IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 9
5421406

	BETWEEN	BRUCE MCLAY Applicant
	A N D	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Christine Hickey
Representatives:	Andrew McKenzie, Counsel for the Applicant Juliet Dobson, Counsel for the Respondent
Investigation meeting:	30 October 2013 at Christchurch
Submissions Received:	31 October 2013
Date of Determination:	23 January 2014

DETERMINATION OF THE AUTHORITY

A. Bruce McLay suffered an unjustified disadvantage in his employment by having a first and final written warning of unlimited duration issued.

B. I order the Chief Executive of the Department of Corrections to:

- **Reinstate Mr McLay to the position he was in before the unjustified final written warning was issued as if it had not been issued and to ensure Mr McLay's personal file reflects that; and**

- **Pay Mr McLay $1,250 in compensation for humiliation, loss of dignity and injury to his feelings under s.123(1)(c)(i) of the Employment Relations Act 2000.**

Employment relationship problem

[1] Bruce McLay is a probation officer. He has been employed by the Department of Corrections (Corrections) for 27 years.

[2] On 5 November 2012 Mr McLay was instructed to attend the District Court to complete a stand-down provision of advice to the courts (PAC) report. He had not visited the District Court building since June 2010. Therefore, he was not familiar with the security system which had been instigated in the interim years. When he arrived at the Court he saw a sign stating that staff and lawyers could proceed in one direction. Mr McLay considered that he was staff. Initially he tried to go through the direction indicated for staff. He was directed by Court security staff to go back, put any metal items and his briefcase through the conveyer-belt scanner and to walk through the walk-through scanner again. He did so while verbally protesting that he was staff and indicated the probation identification tag he was wearing around his neck.

[3] There is a dispute about what happened next and about the significance of the events. On the same day Richard Boyce, the Team Leader of the Court Security Team, registered a security incident involving Mr McLay. A copy of his incident report was sent to the Department.

[4] The Department initiated an investigation into allegations that Mr McLay had refused to comply with security requirements, engaged in inappropriate behaviour when challenged by Court security staff and refused to follow the instructions of the Court security staff.

[5] On 22 May 2013 Corrections determined that Mr McLay had committed serious misconduct and breached the Code of Conduct. Mr McLay was issued with a final written warning.

[6] Mr McLay claims that his employment has been affected to his disadvantage by an unjustified action of his employer; namely the final written warning of unlimited duration issued on 22 May 2013. By way of remedy he seeks the removal of the warning from his file, and compensation of $10,000 for humiliation, loss of dignity and injury to his feelings. He also seeks any other remedy the Authority may find appropriate.

[7] Conversely the Department says that the warning was justified because Mr McLay's behaviour was in breach of its Code of Conduct and amounted to serious misconduct. It says that Mr McLay's behaviour brought the Department into disrepute and reflected poorly on the Department.

[8] On 21 October 2013, when Wayne McKnight's[1] statement of evidence was lodged, it became clear that he considered that the warning was *only valid for a year from the date of the incident*[2]. The Department says that the imposition of a final written warning of twelve months' duration only was a decision that a fair and reasonable employer could have made in all the circumstances at the time.

Issues

[9] The Authority needs to determine:

- Whether, when objectively considered, the Department's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the actions occurred[3]; and
- If the decision to issue Mr McLay with a final written warning was not justifiable what remedies he is entitled to, taking into account any contribution by him.

[10] As permitted under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all evidence and submissions received but states the Authority's findings of facts and law and its conclusions on matters requiring determination. Those findings were made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened. I have seen video footage of the relevant incidents which was shown at the investigation meeting and heard evidence from Mr McLay, Errol Hay who is Mr McLay's wife and Janice Gemmell on his behalf and Mr McKnight, Melissa Brussovs and Richard Boyce on the Department's behalf.

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1 Mr McKnight was the Acting District Manager of Community Probation Canterbury at the relevant time and issued the final written warning.
2 Paragraph 49.
3 Section 103A(1) and (2) Employment Relations Act 2000.

