

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Graeme Johansen (Applicant)
AND Chief Executive, Department of Corrections (Respondent)
REPRESENTATIVES John Steadman, for Applicant
Roanna Chan, for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 13 July & 23 August 2004
DATE OF DETERMINATION 20 January 2005

DETERMINATION OF THE AUTHORITY

Prohibition on Publication

I make the following order which is permanent.

An order prohibiting any reference to the name or identity or information that could lead to the identification of the corrections officer whose situation has been raised in this investigation and which is described in this Determination (Disparity of Treatment para 1 page 10).

Employment Relationship Problem

On 22 August 2003 the applicant was given a final warning in respect of his involvement in an incident that occurred at Mt Eden Women's Prison on 31 May 2003. The applicant submits that the warning was substantively unjustified and that the respondent did not follow a fair process in the matter. The applicant seeks the revocation of the final written warning, compensation under s.123(c)(i) of the Act and costs.

The respondent rejects the applicant's claim the warning given was unjustified. It is the respondent's position that a fair and reasonable investigation process was conducted and a reasonable decision reached and given to the officer.

Background

Late in the evening of 31 May 2003 (after lock up) two E wing inmates were discovered in the cell of one of those inmates. A dummy was found in the cell of the other inmate.

This led to an investigation regarding the sequence of events around lockup that night that resulted in two inmates being locked up in one inmate's cell. Among other findings the Investigation Report concluded that Manual procedures to be followed at lock up could not have been complied with that night.

Ms Tuala, one of the officers involved in lock-up on the night on 31 May (and who signed the Lock-up Book as having locked up these inmates) admitted to having been distracted at the time of locking the inmates in question – she freely admitted to having “*messed up*” in respect of the procedures to be followed at lock up. That officer was issued with a final written warning in respect to the incident.

Mr Johansen also signed the Lock-up Book as having locked up the inmates in question. Following the employer's investigation into this matter he was also given a final written warning on the basis that he:

“signed the lockup book certifying that you had locked the inmates in that unit. I have been able to clearly conclude therefore that you did either lock the inmates in that unit or did falsely certify in writing by your signature that you had done so. Either of these scenarios indicates that serious misconduct has occurred (Final written warning to Mr Johansen dated 22 August 2003).

Mr Johansen denies that he was the other officer involved in the incident. He submits that the investigation has shown that both officers involved in locking the cells in question were female.

Mr Johansen accepts he did sign the Lock-up Book attesting he had locked the two inmates in their cells but submits he signed the Lock-up Book as part of the *team* involved in the lock up – a practice he submits was the common practice at that time at Mt Eden Women's Prison.

Among a number of other issues raised by Mr Johansen he submits there has been disparity of treatment in this matter – in particular he submits that three officers were involved in the lock up of E wing on the night of 31 May 2003 and the third officer has not been the subject of disciplinary action.

Relevant Departmental Policies

Face to Name Musters and Lock and Unlock Procedures

The Department of Corrections (DOC) has comprehensive policies which describe systems for the regular identification of inmates in their appropriate locations and the certification by responsible officers that inmates are identified and present in those locations.

The Department's Policy and Procedure Manual at PPM B.03 defines a Face to Name Muster as:

- A check that requires a designated officer or officers to carry out a muster and that they are satisfied that they have correctly identified by sight every inmate on the muster sheet/photographic board.
- *At lock up and un-lock two officers are to satisfy themselves they have identified each inmate that should be in that cell, ensuring that each inmate responds to the lock up or*

unlock procedure in a manner that satisfies both officers that the inmate is both conscious and responsive.

- Sighting a shape in a bed or a staff member's recall of who is supposed to be in a particular cell or location is not sufficient. (Emphasis mine).

The performance standards¹ associated with this policy are even more explicit. It records at points 10 & 11:

10. A face to name inmate muster check is carried out by two officers using a photographic muster board at lock up and unlock ***and the results recorded.*** (Emphasis mine).
11. Both the final lock up and the morning unlock are carried out by two officers working together to:-
 - a) undertake a muster using a photographic muster board depicting passport-size photographs of unit inmates.
 - b) verify the identity of each inmate
 - c) verify that the inmate in question is in the correct cell
 - d) ensure that the inmate appropriately responds to the muster check in a manner that satisfies both officers that the inmate is conscious and responsive.

