IN THE EMPLOYMENT COURT
AUCKLAND

AC 52/09
ARC 54/09

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
BETWEEN	CORRECTIONS ASSOCIATION OF NEW ZEALAND INC Plaintiff
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

Hearing: 21-24 September 2009
(Heard at Wellington)

Appearances: James M Roberts and Rosslyn Warren, Counsel for Plaintiff
Karen Spackman and David Traylor, Counsel for Defendant
Peter Cranney and Caroline Mayston, Counsel for New Zealand Public Service Association Inc granted leave to appear and be represented

Judgment: 18 December 2009

JUDGMENT OF CHIEF JUDGE GL COLGAN

Nature of proceeding

[1] This case, removed by the Employment Relations Authority for hearing at first instance in this Court, deals with the lawfulness of the proposal by the Department of Corrections ("the Department") for increases in prison populations (also called "musters") by what is known colloquially as "double bunking" of prison cells.

[2] The plaintiff is the union (CANZ) to which the substantial majority of corrections (prison) officers belong. The defendant is their employer and is responsible for the operation of all prisons, also now known as correctional facilities, in New Zealand.

[3] The plaintiff has four causes of action. The first asserts that the defendant's intended double bunking and the consequent increases in inmate numbers will breach the parties' current collective agreement. The second to fourth causes of action consist of different complaints of conduct by the defendant in breach of consultation obligations in the collective agreement and/or statutory obligations to act in good faith.

[4] The remedies sought include declarations of unlawfulness or prospective unlawfulness, compliance orders requiring the defendant to cease the installation of double bunks in prison cells and to remove those double bunks already installed, and costs.

[5] During the period from about 2003 to 2007, four new regional prisons were opened. The intended double bunking is to take place at these four sites. They are the Northland Region Corrections Facility (NRCF) at Ngawha; Auckland Region Women's Corrections Facility (ARWCF) at Wiri; the Spring Hill Corrections Facility (SHCF) at Mercer; and the Otago Corrections Facility (OCF) at Milton. Although not all identical, each is laid out in a modern campus style that features predominantly individual inmate cells in largely self-contained pods located within an extensive secure perimeter fence. These prisons were constructed as part of a modern and progressive penal philosophy, lauded publicly as such at the time by the Department. They, together with older existing prisons and planned new institutions, were intended to house what was forecast to be a growing, but manageable, prison population over the Department's forecasting period of 8 years.

[6] As a result of the 2008 general election, a newly constituted Parliament and Executive determined, announced and implemented promptly, a change in penal policy including increased remands in custody and less and shorter parole of prisoners. A range of other factors have for many years increased, and will continue

to increase, the number of inmates in prisons. These factors include, but are not restricted to, increased conviction numbers from an expanded police service, better identification of offenders by new scientific techniques, longer sentences of imprisonment for serious offences and the like. But while these long term factors and their consequent increased prison populations were largely matched by prison building and rebuilding programmes until 2008, the implementation of the new penal policies introduced almost a year ago mean that prison accommodation, actual and planned, will be outstripped by inmate numbers from about February 2010. Without a very prompt and significant increase in prison accommodation from that time and for the 8 year forecast period, the Department has concluded that it will be unable to accommodate all remand and sentenced inmates. Very roughly, the increase that has not otherwise been planned for until recently will, at about 900 additional inmates, be equivalent to about 10 per cent of the prison population at the end of that period.

[7] It is important to record what this case is and is not about. It is not about the merits of double bunking of prisoners or the respective qualities of inmate facilities at the newer institutions where that is intended to take place as opposed to older prisons which have long had, and continue to have, a significant level of double bunking. The case is not about the merits of governments' respective penal policies or what the Court might consider should be fair and reasonable circumstances in which double bunking is implemented. Rather, the case deals with the lawfulness in employment law of the defendant's double bunking plans and their consequences, both as implemented already and as he has announced will be implemented in future.

[8] Nor, in reality, will this judgment determine what is to happen in prisons. That may ultimately be, if not by agreement between the parties that has not yet been able to be achieved, then by a combination of measures that the defendant and the Minister of Corrections have flagged. These may include one or more of the following strategies: legislative change; the transfer of prison management to private sector operators; the dismissals of large numbers of unionised corrections officers; attempts to prohibit those current staff from being re-employed if they receive redundancy compensation; and lockouts of unionised corrections officers from later this year with military personnel being engaged to ensure effective lockouts.

[9] These are serious potential scenarios reflecting the very high stakes for all parties involved. The fact that some of these potential consequences may be difficult to achieve, both legally and practically, makes all the more fraught an already difficult and uncompromising standoff.

[10] At the end of the hearing I recommended, as bluntly as I felt able to, that the parties should use the necessary interval for the delivery of this judgment to cease their increasingly public and combative rhetoric and to attempt even now to resolve these questions by mutual compromise. Although a judicial settlement conference held shortly after the proceedings were filed was not able to achieve that aim, s181 of the Employment Relations Act 2000, not to mention objective commonsense, requires the Court to review constantly the opportunity for mediation or further mediation. Irrespective of its outcome, I will make such a direction at the conclusion of this judgment.

General background

[11] The defendant has a legal obligation to receive and to detain, upon specific conditions, prisoners remanded in custody or sentenced to terms of imprisonment by courts. He cannot avoid that obligation. Nor is he responsible for the penal policies of the Legislature and the Executive or their implementation in individual cases by sentencing judges. The defendant's onerous and important obligations are necessarily reactive and must be so within the confines of legislation and budgeted funds allowed him.

[12] The defendant will be faced shortly with increasing numbers of prisoners who must be accommodated in existing institutions and in such new institutions as are under construction or redevelopment at present, or as might be constructed or redeveloped in future. However, the defendant cannot meet one statutory obligation (to accommodate prisoners) by breaching another statutory obligation (to comply with a collective agreement) to which he is bound until its expiry and replacement by another collective agreement after 31 December 2009. In these circumstances it is perhaps not surprising that the defendant asserts that his intended double bunking and the manner in which this has been and will be implemented, is in compliance

with his obligations under employment law. Whether that is so is the issue for decision by the Court.

Relevant facts

[13] Three of the four prisons (NRCF, ARWCF and OCF) have only been partially built. That is, their sites and much of their necessary long term infrastructure (and particularly and literally below ground infrastructure) allow for the future construction of further wings or pods of cells and associated facilities. SHCF, on the other hand, was complete at opening. So, for the first three prisons, further inmate accommodation could be provided by completing those sites. Although able to be achieved more easily and quickly than the construction of new institutions, this completion of each prison will nevertheless take longer than the defendant has to find new inmate accommodation. As I understand the position, there are no current plans to complete, as originally designed, each of these three institutions. Indeed, in relation to some, if not all, the inmate occupancy levels that will occur from the proposed double bunking will probably use to capacity some of the already built infrastructure that would have allowed for completion of those sites in any event.

[14] Even if these three institutions were completed as planned, this would provide only about 330 additional single cells, significantly short of the now predicted total muster at the earliest time that they might be completed.

[15] At each of the four prisons some cells were both designed specifically for two inmates and are so used. These larger "twin" or "association" cells have two single beds, although they are not always occupied by two inmates. Twin cells in the four prisons are used by a second inmate when it is desirable, for a number of inmate management reasons, that two inmates share a cell. The second inmate in a twin cell comes within the institution's accepted operating capacity total.

[16] There is no challenge to the defendant's entitlement to use these cells for more than one inmate. At present, or in some cases at least until recently, other cells

at the four prisons have contained only one inmate in a single bed although there is room to accommodate a second bunk above the first.

[17] The defendant is entitled by contract to accommodate a second inmate in each of these single bed cells but up to a maximum of 20 per cent of them and only on conditions. These include that 10 per cent of such double occupancy may occur in temporary over-muster times and that the balance of that 20 per cent may be used likewise in emergency circumstances such as damage to or loss of cells in other institutions, widespread civil disorder and like extraordinary circumstances. In what are known as these *"contingent"* circumstances, in which up to 20 per cent over-muster occupancy is permitted, second bunks are in storage and available to be installed at short notice in what are otherwise single occupant cells.

