

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 132/07
5074858

BETWEEN

GEORGE MITCHINSON
Applicant

AND

THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Helen Doyle

Representatives: Miss Christine French, Counsel for Applicant
Ms Karen Spackman, Counsel for Respondent

Investigation Meeting: 27 and 28 August at Invercargill

Determination: 9 November 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, George Mitchinson, was employed by the respondent as an instructor in the Corrections Inmate Employment Unit (CIE) at Invercargill Prison for about six years before his employment was terminated on 14 December 2006.

[2] Mr Mitchinson's work as a CIE instructor was covered at all material times by a collective employment agreement between his Union, the Corrections Association of New Zealand and the respondent. The collective employment agreement was the Corrections Inmate Employment CANZ Collective Agreement 2006-2009.

[3] Mr Mitchinson says that his dismissal was substantively and procedurally unjustifiable. He would like his employment relationship problem resolved by orders that he be reinstated to his position with the respondent, reimbursed his lost wages from the date of his dismissal, paid compensation in the sum of \$25,000 and reimbursed legal costs.

[4] The respondent is the Chief Executive of the Department of Corrections (the Department of Corrections). The Department of Corrections operates a CIE Unit at Invercargill Prison in which Mr Mitchinson was employed. The primary goal of the service provided by CIE is set out in the Collective Employment Agreement as:

... a professional service committed to reducing reoffending through the development of enterprises offering inmates employment in work places modelled as closely as possible to the commercial world, to prepare inmates to operate effectively in that world.

[5] The Department of Corrections says that Mr Mitchinson falsely declared a work-related injury to his left knee during a warm up to the control and restraint (C&R) training on 2 August 2006 which amounted to serious misconduct and that his dismissal on 14 December 2006 was justified for that reason.

The test for justification in s.103A of the Employment Relations Act 2000

[6] The Authority is required under the test as set out in s.103A of the Employment Relations Act 2000 to determine, on an objective basis, whether the employer's actions were what a fair and reasonable employer would have done in the circumstances at the time the dismissal occurred.

[7] It was held in *Air New Zealand Ltd v. Andrea Hudson* [2006] 1 ERNZ 415 para. 132

The section does not differentiate between aspects of the dismissal process but, because it refers in general to the employer's actions, the test for justification applies at all stages including the employer's decision that misconduct has occurred and the employer's decision to dismiss.

Each of these stages is open to scrutiny although this is not to be done in a mechanical way as it is recognised that the lines between each stage are often blurred.

The issues

[8] The issues for the Authority to determine in this case are:

- Was the investigation into the allegation that Mr Mitchinson had falsely declared a work-related injury to his knee fair and reasonable?

- Was the Department of Corrections justified as a result of that investigation in concluding that there had been serious misconduct?
- Was the decision to dismiss justifiable in all the circumstances?
- If the decision to dismiss was not justifiable, then what remedies should be awarded and are there issues of contribution?

Was the investigation into the allegation that Mr Mitchinson had falsely declared a work-related injury to his knee fair and reasonable?

Commencement of the investigation into the allegation

[9] Mr Mitchinson attended work for the first time after 2 August 2006 on 4 September 2006. He undertook some work until he was asked to go to the Prison Manager's office. At the office, Mr Mitchinson was given a letter advising that there was to be an investigation into an allegation of serious misconduct that he had falsely declared a work-related injury to his left knee during the warm up to the C & R training on 2 August 2006.

[10] Mr Mitchinson was on special leave until 6 September 2006 and then suspended for the duration of the investigation and disciplinary process. He did not return to work before his dismissal on 14 December 2006.

The medical evidence about Mr Mitchinson's knee

[11] On 2 August 2006, Mr Mitchinson had an appointment with Dr David Jones at 11.15am at the Tuatapere medical practice. Tuatapere is about one hour's drive from Invercargill so Mr Mitchinson would have left the prison shortly after 10am that day for the appointment.

[12] Mr Mitchinson advised Dr Jones that he had been doing warm up exercises for C & R training that day when he experienced acute pain associated with a give way sensation in his left knee.

[13] Dr Jones, in his evidence to the Authority, said that he examined Mr Mitchinson's knee. He observed that the left knee was slightly swollen and tender on the lateral or outside of the knee and that the knee was stiff and there was some creaking (creptitus) in the knee.

