IN THE EMPLOYMENT COURT
WELLINGTON

[2015] NZEmpC 7
WRC 12/13

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

Hearing: 1-5 and 23 September 2014
(heard at Wellington)

Appearances: G Bennett, advocate for the plaintiff
K Radich and J Dobson, counsel for the defendant

Judgment: 5 February 2015

JUDGMENT OF JUDGE A D FORD

Introduction

[1] Mr Alatipi worked as a Corrections Officer at Rimutaka Prison. In November 2011 he was dismissed by the defendant for allegedly assaulting a prisoner. A disciplinary investigation concluded that Mr Alatipi had been the only person having access to the prisoner's cell at the time the alleged assault took place. Mr Alatipi brought proceedings against his employer, the defendant, alleging that he had been unjustifiably dismissed. He claimed that the injuries sustained by the prisoner were either self-inflicted or caused by another prisoner. He also claimed that the disciplinary process followed by the defendant was unfair and seriously flawed throughout. He sought various remedies under the Employment Relations Act 2000 (the Act), including reinstatement.

[2] Mr Alatipi was unsuccessful in his claim before the Employment Relations Authority (the Authority). In a determination dated 28 January 2013, the Authority expressed some reservations about aspects of the procedure followed during the disciplinary investigation but it concluded that the defendant had acted in a way that was fairly and reasonably open to it.[1] The delay in having the case heard in this Court is unfortunate. Earlier fixtures that had been made for June and August 2013 had to be vacated through no fault on the part of the parties and a Judicial Settlement Conference subsequently convened by the Court failed to resolve the matter.

Background

[3] The Court was told that Rimutaka Prison, which is situated on the outskirts of Wellington, is one of 19 public prisons throughout New Zealand managed by the Department of Corrections (the defendant or Corrections). It was described as a minimum-to-high security site with approximately 300 staff and 960 prisoners.

[4] Mr Alatipi was employed as a Corrections Officer at the prison between January 2001 and the date of his dismissal in November 2011. Prior to that he was a retail locksmith with Chubb Security in Wellington. Although he was born in New Zealand, Mr Alatipi described himself as "a proud Samoan man". He has four children and seven grandchildren. A 12-year-old daughter still lives at home and he and his wife are full-time caregivers for a nine-year-old grandson.

[5] The incident leading to Mr Alatipi's dismissal occurred on Saturday, 2 July 2011. Mr Alatipi was rostered to work that day between 8.00 am and 5.00 pm in HM4. The initials "HM" stands for "high medium". There were two adjacent units under the same roof, HM3 and HM4, with a guardroom in the middle. They were both remand units, also called "mainstream" units. Each unit was divided physically into an upstairs level and a downstairs level.

[6] The daily routine for both units was that once breakfast was finished (at about 8.00 – 8.30 am) the prisoners on one of the levels would be unlocked and taken to a secure exercise yard while the prisoners on the other level would have their cells

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1 *Alatipi v Chief Executive of Department of Corrections* [2013] NZERA Wellington 9.

unlocked and they would be free to move around the internal area outside their cells, described in evidence as "the wing". The process is referred to as giving the prisoners their "wing time". During their wing time the prisoners can talk amongst themselves, sit at the communal tables downstairs and read, play cards or play recreational games such as table tennis. After about 90 minutes, the two lots of prisoners are swapped around so that everyone has an opportunity to be out in the exercise yard. Lunch is normally taken between 11.00 – 11.15 am and 1.00 pm and then the same routine regarding yard time and wing time is repeated in the afternoons before lock up, which usually starts at about 4.15 pm.

[7] At the time of the incident there was a prisoner (the sole occupant) in cell 26, which was a cell on the upper landing in HM4, who was referred to throughout the Authority's determination as "Prisoner X". In an interlocutory judgment on 12 May 2014, Judge Corkill made a permanent order prohibiting the publication of any evidence that might identify Prisoner X in this proceeding.[2] Prisoner X was on remand facing drug-related and burglary charges. The Court was told by Ms Radich, counsel for Corrections, that Prisoner X had previously been in prison on drug-related charges back in 2009. On this latest occasion, according to a "Prisoner Movements" document produced in evidence, Prisoner X had arrived at Rimutaka Prison on 23 May 2011. He was held in Units HM2 and HM6 before being transferred to HM4 on 22 June 2011. He had appeared in court on Friday, 1 July 2011, which was also his 24th birthday, and he was returned to cell 26 in HM4 later that same day.

[8] On Saturday 2 July 2011, Acting Senior Corrections Officer, Mr Tony Francis, was the officer in charge of units HM3 and HM4. He was on duty in the guardroom supervising the two units. One of his functions was to unlock the cell doors as and when required by the corrections officers. Mr Alatipi had been assigned to work that day with Corrections Officer, Mr Andrew McHena. Both Mr Alatipi and Mr McHena worked in HM4. Two other officers had been assigned similar duties in HM3. The procedure on the day in question was that the prisoners from the cells on the bottom landing were unlocked first and taken out into the exercise yard, and when they were secure in the yard, the prisoners from the cells on

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2 *Alatipi v Chief Executive of the Department of Corrections* [2014] NZEmpC 67.

the top landing were unlocked and allowed to go out into the wing. The incident allegedly happened while the prisoners from the cells on the upper landing (which included cell 26) were being unlocked and released into the wing.

The complaint

[9] Prisoner X did not give evidence in the case but he was interviewed by Principal Corrections Officer, Ms Cheryl Chandler, on the day of the incident. Ms Chandler's record of the interview was typed up on a Corrections IR.07 Form 01 and signed off at 1350 hrs on 2 July 2011. Ms Chandler stated:

> …
>
> When we got to the Management unit [Prisoner X] gave me the following statement.
> On the 2nd July 2011 I [Prisoner X] was in HM 4 wing. At approximately 0835hrs I approached an Officer who I now know to be Officer Alatipi, W. I had heard other prisoners asking for initial phone calls and to talk to [their] Lawyers, so I asked if I could make my initial phone call. He stated that he was not giving initial phones. I said do you guys make up the rules as you go along, I said this because I had heard him say yes and saw him write down numbers. Officer Alatipi then said to me you like fucken complaining all the time don't you. I had only complained once before when I first arrived because my cell was dirty.
> I said to him do your fucken job. He had started to walk away but once I had said that, he said what did you fucken say to me.
> I said Oh fuck off leave me alone.
> He said come to your cell we will have a talk. I started to walk to my cell, I started thinking I was going to get locked up and I didn't think this was fair, so I stopped put my hands up on the railing. Officer Alatipi then said hurry up get in your fucking cell.
>
> I went up to the door, it didn't unlock straightaway. I said are you coming into my cell. He just unlocked the door I walked in he followed and shut the cell door. I went to turn around and got a punch to my head, I fell on the bed and he just kept punching me.
>
> He banged his head on the top bunk as he went to get up from hitting me. He said you like being a smart cunt and then walked out of my cell.
>
> I don't believe I was smart I was only asking for what I thought was my right.
> I know I should not have sworn at the Officer but he started swearing at me first.
> While I was still on the bed he exited the cell and locked it.
>
> As I sat up my nose started to bleed I got up and cleaned it with toilet paper.
>
> I put toilet paper up my nose and I was just sitting on the bed shaking.

> I pushed my intercom button and spoke with the Officer in the guardroom. I asked to speak with someone higher as I had just been assaulted by an Officer. He said yeh and hung up. About five minutes later Officer Alatipi came back into my cell and said you can sign out of here and you can run, but there are no other beds so you will still stay here.
> He said is it all good and put out his hand. I did shake his hand because I was too scared not to and I didn't want any more trouble with him.

Mr Alatipi's version of events

[10] Mr Alatipi gave evidence before me. He had also made statements to the investigator and to the police recording his version of events. The statements were all produced in evidence. Mr Alatipi explained that he did not know Prisoner X very well and that he had probably only interacted with him while on duty on one previous occasion. I accept that statement. Prisoner X also said that he had met Mr Alatipi only once before "and he was alright". On the morning in question he and Mr McHena had unlocked the prisoners from the bottom landing and secured them in the exercise yard. The two officers then commenced unlocking the cells on the top landing of HM4 allowing the prisoners their wing time. They called on Mr Francis to unlock the respective cells as required. Mr Alatipi told the police that when he unlocked cell 26, Prisoner X mentioned that he wanted out of the unit but he (Mr Alatipi) explained that there were no beds and proceeded to carry on with the unlock.

[11] Mr Alatipi said that he continued the unlocking process and by the time he reached cell 16 he was approached by Prisoner X who asked if he could make a telephone call. As it turned out, Mr Alatipi had been instructed by the Principal Corrections Officer the night before that only two phone calls were allowed to be made over the weekend and they could only be made by a new prisoner who had not had a chance to make an initial telephone call on the Friday. The reason for this restriction was not fully explained in evidence but apparently it had something to do with the fact that the principal corrections officers did not usually work on weekends. As Prisoner X was already a remand prisoner he did not qualify to make a weekend phone call but Mr Alatipi suggested that he wait until Monday and then he (Mr Alatipi) would ask the Principal Corrections Officer whether he would be allowed to make his phone call. At that point Prisoner X started getting angry and agitated, claiming that he was entitled to make a call.

[12] Mr Alatipi continued in evidence:

> 11. I said to him something like, "No, the boss has said no calls" and when he continued nutting off, told him, "Look, pull your head in".
>
> 12. I went to walk away, but heard [Prisoner X] say, "Fuck off you coconut".
>
> 13. I stopped and turned around, and asked, "What did you say?"
>
> 14. He replied, "You heard me" and said it again.

[13] Mr Alatipi explained how he then used, what he described as the "AWOCA" process on Prisoner X AWOCA (Ask, Why, Options, Confirm, Act) principles of tactical communication are taught as part of a prison officer's training. They involve talking a prisoner down, giving them options and explaining the consequences of their actions. Mr Alatipi described AWOCA in lay person's language as giving a prisoner time out to calm down and get his thoughts together. He said that prisoners often like an audience and an incident can easily escalate out of control. He therefore took Prisoner X back to his cell and he stood at the door-way, holding the cell door open, and gave Prisoner X a talking to. In a statement he later made to the police, Mr Alatipi said:

> Well, I put him back in his cell and he was still swearing. And then I was standing at the door and I said "Look, pull your fuckin' head in mate. You're not the only one that needs a phone call and it is not going to happen. You've been told. That's it.

[14] Mr Alatipi then locked the cell door and proceeded to carry on with his normal duties. He said that he was not sure what his colleague Mr McHena was doing at the time and he thought that "for muster purposes" he may have told, Mr McHena, that Prisoner X was "nutting off" and so he had locked him back in his cell but he described the encounter as "a complete non-incident as far as I was concerned". He said that prisoners "throw insults and argue with you all the time and it was something I was used to as a corrections officer."

The intercom call

[15] As noted in [8] above, the Acting Senior Corrections Officer on duty on the day of the incident was Mr Francis. Mr Francis did not give evidence before me but

he made a statement to the investigator on 20 July 2011 and another statement to the police on 10 August 2011, both of which were produced by consent. Mr Francis had been an Acting Senior Corrections Officer for over two years. In the absence of a principal corrections officer on the weekend in question, he was the officer in charge of units HM4 and HM5. Mr Francis was positioned in the guardroom. Apart from having to unlock and lock the cell doors as and when required by the corrections officers he also had to handle the radios, phone calls, the intercom and on occasions he would also be required to interview prisoners. He described how he was kept very busy because manning of the guardroom, which had in the past been manned by two people, had been reduced in more recent times to just the one officer.

