

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2012] NZEmpC 172  
ARC 98/09**

IN THE MATTER OF      de novo challenge to a determination of the  
Employment Relations Authority

BETWEEN                      JIMMY GREGORY  
Plaintiff

AND                              CHIEF EXECUTIVE OF THE  
DEPARTMENT OF CORRECTIONS  
Defendant

Hearing:                      15-19 and 22-25 November 2010; 8 April 2011; 5-7, 9 and 12-13  
December 2011  
(Heard at Auckland)

Counsel:                      Mark Ryan, counsel for plaintiff  
Bridget Smith, Rochelle Price and Vonda Hodgson, counsel for  
defendant

Judgment:                      5 October 2012

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**JUDGMENT OF JUDGE B S TRAVIS**

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[1]      The plaintiff's challenge has put in issue the justification for three warnings he received and his summary dismissal on 28 November 2008 from his position as a Principal Corrections Officer (PCO) at the Auckland Regional Women's Corrections Facility (the women's prison). This followed over 20 years of previously unblemished service. All the events took place after the plaintiff commenced work at the women's prison. The plaintiff is convinced that certain staff of the defendant wanted him removed from his employment and followed a course of conduct which resulted in his dismissal.

[2] The Employment Relations Authority<sup>1</sup> (the Authority) found each of the reasons given for the decision to dismiss Mr Gregory were justified, as were each of the three warnings he received. It dismissed his claims that he was unjustifiably disadvantaged and dismissed. The plaintiff challenged all of the Authority's findings and sought a full hearing of the entire matter. It appears the Court heard evidence and saw extensive documentation that was not placed before the Authority.

[3] The plaintiff sought an order for reinstatement as well as reimbursement, and compensation for humiliation, loss of dignity and injury to feelings and costs. It was agreed that, depending on the outcome of the de novo hearing into the justification for the disadvantage and dismissal grievances, remedies, including issues as to contributory conduct, if any, would be dealt with in another hearing.

[4] Through a series of unfortunate events the hearing of this matter was spread over many months and this has contributed to the delay in the issue of this decision.

### **Factual findings**

[5] The plaintiff rejoined the defendant's predecessor on 29 June 1988 having had previous service of nearly two years.

[6] Mr Gregory worked at Mt Eden Men's Prison (the men's prison) and reached the rank of Senior Corrections Officer (SCO). In 2005 he was appointed as a member of the start up staff for the new women's prison about to open at Wiri in South Auckland. He was appointed to his position as a PCO on about 21 November 2005. I understand a PCO to be the most senior uniformed prison officer within the Prison Service.

[7] His initial role was to assist the unit manager in the procurement of assets and to assist in the women's prison becoming fully operational. After successfully completing this role, he was informed by the prison manager, Jeannette Burns, that he would be transferred to the custodial support unit (CSU) and that his new manager would be Allan Wiechern. He received four portfolios: waste management,

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<sup>1</sup> AA 48A/09, 10 November 2009.

visits, property and vehicles. He was also requested by the Corrections Association of New Zealand (CANZ), a union of prison officers, to take over the site as the executive officer, with a view to setting up a committee once full staffing was in place. In or around October 2006, Mr Gregory was given a three month secondment to the position of Business Coach under Ngaro Nellie Sagar, then the Human Resources Advisor. Ms Sagar claimed that Mr Gregory was reluctant to relinquish his PCO position and, contrary to her instructions, continued to have contact with staff, prisoners and, at times, the management in the visits area. She considered this was inappropriate and unnecessary and was interfering with his smooth transition into the Business Coach role.

[8] Mr Gregory's first employment difficulties appear to have arisen at what he described as a "meeting" on Sunday, 17 December 2006, which he said was held to discuss operational issues relating to visits. Present at this gathering with Mr Gregory were Corrections Officer Epi Moors and four others who did not give evidence so I shall not name them.

[9] After the conclusion of the evidence for the plaintiff, a document was produced by Mr Ryan (counsel for the plaintiff) without objection, which he stated had come from the defendant's computer. It purported to be minutes of a business meeting held on 17 December 2006 at 8.15am. This was put to Ms Moors when she gave evidence. She claimed there was no meeting on Sunday 17 December as meetings were held usually on Wednesdays and attendees received email advice in advance of meetings. Ms Moors, in cross-examination, thought that the minutes may have been made at a later stage. However, she confirmed that the minutes did cover a number of matters which had been the subject of discussion at that time.

[10] In the absence of any evidence from the defendant to contradict Mr Ryan's advice, I conclude that these were minutes derived from the defendant's computer on which such minutes were normally stored, and they provided a reasonably accurate account of what was discussed at a meeting on 17 December 2006 (the 17 December meeting).

[11] I find at the 17 December meeting that an issue arose as to whether the new operation order that had been given by Louise Dierck, the Unit Manager, in regard to visiting times and schedules for low security prisoners, was working. There was an interchange with Ms Moors which indicated to Mr Gregory that the staff were not carrying out this order because it did not work. Mr Gregory reminded the staff that it was not up to them to change it.

[12] On Friday, 22 December 2006, Mr Gregory was called to a meeting by Ms Sagar, who told him that she had received a serious complaint regarding the 17 December meeting. In response to Mr Gregory's request as to who had made the complaint, Ms Sagar declined to tell him but said it had been presented by three staff. He was then told that Ms Moors was the main complainant. Ms Sagar told him that the complainant had alleged that he had shouted at her, shaking his fist, pointed, sworn and made the statement "I will smack the black off you".

[13] Mr Gregory claims that at this point he stood up, opened the door, which had previously been closed by Ms Sagar, and informed Ms Sagar that he denied the allegations and wanted a formal investigation. He claims that Ms Sagar told him there was no need for a formal investigation as it could be addressed informally by the parties who would sit around and discuss it. Ms Sagar also told Mr Gregory that he was not allowed to go into the visits area without first ringing Ms Sagar to advise of his intentions.

[14] Ms Sagar's evidence, once issues as to the dates set out in her affidavit were corrected, did not materially dispute Mr Gregory's account of their 22 December meeting. At that point Ms Sagar did not have a written complaint from Ms Moors which contained the statement that Ms Sagar put to Mr Gregory in the 22 December meeting. Ms Moors's letter of 19 December 2006, which Ms Sagar said was given to her on 21 December, contains no mention of any racial slurs. It complains that on 17 December Mr Gregory had spoken to her in a manner she felt was degrading, stressful and humiliating in front of her fellow colleagues. She stated this was not the first time this had happened.

[15] Ms Sagar's evidence was that another officer, who had not been at the 17 December meeting (the sixth officer), had spoken to two of the other officers who had been at the 17 December meeting and that the sixth officer told Ms Sagar that the other officers had told the sixth officer the racist statement was made by Mr Gregory who had advanced towards Ms Moors in a threatening manner when he was saying it. Those alleged movements by Mr Gregory at the 17 December meeting may have been identified on CCTV coverage if that had been obtained in a timely fashion. This was not done.

[16] Ms Sagar was told by Ms Moors, at a meeting with her on 21 December, that Mr Moors did not want to make this a formal complaint but would like something done about it. In an email communication to Ms Burns and Mr Wiechern on Friday 22 December, Ms Sagar advised them that Mr Gregory, in a meeting that morning, had denied he had sworn at Ms Moors or made any racist comments about dark people.

[17] The email from Ms Sagar states: "None of the complaints to date speak about the actual language spoken, only that his manner is intimidating and threatening". The email then goes on to address what Ms Sagar regarded as Mr Gregory's conflict of roles and a confusion for staff between Mr Gregory's current seconded role of business coach and his substantive role of a PCO in the CSU. It states she adopts a suggestion that Ms Moors pick up the CSU portfolio while Mr Gregory was on secondment. It states that Mr Gregory had been asked to let her know when he goes into the visits area and for what reason, as a safety measure for him and the staff, and to ensure there were no surprises for her or management. She concludes the email by stating that she would make contact with Ms Moors verbally and by email: "in regards to a way forward with her complaint. Also to provide her with an update as to know how HR have dealt with the matter and the measures put in place".

[18] The email also noted that Ms Moors's issue was Mr Gregory's "behaviour, language and a racist comment made in reference to 'dark people'". Although it is missing from Ms Moors's statement, Ms Sagar said that she was told by Ms Moors that Mr Gregory was yelling and screaming at her and shaking his fingers at her in front of the other staff, but Ms Moors wanted it resolved at the lowest level.

[19] It does not appear that this email was provided to Mr Gregory or his CANZ representative until these proceedings commenced.

[20] The two other officers present at the 17 December meeting, who had allegedly told the sixth officer, who was not there, of Mr Gregory's racist comments, made no mention of those comments in their written statements dated 19 December 2006, which Ms Sagar said she received on 21 December. One described Mr Gregory as having spoken to Ms Moors "in a manner that in my eyes was very unprofessional, humiliating and was uncalled for". The other referred to Mr Gregory directing "everything towards Epi [Ms Moors] as well as pointing his finger at her[.] I find his mannerism unprofessional toward her, as well as he should [be] setting an example for us new officers".

[21] Copies of the three statements from Ms Moors and the other two officers were finally provided to Mr Gregory's representatives in January 2007, but with the names blacked out.

[22] Ms Sagar's written account, described as her "overview" of her recollection of the 22 December meeting, apparently was prepared sometime in January 2007. It refers to another matter that Ms Sagar confirmed in cross-examination did not relate to Ms Moors's alleged complaint, which she says was brought to Mr Gregory's attention, as a comment made in passing. She states "did you at any time say to a staff member/s that "I will slap the black out of you"?", to which Mr Gregory replied "No[.] But I do know who you maybe referring to. It definitely was not me." She states in her account that at that point she accepted his explanation.

[23] Mr Ryan put to Ms Sagar, in cross-examination several times, without getting a clear answer, what steps were taken by management to protect Ms Moors or any other staff from what Ms Sagar had described as very serious and threatening conduct on Mr Gregory's part. Ms Sagar was finally asked by Mr Ryan:

**Q.** What formal steps were taken by the Department between Friday 22 December 2006 and August 2007 when the harassment and racial allegations were raised against Mr Gregory?

**A.** None.

[24] This matter becomes important because the second disadvantage grievance related to allegations of harassment and bullying and Ms Moors's allegations were central to those and the defendant's findings against the plaintiff.

[25] Mr Gregory claims he went back to his office after the 22 December 2006 meeting with Ms Sagar and sent an email to Zane Paine and Allan Holland, his CANZ representatives, recording his request for a formal investigation. Mr Gregory was then going on leave and requested Ms Sagar forward all documentation to Messrs Paine and Holland as they would be acting as his representatives.

[26] Mr Gregory gave evidence that he was later told by another officer, who had also been at the 17 December meeting, that the allegations were untrue and that Ms Moors and the other complainants were worried that Mr Gregory would report to Ms Dierck that they were not following her orders and Ms Moors had told the others not to worry about it as she would fix it. A confirmatory statement was obtained from that officer at the time and sent to both Mr Paine and to Mr Bradley the National Organiser of CANZ, who were acting for Mr Gregory. That officer was not called as a witness so I shall not name him.

[27] Mr Gregory asserts that at a subsequent meeting in February 2007 with Ms Burns and Ms Sagar and Messrs Paine, Bradley and Gregory, Mr Paine asked Ms Burns for a copy of the complaints in relation to the 17 December meeting, but that Ms Burns advised that she had no knowledge of Ms Moors's allegations and Ms Sagar said that it did not matter any more as Ms Moors had withdrawn her allegation.

[28] Mr Gregory also claimed that at the February 2007 meeting he had already made a formal request for an investigation into the 17 December meeting and Ms Sagar replied that Mr Gregory had not requested one. An issue arose as to whether Ms Burns conceded at that meeting that Mr Gregory had in fact requested the formal investigation and whether she said she would look into it. One of the plaintiff's complaints was that nothing was done about his request for that investigation.

[29] The plaintiff was unable to produce any documentation which showed that he or his CANZ representatives had requested a formal investigation into the 17 December meeting, which was independent of the withdrawal of Ms Moors' complaint. It appears most likely that the defendant's managers believed that once Ms Moors had withdrawn her complaint, there was then no further need for an investigation in response to any request Mr Gregory had made either personally or through his representatives. This misunderstanding was unfortunate because it prevented the isolation of any CCTV coverage of the 17 December meeting which, even though it may not have recorded sound, may have allowed for an independent analysis of whether Mr Gregory had made any threatening gestures of the sort of which Ms Moors had complained.