[14] Dr Jones diagnosed a sprain of the collateral ligament and advised rest, anti-inflammatory medication and physiotherapy.

[15] Dr Jones said in his evidence that what patients tell a doctor about how an injury happened is important in making a diagnosis but it is not the only factor. He said that in Mr Mitchinson's case, there was physical evidence that was *entirely consistent with what he had been told by Mr Mitchinson about the cause of the injury and when it happened*.

[16] Dr Jones completed an ACC form and issued Mr Mitchinson with a medical certificate. He set a review date of 9 August 2006. Dr Jones found Mr Mitchinson's knee to be stiff and painful on that date, and Mr Mitchinson was given a further certificate with a final review date of 31 August 2006.

[17] After 9 August 2006, Mr Mitchinson went away on a pre-arranged holiday to Australia with his wife Jillian. Mr and Mrs Mitchinson gave evidence at the Authority investigation meeting that the holiday was spoilt in some respects. That was because Mr Mitchinson as a result of his knee was not able to do the long guided walks in the Lamington National Park as planned which had been the whole point of the trip in the first place.

[18] Dr Jones undertook a final review of Mr Mitchinson's knee on 31 August 2006. The knee was at that time pain-free and the stiffness had resolved. Dr Jones considered Mr Mitchinson was fit to return to work from 31 August 2006.

[19] The Department of Corrections is an ACC-accredited employer and contracts Care Advantage to help with management of ACC claims. Care Advantage asked Dr Phil Short for a medical opinion with respect to Mr Mitchinson's knee which was duly provided. Dr Short's opinion was that the cause of Mr Mitchinson's pain was related to his underlying osteoarthritis that was aggravated by the warm up exercises rather than a new injury on 2 August 2006.

[20] Dr Jones agreed that what Dr Short was saying in his opinion was possible although Dr Jones believed at the time, based on what he saw, that the sprain was a more likely cause.

[21] Whether Mr Mitchinson and/or Dr Jones were mistaken in treating the swelling of the new injury for the purposes of ACC was not relevant to the allegation

that Mr Mitchinson faced in terms of his employment with the Department of Corrections.

[22] Dr Jones said that, given Mr Mitchinson's history of knee problems, his age of 61 and the fact that he was not particularly fit that it would not take much to cause an injury and an awkward movement as he rotated his knee could be enough to cause a sprain or, as Dr Short suggested, a flare up of his arthritis.

[23] Roger Leslie is employed by the Department of Corrections as the CIE Operations Manager for Otago, Dunedin and Invercargill prisons. Mr Leslie was appointed as the investigating officer for the employment investigation into the allegation of serious misconduct with respect to Mr Mitchinson's claim for ACC for a work-related injury.

[24] Mr Leslie provided a report following his investigation into the circumstances involving Mr Mitchinson dated 10 October 2006. He did not talk to Dr Jones as part of his investigation although he refers in para.27 of that report to Mr Mitchinson's visit to the doctor and the fact that Mr Mitchinson signed an ACC claim form which stated he had been doing warm ups for C & R and felt his knee go.

[25] Mr Leslie did not think there would be anything the doctor could add that would be relevant to the investigation. Mr Leslie said the issues for his investigation were whether Mr Mitchinson suffered a work-related injury at the C & R training and whether Mr Mitchinson followed procedure by reporting the accident in accordance with Departmental policy.

[26] Russell Baker was, until 12 February 2007, Sector Manager for CIE Internal Services. Mr Baker made the decision to dismiss Mr Mitchinson from his employment for falsely declaring a work injury. His factual findings were that he concurred with the conclusion in Mr Leslie's report that the allegations against Mr Mitchinson were upheld on the facts available. He did not talk to Mr Mitchinson's doctor before making a decision to dismiss. He did have the ACC claim form and medical certificates and a limited extract from Mr Mitchinson's patient notes.

[27] Mr Baker said in evidence that he was never asked to talk to Mr Mitchinson's doctor and that Mr Mitchinson had a reasonable opportunity to provide him with information or explanations about the allegation. Mr Baker also said that the

information provided by the doctor was based on Mr Mitchinson self-reporting and that, even if he had the information in front of him at the time he made the decision, his ultimate decision would still have been the same. Mr Baker said that the Department did not deny that Mr Mitchinson may have a knee injury, but the question for him was whether he had injured his knee on the particular day doing the C & R warm up exercises.

