

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 14A/07
WRC 13/07**

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

BETWEEN THE CHIEF EXECUTIVE OF THE
 DEPARTMENT OF CORRECTIONS
 Plaintiff

AND RAKAI TAWHIWHIRANGI
 Defendant

Hearing: 16, 17, 18, 19, 20, 23, 24, and 25 July 2007
 (Heard at Wellington)

Appearances: P J Radich and K Spackman, Counsel for the Plaintiff
 B A Buckett, Counsel for the Defendant

Judgment: 13 September 2007

JUDGMENT OF JUDGE C M SHAW

[1] In its capacity as the public prison service, the Department of Corrections (the department) has challenged a determination of the Employment Relations Authority which found that the department had unjustifiably dismissed Principal Corrections Officer Rakai Tawhiwhirangi for serious misconduct based on allegations that he had assaulted a prisoner. The Authority also found the department had justifiably suspended him pending the outcome of a disciplinary investigation.

[2] Mr Tawhiwhirangi has cross-challenged with a number of allegations against the department including breaches of common law and statutory obligations. He also seeks penalties for his suspension and breaches of statutory duty as well as compensation and reinstatement.

[3] Evidence about compensation and reinstatement was given at the hearing but it was agreed by counsel that reinstatement would be dealt with separately because there may be extra evidence to be given, especially about two television programmes.

The cross-challenge and application for penalty

[4] For the department, Mr Radich initially argued that the Court had no jurisdiction to consider the cross-challenge or the application for penalties on the grounds that they were not matters before the Authority but in closing accepted that the cross-challenge was a matter that could be considered by the Court.

[5] However, in the light of the outcome of this challenge it has not been necessary to discuss the cross-challenge in any detail except to note that on the evidence none of the cross-challenges would have been made out. In addition, although I find that the department unjustifiably dismissed Mr Tawhiwhirangi, there was no evidence that in doing so it was in breach of any statutory or contractual obligation to the extent that warranted any penalty.

[6] The defendant also alleged that he had been treated in a disparate manner from other prison officers who had allegedly assaulted prisoners. Again, in light of the decision about the justification for dismissal, it has not been necessary to traverse that evidence or make a decision on that point.

The issues

[7] To determine whether the department was justified in dismissing Mr Tawhiwhirangi, the Court must decide whether it acted in a way which a fair and reasonable employer would have done in all the circumstances¹. At issue are the decision to suspend, the conduct of the inquiries, the findings of serious misconduct, and the decision to dismiss.

¹ Section 103A Employment Relations Act 2000

Test for justification

[8] The s103A test of justification for dismissal has been comprehensively canvassed in *Air New Zealand Ltd v Hudson*² and several judgments which have followed it. These need not be repeated. It is the Court's duty objectively to evaluate the employer's actions which led to the decision to dismiss.

[9] These actions are measured against the standard of what a fair and reasonable employer would have done in all the circumstances. Mr Radich and Miss Buckett agreed that this refers to a fair and reasonable employer in the position of the plaintiff. This approach is similar to the way the standard of care is assessed in the common law of negligence which acknowledges the reasonable skill and knowledge of a person in the position of the defendant. It is not an unattainable standard that guarantees against all harm in all circumstances.³

[10] In *Whitehouse v Jordan*⁴ the House of Lords approved a test from *Bolam v Friern Hospital Management Committee*⁵:

... where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill.

[11] In applying these principles to employment law I accept Miss Buckett's submission that, in assessing generally whether the actions of an employer were fair and reasonable, relevant factors are the size of the workplace and the number of employees employed, the nature and quality of the resources available to the employer including access to specialist human resources advice, and any other statutory or public interest obligations on the employer.

[12] In this case the following specific factors are relevant to the assessment of the department's actions.

² [2006] 1 ERNZ 415

³ *Hamilton v Papakura District Council* [2000] 1 NZLR 265, 280

⁴ [1981] 1 WLR 246, 258

⁵ [1957] 1 WLR 582, 586

[13] The department has responsibility for all prisons in New Zealand and has some thousands of employees. It necessarily has some characteristics in common with institutions such as the Police and the Army. It has statutory obligations, is hierarchical, rules-driven, and is dependent on its staff to act with integrity and good judgment in performing difficult and potentially dangerous work. It has to weigh the safety of its officers against the safety and security of the inmates.

[14] The department has a dedicated human resource staff and a comprehensive human resources manual. Its policies concerning the conduct and discipline of staff have, to a degree, objectified the standards set by which its processes may be judged. Its processes are systematic and prescriptive and set a high standard of procedural fairness. That is not to say that a single or insignificant breach of the procedures prescribed by the department's policy would necessarily render its actions or decisions unjustifiable. As has often been said, it is not for the Court to pedantically scrutinise every small departure from the prescribed procedure.

[15] In addition, like all other employment investigations, the department's actions are to be judged against the common law standards of fairness which are well settled. The classic tests in *NZ (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd*⁶ require an employer to give an employee notice of the specific allegation of misconduct and any likely consequences; a real opportunity for the employee to attempt to refute the allegation or to explain or mitigate his or her conduct; and an unbiased consideration of the employee's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.

[16] These principles are now to be read in light of the requirements in s4(1A) of the Employment Relations Act 2000. An employer must be responsive and communicative. When investigating serious allegations made against an employee it cannot act as a non-communicative observer and critic. Long-standing requirements

⁶ [1990] 1 NZILR 35, 46

of fair dealing require significant conclusions, including tentative ones, to be articulated to the employee.⁷

[17] The department's own procedures which are described in greater detail below largely reflect the common law tests but expressly require that an employee knows all the information being considered and is able to refute and respond as appropriate. The department has set itself a high standard of procedural fairness.

[18] Overall, decision-makers are required to act reasonably in investigating employees. They must act without bias and predetermination and remain open to persuasion if that is also based on reason.

[19] Finally, as has often been said where a serious charge is the basis of the justification of dismissal, then the evidence in support of it must be as convincing as the charge is grave.⁸ In this case, the allegation that a prison officer has assaulted a prisoner is very grave and calls for a high standard of proof.

The facts

Department of Corrections policy and procedure

[20] The department's policy for managing misconduct and poor performance is in its human resources manual. It incorporates by reference the department's 2005 code of conduct which describes expected standards of conduct and gives examples of misconduct and serious misconduct.

[21] The department's policy states that it is committed to fair and consistent procedures in all cases of misconduct. Key principles include informing the employee of his or her entitlement to advice, support, and union or legal representation, and refraining from interviewing the employee before an opportunity is given for advice, support, or representation. There must be an investigation before disciplinary action is considered. Investigations are to be procedurally fair with the employee being informed of the seriousness of the situation, the details of the

⁷ Refer *X v Auckland District Health Board* unreported, Chief Judge Colgan, 23 February 2007, AC 10/07 para [153]

⁸ *NZ (with exceptions) Shipwrights Union v Honda NZ Ltd* [1989] 3 NZILR 82, 85

allegations, and all evidence and recommendations as well as being given the opportunity to explain or make representations at every stage. A manager must have a good substantive reason before carrying out disciplinary action and must maintain the confidentiality of the employee.

[22] Employees should only be suspended in cases where there are sound reasons such as where there has been alleged serious misconduct and an employment investigation is to be conducted. Suspension is usually preceded by 48 hours' special leave to give the employee an opportunity to prepare submissions on why a suspension should not occur.

[23] The policy sets out five stages of an employment investigation including a preliminary interview to inform the employee about the issues causing concern, the possibility of suspension, the investigation process to be followed, the seriousness of the matter, and the right to representation. The policy also mandates an order for interviews. The last of these interviews is "*in order for the respondent employee to know all the information being considered and to be able to refute and respond as appropriate.*"

[24] The primary purpose of the department's code of conduct is to make standards of integrity and conduct clear. Breach of the standards may result in disciplinary action. The department relied on the following sections of the code when investigating Mr Tawhiwhirangi's conduct on 28 February 2006:

Respect for the rights of others

Subjecting colleagues, offenders, stakeholders or members of the public to any of the following actions is unacceptable:...

offensive or demeaning images or language, including swearing

...

