

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Warren Aranga (Applicant)  
**AND** The Chief Executive of the Department of Corrections (Respondent)  
**REPRESENTATIVES** Kay Stringleman, Advocate for Applicant  
Roanna Chan, Counsel for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 9 February 2005  
10 February 2005  
**DATE OF DETERMINATION** 2 May 2005

DETERMINATION OF THE AUTHORITY

*Employment relationship problem*

- [1] The applicant Warren Aranga (Mr Aranga) alleges that he was unjustifiably dismissed and he seeks reinstatement and compensation.
- [2] The Department of Corrections as respondent (the Department) denies the allegations and says that the dismissal of Mr Aranga was both procedurally fair and substantively justified.
- [3] The parties attended mediation but were unable to resolve their problem.
- [4] Mr Aranga was a long serving employee of the Department having been employed as a prison officer at Christchurch Men's Prison for more than twenty years.
- [5] The employment was governed by the Public Prisons Service Collective Employment Agreement and the Department of Corrections Code of Conduct. In terms of the latter document, an act of violence against an inmate is an example of serious misconduct to which dismissal is an appropriate response.
- [6] On the 27 April 2004 Mr Aranga was in the vicinity of a holding cell at Christchurch Men's Prison when a prisoner (referred throughout this determination as prisoner A) became hostile and abusive towards other corrections officers.
- [7] Mr Aranga chose to enter the holding cell with prisoner A such that the two of them were the only ones in the cell.
- [8] Mr Aranga's evidence was that he was concerned that his colleague was not going to follow up with prisoner A about prisoner A's threats and abuse. His colleague was a less experienced

officer than Mr Aranga and Mr Aranga's evidence was that as a more senior corrections officer, he thought it appropriate to not allow the matter to *be left that way*.

[9] The door to the holding cell remained open so Mr Aranga's colleagues could see what was happening. In addition, because of the part of the prison in which these events took place, there was a security camera operating in the holding cell which recorded as video footage a reasonably basic version of the events that transpired in the holding cell.

[10] I say *reasonably basic version* because the picture quality of the video recording is not perfect partly because of lighting issues at the beginning and partly because there do seem to be some gaps in the frame by frame coverage.

[11] In any event, Mr Aranga is now in the holding cell with prisoner A. Mr Aranga has his back to the cell doorway and prisoner A is advancing towards him.

[12] When Mr Aranga entered the cell, prisoner A had his back to the door and on Mr Aranga entering, prisoner A swung round to confront Mr Aranga. Mr Aranga's evidence was that he entered the cell to *diffuse* the issue between prisoner A and one of his work colleagues but that does seem a little difficult to understand as the other corrections officer was not in the cell and although it is uncontested evidence that prisoner A made some uncharitable remarks in the direction of the other corrections officer, that fact in itself can hardly be all together unusual in an environment of this kind.

[13] There is no doubt that prisoner A, having now to confront Mr Aranga, proceeded to direct his abusive resources in Mr Aranga's direction and there is unchallenged evidence that amongst other things prisoner A called Mr Aranga a fucking black cunt.

[14] A critical question at this point is who advanced on whom. The video clearly shows Mr Aranga moving into the cell from the doorway. Mr Aranga says that the video also shows prisoner A advancing towards Mr Aranga and Mr Aranga says this is when prisoner A used the abusive racial epithet.

[15] Mr Aranga's evidence at the investigation meeting was that he was the first to push out at prisoner A but that he did that in the context of trying to get prisoner A to back away from him rather than in the context of trying to be the aggressor.

[16] The video shows, in these early exchanges between the parties, a lot of shirt pulling and pushing. Although the video does not appear to be a complete record of the incident, by the fourth frame or thereabouts it is clear that the parties are now holding each other at arms length. By the fifth frame, Mr Aranga has broken prisoner A's hold and prisoner A is stepping backwards and continues to do so for several frames but critically during this period Mr Aranga is advancing on prisoner A.

[17] While it would be unreasonable to expect a corrections officer to make absolutely correct decisions in a violent situation such as this, it does seem clear that in the early part of this exchange there were a number of opportunities in which Mr Aranga could have removed himself from the confrontation with prisoner A but as in the example just referred to, he chose to keep advancing into the cell effectively pursuing prisoner A from the side of the cell nearest the doorway to the far side of the cell opposite the door.

[18] Having said that, the total time recorded on the video from the start to the finish is 52 seconds so the length of the incident that is presently under examination was very short indeed. No doubt that fact in itself makes it less rather than more likely that Mr Aranga would have had sufficient time to contemplate and assess his options and make a reasoned and dispassionate decision.