[16] Mr Francis said that it would normally be around 8.45 am when the cells on the top landing were unlocked to allow prisoners into the wing. That would have been after the prisoners from the bottom landing had been secured in the yard. Mr Francis recalled how, while he was on duty in the guardroom on the morning in question, he received a call over the intercom from Prisoner X. The precise timing of the intercom call was not recorded anywhere but in a later interview with Mr Alatipi the police officer dealing with the case stated that it was about 15 minutes after Prisoner X had been locked back in his cell for "time out". I accept that estimate.

[17] The intercom system identified the caller but Mr Francis said that as he had radio traffic going on in his ear as well as the intercom and other things happening, his conversation with Prisoner X was not very clear. Mr Francis told the investigator:

> … and he came on to the intercom, it wasn't very clear – said something about somebody had hit him or something, and I said "who" – backwards and forwards and I wasn't one hundred percent sure, 'cos at that time also there was a call for the HM4 wing door to be unlocked …

[18] To the police, Mr Francis said:

> The prisoner said that something had happened and I think he said that he may have been hit and words to the effect that he wanted to see someone higher up.

[19] A transcript of the intercom conversation between Prisoner X and Mr Francis was produced in evidence. I reproduce it in full. ("O" represents Officer Francis and "SM" refers to Prisoner X):

O
Yes? <*responding to intercom*>

SM
Yeah, I wanna talk to someone higher up than you 'cos I just got …..

O
Sorry?

SM
I wanna talk to someone higher up than you - I just got beaten up by a guard.

O
What's the matter?

SM
I just got beaten up by a guard, I wanna talk to someone higher up than you.

O
Ah, when did this happen?

SM
It was just now – in my cell. I wanna talk to someone higher up than you.

O
Okay - ????

SM
Eh?

<*Transmission stops*>.

<*Transmission starts again*>

O
Sorry, you ….

SM
What was that?

O
Look, if you'd hang on a minute for me please – I'll come down to you in a minute alright?

SM
I don't want to ???? - I want out of here.

O
Yes , alright – give me time to do it please.

Transcript ends.

[20] A short time after the intercom conversation, Mr Alatipi entered the guardroom and, according to a statement Mr Francis made to the investigator on 20 July 2011, he (Mr Francis) asked Mr Alatipi if he "could check out what was happening upstairs because he had a call from a prisoner who was saying that somebody had hit him". According to Mr Alatipi, Mr Francis informed him that the prisoner in cell 26 was complaining that he had been assaulted and he asked Mr Alatipi to go to cell 26 and check out what was going on. Significantly, Mr Francis did not tell Mr Alatipi that Prisoner X claimed to have been assaulted by an officer.

[21] In evidence, Mr Alatipi gave his account of what happened after he had been asked by Mr Francis to check out what was going on in cell 26:

> 18. I asked [Prisoner X] what was happening and what was all this about an assault, and he just started saying things like, "Oh look, I just need to get out of here". I tried to ask him why he wanted to get out of the unit, but he just repeated that he wanted out of the unit. I told him that the place is full, because we had to empty out I think HM5 and HM6 the day before, and I said that HM1 and HM2 had taken all their offloads. As far as I knew there were no alternative beds because they were making room for people coming from another prison.
>
> 19. To try and give him some reassurance I asked him when his court case was. I think he said it was on Tuesday so I told him that I was working Monday, and that if he waited until then I would talk to the PCO and see if we could get him a phone call then.
>
> 20. I then told him something like "Look, as far [as] what happened this morning, I'm over it", and put my hand out for him to shake, and we shook hands. I was referring to him making the racist comments and yelling at me earlier that morning. I just wanted to let him know that there were no bad feelings and we could just carry on as normal.
>
> 21. He seemed to be ok, so I then left his cell. I didn't notice any injuries, and [Prisoner X] didn't seem to be overly upset. I believe I reported to ADCO Francis that everything was all right and [Prisoner X] wanted out of the unit."

The medical round

[22] Each morning and evening medical officers carry out what are referred to as medical rounds of each unit administering medication to those prisoners on

prescribed medication. The medical people have no special training in security and so they are required to be accompanied by a corrections officer. On the morning in question, the nurse carrying out the medical round in HM4 was Nurse Carol Neal. She was accompanied by Corrections Officer, Mr Franciscus De Groot. Corrections Officer McHena had the task of escorting Nurse Neale and Mr De Groot around HM4 and Mr McHena would give instructions to Mr Francis in the guardroom to open and close the cell doors as required. Ms Neale was not called as a witness. It appears that Prisoner X had been prescribed Panadol although the reason for the prescription was not explained.

[23] Mr De Groot told the Court that it was approximately 9.15 am when the group arrived at cell 26. Officer McHena arranged for it to be unlocked. Prisoner X was sitting on his bed. Mr McHena did not give evidence in the case but in his statement to the police he said:

> When the cell door was opened I saw [Prisoner X] sitting on his bed.
>
> I did not notice that anything was wrong with him.
>
> The nurse asked him if he wanted his medication and he said no.
>
> It is normal for them to sometimes refuse the medication so we just proceeded on.

[24] Nurse Neale, in her statement to the investigator, confirmed that when the cell door was open Prisoner X stated that he did not want his medication and she said that was fine. Nurse Neale was asked by the investigator:

> Did you notice anything about his face, anything unusual about him?

[25] Nurse Neale responded:

> I couldn't actually see his face, he was sitting on his bed. He had his head in his hands so I – that's all I saw.

[26] Mr De Groot was called as a witness by Corrections. He confirmed in evidence that when the cell door was open Prisoner X was sitting on the edge of the lower bunk with his head in his hands and he (Mr De Groot) did not notice that he had any injuries. In a written report apparently made "a couple of days" later Mr De Groot went on to state:

…

> When I went into the cell I did ask [Prisoner X] what the reason was to refuse his medication, he started crying and he told me that he was assaulted and wanted to move out off (sic) the unit because he didn't feel safe. When I looked at him I saw that he had bruises on his face and that the right side of his face was swollen. When I asked him who assaulted him he told me in a whispering manner that it was an officer.
>
> **…**

[27] In a statement to the investigator on 20 July 2011, Mr De Groot said:

> In the morning, I was the whole morning with the nurse doing the nursing rounds in all units, and when we went to HM4 and opened cell - I think it was cell 26 – [Prisoner X] was sitting on his bed and the nurse did ask if he wanted to have his medication. His answer was [at] that moment, no. Because I know [Prisoner X] from the previous unit where I was working, I went into his cell and did ask "why are you refusing your medication, because I think you need your medication". Then [Prisoner X] started crying and I had a good look at him and I saw that he was all red, his face, one side was different looking than the other side, and he said, "Dutchy" – that's how they call me my nickname – "Dutchy, I fear for my safety, I want to go to another unit, I'm not safe here so I want to get out". Then I told him "if you want to get out, my job is to listen to you, I will get you out. First, can you tell me what happened". Then he said to me, "I've been assaulted", and I told him "I can see that", because his face was already swollen up, "I see something is wrong, I will do my best to get you out of the unit". Then he told me after that, "I've been assaulted by an officer", and it was a little bit scary to hear that, and I something - listen, "I'll go make sure I get you out of here, and then we talk further later on. … the thing is with me, if a prisoner says "I fear for my safety and I want to be at risk", if I don't listen to the prisoner, and something happens later on to him, then even I can lose my job. So if I know that a prisoner is fearing for his safety, I do an at risk call in.
>
> …

[28] Mr De Groot said that he had a brief discussion with Nurse Neale about what they should do next and it was agreed that they would take Prisoner X to the Health Unit so that his injuries could be properly checked. Mr De Groot told Prisoner X that they needed to finish the medical round but they would come back for him shortly and they would also try and do something about getting him moved to another unit. Mr De Groot and Nurse Neale then continued with their medical round in HM4. Mr De Groot was cross-examined about Prisoner X's statement that he feared for his safety and he wanted to be at risk. It was pointed out that in his statement to the police on 3 August 2011, Mr De Groot had said that Prisoner X had stated: "I fear for my safety I am not safe in here and I want to go to At Risk because

I have been assaulted". Mr De Groot explained that "at risk" was a place where prisoners can be placed "when they do self-harm or had been assaulted". After a rather lengthy exchange on the issue in cross-examination, the witness told the Court that Prisoner X had actually said that "he wanted to sign at risk" because he feared for his safety.

[29] There was another development in the chronology which occurred before Mr De Groot returned to take Prisoner X to the Health Unit. Mr Alatipi gave evidence, which was not challenged, that at changeover time on the morning in question he had further contact with Prisoner X. "Changeover" involved bringing those prisoners from the downstairs level who had been out in the exercise yard back into the unit and then allowing the prisoners from the top landing the opportunity to go out into the yard. Mr Alatipi indicated that changeover probably occurred about 10.00 am. He said that, as with other prisoners, he looked in Prisoner X's door and asked him if he wanted to go out into the yard. Prisoner X was sitting on his bed reading. He declined the invitation to go into the yard and said that he was alright and so Mr Alatipi said that he "let him be". He added that it was not unusual for prisoners to not want to go to the yard. Mr Alatipi said that sometime later the medical team came back to the unit and took Prisoner X away but he had no idea why. Mr Alatipi said the rest of the day went on as normal. He had no knowledge that Prisoner X had made any complaint.

Visit to the Health Unit

[30] Mr De Groot told the Court that after they had finished the medical round he telephoned Principal Corrections Officer, Ms Chandler, the Site Supervision Officer, and told her about Prisoner X's allegations. In cross-examination he confirmed that he actually made the call prior to proceeding to finish off the medical round. I find his evidence in cross-examination the more reliable. It is also consistent with Ms Chandler's own evidence where she said that she advised Mr De Groot to finish his medical round and then bring Prisoner X up to the Health Unit to see her.

[31] Mr De Groot said in his statement to the police of 3 August 2011 that Mr McHena was with him and opened the cell door when he went back to cell 26 to

take Prisoner X to the Health Unit. In his statement to the police of 12 August 2011, Mr McHena said that he could not recall who opened the cell door on that occasion. Prisoner X told the police officer that it was Mr Alatipi who was with Mr De Groot when he was collected from the cell and taken to the Health Unit. That proposition was never put to Mr Alatipi, however, and I do not accept it. It was Mr McHena's task on the morning in question to be the escort on the medical round. I consider Mr De Groot's statement to the police on this issue to be the more reliable and I accept that it would have been Mr McHena who opened the cell door when Prisoner X was taken to the Health Unit.

[32] The Health Unit is about five minutes walk from HM4. Mr De Groot said in evidence that it was approximately 9.30 am when he took Prisoner X to the Health Unit but he was challenged in cross-examination about his time estimates. An extract from the unit diary (completed by Mr Francis) was produced which recorded that Prisoner X and two other prisoners were taken to the medical unit after 10.00 am. The exact time is indecipherable but Mr De Groot accepted that the figure shown in the unit diary appeared to be "1015". Mr De Groot speculated that the time recorded in the unit diary may have been entered later.

[33] Ms Chandler told the Court that it was approximately 9.45 am when Mr De Groot brought Prisoner X to the Health Unit. As Mr Francis did not give evidence, he could not be questioned about the entry he made in the unit diary and so it is difficult to reach any firm conclusions about the exact timing of these particular events. For the record, however, I accept that, regardless of the exact time that Prisoner X was taken to the Health Unit, the matters referred to in [27] above which Mr Alatipi gave evidence about took place while Prisoner X was still in his cell.