Role modelling

All employees play an important part in reducing re-offending. Your working relationships with other employees and with offenders must be based upon the principles of courtesy and respect for the dignity of others.

You must also acknowledge that your actions, attitudes and behaviours will influence offenders and it is your job, therefore, to ensure that influence is a positive one.

Appropriate offender relationships

You should recognise the vulnerability of people under the Department's care and control, show respect for and protect their dignity ...

[25] The code of conduct refers to types of misconduct:

... a single instance/occurrence of serious misconduct would make an employee liable for a severe penalty, which could include dismissal without the need for any further warning to be given.

[26] Examples of serious misconduct given in the code include “*violence or threats of violence against offenders and others in the workplace*”.

[27] Also relevant to this case is the “*Use of Force*” section of the managing offenders policy which includes the structured and prescribed process known as control and restraint. The section includes the following inaccurate paraphrase of s83 of the Corrections Act 2004:

Physical force can only be used if there are reasonable grounds to believe the use of physical force is necessary:

[28] By failing to specify who must have the reasonable grounds, the paraphrase does not adequately reflect the subjective element of the s83 exception to the prohibition of physical force:

83 Use of force

- (1) *No officer or staff member may use physical force in dealing with any prisoner unless the officer or staff member has reasonable grounds for believing that the use of physical force is reasonably necessary—*
 - (a) *in self-defence, in the defence of another person, or to protect the prisoner from injury; or*
 - (b) *in the case of an escape or attempted escape (including the recapture of any person who is fleeing after escape); or*
 - (c) *in the case of an officer,—*
 - (i) *to prevent the prisoner from damaging any property; or*
 - (ii) *in the case of active or passive resistance to a lawful order.*
- (2) *An officer or staff member who uses physical force for any of the purposes or in any of the circumstances referred to in subsection (1) may not use any more physical force than is reasonably necessary in the circumstances ...*

[29] The section on use of force in the policy and procedures manual more accurately sets out the s83 test. It also contains intervention strategies relied on by

the department in this case. Prior to the use of force prison officers are to attempt to communicate with the prisoner to diffuse the situation peacefully without the need for physical force. Officers are to communicate clearly and reasonably with the prisoner. Where appropriate the prisoner can be offered the opportunity to voluntarily remove themselves from the situation. The strategy also contemplates what is called controlled removal where the prisoner is removed from the situation by staff using reasonable means. Only minimum force is to be used by staff to overcome the force that is presented by the prisoner.

[30] The policy therefore contemplates intervention by a prison officer which is less than the formal application of control and restraint but which goes further than verbally communicating with the prisoner. Dave Kilbride, a unit manager at Rimutaka Prison, accepted that it was not unusual for an officer to touch a prisoner and that use of force was sanctioned where there is passive or active resistance.

Background

[31] Mr Tawhiwhirangi has been employed by the department for approximately 21 years. Since September 2003 he has been a principal corrections officer (PCO). This is the senior custodial position within the public prison service. A PCO is responsible for the efficient allocation, distribution, and use of resources and compliance assurance during a given shift. The officer has responsibilities for overall supervision of staff, for performance management of assigned staff, and for the management of inmates. The position description says that this is to ensure the provision of a safe, secure, and humane prison service which contributes to reducing re-offending.

[32] On 28 February 2006 a prisoner at Rimutaka Prison asked to see Mr Tawhiwhirangi. He was brought to the PCO's office. The prisoner asked Mr Tawhiwhirangi to bring contraband into prison for him. Mr Tawhiwhirangi ordered him out of his office and followed him out into the corridor. Prison Officer Collins was in a room across the corridor and, hearing a commotion, came out. He believed that Mr Tawhiwhirangi was about to be attacked and initiated control and restraint procedures on the prisoner. Other officers came to assist. The prisoner was taken to a strip room and later returned to a cell.

[33] Mr Tawhiwhirangi verbally reported the incident to prison management as did a nurse who treated the prisoner's injuries. An operational investigation was conducted which led to employment investigations against Mr Collins and Mr Tawhiwhirangi to determine if they had misconducted themselves during the incident. Mr Tawhiwhirangi was suspended, Mr Collins was not.

[34] In September 2006 a report of the employment investigation found on a preliminary basis that Mr Tawhiwhirangi was guilty of serious misconduct and should be dismissed. Mr Collins was exonerated

[35] Following a series of meetings where Mr Tawhiwhirangi's representatives made submissions, he was dismissed on 20 January 2007.

[36] After the application of control and restraint on the prisoner on 28 February 2006 both Mr Collins and Mr Tawhiwhirangi submitted incident reports. Mr Collins' was made on 1 March 2006. It said:

On Tuesday 28 February 2006 I was rostered wing officer 1300-2100hrs in HM 3/4 Rimutaka Prison.

At approximately 1440hrs I was in the interview room when I did hear raised voices in the corridor [sic]. I then entered the corridor and saw that Prisoner [name] was in a threatening manner advancing on PCO Tawhiwhirangi so I assisted PCO Tawhiwhirangi in taking Prisoner [name] to the ground using approved C & R techniques. Prisoner [name] continued to give hard resistance until other staff arrived to assist. Handcuffs were applied and Prisoner [name] was removed to the strip room.

At this point the handcuffs were removed as the prisoner had become compliant.

Once the prisoner was seen by medical he was escorted to HM5/6.

[37] Mr Tawhiwhirangi's report made 10 minutes after the incident, read:

On Tuesday 28 Feb 06, at approximately 1430hrs, staff placed a request that Prisoner [name] needed an interview with me. I agreed and [prisoner] was brought [sic] to the PCO office. He then openly stated, to me, that he wanted me to bring some items into the unit. I was taken aback, so got him to repeat what he had just asked of me. Again, he repeated that he wanted me to bring in some phones and drugs. At this point I asked him to leave the office and followed him to place him to the unit. On leaving the PCO office, he became verbal and in the corridor, so I placed my hand to guide him to the unit. He turned to face me and I believed he was about to attack and a struggle ensued. At this point Officer Collins emerged from the interview room and assisted me to take him to the ground. He continued to give hard resistance till other staff arrived to assist. Handcuffs were applied and

[prisoner] was moved to the holding room. At this point the handcuffs were removed as the prisoner had become compliant. All were checked for injuries. Nil to staff but [prisoner] had swelling to right eye area. Nursing staff were called to check him.

A call was placed to U/M to inform.

In light of recent staff meeting with CPO, a call was placed to Mr C Smith, PM to seek his advice.

His advice was to complete segregation forms and to move [prisoner] to HM5/6.

[38] The recent staff meeting referred to had been held by Chris Smith, the then prison manager at Rimutaka Prison, to speak to the staff about not letting prisoners intimidate them and to avoid “*getting got*”, a term used to describe prison officers being compromised by offenders.

[39] In accordance with instructions given at that meeting, Mr Tawhiwhirangi immediately rang Mr Smith to report that an attempt had been made to compromise him. What was said in that call was in dispute. Mr Smith’s version was recalled 18 months after the event. He did not make notes of it at the time. He said in evidence:

Mr Tawhiwhirangi then said that a prisoner had just come and asked him to bring in a cell phone. My response was “you’re joking”. Mr Tawhiwhirangi said “no I’m not, so I control and restraint’d the c...”. I asked why he had had to C&R’d (control and restrain) the prisoner and Mr Tawhiwhirangi replied “because the c... asked me to bring him in a cell phone”.

I said “yeah but why did you have to C&R him for asking you to bring in a cellphone”. He then said something like “oh, because he had a go at me” or made some other comment that implied that the prisoner had behaved in a threatening way.

[40] Mr Smith said that the way Mr Tawhiwhirangi raised the issue of control and restraint indicated to him that the use of force may well have been unjustified although he did not tell Mr Tawhiwhirangi this. He wondered whether Mr Tawhiwhirangi was being straight with him and decided to look at the video footage of the incident as recorded on the Security Management System (SMS). He had the video located, saved, and transferred to a CD. It was referred to in the hearing as the SMS footage.

[41] Mr Tawhiwhirangi denied Mr Smith's account of the phone call as did PO Morgan who was in the room with Mr Tawhiwhirangi when he phoned. Again, he was relying on his memory in his evidence in Court.