[28] Dr Jones' diagnosis was not based simply on self-reporting. Mr Mitchinson had physical symptoms consistent with a recent injury to his knee or recent aggravation of an existing knee condition.

[29] A fair and reasonable employer investigating and making a decision about the allegation Mr Mitchinson was facing would have realised the need to have some medical information about whether what had happened to Mr Mitchinson's knee was consistent, or not, with his explanation that he had injured his knee doing warm up on 2 August 2006.

[30] It is not enough for the Department of Corrections to say that Mr Mitchinson and/or his representatives never asked that Dr Jones be spoken to.

[31] The evidence from Dr Jones, provided for the purposes of the Authority investigation meeting, was information that Mr Leslie, as part of his investigation, and Mr Baker, as decision-maker, should have had in order to make a proper assessment and decision in terms of the allegation. Had the information been requested and properly assessed, it could have led to different conclusions in terms of Mr Leslie's investigation and a different outcome in terms of Mr Baker's decision to dismiss.

[32] The failure to obtain some information from Dr Jones and/or talk to him was a significant omission. A physical examination of Mr Mitchinson's knee showed something had recently gone wrong with it. Mr Mitchinson had an appointment with his doctor a little over three hours from when he told Mr Leslie the injury had occurred.

[33] In the absence of that information the investigation primarily focused on whether anyone saw Mr Mitchinson do warm ups at the C & R training and what Mr Mitchinson did after the training and whether he reported any injury or not.

[34] Neither Mr Mitchinson nor anyone else was asked whether he had been injured before attending work and the C & R training on 2 August 2006 before Mr Baker came to a decision that Mr Mitchinson did not participate in the warm up exercises and therefore suffered no injury at the training.

The timeline

[35] Martin Rickard was the Acting Southern Region Catering Manager of CIE and Mr Mitchinson's manager. Mr Rickard had concerns about Mr Mitchinson as an employee.

[36] Mr Rickard sent an email dated 11 August 2006 to two staff, one of them a manager, in the Human Resources Department. Mr Rickard also copied the email to Mr Baker. Mr Rickard set out details of a conversation he had had with the trainer at the C & R training on 2 August 2006, Patrick Lee. Mr Rickard concluded in his email by saying:

In summary, I am fully aware any investigation will take its course, however in my opinion this fits with the ongoing behaviour displayed by George and unless we address this in a serious manner will most likely continue.

[37] Mr Baker also requested Mr Rickard provide a timeline of his contact with Mr Mitchinson since Mr Rickard commenced in his managerial role. Mr Rickard duly emailed this timeline to Mr Baker on 10 August 2006. The timeline commenced at 1 May 2006 and concluded with the conversation Mr Mitchinson had had with Mr Rickard on 2 August 2006. Much of what was contained in the timeline email was of a negative nature about Mr Mitchinson.

[38] Both emails were supplied to Mr Leslie as part of the information for his employment investigation. Quite properly, Mr Leslie attached both emails to his final report as part of Appendix 20.

[39] The High Court in *Hillier v. Lyttelton Borough Council* (1987) 1 NZELC 95,647 at 95,653, said in terms of inquiring into the allegations of misconduct in a fair and reasonable manner that:

It means that the employer must approach the inquiry with an open mind so he is able to give due consideration to what the employee has to say, and to weigh allegations against explanations in a reasonably objective way. Adherence to the outward formalities of fairness mean nothing if a decision has already been made, or if the employer's

mind is for other reasons turned against the employee so that the outcome of the inquiry is unlikely to be effected whatever he may say in his own defence.

[40] Mr Leslie said in his evidence that he tried not to let the timeline affect him in terms of his role as investigator. Mr Baker, in setting out the key factual conclusions in his decision, said that he had discounted the email timeline. In those circumstances, it is somewhat difficult to understand why the timeline was requested in the first place and then provided to the investigator in this matter.

[41] It is important for fairness in an investigation that Mr Mitchinson's explanations and any other information that may corroborate and support those explanations be received in an open-minded way. For reasons that I shall set out as I consider the investigation and decision making process I am not satisfied on an objective basis that all the information was received in that way.

