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Wrong On All Counts

A recent Employment Relations Authority decision, ***Walker v. Vulcan Steel Ltd*** (October 2014) considered a raft of issues from a zero tolerance alcohol policy to duress and discrimination. While the facts of the case are unusual the issues raised have flow on consequences for others.

On 14 March at 10.15 am, having started work at 8.30 am Mr Walker tested positive on a breath test for alcohol at a level of 134 micrograms per litre (driving limit is 400 mg/l). The company had a policy stating:

"Vulcan Steel is committed to creating a zero tolerance to drug and alcohol in the workplace.

. . . we reserve the right to perform random drug and alcohol testing."

Mr Walker was called to a disciplinary meeting on the basis of a *'breach of Vulcan's Zero Tolerance Policy'*. He believed that he had done no wrong because he was not impaired. The company subsequently wrote to him stating:

"Vulcan has made a decision based on your actions in attending work under the influence of alcohol, and also based on your failure to accept that your actions were wrong, that grounds do exist to summarily terminate your employment. However Vulcan is willing to take a lesser course of action and, issue you with a full and final written warning subject to you providing an acknowledgment and undertaking which confirms the following:

(a) That you accept the full and final written warning and will not seek to challenge it; and

(b) That you will not attend at the workplace under the influence of alcohol again."

Mr Walker ultimately signed this letter believing that he had no choice but to sign the undertaking in circumstances where his union representative had protested to the employer and advised them that he considered it to be unlawful.

He raised a personal grievance a few weeks later claiming that the agreement was obtained by coercion and economic duress. As a result of that claim the Employment Relations Authority required the parties to attend mediation. This occurred on 16 May. Neither Mr Walker nor his union delegate sought leave for this and subsequently had their pay docked.

On 22 May Mr Walker was given a letter by his Area Manager regarding mistakes made by him in the course of his work. The letter was reputedly given as part of a new policy that every staff member who made a mistake would get a letter. Subsequent evidence explained that the letter was given to create a paper trail. The letter specifically referred to two errors that it alleged Mr Walker had made and reminded him of the necessity to follow instructions. Others involved in the errors were not at this time issued letters. He claimed that the letter would affect his chances to receive an annual bonus.

On 4 June Mr Walker raised further grievances. He now had 4 outstanding claims:

1. Unjustified disadvantage arising from the final warning.
2. A claim for wages during mediation.
3. Unjustified disadvantage from the 22 May letter.
4. That he had been discriminated against, by reason of union activities (taking a grievance) in having been singled out to receive the letter of 22 May.

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1. Disadvantage for Final Warning

The employer claimed that Mr Walker was estopped from pursing this action because he had signed the acceptance of the warning. Mr Walker in response claimed that he had only signed this under duress The Authority looked firstly at the warning itself and investigated from the stance of whether or not the employer was justified in its stated position that grounds existed to summarily terminate Mr Walker's employment.

In essence they determined that while grounds existed to justify a zero tolerance policy, this needed further definition and explanation to employees. The ERA found that the policy (or the employer's manner of dealing) was not clear. This was not assisted by the fact that in the time between the warning and the hearing the company clarified the policy to allow for a maximum breath alcohol of 50 micrograms.

Walker's evidence was that he understood the zero tolerance to mean a zero tolerance to being under the influence of alcohol and that at 135 mg/lg it was reasonable for him to believe that he was beneath a point where he was '*under the influence'*. The Authority determined that there was a significant different between zero alcohol in the system and zero tolerance of impairment through alcohol. On that basis the Authority concluded that the employer could not have justifiably dismissed Mr Walker for the conduct. Therefore the statement made in the letter threatening dismissal was not correct.

The Employment Relations Authority then went on to consider the concept of duress.

Having concluded that the threat of dismissal was '*not a lawful one'* it then concluded that Mr Walker had in fact been put under duress to sign. He was therefore not estopped from challenging the warning which was found to be unjustified.

2. Mediation Wages

The Authority determined that the failure of the employer to pay for the employee while attending mediation, in circumstances where the Authority had required the parties to attend mediation was a breach of good faith. The object of the Employment Relations Act was to promote good faith and includes to promote mediation as the primary problem-solving mechanism. The Act encourages (or in the view of the Member, arguably enforces) attendance at mediation. Mr Walker would have been disadvantaged if he had refused to attend mediation. The Authority held that the objects of the Act:

". . . could well be defeated if an employer exercised its discretion to refuse to pay an employee for attending mediation which had been ordered by the Authority, even if there was no contractual right to be paid, as many employees cannot afford easily to miss out on even a few hours' pay and may choose to forego attendance at a mediation meeting."

It was therefore concluded that the employer should have paid for the employee to attend mediation when there was an ongoing employment relationship and mediation had been ordered by the Authority.

3. 22 May Letter; Disadvantage

It was clear from the letter itself that it was not intended as a formal warning but rather as a reminder to follow instructions and to perform duties with '*diligence and care'*. The Authority determined on the evidence that the purpose of *"giving Mr Walker the letter was to create a paper trail which. . . by implication, can be referred to in the future for whatever purpose the employer wishes, then a fair and reasonable procedure must be followed."*

The Authority determined that the letter created a disadvantage because it created a paper trail that may be referred to in the future potentially to Mr Walker's disadvantage. He went on to determine that it was therefore an unjustified disadvantage because no 'fair and reasonable employer' would issue such a warning without investigating the issues by using a fair process.

4. Discrimination

Discrimination for involvement in union activities includes having submitted a personal grievance to the employer. Discrimination requires a detrimental outcome. The Authority posed the question as *"Did the respondent subject Mr Walker to a detriment?"* For the reasons expressed above the letter was held to be a detriment. It went on to consider the tests for discrimination:

"In general terms discrimination by reason of a prohibited ground involves one person being treated differently from someone else in comparable circumstances."
(***McAlister v. Air New Zealand*** 2009)

On the facts the Authority determined that other staff involved in the same errors were not issued with similar letters. It did not accept the employer's response that this was because the employee concerned was absent. Moreover it found the employer evidence on this to be misleading, particularly because the other employee was only issued with a letter on the day that the grievance was served. It accepted that *"it is unusual to find direct evidence of discrimination, and a case will usually depend on what inferences can properly be drawn."*

The Authority concluded by finding that the letter was issued because Mr Walker had initiated a personal grievance and that he was therefore unlawfully discriminated against.

By way of remedies the Authority provided for a total compensatory sum of $8,000.00 and removal of both letters.

In conclusion this decision raises a number of significant issues for employers. Issues that may require a change in some practices.

Firstly, documentation recording the acceptance of disciplinary action has been brought into question. The decision that this amounts to duress, although specific to the facts of this case may bring such agreements into question. Secondly, the finding that the letter of 22 May was a disadvantage is wider than some existing decisions. In circumstances where there was no intention for this to be a disciplinary letter, the good faith requirement to consult is significant. Finally, the requirement to pay for attendance at mediation is something that infrequently comes to be considered. This decision however appears to clearly define the law in circumstances where the relationship is ongoing and mediation has been required by the Authority or Court.

This decision is subject to appeal. We will advise of the result.