[42] There are two documents made closer to the incident which shed some light on Mr Tawhiwhirangi's account at the time. The first is his own contemporaneous incident report. Secondly, Mr Smith's report to an operations advisor at head office was based on information that had come from both the prisoner and Mr Tawhiwhirangi. It read:

On 28 February 2006 [prisoner] was alleged to have asked the PCO of his unit to bring in some "phones" and "drugs". The PCO ordered the prisoner out of the office and to go back to his unit.

The PCO followed the prisoner but upon leaving the office it was alleged that this prisoner started an argument with the PCO and when the PCO went to guide the prisoner to his unit a struggle ensued. With the assistance of another officer the prisoner was taken to the ground where handcuffs were applied and he was moved to a holding cell.

On 3 March 2006, at about 8.20am, the Prison Manager at Rimutaka advised an Operations Advisor that [prisoner] has now complained to prison management that he was assaulted by the officers.

This alleged assault has been reported to the police who will be investigating the prisoner's complaint.

Prison management have commenced an internal investigation.

[43] Taking all this evidence into account, I find that the reason Mr Tawhiwhirangi rang Mr Smith was because he had been instructed to report the prisoner's attempt to "get" him and to advise that control and restraint had been used. He told Mr Smith there had been a struggle which had ended with control and restraint being applied. The main tone of the conversation was surprise by both men that such an incident occurred so soon after the staff meeting.

[44] The call to Mr Smith cannot be construed as a damaging admission by Mr Tawhiwhirangi. Its significance is only that it triggered the first of many viewings of the SMS footage by Mr Smith and several managers and led to the decision to hold an operational inquiry.

SMS footage

[45] The department's investigation relied on the close analysis of the video SMS footage. The footage was shown several times in Court with witnesses from both sides giving their interpretation of what occurred. This provided the opportunity for the Court to assess it from an objective point of view.

[46] The evidence of the department's electronic security projects manager was that closed circuit TV has been installed widely in prisons primarily as a tool to assist staff maintain a safe, secure, and efficient operation. The cameras are not necessarily to identify individuals or provide indisputable evidence of events although often this is possible.

[47] The footage from the cameras viewed in these proceedings was recorded at a frame rate of three frames a second compared with a real viewing time of 25 frames per second. This means the picture can be jerky but is regarded as acceptable for the purposes the cameras were installed. They do not record sound.

[48] Pictures taken from inside the PCO's office showed the whole office looking towards the door to the corridor. In the corridor the incident was filmed from two cameras, one looking north, the other looking south. The films from these two cameras could not be synchronised and neither shows forward motion. Some parts of the action captured by the north camera are not recorded from the south end and vice versa. By viewing the two versions in close sequence, a more comprehensive but still incomplete impression of what happened can be gleaned.

[49] Because of gaps in the overall recording, in the end any interpretation of what occurred must be a matter of overall impression and inference. From when the prisoner got up to leave the PCO's office until Mr Collins emerged and intervened, the incident lasted only about 8 seconds. As has been noted by Chief Judge Colgan, such limited electronic records are but one evidential element and their importance should not be overstated.⁹

⁹ *Lawless v Comvita New Zealand Ltd* [2005] ERNZ 861, 870

The investigation

Operational inquiry

[50] The regional manager of Regional Prisons at the time was Mr East. He asked Bruce Eade, a unit manager at Rimutaka Prison, to frame terms of reference and conduct an operational inquiry into the incident. Such an inquiry occurs whenever there is an event that is out of the ordinary at the prison. His role was to gather immediate evidence about what happened and recommend any further investigations which could include employment investigations.

[51] Having viewed the SMS footage, Mr Eade believed that there had been an assault on the prisoner by Mr Tawhiwhirangi. He interviewed the prisoner on 1 March 2006 and made typed notes of that interview:

Yesterday I was C&R. I believe I was assaulted during and after the C&R.

I think I was punched by an officer during the C&R.

After I was handcuffed I was taken into the interview room (HM 5 side).

The PCO (Tawhiwhirangi) was slapping and punching my head.

Officer "MOOTS" was kicking and kneeing me.

I don't know the officer's name – his nickname is "MOOTS".

My ribs are really sore, I have some difficulty breathing, but I'm ok.

Question: why didn't you report the assault on the Wednesday?

I didn't know what to do – others told me to say something, but I didn't know who to tell.

END

2X photos taken as evidence of prisoners black eye.

No photos taken of prisoners rib/side area as I could see no bruising.

[52] The prisoner did not refer to any assault before the control and restraint. When interviewed, Mr Tawhiwhirangi denied any assault but Mr Eade was not convinced and wrote the following note which records his first reaction to Mr Tawhiwhirangi's explanation:

PCO Tawhiwhirangi's claims do not resemble what I saw on the DVD footage.

In my opinion C&R (Use of Force) was not justified as the video footage shows the prisoner walking away from PCO Tawhiwhirangi and at no stage turns towards him.

[53] Mr Eade produced more than one draft of his report which was the subject of some alterations by the human resources department and/or Mr East. On behalf of Mr Tawhiwhirangi, Miss Buckett was critical of this process. Two witnesses for the defendant told the Court that Mr Eade had said that he was unhappy at the changes that had been made. Mr Eade responded that any changes were to the way in which his views were expressed but he stood by the outcome.

[54] In his report Mr Eade concluded **.(document 83 page 5)**

Although the video footage is not entirely clear ... the Investigator finds that PCO Tawhiwhirangi appears to strike (the prisoner) possibly on two occasions in the main corridor,, outside the PCO office.

[55] The operational report was the first formal step against Mr Tawhiwhirangi. It started the process towards his dismissal and although it was not the major determinant it was influential in setting the stage for the suspension and the employment inquiry.

Suspension

[56] Mr East reviewed the operational report on 10 March 2006 and placed Mr Tawhiwhirangi on special leave on pay because it had found that it was probable that the prisoner had been assaulted by Mr Tawhiwhirangi prior to the application of control and restraint.

[57] Mr Tawhiwhirangi was asked to provide submissions on why he should not be suspended and following these he was suspended on full pay. The reasons given were because there was an allegation of serious misconduct against him and if proven he should not have direct contact with clients or colleagues.

[58] Mr Collins was investigated separately but was not suspended. The explanation given for this difference in treatment was that the allegation of assault did not apply to Mr Collins and he was being investigated only for the application of control and restraint. I am satisfied that the suspension was done in accordance with departmental policy and on appropriate grounds. Mr Tawhiwhirangi was facing apparently more serious allegations than Mr Collins.

Employment investigation

[59] On 23 March 2006 Mr East appointed Mr Kilbride to undertake two separate employment investigations against Mr Tawhiwhirangi and Mr Collins. Mr Kilbride had had some casual conversations about the 28 February incident with other managers before receiving his letter of appointment to the employment investigation. His terms of reference differed from Mr Eade's only to the extent that they were called an employment investigation rather than an operational inquiry and the scope of his investigations was focused on Mr Tawhiwhirangi and Mr Collins rather than employees in general. In relation to the former, Mr Kilbride had to:

... investigate and report on the circumstances surrounding the actions of PCO Tawhiwhirangi in the incident on the 28th February 2006 in High Medium 3&4 at Rimutaka Prison, specifically his application of use of force and the alleged assault on prisoner [name] by PCO Tawhiwhirangi.

[60] He was to report on the extent to which the actions of Mr Tawhiwhirangi had complied with the department's code of conduct, the public prison service policy and procedures manual, and relevant legislation.

[61] Mr Kilbride began by reviewing Mr Eade's report and the SMS footage to get an overview and initial impression of the incident he would be investigating. He took Mr Eade's report to be a fair and accurate record. He accepted that at that stage there were no specific allegations by the prisoner that he had been assaulted by Mr Tawhiwhirangi before the control and restraint had been applied.