[19] In any event, it is clear that as the incident proceeds with Mr Aranga advancing on prisoner A across the cell, the physical exchange between the two men continues unabated and about half way through the video, that is at around the 25 to 30 second mark, prisoner A is up against the cell wall opposite the cell door and while Mr Aranga says that at this point he was trying to pull away from prisoner A, the video evidence suggests otherwise.

[20] At this point we see Mr Aranga pushing his hand into prisoner A's face, a swinging elbow from Mr Aranga directed at prisoner A and later on what looks like a closed fist blow administered by Mr Aranga to prisoner A's body. A second or two later there is a forearm pushed into the head of prisoner A by Mr Aranga.

[21] During the investigation meeting, the video was watched by all of the participants in the investigation meeting and with the assistance of his representative, Mr Aranga endeavoured to explain what was going on.

[22] In respect to these various blows administered by Mr Aranga to prisoner A, Mr Aranga's explanations were that these were not blows as such but disabling techniques designed to enable him to disengage himself from prisoner A.

[23] In the result, he was not able to do that by himself and Mr Aranga was eventually assisted by two other officers. The three of them managed to overpower prisoner A, restrain him and remove him.

### ***Issues***

[24] I am required to decide whether the summary dismissal of Mr Aranga was substantively justified and procedurally fair.

[25] To do that, the Authority must satisfy itself that the employer has demonstrated an honest and reasonable belief based on a full and proper inquiry that misconduct warranting dismissal has occurred: *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Limited* [1990] 3NZLR 549.

[26] To assess the matter appropriately, I will consider the following matters:

- Mr Aranga's behaviour on 27 April
- The employer's investigation
- The issue of predetermination

### ***Mr Aranga's behaviour on 27 April***

[27] Much of the debate in the helpful submissions that both representatives provided to the Authority revolved around questions of Mr Aranga's motivation in entering prisoner A's holding cell and taking the actions that he did.

[28] None of those contentions weighed with me particularly. Because Mr Aranga's motivation became so controversial, I chose to put that issue aside completely and concentrate on discerning, as far as I was able, what actually happened and what other behaviours might have been available to Mr Aranga.

[29] The video footage effectively represents a contemporaneous visual record of the incident. I agree with the observation made by Mr Paul Monk, the Department's regional manager South Island Prisons, when he says that the video footage effectively provides *a bonus* for the Department in doing an employment investigation of this kind. Without the video footage, the only references can be to interviews and written documentation.

[30] In my opinion, the video footage is a graphic record of the events in contention.

[31] I watched the video record before the investigation meeting and following the sensible suggestion from the representatives, arranged for the video to be played during the investigation meeting so that Mr Aranga could explain to us what was actually happening at particular points.

[32] This process, coupled with a careful analysis of the Department's preliminary and employment investigations has enabled me to reach certain conclusions in relation to what actually happened.

[33] We know that Mr Aranga entered prisoner A's cell because he claimed prisoner A needed to be remonstrated with for making threatening remarks directed at another corrections officer. An early question is whether it was a smart thing for Mr Aranga to enter the cell in those circumstances.

[34] The Department's witnesses gave evidence that in those circumstances they would have expected an experienced corrections officer like Mr Aranga to simply leave well alone. Their evidence in effect was that there was no issue to be resolved, no point to be made and nothing to be gained by an intervention of the sort that Mr Aranga was embarked upon.

[35] Mr Barry Noakes, a principal corrections officer, who was called to give evidence on behalf of Mr Aranga (and whose conclusion after reviewing the video evidence was that nothing he saw could constitute an assault by Mr Aranga on prisoner A) very fairly conceded that Mr Aranga's decision to enter the cell in the first place was not *the preferred option*. He described the preferred option as being to simply *lock the prisoner down*, that is to say to lock the cell door with only the prisoner inside the cell.

[36] I conclude then that Mr Aranga was not following *best practice* when he entered the cell of prisoner A. Mr Paul Monk's evidence having looked at the video record was as follows:

*I am strongly of the view that Warren (Mr Aranga) need not have entered the cell at all.*

[37] Having got into the cell the next question really is whether Mr Aranga could have retreated. I think the answer to this question is in the affirmative. Even Mr Aranga in answer to questions from me at the investigation meeting seemed to accept that in the early part of the exchange with prisoner A, he could readily have removed himself by simply backing out of the cell.

[38] Having established that Mr Aranga would have been best advised not to enter the cell in the first place and could have got out of the cell in the early stages of the encounter with prisoner A, the next question in this group of questions is whether it can be established who the aggressor was in the exchange between prisoner A and Mr Aranga.