[34] Along with Prisoner X, Mr De Groot also took with him to the Health Unit two other prisoners from HM4 "for methadone". Mr De Groot told the investigator that on the way to the Health Unit, Prisoner X told him "his story" about how he had been assaulted by "an officer". Expanding on this evidence in Court, Mr De Groot said that as the other prisoners were with them, he told Prisoner X to shut up and not to talk about it.

[35] When they arrived at the Health Unit Ms Chandler met them and took Prisoner X to an interview room where he was examined by a male nurse, Mr Charles Kaluwasha. The notes made by Mr Kaluwasha upon examination record:

> Tearful, sobbing +++. Stated at around 08.30hrs the alleged officer approached him, took him to his cell and started punching him to the head several times and sustained bruises to the face and started bleeding from the nose which lasted for approximately 5 minutes.
> Noted some bruises to R) temperal region and haematoma just above the ear. Nil discharge from the ear, eyes intact, PERL, some bruise on RT cheek. BP 130/60, HR 88, Resp 18,sats 98%. Reassurance given and officers decided should be taken to management unit.
> PLAN
> Have some panadols PRN-I did not give him panadol as he had it an hour ago. Any concerns to inform officers.

[36] Ms Chandler took colour photographs of Prisoner X's face and injuries. She told the Court:

> At this time, [Prisoner X] was shaking, weepy and scared. He kept asking me what would happen to him and saying things like "they'll get to me". I assured [Prisoner X] that it was my job to keep him safe and that I would do so." Ms Chandler said that Prisoner X then started to tell her about the assault but she asked him to wait until he was taken to the Management Unit where she would interview him properly.

Management Unit

[37] After his examination at the Health Unit Prisoner X was taken to the Management Unit by Ms Chandler and Mr De Groot and Ms Chandler proceeded to take the statement from him referred to in [9] above. She also asked Prisoner X if he wanted to lay a complaint with the police about the matter. Prisoner X said that he did and so Ms Chandler gave him the relevant form to complete which she collected from him the following day. The statement Prisoner X gave to the police is along the lines of the statement he had given to Ms Chandler although in his statement to the police, after referring to his nose bleed, Prisoner X added: "Other prisoners then came to my cell and I told them what happened."

[38] There was an additional point made by Prisoner X towards the end of his statement to Ms Chandler which was not included in his statement to the police or in any of the statements he made subsequently to the investigator. Referring to the

point in time when he was taken from his cell to the Health Unit, Prisoner X told Ms Chandler:

> When I was walking out of the wing a couple of the prisoners who are friends with Officer Alatipi said you'd better not nark, you better not nark.

[39] After completing the interview, Ms Chandler took steps to download SMS (Security Management System) footage from Unit HM4 at the time of the alleged assault. She also arranged for Prisoner X to be relocated from HM4 to the Management Unit. Ms Chandler advised Mr Francis, the officer in charge of Unit HM4 on the day, that Prisoner X was being moved to the Management Unit but she did not inform him of the reasons for the move. Ms Chandler described the Management Unit to the Court as a very small unit which holds a maximum of 20 prisoners who cannot be dealt with in the mainstream or segregated units because they are either a threat to others or they are at extreme risk from others. Prisoner X never returned to unit HM4. Ms Chandler confirmed that to the best of her knowledge he was held in the Management Unit until his eventual release from Rimutaka Prison on 4 November 2011.

The investigator

[40] Mr Francis was clearly upset that Ms Chandler had made a decision to remove Prisoner X from HM4 to the Management Unit without prior consultation with him. He told the investigator on 20 July 2011 that, as the officer in charge on the day, he should have been informed as to why Prisoner X was being removed from his unit. Mr Francis was also obviously frustrated that he had not been informed of the alleged assault and given the opportunity to investigate the complaint at the time it happened. As he expressed it to the investigator:

> Yep. I would have pulled him out of the unit, I would have interviewed the prisoner myself and got to the bottom of it. If there has been an assault I would have done an incident, I would have referred him to medical, I'd have had him checked over. That is normal process and I've followed that numerous times.

[41] At the end of his interview Mr Francis told the investigator, "As far as I'm concerned I've done what I believed was correct at the time and I stand by that, I'd

always get someone else to check it first, not just take a prisoners word, 'cos trust me, they're not always trustworthy."

[42] Exactly why the process Mr Francis described to the investigator was not followed on this particular occasion was not explained to the Court but the evidence was that he was not involved in any part of the subsequent investigation. Instead, Ms Mary Wilson, an officer from Christchurch, was appointed to conduct the investigation.

[43] Ms Hawthorn gave evidence for Corrections. She is employed by Corrections as the Operations Manager Rehabilitation and Employment for the Lower North Region. She has held that role since 3 September 2012. At the time of the events giving rise to this litigation, Ms Hawthorn was the Assistant Regional Manager, Wellington Area within the prison services and, as such, she was responsible for Arohata, Wellington and Rimutaka Prisons. The managers of each of those prisons reported to her.

[44] Ms Hawthorn told the Court that on 6 July 2011 she received an internal memorandum from Mr Tony O'Neill, the Investigations/Projects Manager, setting out an allegation that Mr Alatipi had assaulted [Prisoner X] on 2 July 2011. She decided to conduct a formal investigation into the allegations against Mr Alatipi and she asked Ms Wilson, then the Investigations/Projects Manager for the southern region, based at Christchurch, to carry out an investigation into the alleged incident on her behalf. On 11 July she provided Ms Wilson with the internal memorandum from Mr O'Neill and some terms of reference for the employment investigation. The terms of reference requested Ms Wilson to provide Ms Hawthorn with her "completed investigation report" by 12 August 2011.

[45] By letter dated 13 July 2011 Ms Hawthorn advised Mr Alatipi of the allegation that had been made against him, namely, "you assaulted a prisoner on Saturday, 2 July 2011 at Rimutaka Prison" and he was informed that an employment investigation into the allegations and the surrounding circumstances would be undertaken. The letter stated that Mr Alatipi was being placed on special leave and he was asked for written submissions by 15 July 2011 as to why he should not be

suspended. The letter also noted that Mr Alatipi had the right to seek the support of his union or other support person.

[46] The letter of 13 July 2011 was the first notification Mr Alatipi had received about the alleged assault on 2 July 2011. The letter did not mention the fact that a complaint had also been made with the police but Mr Alatipi told the Court that he learned from other officers that the police were also going to investigate him. He proceeded to contact his union CANZ (the Corrections Association of New Zealand). On 14 July Mr Alatipi's union representative, Mr Rakai Tawhiwhirangi, sent an email to Ms Hawthorn confirming that he would be representing Mr Alatipi in the matter. The email included a brief memorandum from Mr Alatipi denying that he had assaulted Prisoner X. By letter dated 19 July 2011, Ms Hawthorn informed Mr Alatipi that he would be suspended on full pay during the employment investigation.

[47] Ms Wilson travelled up to Wellington and started conducting her investigation interviews on 20 July 2011. She began by interviewing Mr De Groot, then Prisoner X and Mr Francis. The following day she interviewed Ms Chandler. On 8 August 2011 Ms Wilson interviewed Nurse Carol Neale and Nurse Charles Kaluwasha.

Meeting of 19 August 2011

[48] On 19 August 2011, Ms Wilson met with Mr Alatipi and his representative Mr Tawhiwhirangi. There had been a delay in arranging this meeting due to Mr Alatipi and his representative's unavailability and Ms Wilson's travel plans being disrupted by adverse weather conditions. Others in attendance at the meeting on 19August 2011 were Mr Peter Skipage, Investigations/Projects Manager; Ms Sonia Mackey, a senior HR advisor with Corrections and Steve Godfrey from CANZ.

[49] At the outset of the meeting Ms Mackey explained to Mr Alatipi that she was aware that a police investigation was underway and so therefore he had the right not to answer any questions but she pointed out that Corrections also had the right to

finish the report and make a decision on the report. Ms Mackey concluded: "Therefore, today gives you the opportunity to make us aware of anything that we may not be aware of and put your side forward."

[50] In response, Mr Tawhiwhirangi pointed out to those in attendance that Mr Alatipi had been interviewed at Upper Hutt Police Station the previous day and, as Mr Alatipi's representative, he suggested postponing the meeting and interview until they knew the outcome of the police inquiry. He also confirmed that CANZ had advised Mr Alatipi not to answer any questions until the police decision was known. In response, Ms Wilson said that she understood the position and that Mr Alatipi had the right not to answer any questions but they still wished to proceed with the interview.

[51] The meeting then proceeded. Mr Alatipi answered all of the inconsequential questions put to him but when he was asked by Ms Wilson for his version of events Mr Tawhiwhirangi interrupted and confirmed that Mr Alatipi would not be answering that question until they knew the outcome of the police investigation.

[52] Later that same day, Ms Wilson sent an email to Mr Alatipi and the two CANZ representatives, Mr Tawhiwhirangi and Mr Godfrey, which read:

> Good Afternoon Gentlemen,
>
> Thank you for making yourselves available [today].
>
> It is [regretful] that I do not have any information from Mr Alatipi to include in my investigation as I proceed to bring this to conclusion.
>
> This process would benefit from Mr Alatipi's contribution and in light of this please do not hesitate to contact me if there is a change in the position not to provide information to the investigation and I will ensure to make myself available to you.
>
> On discussion with the ARM, Liz Hawthorne, I am to continue with my full report and once completed forwarded (sic) this to her. At this point I am anticipating that I will have this completed by Friday next week.
>
> Again if Mr Alatipi wishes to take the opportunity to contribute to my report please do not hesitate to contact me.
>
> Regards
>
> **Mary Wilson Investigations / Projects Manager**

[53] Mr Tawhiwhiriangi responded to Ms Wilson's email within 15 minutes stating:

> Thank you Mary
> To reiterate what was discussed at the meeting, today
> Mr Alatipi is merely exercising his rights to a fair process, until the outcome of the police investigation is made clear
> Should this outcome become evident, before you submit your report, next Friday, then Mr Alatipi would be willing to meet
>
> Thank you
>
> Rakai Tawhiwhirangi
> CANZ Executive
> Wellington

The investigation

[54] The next development came when Mr Alatipi received a letter from Ms Hawthorn dated 30 August 2011 attaching a copy of the employment investigation report she had received from the investigator, Ms Wilson. The letter continued:

> … Although you declined to answer most of the questions put to you by the investigator as a part of this investigation, you were advised that we would complete the employment investigation. I now provide you with a copy of the Employment Investigation Report in relation to the allegations that you assaulted [Prisoner X] in cell 26 HM4 at Rimutaka Prison on 2 July 2011.
>
> Prior to making any decisions with respect to what action, if any, I should take in relation to this matter, I wish to consider any comments and submissions you might choose to make regarding it. You have the right to take advice (union, legal or otherwise) before making submissions.
>
> Please ensure any comments and submissions you wish to make are received at my office by no later than 4:30 p.m., Monday, 5 September 2011.
>
> Yours sincerely
>
> …

[55] The Employment Investigation Report (the August report) attached to Ms Hawthorn's letter was undated but Ms Hawthorn told the Court that she received the report on 26 August 2011. She described it in evidence as an "initial report" but that terminology is not used anywhere in the report itself or in Ms Hawthorn's covering letter of 30 August 2011. The report is actually headed "EMPLOYMENT

INVESTIGATION". I will need to return to the report later in this judgment. Suffice it to say at this stage that it is a comprehensive report comprising 99 paragraphs summarising the circumstances surrounding the alleged assault and the evidence obtained by Ms Wilson. The final two sections in the report are headed "Disparities of Evidence" and "Summary of Findings" respectively. None of the witness statements Ms Wilson had referred to and relied upon in this report had been made available to Mr Alatipi or his advisor for their input.

