IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2023] NZEmpC 168
EMPC 167/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	AJY Plaintiff
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Defendant

EMPC 174/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Plaintiff
AND	AJY Defendant

Hearing:	14–17 March 2023, 20–21 March 2023, 23–24 March 2023, 29–31 March 2023 (Heard at Hamilton) 3 May 2023 (Heard at Auckland)
Appearances:	JA Hope, counsel for AJY E Coats and A Codlin, counsel for Department of Corrections
Judgment:	3 October 2023

JUDGMENT OF JUDGE KATHRYN BECK

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[1] Both parties have challenged the determination of the Employment Relations Authority which found that the Department of Corrections (Corrections) had unjustifiably disadvantaged and unjustifiably dismissed AJY from their position as a Corrections Officer (CO).[1] The Authority awarded AJY lost remuneration and compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act). It did not reinstate AJY to their former position with Corrections.

[2] AJY challenges the remedies awarded by the Authority. AJY primarily seeks reinstatement.

[3] Corrections challenges certain other parts of the Authority's determination on a de novo basis. It denies that AJY was unjustifiably disadvantaged and unjustifiably dismissed. It says that they are not entitled to any remedies. It also says that if the Court was to find that they were unjustifiably dismissed, reinstatement is neither practicable nor reasonable, and that any remedies should be reduced for contribution.

Issues

[4] The issues for the Court are set out below.

(a) Was AJY unjustifiably disadvantaged by Corrections' responses or failure to respond to the complaint AJY raised on 20 September 2017?

(b) Was AJY unjustifiably disadvantaged by the decision to move them from the Gatehouse on or about 6 November 2017 and by the way it was carried out?

(c) Was AJY unjustifiably dismissed from their employment with Corrections?

(i) Did Corrections follow a fair and reasonable process?

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1 *AJY v Chief Executive of the Department of Corrections* [2022] NZERA 169 (Member Urlich).

(ii) Was the decision to dismiss substantively justified?

(d) If AJY was unjustifiably dismissed or disadvantaged, then what are the appropriate remedies?

(i) Is reinstatement practicable and reasonable?

(ii) Should reimbursement of lost wages be awarded under s 123(1)(b) of the Act?

(iii) Should compensation be awarded under s 123(1)(c)(i) of the Act?

(e) Should there be a reduction in remedies under s 124 of the Act?

(f) Should non-publication orders be made in relation to the employee and other particular individuals who were involved in the matters arising in this case?

Facts

Background facts

[5] AJY commenced employment with Corrections on 15 May 2000. They first worked as a CO at Prison 1. During their time there, they carried out a range of roles as a CO. In 2010, they completed their prosecutor training and started soon after as a prosecutor.

[6] The Prosecutions team manages the site misconduct process for prisoners, and prepares and implements adjudication hearings in accordance with the Corrections Act 2004 and the Corrections Regulations 2005. It also organises and manages Visiting Justices who attend the site for the purpose of hearing from prisoners who have appealed a misconduct charge or are referred for that purpose.

[7] In 2014, AJY transferred to Prison 2 and was assigned to the Prosecutions team there in September 2016.

[8] There were no issues with AJY's employment during their time at Prison 1 or their early time at Prison 2.

Facts arising in relation to AJY's complaint on 20 September 2017

[9] The Prosecutions team at Prison 2 had issues which it was working to resolve. During the period from December 2016 to February 2017, AJY raised various concerns about some of these issues with their direct manager and his manager. Some of their concerns were investigated and recommendations for improvement were made in a number of reports. However, AJY considered that their concerns were still not being resolved.

[10] One of the issues faced by the Prosecutions team was that there were a number of relationship difficulties within the team. Most of these difficulties appear to have revolved around the working relationship between AJY and another CO, PFD. Both AJY and PFD sent emails to Mr Stapleford, Acting Security Manager, each raising concerns about the other. There was subsequently a meeting on 14 August 2017 in which they were advised to "start afresh".

[11] However, the relationship difficulties were not resolved. On 29 August 2017, AJY sent a plea to Mr Stapleford: "PLEASE – Can you please come down this morning to see us all. Things are not going well with PFD in this office." Mr Stapleford responded: "I have a lot of meetings this morning. Will try to." However, there was no evidence that Mr Stapleford visited Prosecutions that day. Given he was managing around 80 COs and other staff, as well as having other security responsibilities, it is apparent his ability to maintain personal contact with Prosecutions was limited and visits infrequent.

[12] Unfortunately, the difficulties between AJY and PFD remained. On 20 September 2017, AJY made a "formal complaint" about PFD and their behaviour towards them, which they considered "bullying". They wrote:

> I am now making a Formal complaint about [PFD] and [their] behaviour towards me which I would deem to be bullying. As you are aware I have previously informed you of [PFD's] bullying behaviour towards me of not following instructs given be me to follow processes in the Prosecution Officer,

> [their] rude behaviour towards me when asked questions and mostly [their] behaviour of just not speaking to me and giving me the "cold shoulder" treatment. …

[13] Mr Stapleford forwarded the complaint to Ms Goodin, a Senior Human Resources (HR) Advisor, who advised him that Corrections' bullying policies and procedures needed to be followed (which she provided to him through a link), that a meeting needed to be set up to plan a way forward, and that he needed to acknowledge receipt of the complaint. In an email titled "Bullying", Mr Stapleford acknowledged receipt of the email to AJY and said that he would follow up that week. That never happened, and no meeting was set up either with the HR department or with AJY.

[14] When Mr Tukula returned to the role of Security Manager at the beginning of October 2017, Mr Stapleford provided him with a handover document. The document advised that there were ongoing issues between AJY and PFD; however, there is no mention of alleged bullying or the bullying policy. Mr Tukula's evidence was that while he was aware of there being tensions between AJY and PFD, he was not aware that there was a bullying complaint.

[15] On 2 October 2017, Mr Tukula met with AJY and LRC (who also worked in Prosecutions) in response to an email from AJY raising concerns about PFD's work performance. AJY's bullying complaint was not discussed during the meeting. Subsequently, Mr Tukula decided to transfer PFD out of the Prosecutions team at PFD's request. He did this without any knowledge of the bullying complaint.

[16] There was additional evidence provided as to what happened with the complaint from Corrections' perspective. It appears that various individuals thought that someone else was responsible for the complaint, but the material point is that the complaint was not progressed further. There was no follow-up, as promised, with AJY about their complaint. Despite AJY advising that LRC was a witness, they were never spoken to about the allegations. There was no investigation at all.

[17] The complaint appears to have fallen through the cracks created by the departure of Mr Stapleford and the return of Mr Tukula. Ms Goodin made the appropriate concession that Corrections had "dropped the ball".

Facts relevant to Corrections' action of moving AJY to the Gatehouse

[18] An internal review of Prosecutions was undertaken, and a report was prepared. The report set out findings and recommendations. These were accepted by the Prison Director, Christopher Lightbown. A copy of the report was given to the Prosecutions team on 15 September 2017. AJY agreed with the recommendations.

[19] AJY's frustrations with the lack of support for Prosecutions continued to build over the period 15 September to the end of October 2017, and they continued to raise concerns about issues that were still, at least in their view, not being addressed and the recommendations not being implemented.

[20] On Friday, 27 October 2017, AJY lodged a Health and Safety Tracker (Tracker),[2] in which they noted that their stress was at an all-time high and was impacting their health. Under the heading "Actions taken and future recommendations", they emphasised that although they wanted the recommendations from previous reports to be actioned and although they were concerned, they still wished to remain in Prosecutions.

[21] On receiving the Tracker, Mr Tukula emailed Mr Takataka, HR Advisor, that day, providing a copy and advising that he was thinking of moving AJY from Prosecutions out of concern for their welfare. This was in spite of AJY's statement about not removing them.

[22] On Monday, 30 October 2017, AJY advised Mr Tukula that they would be away sick for the rest of the week and would return on Monday, 6 November 2017.

[23] On Wednesday, 1 November 2017, AJY's access to the Prosecutions folder in the computer system, and the PCO access to the Integrated Offender Management System (IOMS),[3] were removed. On the same day, a purchase order was requested to change the PIN number for the lock on the door to the Prosecutions office, which was completed by Friday, 3 November 2017.

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2 A means of notifying a health and safety concern which then required the issue to be formally tracked throughout the investigation until resolution.

3 IOMS is Corrections' repository of information relating to prisoners.

[24] Late in the day on 3 November 2017, after not being able to reach them by phone, Mr Tukula emailed AJY confirming a voice message he had left, directing that AJY not report to Prosecutions on Monday and that they come and see him at 8 am in his office instead.

[25] AJY replied, asked the reason and noted that they would now worry over the weekend about what was happening. Mr Tukula advised that his concern was about their welfare and that it was not a disciplinary meeting. He asked them to remain in the Gatehouse until he arrived, as their start time was normally 7 am.

[26] AJY reiterated in response that they were able to perform their role and that they and LRC just needed support. They confirmed they would meet Mr Tukula in the Gatehouse on Monday, 6 November 2017.

[27] When AJY arrived at work on Monday, 6 November 2017, they waited in the Gatehouse as directed and attempted to access the Prosecutions folder through the computer system, but found they were unable to do so. They also discovered they were locked out of the Prosecutions office.

[28] When LRC came to work in the Prosecutions office that day, they were greeted at the door by PFD.[4] At the end of the day, they were advised that the security PIN codes for the door to prosecutions and exhibit room had been changed.

[29] On discovering they were locked out of the system, AJY became concerned and contacted Allan Whitely of the Corrections Association of New Zealand (CANZ), asking for his assistance for the planned meeting with Mr Tukula. The meeting was put off until 3 pm when both he and Mr Whitely were available.

[30] The outcome of the meeting was recorded in an email sent from Mr Whitely to Mr Tukula that night. Amongst other things, this was that AJY would move from Prosecutions to the Gatehouse on their same hours of "7–3" and they would meet again in January 2018 to discuss a return to Prosecutions.

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4 And so did not have to use a PIN code to enter.

[31] Working in the Gatehouse involved being responsible for security of the prison in relation to persons entering, either by pedestrian access or through vehicle gates. The COs at the Gatehouse search relevant individuals and vehicles where a need to undertake a search is identified. The Gatehouse COs also manage day-to-day resources for the prison site and maintain oversight of prisoners exiting the site for work outside of prison.

[32] On 28 November 2017, AJY raised a personal grievance regarding their complaints about their health and safety claims not being properly dealt with and their removal from Prosecutions. Corrections responded on 5 December 2017, rejecting the claim.

[33] There was no meeting in January 2018 to discuss a return to Prosecutions, but AJY could not have done so at the time in any case. From 17 January to 18 February 2018, they were off work due to a combination of influenza and the impact of an injury to their foot. The injury meant they could only perform light duties and could not undertake prisoner-facing tasks from 14 February to 11 May 2018.[5]

[34] AJY remained in the Gatehouse until their initial suspension on 1 May 2018, confirmed in a letter on 3 May 2018.