[18] The design drawings and plans of the institutions include detail of where such second bunks and associated facilities may be provided. These are referred to by notations on plans and drawings such as *"contingent bed and ladder"*. The label *"contingent"* is a common feature of the specifics of design. The plans and drawings do not identify particular single cells for contingent second bunks: all are so designated. Which single cells, up to 20 per cent of the total, may have a second bunk installed in those circumstances is left to the defendant to determine having regard to a number of operational factors in each institution. However, by being identified as *"contingent"*, these additional beds and associated facilities are restricted by contract to a maximum of 20 per cent of the single cells in each institution.

[19] That is confirmed by the *"built design"* specified capacities for each new prison contained in formal certification of design built capacities. These confirm the relevant design and built capacities and potential future capacities of each institution.

[20] In the case of NRCF, the design built capacity of the institution is 350 together with a further 36 in twin cells and a further 35 for additional emergency capacity. So this provides for a maximum of 421 inmates in contingent circumstances. The infrastructure at NRCF will allow further build capacity to be a maximum of 450 inmates plus 20 per cent of that total for contingencies.

[21] In the case of ARWCF, the design built capacity of the institution is 286 inmates with a further 25 in twin cells and a further 25 again in contingent or emergency double bunking. The infrastructure of this institution allows for a future increase of design built capacity of 350 plus 20 per cent for contingencies.

[22] As noted, SHCF has no future design built capacity so that its figures are 650 inmates plus 24 in twin cells plus 106 for contingencies.

[23] Finally, OCF has a design built capacity of 335 together with 35 in twin cells and 34 contingent inmates in double cells. OCF's future design built capacity may be as much as 500 plus 20 per cent for contingencies.

[24] Those certified design built capacities equate in each case with the maximum capacities specified for the purposes of the collective agreement. The collective employment agreement between the parties so limits inmate accommodation for reasons of employee safety.

[25] The design of cells at the four institutions comprises two standard cell types, each with three configurations. These two standard cell types are, first, around an open courtyard (at NCRF and SHCF) and, second, in closed corridors (at OCF and ARWCF). The three configurations of each of the two standard types are single cells, twin cells, and *"accessible"* cells, that is those which are double bunked or double bunkable for contingencies. There are further versions of the three configurations that provide for both high security and medium security variants.

[26] From the time that the first prototype cells were built at Paremoremo, *"contingent fittings"*, *"contingent beds"* and other contingent features were provided for. Contingent cells, however, can only make up either 10 per cent or 20 per cent of an institution's operating capacity although any single cell can, theoretically, be a contingent cell. For design purposes, *"twin cells"* and *"double cells"* are the same.

[27] Those "single" cells have, nevertheless, been designed to accommodate a second, upper bunk. The design plans show the levels at which additional fittings

may be retro-fitted including an upper bunk reading light and switch and an upper bunk emergency call button. Although where these additional fixtures or fittings might be placed is shown on design drawings, no actual provision was made for them at the time of construction. Rather, if a second/upper bunk is to be installed in such single cells, tradespeople will be required to drill holes in concrete walls for anchor bolts to be installed, connect additional electrical wiring, and the like. The Department does not propose to increase or modify existing shower/toilet/hand basin facilities in cells to be double bunked, taking the view that those currently used by one inmate will be able easily to be used by a second inmate.

[28] Construction and installation of double bunks at OCF, SHCF and NRCF has begun and is due for completion in March 2010. Double bunking at ARWCF is scheduled to be completed by September 2010.

[29] One half of one of the pod units at NRCF (Pukeko North) was closed earlier this year for structural repairs for a period of about five or six months. When it reopened on 11 September, all cells had been double bunked and although the plaintiff contends that the Protocol for reopening accommodation was ignored by the defendant on this occasion, that is not an issue for decision in this case. Without deciding the point, it does appear that Pukeko North double bunking may have been effected without Protocol compliance.

[30] NRCF featured in evidence as an exemplar institution although illustrative of issues at all four prisons. Inmate facilities other than cells at NRCF are problematic, dining facilities in particular. Each pod, currently housing about 44 inmates, has dining facilities catering for about that number at the same time. Although by adding tables and chairs some additional inmates may be able to be accommodated in each pod's dining area, dining facilities cannot simply be doubled at the same time as cells are double bunked. This has led the Department to consider either shifts of meals or requiring inmates to eat meals in their cells. There are other inmate facility issues, both at NRCF and the other prisons that will mean a greater inmate concentration of various facilities.

[31] At OCF and ARWCF the defendant proposes to use existing inmate dining facilities to accommodate additional inmates although at NRCF and SHCF, other arrangements will have to be made including taking meals in shifts and requiring inmates to eat elsewhere including outdoors or in cells.

[32] Proposed in-cell facilities to be provided where double bunking takes place will include better air flows, additional storage units, additional intercom connections and additional reading lights. Additional unit facilities for staff will include more lockers, more meal and changing space, additional key fob and radio storage units, and extra kitchens and laundries. Additional inmate accommodation and facilities will include more "management" and separate cells, additional exercise yards, additional health units, additional staff car parking, and extra inmate employment facilities. No more showers, toilets or wash hand basins will be provided where it is intended that two inmates will use these facilities currently provided for one prisoner in his or her cell.

[33] The case also involves changes to inmate and staff facilities consequent upon double bunking. This includes, but not exhaustively, the construction of some new outdoor exercise yards, the construction of new inmate health facilities, the provision of additional radio and staff key storage and staff lockers, and the like. Although included with other new expenditure on personal protective equipment for staff and other security measures, the new inmate and staff facilities will cost more than $100 million. But in a number of material respects, also, the defendant is not proposing to provide new facilities but to rearrange existing facilities or to manage them differently in operation. Nor do many of the defendant's intended new inmate or staff facilities increase those from their current state in direct or precise proportion to the number of additional inmates to be accommodated in the institutions by the double bunking process.

[34] Where those new prisons have discrete inmate dining facilities, these can currently accommodate the numbers of inmates on the basis that there is one inmate to a cell. As I understand the defendant's proposals, they are not to provide new inmate dining accommodation, at least in the same ratio per inmate as currently exists. Rather, the defendant's proposals are to provide extra tables and chairs in the

same floor space, to provide meals in the current dining areas in shifts and/or to feed inmates in their cells or, when possible, to encourage inmates to eat outdoors.

[35] New custodial staff are to be employed by the defendant in connection with proposed double bunking. Of the 373 additional staff, 290 of these will be corrections officers for an additional 886 inmates.

[36] Double bunking is planned to be a permanent feature of the four institutions, not a stop-gap until the provision of replacement or new accommodation in a few years' time.

[37] The cells that the defendant intends to double bunk were all constructed during previous collective agreements which were materially identical to the current collective agreement. As *"newly built accommodation"* they were then subject to the collective agreement's requirement that they would be *"one prisoner per cell"* unless designed specifically for two inmates.

[38] Although the possibility of double bunking was known to the parties from late 2008 and indeed promoted by the defendant as a solution to anticipated musters, it was only with the Budget announcement in May 2009 that it was confirmed that there would be funding for up to 1,000 additional prison beds through double bunking.

[39] Between February and June 2009 there were about 16 days of meetings between the parties to discuss the defendant's double bunking proposal and to attempt to get agreement on how this would be undertaken.

[40] On 12 June 2009 the defendant signalled a change from consultation and negotiation with the plaintiff in an attempt to reach an agreed solution, to his decision to apply what is known as the Protocol under the parties' collective agreement. In late 2008 and early 2009, the defendant's representatives confirmed, in their dealings with the plaintiff and in documents generated by the Department at the relevant times, their understanding and acceptance of a requirement to have the plaintiff's consent to double bunking and its implications. That was the position at

least until the involvement in the process of Mr Tony Teesdale, an external employment relations consultant. Mr Teesdale was given a lead advocacy and strategic responsibility for the defendant's dealings with the plaintiff on this issue as from early to mid 2009. Mr Teesdale's involvement signalled a sea change in the defendant's approach to the issues.

