

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Iao Metai Ali'imatafitafi (Applicant)  
**AND** Chief Executive, Department of Corrections (Respondent)  
**REPRESENTATIVES** Iao Metai Ali'imatafitafi in person  
Megan Richards and Phillip Cornege, Counsel for Respondent  
**MEMBER OF AUTHORITY** Robin Arthur  
**INVESTIGATION MEETING** 29 May 2006  
**DATE OF DETERMINATION** 15 June 2006

**DETERMINATION OF THE AUTHORITY**

[1] The applicant was dismissed from his job as a work party supervisor for the Community Probation Service ("CPS") of the Department of Corrections ("the Department") on 17 December 2002. His job involved supervising offenders on periodic detention while they did community work.

[2] He did not file a statement of problem in the Authority until almost three years later. However his application was filed within the three year period for commencing an action in the Authority required under s114(6) of the Employment Relations Act 2000 ("the Act").

[3] His personal grievance alleging unjustified dismissal had been raised with his former employer on 19 February 2003. Mediation in 2003 did not settle the grievance.

[4] The applicant alleges his dismissal for serious misconduct was based on consideration of irrelevant matters and an inadequate investigation by the employer. He initially sought reinstatement but withdrew this claim shortly before the investigation meeting. He claims lost wages and compensation for hurt and humiliation.

[5] The respondent replies that the allegation of serious misconduct was thoroughly investigated, findings put to the applicant and his representative for comment, and a reasonable decision made on the information available to the employer.

**The issues**

[6] The issues to be resolved include:  
(i) whether the respondent's investigation of the applicant's alleged serious misconduct was fairly carried out?  
(ii) whether the respondent could come to a reasonable belief that the applicant's actions amounted to serious misconduct?

- (iii) whether there was any disparity or racial discrimination in the respondent's treatment of the applicant?
- (iv) whether, if the respondent did unjustifiably dismiss the applicant, there are any issues of contribution; and
- (v) if the respondent did unjustifiably dismiss the applicant, what remedies should be awarded.

### **The evidence**

[7] The applicant filed a statement of problem on 12 December 2005, additions on 6 January 2006 and his own witness statements and additions on 20 April, 3 May, 18 May, 22 May and 23 May 2006. The respondent filed a statement in reply on 31 January 2006 and also provided witness statements from the CPS Auckland Area Manager Marie-Therese Faith-Allen and the Department's Human Resources Manager for Probation and Offender Services Helen Hurst. Ms Faith-Allen was the official who investigated the alleged misconduct of the applicant and made the decision to dismiss him. Ms Hurst's written evidence was more general regarding the standards of conduct required of CPS staff.

[8] During the investigation meeting each witness answered questions from the Authority. The applicant had an opportunity to ask questions of Ms Faith-Allen and Ms Hurst. Respondent's counsel also put questions to the applicant. Both parties had the opportunity to summarise their case at the end of the meeting.

### **Background**

[9] The roots of this case reach back to an incident that occurred at a central Auckland primary school ("the school") in November 2001. It resulted in the applicant being given a final written warning. Although that warning was subsequently the subject of a full and final settlement agreement between the parties, some background on the incident and its investigation is relevant to the present matter.

[10] The applicant was supervising a work party of detainees at the school on 3 November 2001. According to a subsequent investigation by the respondent's service manager, Alastair Riach, the school alarm was set off during a "smoko" break. The school caretaker arrived several minutes later to re-set the alarm. The alarm was triggered in the library which was several rooms away from the classroom being used by the detainees during the break. The caretaker reported that he then went and spoke to the detainees in the classroom but did not see the supervisor. The applicant did not report the security breach to a probation officer at the end of his duty that day. That night the school's library was broken into and a video player taken.

[11] The applicant's explanation given during the respondent's investigation in 2001 was that he was sitting in a work van around 20 metres from the classroom during the detainees "smoko" break. He could see "almost all" of the detainees from there. He claimed not to hear the alarm due to heavy rain although the caretaker heard the alarm from his house across the road from the school.

[12] The applicant said he was shown the room at the start of the day by a school trustee and told the room was secure. This trustee – whom I will refer to as Mrs M – is important to later developments in this case. She was the chair of the school board and the person who dealt with CPS over its provision of work parties to the school.

[13] The applicant said that Mrs M did not point out that an internal connecting door in the classroom was not locked. A detainee was believed to have used that door to leave the room and set off the alarm in the library.