Facts which are primarily relevant to AJY's dismissal

[35] After AJY started working in the Gatehouse, their health deteriorated.

[36] They took time off in early 2018 as a result of illness and a foot injury from the previous year that was not responding to treatment. When they returned, they were only supposed to work on light duties as prescribed by various medical certificates. They continued to suffer pain from their foot and were prescribed medication for that pain.

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5 Due to health and safety requirements and as specified in various medical certificates.

[37] During this period, they had regular check-ups with their GP.[6] They reported to their GP that [Redacted pursuant to [258]–[259]]. These symptoms, however, were not disclosed to Corrections at the time. AJY was already on light duties. They say they did not consider the possibility of the symptoms further impacting their ability to work.

[38] Over the period early March to mid-April 2018, various issues arose (or continued) between Corrections and AJY. Corrections and AJY continued to meet in an effort to resolve the issues. However, AJY became increasingly and overly focused on what they perceived as being unresolved issues.

[39] They became, in their own words, "obsessed that Prosecutions was not tracking well". This led them to "keep up with misconducts", which involved accessing various prisoners' IOMS records. It is common ground that there was no legitimate basis for them to be "checking" in this way. However, they state that they believed they would return to Prosecutions and were therefore checking to make sure standards were not dropping in their absence.

[40] During this same period, they also sent private and confidential information to their lawyer and to their personal email address.

[41] Additionally, they became concerned about potential contamination of evidence in the prison's evidence room. Their obsession with this issue led to the events that caused their suspension from duty, sparked an employment investigation, and ultimately led to their dismissal. On 1 May 2018, they photocopied pages from the evidence log in the exhibit room relating to two prisoners; they highlighted the matters they were concerned about. The two prisoners were on the Visiting Justice's list of misconduct hearings for that day.

[42] When the Visiting Justice arrived at the Gatehouse that day, AJY approached her and asked to talk. The Visiting Justice said that was not appropriate. AJY then handed the Visiting Justice the folded photocopied pages. Once through the Gatehouse security, the Visiting Justice reported what had happened and handed over the

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6 11 and 20 April and 3 and 23 May 2018.

documents without looking at them. She asked that if they related to the prisoners on her list for that day, those prisoners should be removed from the list, which led to some delay.

[43] AJY says they approached the Visiting Justice with the documents because of concerns about evidence contamination and worry that the prisoners in question were not going to get a fair hearing. They said at the time that they wanted the truth to be known.

[44] Mr Lightbown was advised of what the Visiting Justice had reported about AJY. He wrote to AJY the same day, summarising the events as he understood them. He attached various information, advising his concerns as to the allegations arising from the circumstances, and stating that he was commencing an employment investigation and considering suspension.

[45] AJY did not challenge their suspension, and this was confirmed to be on full pay by way of letter dated 3 May 2018.

[46] An employment investigation was commenced with terms of reference dated 3 May 2018. Rochelle Danby, Manager of the Integrity Support Team (IST), was appointed as an investigator. AJY received a copy of the notification of the employment investigation letter, the two pieces of paper photocopied by them, and the email reporting the incident.

[47] However, although Ms Danby was originally appointed the investigator, the role was subsequently delegated to Nick Coston. The terms of reference were updated to reflect that change, but the updated terms of reference were not provided to AJY or their lawyer.

[48] In the course of the investigation, Mr Coston obtained a report into AJY's IOMS access from 5 March to 1 May 2018 and obtained their emails from 5 March to 1 May 2018. As a result of this report, the terms of reference were again updated on 19 June 2018 to reflect allegations in relation to AJY's IOMS use and in relation to

their emails. AJY was informed of the new allegations but was not provided with a copy of the updated terms of reference.

[49] Between 1 May and 3 July 2018, Mr Coston received and took statements from relevant individuals. Information that had been gathered in the investigation was provided to AJY and their lawyer by the end of September 2018. AJY was interviewed by Mr Coston on 1 and 2 October 2018. They were provided with a list of questions prior to the interview and had provided some written responses already.

[50] Following that interview, Mr Coston carried out additional interviews at AJY's request; however, he chose not to interview other individuals suggested by AJY's lawyer as he did not consider their evidence would be relevant.

[51] On 6 December 2018, AJY's lawyer was sent a draft investigation report and its appendices. The appendices at this stage included the three versions of the terms of reference.

[52] On 12 December 2018, AJY's lawyer, Mr Hope, wrote to Mr Coston seeking an extension of time to respond to the draft report. Among other things, he advised that a psychiatrist's report was expected from Dr M in January 2019 and noted its importance in relation to the circumstances and nature of AJY's alleged behaviour. He also asked Mr Coston to follow up on a number of issues and noted that once the investigation was completed, a further interview of AJY might be necessary.

[53] After carrying out further inquiries on 18 December 2018, Mr Coston provided further information to AJY's lawyer and advised that any report from Dr M could be provided to the decision maker, as Mr Coston's role was to make findings of fact only. He explained his follow-up inquiries and advised he would not be making some of the inquiries requested as in his view they were not relevant. He also responded to AJY's questions.

[54] On 22 January 2019, Mr Coston completed his report and provided it to Mr Lightbown. On 31 January 2019, Mr Lightbown sent a copy of Mr Coston's final investigation report to AJY and invited them to make submissions on the findings.

[55] Mr Hope responded on AJY's behalf on 26 April 2019. By this stage, they had received Dr M's psychiatric report, dated 11 December 2018. That report provided mental health diagnoses.

[56] Mr Hope's letter stated that AJY admitted the allegations, that they acknowledged their actions were inappropriate, and that they were otherwise remorseful. However, Mr Hope went on to say that dismissal would not be appropriate because of AJY's reasons for acting in the way they did. The reasons stated for their actions included their mental and physical condition, their subsequent diagnosis of mental illness, the effect of their medication on them, the background of employment issues up to and including the personal grievances they had raised, and their personal history. The letter also set out the relevance of the diagnoses on their behaviour. Mr Hope submitted that the relevance of the diagnoses on the alleged misconduct was direct and explained their behaviour.

[57] On 18 June 2019, Mr Lightbown wrote to AJY through their lawyer, setting out his preliminary view.

[58] In relation to AJY's health and the medication they were taking at the time, Mr Lightbown acknowledged the GP's report [Redacted pursuant to [258]–[259]]. However, he stated that it appeared to him that their actions in collating and giving documents to the Visiting Justice were planned, which suggested they had clear intentions. He recorded that the "deliberate nature of [their] actions" was of concern to him as there were systems and processes in place which staff were relied on to follow. He noted that AJY did not bring their health concerns – in particular, the medication they were taking – to the attention of anyone at Corrections.

[59] In regard to the psychiatric assessment, Mr Lightbown acknowledged Dr M's report and the diagnoses reported in it. He recorded Mr Hope's submission that AJY's behaviour was directly linked to the diagnoses. However, he went on to state Dr M's report did not explain how their recent diagnosis was linked to their actions.

[60] He also recorded Mr Hope's submission that there was a direct link between an alleged incident, AJY's mental health, and their actions to prevent further similar

incidents in the prison where they had thought that others were not doing so. He then went on to state that the matter referred to was treated seriously and investigated and that no evidence was found in support of the allegations.

[61] Mr Lightbown then went on to reach a preliminary view that all the allegations against AJY were substantiated and concluded that their actions amounted to breaches of the Code of Conduct. He also made comments such as: "I am extremely disappointed in your choice of actions in this regard, even though you knew your decision was in conflict with our expectations." He also noted that he considered their actions to be a serious privacy breach as they "*knowingly* accessed the offenders' information" (emphasis added). Finally, he noted his view that AJY's actions and behaviour constituted serious misconduct and warranted disciplinary action. He stated that, having carefully considered all of the circumstances and the range of disciplinary sanctions available to him, his preliminary view was that the appropriate disciplinary sanction was dismissal on notice.

[62] In response, Mr Hope correctly noted that Mr Lightbown's preliminary view had made factual and/or evaluative decisions which involved medical, psychiatric and pharmacological assessments. He noted that Mr Lightbown was not a psychiatrist or registered medical practitioner and that as such, he did not have all the information necessary to make a decision. He submitted that the health/psychiatric issues required further investigation and that Corrections should obtain the necessary reports from psychiatrists and other specialists before making a decision. Despite the obligation being on Corrections, he also advised that AJY was doing their best to fill the gap in information and obtain a report from a consultant forensic psychiatrist, Dr G.

[63] On 31 July 2019, Mr Hope requested a further report from Dr G in relation to some of the matters raised by Mr Lightbown in his preliminary view letter.

[64] On 4 October 2019, Mr Hope wrote to Mr Lightbown requesting an adjournment of a meeting that was scheduled to take place between AJY and Corrections until the report from Dr G could be completed. He informed Mr Lightbown that the report was necessary because there was a gap in the investigation

that required further input from a psychiatrist. Mr Lightbown gave him until 25 October 2019.

[65] Dr G provided a report dated 11 October 2019 in which they responded to questions relating to some of the positions taken by Mr Lightbown in his preliminary view.

[66] In response to Mr Lightbown's statement that AJY had acted with clear intentions when preparing and giving documents to the Visiting Justice, Dr G stated:

> [Redacted pursuant to [258]–[259]] these circumstances can have profound impact on executive function and self-regulation skills (the mental processes that enable us to plan, focus attention, remember instructions, and juggle multiple tasks successfully).
> …
> The combination of the potential side effects [Redacted pursuant to [258]–[259]] and symptomatology [Redacted pursuant to [258]–[259]]very likely could have compromised the intellectual functioning and in particular the executive function of [AJY].

[67] In answer to Mr Lightbown's comment that he did not believe that the information about the psychiatric diagnosis explained how such diagnosis was linked to AJY's actions, Dr G reported:

> [Redacted pursuant to [258]–[259]]

[68] On 8 November 2019, Mr Lightbown and an HR manager from Corrections met with AJY and their lawyer to hear their submissions on the preliminary view.

[69] On 4 December 2019, Mr Hope wrote to Corrections submitting that Mr Lightbown had a conflict of interest which prevented him from determining the matter. He also raised issues in relation to an independent report which critiqued the prison.

[70] In a letter dated 11 December 2019, Mr Lightbown set out his final view in relation to the allegations and the dismissal of AJY. In summary, Mr Lightbown concluded:

(a) All of the allegations were substantiated;

(b) AJY had breached the Code of Conduct, Privacy Act and Corrections' policies, procedures and guidance (including the Privacy Policy and Privacy Breaches and IOMS Access Guidance);

(c) AJY's accessing of offender information and using it for reasons related to their personal life was a serious privacy breach;

(d) AJY's substantiated and admitted actions had deeply impaired the trust and confidence essential to the employment relationship and he could no longer have trust and confidence in them;

(e) AJY's actions and behaviour constituted serious misconduct and warranted disciplinary action; and

(f) the appropriate disciplinary sanction was dismissal on notice.