[41] The Department began discussing its proposals for significant increased inmate accommodation in December 2008. These discussions were with the plaintiff, the Public Service Association Inc that is the union covering a smaller number of the corrections staff, and with non-unionised employees. Initial discussions were general in nature although, over the period of the next six months or so into mid-2009, the Department concluded that increasing muster numbers by double bunking in the four newest prisons was the only practical way to deal with the imminent influx of inmates expected by February 2010.

[42] These plans were firmed up in May 2009 when what is commonly known as the government's budget announced funding (between $100m and $134m) for a range of measures consistent with the accommodation of more inmates in double bunked cells. These included the provision of personal protective equipment for corrections officers, the recruitment of new corrections officers, and the purchase of furniture and fitting out of cells.

[43] Other measures proposed by the defendant to accompany increased concentrations of inmates in existing facilities include additional advanced staff training and the formation of tactical response teams in the affected institutions to deal with potential inmate conflict that may arise.

[44] At about the time of Mr Teesdale's involvement and the defendant's reassessment of his strategy, the union's President suggested to the Department that instead of continuing to attempt to increase muster levels by agreement, the defendant should consider doing so by applying the Protocol. The defendant considered his position and elected to follow this strategy. I do not understand the plaintiff to have conceded that the defendant could do so without meeting the conditions in the collective agreement and reiterated in the Protocol. The union

hinted to the defendant that he could achieve the same result under the Protocol but only so long as he complied with the collective agreement's conditions relating to increased inmate and staff facilities in proportion to the increased inmate numbers. This may have been suggested as a way of avoiding the impasse in negotiations about remuneration.

[45] Increasing prison musters is the only way for the defendant to cope with increased inmate numbers, at least in the short to medium term. There is no suggestion that double bunking of inmates will result in job losses for corrections officers but their working conditions will be inevitably affected. The plaintiff has, despite negotiation with the defendant, not reached agreement with him on his double bunking plans.

Relevant collective agreement and other contractual provisions

[46] Although no primary statutory provision affects directly the interpretation of the collective agreement, reg 66 of the Corrections Regulations 2005 as delegated legislation pursuant to the Corrections Act 2004, does so. This incorporates expressly international conventions or covenants that, following the judgment of the Supreme Court in *Taunoa v Attorney-General*[1], are also relevant in interpreting and applying New Zealand law.

[47] Regulation 66 provides:

> ***66 Individual cells***
> *(1) As far as practicable in the circumstances, prisoners detained in a prison must be accommodated in individual cells.*
> *(2) Subclause (1) does not apply if—*
> *(a) the manager believes that the sharing of a cell by a prisoner with 1 or more other prisoners will facilitate the management of a prisoner in the prison; or*
> *(b) the manager believes that the sharing of a cell by a prisoner with 1 or more other prisoners is necessary because of—*
> *(i) a temporary shortage of accommodation; or*
> *(ii) an emergency of any kind.*
> *(3) Subclause (1) does not prohibit 2 or more prisoners from being accommodated in one cell if that cell is designed and equipped to accommodate the number of prisoners to be accommodated in it.*

[1] [2008] 1 NZLR 429

[48] At the time of the hearing of this case there was a suggestion that the Executive may be minded to repeal or alter this regulation. That was done very recently by the Corrections Amendment Regulations 2009 (SR2009/374) which will come into force on 1 January 2010. That means that at both the date of hearing and the date of this judgment, reg 66 as set out above remains in force.

[49] Although dealing with a number of other prison issues that are irrelevant to this judgment, the effect of new reg 66 (***"Individual cells"***) will mean that although the presumption of individual inmate cells *"[a]s far as practicable in the circumstances"* under subclause (1) will remain, subclause (2) set out above will be revoked and replaced by the following new subclauses:

> *(2) Despite subclause (1), a prisoner detained in a prison may be accommodated in a shared cell—*
> *(a) if the manager believes that accommodating that prisoner in a shared cell—*
> *(i) will facilitate the management of a prisoner in the prison; or*
> *(ii) is necessary because of an emergency of any kind; or*
> *(b) in the circumstances described in subclause (2A).*
> *(2A) The circumstances are that—*
> *(a) the manager believes that accommodating that prisoner in a shared cell is necessary because a single cell is not reasonably available; and*
> *(b) the chief executive has issued instructions under section 196 of the Act for the purpose of ensuring that the use of shared cells is safe, secure, humane, and effective; and*
> *(c) the accommodation of that prisoner in a shared cell is in accordance with those instructions.*

[50] The starting point in such cases, and no less in this, is the collective agreement currently in force between the parties. This is the Department of Corrections Prison Services Collective Agreement 2008-2009 in force until 31 December 2009. It governs not only the more usual terms and conditions of employment of corrections officers who are members of the plaintiff, but also, as matters of health and safety, such issues as maximum inmate numbers in prisons, how these may be increased (or decreased), and the consequences of doing so.

[51] The collective agreement (unhelpfully lacking any numbering system) begins under the heading *"INTRODUCTION"* with the general proposition:

> *Management has the right to plan, manage, organise and finally decide on the operations and policies of the Prison Services (PS) of the Department of Corrections (the Department), subject to the provisions of this Agreement. However, PS is committed to effective consultation with CANZ and its members and accepts its responsibility to deal with them in good faith in accordance with the Employment Relations Act 2000 and subsequent amendments.*

[52] Under a subheading *"Variations"* the agreement provides that it may be varied during its term by agreement between the parties but, to be effective, any such variation must be recorded in writing and, among other things, signed by CANZ *"following a ratifying vote of its member(s) affected by the proposed changes."*

[53] Other aspirational provisions of the collective agreement include the following:

- *"A primary goal is a professional service committed to reducing re-offending through "needs-based" prisoner management, both with regard to security needs and programmes and treatments to assist prisoners to change their offending behaviour."*

- *"Hand in hand with professional service is a commitment to increasing efficiency and flexibility such that all stakeholders have confidence in what Prison Services does."*

[54] Under subheadings *"Operating Capacity"* and *"Additional Capacity"* the collective agreement provides the following which is at the heart of this case. The bold type face has been added to emphasise the crucial provisions.

> *Operational Capacity*
>
> *The maximum capacity of each institution at the start of this agreement shall be recorded at the prison concerned, and a copy provided to CANZ.*
>
> *Where in any institution there are cells designated for "at risk" prisoner, such cells shall be used for "at risk" prisoners only unless otherwise agreed.*
>
> ***The maximum capacity is not to be exceeded** and every endeavour shall be made to reduce the number of prisoners when the agreed maximum capacity is reached.*
>
> ***The maximum capacity shall only be varied when**:*

- ***Extra prisoner accommodation and facilities are made available***
- *Existing prisoner accommodation and/or facilities are made unavailable*

The variation shall be according to the capacity of the prisoner accommodation and facilities.

All newly built accommodation shall be one prisoner per cell unless cells have been specifically designed for more than one prisoner.

The maximum capacity shall only be varied after the Regional Manager and CANZ have consulted and negotiated on staffing arrangements and facilities in relation to the variation. The agreed Protocol for Managing Variations to Operating Capacity shall be used for this purpose. *Written confirmation of any change to the maximum operating capacity in any institution shall be promptly forwarded to CANZ.*

Additional Capacity

Over and above the "maximum operating capacity" (as set out above) in the prisons/institutions listed in Schedule B, 282 additional beds (including additional beds at ACRP) are available under this "Additional Capacity" clause. The location, facilities and staffing of these additional beds will be implemented as per the Protocol for Managing Variation to Operating Capacity.

Every reasonable endeavour will be made to utilize the maximum operating capacity in preference to the additional capacity.