[30] Mr Gregory then became involved in investigating rumours that staff assaults on prisoners in the high security unit were being covered up and downgraded so as that they would not embarrass the unit manager, Ms Dierck. Ms Burns, he claims, had made no secret of Ms Dierck being groomed for the Prison Manager's job. He claims to have been carrying out those enquiries as CANZ executive to verify the rumours. He was overheard in early March 2007 discussing these matters with staff and this was reported to Ms Dierck. He was called to a meeting the following day. Mr Wiechern and Ms Dierck were present. He was effectively told to desist in making any enquiries as they were not his business.

[31] Mr Gregory also claims he was later told that statements had been made about him at a meeting he was unable to attend. On checking the minutes, these confirmed that Ms Dierck had made a statement to the meeting that a CSU PCO had had formal meetings with two of her staff, had denied them the right of union access and had harassed them about assaults in her unit. Mr Gregory then filed a personal grievance about this matter but was informed that as Ms Dierck had not named him personally, he could not proceed with it.

[32] Mr Gregory claims that he became aware in May 2007 that Ms Moors and other staff were involved in what he described as "an overtime scam" and he raised the matter with his then manager, Mr Galbraith. No evidence was given as to what happened about this matter but it is clear that by early 2007 Mr Gregory was at odds



with a number of female staff and managers at the women's prison over several matters.

### **Taking property off-site and leaving without permission (first warning)**

[33] On 17 July 2007, Mr Gregory was advised by letter from Ms Burns that an investigation had taken place regarding his removal from the women's prison site of prison property, consisting of a radio and keys and of going off-site without permission. He was ordered to attend a meeting on 23 July to give his response.

[34] The incident that gave rise to the investigation was said to have occurred on 11 May 2007. Mr Gregory was seen to have removed a large blue laundry type bag out of the prison to his car, get in his car and drive out of the prison carpark allegedly with a prison radio and keys on his person. According to two corrections officers, he was seen leaving and immediately returning at about 7pm.

[35] Tom Sherlock, who at the time was the Acting Assistant Prisoner Manager for Auckland Prison, carried out a preliminary enquiry into this matter, having been requested to do so by Ms Burns in May 2007. He interviewed a number of corrections officers and reviewed all reports and statements relating to the incidents as well as the relevant CCTV recordings. In his preliminary report, dated 11 June 2007, he records one senior corrections officer stating that he had retrieved the CCTV camera footage showing Mr Gregory at about 17.21 on 11 May 2007 carry a blue laundry type bag out of the prison to his car, get in his car and drive out of the prison carpark. The car stopped and turned around at the cul-de-sac in Hatu Drive a short distance away and returned to the prison carpark. Mr Gregory is then shown getting out of the car, leaving the bag behind, and returning inside the prison.

[36] Two other officers record the time at around 19.00-19.15. One stated that he heard the on-call manager, Mr Galbraith, radio for Mr Gregory over the net and at this point claims that he saw the car stop and turn around at the cul-de-sac of Hatu Drive and Mr Gregory's immediate return into the prison.

[37] This alleged radio call enabled Mr Sherlock to conclude that Mr Gregory must have had his radio on him whilst he was in the car for the short time. He concluded that the removal of the laundry bag was done without approval and that Mr Gregory may have left the prison with his radio and the institution's keys in his possession, thereby breaching security guidelines, that Mr Galbraith may not have informed the prison manager of the incident and that Mr Galbraith had done nothing about managing it. His report also noted that some staff had concerns that Mr Gregory was a bully.

[38] Mr Sherlock's report recommended that a formal employment investigation be carried out with both Mr Galbraith and Mr Gregory. It was also recommended that staff concerns regarding Mr Gregory's conduct be discussed with him.

[39] It may be noted that the report showed in one place that the incident had taken place at about 17.21 and at about 19.00 and 19.15 in other places, a substantial inconsistency which the report did not resolve.

[40] The 17 July 2007 letter Ms Burns wrote to Mr Gregory listed four items to be investigated:

- (a) that he may have removed a blue laundry bag with a car cover inside out of the prison and into his car without approval on 11 May 2007;
- (b) that he may have requested a staff member to undertake personal repair work for him;
- (c) that he may have been off-site with a Department hand held radio/transmitter on 11 May 2007 at approximately **1730 hours**;
- (d) that he may have been off-site with Department security keys on 11 May 2007 at approximately **1730 hours**.

(Emphasis added)

[41] Mr Gregory was provided with a copy of Mr Sherlock's report. It will be noted that the time he was alleged to have been off-site more than two months earlier was said in the letter in two places to be approximately 17.30.

[42] Mr Gregory responded in writing on 23 July stating that he had sought permission to use an industrial sewing machine in the industry building to sew up a

torn car cover. His request was declined on health and safety grounds but he was advised to take it to an officer at inmate employment, having obtained the consent of the on-call manager Mr Galbraith to leave the cover with her. He stated that the car cover was left in her office with a note asking her to contact Mr Gregory. Some weeks later, he received a call on the radio from her advising that the cover was fixed and that he could collect it. They arranged to meet on-site because he was having to leave the site that evening for an appointment at his home, for which he claimed to have permission from Mr Wiechern to leave the site and from a named officer who was covering for Mr Gregory during his absence. He claimed to have left his radio and the prison keys with that officer.

[43] Upon entering the gate house he claimed to have asked a corrections officer to check the bag and its contents, which the officer did, and Mr Gregory then left the site getting into his car and turning on his phone. He claimed that as he was starting to leave the site, he received a message on his phone to say that the appointment at his home had been cancelled so he turned around immediately and returned to the site and uplifted his radio and keys from the named officer covering for him. He stated he had then gone about his duties. He said he had no recollection of any radio call from the on-call manager Mr Galbraith.

[44] Ms Burns wrote to him on 27 August stating that she accepted his submissions that he had made verbal arrangements to have the work carried out on his car seat cover and that his bag was properly searched when he was going out of the gate house on 11 May. She claimed however, that she could not accept his submission that Mr Wiechern had given him permission to leave the site and that the named officer had held his radio and keys whilst he was off-site. This was because the timesheets and rosters confirmed that the named officer was not on site at the time that Mr Gregory left the gatehouse. She stated that the CCTV footage confirmed that Mr Gregory had left the site at approximately 7.20pm and came back at approximately 7.25pm.

[45] Ms Burns's letter stated she had found that there was a serious breach on Mr Gregory's part in being absent from duty without permission from his manager, or the on-call manager Mr Galbraith, who was on-site at the time, and that this

behaviour could have created a “huge potential risk to the health and safety of the staff and prisoners” and a potential risk to the security operations of the prison itself. Mr Gregory was placed on formal review for the next six months and required to complete reports every week on his performance of duties. He was told his current application for secondment would not be considered for six months, nor any acting up roles, and this would form part of his personal development plan. He was also given a six months’ written warning (the first warning).

[46] On 3 September 2007 Mr Bradley wrote to Ms Burns pointing out that her 17 July letter stated the time of leaving the site, apparently confirmed by CCTV footage was approximately 17.30 and an explanation was offered consistent with those facts as stated. It noted Mr Gregory’s explanation referred to an event that had taken place some months prior. Later examination of the CCTV evidence showed that the alleged time of leaving the site to be much later in the evening, that is around 19.30, and consequently some of the previously offered explanations were invalidated. The letter noted that the allegations about removing the blue bag, the radio transmitter and the keys appeared to have been satisfied and withdrawn. The letter invoked the interests of natural justice and requested that any remaining allegations regarding the incident be resubmitted in a newly dated letter which would contain the correct date, time and specifically what was to be responded to.

[47] Ms Burns responded in writing on 12 September acknowledging a typing mistake in the 17 July letter. She stated that the preliminary report gave an accurate report of the timeframes and that Mr Gregory was given ample time to thoroughly review the CCTV footage and to make submissions prior to the meeting on 27 August. She advised that Mr Gregory’s explanation regarding the blue bag was accepted and that it was not proven that he had taken his radio and keys off the site. She stated that both the unit manager, Mr Wiechern, and the call-unit manager, Mr Galbraith, confirmed that Mr Gregory did not seek permission to leave the site during his shift on 11 May and they had not given him permission. It concluded that Mr Gregory had therefore left the site without permission and advised that the disciplinary sanction would not be reviewed.

[48] Mr Bradley responded on 3 October seeking the opportunity to interview Messrs Galbraith and Wiechern. He also set out the practice that Mr Gregory claimed to have adopted, namely advising his manager of his intent to leave a rostered shift with maximum notice. He claimed Mr Wiechern would have given his approval subject to the PCO being able to hand over to an appropriate corrections officer at the time, that there was no system of recording such arrangements and that if some months later Mr Wiechern could not recall the incident, that was not surprising, as it was a part of normal routine. I cannot find any response to this letter.

[49] CANZ lodged a formal personal grievance in relation to this matter on 26 November 2007.

### **Failure to carry out PCO duties safely (second warning)**

[50] Whilst the first investigation was ongoing, another investigation was commenced in early September 2007 concerning an alleged failure on the part of Mr Gregory to carry out his duties safely on the night watch of 7-8 June 2007.

[51] This matter arose as a result of Mr Gregory's report to Mr Galbraith that two officers had not carried out their custodial duties properly on that night watch. The two staff were alleged to have been motionless whilst on duty and presumably asleep and had allegedly falsified documents stating they had conducted security checks and performed other aspects of the duties when they had not. The two staff were dismissed after an enquiry.

[52] During the course of that investigation, carried out by two investigators, Barbara Jamieson, who was then a unit manager of the women's prison and an experienced investigator whose name and details identifying her were suppressed by order under cl 12 of Sch 3 of the Employment Relations Act 2000 (the Act). I shall refer to her as "Ms C". Mr Gregory was interviewed. As a result of that interview the investigators considered that Mr Gregory's actions were not in accordance with the defendant's expectations of a PCO on night watch duties.

[53] The investigators found, in a report dated 27 July 2007 that there were inconsistent practices amongst the PCOs in terms of direction and placement of staff on night watch and no consistent practice ensuring that a briefing was given every night. They found that the PCOs were not completing all of the tasks required of them and there was some falsification of documentation relating to the observations of prisoners. Some staff claimed they had been instructed to show on the observation forms that they had completed observations which had not taken place and that those instructions had come from other staff or from the PCOs. They found specifically that Mr Gregory was not performing all that was required of a CSU PCO on the night watch or as the relieving Master Control Officer during that week and set out several instances.

[54] As a result of their report, the same investigators were tasked by Ms Burns, on 31 August 2007, to carry out an investigation into four allegations that Mr Gregory:

- a) may not have maintained proper control over the women's prison during the night watch of 7-8 June 2007;
- b) may not have ensured that all staff carried out the correct routines required of them on night watch;
- c) may not have carried out the tasks required of him which resulted in non-compliance with written instructions and poor decision making on that night watch;
- d) in relation to the timing of observations, pegging security, checks and directions given to staff on the night watch shifts of which he was in charge, he may have been negligent and had contradicted the operating practices of the women's prison.

[55] Mr Gregory was informed by letter on 27 August 2007 that this investigation would be undertaken, that he would be contacted and, if proven, the four allegations would result in disciplinary action up to and including his dismissal.

[56] The investigators had interview notes from their earlier investigation into the two officers who were dismissed and they also carried out interviews with some 21 officers of various ranks. The investigators also sought to speak again with Mr Gregory. He personally, and with the assistance of his CANZ representatives Messrs Paine and Bradley, declined to be interviewed until he had received copies of the statements from other staff and information about the questions to be asked. This exchange took place at a meeting on 14 September 2007.

[57] On about 2 November 2007 the investigators completed their employment investigation without any input from Mr Gregory and provided their report to Ms Burns. Mr Gregory was provided with a copy of what was described as “the employment investigation report” of the investigators, but, I find, not of the full statements of the various officers interviewed.

[58] Messrs Paine and Bradley responded on 7 December 2007 and initially expressed their concern about the lack of information provided, which I understand to be a reference to the overview of statements provided to them and not the full statements containing allegations against Mr Gregory. The response also questioned why other PCOs at the CSU were not interviewed on the matter and then deals in some considerable detail with each of the various allegations referred to in the summary of findings in the employment investigation report. These included issues as to whether Mr Gregory had complied with standing instructions which were embodied in documents called “desk files”, and whether there were uniform practices with the PCOs. Issues were also raised by CANZ of understaffing which, it was claimed, had required Mr Gregory to be creative in finding solutions to these difficulties. They were said to have been exacerbated on the night watch in question because one of the officers under Mr Gregory had mobility issues.