[71] In relation to the statement provided by Dr G, Mr Lightbown wrote:

> I acknowledge that you have some challenging personal circumstances but I struggle to see this mitigates your choice of actions (in particular towards the Visiting Justice and the impact on that process; and in relation to the Departmental information and systems, namely IOMS).

[72] Mr Lightbown acknowledged the letter from AJY's GP, but advised he was unable to reconcile this with the CCTV stills which showed AJY photocopying information from the evidence book, highlighting the information and waiting for the Visiting Justice to appear. He noted that their behaviour "appears to be deliberate and intentional; I do not see evidence of the noted … symptoms or side effects."

[73] Mr Lightbown again struggled in relation to the alleged incident at the prison, stating that he failed to see how AJY's actions in May 2018 were mitigated by their explanation that they felt "'threatened' by an incident that took place in September 2017". The word "threatened" is in scare quotes.

[74] Likewise, in relation to the accessing of the IOMS information, Mr Lightbown noted that AJY "deliberately" accessed such information despite it being clear that they were not authorised to do so.

[75] In his final view, Mr Lightbown noted AJY's difficult and challenging personal circumstances but said:

> I do not believe that it mitigates your choice of actions. It is my view that you were aware of what you were doing at the time and failed to follow appropriate processes and procedures for your own personal needs. I have considered that you believe you were doing the right thing at the time. However an employee cannot take such actions.

[76] Ultimately, Mr Lightbown stated that he had considered AJY's employment history, their personal circumstances and whether a lesser sanction would be appropriate, but had formed the view that the appropriate disciplinary sanction was dismissal on notice.

[77] AJY was then dismissed on one month's notice.

Law

[78] In considering whether AJY was unjustifiably disadvantaged or dismissed, the starting point is s 103A of the Act, which states:

> **103A Test of justification**
>
> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
>
> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.
>
> (3) In applying the test in subsection (2), the Authority or the court must consider—
>
> (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
>
> (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

AJY's bullying complaint

Submissions

[79] Counsel for AJY submitted that the plaintiff made a formal complaint of bullying against PFD on 20 September 2017which was not investigated. He argued that AJY was disadvantaged in their employment as a result of the defendant's failure to address their complaint.

[80] Counsel for Corrections acknowledged that no formal process was conducted in response to AJY's complaint. However, it was submitted that although AJY described their complaint as formal, Corrections was entitled to adopt a flexible approach in resolving it. Further, Corrections submitted that given the context of what happened before and after the complaint, AJY was not disadvantaged. In particular, it was submitted that a formal investigation would not have been appropriate given the nature of the alleged bullying and the previous discussions relating to the Prosecutions team in respect of their working relationships. Finally, it is submitted that there was a genuine intent to resolve the concerns raised by AJY and that they were ultimately resolved by PFD being moved to a new department.

Issues

[81] Corrections has a "Preventing Harassment & Bullying" policy. In considering whether AJY was disadvantaged by Corrections' lack of response to their complaint it is necessary to consider three issues:

(a) Did the policy apply to the complaint?

(b) Did Corrections comply with the policy?

(c) Did any breach of the policy disadvantage AJY?

Did the policy apply to the complaint?

[82] In a paragraph headed "Application", the policy states that it applies to all employees of Corrections. AJY was an employee, so the policy applied to them. Further, in a section headed "Managers' Responsibility", it refers to managers' duties on receiving complaints or allegations of harassment or bullying. AJY had made it clear that they were making a formal complaint of "bullying". Further, on the face of it, their allegation that PFD was rude to them when asked questions, did not speak to them, and gave them the cold shoulder treatment, comes within the examples of bullying set out in the policy, which includes isolating or ignoring an individual on a regular basis.

[83] Corrections accepts that its "Preventing Harassment & Bullying" policy and procedures applied to AJY's complaint. Indeed, Ms Goodin sent it to Mr Stapleford the same day that the complaint was received. AJY had made it clear that they were making a formal complaint of "bullying".

[84] Therefore, I find that the policy applied to the complaint.

Did Corrections comply with the policy?

[85] The policy states that managers are responsible for "responding promptly and fairly to any complaints or allegations of bullying or harassment." While there was a prompt acknowledgement, there was no further response.

[86] Once a person makes a formal complaint in writing to their manager, the manager's responsibility, as set out in the policy, includes:

(a) taking seriously all complaints and seeking HR advice;

(b) discussing with the complainant how he/she wishes to resolve his/her concerns;

(c) ensuring the complainant has ongoing support and, if necessary, separating the parties involved (preferably without unduly disadvantaging either party);

(d) if necessary, instigating a formal investigation; and

(e) advising the complainant of the result of any investigation.

[87] Ms Coats, counsel for Corrections, submitted that its response was compliant with the policy in that it acknowledged receipt of the complaint, sought advice from HR, and took steps to arrange a meeting with AJY. I do not agree.

[88] Mr Lightbown responded to AJY's complaint, but that was only the first step in the process. Further, while Mr Stapleford received initial advice, he did not follow it. No meeting was arranged with AJY together with HR to discuss the complaint in the 10 days before he left the role, nor was one arranged by anyone else afterwards. While Mr Tukula met with AJY and LRC on 2 October 2017, on his own evidence that meeting was not in relation to the complaint as he was not even aware of it at that time. No other action required by the policy was taken by any of the numerous managers potentially involved in this complaint.

[89] Corrections also submitted that although a formal process was not followed as required by the policy, it was entitled to adopt a flexible approach. I accept that the policy allowed a flexible approach. However, that approach required, at least in the first instance, a discussion with AJY about what their concerns were and how they wished to resolve them. The advice from Ms Goodin at the time was that there needed

to be a meeting with AJY. All witnesses for Corrections have acknowledged that that is a necessary first step. It did not take place.

[90] Because Corrections did not meet with AJY, it was not in a position to fully understand their concerns or the level of seriousness of the behaviour they were alleging. Accordingly, it did not have the information necessary to determine the appropriate way (flexible or otherwise) to approach the situation.

[91] Therefore, I find Corrections did not comply with its policy. This was unjustified.

Was AJY disadvantaged?

[92] Ms Coats submitted that AJY was not disadvantaged by Corrections' failure in not conducting a formal process because a formal investigation would not have been appropriate given the nature of the alleged bullying and the previous discussions relating to the Prosecutions team. Further, it is submitted that there was a genuine intent to resolve the concerns raised by AJY and that the concerns were ultimately resolved by PFD being moved to a new department. Counsel also submitted that on the evidence, it was highly unlikely that PFD was a bully in any case.

[93] However, while, on the face of it, PFD's transfer out of Prosecutions would appear to be a positive outcome for AJY, there was no discussion with them (as required by the policy) as to whether this resolved their concerns. They did not, therefore, have the opportunity to give notice of any concerns about that outcome.

[94] Without any process or inquiry being undertaken at the time (which is when these actions must be assessed), Corrections is simply not in a position to make such a submission about PFD's behaviour. However, such a view[7] is consistent with the way in which it treated the complaint, which was to not take it seriously and to effectively disregard or dismiss it. That is unacceptable.

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7 That she was unlikely to be a bully; see above at [92].

[95] Corrections' policy requires that it take all complaints seriously. To act otherwise is a breach of the policy. Its failure to take AJY's complaint seriously clearly caused distress and stress to them. They understandably felt slighted and hurt by Corrections' failure. It appears to have compounded their feelings of grievance about the way in which they and Prosecutions were treated, which was that they were disregarded. On the evidence, it is apparent that they suffered disadvantage.

Outcome

[96] Accordingly, I find that in failing to follow its own policy in relation to AJY's complaint of bullying dated 20 September 2017, Corrections' actions (or inaction) were unjustified. Further, I find that such unjustified actions caused disadvantage to AJY.

Removal from Prosecutions

Submissions

[97] Counsel for AJY submitted that the way AJY's removal from Prosecutions was carried out was unjustified and that the process disadvantaged them. In particular, it is submitted that insufficient consultation occurred prior to the decision to remove AJY.

[98] Ms Coats acknowledges that Corrections did not consult with AJY before re-assigning them to the Gatehouse. However, Corrections submitted that it was entitled to re-assign AJY, that the re-assignment was necessary to protect their health, and that no consultation was required before a decision was made so long as consultation happened at some point. Finally, it is submitted that once it had been decided that AJY was not going to return to Prosecutions, it was reasonable for their access to be removed from the relevant systems and from the Prosecutions office.

Issues

[99] The central issue arising from AJY's removal from Prosecutions to the Gatehouse is whether AJY was sufficiently consulted, if at all, before the decision was

made to shift them out of Prosecutions. This issue gives rise to the following questions:

(a) Was AJY consulted before being moved from Prosecutions?

(b) Was Corrections required to consult AJY?

(c) If Corrections failed to consult, was AJY disadvantaged?

Was AJY consulted before being moved from Prosecutions?

[100] The central issue arising from AJY's removal from Prosecutions to the Gatehouse is whether they were sufficiently consulted, if at all, before the decision was made to shift them out of Prosecutions.

[101] Mr Tukula accepts that he made the decision to move AJY on or about 1 November 2017, if not before.[8] He says that was because he was concerned for their health and wellbeing if they stayed. He did not meet or discuss the situation with them until 6 November 2017. Accordingly, he made that decision without any reference to, or discussion with, them. This was despite AJY's clearly stated position that they did not want to move.

[102] There is no suggestion that Mr Tukula was open to changing his mind. He took steps to implement his decision before meeting with AJY.[9]

[103] When the meeting finally took place between Mr Tukula, AJY and Mr Whitely on 6 November 2017, it seems the discussion focused on the implementation and communication of the decision, not the decision itself. The removal of AJY at that point was a fait accompli.

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8 Possibly as early as 27 October 2017 when he emailed Mr Takataka

9 Removing computer access and changing PIN codes for locks; see above at [23].

Was Corrections required to consult AJY?

[104] Ms Coats says it was open to Mr Tukula to move AJY in the circumstances and that his motive (AJY's wellbeing) was sound. I accept that a CO can be moved between departments, but it requires, at the very least (even on Corrections' evidence), a conversation before the final decision is made and certainly before implementation begins. That did not happen here. While the result may have been the same, AJY was entitled to be consulted first and for Mr Tukula to have an open mind as to the outcome of that discussion. This is especially the case where they specifically stated they did not want to be moved.