Following lock up (I refer to lockup because it was an incident relating to lock up that was the subject of this investigation) the officers who have carried out the face to name muster check required to be carried out at that time certify in the Lock-Up Book as follows:

"I the undersigned certify that I have locked up the number of inmates set opposite my name".

On the night in question Mr Johansen certified he had locked up the inmates in E wing. Ms Tuala also certified she had locked the inmates in E wing that night.

Disciplinary Policy

The Department also has a comprehensive policy relating to the management of misconduct and poor performance. Essentially it requires that:

- Allegations of misconduct or serious misconduct are investigated before disciplinary action is considered.
- The employee is to be formally advised of the employer's concerns and the seriousness with which it those concerns are being viewed. He or she is to be advised there will be a formal investigation and that they have a right to representation.
- The employer is also required to take steps to ensure the confidentiality of the process.

¹ Checks that inmates are identified as present in the appropriate location are carried out at other times than lock up and unlock. As I understand it at Mt Eden Women's Prison hourly muster checks are undertaken during the day. The procedure for such checks are different in that *one* officer carries out the face to name muster (using a photographic muster board) and certifies that all inmates are present and correct.

- The investigation itself is carried out by a designated officer² who is provided with terms of reference and required to provide a report to the manager who initiates the inquiry.
- The Investigator is required to write a report and set out:
 - An introduction and terms of reference.
 - A background to the incident
 - A summary of the evidence collected
 - Any disparities in the evidence
 - Recommendations on the findings of fact
- Once the Investigation Report has been provided to the initiating manager that person is required to make a judgement as to whether misconduct has occurred and whether disciplinary action is warranted.
- If disciplinary action is contemplated then the manager must conduct a disciplinary interview with the employee in question which must be preceded by advice to the employee which includes the notice of allegations, the seriousness with which they are viewed and advice as to the employee's rights. The procedure particularises in some detail the process to be adopted in the disciplinary interview, the careful consideration to be given to the employee's explanations prior to determining what, if any, disciplinary action is to be taken against the employee and the advice to the employee of the outcome and any disciplinary action.

The Department's policies are consistent with and augmented by the relevant CEA which also stipulates how disciplinary action is to be recorded and held and also requires that an employee who is subject to disciplinary action is to be advised of their right to pursue a personal grievance.

Legal Principles

The respondent in this matter saw the conduct complained of as serious misconduct. It did not, however, dismiss Mr Johansen and instead decided to issue him with a final written warning which had effect for six months.

The test for assessing the justification or otherwise in issuing the final warning to Mr Johansen is that set out in *Northern Distribution Union v BP Oil* [1992] 3 383, CA (albeit that case dealt with a *dismissal* for serious misconduct).

“For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court’s judgement in BP Oil NZ Ltd v Northern Distribution Workers Union [1989] NZLR 580. Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.....In the end, the

² The policy identifies two separate roles to be taken in investigating misconduct - an investigator whose role it is to make inquiries and to establish findings relating to the events surrounding the problem identified and a separate (and subsequent role) to determine if misconduct has occurred and what if any disciplinary action is appropriate.

question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances”

The Court of Appeal in W & H Newspapers v Oram [2000] 2 ERNZ³ modified its thinking in respect to the test above stating:

“Bearing in mind there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of “could” rather than “would”, used in the formulation expressed in the second BP oil case.”

As to the process to be adopted by an employer in implementing any disciplinary action including the possibility of dismissal it is well established that in arriving at its decision an employer must approach the issues in question in a fair and reasonable manner. In Petersen v Board of Trustees of Buller High School CC 7/02 the Chief Judge described the following essential elements of procedural fairness (drawn from an earlier decision of the Court – NZ Food Processing IOUW v Unilever NZ Ltd [1990] 1 NZLR 35,46 & ERNZ [1990] Sel Cas 582, 595.

. “.....

The minimum requirements can be said to be –

- (a) notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;*
- (b) a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and*
- (c) an unbiased consideration of the employee’s explanation, free from predetermination and uninfluenced by irrelevant considerations.*

This needs however, to be considered in light of other guidance in the above decision.

“However, the employer’s conduct of the disciplinary process is not to be put under a microscope or subjected to pedantic scrutiny nor are unreasonably stringent procedural requirements to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person

It was also stated by the Court of Appeal in the Oram case (cited above).