[59] On 19 December 2007, Ms Burns responded raising ten separate allegations arising from Mr Gregory’s night watch conduct. By letter of 17 January 2008 Mr Gregory was advised that his actions constituted serious misconduct and that he was receiving a final written warning (the second warning).

[60] On 25 February 2008 CANZ raised a personal grievance about the second warning.

**The investigation of allegations of harassment, bullying and intimidation (third warning)**

[61] While the investigation into Mr Gregory's performance on the night watch was being conducted, other matters, much wider than what allegedly occurred that particular night, were also the subject of a disciplinary investigation. Those matters consisted of potentially far more serious allegations against Mr Gregory.

[62] On 2 November 2007, Ms Jamieson and Ms C, sent an internal memo to Ms Burns and Warren Cummins, the Northern Regional Manager, in which they stated:

During the recent investigation, staff highlighted some inappropriate behaviours that breached the Code of Conduct and that require action to be taken. In particular this relates to behaviours of sexual harassment, racial harassment and bullying in the workplace by PCO Gregory.

Underneath, we have separated these out into the officer who provided the information and the content of the statement. However, these are indicative only of the behaviours demonstrated or levelled at them and were not fully examined by the Investigators because they did not form part of the Terms of Reference.

[63] This is followed, under the heading "Racial Harassment", first by a quotation from Ms Moors, and then one or two lines from statements apparently made by 13 more members of staff. The memorandum then goes on to state "The Investigators also believe that other staff should be challenged with respect to inappropriate racist comments." The report continued under the heading "Bullying In Workplace" then lists extracts from 17 officers including some who had made statements relating to racial harassment. The memorandum then contains the heading "Personal Vendetta or Crusade" under which extracts from statements of eight officers are set out. It concludes under the heading "Investigators Summary/Findings":

It appear to the Investigators that there is an element of undermining of some staff at different ranks being displayed in the behaviour of PCO Gregory.



[64] Mr Cummins, in evidence, said that he considered this memorandum and decided that Mr Gregory's actions amounted to serious misconduct and disciplinary action was warranted. Consequently he then wrote to Mr Gregory on 19 November 2007, and stated "The Department of Corrections is in receipt of formal complaints alleging harassment, bullying and intimidation by you towards several staff members". The letter stated that the allegations, if proven, would amount to a breach of the defendant's code of conduct and could amount to serious misconduct, justifying disciplinary action up to and including dismissal. A copy of the 2 November memorandum was not sent to Mr Gregory at that time.

[65] Mr Gregory, was by that letter, with immediate effect, placed on special leave on full pay until Thursday 22 November 2007, to give him the opportunity to prepare submissions on why suspension should not occur and to present them at a meeting on that day. The date was later changed to 26 November 2007 and Mr Gregory apparently remained on special leave until that day.

[66] An issue arose at trial as to whether placing persons on special leave requires those officers to be given the opportunity to respond before the leave takes effect. This will be addressed later.

[67] It is also contended on behalf of Mr Gregory that there were no formal complaints addressed to the Regional Manager in writing, but only comments that were solicited by the investigators during their enquiries into what had happened on the night watch. This also is a matter to which I will return.

[68] The 19 November letter was given to Mr Gregory at a meeting held on that day at which Ms Burns also presented the 2 November report on Mr Gregory not carrying out his night watch PCO duties. Mr Cummins said that the presentation of a long service and good conduct medal to Mr Gregory would have to be postponed due to his being under investigation. Mr Cummins said the allegations of bullying, harassment and intimidation against Mr Gregory had come out of the investigation into his alleged breaches of his night watch PCO duties. Mr Cummins said at the meeting they would need to reinterview those officers to see whether any of them

wished to make formal complaints against Mr Gregory, in writing, with their names attached.

[69] At that meeting Mr Cummins also advised he was intending to suspend Mr Gregory in order to protect the officers who might wish to formally complain about him and also to protect Mr Gregory's interests. Mr Gregory was given until 26 November 2007 to make submissions as to why he should, or should not, be suspended.

[70] CANZ wrote a letter to Mr Cummins on 26 November 2007, which was apparently presented to him at the meeting held that day. The letter welcomed Mr Cummins's involvement in the matters and advised that they supported his intention to suspend Mr Gregory in order to protect Mr Gregory from any more unjustified allegations. It also requested that some credible independent investigator be appointed to draw together all of the allegations being made against Mr Gregory. CANZ advised Mr Cummins that such allegations had never been raised in Mr Gregory's previous years of service and had only arisen since the issue involving Ms Moors, which they understood had been withdrawn. It stated:

...Because the allegation was a serious allegation, CANZ would still seek to have that allegation investigated due to its reflection on the good character of PCO Gregory.

[71] At the meeting of 26 November 2007 CANZ also raised the personal grievance over the first written warning.

[72] Mr Cummins advised that the complaint by Ms Moors had been withdrawn by her but would still form part of the investigation. This was also stated in a letter of 26 November from Mr Cummins confirming Mr Gregory's suspension and advising that an independent investigator would not be appointed.

[73] On 21 December 2007 Mr Cummins wrote to Mr Gregory stating that he was enclosing:

the report which contains statements made by staff alleging behaviours by you that were considered as harassing, bullying or intimidating towards them or other staff members.

[74] Although it was not made clear at the hearing, I understood that to be a reference to the internal memorandum dated 2 November 2007 which contained summaries or extracts from other statements. Mr Cummins sought submissions in response to be given on 17 January 2008.

[75] The parties met on 17 January 2008 and at that meeting Mr Gregory was presented with the second warning from Ms Burns relating to the allegations arising out of the night watch. The second warning reminded him that he already had a six months written warning on his file.

[76] At the 17 January meeting CANZ raised concerns about Mr Gregory's ability to provide submissions on the documentation that had been provided and sought disclosure of the transcripts of the interviews with staff. In confirming that request in a letter dated 25 February 2008, Mr Cummins stated:

It is important to note that these additional comments made by staff do not form the basis of the allegations made against you. Furthermore, they were also not an outcome of any further investigation.

[77] The letter went on to state that, as it was CANZ's view that those documents were relevant to enable Mr Gregory to provide a full and detailed response, Mr Cummins would make full disclosure of them. He stated he would do this by including staff transcripts made during meetings with Ms Sagar and forms signed by staff acknowledging their awareness that the statements they had given during the employment investigation would be disclosed to Mr Gregory. He required responses to the allegations to be provided to him by 10 March.

[78] Mr Bradley responded on Mr Gregory's behalf on 10 March 2008. His letter complains that full and detailed allegations had still not been provided, that the information was generalised and vague and therefore they were not able to make a full and detailed response. The letter requested specific dates, approximate times and specific instances of the complaints of bullying and harassment.

[79] Another meeting took place on 13 March. At that meeting, as confirmed by a letter from Mr Cummins dated 27 March, Mr Cummins claimed that the statements provided were specific and there was certainty as to the dates of the alleged

incidents. The letter claimed that the complaints had been voluntary and spontaneous and not created as a result of any questioning or investigation into Mr Gregory's behaviour and stated that it had been noted that Mr Gregory had not denied making those statements.

[80] In his affidavit filed in the Court proceedings Mr Cummins, at paragraph 22, states:

At the meeting with Mr Gregory on 13 March 2008, Mr Gregory stated: "I don't believe I have done anything wrong." When asked if he denied the statements he maintained there was nothing for him to deny.

[81] Mr Cummins's letter of 27 March concluded that as a result of Mr Gregory's actions both staff and management lacked trust and confidence in him, that his behaviour could not continue and that he would be offered harassment training by an independent expert advisor. It noted that Mr Gregory and CANZ had raised the possibility of an offer for him to transfer as a PCO to the Springhill Correctional Facility (Springhill) but "having considered this, I do not believe this to be viable". Instead, it expressed Mr Cummins's "preliminary view" that Mr Gregory would be returned to the women's prison, subject to him successfully completing harassment training, and his performance would then be closely monitored for twelve months. This would be a final written warning (third warning).

[82] CANZ responded in writing on 11 April 2008, endorsing Mr Cummins's preliminary view that termination of employment was not justified. It also alleged that the complaints were not voluntary or spontaneous as they were obtained in confidence as part of another investigation. It still complained that transcripts of the interviews had not been provided, but only edited renditions. It also confirmed that Mr Gregory did deny saying those statements alleged.

[83] On 17 April Mr Cummins confirmed his preliminary view. A personal grievance was lodged on 1 July stating that no admission had ever been made by Mr Gregory who had persistently questioned the validity of the basis for the investigation, the process used to investigate, and the conclusion of harassment reached by the employer.

## **The dismissal**

[84] On 23 July 2008 Vicki Aitken, the Assistant Regional Manager, wrote to Mr Gregory regarding allegations of a breach of the second principle of the Department's code of conduct, by his communicating inappropriately with a prisoner (who, it was agreed by counsel would be described as "Prisoner B"), "and associates". The second principle was said to refer to the responsibility of staff "to maintain appropriate boundaries with offenders".

[85] Mr Gregory was given a copy of the guidelines of the employment investigation which Mrs Aitken was instigating, and which was to be led by Mr Sherlock who, it will be recalled, had carried out the investigation which led to the first warning. Mr Gregory was placed on special leave on full pay until Monday 28 July to give him the opportunity to prepare submissions as to why suspension on full pay should not occur while the employment investigation was being conducted. He was invited to a meeting on Monday 28 July 2008 where he was to respond to the issue of suspension.

[86] On 28 July, after a meeting with Mr Gregory and his CANZ representative, he was suspended by Mrs Aitken and this was confirmed in a letter meant to be dated 30 July 2008, but dated 28 July, in error. The reasons stated in that letter for his suspension included that during the course of its investigation, the Department wished to ensure "appropriate boundaries with offenders to maintain the security and minimise risk" at the women's prison. It was also to place bounds on Mr Gregory's activity with the Department's computer programme, the Integrated Offender Management System (IOMS) which Mr Gregory was alleged to have accessed without authority. This was said to have occurred when he returned to work by his looking up a person mentioned by Prisoner B and his "associate" (who counsel agreed would not be named and who I will refer to as "Ms A"). It was also said to prevent the risk of Mr Gregory "getting got". My understanding is that "getting got" is Departmental jargon which refers to situations of corrections officers being caught up in relationships with prisoners and their associates which could lead them into giving preferential treatment or even into unlawful activities such as smuggling

items into prison. The defendant has conducted seminars for staff on how prison officers can avoid “getting got”.

[87] To avoid any possible breaches of prison security, I will out of necessity be somewhat cryptic about the source of the allegations against Mr Gregory, although it is well known to the parties. As a result of information received, a Professional Standards Unit (PSU) of the Department had carried out a preliminary investigation which gave rise to Mrs Aitken’s concerns.

[88] On 30 July 2008, CANZ wrote in response to the allegations that Mr Gregory may have been communicating inappropriately with Prisoner B and his associates and asked to see any such allegations. The letter observed that it was the Department’s legal obligation to demonstrate why it was that Mr Gregory should be suspended and asked to review all transcripts and to review the IOMS activity on the dates it was alleged Mr Gregory had improperly accessed it. On 4 August, Mr Gregory, while represented by Mr Bradley, provided a statement at an interview conducted by Mr Sherlock.

[89] As a result of that interview and his investigations, Mr Sherlock concluded in his report to Mrs Aitken that no substantive evidence was presented to confirm the allegation that Mr Gregory had communicated inappropriately with Prisoner B. (I shall therefore not set out any more detail which might identify Prisoner B except insofar as it is necessary in determining the justification for Mr Gregory’s dismissal).

[90] It will suffice to note at this point that Mr Gregory had known Prisoner B as a prisoner under the care and control of the Department for some 14 years at the men’s prison and had an extensive working relationship with him. He told Mr Sherlock he had also been introduced some eight or more years earlier to a person described as Prisoner B’s partner, namely Ms A, who Mr Gregory knew by her first name. It was Mr Gregory’s communications with Ms A that became the main focus of Mr Sherlock’s investigation. The following is based on Mr Gregory’s own interview statement he gave to Mr Sherlock.

[91] Mr Gregory said he would have spoken to Ms A 15 times in 8 years. On one call they discussed the sale of her car and who Mr Gregory had used to sell his car, as well as general gossip. On another occasion he explained he was on leave building a home unit and she advised that her brother-in-law was a carpet layer and had access to good priced carpets. Mr Gregory claimed that he had already sourced his carpet, but thanked her. The offer was repeated by Ms A at a time when he was doing up his house, but not accepted for the same reasons.