[39] Evidence given on Mr Aranga's behalf offered explanations for what looks like a series of physical assaults by Mr Aranga on prisoner A. The explanation suggested Mr Aranga was endeavouring to break the hold or series of holds that prisoner A had on Mr Aranga.

[40] At the investigation meeting, Mr Aranga tried to explain his actions on what amounted to a frame by frame analysis. The essence of what he said was that he was trying to break prisoner A's hold on him.

[41] Even if the Authority were to accept that explanation in principle there can be no doubt at all that during the period that the video camera was filming the incident Mr Aranga was advancing on prisoner A across the cell from the doorway to the other side of the cell. Had Mr Aranga not positively advanced on prisoner A in the manner described, then the blows which the Department regarded as assaults on prisoner A would not have happened.

[42] Mr Aranga could not satisfy me at the investigation meeting why he kept advancing on prisoner A despite the opportunities to retreat that presented themselves at various moments during the exchange.

[43] It seems to me impossible to conclude anything other than that Mr Aranga was the aggressor in the exchange with prisoner A for all the reasons just identified. Mr Aranga chose (erroneously) to enter the cell. Mr Aranga chose (erroneously) to not exit the cell. Mr Aranga chose (erroneously) to keep advancing on prisoner A.

[44] In the context of a decision that an employer has to make about whether blows struck by Mr Aranga on prisoner A were blows in the nature of an aggressive assault or blows in the nature of an attempt to disentangle, in my view this context that I have just outlined is absolutely relevant.

[45] I accept that there are two possible explanations for the blows administered by Mr Aranga on prisoner A. The first is that they are designed to extricate Mr Aranga from the clutches of prisoner A. The second is that they are designed to simply administer an aggressive assault on prisoner A.

[46] In his evidence Mr Paul Monk gave very clear evidence about the ability for corrections officers to use force and essentially the test that Mr Monk explained was that force may only be used when there was no other option and then only to the extent necessary.

[47] In my opinion, on the facts as they were presented to me in the investigation meeting with the benefit as seeing the video footage and hearing Mr Aranga's contemporaneous explanation of that as the film was running, it is reasonable for the Department to see Mr Aranga's action as an inappropriate use of force and a breach of its code of conduct constituting an assault on a prisoner which amounted to serious misconduct that justified a summary dismissal.

### ***The employer's investigation***

[48] The employer automatically generated incident reports in respect to the events on 27 April 2004. Mr Aranga produced an incident report and the two other corrections officers who were involved also produced incident reports.

[49] Those reports were considered by a more senior officer along with the video tape of the incident.

[50] A consideration of those evidentiary items resulted in a decision being taken by the Department to conduct a preliminary incident investigation and two unit managers were deployed to undertake that investigation.

[51] This decision was taken promptly and Mr Aranga was advised of the decision to conduct a preliminary investigation.

[52] Mr Monk as regional manager for the Department became involved within a day or so of the incident and he wrote to Mr Aranga on 29 April 2004 advising a preliminary view that although no final decision had been taken it was more than likely that there would be an employment investigation.

[53] The preliminary investigation findings emerged in May 2004 and recommended a formal employment investigation as Mr Monk had predicted.

[54] The preliminary investigation report was sent to Mr Aranga on the 25 May together with a covering letter indicating that a formal employment investigation would now be undertaken in response to the recommendation of the preliminary investigation report.

[55] Mr Aranga was not interviewed for the preliminary investigation but I find that this was not a consequence of default by the Department. Mr Aranga was given two opportunities to be interviewed by the authors of the preliminary investigation report but those opportunities were not taken up. Further, once Mr Aranga and his representatives had viewed the video footage in private (as they had requested before responding to the investigators) they took no steps to advance any views with the investigators.

[56] Mr Davies who is an official of the Corrections Association of New Zealand represented Mr Aranga at the time of his termination of employment. Mr Davies gave evidence at my investigation meeting and on this point his evidence was that neither he nor Mr Aranga were aware of a deadline in the completion of the preliminary investigation. That is at variance with the Department's evidence. The preliminary investigation report for instance has these words at page 9 : *It was emphasised to Mr Aranga and Mr Davies the need for the interview process to take place. Mr Davies advised that they would indicate when they were able to proceed.*

[57] The above quoted passage must be taken to mean that the investigators wished to talk to Mr Aranga and that his Union official told the investigators that they (Mr Davies and Mr Aranga) would revert to the investigators when they were ready to proceed.

[58] Furthermore, the terms of reference for the preliminary investigation were provided to Mr Aranga under cover of a letter advising him of the investigation dated 27 April 2004 (the same date as the incident). The terms of reference quite clearly refer to a deadline for the provision of the completed report so Mr Aranga cannot have been in any doubt about the fact that the report investigators were operating to a deadline.