[56] On 5 September 2011, Mr Tawhiwhirangi made brief submissions by email to Ms Hawthorn in response to the August report. He stated that Mr Alatipi had not declined to answer but had merely exercised his right to silence until the outcome of the police investigation was known. Mr Tawhiwhirangi also confirmed that the police had given the union an assurance that the report on the police investigation would be provided to both parties. He further confirmed that Mr Alatipi would be willing to speak with the investigator, Ms Wilson, as soon as the outcome of the police investigation was known.

[57] Ms Hawthorn responded on the same day by letter to Mr Alatipi acknowledging receipt of Mr Tawhiwhirangi's email. She stated that she would be reviewing the information contained in the employment investigation report. She went on to emphasise the importance of Mr Alatipi taking the opportunity to explain events from his perspective and to comment on the contents of the report. The letter, which was sent by courier, concluded by confirming that unless further submissions were received by 5.00 pm the following day, Tuesday, 6 September 2011, then she would assume that the email from Mr Tawhiwhirangi dated 5 September 2011 was Mr Alatipi's only submission concerning the allegation.

[58] On 6 September 2011, the National President of CANZ, Mr Beven Hanlon, sent an email to Ms Hawthorn, copied to the Chief Executive Officer of Corrections, expressing the union's concern about the contents of the investigation report and the process that had been adopted whereby the investigation report was given to the decision-maker before Mr Alatipi and his representatives had had any input into the investigation. Mr Hanlon stated that Mr Alatipi's right to silence until the outcome of the police inquiry was made known, was one of his "basic human rights".

[59] On 8 September 2011, Detective Sergeant Wayne Radovich of the Prison Investigations Unit, Wellington District, advised Mr Alatipi and his representatives by email that the police had concluded their investigation and the outcome was that no criminal charges would be laid against any party, including Mr Alatipi, in relation to the alleged assault. The email went on to state: "This result has come about as there is insufficient evidence to proceed to any prosecution stage." The email was copied to Corrections.

[60] On 9 September 2011, Ms Hawthorn sent a letter to Mr Alatipi acknowledging having received advice of the outcome of the police investigation. The letter went on to state:

> …
>
> As I have yet to come to a decision concerning the outcome of the employment investigation (based upon the information I have received so far) it is now possible for you to meet with Mary Wilson, Investigations Projects Manager to explain events from your perspective as the impediments that concerned you have been removed. You will also be able to comment on any information or misinformation contained within the report.
>
> I will arrange for Mary to contact you and your representatives to schedule a suitable time.
>
> Yours sincerely
>
> …

[61] Ms Wilson and two other Investigations/Projects Managers from Corrections met with Mr Alatipi and his CANZ representatives on Tuesday, 20 September 2011. The meeting ran from 11.00 am until 11.58 am. It was recorded and a complete transcript was produced in evidence. Mr Alatipi's version of events was essentially that set out earlier in this judgment.

[62] After her meeting with Mr Alatipi on 20 September, Ms Wilson had a further interview with Prisoner X. A record of the interview was typed up on a Job Sheet which was produced in evidence but, as was the case with the record of Ms Wilson's first interview with Prisoner X on 20 July 2011, the statement obtained from Prisoner X was not made available to Mr Alatipi or Mr Tawhiwhirangi for their input.

[63] Ms Wilson told the Court that after her further interview with Prisoner X on 20 September 2011 she proceeded to go through all her interview notes (none of which had been made available to Mr Alatipi) with a view to finally deciding if the allegation was substantiated and, in particular, whether Mr Alatipi had assaulted Prisoner X. She said that after re-reading all of the statements and considering the supporting documents she came to the conclusion that Mr Alatipi had assaulted Prisoner X. The witness added:

> 65. After 26 or so years of working with prisoners, I am confident that I can tell when one of them is "trying it on" or lying to me. I have interviewed many prisoners over the years. This was actually the first time that I found one to be so plausible and genuine that I preferred his evidence over that of a Corrections Officer.

[64] Ms Wilson then completed a revised employment investigation report which was given to Ms Hawthorn on 11 October 2011. That report contained additional information to that contained in the August investigation report referred to in [52] above. It finished with the following conclusion:

> **Conclusion**
>
> 146 It is the conclusion of this investigation, based on evidence provided in interviews of staff and the prisoner and examination of pertinent documents that the allegation, based on the balance of probabilities is substantiated.

[65] On 13 October 2011, Ms Hawthorn forwarded a copy of the October report to Mr Alatipi stating that she would be reviewing the information it contained. She invited Mr Alatipi to make any comments or submissions on the report by 19 October 2011. Mr Tawhiwhirangi presented a one-page submission on Mr Alatipi's behalf. He made the observation that Ms Wilson's report was "heavily reliant on the statement of the prisoner and how the prisoner has related his account of the incident to others." He also queried whether Ms Wilson was the investigator and/or the decision maker in the case.

[66] There was one other point made by Mr Tawhiwhirangi in his submissions to Ms Hawthorn which assumed some significance at the hearing. He said:

> The statement of De Groot goes some way to support Alatipi, as he states that the bruising was yellow. Yellow bruising would indicate injuries of some two/three days previous.

[67] That observation related to a remark Mr De Groot had made in his statement to the police which did not appear anywhere in Ms Wilson's report. Mr De Groot had told the police that when he entered the cell after Prisoner X had refused his medication he noticed that "one part in the middle of his right cheek was yellow."

[68] I will need to return to this topic.

[69] On 28 October 2011, Ms Hawthorn sent a letter to Mr Alatipi confirming that she had considered his submissions and all the material contained in the Employment Investigation Report. She went on to state:

> Therefore, having considered all the information before me, including your submissions (presented by your union representative) I have reached my final decision that the allegation of serious misconduct against you, that you assaulted [Prisoner X] is proven.

[70] Mr Alatipi was invited to make further written submissions before Ms Hawthorn imposed disciplinary action and he was requested to attend a "Disciplinary Interview" on 9 November 2011.

The meeting on 9 November 2011

[71] Those in attendance at the meeting on 9 November 2011 were Mr Alatipi; his representative Mr Hanlon (the president of CANZ); Ms Hawthorn; Ms Janet Stevens, the Senior HR Advisor with Corrections and Ms Ambrose, an Executive Assistant with Corrections, who was the note-taker. A complete transcript of the meeting was produced in evidence. It began with Ms Hawthorn outlining the developments up to that point in time and she then invited Mr Hanlon to make verbal submissions on the proposed disciplinary action.

[72] Mr Hanlon took with him a copy of the defendant's Code of Conduct which set out its policy for managing misconduct and poor performance. The document is known as, and was referred to throughout the hearing as, the "CorrNet". Mr Hanlon proceeded to explain how, in his view, the disciplinary investigation process in

Mr Alatipi's case had not followed the normal process provided for in the Code of Conduct and had thus resulted in findings that were unsubstantiated. The points made by Mr Hanlon were raised and fully explored in evidence and submissions before me. I will attempt to summarise them:

(a) Before the August report referred to in [52] above was produced, Mr Alatipi should have been provided with a copy of all interviews and other information the investigator was proposing to rely upon and he should have been allowed an opportunity to refute or respond to any such material.

(b) The investigator had predetermined the outcome of the investigation and had not interviewed all of the people who needed to be interviewed such as Mr McHena, the second officer who worked with Mr Alatipi on the day, and the three or four other prisoners named by Prisoner X who supposedly could have confirmed or disproved his claims.

(c) The investigator wrongly stated that Mr De Groot had opened the cell door and immediately noticed injuries to Prisoner X whereas that was not correct. Mr De Groot personally knew Prisoner X from earlier interactions with him in another unit but he did not notice any injury to him from the doorway. Neither did the nurse and the other officer who was standing at the cell door notice any injuries to Prisoner X.

(d) The photographs of Prisoner X did not show injuries consistent with the alleged assault and "it's not hard to see why people might not have seen that he was injured." There were no witnesses to the alleged assault. The prison staff the investigator relied upon for her conclusions had simply repeated what Prisoner X had said.

(e) The SMS video footage, which did not specifically show cell 26, showed the surrounding area and if there had been a "vicious assault" like that claimed by Prisoner X then one would have expected

prisoners and others on in the video to react in some way but those in the video footage showed no such reaction.

(f) The investigator had raised with Mr Alatipi a number of procedural issues such as his failure to use the Time Out form and the correct segregation procedures but they were not part of the complaint made against him which was confined to the alleged assault.

(g) The police investigation had concluded that there was insufficient evidence to support a charge of assault. While a criminal conviction requires proof beyond reasonable doubt, the standard used by the police to lay a charge is the balance of probabilities and given that in an employment situation evidence in support of a criminal action must be as convincing as the charge is grave, the police finding was inconsistent with the conclusions of the employment investigation.

[73] One of the specific matters Mr Hanlon raised with Ms Hawthorn in relation to the police inquiry was that in his statement to police, Mr De Groot had said that "one part in the middle of [Prisoner X's] right cheek was yellow." Mr Hanlon made the point that Corrections should have had access to the statements made to the police as part of the employment investigation because the two investigations were "connected". Ms Hawthorn responded by emphasising that she did not have access to the police information and she did not think that it was relevant to the employment matter. At the end of the meeting on 9 November 2011, Ms Hawthorn thanked Mr Hanlon for his submissions.

[74] On 22 November 2011, Ms Hawthorn wrote to Mr Alatipi confirming his dismissal from Corrections effective from that day. He was requested to return his uniform and other issued items to his Residential Manager. In the dismissal letter, Ms Hawthorn responded to many of the issues that had been raised on Mr Alatipi's behalf by Mr Hanlon at the disciplinary meeting on 9 November 2011. Ms Hawthorn made the following points:

(a) There had been no predetermination because she, not the investigator, Ms Wilson, was the decision-maker and before reaching her decision that Mr Alatipi had been guilty of serious misconduct in assaulting Prisoner X, she had reviewed and considered all the information available to her including submissions made on behalf of Mr Alatipi in relation to the contents of Ms Wilson's initial investigation report.

(b) Ms Hawthorn also confirmed that since the meeting on 9 November 2011 she had obtained a copy of Mr De Groot's statement from the police and she had also interviewed Mr De Groot. She enclosed with her dismissal letter a transcript of the interview she had conducted with Mr De Groot on 16 November 2011. The interview ran to five pages. The transcript had not previously been seen by Mr Alatipi or his representative.

(c) Ms Hawthorn said that she found it difficult to understand how Mr Alatipi did not notice the injuries to Prisoner X's face when he entered the cell and then report them to Mr Francis.

(d) Ms Hawthorn confirmed that she had reviewed the SMS video footage and had noted the lack of response from other prisoners but she said that she could not put much weight on that behaviour because she had viewed footage of other assaults where prisoners had not reacted.