What Mr Mitchinson said

[42] Mr Mitchinson was represented by his Union throughout the disciplinary process. He was interviewed as part of Mr Leslie's investigation and provided a statement. His consistent explanation was that he had sustained an injury at C & R training to his left knee and that he believed he had followed the correct procedures in terms of having reported the injury.

[43] Mr Mitchinson said that he arrived at work on the morning of 2 August 2006 at about 7.40am and went to the canteen. At about 8am he looked around the canteen and there was no one else in the room. He made his way to the room where the C & R training was taking place. He said he arrived there late. Mr Mitchinson said in his interview ... *I didn't do any stretches I got straight into it – just removed my keys – I got into knee bends/rotations and it went bang (knee) I felt a sharp pain in my knee.* He described the specific exercise that led to the knee injury as the knee rotation exercise. He said that he attempted the next exercise where he rotated his foot but found the pain too much.

[44] He said that there was an exchange between him and the C & R instructor, Mr Lee. He thought Mr Lee asked him if he had an injury and Mr Mitchinson said he responded that he did. Mr Mitchinson was then told to go and see his manager.

[45] Mr Mitchinson said he went to see Gary Vidler who was the delegated kitchen manager, told him about his knee and then Mr Vidler emailed Mr Rickard at 8.18am. Mr Mitchinson saw the email before it was sent to Mr Rickard and was comfortable with its content. Mr Mitchinson spoke to Mr Rickard about what had happened at C & R training. He said that Mr Rickard told him to go to the doctor and get a medical certificate. He did not accept some matters put to him by Mr Leslie about that telephone call but Mr Rickard had indicated that Mr Mitchinson was talking about an old or previous injury.

[46] Mr Mitchinson said that he then contacted the nurse at the Prison and explained the matter to her. He said that he asked the nurse if he needed to complete an accident form but she told him, as he already had a certificate for his left knee, he would still be covered.

[47] Mr Mitchinson said he then went back to the C & R room and told Mr Lee what he had done and that he was to see his doctor.

[48] Mr Mitchinson then went to see Dr Jones at 11.15am and the ACC form was faxed through to Care Advantage. Before 11.38am on 2 August 2006 Mr Mitchinson telephoned Mr Vidler and advised him that his doctor had put him off on ACC for a week. He also advised Mr Vidler that he had an appointment for 11am the following Wednesday, 9 August for a reassessment. He said that his wife Jillian would drop the medical certificate off to the prison on Friday. Mr Vidler advised Mr Rickard of that discussion with Mr Mitchinson, although not the detail about who would drop off the certificate, by email dated 2 August 2006 which was recorded as being sent at 11.38.

Conclusions reached as to Mr Mitchinson's intention to participate that morning in C & R training

[49] Mr Leslie questioned two control room staff about whether Mr Mitchinson's request for keys that morning was inconsistent with an intention to participate. Both control room officers said that there was no indication that Mr Mitchinson was not going to participate that morning in C & R training except one said that Mr Mitchinson was in uniform.

[50] There was some emphasis during Mr Leslie's investigation on the fact that Mr Mitchinson attended the training in his uniform. The other participants were in

casual clothes. Mr Mitchinson explained that a few years earlier he had damaged his clothes and from that time always wore his uniform to training.

[51] Mr Baker wrote to Mr Mitchinson by letter dated 27 November 2006. In that letter he set out the outcome of the investigation and his preliminary view of penalty. He said about the uniform:

I can advise that while I did find it unusual that you would attend this training in your uniform, I did not consider that factor to be determinative.

[52] When interviewed as part of Mr Leslie's investigation Mr Lee said he did not talk to Mr Mitchinson about his dress for the training. He confirmed that in his evidence before the Authority investigation meeting.

[53] That is inconsistent with that a statement in an email that I have referred to above dated 11 August 2006 from Mr Rickard in which Mr Rickard records a conversation with Mr Lee. In the second bullet point of that email, Mr Rickard recalls *Pat Lee spoke with George and asked him why he was not dressed appropriately if he was to partake in the C & R Refresher*. Mr Rickard and Mr Lee were not questioned on that inconsistency during Mr Leslie's investigation or by Mr Baker.

[54] Mr Lee also said, when interviewed by Mr Leslie, that when he saw Mr Mitchinson in his uniform he assumed he had been taken off the course. That was referred to in Mr Leslie's report.