[105] It was also submitted by Ms Coats that once it had been decided that AJY was not going to return to Prosecutions, it was reasonable for their access to be removed from the relevant systems and from the Prosecutions office. However, this submission misses the central issue. The problem is not whether Corrections is entitled to implement its decisions; the issue is whether it must consult or at least communicate before making and implementing decisions.

[106] Corrections' process was a breach of s 4(1A)(b) of the Act, which requires the parties to an employment relationship to be active and constructive in maintaining a productive employment relationship in which the parties are responsive and communicative. The way that Corrections reached and acted on its decision prior to communicating that decision to AJY, in the face of their stated preferences, was not conducive to an employment relationship in which the parties are communicative. The failure to consult with AJY was also not fair and proper treatment as required by cl 1.5 of the Department of Corrections Frontline Staff (Prisons Based) Collective Agreement CANZ 2017–2019 (the collective agreement).

[107] Corrections did not deal with AJY in good faith. I find its actions were unjustified.

[108] For completeness, I observe there was some dispute over whether movement from one department to another, that did not involve a shift change, required the same

length of notice or, indeed, any notice at all.[10] I consider that this issue was resolved by the agreement reached in relation to AJY being able to continue to work their previously agreed hours for at least another 28 days. Accordingly, there was no shift change.

Was there a disadvantage?

[109] Corrections' failure to follow a fair and reasonable process caused deep distress and embarrassment to AJY. It was clear on the evidence that the removal of computer access and the changing of the locks were not standard steps at the time. LRC's evidence was that after leaving Prosecutions, they continued to have access to Prosecutions files within the computer system for over a year later. Mr Tukula also confirmed he had not taken such steps when COs JBW and PFD had left Prosecutions on earlier occasions. Further, to have PFD (a colleague with whom AJY had issues) organise the lock change compounded the humiliation and was unnecessary.

[110] Such feelings of distress and humiliation were a disadvantage in AJY's employment. It exacerbated the stress they were already feeling and had disclosed to Corrections. The impact on them was a direct result of the unjustified actions of Corrections.

[111] Accordingly, I find that AJY was disadvantaged by the unjustified actions of Corrections in relation to the movement of them from Prosecutions to the Gatehouse.

The dismissal of AJY

Issues

[112] The question for the Court is whether AJY's dismissal was justified. Was the decision to terminate one that a fair and reasonable employer could make in all the circumstances?

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[10] It was agreed that a shift change required 10 days' notice.

[113] AJY says their dismissal was not what a fair and reasonable employer could have done in all the circumstances. In relation to procedure, they raise a number of issues and submit that Corrections:

(a) breached cl 11.1.4 of the collective agreement because the investigation of the allegations against them was not carried out by a manager as required;

(b) failed to consult them about the terms of reference of the investigation;

(c) failed to provide them with the terms of reference after stating that it would do so;

(d) failed to conduct interviews fairly or properly;

(e) failed to provide them with statements taken after they were interviewed;

(f) failed to conduct an investigation in accordance with the terms of reference because it failed to investigate the wider "circumstances" of their conduct; and

(g) breached its conflict-of-interest policy.

[114] In relation to substantive justification, AJY says it failed to fairly consider:

(a) the effect of their mental health diagnoses;

(b) the effect of their medication on their behaviour;

(c) the effect of Corrections' failures to respond to the many issues raised by them from October 2016 to April 2018 and the effect this had on them; and

(d) other circumstances that explained their actions.

[115] AJY also says Corrections failed to properly consider its Code of Conduct in relation to "IOMS browsing" and serious privacy breaches.

[116] Corrections says there was clear substantive justification for its decision to dismiss. Further, it says it conducted a full and fair investigation process and then a full and fair disciplinary process in good faith, without predetermination and consistent with its obligation under s 103A(3) of the Act. Alternatively, to the extent that this Court might find that its process did not meet the requirements of s 103A(3), it says any defects were minor and did not result in AJY being treated unfairly and, therefore, should not result in the dismissal being found to be unjustified.

[117] I will consider the procedural issues before considering the substantive issues.

Did Corrections' investigation follow a fair and reasonable process?

Breach of cl 11.1.4 of the collective employment agreement

Submissions

[118] Counsel for AJY submitted that cl 11.1.4 of the collective agreement was breached because the investigation was not carried out by a manager.

[119] Counsel for Corrections acknowledges that Mr Coston, who was not a manager, conducted the investigation. However, it submitted that a manager initiated the investigation, delegated the role of investigation to Mr Coston, reviewed the investigation report prepared by Mr Coston, provided AJY with an opportunity to make submissions, and decided whether AJY had committed misconduct. This all occurred prior to any substantive disciplinary action being taken.

[120] Additionally, it is submitted that the collective agreement was complied with because a finding to the contrary would be inconsistent with Corrections' custom and practice over time.

[121] Finally, it is submitted that although the investigation was not carried out by a manager, there was no prejudice to AJY because the investigator was experienced, there was no conflict of interest, and the investigation was carried out fairly.

Issues

[122] In determining whether the procedure followed by Corrections in this respect was unfair, it is necessary to consider a number of issues.

(a) Who was entitled to carry out the investigation under the collective agreement?

(b) Was the collective agreement breached?

(c) If there was a breach, did AJY suffer prejudice as a result of the breach?

Who was entitled to carry out the investigation under the collective agreement?

[123] Clause 11.1.4 of the collective agreement requires that disciplinary investigations be undertaken by a manager. The provision sits within cl 11.1 which sets out principles for dealing with disciplinary matters:

> 11.0 PRINCIPLES FOR DISCIPLINARY MATTERS
>
> 11.1 The following principles will be followed when dealing with disciplinary matters:
>
> 11.1.1 The employee must be advised of their right to request CANZ assistance or representation at any stage.
>
> 11.1.2 The employee must be advised of the specific matters(s) causing concern, and a reasonable opportunity provided to state reasons or explanation.
>
> 11.1.3 The employee must be advised of the corrective action required to amend their conduct and given a reasonable opportunity to do so.
>
> *11.1.4 Before any substantive disciplinary action is taken an appropriate investigation is to be undertaken by a manager.*
>
> 11.1.5 Depending on the seriousness of the misconduct an oral warning should usually precede a written warning.

> 11.1.6 The process and results of any disciplinary action is to be recorded in writing, sighted and signed by the employee and placed on their personal file.
>
> 11.1.7 If the offence is sufficiently serious the employee may be suspended pending an investigation.
>
> 11.1.8 If the employee is aggrieved by any action taken by the Department he/she must be advised of their right to pursue a personal grievance in accordance with the appropriate procedure.
>
> (Emphasis added)

[124] When interpreting cl 11.1.4, it is necessary to apply the principles of contractual interpretation. The Supreme Court confirmed in *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* that the interpretation principles relating to contracts should apply to employment agreements.[11]

[125] The key principles of contractual interpretation were articulated by the Supreme Court in *Firm PI 1 v Zurich Australian Insurance Ltd t/a Zurich New Zealand* as follows:[12]

> [60] … the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties intended. …
> …
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. …

[126] The Court did not hear any evidence on the genesis of the provision. Ms Chetwin, for Corrections, observed that it was a "legacy clause". None of the witnesses had any knowledge of when the clause was introduced or why. I do not

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[11] *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948 at [74]–[78]; see also *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78, [2022] ERNZ 304; and *New Zealand Post Primary Teachers' Assoc v Board of Trustees for Rodney College* [2022] NZEmpC 195.

[12] *Firm PI 1 v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63] (footnotes omitted); and affirmed in *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43]–[46], [232]–[233] and [250].

consider that creates a difficulty when the words are clear on their face, as they are in this instance.

[127] The context of the clause is as stated in its heading. It sets out the principles for disciplinary matters. The clause itself is relatively spare on detail in that it does not elaborate on each element. Clause 11.1.4 is the only clause that attributes responsibility for any of the actions to a subject – "a manager".

[128] Within the clause as a whole, I consider the wording of cl 11.1.4 has an ordinary and natural meaning. That is that the appropriate investigation is to be undertaken by a manager. The provision could have simply stated that an appropriate investigation was to be undertaken. Instead, it stated that it was to be undertaken by a manager. It is reasonable to assume that is deliberate.

[129] Corrections submitted that if the ordinary meaning of cl 11.1.4 was accepted, it would be inconsistent with its custom and practice in relation to employment investigations along with its interpretation that it has applied for many years.

[130] However, if Corrections is of the view that this term of the collective agreement no longer represents the intention of the parties, or the current practice, then that is a matter for discussion with CANZ. It is not open to Corrections to unilaterally operate in a manner that is inconsistent with the wording of the contractual obligations. AJY is entitled to rely on the terms of the collective agreement.[13]

[131] I find that cl 11.1.4 means what it says – an individual who undertakes an employment investigation in a disciplinary context must hold the role of manager.

Was the collective agreement breached?

[132] It is common ground that the investigation of the allegations against AJY was conducted by Mr Coston, who was not a manager.

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[13] The Authority made a similar finding in *Huddy v Chief Executive of the Department of Corrections* [2020] NZERA 110 at [65]. However, in the present proceedings, no claim has been brought for a penalty under s 134 of the Act.

[133] While acknowledging that Mr Coston conducted the investigation, Corrections submitted that the clause was not breached because Mr Coston was supervised by Ms Danby, who was a manager, during the investigation.

[134] However, even if such supervision was capable of preventing breach (which is not evident), the evidence does not support the proposition that Ms Danby supervised the investigation. While Ms Danby was indeed named in a number of documents, it was Mr Coston's evidence that he was the investigator in relation to the allegations against AJY. Ms Danby was not involved at all – she did not even review the report after it was finalised.

[135] Corrections also submitted that Mr Lightbown, who was also a manager, effectively conducted his own disciplinary investigation into the allegations against AJY, which included considering information collated by Mr Coston in his report, providing AJY with opportunities to make submissions, forming a preliminary view, and considering submissions in response.

[136] However, Corrections' policies and procedures differentiate between the investigation and disciplinary processes. The Responding to Employee Conduct and Behaviour Policy and Procedures contemplate two steps – the investigation, and what the documents refer to as "making a decision".

[137] In this case, Mr Coston conducted the investigation and Mr Lightbown made the decision as part of the disciplinary process. Mr Lightbown ultimately accepted and relied on the factual findings of Mr Coston. There was no evidence of him conducting his own investigation in relation to the allegations against AJY. He made no independent inquiries and did not interview any witnesses. Nor did he seek any further information other than responses from AJY.

[138] It was clear on the evidence before the Court that Mr Coston was the investigator. Neither Ms Danby nor Mr Lightbown conducted the investigation. Accordingly, a manager did not conduct the investigation. Therefore, Corrections breached cl 11.1.4 of the collective agreement.

If there was a breach, did AJY suffer prejudice as a result of the breach?