[14] Having interviewed the caretaker and Mrs M and considered the applicant's explanations, the respondent found that the applicant had committed serious misconduct. The final written warning issued on 19 December stated he had breached the Department's code of conduct by failing to supervise detainees to the required standard and not notifying his superiors of a lapse in security at a work site. The warning was stated to be for 12 months.

[15] The applicant disputed the warning and this led to both parties attending mediation in March 2002. Through that process a settlement agreement was made and signed. It was agreed to be "*full and final settlement of all matters between the parties*". It provided that the warning issued on 19 December 2001 would expire on 15 June 2002 – so it ran for a six month period rather than 12 months.

[16] The agreement was then certified under s149 of the Act. I am satisfied from that certificate that the mediator explained to both parties that the settlement was final and binding and that its terms were not able to be the subject of action or appeal to the Authority or Court, except for enforcement. The applicant also confirmed to me in the investigation meeting that he understood that the settlement agreement was full and final and covered everything to do with the final written warning issued on 19 December 2001.

[17] Consequently this determination does not deal with the 3 November 2001 incident, its investigation, the issuing of the 19 December 2001 warning or the mediation agreement reached in March 2002. However the applicant's ongoing sense of grievance about the events of that time – and, based on that sense, certain things he has done since – led to the present matter.

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

[18] In November 2002 the school principal sent Mr Riach a copy of a letter he had received from the applicant.

[19] The letter, dated 18 November 2002, began:

*I am lodging a complaint with you to claim damages done to my professional character because of your negligence to inform my person fully of how secure your classrooms were which as a result of your negation to inform adequately, I was blamed for the theft of your school's video player and television: a final written warning was issued to my person by the Employer resulting (sic).*

[20] The letter then set out what the applicant saw as the background to the issue and whether he was told that all the classrooms were locked and secure. It ends with a statement that he is "*claiming damages to the amount of \$2000 settlement*" and that if the principal "*decided against my claim I will pursue it through the legal system*".

[21] Mr Riach sent the copy of the letter to Ms Faith-Allen with a note suggesting that the letter breached four provisions of the Department's code of conduct.

[22] Mr Riach also noted that the letter referred to a day that the applicant had visited the school to talk about the 3 November 2001 incident. Mr Riach contacted Mrs M and learned that in March 2002 the applicant had visited the school and talked with her about the Department's disciplinary action against him.

[23] It emerged later that the applicant had thought at that time Mrs M was the school principal, rather the board chairperson, and he thought his 18 November 2002 letter addressed to the principal was to her.

[24] Ms Faith-Allen started an investigation. In a letter to the applicant she advised that Mr Riach had complained about the applicant's letter sent to the school, his earlier visit to the school and the the applicant's conversation with Mrs M which Mrs M had described as "*totally inappropriate*". The complaint described the applicant's letter and the visit as likely to bring the Department into disrepute and to jeopardise its relationship with a sponsor.

[25] Ms Faith-Allen's letter also set out the possible breaches of the Code of Conduct, the prospects of this amounting to serious misconduct and possible dismissal, and put the applicant on special leave with pay to prepare for a disciplinary meeting. The applicant was reminded of his right to support and advice at the disciplinary meeting.

[26] In summary form the alleged breaches of the Code of Conduct were that the applicant's March visit to the school and 18 November letter amounted to failures to:

- be courteous and professional in his dealing with the public
- maintain the neutrality required of a public servant
- inform his manager of any activity that might conflict with the performance of his duties or the goals of the Department
- avoid work-related or private activity that could reflect badly on the Department or jeopardise its relationships with "stakeholders" or the general public.

#### *Interview of Mrs M*

[27] Ms Faith-Allen arranged to interview Mrs M at the school. She made notes and Mrs M set out her concerns in a letter the following day. Copies of both the notes and Mrs M's letter were later provided to the applicant as part of the disciplinary process.

[28] Mrs M recalled the applicant arriving on an "*unannounced visit*" during the school day. There is no dispute that this was in March 2002, shortly before the mediation session the applicant attended with the Department representatives.

[29] She said the applicant had criticised the school for complaining about the 3 November 2001 incident and blamed the school for steps being taken against him by his superiors. He was also critical of his employer which she considered "*inappropriate*". She recalled telling the applicant that he should talk to his employers rather than the school. He appeared reluctant to leave and kept talking so she ended the conversation by walking away.

[30] Mrs M described the applicant's 18 November 2002 letter as "*a shock*". She was concerned that the applicant "*might pursue some kind of personal vendetta*" against the school. By this she meant that she thought he would "*continue visiting the school to keep making his point*". Ms Faith-Allen told me that she checked with Mrs M that her use of the word "*vendetta*" did not suggest she feared the prospect of violence from the applicant and Mrs M confirmed that it did not.