“The burden on the employer is not that of proving to the Court the employee’s serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct”

³ The Employment Relations Act 2000 was amended with effect from 1 December 2004. The Act has modified the original Act by inserting a new test for justification for the purposes of s.103 (1)(a) & (b) of the Act. The test of justification to be applied to Mr Johansen’s claim is as described here.

Once that has been established, then the Authority:

“is not free to substitute its views for those of the employer about the adequacy of the reason shown by the employer for a dismissal or final warning and it will be prudent for the Tribunal to remind itself not to substitute its own view for those of the employer as a safeguard against it judging the situation by reference to a state of affairs unknown to the employer at the relevant dismissal stage.” (Petersen cited above p36).

Lastly on the question of reviewing the process adopted by the employer in progressing this matter I note the Court’s guidance set out in the Petersen case (cited above).

“In an employment relationship which provides a procedure or code which is to be followed in the event of disciplinary action, it is a term or condition of the employment that the employee will not be dismissed without the established procedure being first followed, and a good and conscientious employer will follow it”.

Credibility and Findings

Credibility

I am disturbed at the extent to which action has been taken by or on behalf of the applicant after the event to manipulate and present markedly different evidence to the Authority than that which was made available to the respondent at the time of the investigation and the disciplinary hearing⁴. The manipulation of evidence has been accompanied by the last minute expansion of the procedural deficiencies cited by the applicant including new allegations of disparity of treatment which (in one case) relies on a comparison which bears no similarity whatsoever to the material circumstances of Mr Johansen’s case.

The manipulation of evidence and the raising of last minute unsupported and groundless claims of disparity of treatment serve no useful purpose in advancing the applicant’s claims and they have the negative affect of raising doubts as to the applicant’s credibility and that of his witnesses.

Having reviewed the evidence before me and considered it against such documentary evidence as is available by way of corroboration it is the evidence of the respondent’s witnesses which I prefer in circumstances where there are disputes over the evidence.

Findings

The Process

The investigation (conducted by Brian Hay, Compliance Officer, Northern) was conducted in accordance with the Department’s Manual procedures. Mr Johansen was appropriately notified. He and Ms Tuala (the other officer who certified that the prisoners in E wing had been locked in their cells on 31 May) were interviewed along with other staff on duty that night and one of the inmates involved. Mr Johansen was attended by his representative at that interview.

⁴ In law, this serves no useful purpose as the test to be applied in respect of the justification of disciplinary action is that it is examined having regard to the information that was available to the employer at the time of the investigation or which was reasonably available to an employer carrying out a thorough and fair inquiry.

On completion of his investigation and in accordance with the Department's processes and the terms of reference Mr Hay submitted a written Report to Mr Moynihan in June 2003. The critical finding in that Report was that the Manual procedure (PPM B.03) which requires two officers to verify the identity of each inmate and verify that inmate is in the correct cell and is conscious and responsive could not have been complied with. One identified option for management was that disciplinary action be taken against two officers (Mr Johansen and Ms Tuala) for failure to comply with the Manual lockup procedures.

On receipt of the Investigation Report Mr Moynihan wrote to Mr Johansen⁵ enclosing the Report and summarising the critical finding of the investigation and the fact Mr Johansen was recorded as having signed the Lock-up Book that day. Mr Johansen was advised that his conduct constituted serious misconduct. Mr Moynihan advised that prior to making any final decision he wished to meet with Mr Johansen to give him an opportunity to make submissions on the Report and findings. He was advised of his right to representation.

At the meeting which was held on 23 July 2003 Mr Johansen was accompanied by his representative and written submissions made on his behalf (submitted prior to that meeting) were considered and discussed. Mr Johansen expressed concern that one officer on duty at that time of the lock up had not been interviewed. At Mr Johansen's request that officer (Officer Skaith) was interviewed the next day.

On 22 August Mr Moynihan wrote to Mr Johansen advising he had considered the findings of the investigation, Mr Johansen's submissions and representations made on his behalf. Mr Moynihan recorded Mr Johansen's explanations but stated he had been able to clearly conclude that Mr Johansen *had either locked the inmates in that unit or did falsely certify in writing by his signature that he had done so.*

Mr Johansen was advised that either scenario amounted to serious misconduct or Mr Moynihan was satisfied serious misconduct had occurred. Mr Johansen was given a final written warning to remain in force for six months and he was reminded of his right to bring a personal grievance.