[139] Corrections submitted that in the event that it was found that Mr Coston conducting the investigation was a breach of the collective agreement, this did not result in any prejudice or disadvantage to AJY. It also notes that AJY did not raise any concerns relating to this alleged breach of the collective agreement during the investigation or the disciplinary process. While that might be the case, AJY did raise issues in relation to the conduct of the investigation and cannot be said to have waived their rights in relation to any breach of contract.

[140] Ms Chetwin said in evidence that it was common practice for IST staff who are not managers to conduct employment investigations, including in relation to employees covered by the collective agreement. She says these staff are trained and well placed to carry out such investigations. However, I observe that Mr Coston had only been in Corrections for one day and had not conducted an employment investigation previously, which calls into question whether he could be described as well trained and well placed to carry out the investigation at the time.

[141] As to whether the breach of the collective agreement resulted in procedural unfairness to AJY, it is necessary to consider this in the context of the other concerns raised by them in relation to the process followed.

Consultation on and provision of terms of reference

Submissions

[142] AJY submitted that Corrections failed to consult with them about the terms of reference and that the terms of reference should have been agreed after consultation. Further, they say that Corrections failed to provide them with the updated versions of the terms of reference for Mr Coston's investigation after stating that it would do so. AJY submitted that these failures contributed to the unfairness of their dismissal.

[143] In response, Corrections submitted that no consultation was required in relation to the terms of reference. Additionally, it submitted that AJY was made aware of the allegations set out in the terms of reference, that they received copies of the updated

terms of reference with the draft investigation report, and that in any case they were not disadvantaged in not receiving the terms of reference.

Analysis

[144] There were three versions of the terms of reference. The initial terms of reference dated 3 May 2018 are addressed to Ms Danby.

[145] The second terms of reference are dated 21 May 2018. These are directed to Ms Danby, Manager IST, and Mr Coston, Senior Investigator. They note that Mr Lightbown updated the terms of reference to reflect that Mr Coston would be "assisting" with the investigation. These do not appear to have been provided to AJY or their lawyer at the time.

[146] The third terms of reference dated 19 June 2018 are again directed to both Ms Danby and Mr Coston and include the additional allegations to be included in the employment investigation.

[147] There is no requirement under the Act or within the contractual arrangements between the parties that the terms of reference be agreed. There is also no explicit duty to consult about the terms of reference or to provide them to an employee under investigation. However, where an employer amends the terms of reference of an investigation, they have a duty under s 4(1A)(b) of the Act to be active in communicating about those changes.

[148] In the present case, Corrections may not have provided the second and third terms of reference to AJY prior to releasing the draft investigation report. However, it did send them a letter on 14 June 2018. That letter outlined the additional allegations and noted that Ms Danby and Mr Coston would be in contact with them in relation to the investigation. Therefore, I find that even if Corrections did not provide the second and third terms of reference to AJY, it complied with its duty to be communicative by sending them the letter of 14 June 2018.

[149] The only issue arising from this suite of correspondence and terms of reference is the consistent reference to Ms Danby when she was not involved in the investigation. The references are misleading and in breach of s 4(1)(b) of the Act. Again, whether this causes prejudice or resulted in an unfair process depends largely on the findings of the Court in relation to the conduct of the investigation itself.

Fairness of interviews and related concerns

Submissions

[150] Mr Hope submitted that Mr Coston interviewed AJY differently to other employees and that doing so was unfair. He also submitted that insufficient information was given to interviewees when seeking information from them and that this could be construed as an active attempt not to get information. Finally, he submitted that AJY did not receive statements from follow-up interviews carried out by Mr Coston after they were interviewed.

[151] However, Corrections submitted that AJY was interviewed differently because they asked to be interviewed differently.

[152] In relation to the submission that Mr Coston did not provide enough information to interviewees, Corrections submitted that the witnesses were all made aware that their statements related to an investigation but that it was not required to inform them who the employee under investigation was and what the allegations against them were. Additionally, it was noted that it was not put to Mr Coston that he had actively tried to not get relevant information.

[153] Finally, in relation to Mr Hope's submission that AJY did not receive full disclosure, Corrections submitted that the relevant statements were attached to the draft investigation report and that AJY had an opportunity to respond to those statements as part of their overall response to the draft report.

Issues

[154] The following issues are raised by the parties' submissions:

(a) Was AJY interviewed fairly?

(b) Did Mr Coston provide sufficient information to the interviewees?

(c) Did Mr Coston provide AJY with an opportunity to respond to the statements of witnesses interviewed after AJY was interviewed?

Was AJY interviewed fairly?

[155] I accept that the interview styles were different, but that was because AJY had asked for questions ahead of time and had already provided some responses in writing. They had also sought further information by the time they were interviewed. The other witnesses had not made requests of that nature. The difference in style was a direct result of AJY and their lawyer's requests in relation to the process. I do not consider there was any unfairness in that regard.

Did Mr Coston provide sufficient information to the interviewees?

[156] Mr Coston acknowledged that he did not tell interviewees that AJY was being investigated or what the allegations against them were. While being cross-examined, he claimed he was careful about what information he shared because he wanted to protect AJY's privacy and because he wanted to make sure that he was only seeking information that would be relevant to his investigation.

[157] I find that Mr Coston did not need to provide information about who was being investigated and for what, unless that information was relevant to the questions being asked of the particular witness. For example, if he was interviewing a witness purely about the responsibilities of the Gatehouse team or the Prosecutions team, it is not clear that such information would necessarily be relevant or helpful to the witness.

[158] However, in relation to Mr Coston's interview of Mr Tukula, I consider that AJY's identity and the allegations against them were relevant and should have been identified to Mr Tukula. He had dealt with AJY extensively and was well aware of the many concerns raised by them. He may have been in a position to speak to the circumstances of their actions and should have received more information about the allegations against them.

[159] However, although I have found that Mr Tukula should have received more information, I observe that there is no evidence that Mr Coston actively tried to avoid getting evidence from him or any other witness.

Did AJY have an opportunity to respond to statements taken after their interview?

[160] When AJY was interviewed, they suggested that Mr Coston carry out a number of additional interviews. Following that request, Mr Coston interviewed LRC and Ms Rohrlach. The witness statements from each witness were attached as appendices to the draft investigation report. Subsequently, after providing the draft report to AJY and receiving submissions from them, Mr Coston carried out two further follow-up interviews with Mr Tukula and Ms Rohrlach.

[161] AJY had an opportunity to respond to the first two follow-up statements in the context of the draft investigation report and they did in fact respond to those statements. Therefore, they had both access to the information and an opportunity to comment on it prior to any decision being made.

[162] On the other hand, there is no evidence that AJY received copies of the two further follow-up interviews prior to the report being finalised. In correspondence to Mr Hope, Mr Coston referred to the follow-up inquiries that he had made with Mr Tukula and Ms Rohrlach, but there is no evidence that those documents were actually provided to AJY prior to his report being released or that he gave AJY an opportunity to respond. However, although Mr Coston may not have given AJY an opportunity to respond to those statements, Mr Lightbown did. That is sufficient.

Failure to investigate the wider circumstances of AJY's conduct

Submissions

[163] AJY says that Mr Coston failed to investigate the wider "circumstances" of their conduct. By "circumstances", they refer to their mental health diagnoses, the effect of the medication they were taking on their behaviour, the failure of management to respond to the many issues raised by them from October 2016 to April 2018, and the effect this had on them.

[164] AJY says when information was given to Mr Coston that was contextual and which provided the circumstances and background, he added it as appendices to his report, restated it without analysis, and made no attempt to weave it into his findings. They say he was dismissive of this information and classified it as mitigation that was for the accountable manager.[14]

[165] Corrections says Mr Coston was independent, free of any conflict of interest, experienced in conducting investigations, and conducted the steps required in the process in accordance with its policy. Additionally, it submitted that Mr Coston fairly summarised AJY's explanations in his report and attached all relevant evidence that had been collected as appendices.

Issues

[166] Under this heading the primary issue for concern is whether Mr Coston investigated in accordance with the terms of reference and, in particular, whether he established the circumstances as well as the facts of AJY's actions.

Analysis

[167] The terms of reference in all their forms requested that Mr Coston:

> 1 Conduct interviews with any persons, including AJY, and other employees who you consider may have information relevant to *establishing the circumstances and facts* as above;

[14] Mr Lightbown.

> 2 *Conduct interviews with any person(s) nominated by AJY* or other witnesses who may be relevant to the employment investigation;
>
> 3 Identify and report on any other sources of information that may assist to *clarify*, confirm or refute anything in relation to the allegations. This should include examination of the following, but not limited to, procedures, policies etc.;
>
> 4 Identify any further information required to investigate the allegations and establish the facts in relation to above;
>
> …
>
> The role of the investigator is to carry out an investigation into the allegations and to report back the facts. The employment investigation is to consider the information gathered *and any other relevant available information* and to carry out any further investigation and interviews as necessary to gather *information relating to the allegations* and record the findings.
>
> [Emphasis added]

[168] The technique followed by Mr Coston was to interview various witnesses and record those interviews in what he referred to as witness statements. In his investigation report, he summarised these interviews, listed "other relevant information", noted disparities and corroborative evidence, and briefly summarised the fact that submissions on the draft report had been received and attached them as appendices. He then made recommendations in relation to each allegation, all of which he recommended be upheld.

[169] It was apparent from Mr Coston's evidence in Court and the documentation produced by him at the time that he took a narrow approach as to what was relevant information for the purposes of his investigation.

[170] Throughout the interviews, AJY referred to their dissatisfaction with management's failure to respond to concerns raised by them, management's lack of accountability, and belief in corruption and incompetence as motivation/explanation for their actions. Despite this, Mr Coston took no steps to look further into these matters, other than the specific concern about the management of the particular evidence referred to in the pages provided to the Visiting Justice. Despite going back to Mr Tukula for further information (after having interviewed AJY), he only asked him about NIK procedures.[15] He did not ask him about any of the matters raised by AJY, such as their belief that they would return to Prosecutions, the issues with competence in Prosecutions, and the alleged failure to address concerns raised by them

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15 A narcotics identification system.

in relation to Prosecutions and also in relation to access to the evidence room in general.

[171] In response to AJY's questions about why he had not commented on or asked questions about these matters, his consistent response was that the matter "is not relevant to the investigation being conducted and does not form part of the terms of reference."

[172] An example of this was a question as to why AJY's emails to Mr Tukula and Mr Lightbown about contamination of evidence and the evidence room, although provided to him, were not referred to in his draft report. Mr Coston's response was that "it is considered that the content of the email referred to above, forms part of [AJY's] mitigation relevant to [their] actions and does not require further investigation as it does not form part of the terms of reference." While a copy of the email was provided in an appendix, there is only a brief reference to it in the body of the report. Given that the terms of reference required him to establish the "circumstances" of the conduct, this approach was flawed and excessively narrow.