#### *First disciplinary meeting*

[31] The applicant was accompanied to a disciplinary meeting on 6 December 2002 by PSA organiser Kerry Davies. Ms Faith-Allen advised that following the meeting she would prepare a

draft report on her investigation so that the applicant could comment on its findings and any recommendations.

[32] The applicant explained that his March 2002 visit to the school was to prepare for the mediation that month over his earlier written warning. He confirmed that Mrs M had told him to talk to his employer rather than her but described Mrs M's letter to Ms Faith-Allen as largely untrue.

[33] He described the "*sole purpose*" of the letter of 18 November 2002 as "*purely to clear myself*".

#### *Interview of Gordon Henderson*

[34] During the meeting Ms Faith-Allen asked whether the applicant wanted her to interview anyone else as part of her investigation. After the meeting Ms Davies contacted her to suggest another supervisor, Gordon Henderson, also be interviewed as the applicant had shown his letter to the school to Mr Henderson before it was sent. The applicant said Mr Henderson had thought it appropriate to send the letter to the school.

[35] Ms Faith-Allen spoke with Mr Henderson who confirmed that the applicant had shown him the letter before sending it and that he considered the applicant was "*obsessed*" with the 3 November 2001 incident. She did not establish whether Mr Henderson had thought it appropriate to send the letter.

[36] The applicant says Mr Henderson had at times acted as a manager and given him instructions. On that basis, he suggests showing Mr Henderson the letter amounted to advising Department management. I do not accept that argument. Mr Henderson was another supervisor at the same level. There is nothing to suggest that he was authorised as a departmental representative to receive notice of and consent to another employee taking personal legal action against a CPS "sponsor" such as the school.

#### *Employer's preliminary report*

[37] Ms Faith-Allen prepared an eight page report on her investigation, clearly marked as a draft. She provided a copy of the report to the applicant and his representative and asked for comments.

[38] The report summarised the evidence she had gathered, the applicant's responses and discussed what she saw as discrepancies in the evidence. She set out a number of findings. She preferred Mrs M's account of her conversation with the applicant and considered that his behaviour during the March 2002 school visit did not maintain the neutrality required of the applicant as a public servant. While the applicant said his letter and visit to the school were intended to clear his name, the code required employees to consider how such interactions would be seen by others. His activity, although he believed he was acting in a private capacity, compromised the Department and brought it into disrepute.

[39] She stated her preliminary view that the applicant had committed serious misconduct and that the appropriate disciplinary action was dismissal.

#### *Second disciplinary meeting*

[40] In a meeting with Ms Faith-Allen on 11 December 2002 the applicant and his representative commented on the report. Ms Davies' submissions acknowledged that the 18 November letter

breached the code of conduct but suggested a final written warning was more appropriate than dismissal. The applicant also raised two examples of disciplinary action where other breaches of the code of conduct had not resulted in dismissal.

### *Letter of dismissal*

[41] Ms Faith-Allen's evidence was that she considered all the evidence and the applicant's submissions after the 11 December 2002 meeting. She amended her investigation report to take account of the applicant's explanations. She accepted that the applicant's visit to the school in March 2002 was to prepare for his mediation session and he was entitled to make such preparations. However it was the manner of his interaction with Mrs M that was the issue for the employer.

[42] She also investigated the two examples raised by the applicant of how the Department had dealt with other breaches of the Code of Conduct. On one she could find no additional information and on the other she considered the circumstances were different. In that case there was neither involvement of "stakeholders" nor the same potential to bring the Department into disrepute.

[43] On 16 December she prepared a letter summarising her conclusions and advising the applicant he was dismissed immediately for serious misconduct. She met with the applicant and Ms Davies on 17 December 2002, explained her decision and handed over the dismissal letter.

[44] I am satisfied that Ms Faith-Allen's investigation met the minimum requirements for procedural fairness of an employer investigating alleged serious misconduct. The applicant had clear notice of the specific allegations and likely consequences and a real opportunity to refute the allegations. There is nothing in the evidence to suggest that Ms Faith-Allen's consideration of the applicant's explanations was biased or influenced by irrelevant considerations.

[45] I do not accept that the applicant's suggestion that the investigation was biased from the beginning because it was initiated by Mr Riach with whom he had clashed earlier on a number of issues. I accept Ms Faith-Allen's evidence that Mr Riach played no part in the substance of her investigation or deliberation, other than providing some documents she requested regarding the applicant's earlier training.