[55] As already noted at paragraphs [17] to [23], the maximum capacities of each of the prisons recorded as required by the agreement are as follows:

- NRCF – 350 (plus 36 in twin cells) plus an additional 35 for additional emergency capacity: total 421 inmates.
- ARWCF – 286 (plus 25 in twin cells) plus an additional 25 in contingent or emergency double bunking: total 336 inmates.
- SHCF – 650 (plus 24 in twin cells) plus an additional 106 in contingent or emergency double bunking: total 780.
- OCF – 335 (plus 35 in twin cells) plus an additional 34 in contingent or emergency double bunking: total 404.

[56] Under a heading *"TERMINATION"* and a subheading *"Organisational Change"* the collective agreement provides the following:

> *The process of change is continuous and forms part of the organisation's continuous improvement.*
>
> *Where organisational change is being considered that may result in positions no longer existing, consultation shall take place in accordance with the Consultation provisions of this Agreement, prior to a decision being made.*

[57] The *"CONSULTATION"* provisions of the agreement are as follows:

> *The process of change is continuous and should form part of the organisation's continuous improvement. Consultation is an essential part of that process.*
>
> *PS will notify the Secretary of CANZ once it has decided to undertake an organisational review, initiated by PS, which is likely to result in significant changes in the organisational structure, staffing or work practices affecting staff. Where a decision to make a change or to undertake a review is beyond the control of the Chief Executive, this notification will be made as soon as possible after the decision is announced.*
>
> *PS will provide CANZ and staff with an opportunity to be involved and consulted during such reviews and take any views into account before decisions are finalised.*

[58] The agreement therefore provides that the inmate maximum capacity of each institution (as recorded at the start of the collective agreement) is not to be exceeded. There is provision for variation of a maximum capacity (without the need to vary the collective agreement as a whole) and in the case of a proposed increase to this, only when extra prisoner accommodation and facilities are made available. Even then, a variation must be according to the capacity of prisoner and accommodation facilities including those extra facilities that are required to be made available.

[59] The intent of this provision is that the Chief Executive is not able to add minimally or nominally to prisoner facilities and then vary upwards, and disproportionately, the maximum capacity of the institution. The collective agreement contemplates a proportionality of increased inmates to facilities.

[60] Additionally, new prisoner accommodation is to be on the basis of one prisoner per cell unless these cells have been specifically designed for more than one

prisoner. This reference to *"newly built accommodation"* refers to *"extra prisoner accommodation"*.

[61] There can be no increase in inmate numbers that exceed the maxima without consultation and negotiation with the union about relevant staffing arrangements and facilities. That contemplates not merely conferring about such matters but, by negotiation, obtaining the union's agreement to those staff issues. If the union's agreement were not necessary, reference to negotiation as well as to consultation, would be superfluous and meaningless.

[62] The next relevant document is the *"Protocol for Managing Variations to Operating Capacity"*. The Protocol is an agreed methodology for varying, upwards or downwards, the agreed prison musters as circumstances change during the life of the collective agreement. The Protocol sets out a process for managing the inevitable variations to maximum operating capacities of prisons but is not in substitution for the balance of the collective agreement and does not add to or detract from the rights and obligations thereunder. The Protocol is referred to in, and incorporated into, the collective agreement so that it, too, contains contractual rights and obligations between the parties.

[63] The principles of the Protocol include that managers *"are to increase capacity when extra accommodation and facilities are made available"* and are to *"decrease capacity when existing accommodation and/or facilities are made unavailable."* The Protocol reiterates the collective agreement by requiring prison managers to do so in consultation with unions and staff as set out in guidelines that are Appendix 1 to the Protocol. The Protocol also requires managers to maintain accurate and comprehensive records of discussions and decisions by use of a template document that is Appendix 2 to the Protocol.

[64] The Protocol contains a number of definitions. **"Maximum Operating Capacity"** is *"The maximum number of inmates who may be accommodated in a particular prison at a point in time."* although this is able to be varied *"subject to certain criteria being satisfied."* **"Inmate Accommodation"** *"Means beds in cells of any type provided for the use of inmates in accordance with their intended*

purpose." **"Inmate facilities"** *"Means services provided for inmates including but not limited to: … Showers … Hand basins … Cafeteria space, tables and chairs … Recreational facilities."* **"Extra"** *"In relation to inmate accommodation and facilities "extra" means either newly built accommodation and facilities, or accommodation and facilities already built but which have been closed for a period."* **"Existing"** *"In relation to inmate accommodation or facilities, "existing" means accommodation and/or facilities already built which either are in use or have been in use at some point in time."* **"Staffing facilities"** *"Means services provided for staff in accordance with OSH guidelines, including but not limited to: … Office space and desks and chairs … Workstations … Radios … Showers ... Toilets … Hand basins … Cafeteria space, tables and chairs"*.

[65] The Protocol requires site managers to develop a process for dealing with proposed changes to operating capacity at the site manager's site or institution. If a site manager considers that there should be a variation to the site's operating capacity, he or she must advise both the Department's human resources section and the National Secretary of the union. Included in the ***"National Procedure"*** is a requirement that:

> *When new accommodation and facilities are to be built, early consultation is required. CANZ will be given the opportunity to have representation on any Project Team formed to deal with the issue.*

[66] The Protocol also specifies that *"No new accommodation and facilities are to be operated until such time as the operating capacity is varied in accordance with the required process."*

[67] It is another requirement of the Protocol that *"While reasonable endeavours shall be made to reach agreement on any such changes, no formal variation to the collective agreement shall be required in order to vary the operating capacity in accordance with this protocol."*

[68] Appendix 1 to the Protocol sets out the process of consultation to be followed and confirmed in documents. The appendix contains first the criteria to be used by prison managers to vary prisons' operating capacities. The appendix reiterates the collective agreement's constraints on varying maximum capacities set out earlier in

this judgment. The appendix then goes on to set out *"guidelines designed to assist managers to conduct the process required for varying the operating capacity."* These are a series of what are described, albeit not very aptly, as ***"Steps"***. The first of these requires a prison manager to consider whether a variation of the institution's operating capacity is required and sets out examples and issues that may need to be considered. This first step then allows for the logical conclusions of status quo maintenance, a requirement for more accommodation and facilities, or that there will be a surfeit of these for the time being. The step requires a manager to assess the extent of a variation to the operating capacity if there is to be one. This is said to be *"usually straight forward and relates to the number of beds being made available or unavailable …"* but again reminds managers that *"All newly built accommodation shall be one inmate per cell unless cells have been specifically designed for more than one inmate."* and *"Cells designated for "at risk" inmates, shall be used for "at risk" inmates only, unless otherwise agreed."*

[69] The second step following a manager's assessment of the need for a variation addresses ***"Pre-conditions for varying operating capacity"***. This reiterates the collective agreement's constraints on maximum capacity variation and notes that *"Any increase or decrease in maximum capacity must be in <u>reasonable proportion</u> to the capacity of the inmate accommodation and facilities made available or unavailable respectively"* (original emphasis). This second step directs managers to conduct the appendix's process to vary the operating capacity where inmate accommodation is being newly built and confirms the likelihood that such a process will *"flow from the Project Team set up to manage the issues relating to the planning and construction activity."* The step emphasises, by stating in bold letters, that no new inmate accommodation and facilities shall be opened and operated without a process of consultation being undertaken to vary the operating capacity. This step also addresses **"Re-opening existing accommodation"** which has occurred in this case in respect of the pod known as Pukeko North at NRCF. This sub-unit was closed for about 9 months for significant repairs because of excessive foundation subsidence. As part of the work conducted prior to its recent reopening, double bunks have been installed in all previously single bunked cells. In such circumstances the Protocol required *"a consultation process to vary the operating capacity"* and *"Unless agreed with CANZ,* ***such accommodation may not be re-***

opened unless extra inmate facilities are also made available*”* (original emphasis) but allows for such facilities to be made available by the reopening of temporarily closed facilities or the building of new ones.