I find that the investigation process and the resulting disciplinary process implemented by DOC in this matter followed the Department's Manual and the CEA precisely and that the process adopted accords with the legal principles cited in this determination. The investigation was thorough and fairly conducted and in particular I find there is no foundation for Mr Johansen's claim he was not allowed an adequate opportunity to make representations. I find further, there is no foundation to the claims made on his behalf that the process was attended by bias and predetermination.

Substantive findings

In respect of the substantive findings Mr Johansen holds to and repeats the explanations he gave to the employer at the time of the interviews and at the disciplinary meeting he attended. He considers an appropriate evaluation of his explanations would have resulted in his exoneration in this matter. I will address his long held positions.

⁵ He also wrote to Ms Tuala. His finding in her case was different because she had admitted being involved in the lockup that night and admitted she had messed up in respect to compliance with the required process.

- Mr Johansen was not the second person involved in the face to name muster and lock up on the night of 31 May

Mr Johansen submits that the investigation clearly showed it was two women who undertook the lock up that night. It is his position that he was checking the yards and took no part in locking the two cells in question.

Correction's position is that the investigation was unclear (and the situation remains unclear) as to the identity of the second officer involved.

A review of the evidence shows that Mr Johansen is relying, in support of his position, on the information provided to the Investigator by one of the inmates involved. She was quite specific in her statement to the Investigator that it was Ms Tuala and Ms Potatau who were involved in the face to name muster and lock up that night. However, assessment of all of the information provided to the investigator shows there are different recollections as to who the second officer was.

I find it was open to Mr Moynihan to be wary of accepting an inmate's version of events in preference to other officers and that the position arrived at by Mr Moynihan, that it is not possible to identify with certainty who that officer was, was a reasonable finding available to him on the information before him at the time.

I also reject a position taken for the applicant that the Investigator did not ask Ms Tuala the one question he should have "who was the officer with her during the face to name muster and lock up on 31 May? The evidence shows Ms Tuala was asked who had the photo muster board that night. Her reply was "*I am not sure maybe Mr Johansen*".

I also note in this respect that I simply do not accept the after the event information provided to the employer on this point, or the evidence given to me by Ms Tuala, that the second officer was Ms Potatau.

- Signing the Lock-Up Book does not certify that the face to name muster has been completed

This submission was made on Mr Johansen's behalf at the disciplinary meeting and again at the Investigation Meeting in association with a claim that Corrections have now changed the lock up procedures.

PPM B.O3 requires that at lock up two officers are to carry out a face to name muster in accordance with the manual procedure and the results are to be recorded. The record of the results of the face to name muster is held in the Lock-Up Book completed after lock up. The column where the officers who, having conducted the face to name muster and lock up, sign that they have done so is unequivocal. It states "*I the undersigned have locked up the number of inmates set opposite my name.*" Mr Johansen signed for locking the inmates in E wing on the night in question. The evidence shows that Mr Moynihan turned his attention to this explanation made on Mr Johansen's behalf. He described the process required at lockup and the fact that signing the Lock-up Book certified the face to name muster had been carried out and referred to this as part of the accountability trail built into the system. Mr Moynihan's conclusion in this regard was I find entirely reasonable.

I find there has been no change to the Manual procedures relating to lock up. However, as an aid to identification of inmates at lock up they are now required to stand at their cell door during the face to name muster and lock up.

- Mr Johansen signed the Lock-Up Book as part of the team involved in the lock up and this was accepted custom and practice at Mt Eden Women's Prison.

I did not find the evidence of the applicant's witnesses credible on this point. Mr Moynihan did not accept this submission by Mr Johansen an officer of 13 plus years experience. It was a conclusion he that he was entitled to come to.

- Disparity of Treatment

To a large extent this submission made on behalf of Mr Johansen depends on his submission that Ms Potatau the Senior Corrections Officer on duty that day was the second officer involved in the face to name muster and lock up on the night in question. It is Mr Johansen's view that she has escaped censure and that this amounts to disparity of treatment.

As noted, Mr Moynihan arrived at the position on reviewing all the information available to him at the time that it was not possible to identify who the second officer was. Having reviewed the evidence of the investigation I conclude that was a reasonable conclusion to arrive at. Given it was not possible to determine with certainty that Ms Potatau was the second officer involved there was, I find, no basis to censure her – the position explained in evidence by Mr Moynihan.

I believe, however, that Mr Johansen goes further on this issue and argues that as the senior officer that night some responsibility for the security lapse must be borne by Ms Potatau because she signed the Lock-up Book that the security checks had been done and the wing was secure.