[59] Furthermore, Mr Davies as an experienced official of the Corrections Association of New Zealand must have done a number of these matters and it seems to me inconceivable that he would not have been aware of the Department's process.

[60] Mr Aranga also complains about the process used by Mr Hawthorne, the Department's decision maker, who had to make the decision in relation to dismissal. He apparently objects to the fact that Mr Hawthorne was briefed on the matter by Mr Monk (Mr Monk having departed for a period of annual leave). It seems to be of particular concern to Mr Aranga that Mr Hawthorne obtained information from other senior managers of the department when he inherited the issue from Mr Monk. I have considered these submissions and do not think anything turns on who Mr Hawthorne was briefed by or in what terms. In all the circumstances, Mr Hawthorne would have been failing in his duty if he had not been properly briefed before he had to make this difficult decision. It is a matter for him who he gets his information from provided the source of that information is from competent officials of the respondent employer and/or from documentation prepared for the respondent employer in relation to the matters in contention.

[61] Mr Hawthorne satisfied me in giving his evidence at my investigation meeting that the information that he had received gave him sufficient background to enable him to tackle this challenging task and I am not persuaded that the background research that Mr Hawthorne quite properly did disadvantaged Mr Aranga in any way.

[62] Next there is an issue about Mr Hawthorne's handling of the disciplinary interview. The allegation is that Mr Hawthorne did not allow Mr Aranga and his representatives to comment appropriately on the allegations made against him. I do not accept this submission.

[63] I think Mr Hawthorne went out of his way to endeavour to provide Mr Aranga with an opportunity to be heard at the disciplinary meeting and Mr Aranga (through his representative Mr Davies) chose not to continue with a question and answer session initiated by Mr Hawthorne apparently on the basis of Mr Aranga's stress.

[64] In the circumstances, it is not surprising that Mr Aranga may have felt stressed by the occasion but in my opinion, he did himself no service by refusing to continue to respond to Mr Hawthorne's questions.

[65] I also am not impressed with the suggestion that Mr Hawthorne ought to have agreed to Mr Davies proposal that any further questions he might have ought to be submitted in writing and Mr Aranga would respond in writing. Such an arrangement would be highly unusual in a disciplinary context and it is not unreasonable for Mr Hawthorne to reject it.

### ***Predetermination***

[66] The letter of 28 August 2004 raising Mr Aranga's personal grievance claims amongst other things that the department has *a predetermined position on the outcome* of Mr Aranga's employment.

[67] That claim is elaborated upon in the documentation provided for my investigation meeting.

[68] The allegation appears to be directed at the department's regional manager Mr Paul Monk. Mr Davies' evidence is that during a meeting with Mr Monk on an unrelated matter, Mr Monk had referred to the Aranga incident, noted that he had just seen the video and said words to the effect that *he's got no show, the only thing he can do is claim a temporary black out and throw himself on our mercy*.

[69] Mr Davies' evidence then continues with a description of what he recalls of the preliminary investigation process and his surprise that Mr Aranga never got to speak to the investigators compiling that initial report. As I have already indicated, my view is that Mr Aranga and his advisers had ample opportunity to do that and that the employer has done nothing wrong in that regard.

[70] In any event, Mr Davies clearly was influenced by the adverse findings against Mr Aranga in that preliminary report and that reinforced the anxiety that he must have already experienced when he recalled Mr Monk's remarks quoted above.

[71] For that reason, Mr Davies asked Mr Monk to absent himself from the viewing of the video tape and Mr Monk agreed.

[72] Mr Monk's evidence was that he had not said anything like the words that Mr Davies recalled him saying in relation to seeing the video tape. His evidence was that he might well have said something like : *It did not look very good and that the security footage was not consistent with the incident report* but he absolutely denied the colourful language that Mr Davies reported.

[73] Given Mr Davies' anxiety about Mr Monk's apparent predetermination of the matter, Mr Monk notes in his evidence that he readily agreed to the suggestion that he not be present at the *video viewing*.

[74] It seems to me unlikely that a senior and experienced manager such as Mr Monk would have used the colourful language that Mr Davies recalls. While Mr Monk does not deny that he might well have expressed views unhelpful to Mr Aranga in less colourful terms, it seems to me nothing turns on what Mr Monk said.

[75] He quite properly agreed to Mr Davies request that he withdraw from the video viewing, and critically, he was not the decision maker when the issue finally fell for determination.

[76] In those circumstances, I find no evidence of predetermination.

### ***Determination***

[77] Mr Aranga's claim for reinstatement and compensation for the alleged wrong fails as I find that Mr Aranga has no personal grievance.

[78] Costs are reserved.

James Crichton  
Member of Employment Relations Authority