[92] In about March 2008 Mr Gregory said that he had missed a call from a woman who was very distressed and upon returning the call he was diverted to his answer service and then knew it was Ms A who had called. He had tried to return the call on a number of occasions on his way home but to no avail. Later that week, Ms A phoned, got through to him and advised him that she had been arrested for drugs, and something to do with [name redacted at the request of the defendant with no objection from the plaintiff and substituted with the words "the Gang"] which I was given to understand was a local gang.

[93] Ms A advised Mr Gregory that she was not guilty and that she may have got him into trouble because the police had taken her phone and his number was on it. She was very upset because she had lost her children and her house. She claimed the police had carried out a search warrant at her house and found something behind a wall in her basement which she claimed was not hers. She believed it to be the property of the previous tenant, whose name she gave to Mr Gregory, (I shall refer to him as Mr X) and who she said was named on the search warrant. She asked him if he had heard of Mr X as he was some sort of a drug king pin. Mr Gregory told her that he had no idea who he was but that he would ask around, but he did no more. He advised her to keep a record of all events and to let her lawyer know of all the facts as they happened.

[94] Mr Gregory's statement said that days after he returned to work on 28 April, something jogged his memory of his previous conversation with her and, suspecting there might be a link as he had a few members of the Gang in his unit at present, he then logged onto the IOMS and searched the name of Mr X but no records or information were available. He says he took that matter no further. He said that at

no time did he offer any information to Ms A or any third party. He claimed that the last conversation with Ms A took place within a couple of days of her being arrested on 31 March and he did not access IOMS until 5 May 2008. He also claimed that Ms A had definitely not asked him to look up Mr X's name.

[95] Mr Gregory was also asked by Mr Sherlock whether as Ms A was out of accommodation and had nowhere to stay, Mr Gregory had made an offer to let her have one of his rental properties to use. He replied:

No, I have rental properties and I have my own house. But she couldn't use it because she has a dog. So it was never up for grabs. But we did talk about it.

Mr Sherlock asked Mr Gregory:

You mentioned you went around to see her once. How long ago was that?

JG: just after she was arrested.

He was then asked by Mr Sherlock:

So you just went around there to talk about personal issues?

JG: We stood outside, we just talked about things in general and who lawyers (mumble) and I said (blank) was no slouch and to be honest with (blank). And if she had done anything put your hand up now. Usual bullshit you go through and again I re-iterate there is nothing wrong with me going around there Tom. She is a member of the public until convicted and I will not change the way I act for anybody in that relationship.

[96] "Tom" is a reference to Mr Sherlock. Mr Gregory also confirmed that he did not tell his manager about his contact with Ms A. He told Mr Sherlock that he gave the matter of advising his manager some thought at the time Ms A was arrested and stated:

I did give that some thought but then she is innocent until proven guilty and even if she had been convicted then I would have had to say something for obvious reasons. And that is where I decided the line was drawn. At the moment she is accused of it, if she is convicted I would have said something then because as the boss has already said there is a good chance she will be coming to my unit. ... I don't give a rats arse, I'll call anyone I like and that's what I do... (laughs) I don't believe I have done anything here wrong at all...

[97] As to his access to IOMS, Mr Gregory stated:



I am guilty of that. I did that right or wrong. It was for no malicious reason it was for interest and I definitely did that...

I didn't pass that information on, it was purely interest and I do believe that was inappropriate, now. (laughs) and if I had not been caught it would not have been inappropriate. Sorry can't tell you any more than that, I did definitely do that.

[98] On his behalf, CANZ wrote to Mrs Aitken on 8 October stating that Mr Gregory had, on a handful of occasions over 15 years, conversed with Ms A and had responded to a telephone conversation from Ms A:

... who was seeking legitimate information or help and advice with the normal problems faced by a member of the public whose life has been affected by a relationship with a sentenced prisoner.

[99] The 8 October letter also states that Mr Gregory admitted that he stood in the public street in front of Ms A's home and gave her normal advice about the problem she was having, as above. It also claimed that he had accessed IOMS for work purposes. The letter claimed that it was not sufficient to quote from the code of conduct without specifying exactly how the alleged actions had contravened it.

[100] On 13 November 2008, Mrs Aitken wrote to Mr Gregory at some length, providing him with her preliminary views based on the outcome of the employment investigation. The allegation that he had communicated inappropriately with Prisoner B was found not to have been substantiated because there was no evidence of direct communication between them.

[101] Mrs Aitken stated that the allegation that he had communicated inappropriately with Prisoner B's partner, Ms A, had been substantiated and that his communications were in breach of the Department's code of conduct. Mrs Aitken stated in the letter that she did not accept Mr Gregory's contention that his interactions with Ms A should be treated the same way as his interactions with other members of the public because she first became known to Mr Gregory as Prisoner B's partner. It noted that the later contact had been after Ms A had been arrested for an offence which could have led to a custodial sentence at the women's prison where he was a PCO. It stated:

Your involvement with her after her arrest clearly potentially places you and the Department at high risk of compromised integrity or perceptions of compromised integrity should this situation occur.

[102] It referred to various parts of the code of conduct and that section of the letter concluded by noting that Mrs Aitken found his statement in the investigation report that “I will not change the way I act for anybody...” very concerning. She stated that this indicated to her that he was unwilling to learn or change in regard to his involvement with Ms A or any other arrested potential prisoner he might know or meet. She stated this further adversely impacted on her trust and confidence in Mr Gregory.

[103] As to the allegation that Mr Gregory had improperly accessed IOMS, Mrs Aitken stated that she had formed the preliminary view that this allegation had been substantiated and was in breach of the code of conduct. She concluded:

I would also note that your statement to the investigator regarding your use of IOMS for non-work purposes, that “if I had not been caught it would not have been inappropriate”, very concerning. It indicates to me that you might access IOMS again if you were confident you would not get caught. The implication of your statement impacts on my trust and confidence in you.

[104] The letter also stated:

In considering my preliminary views on the disciplinary responses to my findings I am also compelled to take into consideration your disciplinary history of the past 18 months and the seriousness of those behaviours. That is, that you have two current final warnings on your file, both for issues of serious misconduct, and both of which have significantly eroded the Department’s trust and confidence in you.

[105] CANZ responded on Mr Gregory’s behalf on 28 November, vigorously disputing her preliminary views, asking for the guidelines referred to in the previous letter, stating the third final written warning evolved from a malicious complaint, and

Finally, it is hard to avoid noticing that after 20 odd years of service Jimbob only met difficulties when he went to the women’s prison; trust and confidence only then became an issue. A good employer would recognise that and consider a transfer from that environment as opposed to dismissal.

[106] The final decision was given by Mrs Aitken in a letter dated 28 November 2008 which confirmed her preliminary views, referred to CANZ’s further

submissions and announced the decision that dismissal without notice that day was the appropriate outcome.

### **Disadvantage grievances**

[107] It was common ground that for the plaintiff to have a valid disadvantage personal grievance claim under s 103(1)(b) of the Act, he must prove that his employment, or one or more conditions of his employment, was affected to his disadvantage. As with an unjustified dismissal claim the burden then shifts to the defendant under s 103A, to establish that the defendant's actions and how the defendant acted, were what a fair and reasonable employer would have done in all the circumstances. That test has subsequently changed but this was the test in force at the time of the warnings and the dismissal.

[108] Although 'disadvantage' is not defined in the Act, any disciplinary action, including warnings, can constitute an unjustified disadvantage providing such action is unjustified.<sup>2</sup> It is accepted in the present case that all of the warnings issued to Mr Gregory were disadvantageous and the issue is whether the defendant can discharge the burden of justifying them.

[109] I accept the submission of Ms Price, counsel for the defendant, that in assessing the procedure followed by the employer in reaching its decision to take disciplinary action the investigation will not be subject to "minute or pedantic scrutiny".<sup>3</sup> Rather, the Court should have objective regard to fairness from the perspective of both parties. The Court has, subsequent to the introduction of s 103A, observed that there needs to be a balanced assessment of both procedure and substance which may mean that what the Court of Appeal has termed "procedural infelicities"<sup>4</sup> will not be determinative of personal grievance claims.<sup>5</sup>

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<sup>2</sup> *Alliance Freezing Company (Southland) Ltd v NZ Amalgamated Engineering etc IUOW* (1989) ERNZ Sel Cas 575 (CA); *Clark v Northland Polytechnic Council* [1999] 1 ERNZ 270.

<sup>3</sup> *Air New Zealand v Sutherland* [1993] 2 ERNZ 10 at 18.

<sup>4</sup> *Waitakere City Council v Ioane* [2005] ERNZ 1043, [2006] 2 NZLR 310 (CA) at [28].

<sup>5</sup> *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 8 NZELC 98, 793 at [3]; *Clarke v AFFCO NZ Ltd* [2011] NZEmpC 17 at [19].

## **Justification of first warning**

[110] Mr Ryan on behalf of the plaintiff attacked the first warning in several respects. The first was the confusion over the time when it was alleged Mr Gregory left the site. In Ms Burns' letter of 17 July 2007, the time of leaving the site is referred to twice as approximately 17.30. This time appeared in Mr Sherlock's report along with the later time of approximately 19.15. The plaintiff's position is that all his submissions were then provided on the basis of that time. Ms Burns, in her letter of 27 August, found there were discrepancies in Mr Gregory's submissions and that he had left the site at approximately 19.20 (without permission) and returned five minutes later. This caused her to issue the first warning.

[111] This, on Mr Ryan's submission, invalidated some of the earlier explanations from Mr Gregory and this was put to Ms Burns by CANZ. Whilst Ms Burns acknowledged the typing mistake, she had concluded, in her letter of 12 September 2007, that Mr Gregory had provided an inaccurate account of having sought permission from his unit manager, Mr Wiechern, and the on-call unit manager, Mr Galbraith and therefore she would not be reviewing the disciplinary sanction. Ms Burns concluded that both Mr Galbraith and Mr Wiechern denied having given permission to Mr Gregory to leave the site.

[112] Mr Ryan referred to an exchange in his cross-examination of Ms Burns when she confirmed that she had given evidence to the Court that Mr Wiechern had told her that he did not give Mr Gregory permission to leave the site. It was put to her that she had told the Employment Relations Authority that when she had spoken to Mr Wiechern he had told her that he could not remember giving permission. Ms Burns claimed that at a meeting where Mr Gregory was present, Mr Gregory claimed that he had got permission from Mr Wiechern and Mr Wiechern had replied "I did not give that permission". However, when minutes of that meeting were put to her, she could not find anywhere where Mr Wiechern had said "I did not give that permission". She accepted that it should have been there, if it was said.

[113] Ms Burns accepted that the Authority was accurate in its finding at [66]:

I also accept it is more likely than not that inquiries were made of the unit manager and the on-call manager although their responses were not clearly documented. Ms Burns did make an error in later asserting that the unit manager had not given Mr Gregory permission to be off-site because the evidence on that point was not that unequivocal. Rather the unit manager said he could not “recall” giving permission.

[114] Subsequent enquiries of Mr Galbraith indicated that he could not recall whether or not permission was granted, a far less equivocal position which did not fatally undermine Mr Gregory’s explanation as Ms Burns appears to have concluded. Messrs Galbraith and Wiechern, either of whom may have provided the necessary permission for Mr Gregory to leave the site for an appointment, were not interviewed by Mr Sherlock as part of his investigation. Although Mrs Burns appeared to have spoken to both Mr Galbraith and Ms Wiechern, no formal record of their responses was recorded. Mr Galbraith in his evidence to the Court, thought he may have said he did not give permission. This should have been clarified at the time with proper enquiries.

[115] Mr Gregory’s contemporary explanation was that when the date of a requirement to be off-site became known, permission to leave was obtained at the earliest opportunity so that coverage could be organised. He claims to have known of the appointment, which would have required him to leave the site, some time considerably in advance, and that is when he obtained the permission. His evidence was that when he was about to leave the site in his car, he received a telephone call on his cell phone advising him that the appointment was cancelled and he immediately returned the car to the carpark and himself back into the secure part of the prison.

[116] The issue of whether he had advised the officer below him of his intention to leave and had left behind his radio and keys appears to have been bedevilled by the confusion of the actual time of his alleged departure. Mr Gregory, some months after the events in question, when giving his explanation, stated he left his keys and radio and control of the prison with the person immediately below him in the hierarchy, who he recalled was on duty at 5.30 pm. That named person was not on duty at 19.30. Because that officer was not on duty at 7.30 pm, Ms Burn’s rejected Mr Gregory’s explanation. She did not, however, appear to have interviewed the

officers who were on duty at 7.30 pm to see if any of those officers could recall Mr Gregory leaving behind his keys and radio, or leaving an officer in charge during his temporary absence.