Background leading to the final warning

[11] The situation came to the Department's notice on 5 November 2012 when another Department staff member drew it to Mr McKnight's attention. Mr Boyce sent a copy of his report to Mr McKnight that day. Mr Boyce's report characterises the security incident as a *probation officer refusing to identify himself*. Mr Boyce wrote:

> *On 05 Nov 2012 about 1220 hrs at the Christchurch District Court 282 Durham Street an unknown person entered the Court Building and the screening station area. He initially walked straight through the walkthrough-scanner without stopping. He was stopped by CSO Lee REYNOLDS who asked him to return through the walkthrough-scanner to which he said "… I'm staff …", whilst he said this he waved an ID Card that was around his neck, which looked like a Probation Service ID Card. CSO REYNOLDS informed him that Probation Staff were required to be searched prior to entering and that he should walk back through and place any metal items in the tray along with his brief case he was carrying, to which he again said "… but I'm staff …". It was explained that this was the procedure and he then complied. On collecting his items at the other side he continued to mutter that he was staff and so CSO TL Richard BOYCE, who was standing close by and observing the situation, decided to engage the person to find his identity. The person refused to talk to CSO TL BOYCE or identify himself. CSO BOYCE could see what appeared to be a Probation ID card hanging from the persons neck, but the person would not stop in order for it to be established correctly.*
>
> *The person continued to walk toward District Court No 2 and CSO TL BOYCE continued to ask the person to stop and clearly identify himself. During this the person said "I'm not speaking to you, I've been asked here to do a report …". At the court door, CSO TL BOYCE blocked the persons entrance by standing in the door way and again ask* [sic] *them to identify themselves, the person then moved forward and CSO TL BOYCE placed his left hand onto the persons upper arm/chest area with an open palm. The person then continued to push forward to try to move the door and on this CSO BOYCE took hold of the persons jacket with both hands at chest height and push* [sic] *the person backward and away from the door, clearly saying "Stop moving forward …". The person continued to hold onto the door handle of the court pulling the door open. When the person was away from the door a short distance CSO TL BOYCE released him and said "let go of the door … and tell me who you are …". The person then let go of the door handle and he was again asked to identify himself, he again refused to and then said "I'm going, I'm not doing this …". The person then left the Court building escorted by CSO REYNOLDS.*
>
> *CSO TL BOYCE then attempted to identify the individual with a member of probation staff in the building and it was ascertained that the identity of the person was believed to be Mr Bruce McKEAY* [sic] *(Probation Service Christchurch). …*
>
> *No further action is anticipated by MoJ regarding this matter.*

[12] At Mr McKnight's request, Mr Boyce sent him a copy of the video footage of the incident. On about 23 November 2012, Mr McKnight first viewed the video footage. He gave a copy of the footage to Mr McLay after he had viewed it and on 28 November 2012, Mr McKnight sent Mr McLay a letter in which he notified him that the Department was initiating a formal investigation. He outlined allegations that Mr McLay:

> *a. refused to comply with security requirements in place at the District Court building*
>
> *b. and; engaged in inappropriate behaviour when challenged by Court security staff*
>
> *c. and; refused to follow the instructions of Court security staff.*
>
> *These actions could potentially indicate a breach of one or more provisions of the Departments Code of Conduct and could be considered to be, if proven, serious misconduct. I refer you to the Code of Conduct which outlines the high standards of behaviour we expect of you. Specifically you must:*
>
> > Behave in a way that reflects well on your position at Corrections, both in and out of the workplace (page 7) **and:**
> >
> > Maintain and role model high standards of integrity, presenting yourself in a way that enhances your credibility, and supports our success. (page 7)
>
> *In addition, the Code also includes examples of conduct that fall below our expectations:*
>
> > Actions that bring Corrections into disrepute or negatively affect the public perception of Corrections or the Government.
>
> *Furthermore, such actions have potential to undermine the trust and confidence necessary between you and The Chief Executive of the Dept of Corrections as your employer.*
>
> *I have considered the information in the* Security Incident Form *outlining the allegations and am of the view that they are sufficiently serious to warrant further investigation. …*

[13] On 30 November, Mr McKnight instructed Melissa Brussovs, the Department's Regional Operations Advisor for the Southern Region to conduct an employment investigation to establish the circumstances and facts surrounding the three allegations.

[14] Ms Brussovs was specifically requested to:

> *1 Interview Bruce McLay and any other person(s) who you consider may have information relevant to establishing the circumstances and facts as above;*
>
> *2 Interview any person(s) nominated by Bruce McLay as having information relevant to the investigation;*
>
> *3 Advise me of any new or additional issues of concern that arise during your investigation, so that I can make a decision as to how these should be addressed;*
>
> *4 Ensure that interviews are conducted in private and that all information relating to the investigation is kept confidential and secure;*
>
> *5 Gather any further information required to investigate the allegations and establish the facts;*
>
> *6 Prepare a written report of the investigation including:*
>
> *a) The process followed in conducting the investigation;*
>
> *b) A summary of the information obtained;*
>
> *c) An analysis of any inconsistencies in the information; and*
>
> *d) Your conclusions as to whether or not the allegation outlined in my letter, of 28 November 2012 to Bruce McLay are substantiated.*
>
> *The role of the investigator is to carry out an investigation into the allegations and to report back the facts. You are not required to make conclusions as to whether misconduct has occurred. …*

[15] On 6 December 2012, on behalf of Mr McLay, Janice Gemmell, the Secretary of the National Union of Public Employees, wrote to Ms Brussovs asking for clarification on the three allegations.