[62] Mr Kilbride conducted a number of interviews. Seven were relevant to this case:

6 April 2006	The prisoner
20 April 2006	Mr Tawhiwhirangi
27 April 2006	Officers Tamariki and Johnson
1 May 2006	Unit Manager Jim Morgan
9 May 2006	The nurse
3 July 2006	Mr Tawhiwhirangi
4 July 2006	The prisoner
12 July 2006	Jim Morgan

[63] Mr Eade was a witness to Mr Kilbride's interview of the prisoner on 6 April 2006. Mr Kilbride wanted to record the interview but the machine was not working

so he made notes after the meeting and later had them typed up with some additions. Mr Kilbride began by confirming that the prisoner wanted to proceed with his allegations. He told him to tell the truth about what happened on 28 February because he would be shown the SMS footage and the closer his version of events matched the footage the greater weight the credibility of his statement.

[64] The prisoner described an incident with another prison officer a week earlier when he said he was given a hiding for threatening an officer. He next said that on 28 February 2006 when he attempted to blackmail Mr Tawhiwhirangi, the officer swore at him, got out of his chair, pointed him to the door and told him to get the f*** out of there. The prisoner said to him “*the inspector won’t be too happy about this*” and Mr Tawhiwhirangi replied “*are you threatening me.*” When they got out to the corridor, Mr Tawhiwhirangi slapped him just behind his head and asked him if he wanted a f***** fight and slapped him again. Mr Collins came out and wrestled him to the ground.

[65] The prisoner then gave a detailed account of what followed in the strip room. This included allegations of other assaults by prison officers that were not pursued by the department.

[66] When Mr Kilbride showed the prisoner the SMS footage he said “*that’s where Rakai pushed me*” (in the office); “*in the doorway was where I was hit the first time*” and “*in the hallway where I was hit the second time*”. Mr Kilbride asked him about the shove. The prisoner said the shove in the office was hard enough to push him forward and the hits were both hard enough to snap his head forward.

[67] Mr Kilbride then took 2 weeks to familiarise himself with the HR manual and his responsibilities as an investigator before holding a preliminary interview with Mr Tawhiwhirangi on 20 April 2006. Mr Tawhiwhirangi was supported by Beven Hanlon and Steve Harrison from Corrections Association of New Zealand (CANZ). Mr Burger, an HR manager, was also present.

[68] Mr Kilbride opened by saying:

Obviously this is a preliminary meeting concerning an employment investigation with Mr Tawhiwhirangi relevant to the incident on 28 February 2006.

Can you confirm that you have received all the information?

Bevan Hanlon

It's hard to say it's a little confusing. ...

[69] The meeting took some time. Mr Hanlon wanted to clarify what the investigation was about. Mr Burger told him it was about the incident on 28 February 2006. Mr Hanlon protested to Mr Kilbride and in evidence said that he never understood what it was about. He told the meeting *“To me my understanding so far is basically we start from where the inmates left in the PCO’s office with Rakai and it basically finishes where the inmate gets taken into the holding cell.”* Mr Burger confirmed that it included the actions in the room.

[70] While I find they were all clear about the time span of events under investigation, at no time was Mr Tawhiwhirangi told *“This is what we have been told happened and this is why we are investigating you.”* The only reference in this interview to the allegations of assault was by Mr Tawhiwhirangi when they were discussing the lump on the prisoner’s head. He assumed that it had happened during the control and restraint when he went to the ground. He said *“I’m telling you now mate, I didn’t touch him.”*

[71] Because the prisoner’s complaint was being investigated by the police, Mr Tawhiwhirangi did not wish to answer any questions about the incident at that time. That was accepted. Mr Tawhiwhirangi gave Mr Kilbride a list of additional people he wanted interviewed as part of the inquiry. This included Mr Eade along with Mr Morgan and Mr Waitai concerning the alleged changes to Mr Eade’s operational report.

[72] Mr Hanlon asked Mr Kilbride to look at the SMS footage of some other assaults on prisoners to compare them with what happened on 28 February 2006. He also asked him to re-interview the prisoner to see if he was still going ahead with his allegations. The meeting ended with Mr Kilbride saying he would put together his report and give an opportunity for comment later.

[73] I find that the department had started its investigation primarily because of the prisoner's complaint of an assault during or after control and restraint which resulted in an injury. Early in its investigation it decided that the absence of videotaped evidence of what happened after the control and restraint meant it could not take any action against staff in relation to that so it decided to focus on what had led up to the control and restraint for which it did have footage. Although the prisoner had not specifically complained of an assault at that stage, it interpreted what he said and what the video showed as sufficient evidence to proceed against Mr Tawhiwhirangi. There was an initial belief based on Mr Eade's report that the prisoner's injury had been caused by Mr Tawhiwhirangi striking him.

[74] Mr Tawhiwhirangi and his representatives believed the inquiry was about the control and restraint and its aftermath although they were aware that he was being investigated for the incident as a whole including what had happened in and outside his office.

[75] Mr Kilbride then spoke to the nurse who had reported the injuries and the unit manager, Mr Morgan, who had talked to the prisoner after the event. Neither added any new material information. Mr Morgan said he had observed a lump above the prisoner's eyebrow. He did not mention a black eye.

[76] Mr Kilbride next asked prison officers Tamariki and Johnston, who had not been at the incident but were instructors in control and restraint, to view the SMS footage with him and comment on it.

[77] Mr Tamariki observed Mr Tawhiwhirangi's hand being close to the prisoner's jaw with what looked like a punch as they exited the office. He thought that the movement of the prisoner justified Mr Collins taking him to the ground because he presented a threat to both him and Mr Tawhiwhirangi.

[78] Mr Johnston said that in the office Mr Tawhiwhirangi appeared to have both hands on the prisoner's upper back and as they exited the office it appears he had been struck to the right side of his neck by Mr Tawhiwhirangi. The prisoner stepped away and turned his head to the right and reacted in a way that was consistent with

him trying to fend off another blow although it was hard to define where the blow was struck from.

[79] Mr Kilbride asked Mr Johnston for more detailed reactions to what he had viewed especially in relation to whether the use of force policy had been complied with. Mr Johnston said:

The only thing I could say with that may have initiated it a reasonable ground or grounds to use force may have been when the prisoner exited the PCOs office and having no benefit of audio, may at that time have refused an order passively by simply walking away. That could in viewing the tape and the recordings, there was nothing that the prisoner did that I can see, he did not appear to confront any Officer, he was compliant as I said before, the only thing that may have given grounds to use force was if the Officer, namely Mr Tawhiwhirangi had given him an instruction in or prior to exiting the PCOs office and that prisoner failed to comply with that, then those grounds would constitute reasonable use of force by passive resistance to a lawful order.

[80] He could see no other evidence that the prisoner had threatened or confronted an officer as he did not look aggressive and appeared to defend himself or react with a blow. He said that at no time did the prisoner turn and confront Mr Tawhiwhirangi.

[81] By the time Mr Kilbride interviewed Mr Tawhiwhirangi again on 3 July 2006 Mr Burger had sent copies of all interviews to the union and the police had advised that the prisoner had elected not to provide a statement and they were not pursuing the matter any further.

[82] Mr Kilbride began this interview by speaking about the police inquiry. He then asked Mr Tawhiwhirangi, who attended with Mr Hanlon and Mr Harrison, to explain in his own words what had happened. Mr Tawhiwhirangi began his narration with the prisoner requesting the interview and described what happened next. He said that after the prisoner had asked for the phone and drugs:

*I told him to get out of my office, get out. He wouldn't go and he said that he really needed the stuff and I said that I don't give a shit what you want or what you need, how dare you sit there and ask me to bring this stuff in for you. I stood up and said get out and get back to the wing now, get out of my office. He started getting verbal. He said 'come on you've got too'. I said 'no I don't, get out'. He turned to walk out and I guided him out, I put my hands on his back and said go back to the wing, get out. Out through my door he turned and said you f***** old bastard I really need it and I said 'I*

*don't give a f***** hell what you need, get out'. I pushed him out to the corridor guide him back to the wing.*

*At that point he turned to me and said 'you f***** old bastard you'll get it'. I said 'get out'. I've received threats over the years many times I said go back. He spun around again and he said 'I'll f***** get you', and as he turned around to come back again Willie Collins came out of the office he was in the other interview room and as he spun around and come back towards me we took a hold of him and took him down to the ground.*

[83] He then described the control and restraint and what followed including his call to Mr Smith and finalising the paperwork about 10 minutes after the incident.