[117] I find that all of these matters should have undermined the certainty that Ms Burns expressed that Mr Gregory had left the site without permission and without leaving another officer in charge. Particularly Messrs Galbraith and Wiechern, should have been the subject of further interviews and formal written statements. That did not take place.

[118] There was also an issue raised at the time, I find, by CANZ on Mr Gregory's behalf, as to whether he had actually left the prison site in his short drive from the prison car park to the cul-de-sac on Hautu Drive. It was arguable that this area was prison property although it was outside the security fence. This explanation placed the onus back onto the defendant at the time to establish on balance whether he had left the prison site. If there was an equivocal issue about this matter then it was inappropriate for disciplinary action to be taken until it was resolved. In this regard, the matter was not unlike *Sky Network Television Ltd v Duncan*<sup>6</sup> in the Court of Appeal.

[119] The issues I have found proven, go not merely to procedural fairness but also to substantive justification. I do not understand there to be any issue taken by the plaintiff that if he had left the site without permission and without having arranged for someone to cover for his important duties, that this would have amounted to misconduct and would have justified the first warning. I find however, that a fair and reasonable employer would not have reached that conclusion given the confusion that had arisen from the initial incorrect statement of the time and that the investigation needed to be reopened with formal statements obtained from Messrs Galbraith and Wiechern regarding whether they gave permission for Mr Gregory to leave.

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<sup>6</sup> [1998] 3 ERNZ 917 (CA) at 923-924.

[120] The defendant, having failed to discharge the burden of showing that the first warning was justified, Mr Gregory's unjustified disadvantage grievance has been established. The first aspect of Mr Gregory's challenge therefore succeeds.

### **Second warning**

[121] The letter of 17 January 2008, which concluded that Mr Gregory's actions amounted to serious misconduct, referred to nine incidents "which alleged that you had been deficient in the performance of your PCO duties". However, the letter does not expressly state that the allegations were found to have been proven. The letter does not purport to set out findings but does set out six allegations of breaches of the code of conduct. The plaintiff contends that all of these allegations were new and had never been previously put. In the letter of 31 August, four allegations were made and reference was made to one alleged breach of the code of conduct which is not referred to in the letter of 17 January.

[122] Mr Ryan contended that the defendant had not followed its own human resources policy for managing performance and misconduct issues, which required allegations to be put and, if new information disclosed during an investigation is to be relied upon, this should also have been put to the plaintiff for rebuttal or explanation and that this simply did not happen. There was a further complaint that what had been received by CANZ were redacted statements or summaries of statements rather than the full statements of the interviews with staff in relation to the allegations.

[123] On the basis of these alleged failures, Mr Ryan contended there was no substantive justification, particularly because other CSU PCOs were not interviewed as to their practices and Mr Gregory had claimed his practices were consistent with the other PCOs. This was particularly necessary, he submitted, because the original report into the two dismissed officers had found that there were inconsistent practices between PCOs as to their duties.

[124] Mr Ryan also observed that the order of staff the investigators spoke to in their investigation into the performance issues was illogical. Instead of speaking

with the staff who were actually at work on the night watch on the evening of 7/8 June 2007, the investigators went first to Ms Moors and expanded her statements into issues of harassment. Mr Ryan submitted this undermined the fairness of the investigation into the alleged performance failures.

[125] Mr Ryan submitted that the initial report of 27 July 2007 into the two PCOs who were dismissed, had made certain recommendations, in particular about creating new desk files, but the old desk files still existed at the time of the investigation.

[126] Mr Ryan referred to the divergences in practice that were disclosed in the July investigation report, against a background that the women's prison had only been commissioned a very short time before this investigation and there were likely to be teething problems. He referred to Ms Burns's evidence that the policies and procedures in the desk files were live documents and always being updated so that although Mr Gregory accepted he had made mistakes, in the context of the other matters that were identified by the investigators, a fair and reasonable employer would not have given Mr Gregory a final written warning.

[127] One matter about which Mr Gregory expressly agreed he had made a mistake was being the sole person in the master control room on the night watch. There was also an issue whether he should have been out on patrols rather than working from the master control room. Mr Ryan pointed out however, that there was no specific regulation which embodied these requirements. Mr Ryan also observed that one of the findings in the investigation report was that Mr Gregory had not carried out his reports as "the relieving Master Control Officer" which seems to accept that the CSU PCO could also be a relieving control officer. This was also inconsistent, he submitted, with Ms Burns's finding that under no circumstances could a PCO be in master control. Those issues had arisen on that particular night watch because one of the PCOs was recovering from a serious ankle injury and she had provided a statement that was supportive of Mr Gregory's position.

[128] Mr Ryan took issue with the way in which the material in relation to this enquiry was handed to Mr Gregory at a meeting Mr Cummins was having concerning the next set of allegations of bullying and harassment, which resulted in



the third warning. He submitted this should have been done separately at another meeting at which notice was given that its purpose was to present these findings and discuss them, rather than handing them out in the midst of an enquiry into another matter. CANZ had referred to this problem in its letter of 26 November 2007.

[129] Mr Ryan also took issue with Ms Burns's response in her letter of 19 December where she stated:

The practice of PCO's, other than PCO Gregory letting staff go early without their relief being present, has not been brought to the attention of management, and was not raised as an issue during the investigation.

[130] Mr Ryan observed that the original investigation resulting in the 27 July 2007 report was into practices of PCOs generally, as well as those of Mr Gregory. The divergence of practices adopted by other PCOs, who had come from diverse prisons to the women's prison, had been an issue raised during the enquiry by CANZ but which was not followed up by the defendant.

[131] Ms Price submitted that the final written warning of 17 January, in relation to the failure to carry out the PCO duties, was procedurally and substantively justified because these issues had arisen out of the enquiry into the two dismissed officers and the investigators carried out a subsequent investigation which was full and thorough. She observed that the investigators did not consider it necessary to interview officers that did not work with Mr Gregory on the particular night watch.

[132] That however, does not explain why Ms Moors was first approached as she was not involved on the night watch of 7-8 June which was the actual focus of the investigation. The answer was apparently either because she had previously worked with Mr Gregory on night watch or her name had come up in a previous interview as having relevant information. It is also of note that Ms Jamieson who worked at the women's prison, made all the necessary arrangements for the investigation of witnesses even though she was new to the investigation process. The evidence established that Ms Jamieson was aware of Ms Moors's withdrawn complaint about the 17 December 2006 meeting.

[133] I did not find the explanation for why Ms Moors was interviewed first satisfactory. This action of Ms Jamieson tends to support Mr Gregory's underlying view that there was a concerted effort being made to obtain adverse information on him which was detrimental to his future employment with the Department.

[134] As to the changes in the provisions of the code of conduct (the code) relied on for the disciplinary action in the defendant's letters, Ms Price submitted that Mr Gregory was well aware that he was alleged to have breached principle 2 which was set out in the initial 17 January letter. That does not, however, answer the contention that the letter, deciding the allegations were proven, raised completely new alleged breaches of the code which had never previously been put. I note that the original allegation of the breach of the particular principle of the code in the first letter was not repeated. There are also difficulties in that the final letter, dated 14 March 2008, does not actually make findings. The allegations which are set out are very generalised and at least one, that Mr Gregory was not being approachable to staff for guidance, appears to have been new and was never previously put for Mr Gregory's explanation.

[135] Ms Price submitted there was no disparate treatment in that the alleged breaches by other PCOs were not investigated. Ms Price referred to *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)*<sup>7</sup> as the leading Court of Appeal case on disparity of treatment. When this allegation is raised the Court must consider three separate issues:<sup>8</sup>

- (a) Is there disparity of treatment?
- (b) If so, is there an adequate explanation of the disparity?
- (c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[136] Ms Price submitted that Mr Gregory was not treated disparately and whilst the defendant accepts that there was evidence to suggest that other PCOs carried out their duties in different ways, she submitted that there were no examples of other PCOs allowing only one person to be present at the master control, or of allowing

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<sup>7</sup> [2005] ERNZ 767 (CA).

<sup>8</sup> At [45].

officers to leave the site earlier without relief or allowing officers to falsify logbook records. These, she submitted, were serious examples of Mr Gregory failing to perform his duties which affected the security of the women's prison and no allegations were made in the course of the investigation that other PCOs behaved in this manner. She therefore submitted that Mr Gregory was not subjected to disparate treatment.

[137] Ms Burns in the course of her examination-in-chief, said no other PCOs (presumably apart from Mr Gregory) allowed, knowingly, documents to be falsified by staff knowing that checks had not been carried out. That however, was not an allegation Ms Burns apparently found proven for it is not referred to expressly in her letter of 17 January 2008 containing the final warning. Ms Burns also conceded in cross-examination that although the two dismissed officers alleged that Mr Gregory had condoned their falsified entries, she could not find, categorically, that Mr Gregory had condoned them.

[138] As to the other PCOs not being investigated, there was clear evidence that in the course of the enquiry, CANZ, on behalf of Mr Gregory, raised allegations that other PCOs had disparate practices which may not have complied with the desk files. These allegations were never investigated. No other PCOs were disciplined about these matters.

[139] I find that there was an element of disparity of treatment and an inadequate explanation for this. This on its own may not have been sufficient to prevent the defendant justifying the warning, had it not been for the other deficiencies advanced by Mr Ryan, whose submissions I accept.

[140] Although Ms Burns had grounds for considering that some aspects of Mr Gregory's conduct on the night watch of 7-8 June 2007 were not in accordance with accepted practice, in particular in relation to his presence in the master control room, and letting staff go early, I am not satisfied that all of the allegations set out in the warning letter were substantively justified.

[141] The investigator's report had referred to the role of relieving Master Control Officer and there was evidence available to the Department at the time that other PCOs also let staff go early. There was also evidence that the way Mr Gregory supervised pegging duties and the monitoring of prisoners was the same as other PCOs. PCOs were not interviewed to confirm this but Mr Gregory was singled out for adverse findings.

[142] In these circumstances, a fair and reasonable employer would not have issued Mr Gregory with a final written warning. I consider that a fair and reasonable employer would have examined the practices of the other PCOs and have ensured future compliance with the new desk files that were created towards the end of the investigation. This may have justified a warning to Mr Gregory for the performance failures he conceded on the night watch in question but I conclude that the defendant has failed to discharge the burden of showing that a final written warning was justified.

[143] Mr Gregory's challenge on this aspect is successful and I find his disadvantage grievance relating to the second warning proven.

### **The third warning**

[144] While the plaintiff was trying to respond to the investigation into the conduct of his PCO duties, he was advised on 19 November 2007 that the defendant had received formal complaints which alleged harassment, bullying and intimidation by him towards several staff.

[145] It is common ground that contrary to what was asserted in the 19 November letter that no "formal complaints" in the sense of complaints addressed in writing to the regional manager as contemplated by the code of conduct had ever been received. What was being addressed were allegations that had come up in a previous, arguably unrelated, investigation. This allegation of formal complaints was misleading.

[146] CANZ had also observed in response that Ms Moors had previously withdrawn her allegations and sought written confirmation of that. Mr Cummins, by letter of 26 November confirmed that the allegation of Ms Moors had been withdrawn by the individual but asserted that it would still form part of the investigation. Mr Cummins had acknowledged that interviewees would be reinterviewed for the purpose of conducting the investigation into the complaints of bullying, harassment or intimidation. That was never done, the Department taking the view that there was no wish to make those interviewees re-live the matters they had previously raised.

[147] In relation to the incident involving Ms Moors, it is not clear, unfortunately from the plaintiff's point of view, that a formal request for an investigation was made in a timely fashion. But it is clear that he contested the allegations put to him orally by Ms Sagar on 22 December 2007 and said that he definitely wanted to take the matter further. He continued to maintain that position. A full investigation of the serious allegations concerning what took place at the 17 December meeting should have involved all the staff who were present, one of whom provided a statement to CANZ that the allegations were untrue.

[148] Although it was not the subject of an independent allegation of a disadvantage grievance, Mr Ryan took issue with the Department's procedure of immediately standing down a person subject to an enquiry on "special leave" to consider why that person should not be suspended during the enquiry. It is not necessary to resolve this issue for this particular grievance because CANZ took no issue at the time about special leave and it is now too late to do so and CANZ accepted that the suspension was appropriate because it protected Mr Gregory from further allegations.

[149] I express the preliminary view that there is a real issue about placing persons on special leave without any prior notice, especially if it is in the middle of a shift. There may be occasions when this can be disadvantageous to the affected employee, especially if this is done without any opportunity for prior explanation. It is difficult to see the difference between compulsory special leave on pay and a suspension.