(e) Ms Hawthorn said that she had considered whether there was any other information available from other sources that could have added to her knowledge of the matter but decided that it was "unlikely that any additional insights would be obtained." She went on to say, "This is due to the other Corrections Officer being unaware of the altercation (according to your interview transcript) and the configuration of the cell reducing possible witnesses to the incident."

(f) Ms Hawthorn said that while she did not disagree with the employment principle that there was a requirement for a high standard of proof to

support a grave allegation, the police conclusion did not prevent her from initiating her own investigation and reaching the conclusions which she had come to.

(g) Finally, Ms Hawthorn made the point that she had reviewed Mr Alatipi's 10 years of service and found that it contained "previous instances of inappropriate behaviour" which gave her reasonable doubt as to his suitability for continued employment. She, therefore, concluded that dismissal was the appropriate penalty. Ms Hawthorn did not specify in her letter the "inappropriate behaviour" referred to but in evidence she explained that Mr Alatipi had three warnings on his file. First, in July 2008 for not adhering to escort instructions, another in August 2009 for inappropriately accessing the defendant's information system and another warning in November 2009 for allegedly having "borrowed" noodles from a prisoner. None of those matters had been raised with Mr Alatipi in the context of the current investigation.

The law

[75] The test of justification for a dismissal is set out in s 103A of the Act. Section 103A provides that whether a dismissal was justified must be determined on an objective basis, having regard to 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.

[76] Subsection (3) then provides that in applying the test the Court must consider the following non-exhaustive factors:

> (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.

[77] In addition to the factors listed in subsection (3), the Court may consider any other factors it thinks appropriate,[3] but the Court must not determine a dismissal unjustified solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.[4]

[78] It is well established that in undertaking its analysis, the Court may not substitute its view for that of the employer. Its role is to inquire into and assess on an objective basis whether the decision and conduct of the employer fell within the range of conduct open to a fair and reasonable employer in all the circumstances at the time.[5]

[79] In the recent decision of *Howard v Carter Holt Harvey Packaging Ltd*,[6] Judge Corkill noted that, in this particular area of the law, this Court has continued to follow and apply the dicta of the Court of Appeal in *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd*, where it was stated:[7]

> What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable inquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.

[80] In *Air Nelson Limited v C*, Air Nelson sought leave to appeal against a decision of this Court upon the grounds that essentially the Court had erred in its application of the s 103A test of justification by considering events afresh or

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3 Section 103A(4).
4 Section 103A(5).
5 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [59].
6 *Howard v Carter Holt Harvey Packaging Ltd* [2014] NZEmpC 157.
7 *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA) at 556.

reaching its own view of the facts.[8] The Court of Appeal rejected that proposition, refusing leave and holding that:

> [19] Section 103A requires the Court to undertake an objective assessment both of the fairness and reasonableness of the procedure adopted by [the employer] when carrying out its inquiry and of its decision to dismiss [the employee]. Within that inquiry into fairness and reasonableness the Court is empowered to determine whether [the employer] had a sufficient and reliable evidential basis for concluding that [the employee] had been guilty of misconduct.
>
> [20] … After examining the evidence, Judge Perkins concluded that [the employer's] findings on both issues could not be justified according to the standard of what a fair and reasonable employer could have done in all the circumstances. Among other things, he found that [the investigator] did not undertake his investigation with an open mind; and that he failed to assess the relevant evidence in a fair and balanced way. The Judge's s 103A evaluation was of an essentially factual nature.

[81] Another principal of particular relevance to the present case involves the nature of the evidence required where a serious charge is the basis of the justification for the dismissal. In this regard, this Court has traditionally followed the principle affirmed by the Court of Appeal in *Honda New Zealand Ltd v New Zealand Boilermakers etc Union*, where it was stated:[9]

> It is well settled that the standard of proof which the employer must attain is the civil standard of balance of probabilities rather than the criminal standard of beyond reasonable doubt; however, where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave. This does not involve proof beyond reasonable doubt, nor does it involve some kind of half-way house between proof on a balance of probabilities and proof beyond reasonable doubt. It involves only an awareness on the part of the grievance committee of the gravity of the allegation and the need, therefore, if the balance is to be tilted in favour of the party alleging the act of serious misconduct, that the proof of that act must be convincing in the way we have described. That is because the more serious the misconduct alleged, the more inherently unlikely it is to have occurred and the more likely the presence of an explanation at least equally consistent with the absence of misconduct.

[82] Also relevant to any consideration of the issue of justification, is the ongoing obligation under s 4 of the Act for parties to an employment relationship to deal with each other in good faith. In this regard, each party had an obligation not to do

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8 *Air Nelson Ltd v* C [2011] NZCA 488.

9 *Honda New Zealand Ltd v New Zealand Boilermakers etc Union* [1991] 1 NZLR 392 (CA) at 394-395.

anything, whether directly or indirectly, to mislead or deceive the other or that is likely to mislead or deceive the other.[10] More specifically, in relation to the circumstances of the present case where Corrections were proposing to make a decision that would or was likely to have an adverse effect on the continuation of Mr Alatipi's employment, it had an obligation to provide him with access to information relevant to the continuation of his employment along with the opportunity to comment on that information before any decision to terminate his employment was made.[11]

[83] The terms and conditions of Mr Alatipi's employment were covered by the Prison Services Collective Agreement 2010 – 2001 and, as noted in [72] above, a Code of Conduct which sets out the policy and procedure for managing misconduct. The Code of Conduct records that Corrections is committed to fair and consistent procedures in all cases of misconduct. One of the stated key principles for managing misconduct, which has particular relevance to the present case, is a provision confirming that the respondent employee should be provided with all of the information and material that is being considered which has arisen from interviews or other sources and have the opportunity to refute and respond to that material before any findings are reached. The principle also confirms that if new or significant material is raised during the employment investigation, it should be put to the respondent employee for explanation or rebuttal.

Discussion

[84] The thrust of the comprehensive submissions advanced by Mr Bennett on behalf of the plaintiff was that Mr Alatipi did not, in fact, assault Prisoner X. It was submitted on Mr Alatipi's behalf that Corrections did not adequately investigate the allegations made against him and that the procedural process followed was substantially unfair. In response, Ms Radich submitted that there was "plenty of evidence" supporting the allegation that Prisoner X had been assaulted by the plaintiff and that a fair process had been followed by the defendant throughout the investigation.

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10 Section 4(1)(b).
11 Section 4(1A)(c).

[85] As the authorities cited above make clear, it is not the function of the Court to conduct its own fact-finding investigation and substitute its view of the facts for those of the employer but s 103A does require the Court to undertake an objective assessment of the fairness and reasonableness of the investigation and of the procedure adopted by the employer in reaching its decision to dismiss the employee. In terms of the factual investigation, the task of the Court is to make an objective assessment as to whether the employer had, using the terminology of the Court of Appeal in *Airline Stewards and Hostesses* case, "either clear evidence upon which any reasonable employer could safely rely or [had] carried out reasonable inquiries which left it on the balance of probabilities with grounds for believing that the employee was at fault in the manner alleged". In other words, in the context of the present case, the assessment is whether Corrections had a sufficient factual basis from which to conclude that Mr Alatipi did assault Prisoner X.

[86] The issues arising out of the submissions advanced on behalf of the plaintiff can perhaps best be summed up as follows:

(a) Did Ms Wilson in her investigation, or Ms Hawthorn in making her decision to dismiss, consider the disparity between the lack of visible injuries in photographic evidence of Prisoner X following the assault and the likely injuries suffered by Prisoner X? Was his account of the assault correct? If they did was such a conclusion one which a fair and reasonable employer could nevertheless draw?

(b) Did Ms Wilson or Ms Hawthorn consider inconsistencies in Prisoner X's statements as to his vomiting and blood nose following the incident, and the lack of any corroborating accounts from other witnesses? Were reasonable inquiries made?

(c) Did Ms Wilson or Ms Hawthorn adequately consider the possibility that Prisoner X's injuries were self-inflicted, as well as any motive Prisoner X may have had for such action?

[87] Photographs were produced of cell 26. Immediately inside the cell door is a double bunk on the left-hand side of the cell running lengthways away from the door. Prisoner X gave the following accounts of what allegedly happened:

(a) To Mr De Groot -- (apart from Mr Alatipi, the first person on the scene after the alleged assault)

(i) … "Dutchy, I fear for my safety, I want to go to another unit, I'm not safe in here so I want to get out … I've been assaulted by an officer …" (Mr De Groot to the investigator – 20 July 2011)

(ii) "He stated 'I fear for my safety I am not safe in here and I want to go to At Risk because I have been assaulted'." (Mr De Groot to Detective Sgt Radovich – 3 August 2011)

(b) To Nurse Charles Kaluwasha – 2 July 2011

> … the alleged officer approached him, took him to his cell and started punching him to the head several times and sustained bruises to the face and started bleeding from the nose which lasted for approximately 5 minutes. (medtech notes written by Charles Kaluwasha, the attending nurse)

(c) To Ms Chandler – 2 July 2011

> He just unlocked the door I walked in he followed and shut the cell door. I went to turn around and got a punch to my head, I fell on the bed and he just kept punching me. (Ms Chandler's interview notes – 2 July 2011)

(d) In his "assault complaint form" – 3 July 2011

> I walked in and the officer came in behind me and shut the door. I had my back to him and was about to turn around when I was smacked to the side of my head which knocked me to my bed, I curled up into a foetal position as he was on top of me punching me in the head and arms. (Prisoner X's police complaint – 3 July 2011)

(e) To Detective Sgt Radovich – 8 July 2011

> I heard the cell door shut behind me.

> I had my back to the cell door.
>
> I knew he was in the cell as I heard his boots on the floor.
>
> I had my back to him and was about to turn round to the right hand side when I was smacked to the side of my head which knocked me to my bed.
>
> I would describe the 'smack' as a closed fist punch.
>
> I was struck on the right-hand side of my face just below my eye socket.
>
> I fell onto the bed and curled up into a foetal position.
>
> The Samoan CO was on top of me punching me in the head and arms.
>
> He was punching me on the right hand side of my head.
>
> He punched me about 5 – 7 times.
>
> He held me down with his left hand and punched me with his right hand which was a closed fist.
>
> I was trying to cover myself from getting punched in the head and also got punched in the hand.
>
> I was saying "what the fuck, what the …"

(f) To the investigator – 20 July 2011

> … I walked in and then I could hear his boots behind me, so I turn my head like that and then just straightaway as he closed the door it was just boom and I was – just hit me in the side of the face, like round here, and I fell onto the bed and he was just on top of me with like – his – like – in between here, I'm in there so I couldn't move my arms and I just ???? like that and just getting punched in the head. He got up and bumped his head up on the way …

[88] Coloured photographs of Prisoner X's face, which Ms Chandler took on the morning of the alleged assault, were produced in evidence together with a coloured photograph taken at the time of his admission to Rimutuka. Unfortunately, the photographs cannot be reproduced in this judgment. Prisoner X is of European descent. In his admission photo, he could fairly be described as a reasonably handsome young man with a roughly shaven face and a strong jaw line. He has deep-set hazel eyes which are darkly circled. In the photographs taken on the morning of the alleged assault there is evidence of some discoloration (of a

reddish-purplish nature with perhaps a tinge of yellow) on the right cheek but there is no evidence of any abrasions or broken skin and there are no discernible swellings. There was no evidence of any injury whatsoever to Prisoner X's arms or hands or any other part of his body. The small haematoma Nurse Kaluwasha described was in the hair above the right ear and is not visible in the photographs. Nurse Kaluwasha referred to the discoloration on Prisoner X's right cheek as bruising but he described it in cross-examination as "a minor trauma, a minor injury".