[16] On 14 December, Darrell Higson, at Mr McKnight's request replied to Ms Gemmell. In relation to allegation (a) that Mr McLay refused to comply with security requirements, he wrote:

> - *Bruce walked straight through the walk-through scanner without stopping.*
> - *He initially refused to return to the scanner and then did.*
> - *He repeatedly refused to identify himself. He never did, his identity was only ascertained after he left.*

[17] In relation to allegation (b), that Mr McLay behaved inappropriately when challenged by Court security staff, he wrote:

> - *Repeatedly refused to identify himself. His identity was only ascertained after he left.*
> - *Refused to reply to security officer when asked fair and reasonable questions – said "I'm not speaking to you".*
> - *When denied access to Court Room #2 Bruce tried to push past security officer, who had placed himself in the path of Bruce, who needed to push hold him back from entering the room.*
> - *Security officer was required to escort him out of the building.*

[18] In relation to allegation (c), that Mr McLay refused to follow the instructions of Court security staff, he wrote:

> - *Initially refused to return to the scanner and then did.*
> - *Refused to follow fair and reasonable instructions of security officers, including stopping walking.*
> - *Refused to stop moving forward when requested as he pushed past security officer to try and access Court Room #2.*

[19] Ms Brussovs interviewed Mr McLay on 11 January 2013. Mr McLay was accompanied by his lawyer, Andrew McKenzie. Mr McLay told Ms Brussovs that a former Probation Officer, Adrian Ramsay, who is one of the people shown on the video, told Mr Boyce that he could identify Mr McLay as a probation officer.

[20] Mr McLay also told Ms Brussovs that contrary to Mr Boyce's report, he said to John Wihone, the colleague he was meeting at Court who was present during the last part of the incident, and not to Mr Boyce, *I can't do this anymore, I'm sorry, I'm going*.

[21] Ms Brussovs did not interview Mr Boyce, Mr Ramsay or Mr Wihone about the incident. She considered that Mr Boyce and Mr McLay's views were sufficiently congruent on the relevant facts and that Mr Wihone and Mr Ramsay only became involved after the relevant events had occurred.

[22] On 14 February 2013, Ms Brussovs' investigation report was supplied to Mr McLay. She concluded:

> *8.1 With regard to the allegation that Bruce McLay refused to comply with the security requirements in place at the*

District Court building, I find that with regard to the entry procedures, after establishing the correct procedure with staff Bruce complied with the request to re-enter the walk-through scanner. I accept that Bruce was genuinely confused about his status as "staff", and was unfamiliar with the procedures for entering the Court Building. This is corroborated by the video evidence.

8.2 With regard to the allegation that Bruce McLay engaged in inappropriate behaviour when challenged by Court security staff, I find that he failed to stop entering Court 2 as directed by the CSO, and this resulted in the security guard engaging physically with Bruce McLay to enforce compliance.

8.3 With regard to the alleged refusal to follow the instructions of Court Security Staff, Bruce McLay was asked numerous times by the Court Security Officer to identify himself. Bruce stated that he physically produced his ID card. The CSO states that he tried to engage Bruce in a verbal exchange to ascertain his ID, but that Bruce refused and waved his card. Bruce was of the opinion that simply producing has ID card was sufficient, despite the instructions of the CSO to provide a verbal response. I find that the CSO's request for Bruce to verbally identify himself was a fair and reasonable request and that it would be fair and reasonable to expect a visitor in an official capacity to comply with this request. I find that Bruce refused to comply with security requirements by failing to verbally identify himself. Unfortunately, had the security requirements been fully satisfied upon entry into the Court Building, it appears unlikely that any of the following events would have occurred.

8.4 The Code of Conduct demands high standards of behaviour from Corrections staff, particularly relevant in this case are the requirements to behave in a way that reflects well on the position of Probation Officer at Corrections, and maintaining and role modelling high standards of integrity. In my view the evidence gathered does not support on the balance of probability that Bruce's behaviour on this occasion met the high standards required of him.