[84] Mr Kilbride checked that Mr Hanlon had seen the SMS footage and the stills and then asked a series of questions of Mr Tawhiwhirangi. These included what the prisoner had asked for and whether it was a similar blackmail situation to the earlier confrontational episode with another prison officer. He also asked whether Mr Tawhiwhirangi had talked to Mr Morgan about a debrief afterwards and then asked about the events after the control and restraint. *"In the interview room and I'll just ask you straight out, did you assault [the prisoner] in that interview room."* Mr Tawhiwhirangi answered *"No I didn't."*

[85] Mr Kilbride then focused on what had happened in the corridor. First he asked what the prisoner's intent was when he turned towards him. Mr Tawhiwhirangi said that his body language and his verbals made him believe he had an agenda to get out of the wing and to put himself in a situation where he got moved that was not of his own doing. Mr Tawhiwhirangi said on the basis of the way the prisoner was swearing *"You f***** old c**** I'll get you you'll, f**** get it for this you'll get done"* coupled with the action, the total look, and the body language, he was going to get hit. He moved away a little bit, leaned back out of striking range, and then Mr Collins came out.

[86] Mr Kilbride asked him if he had pushed or struck the prisoner in the office. He said that he had put his hand on his shoulder to guide him out the door because the prisoner was reluctant to go back to the wing but denied physically pushing him or striking him in the corridor.

[87] Mr Kilbride then produced some still photos taken from the SMS footage. Mr Hanlon said he was not comfortable with these. They were selective and had been chosen to show frames that may look as though Mr Tawhiwhirangi was hitting the prisoner. Mr Kilbride said he had the SMS footage there if Mr Tawhiwhirangi wished to see it. Mr Tawhiwhirangi said he had seen it. Mr Kilbride did not suggest that they go through it together and Mr Tawhiwhirangi did not ask to see it again.

[88] While looking at the still photographs, Mr Kilbride asked for Mr Tawhiwhirangi's comments but did not ask any specific questions. Mr Tawhiwhirangi said *"I'm telling you, I never touched him ok. Maybe its pushing him out and as he is turning."* *"What I wrote in my incident report is exactly what happened, exactly."*

[89] Mr Burger asked about the first time Mr Tawhiwhirangi had seen the lump on the prisoner's head. Mr Tawhiwhirangi presumed it had come from when he went to the ground during the control and restraint. Mr Kilbride asked no further questions about the incident.

[90] There followed discussions about other peripheral matters. Mr Hanlon again requested that Mr Kilbride look at the footage of other prison officers in similar incidents to compare them with how Mr Tawhiwhirangi was treated. He noted that the prisoner had withdrawn his complaint to the police. He expressed concerns about the key findings of the operational investigation by Mr Eade and asked that not a lot of weight be put on it because of those concerns.

[91] Mr Kilbride's last substantive interview was with the prisoner on 4 July 2006 when he asked if he was standing by the allegations he had made to the department in spite of withdrawing his complaint from the police. Although Mr Kilbride took full handwritten notes of this interview, he later only supplied a very brief typed version to Mr Tawhiwhirangi in which he recorded that the prisoner told him he did not provide the police with a statement because he couldn't be bothered but what he originally told Mr Kilbride was the truth.

[92] The original handwritten notes were not disclosed until the Court hearing. They show that Mr Kilbride narrated Mr Tawhiwhirangi's version of events to the prisoner from when the prisoner entered the PCO office until he was put in the strip room. Apart from denying he had asked for drugs, the prisoner simply answered "No" at the end. Mr Kilbride then set out the prisoner's version which was that he had gone to blackmail Mr Tawhiwhirangi, had been pushed and smacked in the doorway and corridor twice. The prisoner agreed with that.

[93] Mr Tawhiwhirangi was not re-interviewed by Mr Kilbride after this.

[94] Meantime, Mr Kilbride asked the police to try to enhance the stills from the SMS footage to get more detail from them. On 21 July 2006 the police advised that this was not possible. In addition, he used his own computer to try to freeze-frame it and get a series of still images from the footage. He said this was to assist people, including Mr East, to interpret it and to put in front of Mr Tawhiwhirangi for his comment. He denied it was constructed to achieve a desired outcome. When he was asked how a reader of his report would know what footage he was relying on, he said that he was confident that the reader of the report was the regional manager, Wellington Prisons, who knew the SMS footage.

[95] A month then passed and, in mid-August, Miss Buckett was instructed to act for Mr Tawhiwhirangi. She wrote to Mr East advising that Mr Tawhiwhirangi was very stressed and pointed out that he had been suspended from work for 5 to 6 months. Mr East replied that he expected the investigation to be completed the next day and once he considered it it would be sent to Mr Tawhiwhirangi. On 4 September 2006 Mr Tawhiwhirangi's position was filled by another PCO.

[96] The employment report was finally received on 20 September 2006. It set out the terms of reference, described how the investigation was instigated, its methodology, and a summary of the interviews with each witness. The principal relevant allegation by the prisoner was recorded as:

... just prior to Control and Restraint ... he was allegedly assaulted by PCO Tawhiwhirangi. [The prisoner] alleges he was pushed by PCO Tawhiwhirangi while in the PCO office, slapped by PCO Tawhiwhirangi upon exiting the PCO office and again hit when in the corridor. ...

[97] The report records Mr Tawhiwhirangi's explanation and contains a selection of stills from the SMS footage. It finds that the SMS footage provided sufficient evidence that the prisoner was pushed in the office, what appears to have been a clenched fist came in contact with his rear right facial area, that he was slapped upon exiting the PCO office, and slapped in the corridor.

[98] Mr Kilbride found that PCO Tawhiwhirangi had assaulted the prisoner and was therefore in breach of the second principle of the code of conduct. He concluded:

Officer [sic] are expected to respect the rights of prisoners. Subjecting prisoners to physical violence as PCO Tawhiwhirangi has on this instance is unacceptable and constitutes a breach towards the Code of Conduct by way of serious misconduct.

[99] Mr Kilbride's evidence was subject to a number of challenges in cross-examination particularly about the way in which he had conducted the employment investigation.

[100] He accepted that Mr Tawhiwhirangi was not told on 20 April 2006 of the specific allegations of assault Mr Kilbride had in mind after speaking with the prisoner on 6 April 2006, namely the pushing and slapping as they exited the PCO's office.

[101] The second challenge concerned some additions made by Mr Kilbride to the typed version of his handwritten recollections of his meeting with the prisoner on 6 April. Mr Kilbride accepted that he had made these additions but I find that these were insignificant.

[102] Third was the reliance Mr Kilbride placed on Mr Eade's report and the reliability of that report which he found to be accurate. To the extent that it was critical of Mr Tawhiwhirangi, it must at least have coloured his interpretation of the SMS footage. Although Mr Kilbride did his own comprehensive report specifically on the employment matters, I find he was clearly influenced by the Eade report. The fact that the author of that report was present during Mr Kilbride's interview with the

prisoner raises the suspicion that some collusion occurred between them. It could not be said that the reports were entirely independent of each other.

[103] The fourth area of challenge concerned Mr Kilbride's failure to give Mr Tawhiwhirangi a copy of the full notes of the second interview with the prisoner on 4 July 2006 and instead gave him a condensed version which simply reiterated that the prisoner was standing by his version of events.

[104] Mr Kilbride accepted that the failure to give a copy of these full notes was an error. He agreed that it would have been fair to have shown Mr Tawhiwhirangi this further information and asked for his comment. Although in Mr Kilbride's mind the interview with the prisoner was just a simple reiteration of what he had already heard, its significance to the inquiry is that it is one of the few times that both sides of the account of the incident on 28 February 2006 were clearly set out. If Mr Tawhiwhirangi had been given a copy of that before his interview he would have been in no doubt at all precisely what he was being accused of and what was on the minds of his investigators.

[105] Fifth, Mr Kilbride was challenged about the use of SMS footage. The interpretation of this formed a major part of the hearing and was critical to the ultimate decision to dismiss. Mr Kilbride said that the account of the prisoner was supported by the SMS footage. This satisfied him that the assaults had occurred.

[106] When challenged over not going through the footage with Mr Tawhiwhirangi, he maintained it was sufficient that he had asked Mr Tawhiwhirangi if he wished to view the footage. I find this was a different approach from that which he had taken with the prisoner. He had shown him the footage and asked him to comment on what was happening.