[70] The third step in Appendix 1 to the Protocol addresses the requirement of consultation with unions and staff affected by a proposed variation to operating capacities, such consultations to be about *“staffing arrangement and staffing facilities”*. The appendix notes that there is no obligation on managers to consult on other issues but notes that it may be possible that other factors might impact directly or indirectly on staffing arrangements and facilities. The Protocol requires a full risk assessment of the proposal (to vary operating capacity) and sets out six separate issues that may need to be included in that consultative risk assessment.

[71] The fourth step for managers is to communicate to unions and unrepresented staff affected that a proposal to vary the institution’s operating capacity is being considered. There is a requirement to provide a brief outline of what the proposal relates to and suggests a meeting or telephone discussion with a delegate together with email advice to unrepresented staff affected.

[72] Step 5 is for the manager to prepare the proposal and supporting documentation and will explain it clearly. The manager is to identify which of the two conditions of extra inmate accommodation and facilities or reduced inmate accommodation and facilities might justify a variation, to describe the units and numbers of beds affected, to describe the proposed changes to staffing arrangements, to describe changes to staffing facilities, and to describe a proposed timetable.

[73] The sixth step addresses meetings with unions and unrepresented staff and the seventh the detail of what is to be provided by way of information at such meetings and the process for discussion, feedback and recording of outcomes.

[74] The eighth “step” notes, importantly for this case:

> ***… while it is highly desirable to reach a consensus, it is not necessary to reach an agreement.***

> ***Also note there is no need to enter into a formal variation of the collective agreement, but the maximum operating capacity recorded on site shall be amended accordingly.***

[75] Appendix 2 to the Protocol is a series of template letters and documents to be completed by prison managers. They are not immediately relevant to this judgment.

[76] Apart from the clear and unambiguous but, in this case, unrealistic, position that the operating capacities of prisons can be increased by mutual and agreed variation or variations to the collective agreement requiring ratification by affected CANZ members, the ability to use the Protocol depends on the interpretation of the *"Operating Capacity"* clause of the collective agreement. This is interpretable two ways.

[77] The first interpretation of the *"Operating Capacity"* clause is, in the context of this case, that an institution's maximum capacity can be increased when extra prisoner accommodation and extra prisoner facilities are made available but only according to the capacity of that additional prisoner accommodation and additional prisoner facilities. If additional prisoner accommodation is *"newly built"*, it shall be one prisoner per cell unless cells have been specifically designed for more than one prisoner.

[78] In this first possible interpretation of the *"Operating Capacity"* clause, reference to the agreed Protocol (including its requirement for negotiation as well as consultation) is for the purpose of addressing *"staffing arrangements and facilities in relation to the variation"* and requires consultation and negotiation only about staffing arrangements and facilities. The Protocol and its contents would not deal with the requirement for extra prisoner accommodation and extra prisoner facilities that must be made available, and consultation and negotiation about these.

[79] To achieve compliance with the collective agreement, the defendant must make available extra prisoner accommodation and extra prisoner facilities and the muster increase must equate with the capacity of these extra prisoner accommodations and extra prisoner facilities. If the defendant complies with the foregoing requirements, then no consultation or negotiation with the union is

required on that issue. Consultation and negotiation deal only with staffing arrangements and facilities in relation to the variation under the Protocol.

[80] The alternative interpretation of the *"Operating Capacity"* clause is that the Protocol (and therefore a requirement for consultation and negotiation) extends to consultation and negotiation on extra prisoner accommodation and extra prisoner facilities as well as to a requirement to consult and negotiate on staffing arrangements and facilities. That interpretation, although not in apparent accordance with the wording of the main collective agreement, does make sense of the Protocol's references to *"inmate accommodation"* and *"inmate facilities"* in that document's definitions. These would be arguably meaningless if the first interpretation of the collective agreement (set out above) were to be accepted.

[81] This second or alternative interpretation is also more consistent with other elements in the Protocol including:

- the definition of *"extra"* in the Protocol incorporating reference to *"inmate accommodation and facilities"*;

- reference to *"existing"* in the definition incorporating *"inmate accommodation or facilities"*;

- reference to *"punishment cells"* in the Protocol which are said to be excluded from the maximum operating capacity;

- reference under the Protocol's procedure to *"new accommodation"* which apparently refers to inmate accommodation;

- the requirement under step 2 of the Protocol to the phrase *"any increase or decrease in maximum capacity must be in <u>reasonable proportion</u> to the capacity of the inmate accommodation and facilities made available or unavailable respectively"* (original emphasis);

- the words in bold type *"no new inmate accommodation and facilities shall be opened or operated without a process of consultation being undertaken to vary the operating capacity"*;

- the numerous other references in the Protocol to inmate capacities and facilities, not merely to *"staffing arrangements and facilities"* as appears to govern the use of the Protocol in the collective agreement.

[82] Collective agreements should be interpreted and applied according to their plain words if the Court is satisfied that these identify clearly what the parties intended to happen. If, however, there are real ambiguities or that doing so would produce a result in practice that could not have been intended by the parties, then the Court is entitled to, and indeed must, consider more than just the words of the relevant provision in the context of the whole agreement. Factors such as the nature of the enterprise and the work performed, antecedent agreements and practices, and the operation of the provision and its antecedents in practice before dispute about its interpretation arose, are all valid contributors to the ascertainment of the meaning intended for it by the parties. So, too, are the contents of relevant, associated or incorporated documents such as the Protocol.

[83] After much hesitation, because both interpretations are tenable, I find the second interpretation to be that which the parties must have intended. That is for the following reasons. First, the Protocol existed in its current form at the time the collective agreement was settled. So, despite using the words they did in the *"Operating Capacity"* clause, the parties were aware of the broader scope of the Protocol and its numerous references to consultation about, and negotiation over, inmate accommodation and inmate facilities. The parties clearly intended the Protocol to be incorporated in the collective agreement's process of increasing prison operating capacities. The Protocol and its predecessors had been applied in the past in respect of such exercises.

[84] Numerous strategic and advisory documents have, since the late 1990s and until recently, confirmed the defendant's intention (or that of its predecessors) as to the meaning of these provisions. The contents of these are consonant with the

defendant's dealings with the union in particular. These consistently emphasise and confirm that inmates at new prisons were and are to be accommodated principally in single cells. That interpretation was applied by the defendant in practice until at least May 2009 when he received strategic advice from a new source.

[85] The parties followed the scheme of the Protocol during at least the early stages of the double bunking process. A party's performance of a collective agreement or contractual provision that is subsequently controversial may be one, and an important, element in determining what that party intended when entering into the provision. Later advice to the Department has probably and understandably caused it to apply the interpretation that now advances. That is more consistent with the defendant's earlier conduct before controversy about, and close scrutiny of, it.

[86] The operative collective agreement contains provisions to which the defendant has agreed over many years in a succession of materially similar collective instruments. These fetters on maximum numbers of inmates in individual prisons constrain the ability of the defendant and his prison managers to increase the numbers of inmates at their institutions without consultation and negotiation with the union and affected staff, not only about facilities for staff associated with increased inmate numbers but also about increased inmate accommodation and facilities.

[87] That is not, however, the vital issue in this case. Whilst both consultation and negotiation are required with the union about both extra inmate accommodation and facilities on the one hand, and extra staff facilities on the other, agreement about these is not required.

[88] That is because what is described as the eighth step in the Protocol's process set out in para [74] of this judgment confirms that while consensus between the parties is desirable, agreement is unnecessary. This is written in relation to any variation to maximum operating capacities and not merely to any particular step or steps in the Protocol. It confirms that while consultation and negotiation must take place in relation to both inmate accommodation and facilities and to facilities for staff consequent on the provision of increased inmate accommodation, the requirement for negotiation does not go so far as to include the union's agreement to

these changes. Whether, following consultation and negotiation, agreement to double bunking is required, is now the plaintiff's lifeline.