### **Did the employer reasonably believe the applicant's conduct warranted dismissal?**

[46] The Authority's role is not to substitute its view for that of the CPS in deciding to dismiss the applicant. Rather it is to determine whether the decision to dismiss him was fairly and reasonably made in the circumstances.

[47] Counsel for the respondent submitted that the standard for this dismissal, made in December 2002, was that which applied before introduction in 2004 of the present test of justification under s103A of the Act. I accept that submission but am satisfied that on either test the respondent has met the burden of establishing that it had reasonable grounds for believing the applicant's conduct was sufficiently grave to warrant dismissal.

[48] The applicant has maintained throughout that his letter to the school was a device to clear his name over the 3 November 2001 incident. In his written statements and submissions for this investigation he has described it as an "*innocent letter*", "*an honest enquiry*" and "*simply a negotiating skill strategy*".

[49] That is entirely at odds with the plain face of the letter. It did not ask for more information or for the school to change its statement about the 3 November 2001 events. It was a demand for damages and a threat of further legal action.

[50] It was written and delivered more than four months after his final written warning for the 3 November 2001 incident had expired. This was more than seven months after he had concluded a full and final settlement with the Department on the incident and disciplinary consequences of it.

[51] The applicant could not reasonably claim his writing of the letter and visit to the school were purely private activities undertaken in a private capacity. Both actions were about a work matter in which he was involved as an employee of the Department. That was the only basis on which he had any contact with the school.

[52] I am satisfied that the respondent had reasonable grounds for believing the letter and the visit were in breach of the standards set in its code of conduct. It was conduct which failed to maintain the neutrality of a public servant. The applicant had not advised the Department of his intended action, despite the issue being one in which he was only involved as its employee. The Department could reasonably apprehend that this reflected badly on it and jeopardised its relationship with the school as a “sponsor” that used CPS work parties. Together, these breaches were capable of amounting to serious misconduct.

[53] The applicant’s employment agreement expressly required him to “maintain high standards of integrity and conduct” and made him subject to the Department’s Code of Conduct. There is no dispute that he was aware of the Code and its application, and that breaches of the Code could result in disciplinary action. He must have been particularly aware of this because breaches of the Code were the reason he received the earlier final written warning for the 3 November 2001 incident.

### **Disparity and racial harassment**

[54] The applicant also alleges that he was treated differently from other employees disciplined for breaching the Department’s Code of Conduct. I am satisfied that Ms Faith-Allen properly considered and dealt with that allegation during her investigation. Neither of the examples that the applicant offered in his disciplinary meetings with Ms Faith-Allen, and repeated during the Authority’s investigation, involved “stakeholders” such as the school or affected the CPS’s relationship with such “sponsors” who are vital if CPS is to secure venues and opportunities for its work parties.

[55] Similarly I am not satisfied that the applicant’s allegations of racial harassment have merit. He offered two examples. One was that letters he wrote to one human resources manager in the Department were referred to another person for reply. That is a reality of the operation of a large organisation and does not amount to ‘racial harassment’ even if the applicant considers corresponding with only the addressed individual is culturally more appropriate for him.

[56] The second example is the applicant’s concern that his manager Mr Riach criticised him in a letter written to the applicant. Mr Riach suggested that the applicant had asked his colleague Mr Henderson to pass on a message about a work matter to Mr Riach. The applicant says that Mr Henderson was older than him, and that as the applicant is a Samoan of chiefly rank, it is insulting to suggest that he would be so disrespectful to an older person as to get Mr Henderson carry a message on his behalf. He also says that he never asked Mr Henderson to pass on the alleged message to Mr Riach in any event. The applicant may well be correct that Mr Riach was mistaken. However, even if Mr Riach’s criticism was wrong and annoying to the applicant (as any mistake by

an employee's manager can be), it falls well below language which would amount to racial harassment as defined in the Act.

### **Determination**

[57] For the reasons given in this determination, I find that the respondent's dismissal of the applicant on 17 December 2002 was justified.

[58] Having reached this conclusion I need not consider the issues of contribution, mitigation or remedies. I find the applicant does not have a personal grievance and dismiss his application.

### **Costs**

[59] Costs are reserved. If costs are an issue, the parties are encouraged to resolve this matter between themselves. If they are unable to do so, the respondent may apply for a determination on costs. If the respondent does file such an application, the applicant will be provided an opportunity to reply before costs are determined.

**Robin Arthur**  
**Member of Employment Relations Authority**