[107] Although Mr Kilbride believed that the account of the prisoner was consistent with the footage, in at least one respect it differed. Mr Kilbride was shown the segment in Court for him to identify the head snapping movement described by the prisoner but the action was not apparent. Neither Officers Johnston nor Tamariki observed the prisoner's head snapping forward. The result was that Mr

Tawhiwhirangi was judged on this unsupported assumption about the force of the alleged assault without the opportunity to comment.

[108] Although Mr Kilbride asked Mr Tawhiwhirangi if he had struck the prisoner or physically pushed him in the office, he accepted that, during the interviews with him, Mr Tawhiwhirangi had no idea how Mr Kilbride was viewing the footage. Mr Kilbride said he was guided by HR about how to conduct the interviews but agreed that he did not follow the procedures in the department's manual 100 percent.

[109] In his description of the SMS footage as he watched it in Court, Mr Kilbride intensified the descriptions of what he observed from those recorded in his report. He referred to a punch and a hit. He alleged for the first time that the prisoner's knee had been hit from under him and gave subjective descriptions of the prisoner's attitude. Under cross-examination he agreed that this evidence was not consistent with the report that he had given to Mr East. He gave the impression that he wanted to bolster the seriousness of the assault beyond what he had described in his report. He could not accept that it was possible on viewing the footage to see that the prisoner had been in an aggressive stance towards Mr Tawhiwhirangi or any of the other interpretations put to him.

[110] The sixth issue was Mr Tawhiwhirangi's state of mind during the incident. Mr Kilbride said that what he saw in the SMS footage was a prisoner compliant with instructions moving towards the wing away from a threat from Mr Tawhiwhirangi and that if there were tensions these were the fault of the officer. Under cross-examination he accepted there had been a heated discussion in the office; that the prisoner may well have been passively resisting; that on Mr Tawhiwhirangi's version the prisoner had made a threat of violence against Mr Tawhiwhirangi; and the prisoner had made threatening remarks on 22 February 2006 to another prisoner officer in a similar situation. None of this was properly canvassed in his report.

Reaching a decision

[111] Mr East was the ultimate decision maker for the suspension and dismissal of Mr Tawhiwhirangi.

[112] He made the decision to suspend following written submissions from CANZ. There was no initial complaint about the suspension but on the request of CANZ and later Miss Buckett he twice reviewed his decision. He considered that suspension remained appropriate because the employment investigation was ongoing. This was in spite of the concerning delays in the investigation which had been caused in part by the complaint to the police which delayed Mr Tawhiwhirangi's substantive interview, and Mr Kilbride taking pre-arranged annual leave.

[113] Once he received Mr Kilbride's report, Mr East wrote to Miss Buckett advising:

On the basis of the evidence, and the findings of fact set out in the investigation report, my preliminary view is that the allegation of misconduct can be upheld.

However, before finalising any decision, I think it is important for me to hear and consider any response or submissions that Mr Tawhiwhirangi (and you as his representative) wish to make.

[114] The meeting for these submissions was delayed until November for a variety of reasons including mediation on another personal grievance lodged by Mr Tawhiwhirangi. In the meantime, Mr Tawhiwhirangi was medically diagnosed as suffering from stress and then had knee surgery.

[115] At the meeting on 14 November 2006, Miss Buckett spoke of Mr Tawhiwhirangi's loyalty to the department and his 21 years of unblemished employment but maintained that she could not respond to the Kilbride report until Mr East answered some questions. Mr East replied it was all in the report, that he accepted the findings and recommendations, and was prepared to listen to submissions before making a final decision.

[116] In response to questioning by Miss Buckett, Mr East referred to the still frames from the SMS footage to show where the assaults occurred. Miss Buckett said that it was impossible to tell in any sense whether blows had been struck and that what was in the photos was consistent with what both Mr Tawhiwhirangi and the prisoner had said, namely he had pushed him out of the office.

[117] Miss Buckett queried two findings in the operational report which found that Mr Tawhiwhirangi's incident report was not entirely accurate and that it was Mr Tawhiwhirangi who had brought the inmate down. She asked Mr East to hear directly from Mr Collins about the incident in order to explore the evidence about who was the aggressor. Mr Tawhiwhirangi told Mr East that he had never touched the prisoner, he had only guided him and never assaulted him. The interview then ended.

[118] On 30 November 2006 Mr East sent Miss Buckett a detailed response to her oral submissions and correspondence since the interview. He refuted each of her allegations by reference to the evidence in the Kilbride report. He also said that interviewing Mr Collins would not add anything to the submissions already presented for Mr Tawhiwhirangi. Significantly, he commented on Mr Collin's veracity. He said that Mr Collins had accepted that his incident report was not an accurate reflection of the event and that contradicted Miss Buckett's submission that both incident reports were consistent with the video footage. Later, in his response, he repeated that Mr Collins had accepted that he had recorded an untrue statement in relation to the prisoner's alleged threatening manner.

[119] Mr East's belief that Mr Collins had retracted this part of his statement was wrong. It was based on what a union official had told Mr Burger. As it transpired, the department had been specifically told by CANZ that it should not discuss the situation of either Mr Tawhiwhirangi or Mr Collins with that official. By 8 December 2006 Mr East had been sent an affidavit by Mr Collins in which he swore that it was not true that he had retracted his statement and that he stood by it but Mr East took no steps even after that to interview Mr Collins.

[120] In January 2007 Mr East's disciplinary file was reviewed by the general manager of public prisons, Harry Hawthorne, who had received complaints from CANZ about the investigation. Mr Hawthorne was critical of the detail in the preliminary investigation, the poor initial interview of the prisoner, and the way the prisoner interview had been documented differently from staff interviews. He noted that the investigation had taken 11 months to complete and that it took 6 weeks to

properly interview the prisoner. Mr East took advice on these matters but proceeded to his final decision.

[121] Mr East's findings were:

I find, on balance, that PCO Tawhiwhirangi assaulted Prisoner [name] three times on the 28th February 2006 at Rimutaka Prison (high Medium 3 & 4):

- 1. prisoner [name] was pushed by PCO Tawhiwhirangi in the office;*
- 2. prisoner [name] was slapped by PCO Tawhiwhirangi upon exiting the PCO office;*
- 3. prisoner [name] was slapped by PCO Tawhiwhirangi in the corridor.*

This behaviour has breached the first and second principle of the Department's Code of Conduct in that:

Officer Tawhiwhirangi's behaviour amounted to assaults of the prisoner, transgressing the Code's requirement for the respect for rights of others (page 19 of the Code)

His actions as a pro-social role model were neither appropriate nor positive and transgressed the Code's requirements (page 20 of the code)

Officer Tawhiwhirangi failed to comply with the Corrections Act 2004 (Section 83 states: "No officer or staff member may use physical force in dealing with any prisoner unless the officer or staff member has reasonable grounds for believing that the use of physical force is reasonably necessary".) and therefore transgressed the Code's requirements for the performance of his duties (pages 17 of the Code)

He failed to act with professionalism and integrity toward prisoner [name], transgressing the Code's requirements (page 9 of the Code).

In summary I find that PCO Tawhiwhirangi's behaviour on 28 February 2006 constituted serious misconduct under the Department's Code of Conduct.

[122] Mr East's reference to s83 was the only mention of that section in all of the considerable amount of evidence presented during the investigations.

[123] Because of the finding of serious misconduct, and in spite of his long service, Mr East found that Mr Tawhiwhirangi had undermined the trust and confidence of the department. He therefore proposed terminating his employment and invited written response to that.

[124] In his evidence, Mr East said that he regarded Mr Kilbride's report as true and accurate and remained convinced that the assaults had occurred. He accepted

that even if the two views of the incident were interleaved there were still gaps in the action and no single frame showed any contact or a punch but his viewing of the SMS footage on a number of occasions was focused by his training and experience in cinematic analysis of movement when he had taught bio-mechanics in the 1970s.