9. ***Conclusions***

9.1 I find the allegation that Bruce McLay refused to comply with security requirements in place at the District Court building is ***partially upheld****.*

9.2 I find the allegation that Bruce McLay engaged in inappropriate behaviour when challenged by Court staff is ***upheld****.*

9.3 I find that allegation that Bruce McLay refused to follow the instructions of Court Security Staff is ***upheld****.*

[23] Mr McLay was asked to submit any comments or submissions he might have to Mr McKnight by 22 February 2013. For various reasons, largely to do with Mr McKenzie's unavailability, progress was delayed. On 4 April 2013 Ms Gemmell wrote to Mr McKnight on Mr McLay's behalf essentially submitting that his actions could not constitute serious misconduct and suggesting counselling or another informal means of redress.

[24] On 24 April 2013 Mr McKnight wrote to Mr McLay with his preliminary view that all three of the allegations against him were upheld and that his behaviour on the day constituted serious misconduct by breaching the three areas of the Code of Conduct set out in the allegations letter of 28 November 2012. He set out his preliminary view that Mr McLay should receive a final written warning for serious misconduct.

[25] On 3 May 2013 Ms Gemmell responded on Mr McLay's behalf challenging the Department's view on essentially the same grounds set out in her 4 April 2013 letter.

[26] On 22 May 2013 Mr McKnight wrote to Mr McLay confirming his preliminary view that Mr McLay had committed serious misconduct for which a final written warning was the appropriate outcome. He wrote that:

> *The need for the Security Officer to initiate physical contact with you to perform his duties is key to my decision to determine that this issue constitutes serious misconduct.*

[27] On 29 May 2013 Ms Gemmell raised a personal grievance on Mr McLay's behalf.

Determination

[28] The test for whether the Department's issuing of a final written warning of unlimited duration was an unjustified disadvantage is in s.103A of the Employment Relations Act 2000. The Authority must objectively consider whether the Department's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the actions occurred.

[29] In applying that test the Authority must consider the factors in s.103A(3)(a) to (d) and any other factors it thinks appropriate as set out in s.103(4) of the Act as to the fairness of the procedure. The Authority must not determine an action unjustifiable if

any procedural defects were minor and did not result in Mr McLay being treated unfairly.

[30] There are two limbs to the test for unjustifiable disadvantage as set out in s.103(1)(b). First, the employer's action must have caused disadvantage to the employee in their employment and secondly, that action of the employer must be unjustifiable.

[31] Both parties agree that the issuing of a final written warning on Mr McLay's employment record was of disadvantage to him in his employment. Until almost a year after the incident Mr McLay says he believed that the warning was of indefinite duration. The Department now says that it was for the duration of twelve months only. The warning was not expressed to be for only twelve months duration and I consider that when Mr McKnight's evidence was filed he is likely to have belatedly realised or been advised that it would be unlikely that after twelve months the Department could rely on it to dismiss Mr McLay in any event. However, the existence of such a warning potentially made Mr McLay's employment less secure for that twelve month period at least. Therefore, the main issue to be decided is:

Was the issuing of the first and final warning justified?

[32] Submissions for Mr McLay are that the warning was unjustified for several reasons. First, Mr McKenzie questions whether the conduct in question can amount to **serious** misconduct.

[33] Serious misconduct:

> *... will generally involve deliberate action inimitable to the employer's interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.*[4]

[34] It is conduct which:

> *deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.*[5]

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[4] *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319
[5] *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

[35] Mr McKenzie argues that a fair and reasonable employer could not have concluded that Mr McLay *refused*, under allegation (a), to comply with security arrangements at the Court because his behaviour was mistaken not wilful and he then complied once he understood the security requirements applied to him.

[36] Mr McKnight and Ms Brussovs agree that allegation (a) refers to the first part of Mr McLay's behaviour on entering the Court building, before Mr Boyce's involvement. In her report Ms Brussovs wrote:

> *after establishing the correct procedure with staff Bruce complied with the request to re-enter the walk-through scanner. I accept that Bruce was genuinely confused about his status as "staff"…*

[37] The fact conduct was not wilful or deliberate does not prevent it from being misconduct justifying dismissal. The test requires an overall evaluation as to whether the decision to dismiss was one [6]*a reasonable and fair employer could have taken.*