[173] AJY's belief at the time (misplaced or otherwise) that they were returning to Prosecutions was a circumstance that was highly relevant to their conduct in relation to the accessing of prisoners' records on IOMS. Likewise, their belief that there had been security breaches, improperly imposed misconducts, incompetent prosecution processes and actions, and failure to protect staff from sexual assaults from prisoners, was also relevant to AJY's conduct in accessing IOMS records. However, Mr Coston again stated that those claims did not form part of his investigation and did not form part of the terms of reference. He made the same comment about their claims of stress and workplace bullying.

[174] In relation to AJY's mental health diagnoses, other than attaching Mr Hope's email to him which asked for an extension of time and advised him that AJY was being examined by a psychiatrist, Mr Coston made no reference to this in the body of his report. This was despite AJY, in their interview with him, mentioning on more than one occasion that they had acted in this way because of their mental state.

[175] Likewise, although attached as an appendix, other than noting that "a letter provided by AJY relating to information provided by a doctor is included with the appendices", Mr Coston failed to draw Mr Lightbown's attention to the fact that it outlined occasions on which AJY visited their doctor complaining of feeling [Redacted pursuant to [258]–[259]] which they now considered may have impacted on their behaviour. Again, this is clearly relevant information both to the allegations and the circumstances. Mr Coston's brief reference to the letter with no further information (albeit that it was attached) further illustrates his flawed approach.

[176] It should be noted that at no stage did AJY deny the conduct. From their perspective, the matter at issue was always why they had done what they did – that is, the circumstances of the conduct. While Mr Coston was not required to undertake full in-depth investigations of the matters raised by AJY, the terms of reference did require him to look into those circumstances and to outline them in his report. Such matters were clearly relevant and should have been covered in the investigation and the subsequent report. They were not. To that extent, Mr Coston's investigation was flawed.

[177] As a result, the report was not a reliable basis on which to make findings.

[178] However, the disciplinary process did not stop there. Ms Coats submitted that even if the Court was to find that Mr Coston's investigation was flawed, any deficiencies were rectified by the process subsequently undertaken by Mr Lightbown.

Was Corrections' disciplinary process and outcome fair?

Did Corrections breach its conflict-of-interest policy?

Submissions

[179] Mr Hope submitted that Corrections breached its conflict of interest policy by allowing Mr Lightbown to conduct the disciplinary proceedings. It is submitted that Mr Lightbown had a conflict because AJY had emailed him about the allegedly contaminated evidence and took no action, which resulted in AJY approaching the

Visiting Justice. Counsel also submitted that Mr Lightbown was conflicted because he had dealt with prior concerns raised by AJY.

[180] Corrections submitted in response that the complaint about Mr Lightbown undertaking the disciplinary process was raised late but was still fairly considered. It submitted that although Mr Lightbown was aware of some of AJY's concerns, he was only carbon-copied into the correspondence and was not involved in any response.

Analysis

[181] Corrections' document titled "Procedures: How do Managers address concerns about conduct and behaviour" states, in relation to conflicts of interest:

> To support the transparency and integrity of the process the Accountable Manager … must not have otherwise been involved in the events or conduct in question, or have a personal relationship or actual or perceived conflict of interest with the staff member to the extent that they would not be reasonably able to nor be perceived as remaining unbiased. It is acknowledged however, that the Accountable Manager will normally have a reporting relationship with the staff member. Refer to the Department's *Conflicts of interest Policy* for more detail.

[182] The parties have not provided a copy of the "Conflict of interests Policy", so the above document remains the starting point for assessing whether Mr Lightbown was conflicted. When reviewed in light of this standard, it is clear that there was no conflict of interest as alleged.

[183] Mr Lightbown received the personal grievance raised by AJY in relation to their removal from Prosecutions, and he sought to resolve it. Additionally, he conducted a meeting on 9 April 2018 with AJY and their representative. This meeting was in respect of the personal grievances raised by AJY. However, I find that Mr Lightbown was not personally connected to the events giving rise to that personal grievance. Further, where a manager engages with an employee in relation to a personal grievance, that will not normally prevent them from conducting disciplinary proceedings against that employee.

[184] Additionally, although AJY carbon-copied Mr Lightbown into their correspondence of 12 April 2018 relating to evidence procedures, the email was

directed to Mr Tukula, and Mr Tukula responded. Mr Lightbown was not the manager responsible for any reply, and he did not in fact make any reply. Mr Lightbown's connection with the concerns raised by AJY was merely incidental. Therefore, no concern can be said to arise from this correspondence.

Outcome

[185] I consider that Mr Lightbown was not conflicted and was entitled to conduct the disciplinary proceedings.

Was AJY fairly dismissed?

Submissions

[186] Mr Hope submitted that Corrections' decision to dismiss AJY was not a decision that could have been reached by a fair and reasonable employer. In particular, he submitted that Corrections failed to properly consider the effect on AJY's actions of the following factors: AJY's mental health diagnoses, the medication being taken by AJY, Corrections' failure to respond appropriately to the many issues raised by AJY between October 2016 to April 2018, and other relevant circumstances. Finally, Mr Hope submitted that Corrections failed to properly consider its own Code of Conduct in relation to "IOMS browsing" and Serious Privacy Breaches.

[187] In response, Ms Coats submitted that Mr Lightbown did consider all of the information but that, for one reason or another, it was either not relevant or did not mitigate AJY's actions. Additionally, she submitted that although Mr Lightbown considered all relevant information, he was not required to find that the information mitigated AJY's actions, nor was he precluded from dismissing them as a fair and reasonable employer.

[188] In relation to AJY's mental health diagnoses and medication, Ms Coats submitted that Mr Lightbown's assessment of the CCTV evidence showed that AJY acted intentionally and that if there were concerns with their health they should have been raised at the time. It was submitted that little weight should be placed on Dr G's

report because he had been told that a positive report could save AJY's job. In any case, it is submitted that the medical reports are equivocal. Additionally, in relation to the suggestion that Mr Lightbown should have obtained additional reports, it is submitted that it was unnecessary for Corrections to seek further reports where that information had already been obtained by AJY, and it was unclear what reports should have been obtained in any case.

[189] In response to Mr Hope's submission that Corrections should have responded better to the issues raised by AJY during their time in Prosecutions and at the Gatehouse, Ms Coats submitted that Corrections did respond and was responding but that not all of the concerns could be resolved immediately. Further, although concerns were raised about Corrections in an independent report, AJY still knew and should have followed the appropriate reporting pathways in raising complaints.

[190] In relation to other relevant circumstances noted by Mr Hope, Ms Coats submitted that Mr Lightbown considered AJY's claim that they were entitled to send their lawyer emails that related to their personal grievances, but concluded that that was still a breach of Corrections' policies.[16] Similarly, AJY's claim that they were making a protected disclosure was rejected because they acknowledged at the time that they did not even know what a protected disclosure was. Further, it is submitted that AJY did not think that they were going back to Prosecutions, so that could not justify their checking in on what Prosecutions was doing.

[191] Finally, in relation to Mr Hope's submission that Mr Lightbown failed to properly consider Corrections' Code of Conduct, it was submitted that AJY was not simply browsing for information out of curiosity, but that they were accessing it for their own personal gain to support their personal grievances and to collect "evidence" to show cover-ups, incompetence, and poor work.

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[16] Corrections relied on *Shaw v Bay of Plenty District Health Board* [2022] NZEmpC 10, [2022] ERNZ 74 as authority for this submission.

Issues

[192] The topics addressed by the parties in their submissions give rise to the following issues:

(a) Did Mr Lightbown consider fairly all relevant information and factors before making a decision?

(b) Did Mr Lightbown reach conclusions which were available to a fair and reasonable employer?

Did Mr Lightbown consider fairly all relevant information and factors?

[193] Ms Coats submitted that Mr Lightbown fairly considered all relevant information. However, despite acknowledging all of the information provided to him, he clearly missed the point of much of the evidence provided on behalf of AJY.

[194] The evidence provided by the three medical professionals indicated that AJY's behaviour was likely influenced to some degree by their situation, and in particular, their medication and their psychiatric condition. However, in both his preliminary and final views, Mr Lightbown continually emphasised that AJY had acted intentionally. This appears to, at best, misunderstand and, at worst, ignore Dr G's statement about compromised intellectual functioning.

[195] The shortcomings in Mr Lightbown's perspective are most clearly illustrated by his response to Dr G's analysis. To check whether he should accept parts of Dr G's analysis, Mr Lightbown reviewed CCTV footage and concluded that AJY's actions were deliberate and planned. This interpretation of CCTV stills misses the point made by three medical practitioners. It was AJY's cognitive function and judgement that were said to be impaired, not their ability to photocopy. To dismiss medical evidence on the basis of his observations from CCTV footage is not justified.

[196] Similarly, in relation to the alleged incident at the prison that AJY was concerned about, Mr Lightbown's approach was dismissive. He merely noted that the situation had been dealt with fairly. I consider he missed the point. Due to the impact

of their mental health conditions, AJY was likely unable to view the incident in the way he explained it.

[197] His approach throughout indicates a lack of understanding of the impact of the symptomology of AJY's diagnosed mental illness on their conduct and thought processes. In response to the preliminary view where Mr Lightbown had expressed uncertainty as to how the psychiatric evidence was relevant, Mr Hope had advised him to obtain his own psychiatric evidence. Throughout his final view, Mr Lightbown emphasised multiple times that he failed to see how AJY's circumstances mitigated their conduct.

[198] If Mr Lightbown could not understand, then he should have made further inquiries to assist him to do so. In those circumstances, he could have made further inquiries of Dr G or AJY's GP.[17] Alternatively, he could have obtained his own medical advice as suggested by Mr Hope. His failure to do so gave rise to additional unfairness.

[199] When asked by Ms Coats whether he had considered obtaining such medical advice, he responded:

> To be fair, no. I think there was lots of information, … [Dr M's] report gave me the information if you like, so what would be gained by doing it if we felt that it wasn't relevant to that incident. So it may say "agreed" but it would still – the outcome would've still been the same.

[200] His evidence was that he did not obtain an additional report because he did not consider the information would be relevant to the incident. He was mistaken. As a matter of fairness, Corrections was specifically required to genuinely consider the employee's explanation.[18] Mr Lightbown's closed mind to such an explanation indicates that he did not do so. Further, he did not disclose that view[19] to Mr Hope at the time. As a matter of good faith, he should have done so.

[201] Overall, Mr Lightbown indicated, at best, a lack of understanding as to the impact of the psychiatric diagnosis on AJY's conduct and, at worst, a closed mind as

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17 Dr M was in the USA.
18 Employment Relations Act 2000, s 103A(4).
19 That the medical information was not relevant.

to the impact of that psychiatric diagnosis. His consistent reference to deliberate, intentional and knowing behaviour, despite clear statements from Dr G, is unsustainable. Such references are also inconsistent with his position that AJY's mental health was not relevant.