[89] As was evident from his appearance in Court and in the SMS video footage, Mr Alatipi is, and was at the time, a well built prison officer. Prisoner X told the investigator that the "Samoan" was stocky and definitely bigger than himself. The reality is that if Mr Alatipi had sat on top of Prisoner X and punched him a number of times on the head, as Prisoner X claimed, he (Prisoner X) was likely, in colloquial terms, to have had his face virtually beaten to a pulp. There is simply no evidence in the photographs, however, to support anything like an attack of that nature.

[90] The photographs produced in evidence appear to be standard coloured photographs. I was not impressed with attempts made by witnesses for Corrections to downplay their obvious significance. For example:

(i) Ms Chandler said in her evidence:

> Um, as site supervision, we have two little Samsung cameras, normal cameras that you buy from any shop, Noel Leeming or something, and I know how to turn them on, sir, and I know how to click the camera to take the photo. I don't know how to adjust them but I felt that I had good pictures because I'm not very experienced with a camera and I thought it showed it clearly in these photos that there was injuries and bumps here. It didn't show the swelling as much as it was though, unfortunately. … I note at this point that the photos don't really show the full extent of the swelling on [Prisoner X's] face. However, I didn't realise that at the time as I was not experienced with using a camera. If I had known that the photos did not clearly show this, I would have taken some more photos to capture the full extent of the swelling.

(ii) Mr De Groot said in his evidence:

> It was at this point that [Prisoner X] moved his hands down off his face and I could see that he had bruises on his face and that the right side of his face was red and swollen. The two sides of

> his face looked quite different. The photos of his injuries don't really show this, or show the extent of the swelling.

(iii) Ms Hawthorn was referred to the photographs and asked in cross-examination whether she believed the injury on the side of the face "was caused by Mr Alatipi punching [Prisoner X] six or seven times". The witness responded:

> I think probably what happened is that he was punched in the side of the head when he first stepped into his cell and that's caused the injury that Nurse Kaluwasha has identified above his right ear, that haematoma. And then I believe he was punched by Mr Alatipi on the right-hand side of his cheek and after that he's been able to cover up his, his head, and protect himself.

[91] In his evidence Mr Hanlon, the CANZ president, was also asked about the photographs. He prefaced his observations by explaining how he had seen his "fair share of assaults, both staff and prisoners" over his years with Corrections. He described the assault alleged by Prisoner X as "a vicious attack". He said that Prisoner X claimed that he had been hit several times, "firstly, from behind, with enough force to push him on to the bunk, and then the officer follows him up and gets on top of him and pounds him. That's what the prisoner claimed." The witness said that, given the size difference between Mr Alatipi and the prisoner, he would have expected the photographs to reveal more serious injuries. At the disciplinary interview held on 9 November 2011 (see [72](d) above) Mr Hanlon told Ms Hawthorn that, based on the photographs taken by Ms Chandler, "it’s not hard to see why people might not have seen that he was injured."

[92] It was put to Mr Hanlon by Ms Radich in cross-examination that Prisoner X had mentioned being punched in the face only the once and that, as he was then curled up in a foetal position, he was able to use his hands to block injuries to other parts of his face and head. The difficulty with that proposition, however, is that it does not accurately record what Prisoner X claimed in his statements. In his statement to Nurse Kaluwasha, for example, he spoke about having been punched in the head several times. Prisoner X did not appear to differentiate between the "face" and the "head" when describing the alleged assault. To Ms Chandler (see [87](c) above) he described the punch to his cheek which allegedly tossed him onto his bunk

as "a punch to my head". Most significantly, however, as noted above, there was no evidence of any marks or injuries to Prisoner X's hands or arms.

[93] It was also significant that when Ms Radich put that particular proposition to Mr Hanlon in cross-examination it appeared to be accepted by counsel that the photographs showed that Prisoner X had sustained no more than one punch to his face. In counsel's words:

> Q. And just to put the question again, if [Prisoner X] was punched in the face only once this photo would be consistent with that, wouldn't it?"
>
> …
>
> Q. I'll just put that question to you again. If a person was hit in the face on the right cheekbone once this photo would be consistent with that, wouldn't it?
>
> A. Yeah, I guess so.

[94] The corollary to any acceptance of the fact that the injury to Prisoner X's right cheek resulted solely from the one initial punch which knocked him onto his bunk must be that the only injury resulting from the several other alleged punches which then followed was the petite haematoma detected by Nurse Kaluwasha above Prisoner X's right ear. No other injuries whatsoever were detected. For the reasons mentioned above, that proposition simply defies credibility.

[95] Apart from the photographic evidence, there were other matters arising out of the various statements which it would seem should have been queried or explored further by the investigator but were not:

(a) For example, there is the interesting late "add on" by Prisoner X about his vomiting in the cell after the alleged attack. Prisoner X had described details of the alleged assault to Mr De Groot and Nurse Kaluwasha shortly after it occurred on the morning of 2 July 2011. Later that same morning he was interviewed at some length by Ms Chandler and, either on that same day or the next, he wrote up his own account of the incident. In none of those accounts or statements did he make any mention of the fact that he had vomited after the

alleged assault. The vomiting was not mentioned until he was interviewed by Detective Sgt Radovich on 8 July 2011 and he did not mention it to Ms Wilson, the investigator, until his second interview with her on 20 September 2011. When Ms Wilson asked him on that occasion why he had not offered the information at earlier interviews, he said that "he had just forgotten to". That is no explanation, of course, for failing to mention the vomiting in statements made on the very day of the incident.

(b) Apart from the vomiting, Prisoner X claimed that he had suffered a bleeding nose from the assault which had lasted for approximately five minutes. He said that he had put toilet paper up his nose to prevent the bleeding. However, when Mr De Groot entered the cell and closely examined Prisoner X's face he saw nothing to indicate that he had been vomiting or suffering from a bleeding nose. Likewise, when Nurse Kaluwasha medically examined Prisoner X at the Health Unit a short time later he found no such evidence. Moreover, Nurse Kaluwasha accepted in cross-examination that the bruising he detected to Prisoner X's right cheek would not have caused nasal bleeding and he saw no evidence of any punch around the nose area which would have caused a nose bleed. I found that evidence compelling.

(c) There was then the question about whether Prisoner X had taken his Panadol medication on the morning of the incident. Both Nurse Neal and Mr De Groot said in their statements that, when they had attended Prisoner X in his cell in Unit 4, he had refused his Panadol medication. Nurse Kaluwasha, however, said in his statement that when he saw Prisoner X in the Health Unit he did not give him any Panadol as he had already received Panadol in his unit prior to going to the Health Unit. Why did Prisoner X make the false statement to Nurse Kaluwasha that he had earlier taken his Panadol? That point was never investigated.

(d) Questions also arose out of Prisoner X's statements about his alleged communications with other prisoners regarding the incident. In his handwritten complaint to the police dated 3 July, Prisoner X mentioned that after the alleged assault, "other prisoners then came to my cell and I told them what happened." He had not mentioned this, however, in his statements on the day of the incident to Mr De Groot, Nurse Kaluwasha or Ms Chandler. He later mentioned the involvement of the other prisoners when he was interviewed by the police on 8 July and by the investigator on 20 July 2011. He gave the investigator the surnames of the other prisoners but the investigator did not see fit to follow the matter up by interviewing either of the named prisoners. That still, of course, does not explain why Prisoner X did not mention his discussion with the other prisoners in the statements he made about the alleged assault on the day that it supposedly happened.

(e) Prisoner X claimed in his statement to Ms Chandler on 2 July 2011 that as he was being escorted by Mr De Groot from his cell to the medical unit, "a couple of the prisoners who are friends with Officer Alatipi said you better not nark, you better not nark." Mr De Groot was asked in cross-examination about this claim and he said that he had not heard any such comments. It seems completely implausible that other prisoners could have made veiled threats of that nature to Prisoner X without the escorting officer overhearing the comments but this claim by Prisoner X was never investigated.

(f) There was evidence of the lengths that Prisoner X was prepared to go to to dramatise his alleged injuries. When he was visited in his cell by Mr Alatipi after the alleged assault and asked if he wished to go out to the exercise yard, Prisoner X was sitting on his bed reading. A short time after that he was escorted by Mr De Groot to the Health Unit where he was examined by Nurse Kaluwasha who described him as "tearful, sobbing" - (see [35] above). He was also seen and interviewed at the same time by Ms Chandler who in her evidence described his demeanour as "shaking, weepy and scared. He kept asking me what

would happen to him and saying things like "they'll get to me". The investigator seems to have accepted Prisoner X's statements and chameleon-like demeanour without question.

(g) Although there was evidence before Ms Wilson and Ms Hawthorn of a motive for Prisoner X to self-inflict the injuries; namely, that he feared for his safety and wished to be transferred to one of the more secure segregated units, that possibility does not appear to have been adequately considered or investigated.

(h) There was ample evidence before Corrections that Prisoner X feared for his safety. For example:

(i) To Prison Officer De Groot – 2 July 2011

> Dutchy, I fear for my safety, I want to go to another unit, I'm not safe up here so I want to get out.

(ii) To the investigator – (first interview) Transcript dated 20 July 2011 (MW-the investigator)

> **MW**
> Well, the interview's now concluded.
>
> **MW**
> [Prisoner X] is wanting to add something to his interview. Go ahead [Prisoner X]
>
> **[Prisoner X]**
> Just been getting threats from Mongrel Mob members -- that they were -- yeah, they were gonna -- they said they're -- I got a -- there's a mob member in our wing and he said that, yeah, he just said they were gonna stab me and get me. That's about it, yeah. He just told me to watch my back.
>
> **MW**
> Do you know what that's in relation to?
>
> **[Prisoner X]**
> To what happened, what happened now, to the assault????
>
> **MW**
> What makes you say that?
>
> **[Prisoner X]**

Oh, it's just the guy that -- the guy -- the Mongrel Mob member that was in there told me that, so . . .

MW
Do you know who that Mongrel Mob member is?

[Prisoner X]
That's in the wing?

MW
Yeah.

[Prisoner X]
His name's Harry Penman. <Sounds like>.

MW
Harry Penman.

[Prisoner X]
He just told me -- give me a bit of advice to watch out. He got told to stab me up 'cos he said "do it for the Ma'a <sounds like> Porirua --Porirua mobsters. Apparently he lives in -- this guy lives in Porirua and his family's in it or something. I'm not too sure. That's just what I got told. It's a scary that, yeah, it's a bit scary now <laughs slightly>.

MW
Is there anything else that you've remembered you might like to add?

[Prisoner X]
No that's it, that's definitely it.

MW
That's it. Okay, thank you. Interview concluded.

(i) The investigator did not challenge any part of that statement in which Prisoner X alleged that he had received threats from a mongrel mob member. The threats may have been real but if the claim had been properly investigated by Ms Wilson it would have been readily apparent to her that it would have been quite impossible for Prisoner Penman to have been given instructions by some other prisoner to stab Prisoner X over the alleged assault involving Mr Alatipi. On Ms Wilson's own investigation of the facts no one else knew anything about the alleged assault and, if they did, then they should have been interviewed. On the evidence, the claim by Prisoner X that the

> threats had some connection with the alleged assault by Mr Alatipi was a totally implausible proposition.