[38] Somewhat puzzlingly, after finding that once Mr McKay understood what he was required to do he complied with the security arrangements, Ms Brussovs concluded that the allegation of *refusal* was *partially upheld*. She clarified at the investigation meeting that she meant that he had initially refused to comply. However, it is not reasonable to classify Mr McLay's initial confusion and mistake as *refusal.*

[39] Even more puzzlingly Mr McKnight concludes that all three allegations were proved and all three amounted to serious misconduct. He did not conclude that allegation (a) was only partially proved. Mr McKnight knew at the time he made the decision about allegation (a) that Mr McLay was genuinely confused and that once he understood the requirements he complied with them. In those circumstances a fair and reasonable employer could not have concluded that Mr McLay's behaviour up to that point amounted to serious misconduct. Therefore, that act of alleged misconduct cannot be relied upon to found a disciplinary consequence based on serious misconduct. If Mr McKay's behaviour to that point was misconduct at all, given that once he understood what was required of him he complied, it must have been far less than serious misconduct.

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[6] *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448; [2001] 3 NZLR 293 (CA), at para 31

[40] Secondly, Mr McKenzie submits that allegations (b) and (c) are *double counting* by which he means that they essentially amount to the same allegation; that is, if Mr McLay *refused to follow the instructions of Court security staff* (allegation (c)) then logically he must have *engaged in inappropriate behaviour when challenged by Court security staff* (allegation(b)). That is, it must be inappropriate behaviour for any probation officer visiting the District Court to refuse to follow the instructions of Court security staff. His submission is that Mr McLay should not be considered to have committed two different acts of misconduct for what essentially was one incident or event amounting to a failure to comply with Mr Boyce's requests.

[41] I consider this to be an important point. Framing the allegations in the way they were framed does amplify what Mr McLay was alleged to have done unnecessarily. That was unfair.

[42] In addition, Mr McKenzie submits that Mr McLay's failure to stop and engage with Mr Boyce was not serious misconduct because he did not wilfully refuse to do so but believed he was acting in a way he was entitled to once he had complied with the screening requirements. I do not find it necessary to make a finding on this point because of the following considerations.

Was the decision making process one a fair and reasonable employer could have undertaken?

[43] Mr McKenzie also submits that the Department failed in its obligation under s.103A(3)(a) of the Act because it did not carry out a sufficient investigation, as required under s.103A(3)(a) of the Act. He submits that the Department should have interviewed the other people shown in the video once Mr Boyce became involved, specifically Mr Ramsay and Mr Wihone. Mr McKenzie also says that a full investigation would have included putting Mr McLay's response to Mr Boyce and hearing his response to that.

[44] The Department was well resourced to undertake further investigation or more in-depth investigation.

[45] The video footage does not have any audio. Therefore, the real tenor of the incident and what was actually said by Mr Boyce and Mr McLay cannot be fully ascertained by watching the video footage alone. Ms Brussovs and Mr McKnight appear to consider that the relevant misconduct was over by the time Mr Ramsay and

Mr Wihone appeared on screen and therefore it was not necessary and would not have been helpful to interview them.

[46] However, the video shows that they were both very quickly on the scene once Mr McLay and Mr Boyce were at the door of Court No. 2. They may have even been able to see and hear from the other side of the Court No. 2 door before they became visible on the video footage once Mr Boyce and Mr McLay reached the door.

[47] Ms Brussovs' report records Mr McLay's explanation was that he directed his comment about needing to leave to Mr Wihone and that it was not a comment directed to Mr Boyce. Mr Boyce's report gives the impression that what Mr McLay said was a continuation of what Mr Boyce characterised as a refusal to identify himself. I consider in a full investigation the Department would have put Mr McLay's explanation of to whom he was talking to Mr Wihone and Mr Boyce for their comments. The video footage is congruent with Mr McLay's explanation that he spoke to Mr Wihone and not to Mr Boyce when he decided to leave the Court.

[48] In addition, it is relevant at what point Mr McLay's identity could have been established and accepted by Mr Boyce. Mr McLay says that Mr Ramsay identified him to Mr Boyce at a much earlier point than in Mr Boyce's report. Mr McLay's version of events is congruent with a suggestion that Mr Boyce was acting in an over-zealous manner at least at that stage by refusing to accept Mr Ramsay's identification of Mr McLay.

[49] I consider that the investigation was insufficient because Mr Boyce did not have Mr McLay's explanation put to him for his response and was not interviewed by Ms Brussovs before she prepared her report. He should have been shown the video footage and had Mr McLay's explanation put to him alongside it.