[202] For completeness, I observe that Corrections' policies and procedures require the decision maker to decide whether disciplinary action is appropriate and, if so, to consider which disciplinary sanction might be appropriate. Disciplinary sanctions that a decision maker can consider are warnings, retraining or coaching, temporary or permanent transfer to other duties, leave without pay, demotion and transfer to another appropriate role or location. While he stated that he had considered submissions in relation to a lesser sanction – a warning and return to work plan – this appears to have been the extent of his consideration of the options available to him.

[203] Given the medical diagnosis, a period of leave without pay and/or transfer to another or appropriate role or location were options that could have been available to Corrections. Further, the collective agreement has the option of medical retirement. There was no evidence of this having been considered despite Mr Hope's suggestion that Mr Lightbown obtain his own medical advice. However, I observe the issue of medical retirement was not argued by the parties, and Mr Lightbown was not cross-examined on it either, so I have not placed any weight on it.

Did Mr Lightbown reach outcomes that were open to a fair and reasonable employer?

[204] In Corrections' document titled: "Procedures: How do Managers address concerns about conduct and behaviour", the process for implementing disciplinary action is set out. The document states:

> If the decision-maker decides that misconduct or serious misconduct has occurred, the next step is to decide whether disciplinary action is warranted. When determining the type of disciplinary action that is appropriate as a response to misconduct or serious misconduct, any mitigating factors should be considered such as the staff member's record of service and conduct or any personal factors that might be relevant.

[205] In light of this requirement, it is inexplicable that Mr Lightbown was unable to identify any mitigating circumstances. He wrote in his final view:

> I have genuinely considered your submissions (in particular your difficult and challenging personal circumstances); however, I do not believe that it mitigates your choice of actions. It is my view that you were of were aware of what you were doing …

[206] Having already concluded that Mr Lightbown did not fairly consider the psychiatric evidence provided on behalf of AJY, I find that he was not in a position to make any final decisions about whether there were any mitigating factors arising from that evidence that would affect their dismissal. His decision that AJY's mental health and medication did not mitigate their behaviour at all was not a conclusion that a fair employer could have reached.

[207] Similarly, Mr Lightbown's conclusion is further undermined by the fact that there were plainly other mitigating factors beyond their mental health and other health-related concerns, which may have included, among other factors: their length of service, their clean record of service, the fact they admitted wrongdoing, Corrections' failure to respond promptly to their legitimate concerns, and their belief that they were acting in the nature of a whistle blower.

[208] AJY served with Corrections for 18 years, and 16 of those years were without any issue. That was clearly a mitigating factor. In fact, Corrections' own procedures identified that an employee's "record of service and conduct" would be relevant as a mitigating factor.[20]

[209] AJY admitted wrongdoing. As submitted by Mr Hope, they attempted to explain why they acted in the way they did, but they did not, at least for the most part, attempt to justify their behaviour. A manager working within the context of Corrections should have been fully aware that an admission of wrongdoing needed to be treated as a mitigating factor.

[210] Further, Corrections had created an atmosphere in which complaints about legitimate concerns were not perceived as being dealt with fairly. Its behaviour in relation to AJY as described above in relation to the disadvantage grievances was

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[20] See above at [204].

symptomatic of that behaviour. Additionally, an independent report of the prison stated:

> At present, symptoms of a default culture are evident within [Prison 2], with low trust between some leaders and employees. This default culture is being sustained by a lack of cohesion within the [Prison 2] management team, a lack of transparency at the leadership level, a perception of some inappropriate behaviours by some managers (ranging from discourtesy to potential misconduct) and a view that leaders are not talking about these openly and honestly. Through our conversations with employees, we found that this is contributing to division or disconnect between employees and leaders and is impacting on how empowered some employees feel to speak up about matters of concern.
> …
> Employees have a strong sense that their voices are not being heard, in that they need to raise issues multiple times and escalate them in order to get acknowledgement and action.

[211] In light of their overall situation and the conclusions from the independent report, it is clear that the atmosphere created by Corrections contributed to AJY's decision to act in the way they did. That also was a mitigating factor.

[212] Finally, AJY believed they were acting as a whistle blower. Ms Coats submitted that AJY had not even heard of Corrections' Protected Disclosure of Information about Serious Wrongdoing ("Whistle Blowing") policy and that, in any case, their conduct could not fall under that category when approaching the Visiting Justice. That submission may be correct; however, that does not mean they were not trying to be a whistle blower in some broader sense. The evidence indicates that AJY was trying to report wrongdoing to an authority figure, which is what whistle blowing is at a conceptual level. Their belief that they were acting as a whistle blower (once they became aware of the term) should have been acknowledged as a mitigating factor.

[213] On that note, I reject Corrections' submission that AJY was purely acting for their own personal gain. In attempting to report what they considered to be cover-ups, incompetence, and poor work by Corrections, they were not merely trying to protect themself; rather, they were trying to prevent what they felt at the time to be wrongdoing.

[214] Ultimately, while acknowledging the information provided by AJY, Mr Lightbown reached the insupportable conclusion that their behaviour was not

mitigated in any way by their personal circumstances and context. In light of the evidence available, it was not open to Mr Lightbown as a fair and reasonable employer to reach that conclusion.

[215] If appropriate mitigating factors had been identified, there is a possibility that Corrections would have reached a different conclusion about disciplinary sanctions irrespective of whether or not AJY's behaviour was serious misconduct. Therefore, a fair and reasonable employer could not have dismissed AJY until that process had been carried out.

Conclusion on AJY's dismissal

[216] There were a number of defects in the process that led to AJY's dismissal:

(a) The investigator was not a manager, which was a breach of the collective agreement.

(b) The terms of reference and related correspondence misleadingly referred to an individual as conducting the investigation when they in fact had no involvement in it.

(c) The investigator did not provide sufficient information about the investigation to Mr Tukula when interviewing him.

(d) The investigator did not fairly investigate the circumstances of AJY's conduct.

(e) The decision maker failed to fairly consider the psychiatric and other medical evidence provided by AJY.

(f) The decision maker dismissed psychiatric and other medical evidence based on CCTV footage.

(g) The decision maker failed to obtain follow-up psychiatric evidence.

(h) The decision maker failed to inform AJY or their representative that he did not consider the psychiatric and other medical evidence to be relevant.

(i) The decision maker failed to fairly consider what disciplinary sanction might be appropriate.

(j) The decision maker failed to identify mitigating factors.

[217] In considering whether AJY's dismissal was justified, I note s 103A(5) of the Act which states that a dismissal is not unjustified solely because of defects of process where the defects are "minor" or "did not result in the employee being treated unfairly".

[218] In the circumstances, I find that Mr Lightbown's process addressed some of the deficiencies in Mr Coston's investigation. However, it did not rectify all of them, and further breaches occurred while he considered the matter.

[219] Ultimately, when considered in totality, the breaches were not minor, and AJY was treated unfairly. The decision to dismiss was not one that a fair and reasonable employer could have made in the circumstances. Therefore, I find that AJY's dismissal was both procedurally and substantively unjustified.

Remedies

Unjustified disadvantages – transfer to the Gatehouse and the bullying complaint

[220] As noted above, AJY has established personal grievances for unjustified disadvantage in relation to both their transfer to the Gatehouse and the failure of Corrections to deal with their complaint of bullying. There is no lost remuneration in relation to these grievances. AJY is seeking compensation under s 123(1)(c)(i) of the Act.

[221] They say they suffered considerable stress and anxiety in relation to the transfer to the Gatehouse and the failure to follow a fair and reasonable process. I accept

Corrections' actions caused deep distress and embarrassment to AJY. The treatment of them and the compounded humiliation of having PFD organise a lock change have already been recorded. This exacerbated the stress AJY was already feeling and had disclosed to Corrections in their Tracker.

[222] Likewise, in relation to the failure to undertake any process or inquiry in relation to their bullying complaint, such failure clearly caused distress and stress to them. They felt slighted and hurt by Corrections' failure which appeared to compound their feelings of grievance about the way in which they and Prosecutions were treated, which was that they were disregarded.[21]

[223] The Court has adopted an approach to the quantification of an award under s 123(1)(c) of the Act.[22] The three bands were recently updated in *GF v Comptroller of the New Zealand Customs Service*:[23]

- band 1 – low-range loss: $0–$12,000
- band 2 – mid-range loss: $12,000–$50,000
- band 3 – high-range loss: $50,000 or more

[224] AJY has not separated out the compensation sought for their disadvantage and dismissal claims. They seek $40,000 in total.

[225] In relation to the Gatehouse transfer, I consider that the impact of Corrections' conduct on AJY was at the high end of band 1 and accordingly, I award them $10,000.

[226] On the other hand, I consider that the impact of Corrections' failure to respond to the bullying incident was towards the middle of band 1, so I award AJY $6,000 in relation to that.

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21 See above at [95].

22 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337 at [67]; and *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

23 *GF v Comptroller of NZ Customs Service* [2023] NZEmpC 101, (2023) 19 NZELR 739 at [162].

Reinstatement

[227] AJY seeks reinstatement, but Corrections is opposed.

[228] Sections 123(1)(a) and 125 of the Act provide that reinstatement of the employee to the employee's former position, or the placement of the employee in a position no less advantageous to the employee, must be provided wherever it is practicable and reasonable to do so.

[229] Mr Hope submitted that AJY has acted in a reasonable and conciliatory manner and that there is no evidence there would be animosity if they were reinstated. He also notes there are vacancies at both prisons where they have worked in the past and submitted there are no issues about their competency to fill those roles as they have a good work record. In relation to whether Corrections can trust them, Mr Hope submitted that AJY's actions were primarily explained by their psychiatric conditions and that now that their health issues are almost completely resolved or under control, the trust issue has faded away. Finally, Mr Hope submitted that AJY was a victim of wrong-doing and may struggle to find work elsewhere if they are not reinstated.

[230] On the other hand, Ms Coats submitted Corrections cannot have trust and confidence in AJY given the ongoing nature of the breaches and the fact that more breaches occurred after the disciplinary process began. It is also submitted that AJY has shown a lack of insight into why their conduct is of concern and has shown an overall distrust of management. Further, it is submitted that AJY had many difficult working relationships while at Corrections.

[231] Mr Hope said in his submissions that AJY was reasonable and conciliatory. However, I consider AJY exhibited a high degree of distrust. Their evidence showed ongoing antagonism towards Corrections and individuals within Corrections. Even though some of those individuals may well have moved on or now be in different prisons, the way in which AJY gave their evidence, the wording of the evidence, and the way in which they answered questions, illustrate that the relationship has been too significantly damaged for it to be practicable or reasonable to reinstate them.