[125] He also told the Court his decision to dismiss was influenced by Mr Tawhiwhirangi's seniority, the training programmes he would have completed which included modules relating to the effective management of prisoners, and his job description which required him to mentor staff to apply pro-social modelling, behaviour, and active behaviour management. Mr East believed Mr Tawhiwhirangi was the main aggressor and that assaults on a prisoner could not be accepted. He was satisfied that both the operational and employment investigations were managed fairly. He had formed his view after considering all the evidence including submissions and had given an opportunity for comment on the appropriate penalty.

[126] The principal challenge to Mr East's account was as to whether he had made an independent decision or slavishly followed the employment report. I find that, although he viewed the SMS footage to interpret it for himself, Mr East was very reliant on the findings in Mr Kilbride's report. It was apparent from his evidence that he had formed a view based on it and was not prepared to budge from it.

[127] One example is the sequence where Mr Tawhiwhirangi said the prisoner had half turned to face him as they were in the corridor. While watching the footage and analysing the still photos in some detail in Court, Mr East was unable to acknowledge that the visual evidence supported Mr Tawhiwhirangi's version of events as much as they supported his own. Neither Mr Kilbride nor Mr East had properly heard the alternative interpretation before the dismissal but this was given by Mr Tawhiwhirangi and Mr Collins in their evidence to the Court.

[128] Mr Tawhiwhirangi gave a detailed interpretation of the footage as it was being played. He noted that the prisoner walked to his office with a "*gang swagger*". After his request for the phone and drugs, Mr Tawhiwhirangi's response was to send him away back to the wing saying words to the effect "*don't bloody ask me that*". The prisoner began to swear at him. As Mr Tawhiwhirangi said "*bugger*

off get back to the wing” he had his arms up in the air in a shooing motion. As the prisoner reluctantly left the office, he was swearing and took a step towards an open door across the corridor instead of turning left towards the wing. Mr Tawhiwhirangi told him to go to the wing and put his hand on his shoulder to turn him. The prisoner shrugged his hand off and at the same time came back to him with his elbow in a striking motion saying “*I’m not f***** going down there*” and making threats. Mr Tawhiwhirangi stepped back to avoid the elbow. Mr Tawhiwhirangi’s interpretation of the last defensive movement of the prisoner was that it was in response to the arrival of Mr Collins who was just emerging from the office door and who, in a matter of moments, instigated control and restraint.

[129] Mr Collins told the Court he has been a prison officer for nearly 3 years. When he took the prisoner to the PCO’s room to see Mr Tawhiwhirangi he thought he was a bit hyped up and aggressive and he was concerned because he had seen colleagues assaulted in the past. He left the PCO office, closed the door and went to his office across the corridor. He heard raised voices and the prisoner threatening Mr Tawhiwhirangi saying “*I’m going to get you, you f***** old c*****”. Mr Tawhiwhirangi was saying “*get back into the wing.*” As Mr Collins left his office to see what was happening he could see across the corridor to inside the PCO’s office which was three to five paces away. The incident happened in a flash. He saw the prisoner raise his right arm and turn towards Mr Tawhiwhirangi who was standing, leaning backwards, with his arm up.

[130] I find Mr Collins had an unobstructed view of the corridor where the incident occurred and his account to the Court was credible. He graphically described what he had seen and plausibly explained the extent to which he could see into the corridor. His description was consistent with the SMS footage. It is also consistent with Mr Tawhiwhirangi’s evidence that he had stepped backwards defensively from the prisoner. Mr East could not accept that interpretation even though to an objective viewer it was a reasonable one and is consistent with what Mr Collins observed.

[131] Having heard both sides, I conclude that the pictures can be viewed consistently with each version. The prisoner’s head does turn towards Mr

Tawhiwhirangi. This was accepted by Mr East, but he could only see that movement as indicating suspicion by the prisoner of where the next assault was coming from. From Mr Tawhiwhirangi's account, I find that it could also reasonably be interpreted as the prisoner beginning to turn aggressively towards Mr Tawhiwhirangi. That interpretation is supported by the language used by the prisoner and certainly that was how Mr Collins saw it and he was the only eyewitness.

[132] I conclude that Mr East's mind had been well and truly made up when he received the Kilbride report. He did not alter one aspect of the report even after Miss Buckett raised the possibility of different interpretations on many issues on 14 November 2006.

[133] I take his refusal to interview Mr Collins when requested by Miss Buckett as an example of his unwillingness to investigate another point of view. Mr East told the Court that he was acting on advice from the HR department. Instead of making an independent inquiry, he relied on Mr Kilbride's interpretation of the video that Mr Collins was not in a position to have seen what happened. Mr East accepted that Mr Collins had heard a verbal altercation between the prisoner and Mr Tawhiwhirangi but would not accept that Mr Collins had seen the prisoner advancing in a threatening manner on Mr Tawhiwhirangi.

[134] When Mr Collins was interviewed by Mr Kilbride during his own employment inquiry, he said he had seen the prisoner walking away from the PCO but that he had tried to turn. Mr Kilbride did not question Mr Collins at that interview about what he was able to see. He accepted his account for the purposes of that investigation and found that it could not be conclusively ascertained from the footage whether the prisoner gave an impression he was about to turn. This is a realistic and objective view of the footage but was not taken into account in the Tawhiwhirangi investigation.

[135] I hold that it was unacceptable for Mr Collins's account to have been treated as irrelevant to Mr Tawhiwhirangi's investigation when he was the only potential eyewitness apart from the prisoner. It is also a good example of how the SMS footage can give an impression which may not be entirely accurate and that the

utmost caution should be exercised in interpreting it. Mr East accepted Mr Kilbride's interpretation without question but if he had made proper inquiry of Mr Collins as requested he may have been put in some doubt.

Conclusions on the facts

[136] Although there was no doubt that the investigation spanned the time from the arrival of the prisoner at the PCO's office to his eventual return to the wing, Mr Tawhiwhirangi and his representatives were justified in being uncertain about the allegations he was facing during the early stages of the investigation. Mr Eade's terms of reference were very general and not specific to Mr Tawhiwhirangi although it did mention possible assaults before the use of force.

[137] The allegations were not specified at the start of the employment investigation, the terms of reference for which were also very general. The actions of Mr Tawhiwhirangi which were to be investigated were "*specifically his application of use of force and the alleged assault on [the prisoner]*". The prisoner had complained of an assault during and after the control and restraint and at that stage had not made any allegations of an assault at any other time. A number of managers had seen the footage and believed Mr Tawhiwhirangi had assaulted him in the corridor but Mr Tawhiwhirangi had no notice of that.

[138] Once the prisoner had been interviewed and shown the SMS footage, Mr Kilbride knew precisely that the allegations were of a push and two slaps before the control and restraint and should have outlined these at the commencement of the 20 April 2006 meeting. That did not happen. Mr Kilbride missed another opportunity to be even more specific when he re-interviewed Mr Tawhiwhirangi on 3 July 2006. By then, his interpretation of the SMS footage was based not only on what the prisoner had told him but on the opinions of Officers Tamariki and Johnston. Mr Tawhiwhirangi was not given a chance to refute their interpretation by being asked about them at the interview.

[139] The closest Mr Kilbride came to specifying the allegations was when a significant way into the 3 July interview, he asked Mr Tawhiwhirangi did he push or

slap the prisoner but this was not done in a way that identified what the precise allegations were or the context in which they allegedly occurred.

[140] In contrast, Mr Kilbride had carefully described in detail to the prisoner each of the points of view that were in consideration and asked the prisoner to comment on them. In that way he ascertained the response of the prisoner to each set of events. Mr Tawhiwhirangi was not accorded that opportunity.

[141] This failure is all the more remarkable because of the time spent by the investigators and other managers in viewing the SMS footage and analysing it closely. They were plainly very anxious to ensure that their interpretation of what happened could be verified by the footage but gave no corresponding opportunity to Mr Tawhiwhirangi to present his interpretation to them in the same way. In the circumstances of this case, it was not sufficient that he had had an opportunity to view the tape in their absence. Without the investigators specifying their interpretation and pointing out to him on the tape the areas of concern about his conduct, his opportunity to view the SMS footage on his own was not sufficient to meet the investigation's obligation to give him the chance to refute their allegations.

