] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[181] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**