[232] Additionally, Mr Hope submitted that in light of AJY's health improvements, there are no longer any issues that could undermine Corrections' trust of them, but that is clearly not the case. Although I accept that AJY's health has likely improved and would not in any case prevent reinstatement, the evidence gives rise to other concerns as to whether they have shown insight into their actions and accordingly whether Corrections can trust them.

[233] Only two months prior to AJY's dismissal, they continued to seek and receive confidential Corrections information. This shows that although they took some responsibility for the actions that led to the disciplinary process, they may still lack insight as to why their actions were of concern. In those circumstances, Ms Coats's submission that Corrections cannot have trust and confidence in AJY is not unreasonable.

[234] Therefore, I do not consider that reinstatement would be practicable or reasonable despite AJY's very strong desire to return, and as a result, it is not ordered.

Lost wages

[235] Section 128 of the Act states that where an employee has lost remuneration as a result of a personal grievance, the Court must order the employer to pay to the employee the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration. However, under s 128(3), the Court has a discretion to make an award for a longer period than three months. Finally, where a party has contributed to their personal grievance or failed to mitigate their loss, reductions can be made.

[236] AJY's employment came to an end in early January 2020. They have not been employed since that time. As a result of being unjustifiably dismissed in a manner which was both procedurally and substantively unfair, they have on the face of it suffered extensive loss. Therefore, I must award at least three months' ordinary time remuneration unless some other factor prevents that.

[237] Ms Coats submitted that AJY failed to mitigate their losses. However, AJY states they did apply for positions and provided a document summarising some of

those applications. Although independent evidence of the applications was not provided, I accept that on the balance of probabilities AJY did in fact attempt to mitigate their losses and that they were unsuccessful. For completeness, I observe that there were a number of lockdowns during 2020, which made job applications and hiring more difficult.

[238] Turning to the issue of whether the Court should exercise its discretion to increase the quantum of remuneration, I note that AJY is seeking 173 weeks. The Court of Appeal indicated in *Telecom New Zealand Ltd v Nutter* that when evaluating loss, all contingencies that could have otherwise led to the employee's termination need to be considered:[24]

> [81] Those fixing compensation in this area must have regard to the actual loss suffered by the employee. As indicated, that loss sets an upper ceiling on any award and it is plainly a logical starting point for assessment. … We also emphasise that full compensation must be assessed in light of all contingencies and in no circumstances should an award be made which exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been followed the employee would have been dismissed.

[239] There are a number of contingencies that could have led to the termination of AJY's employment. They could have been dismissed. Although their dismissal was not inevitable, it was a possibility in light their behaviour. Additionally, Corrections could have explored medical retirement with them if follow-up inquiries had raised issues about their health or fitness to return to work. It could have also explored the other options set out in its policy.[25]

[240] For completeness, I accept that AJY contributed to their loss of remuneration. However, although I find that they contributed to their loss, I do not find that their dismissal was inevitable in the circumstances, so they are still entitled to some lost remuneration. Their contribution also needs to be included as a factor when considering the proper quantum of lost remuneration.

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24 *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [81].
25 See above at [202]–[203].

[241] As a result of these possible contingencies and in light of AJY's contribution, it would not be appropriate to order remuneration for 173 weeks, which would come to just under 40 months. In the circumstances, I find that an award of nine months is appropriate.

Loss of benefit

[242] AJY seeks compensation for loss of a benefit pursuant to s 123(1)(c)(ii) in relation to loss of long service and retirement benefits. If they would have been entitled to any long service leave or retirement benefits as a result of nine months' additional service, they are entitled to them also. If the parties are unable to reach an agreement on that issue, they may make submissions on the issue.

Compensation

[243] Corrections' decision to dismiss AJY has had a significant impact on them. That is apparent from their evidence. They have been deeply affected. They have suffered significant humiliation, loss of dignity and injury to their feelings over and above the impact of the psychiatric diagnosis. When applying the bands approach set out above at [223] to the situation, I consider they are entitled to compensation in the upper half of band 2.

[244] In his submissions, Mr Hope has only sought $40,000 overall for all three personal grievances. Although that sum is not identified in the pleadings, I am prevented from making an award in excess of the sum claimed.[26] Therefore, after subtracting the $16,000 which has been awarded in relation to the disadvantage grievances, only $24,000 remains. That sits within the middle of band 2 and is lower than I would have granted in the circumstances. However, in light of the submissions made, I accordingly award AJY $24,000 in relation to their dismissal grievance.

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[26] *Richora Group Ltd v Cheng,* above n 22, at [71]–[76]; and *McCulloch and Partners v Smith* CA133/03, 3 December 2003 at [3].

Contribution

[245] The Court is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed to the situation that gave rise to the personal grievance and if the actions require, then reduce the remedies that would otherwise have been awarded.

[246] Corrections submitted that AJY's contribution to their personal grievances was both causative of the outcome and culpable/blameworthy; in particular it notes that they admitted they did all the things they were dismissed for and that their actions were serious breaches of policy and contract and were blameworthy. Finally, it submitted that their actions led to significant delays.

[247] I accept that AJY's actions contributed to the situation that led to their dismissal. Further, as they themself acknowledged, those actions were blameworthy. However, I do not accept that they contributed to the situation which led to the two disadvantage grievances, so the remedies for those grievances need not be reduced. I have also already resolved the issue of contribution in relation to the lost wages.[27]

[248] When considering by how much the compensation for the dismissal grievance should be decreased, I am instructed by *Xtreme Dining Ltd v Dewar* where the full Court made it clear that a reduction of 50 per cent is to be reserved for exceptional cases, and that care should be taken before imposing a reduction of 25 per cent. That is because even a 25 per cent reduction is of "particular significance."[28]

[249] The present case is not an exceptional case. Although the breaches were arguably serious, the circumstances were also arguably outside the ordinary with the involvement of complex mental health issues. In the circumstances, I consider that the Authority's approach of reducing the compensation awarded by 20 per cent was fair.

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27 See above at [240]–[241].

28 *Xtreme Dining Group, (t/a Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628 at [217]–[222].

[250] However, as I have already noted, the compensation sought in this case was lower than I would have granted in light of the breach findings and AJY's evidence of the impact on her. Therefore, a reduction is not required, and I order accordingly.

Non-publication

[251] At the request of the parties, permanent non-publication orders have been made. I now record the basis for making those orders.

[252] Schedule 3 cl 12 of the Act states that the Court may order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, subject to such conditions as the Court thinks fit.

[253] It is well established that the discretion is broad, but the principle of open justice is one of fundamental importance. As a starting point for determining when the circumstances of a particular case justify making an order of non-publication,[29] sound reasons must exist for the making of an order of non-publication so as to displace the open justice presumption.[30]

[254] There are three aspects of the evidence which require consideration. The first relates to the name and identifying details of AJY and confidential sensitive information about them. The second is aspects of Mr Coston's evidence. The third is in relation to other sensitive evidence that has been heard in these proceedings in relation to third parties and the names of those third parties

AJY

[255] In relation to AJY, I note that they already have non-publication orders in the Authority. They sought non-publication orders of personal private, family and health circumstances covered during the hearing of these proceedings and contained in their witness statements and documents identified in the bundle of documents.

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29 *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [2]–[3].
30 At [13]; and *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511 at [90].

[256] The information was identified as private, sensitive and of a highly personal nature. There was no public interest in its disclosure. This is an appropriate matter in which to issue a non-publication order. The requisite high standard has been met and the interests of justice require non-publication of information relating to AJY's personal private, family and health circumstances.

[257] The requisite high standard has also been met in relation to AJY's name. The interests of justice require non-publication of their identity.

[258] The orders I made on 14 March 2023 were:

(a) All information covered in this hearing, contained on the Court file, and then ultimately in the judgment, relating to AJY's personal private, family and health circumstances is subject to a non-publication order issued under cl 12(1) of sch 3 to the Act.

(b) AJY's identity is subject to a non-publication order issued under cl 12 (1) of sch 3 to the Act.

[259] Where AJY is referred to, their name has been anonymised by reference to a system of alphabetical identification. Where private family and health circumstances have been referred to in [37], [58], [66], [67] and [175] above, they are redacted. However, to ensure the coherency of this decision, it has been necessary to include some generalised details relating to AJY's health in this judgment, and I do not consider that information to be subject to the orders outlined above.

Mr Coston

[260] I also made non-publication orders in respect of the evidence of Mr Coston. Such orders required that particular evidence in relation to Mr Coston not be published.[31]

[31] As noted in the Court's minute dated 8 March 2023.

[261] The publication of such evidence, while relevant to the proceedings, was not ultimately referred to in this judgment in any case. There is no material public interest in the publication of the evidence. The orders granted are in the interests of justice.

Third parties

[262] Individuals are referred to in these proceedings who are not witnesses.

[263] During the hearing, the Court heard sensitive evidence relating to some individuals. While it has not been referred to in this judgment, it is still appropriate that it be subject to non-publication orders. The individuals are not aware of the evidence being given and have not been given any opportunity to respond to it. There is no material public interest in the evidence or the identities of the relevant individuals. The orders sought go no further than is reasonably necessary to protect the relevant individuals and are in the interests of justice.

[264] Accordingly, I order that the evidence as particularised at [9] of the memorandum of the Chief Executive of Corrections dated 3 May 2023 in relation to PQB and JBW, and their identities, be subject to non-publication orders.

[265] In relation to a colleague of AJY, the Court heard evidence of allegations of bullying, poor work performance and conduct. Such matters are referred to in the judgment. That employee has not had the opportunity to respond to such allegations. I consider that the important principle of open justice does not require the disclosure of the employee's identity. Non-publication of their name will not hinder the Court's ability to provide a fair and accurate report of what occurred. There is no public interest in their name being published. On the contrary, as a matter of natural justice, it is appropriate to protect their identity. Accordingly, I make an order of non-publication of the name and identifying details of PFD.

[266] Given the nature of the orders above, the Court file is not to be inspected by any person without leave of a Judge.

Conclusion

[267] In light of my findings that AJY was unjustifiably dismissed and unjustifiably disadvantaged and by way of summary of the remedies ordered, I make the following orders:

(a) Corrections is to pay AJY the following sums within 14 days of the date of this judgment:

(i) reimbursement of nine months' lost wages pursuant to s 123(1)(b) of the Act;

(ii) compensation of $40,000 pursuant to s 123(1)(c)(i) of the Act;

(iii) compensation pursuant to s 123(1)(c)(ii) of the Act in relation to any long service leave or retirement benefits that would have arisen as a result of nine months' additional service.

(b) If the parties are unable to agree (i) and (iii) above, the parties may file further submissions on the issue.

[268] The necessary non-publication orders are set out above at [255]–[266].

[269] Costs are reserved. The parties are encouraged to agree on costs. If that is not possible, memoranda may be filed.

Kathryn Beck
Judge

Judgment signed at 5 pm on 3 October 2023