[96] The various matters touched upon in [95] are not in themselves conclusive evidence of an unjustified dismissal. They are all relevant, however, to any consideration of the statutory test of justification for a dismissal and, in particular, to any consideration of the two-pronged allegation made by Mr Bennett that Corrections did not sufficiently investigate the allegations made against Mr Alatipi and followed a defective process in the conduct of the investigation which resulted in Mr Alatipi being unfairly treated.

The investigation process

[97] In terms of the investigation process one of Mr Bennett's principal submissions was that Corrections acted unfairly and unreasonably in requiring Ms Wilson to complete the August employment investigation report before she had received any input from Mr Alatipi or his union advisors. The report is referred to in [54] above. It was prepared against the background of Mr Alatipi having been advised by Corrections of his right to silence and the direction he had received from his union to invoke the right to silence while the police investigation was underway. It was submitted that the report showed that Ms Wilson had prejudged the outcome of the investigation before she had obtained any proper input from Mr Alatipi. Ms Wilson was asked by Mr Bennett in cross-examination why she had carried on preparing her investigation report when she could have asked Ms Hawthorn to postpone it until the police had decided whether they were going to charge Mr Alatipi or not? Ms Wilson replied:

> I had a discussion with HR Janet and Sonia, and Ms Hawthorn and my instructions were to continue on with the investigation at that point.

[98] Ms Wilson was asked about the "normal Department policy when an officer or an employee invokes the right to silence" and whether Corrections postponed the matter and waited until the police decide whether they were going to lay charges or whether they carry on with the investigation? The witness responded: "sometimes they postpone and on other occasions they can move on forward."

[99] In response, Ms Radich submitted that as Mr Alatipi had willingly spoken to the police he had waved any right to silence. Counsel referred to *B v Virgin Australia (NZ) Employment and Crewing Ltd* where Judge Inglis stated:[12]

> And even where an employee is facing parallel criminal proceedings there is no immutable rule that s/he is entitled to refuse to respond to questions arising in a disciplinary context. Performance of the duties of good faith contained within s 4(1A)(b) (to be responsive and communicative) are couched in mandatory, not discretionary, terms.

[100] Ms Radich further submitted that it was not unfair for Ms Wilson to proceed with preparing the "draft report"; that the decision to dismiss was not predetermined; that the "initial draft report" did not include any finalised conclusions and that, in any event, it was not Ms Wilson but Ms Hawthorn who had made the ultimate decision to dismiss.

[101] The submission made by Ms Radich regarding the right to silence is correct. At the time of the meeting on 19 August 2011, Mr Alatipi had already waived his right to silence by giving a full statement to the police the previous day. But that point does not appear to have been appreciated or raised by anyone at the meeting on 19 August. In other words, Mr Alatipi could no longer seek to rely on the privilege against self-incrimination.

[102] By the same token, it does not appear from the transcript of the meeting that Mr Tawhiwhirangi was at that stage actually seeking to invoke the plaintiff's right to silence. The point Mr Tawhiwhirangi appeared to be making was that, although Mr Alatipi had given a full statement to the police, he was reluctant to engage in the disciplinary process any further until the police had made up their mind as to whether to prosecute or not. As Mr Tawhiwhirangi expressed it:

> I think it's in his – in the fairness of justice to him that we postpone – not delay, I think delay is a bad word – postpone our meeting and our gathering, our interview until we get the outcome of that … police decision.

[103] In his follow-up email (see [53] above) Mr Tawhiwhirangi expressed the same sentiment:

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[12] *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 40, [2013] ERNZ 72 at [158] (citations omitted).

> Mr Alatipi is merely exercising his right as to a fair process, until the outcome of the police investigation is made clear.

[104] Both parties had a statutory obligation to act in good faith. The allegation made against Mr Alatipi was serious. The police were involved. At the start of the meeting on 19 August 2011, Mr Alatipi had been advised by the Corrections Senior HR Advisor, Ms Mackey, that he had the right not to answer any questions. In response, as I have observed, it does not appear that Mr Tawhiwhirangi sought to invoke any legal right to silence but he requested a postponement of the meeting until the police decision was known. The transcript of the meeting shows that Mr Tawhiwhirangi made that request because the police had said that after they made their decision they would then release the statements they had obtained from the various witnesses. As Mr Tawhiwhirangi put it:

> It's actually imperative in natural justice that Willie has the right to see the statements made to the Police in relation to the statements made by the same people to you. In other words we get a fair understanding of what has been said, and we don't have that from the Police.

[105] Corrections understood Mr Alatipi's position but the transcript of the meeting shows that Mr Skipage responded by stating that Ms Wilson had been instructed to continue on with her report irrespective of whether Mr Alatipi had any input. Ms Wilson then went ahead and produced her August report.

[106] Employment investigations involving potential criminal conduct can give rise to procedural difficulties. The employer, understandably, will wish to complete its disciplinary investigation without delay but it has an obligation to act fairly and in good faith. The employee, likewise, has an obligation to act in good faith. That includes a duty to be responsive and communicative which in turn includes the obligation to answer questions posed by the employer in the course of a disciplinary investigation. The good faith obligations in the Act do not specifically recognise the privilege against self-incrimination. Where the justice lies in any particular case will depend upon the facts.

[107] In the present case, the police duly concluded their investigation and on 8 September 2011 they advised the parties that no criminal charges would be laid. Given the delays already in the investigation of the 2 July 2011 incident, the

additional three-week delay between the meeting on 19 August 2011 and the announcement of the police decision on 8 September 2011 was not all that significant. There seems to me to have been no sound reason why Corrections, in the exercise of their good faith obligations, could not have acceded to Mr Tawhiwhirangi's request and held off producing the report until after the police had made their decision. At least no such reasons were ever given to Mr Tawhiwhirangi.

[108] If there was evidence that there was going to be a long delay with the police investigation then the situation may well have been different but there was no such evidence and there was no evidence to show that anyone from Corrections had made inquiries to try and find out from the police how long their investigation might take. As noted in [98] above, on certain other occasions where the police were involved, Corrections had postponed the disciplinary process.

[109] Although the Code of Conduct did not specifically provide for the situation where there was a contemporaneous police investigation, Mr Tawhiwhirangi's request was consistent with Mr Alatipi's rights under the code to obtain access to all relevant information and material.

[110] Section 103A(5)(b) of the Act provides that a dismissal will not be unjustifiable where any procedural defects do not result in the employee being treated unfairly. The unfairness alleged on behalf of Mr Alatipi was that the usual practice in other cases was that, when requested, Corrections would wait until the completion of a police investigation before interviewing the affected employee. Unchallenged evidence was given to that effect by the Union representative, Mr Tawhiwhirangi. Corrections provided no reason or explanation for not agreeing to follow that same procedure in Mr Alatipi's case. The end result was that Ms Wilson went ahead and produced her August investigation report containing adverse findings against Mr Alatipi without having had any meaningful input from Mr Alatipi or his advisors. As Mr Bennett expressed it:

> The process adopted by the Department meant that Mr Alatipi did not have a real and timely opportunity to respond to the Department's concerns before the Department had already formed its views.

[111] I agree with Mr Bennett's submission that in all the circumstances no fair and reasonable employer could have acted as Corrections did on this occasion and simply rejected out of hand Mr Tawhiwhirangi's request for a postponement of the investigation.

[112] Ms Radich referred in her submissions to the August investigation report as an "initial draft report" but that terminology was not used at the time. As noted in [55] above, the report was simply intituled "Employment Investigation" and when Ms Hawthorn forwarded it to Mr Alatipi on 30 August 2011 she stated in her covering letter that he had been advised "we would complete the employment investigation". She then said: "I now provide you with a copy of the Employment Investigation Report in relation to the allegation that you assaulted [Prisoner X] in cell 26 HM4 at Rimutaka Prison on 2 July 2011." Mr Alatipi was then invited to make comments and submissions prior to Ms Hawthorn making any decisions with respect to what action, if any, she should take in relation to the matter. All that has a ring of finality about it. In other words, the misconduct allegation had been established and Mr Alatipi was being offered the opportunity to make submissions on penalty or punishment.

[113] The matter was pursued by Mr Bennett in an exchange during cross-examination with Ms Wilson:

> Q. So what would you call somebody who says, "Based on everything I've seen he's guilty," because that is what you are saying there. On the balance of probabilities he has done it?
>
> A. Yes, that's what I'm saying.
>
> Q. And you're the investigator not the decision maker?
>
> A. That's right.
>
> Q. So haven't you already made – hasn't the Department already made the decision to find him guilty before he even gets a chance to see the decision maker?
>
> A. Absolutely not, there's further processes that have to be carried out after this and Ms Hawthorn was responsible to actually make the decision, not me.
>
> Q. But you've made a decision?

A. I've come to a conclusion about the information that was in front of me, yes, certainly not a decision as to the, as to what would happen from there.

[114] After the police decided on 8 September 2011 that no charges would be laid, Ms Wilson met with Mr Alatipi and his representative and obtained a full statement relating to the incident but by that stage the damage had been done. Ms Wilson had produced her August report which showed that she had made up her mind already about Mr Alatipi's guilt. The additions she made in her revised employment investigation report dated 11 October 2011 were all designed to bolster the decision she had already conveyed in her August report which was that Mr Alatipi was guilty of the alleged assault.

[115] One of the unfair ways in which Ms Wilson used her second report to strengthen the conclusions reached in her August report was by recording various ways in which Mr Alatipi had allegedly breached matters of protocol in relation to the incident in question. For example, it was alleged in the second report that Mr Alatipi had failed to follow correct procedures when locking a prisoner for Time Out as noted on "M.01.03 Form 1 Time Out" and in failing to follow "PS Custodial Practice Manual (CPM) Guidelines -- locking and Unlocking movements". These alleged breaches of protocol were highlighted in the "Summary of Findings" section of Ms Wilson's report of 11 October 2011 but none of them were matters which had been included in the allegation of misconduct made against Mr Alatipi.

[116] To a large extent Ms Hawthorn, as the decision-maker, was, in colloquial terms, "tarred with the same brush". She had read Ms Wilson's August report and she was well aware of Ms Wilson's conclusion that Mr Alatipi was guilty of the assault alleged. Ms Hawthorn as the decision-maker, had an obligation under the defendant's Code of Conduct to make her own independent judgment as to whether there were sufficient reasons for the dismissal and if that required further inquiries then she was required to undertake those inquiries. There was no evidence, however, that Ms Hawthorn had independently sought to question or challenge any aspect of Ms Wilson's investigation apart from one inquiry which she made of the police at the instigation of Mr Alatipi's union advisor about a particular aspect of Mr De Groot's

statement to the police. I now refer briefly to the inquiry made of the police by Ms Hawthorn.

[117] The union representatives had made it very clear to Ms Hawthorn from the outset that all statements the police obtained in the course of their investigation would be made available to Corrections. In evidence Ms Hawthorn claimed to be unaware that she was entitled to the police documentation but I found her claims in this regard unconvincing. One of the submissions that had been made by Mr Tawhiwhirangi to Ms Hawthorn (see [66] above) was that Mr De Groot had stated that "the bruising was yellow" and yellow bruising would indicate that the injury was perhaps two or three days old. Ms Hawthorn correctly assumed that the statement in question must have been made by Mr De Groot in his statement to the police and so she approached the police and requested a copy of Mr De Groot's statement. The statement was provided and Ms Hawthorn then proceeded to re-interview Mr De Groot about the matter but, in breach of one of the key provisions in the Code of Conduct, she did not make a copy of her interview notes available to Mr Alatipi or to Mr Tawhiwhirangi for their input before sending out her dismissal letter on 22 November 2011.