Suspensions have been the subject of a number of Court decisions which have referred to the need to adopt a fair procedure before the suspending of an employee.<sup>9</sup>

[150] At the meeting on 17 January 2007, CANZ raised concerns about Mr Gregory's ability to provide submissions without the disclosure of the full transcripts of the interviews made by the defendant's staff when speaking with Ms Sagar. As I have found, in his letter dated 25 February 2008, acknowledging what was said at that meeting, Mr Cummins stated:

It is important to note that these additional comments made by staff do not form the basis of the allegations made against you. Furthermore, they were also not an outcome of any further investigation.

[151] The letter goes on to say that there was no intention to withhold any information and "staff transcripts during meetings of staff" with Ms Sagar were provided together with forms signed by the staff stating their awareness that their statements given during the previous employment investigation, would be disclosed to Mr Gregory.

[152] There was a major issue between the parties as to whether full statements were provided to Mr Gregory prior to the Authority investigation when, it is common ground, full unedited statements were provided.

[153] I find, on balance, that the defendant has not discharged the onus of showing that a full record of all the statements made by the staff which formed the basis of the third warning were provided to Mr Gregory, prior to the Authority investigation, which was far too late. There is a real issue as to whether sufficient information was therefore provided by the defendant to enable Mr Gregory to make an adequate response. Certainly what were described as the redacted statements, or the summaries of them, gave the flavour of the allegations but did not provide details of times or places, or in many cases, the precise statements alleged to have been made by Mr Gregory or the actions he allegedly took. Several of the statements were accounts by staff of what they alleged they had been told by other staff and could not therefore be regarded as totally reliable.

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<sup>9</sup> See *Taiwhiwhirangi v Attorney-General in respect of the Chief Executive, Department of Justice* [1993] 2 ERNZ 546.

[154] There was also an issue between the parties as to whether the complaints were “voluntary and spontaneous, not as a result of any questioning or investigation into your allegedly harassing behaviour”, as asserted by Mr Cummins in his letter of 27 March 2008. That letter sets out what the Department had “particularly relied on” and claims they “are specific and there is certainty as to the date the alleged incidents occurred”. Then follows brief summaries of what the seven named officers allegedly said. Only one summary, the one relating to Ms Moors, contains a date, which is shown as “December 2006”.

[155] Ms Price maintained that the summaries contained specific and detailed allegations and were not solicited by the investigator. She submitted that, given Ms Moors’s response, the investigators considered it necessary to talk to other officers who were allegedly present when Mr Gregory made the racist comment to Ms Moors to which I have previously referred.

[156] However, having seen the full statements supplied to the plaintiff at the Authority investigation and the questions that were posed to the officers and having heard the evidence of one of the investigators, Ms Jamieson not having been called, and of Ms Sagar, I am satisfied that the staff concerns were largely solicited, and the main source of those allegations was Ms Moors’s statement. I have already observed it is of concern that Ms Moors was the first person to be investigated in relation to the allegations of what took place on the night watch of 7-8 June, even though she had no relevant information, not having been on duty that night. It was also difficult to avoid the view that the investigators were tasked with soliciting that information as a result of the original comments from Mr Sherlock in relation to the investigation which led to the first warning, that staff had expressed some concerns about Mr Gregory’s bullying behaviour towards them.

[157] Mr Ryan submitted that the decision to go to Ms Moors first raised significant elements of bias and predetermination especially as the same investigators had been involved in the previous investigation in which some of the allegations began to emerge. There is some force in this submission. I also do not understand why no formal steps were taken about Ms Moors’s original withdrawn complaint between December 2006 and August 2007.

[158] I do not accept the explanation that it would have been unnecessarily traumatic for the officers to be have been reinterviewed specifically about their allegations, which arose out of a separate investigation, when dealing with the racial harassment and bullying enquiry. Those interviewees were approached again by Ms Sagar, apparently on Mr Cummins's directions, to confirm their statements and that they understood they would be provided to Mr Gregory. This would have been an occasion to provide more formal signed statements providing more specific details of when the alleged misconduct had taken place.

[159] It is also clear from the interviewing process that some officers made statements which were exculpatory of Mr Gregory and some made accusations against other officers of equally serious racial slurs and harassment. None of this material was, I find, supplied to Mr Gregory before the decision to issue the third warning was made.

[160] There was an investigation of some of those allegations against some other officers, but none of those officers received final written warnings or indeed any disciplinary action. Some of the serious racist allegations against other officers were not investigated at all. This has raised yet another issue of disparate treatment.

[161] There is also the difficulty that Mr Cummins stated, in deciding to impose a final written warning, that at no stage did the plaintiff deny the allegations. However, at the meeting on 13 March 2008 the plaintiff did state "I do not believe I have done anything wrong" and maintained there was nothing for him to deny. There was also a formal denial by CANZ on behalf of Mr Gregory that he had made the statements alleged against him, because it appeared to have been assumed by the defendant that they had been admitted. Before the investigation was concluded, I find that it should have been clear to the defendant that Mr Gregory was denying having made the statements and in particular the racist slurs he was alleged to have made.

[162] In this context, the defendant submits that Mr Gregory was not active and constructive because he had refused to provide a response. This raises the difficulty which pervaded the preliminary investigations carried out by the defendant in that



complete copies of the statements were not provided. Further, Mr Gregory was invited to respond to the lengthy reports which the defendant's management had not endeavoured to summarise by way of extracting the specific allegations it wished to deal with in a disciplinary context. This left Mr Gregory in the position of having to respond to a great deal of information, some of it not precise or detailed and which had not been the subject of a summary from the manager tasked with determining whether any of that material amounted to specific examples of misconduct.

[163] The other major issue arising from this particular enquiry was the decision of Mr Cummins not to transfer the plaintiff to Spring Hill Prison where Mr Gregory had arranged a position. Instead, Mr Cummins elected to send him back into the environment where management had found him to be guilty of the serious misconduct of racial harassment, bullying and intimidation of staff, thereby of putting the health and safety of members of his staff in jeopardy. Some staff were allegedly expressing fear at Mr Gregory's return to the workplace. Whilst the harassment training Mr Gregory undertook produced a positive result, this did not overcome the impact of Mr Gregory's alleged conduct, as became clear when Ms Moors gave her evidence to the Court. Mr Ryan submitted that this was not the action of a reasonable and fair employer and it also supported the plaintiff's belief that he was the subject of a united effort by the defendant to dismiss him from his employment.

[164] Mr Ryan submitted that the sending of the plaintiff back to the same environment where there was such a degree of hostility could not be justified by the Department and that the only reason such action would be taken by an employer was to set up the employee to fail with the underlying desire to dismiss him.

[165] Mr Ryan submitted that the decision to send the plaintiff back to the women's prison undermined the substantive justification and the final written warning and corroborated to a significant degree the overall objective of the defendant to dismiss the plaintiff by creating, over a short period of time, an unfortunate disciplinary history.

[166] I do not accept that this was the only or even the actual reason for returning Mr Gregory to the women's prison. Mr Cummins explained it as not wanting to send the problem of inappropriate conduct of an officer to another prison. It was, I find, an unfortunate decision in all the circumstances which would have jeopardised Mr Gregory's future employment.

[167] My conclusion is that a fair and reasonable employer did have a great deal of material which would cause it grave concern about the behaviour of Mr Gregory and other PCOs. This raised an important issue whether he should continue in what was becoming a seriously dysfunctional environment when he was involved. There was the opportunity to move Mr Gregory into another environment far more similar to his previous involvement at Mt Eden where he had had no difficulties over many years. This raises serious questions about the appropriateness of the defendant's response to issue him with a final written warning and send him back to the women's prison.

[168] Mr Gregory returned to work at the women's prison and attended a workshop on harassment on 23 April 2008 which produced a positive report concerning his response. He continued to deny that he had used the racial slurs alleged, although he had agreed he had said "it's a colour thing" and had raised his voice to his team members on various occasions. He accepted that that may amount to harassment.

[169] I find that there was disparate treatment and that other PCOs, who were not disciplined, had engaged in conduct very similar to that alleged against Mr Gregory. That disparate treatment against a background of warnings, which I have found to be unjustified, undermines the defendant's burden of justifying this final warning. There was also the problem which arose in not providing the actual statements with sufficient detail for Mr Gregory to be able to respond and the wrongful conclusion of Mr Cummins that there had been admission by Mr Gregory of having made the racial slurs alleged.

[170] There was, however, sufficient material for a fair and reasonable employer to undertake remedial action at this point, although clearly matters had been allowed to drift within the prison from Ms Moors's initial complaint about the events on 17

December 2006. The provision of harassment training earlier may well have avoided this situation.

[171] For all of these reasons, and accepting, as I do, the thrust of Mr Ryan's submissions, I find that a fair and reasonable employer would not have imposed a final written warning on the material available to it as a result of the disciplinary investigation.

[172] The plaintiff's challenge on this aspect is also successful and his disadvantage grievance is upheld.

### **The Dismissal**

[173] Mr Ryan submitted that the plaintiff's dismissal was unjustified on the following grounds:

- (i) the defendant failed to carry out a full and fair investigation into the allegations raised against him;
- (ii) the defendant failed to raise concerns with the employee prior to dismissing him;
- (iii) the defendant failed to give the plaintiff a reasonable opportunity to be heard in relation to the allegations;
- (iv) the defendant did not genuinely consider the plaintiff's explanation in relation to the allegations;
- (v) the defendant failed to consider alternatives to dismissal.

[174] In relation to the investigation, the first issue raised by Mr Ryan was that the plaintiff was stood down on special leave for a period of time to enable him to make submissions in relation to a possible suspension, that this was done unilaterally and he was not given any opportunity to comment on the decision to stand him down. This was not raised by CANZ at the time and it is too late to raise this issue for the first time in final submissions. It would have been subject to the 90 day limit on raising personal grievances contained in s 114 of the Act.

[175] Unlike the previous occasions, CANZ took issue at the time with the suspension itself but did not raise a personal grievance within 90 days. The

suspension appears to have been justified and was imposed after Mr Gregory was given the opportunity to respond. I do not consider these matters undermined the procedural substantive justification for the dismissal.

[176] Mr Ryan's principal submission was that because Mrs Aitken was not provided with the statements from Ms A and Prisoner B before making her decision to dismiss, she did not have all the relevant information before her. He submitted that this was fatal to the decision to dismiss. In addition, he submitted that the plaintiff was not provided with copies of those statements prior to being interviewed by Mr Sherlock and that this was contrary to the defendant's human resources manual that makes it clear that all new information should be put to the plaintiff for explanation or rebuttal, prior to any decision being made.

[177] I did not find Mr Sherlock's explanation for failing to provide the transcripts to either Mrs Aitken or Mr Gregory convincing. He mistakenly said Ms A had declined on advice from her lawyer to have a formal interview. When eventually the transcript of the telephone conversation was made available (well after the dismissal) it was clear that this statement did not accurately record Ms A's response which was that she would have to speak to her lawyer who would probably advise her not to say anything. Mr Sherlock also implied that Prisoner B and Ms A would not sign a statement but this was never tested as they were not provided with the transcripts for signature.

[178] Mr Ryan submitted that there was material in the statements of Ms A, and Prisoner B in their interviews with Mr Sherlock that was exculpatory of the plaintiff, and Mrs Aitken never received this.

[179] Ms Price, in reliance on the decision of the Chief Judge in *Henderson*, submitted that material favourable to an employee, which was not provided to the employee would not necessarily undermine an otherwise substantively justified decision. The Chief Judge found:<sup>10</sup>

Unitech did not, however, even tell Ms Henderson of the fact or outcome of these interviews, let alone provide her with copies of the notes of them or

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<sup>10</sup> At [52].

allow her to respond to issues affecting her situation that had emerged from these interviews. Rather, Ms Hawke determined both that Ms Henderson had been guilty of serious misconduct in employment and that this warranted summary dismissal. This is likewise a failing that might, in many cases, be fatal to the fairness of the process. But in this, the essential acts of harassment were admitted and other information gleaned in the inquiry did not affect these.

[180] Ms Price submitted that in the present case where Mr Gregory had disclosed communications with Ms A that was a sufficient basis to find substantive justification and the non-disclosure did not undermine the overall fairness of the investigative process.

[181] The first difficulty with this submission is that the material was not even made available to the decision maker and may or may not have influenced her final decision. The second, difficulty with the non-disclosure of the statements of Prisoner B and Ms A is that Prisoner B denied that Ms A was his partner. This may well have raised an issue as to whether or not the communications with Ms A were with an associate of a prisoner, as the allegations in relation to Prisoner B were found to be unsupported and were not relied on by the defendant for the dismissal.