[142] Mr East's approach to Mr Collins's evidence about what he saw and heard in the corridor leads me to the conclusion that he did not approach this investigation in a totally unbiased or independent way. In the course of the employment investigation, Mr Kilbride decided that Mr Collins's evidence of what he saw in the corridor was irrelevant even though it had been relevant to his conclusions about Mr Collins's actions. As the only eyewitness account it was plainly very relevant but Mr East relied uncritically on Mr Kilbride's report.

[143] In addition, on the basis of a secondhand conversation with an unauthorised union official, Mr East accepted that Mr Collins had retracted an important part of the statement he made in his first incident report about the prisoner advancing in a threatening manner. Given the importance of that evidence and the seriousness of an officer retracting a statement made in an official report of an incident, it is remarkable that Mr East did not interview him in person to verify this, particularly when he was given sworn evidence from Mr Collins denying this.

Decision

[144] Because of its particular characteristics and legislative and policy obligations, I find that the department is obliged to act with a high standard of fairness and reasonableness. I find it did not act as a fair and reasonable employer either in its investigation or in its decision to dismiss Mr Tawhiwhirangi for serious misconduct. The dismissal was therefore unjustifiable. The reasons for this conclusion are as follows.

1. The investigation procedures

[145] First, the department was bound to be familiar with and apply the relevant law to the investigation. As it was a case of alleged assault against a prisoner, s83 of the Corrections Act 2004 was applicable. Use of force by prison officers in defined circumstances is acceptable under the law. The type of force used ranges from physically guiding a passively resisting prisoner to formally executed control and restraint procedures.

[146] While it is obvious that an unjustified assault on a prisoner would amount to serious misconduct, the mere application of force by a prison officer on a prisoner does not establish serious misconduct. In order to assess whether it is justified in terms of s83, the decision-maker must properly inquire into the state of mind of the officer at the time the physical force was used.

[147] Mr Kilbride's terms of reference included a requirement for him to report on compliance with relevant legislation but he did not address s83. The whole focus of the investigation was on whether Mr Tawhiwhirangi actually assaulted the prisoner. The question of whether Mr Tawhiwhirangi had been justified in his actions was not addressed by Mr Kilbride in spite of a number of signals that it should have been an issue for consideration in the investigation.

[148] For example, the prisoner described his own behaviour to Mr Kilbride which he said Mr Tawhiwhirangi interpreted as threatening; Mr Johnston said there were possible grounds for his use of force if the prisoner had failed to comply with an instruction in the office; and Mr Collins said he saw the prisoner advancing on Mr

Tawhiwhirangi. None of these accounts were explored further by Mr Kilbride who made findings of what physically had happened before the application of control and restraint but did not refer at all to the possibility of the actions being justified in terms of s83.

[149] In his preliminary findings, Mr East detailed the three findings of assault. Apart from quoting s83, it is not apparent from his report that he had addressed or turned his mind to Mr Tawhiwhirangi's subjective views at the time of the application of force. I find, therefore, that Mr East did not properly consider the justifiability of the actions which he found Mr Tawhiwhirangi to have committed.

[150] I conclude that because the principal, if not only, focus by Mr Kilbride and Mr East was on whether Mr Tawhiwhirangi had applied physical force to the prisoner, there was no consideration in the employment investigation or the preliminary findings of Mr Tawhiwhirangi's reasons for acting as they found he had. A reasonable and fair employer in the position of the department would not have omitted this critical part from its investigation.

[151] Second, a reasonable employer in the defendant's situation was obliged to investigate the allegations against Mr Tawhiwhirangi in the manner set out in its own policies as well as in accordance with the well-established principles of common law.

[152] I find that by failing to re-interview Mr Tawhiwhirangi after the second interview with the prisoner the department did not comply with the requirement in its HR manual to give the employee the opportunity to know all the information being considered about him and to be able to refute and respond if possible. It did not particularise sufficiently the specific allegations against Mr Tawhiwhirangi until Mr Kilbride's report was released and the findings had been made. Mr Tawhiwhirangi was not told that the SMS footage had been viewed in an adverse way to him and the investigators failed to show it to him and ask for his explanation. Mr Radich submitted that the responsibility for showing the footage to Mr Tawhiwhirangi lay with his union representatives, however they were not conducting the inquiry. The

responsibility lay with the employer to clearly demonstrate its allegations against him.

[153] Third, a fair and reasonable employer would have approached the inquiry with an open, unbiased mind and been receptive to any reasonable explanations offered. The way in which the employment investigation was carried out and the decision to dismiss was reached strongly suggests that the investigators formed a fixed and unchangeable view of what had happened even though the SMS footage was not conclusive. Each of those involved in the investigation took an unwavering stance that Mr Tawhiwhirangi had assaulted the prisoner.

[154] Mr East's decision-making was also fatally compromised by his refusal to reconsider the evidence of Mr Collins in the context of Mr Tawhiwhirangi's employment investigation. The evidence of Mr Collins, the only eyewitness, was deliberately discounted and even the prisoner's mention of his threats to Mr Tawhiwhirangi were not taken into account. Mr East may have been relying on the advice of the human resources department when he found that this was not relevant but in his role as decision-maker it was for him to act fairly and independently. I find that he did not.

[155] I conclude that the employment investigation was not conducted fairly. It was in breach of the department's policy requiring investigations to be procedurally fair by informing the employee of the details of the allegations and evidence against him. It did not afford him a real opportunity to explain and the investigator closed his mind to any alternative explanation.

2. The reasons for the decision to dismiss

[156] In relation to the decision-maker, I find that under the department's procedures it was appropriate that the investigations into the incident and the employment investigation were carried out by delegates of the decision-maker. In such circumstances, some important safeguarding principles apply¹⁰. In spite of the delegation, an employee still has the right to be fairly heard by the decision-maker

¹⁰ These have been referred to in *Timu v Waitemata District Health Board* unreported, Judge Couch, 7 June 2007, AC 34/07

and the decision-maker must make his or her own independent judgment that there are sufficient reasons for dismissal. If this requires further inquiries, the decision-maker should undertake those inquiries.

[157] Putting aside the allegations of disparity raised by the defendant, I have reached the conclusion that the decision to dismiss would not have been a reasonable response even if Mr Tawhiwhirangi had used the physical force as alleged by the department.

[158] The event was triggered by an attempt by a prisoner to coerce a prison officer into delivering contraband. That of itself would not justify the use of force but Mr Tawhiwhirangi's description of the attitude of the prisoner in the office to his direction that he leave the office and return to the wing raises the strong possibility that the prisoner was passively resisting that instruction particularly given the prisoner's previous attempt to coerce a prison officer. In the light of Mr Collins's observation of the prisoner's demeanour as being agitated and hyped up, pushing the prisoner towards the door could hardly be classified as a serious use of force.

[159] What followed next took a matter of seconds and objectively viewed could be interpreted as a struggle as described by Mr Smith in his first report of the incident. If, in the course of that struggle to move him, the prisoner received two slaps to his neck area, neither of which caused any injury or even prompted a complaint by the prisoner, a fair and reasonable employer in the position of the department would not have found this to be physical violence of the most serious type. At most, it was an instinctive reaction by the prison officer in the face of a threatening, abusive prisoner.

[160] It was, therefore, reasonably open to a fair-minded employer to conclude that even if the alleged application of force by Mr Tawhiwhirangi occurred it was in circumstances which did not justify dismissal. In the light of the department's requirement that prison officers provide good examples and treat prisoners with dignity it may have reasonably concluded there had been breaches of the code of conduct but not serious misconduct.

[161] I find that a fair and reasonable employer would not have reached a decision to dismiss Mr Tawhiwhirangi in all the circumstances. This was a serious allegation of assault by a senior officer on a vulnerable prisoner. The evidence upon which the decision was based was inadequate.

Conclusion

[162] Mr Tawhiwhirangi was unjustifiably dismissed by the Department of Corrections from his position as a principal corrections officer. The department's challenge is dismissed as is the defendant's cross-challenge and application for penalties. The question of what remedies are appropriate will be deferred until the further hearing on reinstatement has been held. Counsel are requested to confer with the Registrar to arrange a date for this hearing.

Costs

[163] These are reserved pending the hearing on reinstatement.

C M Shaw
JUDGE

Judgment signed at 3.45pm on 13 September 2007