The respondent's position is that the Senior Officer (who could indeed undertake the face to name muster and do the lockup) in this case signed that the wing was secure after the appropriate security steps had been undertaken. There was a significant difference between the conduct of Ms Potatau and that of Mr Johansen – Mr Johansen signed that he had locked the inmates in question and Ms Potatau did not. Mr Moynihan deposed in his evidence that he could not conclude on the basis of the investigation that there had been any deficiency in Ms Potatau's conduct that night which warranted disciplinary action against her. That was a reasonable conclusion and one which was open to Mr Moynihan on the information available to him at the time. There has been no disparity between the treatment of Mr Johansen and that of Ms Potatau.

Further, on the issue of disparity treatment I find that Mr Johansen has not suffered disparity of treatment vis a vis Officer Skaith. As a result of the investigation Mr Moynihan arrived at the conclusion that in all probability Officer Skaith was undertaking the hourly face to name muster at 4.30pm on the day in question – a muster unrelated to the face to name muster that must be carried out by two officers at lock up.. A review of the evidence shows that was a conclusion he could reasonably come to on the information before him.

Lastly Mr Johansen has not established a prima facie case in respect to the warning issued to another officer over alleged falsification of documentation. This occurred in significantly

different circumstances that had no bearing whatsoever on inmate/prison security. I also reject to the claim made by Mr Johansen that the action in warning him was predetermined and pay back for his involvement in the matter in question.

- Mr Johansen's honesty was impugned in the process

Mr Johansen submits that because other officers involved were specifically commended for their frank and honest disclosures in the process and he was not so specifically commended then by implication his honesty and integrity have been called into question. Mr Johansen submits, further, that he was threatened by Mr Moynihan with dismissal in the disciplinary meeting because he hadn't admitted to being the second officer involved in the lock up and that he was told that dismissal was not being considered for Ms Tuala because she had admitted her involvement.

This allegation was not raised until the second day of the investigation meeting. Mr Moynihan denied saying this and I found him to be a most credible witness. I also find this claim to be contrary to the documentary evidence which shows that when Mr Moynihan was questioned at the disciplinary meeting as to the range of disciplinary action being considered he specifically replied that he was *not* looking seriously at dismissal. He did note this was a trust and confidence issue and that Mr Johansen had taken the approach of justifying his position whereas the other person involved had taken a different position.

I find that Mr Moynihan did not threaten Mr Johansen with dismissal and that the commendation made to Ms Tuala does not imply dishonesty on Mr Johansen's part.

- Mr Johansen suffered humiliation as a result of the dummy being left in the staff room for some days after the incident and him becoming the butt of jokes about it

I can accept it would be uncomfortable and upsetting to be subject to an investigation into a security lapse such as this. However, the evidence shows the dummy had to be retained so that it could be photographed by the Crime Prevention Officer. Neither Mr Johansen nor any other staff member complained about the dummy and there is no evidence of any malicious conduct by staff relating to the dummy. I do not, therefore, accept that Mr Johansen has been subject to humiliation in this regard.

Conclusion

Boiled down to its essential elements, Mr Moynihan arrived at the conclusion following a thorough and fair investigation that it was not possible to identify the second person involved in the lock up on the night of 31 May 2003. It was a conclusion open to him on the information available to him at the time. Then, having rejected Mr Johansen's explanation that he signed the Lock-Up Book as part of the team involved in the lock up (a reasonable conclusion I find was open to him) Mr Moynihan arrived at the only possible conclusion available to him on all the evidence i.e. that Mr Johansen had locked up the inmates in E wing that night or falsely certified in writing that he had. Mr Moynihan considered either situation amounted to serious misconduct. It was a conclusion open to the employer in all the circumstances.

The evidence shows Mr Johansen and Ms Tuala were treated identically and that the employer had specified regard to the appropriate disciplinary action to be taken. Final warnings are usually issued for 12 months but in all the circumstances of this case Mr Moynihan decided these warnings would remain in force for only six months.

Determination

Mr Johansen's application is declined. He does not have a disadvantage grievance against his employer and he is not entitled to the remedies he seeks.

Costs

Costs are reserved. The parties are requested to attempt to resolve the question between them. If they cannot resolve costs they are to file and serve submissions on the subject for determination.

Janet Scott
Member of Employment Relations Authority