[182] In Ms A's transcribed statement of her communications with Mr Sherlock, Mr Sherlock agreed that Ms A thought very highly of Mr Gregory. Mr Sherlock had also noted that in his interview with Prisoner B that Ms A was not Prisoner B's partner. Notwithstanding this his report concluded

PCO Gregory has clearly acted inappropriately as a Corrections Officer by maintaining regular and personal communication with a partner of a Prisoner without declaring to his Manager, conflicts of interests and compromising of integrity.

[183] Mr Sherlock conceded in cross-examination that he had been told by Prisoner B that Ms A was not his partner and that they had broken up but he claimed that he did not believe Prisoner B and believed they still had a relationship.

[184] The transcript of the discussion between Mr Sherlock and Prisoner B was somewhat equivocal. At one point Mr Sherlock asked , "she's your partner?" and Prisoner B responded "yep". Later Prisoner B said that he had hung up on Ms A and in colourful language had told her to go away. Mr Sherlock asked "she's still your

partner though?” and Prisoner B replied “yeah, nah we have split up but we got kids and [we’re] off and on, off and on”. It is also to be noted that Prisoner B was still ringing Ms A at the time.

[185] I find it was not an unreasonable conclusion for Mr Sherlock to have reached that Ms A was still in some form of a relationship with Prisoner B, albeit necessarily at a distance as he was still incarcerated. However, if the statements had been provided to Mrs Aitken, the decision maker, she could have made up her own mind on the issue. That opportunity was denied Mr Gregory.

[186] Mr Ryan then referred to Mrs Aitken’s evidence where she confirmed that she was the decision maker and that she had concluded Ms A was not an offender. Mr Sherlock quoted from the code of conduct which requires staff to maintain appropriate boundaries with offenders. The two provisions he quoted concerned persons with whom the officer is related or had a relationship becoming an offender, or where a person with whom an officer was forming a relationship had previously been under the care and control of the Department. These clearly had no application at all to Ms A. Mr Sherlock endeavoured to create a linkage based on the possibility that after her arrest, Ms A might be incarcerated at the women’s prison.

[187] I find that those references to the code did not cover the situation for which Mr Gregory was found guilty of misconduct, namely inappropriately communicating with a prisoner’s partner. Those provisions quoted by Mr Sherlock, and apparently adopted by Mrs Aitken, simply do not cover that situation.

[188] The second principle of the code of conduct, which Mrs Aitken found was breached by Mr Gregory on the basis of Mr Sherlock’s report, requires an officer “to maintain appropriate boundaries with offenders you have dealings with...”, and then sets out what an officer must not do in relation to those offenders. At no stage was Ms A an offender and I find that principle cannot apply to Mr Gregory’s conduct. Indeed Mr Sherlock had found there was no evidence Mr Gregory had communicated inappropriately with Prisoner B and Mrs Aitken adopted that conclusion.

[189] Mr Sherlock was under the impression that the appropriate boundaries with offenders were not just about the interactions with offenders but about a complete package of what an ‘offender’ means and included family and gang associates. So that if a staff member had a relationship with a partner of a prisoner that would be inappropriate.

[190] Mr Sherlock could not point to any document which embodied that change in the definition of ‘offender’, but did make reference as to what he described as the “Getting Got package”. The Court was provided with documents from that package that described the professional boundaries and the awareness that staff should have in their relationship with prisoners. That programme, which it appears Mr Gregory may have attended, does not expressly deal with the situation of his contact with Ms A.

[191] Neither does another document described as “Keeping Safe”, expressly deal with the situation. In dealing with correct behaviour in prisons it does state “Do not enter into a personal or business relationship with a prisoner or their families” and “Never accept a gift from or give a gift to any prisoner or their friends and families. This includes acting on behalf of the prisoner to friends and family and vice versa”.

[192] In her letter summarily dismissing the plaintiff, Mrs Aitken referred to other passages in the second principle of the code of conduct. The first stated:

This principle covers your general obligation to provide quality service to respect the rights of the public, colleagues and offenders, and to refrain from conduct that might lead to conflicts of interest or your integrity being compromised.

[193] This statement followed the first statement of the second principle in highlighted letters “Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public, colleagues and offenders”.

[194] In the course of cross-examination, but not in final submissions, Mr Ryan put to Department witnesses that Mr Gregory’s communications with Ms A were respecting her right to be regarded as innocent until proven guilty and therefore he

was acting in accordance with the principle that he was respecting the rights of the public. I do not accept this contention and consider it was proper that Mr Ryan did not make it part of his final submissions. However, I agree that the principle quoted above from the code does not assist the defendant.

[195] Mrs Aitken's letter goes on to refer to another statement from the code which appears under the heading "Conflicts of interest and compromising of integrity".

You must perform your duties honestly and impartially and avoid any personal, financial or professional situations which might compromise your integrity or otherwise lead to a conflict of interest.

[196] Mrs Aitken reached the view that an experienced officer must have known that his conversations with Ms A were in breach of the code because his communications with an associate or partner of a prisoner were inappropriate and represented a serious conflict of interest in terms of having formed a relationship with the partner of a prisoner under Mr Gregory's care, whom he met when she visited the prisoner. That refers to events that occurred at the men's prison, several years earlier. I have difficulties in understanding how that provision in the code deals with Mr Gregory's communications with Ms A.

[197] Mrs Aitken then concluded that Mr Gregory should have reported his contact with Ms A to his manager at the earliest stage because the code states:

You should avoid any financial or other interest or undertaking that could compromise the performance of your duties or the standing of the Department in its relationship with the public, clients or the Minister...

Inform your manager promptly if you are involved in any activity, or have a commitment which may or could be seen by others to conflict with the performance of your duties or the goals of the Department.

[198] The first part of that quotation from the code omits the following words:

This would include any situation where actions you take in an official capacity could be seen to influence, or be influenced by, your private interests (e.g. company directorships, shareholdings, offers of outside employment).

[199] Inclusion of that sentence suggests that this particular clause of the code did not relate to the situation disclosed in Mr Gregory's communications with Ms A.



The examples given in the code deal with situations where a conflict of interest could occur between an officer's public duties and private interests. It strongly indicates that this part of the code was not appropriate to deal with the allegations of misconduct against Mr Gregory.

[200] I find there is an absence of express statements in the code or in the "Getting Got" or "Keeping Safe" instruction material, which clearly covers Mr Gregory's communications with Ms A.

[201] The issue then becomes whether a fair and reasonable employer in the position of the Department would have concluded in these circumstances that his communications with Ms A were inappropriate and amounted to serious misconduct justifying summary dismissal.

[202] However, it is difficult to escape the view that Mr Gregory was putting himself at considerable risk in his communications with Ms A in the manner that he described in his interview with Mr Sherlock, especially as she could be convicted and become an inmate of the women's prison. It would have been sensible if he had drawn the latest communications to the attention of his manager. Mr Gregory's history as disclosed to the Court, does suggest an independence of mind and a willingness to become involved in areas that are not directly his concern. As early as 4 November 1988 a probation report on his service states:

Can, and does, get off side on occasions with some staff. Tends at times to have a little too much to say about matters that were perhaps better left to senior staff. It is a pity Mr Gregory's propensity to comment on matters that are often not his concern detracts from an otherwise good performance. Must endeavour to curb this tendency.

[203] It is a pity that this advice was not heeded. His crude response to Mr Sherlock, indicating that he had no intention of changing his ways and would not discontinue his communications with Ms A, were matters Mrs Aitken was entitled to take into account.

[204] Mr Gregory also obtained some support from his witnesses who described how they had dealt with ex-prisoners and their families and associates in their private life. One of those witnesses stated that if a prisoner on the outside had asked him to

do something then he would inform his manager but would not report just general conversation. One said that if he met a member of the prisoner's family and had a conversation, he would not bring that to his manager's notice. The line may be a reasonably fine one and Mr Gregory was entitled to the benefit of doubt. It is not clear whether this evidence was provided to Mrs Aitken at the time of the investigation, or whether Mr Gregory was relying only on his understanding of his right to speak to members of the public, notwithstanding their relationship to serving prisoners or the risk they might become inmates themselves.

[205] On balance, because of the deficiencies in the investigation which Mr Ryan has pointed out and the lack of an express code of conduct dealing with the precise situation in which Mr Gregory found himself, I find that in all the circumstances a fair and reasonable employer would not have dismissed Mr Gregory for his communications with Ms A.

[206] The finding of inappropriate communications with Ms A was not the only matter relied upon by the defendant in justification of his dismissal. The plaintiff was also found to have inappropriately have accessed IOMS when he had no legitimate requirement or business to do so.

[207] In his report of his employment investigation Mr Sherlock found, under the headings, "Findings":

21. Ms [A] asked PCO Gregory for information about a prisoner Mr [X].

[208] Mr Ryan cross-examined Mr Sherlock closely about this finding. He was initially asked where, in the transcript of his telephone conversation with Ms A, she had asked Mr Gregory for information about Mr X. Mr Sherlock responded by repeating that he did not consider that this was a formal interview or signed interview, but he had cross-referenced it to Mr Gregory's interview. He did not respond to Mr Ryan's repeated request for him to demonstrate where it was written in the transcript that Ms A had asked Mr Gregory for information about Mr X. Mr Sherlock responded that Ms A had previously stated to Prisoner B that Mr Gregory was looking into it. There is, however, nothing written in the transcript of the interview with Ms A that she asked Mr Gregory for that information.

[209] In Mr Sherlock's interview with Mr Gregory, the plaintiff stated that Ms A had said what was found in Ms A's house in the police search was not hers, but she believed it to be that of the previous tenant Mr X, whose name was on a search warrant and she asked Mr Gregory if he heard of Mr X as he was some sort of drug king pin. Mr Gregory then stated:

I told her I had no idea who he was but I would ask around and I did no more.

[210] Mr Sherlock put to Mr Gregory in the interview:

I get from your statement that you agree that Ms A asked you to look up about this prisoner [Mr] X to find out some information about, I presume that was what the request was about. The inferences, that was either on or about the 30<sup>th</sup> April that she made that request. Can you confirm if that is the timeframe if she actually asked you?

[211] Mr Gregory responded to only one aspect of that composite question when he replied: "No. Just after she was arrested". Later in the interview when confirming that Ms A's arrest was on 31 March Mr Gregory stated:

She never asked me to look it up she asked me if I knew him and I said I didn't know the guy but I would find out. She definitely didn't ask me to look him up.

[212] Mr Sherlock confirmed in his report that there was no evidence that he could find that Mr Gregory had supplied any information from IOMS to Ms A.

[213] Mr Sherlock found that Mr Gregory had accessed the IOMS database and searched for information regarding prisoner Mr X on 5 May 2008. Mr Gregory admitted this.

[214] Mr Sherlock confirmed that he had concluded that Mr Gregory had accessed IOMS on his first day back on duty on 5 May 2008. It was conceded by Ms Aitken in cross-examination that Mr Gregory had been back at work for five weeks and therefore had not accessed IOMS on his first day back. This does suggest that Mr Gregory was not immediately looking for information on Mr X because Ms A had just asked him to do so.

[215] It appears to be common ground that Mr Gregory accessed IOMS for approximately three minutes on 5 May. He gave the explanation to Mr Sherlock that I set out earlier. He has never wavered in that explanation.

[216] Mr Sherlock confirmed in cross-examination that he did not make any enquiries at the women's prison to see if any, or how many of the Gang's associates or gang members were on remand or on sentence in the women's prison. It was put to him that this may have been a professional use of IOMS by Mr Gregory. Mr Sherlock did not accept that because he considered Ms A had asked Mr Gregory to find out the information about Mr X and Mr Gregory had undertaken to do so and on Mr Gregory's first day back at work on 5 May he accessed IOMS to make this inquiry. He believed the weight of the timing led to his conclusion that it was an inappropriate accessing. That process is undermined by the fact that it was not Mr Gregory's first day back at work and he had given that information to Mr Sherlock. Therefore the assumption on which Mr Sherlock proceeded was incorrect. Mr Sherlock's finding that Ms A had requested Mr Gregory to find out about Mr X and he had agreed to do so was also not supported by the evidence before Mr Sherlock.

[217] I find that these errors undermined Mr Sherlock's conclusion, which was relied upon by Mrs Aitken, that the access to IOMS was inappropriate.

[218] Mr Ryan submitted there was further support for that finding in the 'Getting Got' guidelines, which were put to Mr Sherlock. These directed officers that the first thing that they must do is to "Check things out". Mr Sherlock's response was that Mr Gregory did indeed check it out, but that was because Mr Sherlock believed Ms A had asked him to do that, and that that was his finding. That finding cannot stand.