[89] I conclude that the scheme of the regime limiting inmate numbers, and by which this can be altered, is as follows.

[90] First, each institution is to have its operating capacity fixed at the commencement of the collective agreement and published. This may be increased by up to 20 per cent but only for what is referred to as *"contingency"* or *"emergency"* use. The essence of such flexibility is its temporary and extraordinary nature.

[91] Next, the collective agreement provides that not only is this operating capacity not to be exceeded but also that when it is reached, there is a process by which it is to be reduced. I do not need to deal with this aspect of the process further because this is a case about a plan to exceed, both substantially and on a long-term basis, the operating capacities of the four prisons. The need to keep below the maximum muster nevertheless emphasises the significance of these numbers.

[92] Absent the union's agreement to a variation of the collective agreement itself, a variation to the collective agreement's maximum muster numbers of any particular institution is only permitted in two circumstances. These include, first, that the defendant is to make available both extra prisoner accommodation and extra prisoner facilities at the institution affected. The collective agreement requires that such an additional combination of facilities cannot be merely nominal. The increase in muster must be broadly in proportion to the additional accommodation and facilities. This means in practice that the Department cannot simply make available one or two extra dining tables or a few square metres of exercise yard to enable it to add many times that number of additional inmates. Such facilities must be "extra" and not merely a redesign or other use of existing facilities (unless these are existing ones being re-opened), and must be coincident in their availability with the new, extra inmate accommodation.

[93] Further, even if all the foregoing conditions are fulfilled, a prison's maximum operating capacity can only be varied after a process of consultation and negotiation on inmate accommodation and facilities and on staffing arrangements and facilities. This process of consultation and negotiation must follow the prescriptive protocol established for this purpose.

[94] Finally, and crucially, although the requirement of negotiation about extra inmate accommodation might in other circumstances imply agreement to the defendant's proposals by the plaintiff, the collective agreement and the Protocol do not require consultation and negotiation to end in agreement.

[95] The drafting of, and logical co-ordination between, the collective agreement and the Protocol is unfortunate. That is not only in their lack of clarity about what should be consulted on and negotiated over. The documents do not really address squarely the circumstances which have now arisen and in which the defendant wishes to increase musters substantially and on a long-term basis across several prisons. The collective agreement and its Protocol contemplate isolated and ad hoc muster increases intended to be dealt with either by the creation of additional cells and facilities, or the reopening of previously closed cells and facilities. The documents did not contemplate mass double bunking as the defendant now intends.

[96] So, for example, *"extra"* in relation to inmate accommodation and facilities is defined as being either newly built, or already built but previously closed and reopened, cells and other inmate facilities. The phrase *"newly built"* in relation to cells requires that these must be for single inmates unless designed specifically otherwise. It is difficult to describe the affixing of a second bunk and the associated additions of reading lights and call buttons in existing and relatively newly built cells, as being a process in which these are *"newly built"*. But the collective agreement and its Protocol do not contemplate modifications to existing cells as more aptly describes the double bunking process.

[97] Nevertheless, the Court must interpret and apply the provisions that the parties have agreed will apply in the event that there are to be increases in prison muster levels above the specified maxima as double bunking will clearly involve.

[98] For the foregoing reasons, I conclude that while the collective agreement requires consultation about and negotiation over, the defendant's proposals to increase muster levels including the elements of inmate accommodation and facilities as well as the elements of staffing arrangements and facilities, the union's agreement to these is not required. The defendant is correct in his assertion that by recourse to the Protocol, double bunking can be implemented without the agreement of the plaintiff, if he otherwise follows the Protocol.

Previous cases

[99] The muster capacity provisions of previous collective agreements or collective contracts between the same parties have been the subject of judicial consideration on at least three occasions. Those decisions are instructive in two ways. First, they interpret and apply relevant similar or identical provisions in the current collective agreement that are in dispute between the parties. Second, even if they do not, they are illuminating background against which the parties entered deliberately into the current arrangements. The cases concerned Mt Eden Prison (in 1998 and 2005) and Manawatu Prison (in 1999).

[100] In *New Zealand Penal Officers' Association Inc v Attorney-General in respect of the Department of Corrections*[2] this Court considered a maximum muster provision in a collective employment contract between the same parties (although now renamed). After referring to agreed maximum capacities of specified institutions, the agreement stated:

> *... At no time is the capacity to be exceeded and every endeavour shall be made to reduce the muster level when the agreed maximum capacity is reached.*
>
> *The agreed maximum capacity shall only be varied when:*
>
> - *extra inmate accommodation and facilities are made available*
> - *existing inmate accommodation and/or facilities are made unavailable.*
>
> *The variation shall be according to the capacity of the inmate accommodation and facilities.*

[2] AC 29A/98 26 June 1998

> *All newly-built accommodation shall be one inmate per cell unless association cells have been specifically designed.*
>
> *The capacity shall only be varied after the General Manager and the POA [Prison Officers Association, now the plaintiff] have consulted and negotiated on staffing arrangements and facilities in relation to the variation.*

[101] The judgment identified that the maximum muster provision was included in the collective contract for good reasons of staff health and safety. The particular issue in the case was the use by the employer of previously empty cells at Mt Eden Prison to accommodate over-muster numbers of inmates. The employer took the view that it was able to do so because this amounted to the provisional making available of extra inmate accommodation and facilities. Addressing the provision that required all newly built accommodation to be on the basis of one inmate per cell, the Judge did not accept the argument that this meant that extra inmate accommodation was not made available unless it was newly built. Indeed he found that the reference to newly built accommodation appeared to contemplate that there may be extra inmate accommodation made available that was not newly built. The Judge did not agree with the union's position that because all the accommodation in the closed wings of closed cells was already there when the collective employment contract was settled, to reopen a closed wing was not to make extra facilities available but rather to use existing facilities. He held:

> *When the contract was signed, the status of the wings as either in operation or closed was known to the parties. They must be taken to have contemplated a maximum capacity in relation to the ordinarily operational wings. If the defendant were [later] to open a closed wing, that would clearly make available extra accommodation. This, if it had happened, would have enabled the respondent to engage the applicant in negotiations for a variation of the agreed maximum. As to making fuller use of existing facilities, that is not making available extra accommodation. The example was given of doubling prisoners in cells that normally, and at the time of the making of the collective employment contract, were used to house one prisoner. Obviously, the superintendent is entitled to adopt this course for reasons that may seem good to him, including considerations of the welfare of inmates. But doing so in individual cases would not entitle the defendant to seek a variation of the agreed maximum capacity and would need to stop short of exceeding the existing agreed maximum capacity.*

[102] The next judgment in time is *Corrections Association of New Zealand v Attorney-General in respect of the Department of Corrections (No 2)*[3]. This dealt again with the issue of maximum inmate capacities at prisons, on this occasion, Manawatu Prison. Materially the same contractual provisions affecting maximum inmate capacities and excesses were applicable in that case. The judgment records that these provisions were the latest in a succession of similar clauses applicable to the parties and their predecessors since 1988. At the time of the settlement of the 1998 collective employment contract, the parties also entered into an agreement which included not only the collective employment contract but matters set out in a letter signed by representatives of the employer and the union which was said to have been a *"letter of understanding … stated to be contractual and form[ing] part of the ratified settlement."*

[103] What were described as *"clip-on"* cells had been added to existing cell blocks or wings at Manawatu Prison. The additional cells consisted of a combination of single and double cells causing the maximum muster number to be exceeded. The Court found that apart from the addition of the cells, the only relevant alterations made to other facilities were the construction of separation grills in the wings to assist with the movement and control of inmates, the construction of a secure perimeter fence, and the construction of a partition dividing a recreation concourse between wings. The Court found that toilet and shower facilities had not been increased except marginally and there had been no alteration to dining and internal recreation areas. It was common ground that with the additional inmates, dining facilities were inadequate.