[50] In addition, Mr Wihone and Mr Ramsay were not asked for their recall and views of the incident and should have been. Mr Wihone was a current colleague of Mr McLay and was the person he expected to meet at the Court. The video shows that they were present during the part of the incident in which Mr Boyce was physically stopping Mr McLay from entering District Court No. 2. Interviewing Mr Ramsay and Mr Wihone may have clarified the context and tenor of the incident at that stage and whether or not Mr McLay was still refusing to identify himself, as Mr Boyce reported.

[51] I am also concerned that Mr McKnight's real reason for considering Mr McLay's behaviour to have been serious misconduct was what he saw as the *need* for Mr Boyce to *initiate physical contact* with you. That specific allegation was not put to Mr McLay. Also the *need* for Mr Boyce to initiate physical contact was assumed by Mr McKnight but not explored with Mr McLay or Mr Boyce. The possibility that Mr Boyce was over-zealous was not considered by Mr McKnight.

[52] In addition, as a part of allegation (b) it was alleged that *a security officer was required to escort* Mr McLay out of the building. Mr McLay's explanation was that he decided of his own accord to leave without being asked or directed to do so by a security officer. The video appears to corroborate that. It may have been that Mr Wihone and Mr Ramsay would have been able to clarify whether Mr Boyce's view was correct or not.

[53] The insufficiency of investigation and the other procedural shortcomings noted above when taken together are more than minor and resulted in Mr McLay being treated unfairly.

[54] In all the circumstances, including Mr McLay's 27 years of what appear to be unblemished service, the fact that allegation (a) could not have amounted to serious misconduct, that a specific allegation was not put to Mr McLay for his response and and that the investigation was insufficient, I consider that the issuing of a first and final written warning, especially one of apparently unlimited duration, was not an action a fair and reasonable employer could have taken. The fact that later the Department told Mr McLay that it considered the warning to only be effective for 12 months from 5 November 2012 does not operate to make the decision conveyed to Mr McLay on 22 May 2013 a justified one.

Determination

[55] For the reasons set out above the issuing of a first and final warning to Mr McLay was unjustified. Therefore, Mr McLay has a personal grievance that he was unjustifiably disadvantaged in his employment. That leads me to a consideration of appropriate remedies.

[56] Mr McLay has claimed $10,000 compensation and the removal of the warning from his file. Mr McLay's evidence and that of his wife was that the unlimited nature of the final warning from the time of the communication of the preliminary view on

24 April 2013 led to significant stress because Mr McLay feared that for the rest of his working career it would be 'hanging over his head'. He was anxious that any *one further, single incident/difficulty/error at work could have a negative effect and cost me my employment.* However, I am not satisfied the evidence supports an award of up to $10,000. For example, there is no medical evidence supporting Mr McLay's evidence of his stress levels. An award of $5,000 would be appropriate, prior to any consideration of Mr McLay's contribution.

[57] As a part of the consideration of remedies s.124 of the Act requires the Authority to consider the extent to which an employee contributed towards the situation that gave rise to a personal grievance.

[58] Even if I take the view, as Mr McKenzie suggests in his submissions, that Mr Boyce was over-zealous Mr McLay's behaviour could easily have been very different. Just by stopping and facing Mr Boyce and talking to him rather than continuing to walk quickly ahead of him waving his ID card Mr McLay could have ensured that he was able to meet Mr Wihone in Court No. 2. Mr McLay acknowledged, through Ms Gemmell, that his behaviour could have been different. At the very least Mr McLay acted in a dismissive and arrogant way to Mr Boyce, who was clearly a part of the District Court's official security staff with whom the Department could reasonably have expected Mr McLay to co-operate. Therefore I conclude that Mr McLay's actions contributed significantly to the situation that gave rise to his grievance. His actions in failing to deal appropriately with Mr Boyce led to the investigation and disciplinary proceedings and were blameworthy. I have taken that into consideration in awarding the following remedies:

- Mr McLay is to be reinstated to the position he was in before the unjustified final written warning was issued, as if it had not been issued, and his personal file should reflect that.

- Mr McLay should be compensated $1,250 under s.123(1)(c)(i) of the Act.

Costs

[59] Costs are reserved. The parties are encouraged to agree on costs taking account of the usual tariff based approach of the Authority; the daily tariff being

$3,500. The meeting took a little less than a whole day. If it is not possible to reach agreement any party seeking costs should file and serve a memorandum on the matter within 28 days of this determination. The other party shall have a further 14 days from the date it receives the memorandum in which to file and serve a memorandum in reply.

Christine Hickey
Member of the Employment Relations Authority