[219] Mr Ryan took issue with Mrs Aitken not mentioning the IOMS allegation in her letter to Mr Gregory of 23 July or any other communication to him until her preliminary view letter of 13 November. Mrs Aitken observed that she had annexed a preliminary report which did mention it. She did, however, accept that she had not particularised anything about IOMS access as being a concern to her, but noted it

was covered extensively in Mr Sherlock's report. It is unfortunate that it was not spelt out in the first letter and it is not clear why it was not.

[220] During a pause in the cross-examination, I put to Mrs Aitken that the Department should have specified the allegations it was concerned about rather than just sending a large report and expecting every point in it to be covered. Mrs Aitken appeared to accept that this could be helpful.

[221] However, it is clear, I find, from the responses from CANZ to the Department that Mr Gregory, through his representatives, knew that he was required to respond to the allegation that he had inappropriately accessed IOMS. In CANZ's letter of 28 November, it repeats Mr Gregory's explanation that there were members of the Gang imprisoned in his unit and that this required "no further elaboration". There is nothing of substance therefore in this issue.

[222] Mr Ryan also took issue with Mrs Aitken's evidence that before making her decision on 28 November confirming her preliminary view expressed in her letter of 13 November, she took a number of days to confirm her decision and took into account everything that had been said. Her letter of 28 November confirming the dismissal set out the submissions received from CANZ in relation to her preliminary view that day and Mr Ryan put to her that she could not have taken a number of days to confirm her decision because she issued it on the same day she received CANZ's submissions. She responded that she was mistaken, that it was not intentional, and it was around the issue of thinking long and hard about these submissions from CANZ in relation to the whole investigation that took nearly five months.

[223] I am not satisfied that anything turns on this point as the submissions of CANZ set out in the 28 November letter are in substance the same as the submissions that it had made on earlier occasions and that Mr Gregory had made in his interview with Mr Sherlock.

[224] Mr Ryan put to Ms Aitken that the following quotation in her dismissal letter from the code of conduct did not apply to the circumstances:

You should ensure that no other individual or organisation with which you are personally involved is given preferential treatment over any other individual or organisation, such as access to “inside information”.

[225] This was said to be because Ms A was never given or provided access to inside information. Mrs Aitken eventually accepted that Mr Gregory had not given anyone preferential treatment.

[226] Mr Ryan then referred her to the next quotation from the code which required Mr Gregory to:

Carry out your duties in an efficient and competent manner in compliance with the policies and prescribed operating standards and procedures of the Department.

[227] Mrs Aitken was then referred to her extract from the code of conduct which required employees to:

Be familiar with, and consistently apply, the requirements of service or group operational manuals, for example PPM and CPPS Operational Manuals, as well as wider Department policies and procedures that affect your work...

Show reasonable care for Department property, resources, and funds and neither use nor approve them to be used for anything other than authorised purposes.

[228] I accept Mr Ryan’s submission that apart from the statement that officers should not use Departmental property or resources for anything other than authorised purposes, this part of the code has no direct application to the conduct alleged against Mr Gregory. It appears to have been included largely as a makeweight.

[229] Mr Ryan then took issue with the fact that five of the eight extracts from the code of conduct that Mr Gregory was alleged to have breached in relation to the IOMS accessing, were put to him for the first time in the 13 November letter which outlined Ms Aitken’s preliminary view that dismissal was the appropriate outcome. These were:

- (a) the reference to avoiding financial and other interests that could compromise his duties;

- (b) the requirement to talk to his manager about any relationship that had the potential to affect his work;
- (c) the requirement to be familiar with and consistently apply the requirements of service or group operational manuals;
- (d) the obligation to “carry out his duties in an efficient and competent manner in compliance with the policies and prescribed operating standards and procedures of the Department.”;
- (e) the requirement to use any information technology systems in the Department for the business purposes for which they were provided.

[230] I accept Mr Ryan’s submissions, that five out of the eight direct quotes from the code had never been brought to Mr Gregory’s attention before the preliminary decision to dismiss was announced.

[231] Mr Ryan relied on an extract from the Human Resource manual which required that any new or significant material raised during the employment investigation should be put to the employee for explanation and rebuttal. He submitted that the five portions of the code which had not been put to Mr Gregory previously, prevented Mr Gregory from giving a response before Mrs Aitken had reached her preliminary view. Mr Ryan submitted that that was a matter where the Department had failed to follow its own processes. It is difficult to avoid that conclusion.

[232] Mr Ryan next referred to his exchange with Mrs Aitken over whether she had received advice from HR as to how to deal with IT matters and the allegations of breaches of the code of conduct. She could not recall whether she had asked for advice about it and thought the matter was fairly clear. He then put to her a document which was a set of email exchanges dating back as early as 9 July 2008 from Ms Sagar to Mrs Aitken. It referred to the need to obtain further evidence about the number of times Mr Gregory had been searching IOMS for Mr X. It goes on to state:

There are two streams that could be perused but it appears that we could be heading down the IT stream rather than the potential corruption-based on evidence. This being the case we would need to prove that there has been continuous instances of misuse and not a potential or coincidental one off search. In particular since he has been back and possibly prior to him being back, as there are relevant consequences to behaviours as well. Whilst we were discussing this further we are of the opinion If we were to use that information then we would definitely need further evidence than what we currently have.

[233] These documents were expressed to be confidential as was another communication on 24 October 2008 which refers to Ms Sagar's research into Mr Gregory's disciplinary history. Mr Gregory's recent disciplinary history and the role it played in the decision to dismiss is a matter to which I will return.

[234] Mrs Aitken confirmed that she had received advice that to prove a breach of the IT policy, a coincidental one off search would not be enough and that multiple incidences of abuse would be required to be approved. But she contended that what was being put to her by HR was that if some person accidentally or coincidentally looked up someone's name, that would not be sufficient because the answer could be "I typed in the wrong name." Mrs Aitken contended that Mr Gregory's actions were to deliberately look up Mr X, although there were no other incidents of misuse. Ms Aitken maintained that in checking up on Mr X, Mr Gregory had breached the policy because he did not have any reason to do that search. There is force in Mrs Aitken's view, even if it appears on its face to be contrary to the IT advice she received. If this was the only issue it would not vitiate the decision to dismiss Mr Gregory for accessing IOMS inappropriately.

[235] However, I conclude that the most substantial defect in relation to the allegation of improperly accessing IOMS was the failure to check the plaintiff's explanation that he accessed IOMS to see if there was a relationship between Mr X, the Gang and members of the gang or associates who were actually under the supervision of Mr Gregory in the women's prison. He asserted that there were members of the Gang in his unit in explanation and no steps were taken by the Department to check that explanation for his accessing IOMS. If it could not be disregarded, it gave colour of right for his accessing IOMS and supported the view



that it was for proper Departmental purposes and not for Mr Gregory's personal ends.

[236] The conclusion that IOMS was accessed inappropriately was therefore not one that a fair and reasonable employer could have reached in the absence of a properly conducted investigation which had properly considered the explanation offered by Mr Gregory.

[237] Mr Ryan observed that the dismissal letter of 28 November did not expressly make findings in relation to the allegations. It found that Mr Gregory had not offered any additional significant responses, and that as his "actions constitute a serious impediment to the Department's ability to have trust and confidence in you as a custodial officer, my preliminary view will stand. Accordingly, my decision is that dismissal without notice is the appropriate outcome".

[238] Mr Ryan asked Ms Aitken what Mr Gregory was actually dismissed for and she stated he was dismissed for the allegation of having an inappropriate contact and relationship with an offender's partner and that lead to a compromise of his integrity and a conflict of interest. She said he was also dismissed for inappropriately accessing the Department records system outside of business purposes and this was linked to the investigation around Ms A. That added to her lack of trust and confidence and that was demonstrated by his comments throughout the process and further strengthened by his previous record.

[239] To summarise to this point, the following are the defective aspects of the decision to dismiss:

- a) Mr Gregory's explanation for accessing IOMS was not investigated but apparently nonetheless rejected;
- b) the investigation wrongly concluded that he had accessed IOMS at Ms A's request;
- c) the investigation and the decision to dismiss had proceeded on the basis that he had accessed IOMS for Ms A as soon as he

returned to work. In fact, it was accepted by Mrs Aitken that he did not access IOMS until some five weeks after returning to work after his discussions with Ms A;

- d) the particular breaches of the code of conduct were not properly put to Mr Gregory for his explanation and five out of the eight specific breaches of the code relied on for his dismissal had never previously been put to him;
- e) the allegation in relation to IOMS was not put to him specifically until the preliminary view that he should be dismissed was reached;
- f) most of the quoted breaches of the code of conduct did not have application to Mr Gregory's conduct, both in relation to the accessing of IOMS and his communications with Ms A;
- g) there was an issue as to whether Ms A was Prisoner B's partner or simply a member of the public as Mr Gregory asserted;
- h) this would have been clearer had the interviews with Ms A and Prisoner B been provided to both Ms Aitken and to Mr Gregory, especially as these contained some exculpatory statements about Mr Gregory;
- i) the failure to provide those statements to Ms Aitken meant that she did not have a full picture of the alleged inappropriate communications with Ms A.

[240] Mrs Aitken also referred to Mr Gregory's previous record. This brings me to the issue outlined by Mr Ryan at the opening of this case in November 2010, that Mr Gregory was pursuing the written warnings as disadvantage grievances, not merely because they had disadvantaged him, but because they were an essential element of the decision to dismiss him.

[241] The Department's position from its opening onwards was that the decision to terminate Mr Gregory's employment with effect from 28 November 2008 did not rely on the previous written warning or the two final written warnings. Thus, even if the Court found any issues with those investigations which were challenged by unjustified disadvantage claims, that was not fatal to the ultimate and separate decision to terminate Mr Gregory's employment.

[242] In the 28 November dismissal letter, Mrs Aitken states, as one of Mr Gregory's actions and the associated breaches of the code of conduct "that have informed my final decision" the following:

5. The seriousness of your disciplinary history of the past 18 months and the seriousness of those behaviours, which have significantly eroded the Department's trust and confidence in you.

[243] Reference is also made to Mr Gregory's disciplinary history in the exchange with the Human Resource Department of 9 July as referred to above.

[244] It is difficult to escape the conclusion that Mr Gregory's recent record of one written warning and two final warnings, was taken into account. On some views of the matter the allegations of racial harassment and bullying may have been sufficiently serious in themselves to have justified dismissal. In view of my findings in relation to those warnings and the effect that this would have on the plaintiff's disciplinary record, this additional basis for the finding that trust and confidence was fundamentally undermined, is no longer sustainable.

[245] This, I find, is another ground for concluding that the defendant has failed to discharge the onus of showing that the summary dismissal was justified as a decision a fair and reasonable employer would have reached in all the circumstances.

[246] The plaintiff's challenge is therefore successful and I uphold his claim that he was unjustifiably summarily dismissed on 28 November 2008.

## **Remedies**

[247] At counsel's request, the issue of remedies has been left for a later judgment. This matter must therefore be regarded as part-heard.

[248] As I discussed with counsel at the time, there are serious conflicts in the evidence in relation to the allegations of misconduct which were relied upon by the defendant to justify the three warnings and, to a lesser extent, the dismissal. In accordance with s 103A, I have endeavoured to review the actions of the employer and determine whether those actions were what a fair and reasonable employer would have done in all the circumstances. It was not necessary for the purposes of that review to resolve those conflicts.

[249] However, for the purposes of s 124 of the Act, in determining whether there was contributory conduct and in considering the remedies and, in particular, the remedy of reinstatement, it will be necessary to make actual findings on whether or not the actions of the plaintiff relied on by the defendant as having demonstrated misconduct, had been proven.

[250] In relation to the remedy of reinstatement, there are matters relating to the statements Mr Gregory made that his access to IOMS was only inappropriate because he was caught and that he would still continue to make similar contact with persons in the position of Ms A, which will need consideration in the context of the special role performed by the Department.

[251] In these circumstances, the parties would be well served to endeavour to resolve their differences. I therefore direct the parties to mediation in terms of s 188(2)(c) of the Act, once they have had the time to assimilate the matters contained in this judgment.

[252] In the meantime I adjourn the matter part-heard to deal with the issue of remedies.

## **Suppression orders**

[253] The parties are to have the opportunity to seek to redact from any passages in this judgment any information or the names of any persons that they do not wish to have disclosed publicly for security or other reasons. These matters should be addressed within the next 14 days, pending which this judgment will not be released except to the parties and to the other judges of the Employment Court.

B S Travis  
Judge

Judgment signed at 12noon on 5 October 2012