[104] The Court concluded:

> *The word "extra" applies to both accommodation and facilities. It is quite clear that the maximum capacity shall only be varied when both extra inmate accommodation and extra inmate facilities are made available.*

[105] Extra facilities not having been completed, the Court declared the employer to have been in breach of the collective employment contract in respect of the specified maximum operating capacity.

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[3] [1999] 2 ERNZ 974

[106] The third judgment is *Chief Executive Officer of the Department of Corrections v Corrections Association of New Zealand Inc*[4]. The judgment sets out the relevant provisions of the collective instrument between the parties dating back to 1998. This refers to *"The agreed Protocol for Managing Variations to Operating Capacity"* which came into existence before the 2003 collective employment agreement was negotiated and ratified. This was described as *"a modus operandi formulated for the purpose of varying the maximum capacities of each institution."* Relevant to this case was the Court's conclusion that inmate capacity or maximum muster was to be defined by reference to beds in cells rather than numbers of inmates within the institution.

Decision – First cause of action

[107] Without recourse to the Protocol, the defendant's installation of additional bunks in single cells to house increased muster numbers generally, is not and will not be compliant with the collective agreement. This provides that new inmate accommodation is to be on the basis of one inmate per cell. The exception to that requirement (*"unless cells have been specifically designed for more than one prisoner"*) is met in the sense that such cells have been designed for more than one inmate. However, only a percentage of such cells are to be so used and in defined circumstances which are not those that have caused the defendant to double bunk the four prisons. In addition, the defendant intends by double bunking to exceed the contingent allowances for extra inmates in any event. What occurred at NRCF's Pukeko North pod illustrates that intention.

[108] The collective agreement's requirement for the announcement of each institution's operating capacity implies an expectation that this will be the institution's operating capacity for the duration of the collective agreement unless the agreement is varied by the parties or the application of the Protocol varies a particular institution's operating capacity.

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[4] [2005] ERNZ 984

[109] If the defendant wishes to double bunk the prisons generally and on grounds other than those allowed for in the collective agreement, what are referred as the *"contingent"* circumstances, then the appropriate course for him is to seek a variation of the collective agreement. This will require ratification by affected CANZ members. Alternatively, the defendant may seek, in collective bargaining, to have a provision in a new collective agreement that allows for greater muster flexibility.

[110] However, pursuit of his objectives by the defendant by recourse to the Protocol under the collective agreement does not require the union's agreement so long as other requirements of those documents are complied with as I am satisfied they have been. The evidence establishes t hat there has been the required consultation and negotiation about the planned increases in musters by double bunking. If that has not occurred, that is not because the defendant has not been willing to engage with the union on these issues.

[111] Although increased inmate accommodation can only be provided in an institution in conjunction with increased facilities for inmates and staff and there must be a degree of proportionality between these increases, the Protocol does not require what might be described as "one for one" increase in such facilities to match increased inmate numbers.

[112] As the collective agreement including the Protocol has been interpreted, I am satisfied that its consultation and negotiation obligations have been met by the defendant.

[113] For the foregoing reasons, I conclude that the defendant's double bunking of the four prisons, both actual and planned, is not in breach of the collective agreement. In particular, to the extent that maximum specified musters at the four prisons will be exceeded, the defendant's double bunking does not require the agreement of the plaintiff.

[114] The plaintiff's first cause of action fails and is dismissed.

Decision – Second cause of action

[115] This alleges breach of the collective agreement's consultation provisions. The union says that between December 2008 and 11 June 2009 the defendant negotiated about the implementation of double bunking and did not *"consult"* with it about the way in which the prospective muster increase might be managed. The plaintiff says, for example, that the defendant closed his mind to other options that ought to have been the object of consultation, including the completion of three of the four newest prisons that have been substantially, but not completely, built.

[116] I conclude, however, that at the outset the defendant did consult with the plaintiff about how he might best deal with the impending increased musters. The plaintiff made suggestions about other ways of dealing with the prospective muster increase but these did not find favour with the defendant. While it is correct that, as from early 2009, the defendant focused increasingly and then solely on double bunking and how it might be implemented, a fair and reasonable employer in the circumstances of the defendant could only have come to the conclusion that double bunking was the most practicable and indeed the sole solution, at least in the short to medium term. An employer is entitled to take strategic decisions such as the defendant took with regard to double bunking, and indeed the preamble to the collective agreement recognises this.

[117] The plaintiff seeks to draw a marked distinction between processes of consultation and negotiation. It says they are entirely separate and distinct processes. I do not agree in this case. An employer in the circumstances of the defendant is obliged to consult with its employees and their representative but is not required to engage in that process by reference to impossibilities or even practical unrealities. I use as an example the completion of incomplete prisons strategy put up by the plaintiff. The additional inmate accommodation that might have been provided, even if construction could have been completed within the period of about 15 months from November 2008 to February 2010, would not have provided a satisfactory solution to the anticipated muster increase. That is because completion of incomplete prisons would still provide a shortfall of several hundred beds for inmates by February 2010 and until some time in 2012. The defendant was entitled

reasonably to so conclude as he did and to reject thereby further discussion of this inadequate alternative.

[118] Further, consultation in employment relations cannot always be separated from negotiation or bargaining. The facts of this case and the plaintiff's participation in the process well illustrate that. Whereas pure consultation would have left the decision making to the defendant, the process engaged in attempted to include the plaintiff in that decision making by seeking its agreement to terms on which increased musters might be introduced. The plaintiff, for its part, participated in that negotiation exercise and, as was its entitlement, proposed terms and conditions including increased remuneration but on which agreement could not be reached. In this sense, the plaintiff has had both consultation and negotiation, albeit sometimes in an amalgamated exercise. It has had more opportunity to effect change than if consultation alone had been allowed for.

[119] It is not correct to say, as the plaintiff does, that the defendant has not met his consultation obligations under the collective agreement on this issue. This cause of action fails.

Decision – Third cause of action

[120] This is a general claim that the defendant has failed to deal with the plaintiff in good faith. This is based on an allegation that the defendant has misled or deceived the plaintiff about the extent of the problem the defendant faces with prospective increased muster numbers. The union says the defendant's advice to it in December 2008 that there was a predicted *"crisis"* caused by new policies, was deceptive and misleading. That is said to be because analysis of the documented predictions discloses that, by February 2010, the defendant will need only an additional 163 inmate beds, being 1.9 per cent of the inmate population and that even by December 2016, the increase will only be 2.8 per cent above the previously predicted muster at that date. The plaintiff submits that increased numbers of inmates have been known for some time and new penal policies will not increase significantly the prisoner population. The plaintiff asks rhetorically in submissions:

"If there is going to be prisoner population crisis in February 2010 the question is why hasn't the defendant done something about it earlier?".

[121] Further, the plaintiff says that the defendant has been deceptive and misleading in his assertion that it will not be feasible to complete construction of additional (single) cells at NRCF, ARWCF and OCF because of resource management consent constraints. The plaintiff says that this assertion made at the time is now shown to be untrue by evidence adduced at the hearing that original resource designations for these sites were permissive and allowed them to grow with limited restrictions. The plaintiff emphasises that if the intended double bunking takes place at these sites, it will not be possible to extend the number of cells allowed for in the original designs, whether as single or double bunked cells. It says this was misleading or deceptive conduct.

[122] I do not agree. Whether the defendant can complete facilities at the three incomplete prisons expeditiously and in good time to accommodate increased musters in single cells is a difficult question, not least of resource management law and practice. There are mixed views honestly held on the question. I do not think that the defendant's initial stance can be said to have been one taken and conveyed to the plaintiff in bad faith.

[123] Next, the plaintiff says that despite its recent assertions that the cells at the four prisons were designed specifically for two inmates per cell, the defendant has long conceded privately that the cells were not specifically designed for that purpose. I do not agree. The design and construction documents confirm that they were designed for up to two inmates. The evidence does not support, to the requisite standard, such a conclusion about the bad faith of the defendant's past assertions. It is open to a party to change its/his mind upon receipt of advice about its position in law. That is not bad faith, as long as it is done openly and transparently as I find it has been.