[118] In cross-examination Ms Hawthorn was asked why she had not requested from the police a copy of all the statements they had obtained relating to the complaint. It was a fair question. She could easily have done so and a perusal of those statements may well have caused her to have second thoughts about some of Ms Wilson's findings. However, it did not appear from her evidence that Ms Hawthorn was interested in going out of her way to check out the obvious shortcomings in Ms Wilson's reports or in making any independent judgment as to whether there were sufficient reasons for dismissal.

[119] Ms Hawthorn's approach became particularly apparent when she was questioned in cross-examination about Ms Wilson's failure to interview the other prisoners who Prisoner X had allegedly spoken to in connection with the alleged assault, in particular, about his vomiting and bleeding nose. When Ms Wilson was asked for an explanation she said, "I didn't feel it necessary to involve prisoners in an investigation of an assault, alleged assault against a corrections officer."

Ms Hawthorn also said that they did not want to involve prisoners if they didn't have to. The reality, however, if Prisoner X is to be believed, was that the other named prisoners would have been able to corroborate an important part of his allegation. Conversely, if the other prisoners denied any knowledge of the matters attributed to them by Prisoner X then that would have cast serious doubts on Prisoner X's credibility. Given the seriousness of the misconduct allegation, namely a criminal act on the part of a long-serving prison officer, the investigator and/or the decision-maker should have followed the matter up. I found their failure to do so quite inexplicable.

[120] Likewise, there was the unexplained failure on the part of Ms Wilson and Ms Hawthorn to interview Mr McHena who was Mr Alatipi's work colleague on the morning in question. Ms Wilson was cross-examined at some length on this topic. Her explanation seemed to be that she did not interview him because she could tell from the video footage that he had not been near Mr Alatipi or Prisoner X when the alleged assault took place. Again, I found her evidence in this regard unconvincing and somewhat surprising. Ms Hawthorn gave a similar explanation. Mr McHena was an obvious person to be interviewed. Failure to interview him because he had not been near Mr Alatipi or Prisoner X when the alleged assault occurred ignores the reality which was that there were no eye witnesses. However, Mr McHena may have been able to provide other information relevant to the investigation. He should not simply have been dismissed out of hand as a person to be interviewed.

[121] The legal position, as noted in [81] above, is that where a serious charge is the basis of the justification for the dismissal then the evidence in support of it must be as convincing in its nature as the charge is grave. In the present case there is a particularly relevant factor which in my view underlines the importance of this principle. The complainant was a prisoner on drug-related charges. Corrections owed Mr Alatipi, as a long serving employee, an obligation to act in good faith and to treat him fairly. The investigator and the decision-maker would or should have been aware that Prisoner X was unlikely ever to be accountable in a court of law for the statements he made to them in the course of the disciplinary investigation. In those circumstances, in my view, the investigation needed to be more robust and probing than might otherwise have been the case.

[122] A disturbing aspect of the investigation, however, was the way in which the investigator appeared to passively accept from the outset everything that Prisoner X told her about the alleged assault. For example, in her first interview with him on 20 July 2011, Ms Wilson asked Prisoner X to tell her what happened. The transcript then records the answer that was given by Prisoner X. It ran to one and a quarter standard A4 pages without any interruption from the investigator. There was then no follow-up questions or challenges made to any part of the answer given. The investigator instead asked other rather innocuous questions about the identity of the prison officer, the identity of others Prisoner X had talked to and matters relating to his pending court case. As a long serving employee, Mr Alatipi deserved better than that.

Summary

[123] My conclusion, for the reasons canvassed at some length in this judgment, is that on any objective assessment of the facts, Corrections did not have a sufficient and reliable evidential basis for concluding that Mr Alatipi had assaulted Prisoner X. There were many issues arising out of the evidence before the investigator and the decision-maker which called for further inquiry. Those matters needed to be properly investigated before firm conclusions were drawn about Mr Alatipi's alleged conduct but that did not happen. A fair and reasonable employer would have ensured that those further inquiries were carried out. A fair and reasonable employer could not have drawn the conclusion that Mr Alatipi had been guilty of the alleged assault simply on the strength of the facts as they stood. Additionally, for the reasons also explained above, there were significant defects in the dismissal process followed by Corrections which resulted in Mr Alatipi being treated unfairly.

[124] In terms of the s 103A test of justification, I am satisfied that the decision to dismiss Mr Alatipi was beyond that which a fair and reasonable employer could have reached in all the circumstances at the time the dismissal occurred. The plaintiff, therefore, succeeds in his challenge.

Remedies

[125] Mr Alatipi seeks reimbursement of lost wages made up as follows:

i. $18,162.27 (lost wages to 20 October 2012); and

ii. $169.07 per week from 21 October 2012 to the date of the decision.

[126] At the time of his dismissal on 24 November 2011 Mr Alatipi was on a salary of $47,000 a year. He gave evidence about some 15 other employment positions that he had subsequently applied for. The defendant criticised that evidence on the basis that the plaintiff had failed to produce any application letters or responses to his job applications. The defendant submitted that there was insufficient evidence to establish that the plaintiff had taken adequate steps to obtain full-time employment in mitigation of his loss. The difficulty with that submission is that the plaintiff was not cross-examined on any aspect of his claim for lost wages. His evidence about the positions he had applied for was quite specific and, in the absence of any challenge, I am prepared to accept that the plaintiff did, in fact, take appropriate steps to mitigate his loss.

[127] By the same token, there was no evidence to show how the respective figures of $18,162.27 and $169.07 mentioned in the breakdown were made up. The onus is on the plaintiff to establish a claim for economic loss. The Court should not be left to speculate on such matters. Regulation 11(1)(d) of the Employment Court Regulations 2000 provides that when any sum of money is claimed, the method by which the claim is calculated must be specified in the statement of claim. That was not done in this case.

[128] I accept that Mr Alatipi would have suffered loss of wages but the basis for the specific amounts claimed has simply not been adequately explained or made out. The evidence was that he did secure a part-time position with Post Haste Couriers (20 hours per week) "just before Christmas" 2011 and that he moved to a similar role at Express Couriers in April 2012. Under s 128(2) of the Act Mr Alatipi is entitled to receive the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. Under s 128(3) the Court may, in its discretion, award a greater sum. I am satisfied that Mr Alatipi would have lost in excess of three months' ordinary time remuneration but because I am unable on the evidence to be any more specific, I make an award under this head in the sum of three months' ordinary time remuneration.

[129] The plaintiff also claims compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c)(i) of the Act. There was compelling evidence given on this aspect of his claim which was not challenged and which I accept. He said that his dismissal which came approximately 1 month before Christmas sent him into a state of total shock and he could not believe what was happening. He struggled with how to tell his wife and family that he would no longer be able to provide for them financially. He described rather graphically the humiliation, shame and frustration that he suffered.

[130] Financially, the dismissal had a significant impact on the plaintiff and put his marriage under strain. He described the thoughts he had of losing his home and everything in it as being unbearable and his self-doubts led to suicidal thoughts. For the first time in his life, he now has trouble sleeping and suffers from migraines. He constantly feels stressed and he described himself as "not being a nice person to be around."

[131] I am satisfied that the unjustified dismissal had a significant impact upon Mr Alatipi physically, emotionally and financially. The stress and fear he sustained and which he gave persuasive evidence about was all very real. I accept, in his words, that it was "like my world had come crashing down". I consider $20,000 to be appropriate compensation under this head and I so award.

[132] Counsel for the defendant submitted that in the event of the Court finding that the plaintiff had been unjustifiably dismissed, the extent to which his actions, particularly his alleged assault on Prisoner X, contributed to the situation was significant and warranted a reduction in remedies under s 124 of the Act of 100 per cent. However, given my findings, as summarised above, I do not accept that submission. I see no contributory conduct on Mr Alatipi’s part which would warrant a reduction in the remedies awarded.

[133] Mr Alatipi also claims reinstatement and I have deliberately left this issue until last. The problem was that although Mr Bennett had mentioned the remedy of reinstatement in his opening and closing submissions, he had not sought reinstatement in the relief claimed in the statement of claim. Mr Bennett, therefore,

sought leave at the end of his submissions to amend the statement of claim to include a claim for reinstatement. His application was not opposed. Responsibly, the defendant left "that matter in the Court's hands". I heard submissions from both parties and it was agreed that I would deal with the matter in this judgment.

[134] Reinstatement had been sought in the statement of problem filed in the Authority. The reason why it was not included in the relief claimed in this Court would appear to be simply oversight on Mr Bennett's part. He accepted that it should have been claimed but he submitted that there could be no prejudice to the defendant because its principal witness had given evidence opposing reinstatement.

[135] I have decided to grant the late application to amend the statement of claim to include reinstatement as one of the remedies sought. In her evidence, Ms Hawthorn had dealt with the issue at some length. She prefaced her evidence on the subject by stating that she was not clear whether Mr Alatipi was now seeking reinstatement but she said that if he was seeking reinstatement then she had "serious concerns about that occurring within Prison Services". Ms Hawthorn then proceeded to give detailed evidence in support of her concerns. Likewise, in her closing submissions, Ms Radich spent some five pages addressing the subject of reinstatement. I am satisfied, therefore, that the defendant is not prejudiced in any way by the late application and that it is just that the application be granted.

[136] Turning to the merits, s 125 of the Act provides that reinstatement is available as a remedy if it is practicable and reasonable to do so. The thrust of Ms Hawthorn's evidence in opposition to reinstatement and of Ms Radich's submissions on the subject was based upon the premise that Mr Alatipi had, in fact, assaulted Prisoner X and the need for Corrections to have complete and utter trust in corrections officers to act professionally and appropriately at all times in their dealings with prisoners. All that is perfectly understandable but as Mr Alatipi has succeeded in his challenge the situation is now different. In the circumstances, I have not been persuaded that there is any reason why Mr Alatipi should not be reinstated to his former position and reinstatement is so ordered.

[137] Mr Bennett submitted that perhaps a further hearing could be convened to deal with the practicalities of reinstating Mr Alatipi. I would like to think that this was a matter which the parties would be able to reach agreement on without further involvement of the Court. The defendant is represented by responsible counsel who will be keenly aware of the issues involved in reinstating an employee to his former position after a significant period away from that particular workplace. I would prefer, therefore, to allow the parties the opportunity to try and resolve this issue between themselves.

[138] If agreement cannot be reached within 21 days from the date of this judgment on a proposal that would see Mr Alatipi fully reinstated within 6 weeks from the date of this judgment (or longer if Mr Alatipi consents) then leave is granted for either party to approach the Court for further directions.

Conclusions

[139] Mr Alatipi succeeds in his challenge. His dismissal as a Corrections Officer on 24 November 2011 was unjustified. He is to be reinstated to his former position as directed in [138] above. He is also to be reimbursed for lost remuneration in the sum of three months' ordinary time remuneration and he is awarded compensation for humiliation, loss of dignity and injury to feelings in the sum of $20,000.

[140] The plaintiff is also entitled to costs. If that issue cannot be agreed between the parties then Mr Bennett is to file submissions within 30 days and counsel for the defendant will have a like period of time in which to file submissions in response.

A D Ford
Judge

Judgment signed at 3.30 pm on 5 February 2015