[124] Probably as a result of other associated information to which he was privy, the defendant accepted from early 2009 that it was unlikely that Ministers would agree to budgetary provision for remuneration increases for corrections officers in

consideration of agreeing to double bunking. Accordingly, he did not lobby the Minister of Corrections in particular and Government in general for this to be a priority in the May 2009 budget. The plaintiff says, however, that a claim for increased remuneration for its members having been made by the union as an important element of its agreement to double bunking, the defendant was obliged as a matter of good faith to press Government for the funding necessary to accommodate the union's claim.

[125] I do not agree that the defendant's failure or refusal to do so amounted to acting in bad faith towards the union and its members. The statutory good faith obligations do not extend to an obligation on the employer to bring pressure to bear on the responsible Minister to seek to persuade or influence in turn the Minister of Finance to make budgetary provision for remuneration increases. The defendant was entitled to assess both what was known to him to be practicable and realistic, and to make his budget bids accordingly. It was also open to the defendant to both resist the union's claim for increased remuneration and to prepare budget bids accordingly. Statutory good faith obligations in employment relationships do not extend to such considerations. While unions in the state sector may legitimately attempt to bring pressure on chief executives to support budget bids that will allow for such increases in subsequent collective negotiations and chief executives may elect to do so, a failure or refusal to do so did not amount to bad faith on the part of the employer in this case.

[126] As s4 of the Employment Relations Act 2000 exemplifies, good faith is to do with honest or transparent conduct between parties and prohibits dealings that mislead or deceive or may do so. So it will be acting in good faith to disclose frankly an intention to do or not to do something in dealings beyond the employment relationship, as the other party may wish. It may have been bad faith, for example, for the defendant to have assured the union that he would press the Minister of Finance for budgetary provision for remuneration increases in circumstances when he did not do so and never had any intention of doing so. But there is no suggestion here of such a strategy having been set up and followed by the defendant. On the contrary, the defendant may be said to have been bluntly honest with the union about his intention not to seek budgetary provision for increased remuneration because of

the likely futility of doing so. That is really what he has been criticised by the plaintiff for doing, but that is a political consideration rather than one of fair dealing in employment relations.

[127] Not only did the defendant not act in bad faith, as alleged by the union, but he acted in good faith towards it and its members, albeit they may not have welcomed his message or stance.

[128] The plaintiff argues that the defendant began bargaining with it representing that he had no funding with which to pay the Department's staff additional remuneration in return for agreeing to double bunking. This was said by the union to be a strategy to obtain its agreement to safety issues. The plaintiff says that the defendant's briefing note to the Minister of 16 February 2009 advising that there should be a consistent message that there would be no financial incentives and seeking the support of Treasury officials in representing that position was an illustration of the defendant's bad faith. This strategy of not compensating in remuneration for double bunking was said to have been reiterated on 27 February 2009 in a Draft Cabinet paper concerning funding for prison capacities. The plaintiff says that it was duplicitous and in bad faith that, having decided consistently that there should be no additional remuneration paid, the defendant relied on the absence of budgetary provision for additional remuneration against which he had lobbied. He could not have justified subsequently his position by reference to the absence of budgetary provision in good faith.

[129] Further, the defendant's e-mail to all staff of 8 June 2009 is said to have perpetuated this bad faith dealing with the union and its members. Mr Roberts submitted that the defendant cannot now assert in good faith that matters were out of his hands when he was responsible for recommending those as negotiation strategies. The failure to obtain funds to pay additional remuneration were said to be part of the strategy that the defendant recommended to the Minister and implemented. Counsel submits that the defendant cannot in good faith claim that these are matters of government policy over which he had no influence and it is clear that he recommended them. The plaintiff says that the defendant's position is of his own making, both in terms of the way he chose to bargain with the union and his failure

to accelerate or complete building projects to ensure sufficient prisoner accommodation well before February 2010. The plaintiff is critical of the defendant's suggested threat of privatisation as leverage to gain the union's agreement to double bunking.

[130] The plaintiff submits that the defendant did not believe that he could apply the protocol to justify variations to operating capacities because if this had in fact been an option, it would have been unnecessary for the defendant to have had such extreme backup options as threats of privatisation, lockouts with military personnel performing corrections officers' duties, and the like. The plaintiff says that the defendant's dealings in relation to the Protocol have illustrated his bad faith.

[131] Although the frustration and disappointment of the plaintiff and its affected members is understandable in view of past preparedness by the defendant's predecessors to pay monetary allowances to corrections officers for increased musters, I do not find that what might be described as the defendant's hard-nosed resistance to the plaintiff's claims can amount to acting in bad faith. It is not bad faith for an employer to refuse to compromise as the employer has done of past occasions. Nor is it bad faith for an employer to adopt and adhere to a strategy that frustrates the employees' expectations of compromise, so long as this does not deceive or mislead as I am satisfied the defendant's strategies did not. This cause of action must likewise be and is dismissed.

Decision – Fourth cause of action

[132] This is brought in the alternative to the third. It maintains that if, at the time they were being designed and constructed, the (single) cells at the prisons were in fact designed specifically for more than one inmate, then the defendant has misled or deceived the plaintiff by not making this clear.

[133] The plaintiff relies on the *"Operating Capacity"* clause in the collective agreement and its predecessors that the construction of new prisons was to be on the basis of one prisoner per cell unless these were designed specifically for more than one inmate. Mr Roberts submitted that the evidence showed at the time of the design

and construction of these institutions, the defendant or his predecessor held out, including to the plaintiff, that accommodation of inmates was to be in single cells. The plaintiff says that it relied on these assurances and it was reasonable for it to have understood that cells were not designed specifically for more than one inmate. Mr Roberts highlighted evidence that:

- there was no discussion with the union about cell design during consultation with it about such associated matters as prison layout and site operations;

- when cell prototypes were built, there was no reference to the numbers of inmates they might hold;

- there was no information given to the union during the design and construction phase about the cells being designed other than for single occupants or any opportunity to comment on these elements; and

- the high probability that if there had been any suggestion that cells were designed and built for more than one inmate, the union representative would have objected strenuously.

[134] Whilst I accept that at the time of their design and construction, the cells in the four new prisons were, for the most part, to accommodate single inmates, I do not think it can be said that the defendant held out deceptively that this was so contrary to the reality that these were cells for occupation by two inmates. It was obvious from the plans and other designs that although accommodating only one inmate at the time of their commissioning, the cells could accommodate a second inmate and were designed accordingly. At the time of their design and construction several years before the changes in 2008 that precipitated this litigation, the intention of the defendant and/or his predecessors was that such cells would be occupied by a single inmate, or in some cases, by two inmates and that in "*contingent*" circumstances, a proportion of them might be double bunked.

[135] In these circumstances I do not think that the defendant can be said to have deceived or mislead the union or that his conduct was otherwise in bad faith. This alternate cause of action also fails and is dismissed.

Summary of judgment

[136] The plaintiff's four separate claims have failed and are dismissed.

Further mediation

[137] As indicated earlier in this judgment, and despite this litigation now being at an end, I direct the parties to further mediation of their dispute pursuant to s188(2)(c) of the Act. Important issues remain between them and although the result of this case changes the landscape, they will still have to engage in important on-going employment relations' issues. Despite the heat generated by this dispute, I detected in the longstanding lead negotiators for both parties not only a personal disappointment that they had failed to resolve this dispute, but a mutual respect and a realisation of the importance of the need to resolve other major consequential issues arising from it. I encourage them to do so, in either or both mediation and collective bargaining that must be about to take place if it has not begun already in anticipation of the expiry on 31 December 2009 of the current collective agreement.

Costs

[138] I would prefer to deal with any costs issues after this dispute has been resolved and if any remain at that time. Leave is reserved for either party to apply by memorandum.

GL Colgan
Chief Judge

Judgment signed at 4.30 pm on Friday 18 December 2009