[55] Mr Leslie said in his evidence that he did not reach a view on whether Mr Mitchinson intended to participate in C & R training. Mr Baker did not reach an independent conclusion about that matter. Mr Mitchinson had though removed his key chain and put it into a pigeonhole before proceeding through to the training room on 2 August 2006.

Conclusions reached as a result of the information provided by the other participants in the C&R training on 2 August 2006

[56] In para. 34 of his investigation report Mr Leslie sets out as summary of what the participants said they saw at the C & R Training:

Of the eight persons who were at the course that day with Mr Mitchinson, three stated he took no part at all (Lee, Mason and Anderson) Two said they didn't see him take

part (Ballantyne and Grey), and one (Goetz) said that he did not remember him taking part. Two (Ithell and Soper) said that they saw him take part.

[57] Only some of the participants and Mr Lee were asked how far away from Mr Mitchinson they were and whether they were able to see him clearly at all times. The questions asked of the participants were not consistent.

[58] Mr Leslie referred to Mr Soper and Mr Ithell claiming to have seen Mr Mitchinson undertake warm-up exercise in para.48 in his report. He said in para. 48 that Mr Ithell is the chairman of the Invercargill branch of Corrections Association New Zealand and that Mr Ithell intended to formally support Mr Mitchinson in the investigation and take part in preparing a defence for him.

[59] That aside it is not clear why Mr Soper and Mr Ithell's statements that they had seen Mr Mitchinson participate in warm ups were rejected by Mr Leslie.

[60] Mr Leslie gave some evidence at the Authority meeting about Mr Soper's demeanour but that was not a matter appearing in the report.

[61] Mr Baker had three meetings with Mr Mitchinson after the report was released. These took place on 3 November 2006, 20 November 2006 and 12 December 2006. Mr Baker did not talk to any of the other people interviewed by Mr Leslie as part of his investigation.

[62] Mr Baker said in his letter of 27 November 2006 that on balance, he accepted the evidence of those officers who said that Mr Mitchinson did not participate in the warm up exercises. Mr Baker stated that he did not read into the report that Mr Ithell's position as Union delegate should mean his evidence should be discounted but did not mention the reason why he rejected the statements from Messrs Ithell and Soper.

[63] In his evidence at the Authority investigation meeting Mr Baker said that he felt Mr Ithell in his statement contradicted himself and that Mr Soper had said that he heard Mr Mitchinson say *something has gone pop*, and Mr Baker thought someone else must have heard it if it was to be true.

[64] Mr Baker concluded that the information provided by Mr Lee was very reliable and that he was able to provide a full account of what happened when

Mr Mitchinson arrived at training. He said Mr Lee's account that Mr Mitchinson did not participate in the warm up exercise was very credible. Mr Baker said in contrast Mr Mitchinson was not able to provide a credible explanation with sufficient detail that would give him reason to believe he did participate in the exercises. Mr Baker said that three of the other trainees say that he [Mr Mitchinson] did not participate in the warm up exercises.

[65] Mr Mitchinson did provide detail with respect to what exercises he was doing at the C & R training. Whilst Mr Baker's conclusion could be reasonable if Mr Mitchinson had not been able to say what exercise he was doing that was not the situation here. There was also consistent physical evidence of a recent injury following examination of the knee by a doctor.

[66] Mr Leslie's report concluded, in para.50, that while Messrs Ithell and Soper claimed to have seen Mr Mitchinson undertake warm up exercises at the start of C & R training, there was a body of evidence that would indicate otherwise. He then set out seven bullet points.

[67] Some of the bullet points contain statements that are not correct. One of them is that Mr Mitchinson was clearly heard saying he was carrying an old injury and this was the reason he couldn't participate in the course. There is no information from the participants that could justify a statement of that nature. There is also a statement that no-one else interviewed corroborates Mr Mitchinson's statement that he told Mr Lee he had just hurt himself. Mr Soper did in his interview so that statement is also incorrect.

[68] Mr Leslie set out in one of the bullet point statements that three of those present at the C & R training say that Mr Mitchinson definitely did not participate in any warm up exercises. He records that the master trainer, Pat Lee, was adamant about this.

[69] The three referred to in that bullet point are Mason, Anderson and Lee.

[70] The interviews undertaken by Mr Leslie with the participants took place some weeks after 2 August 2006. A fair and reasonable employer would be cautious about the reliability of individual recollections of a training event. Memory can be assisted and reliability gauged by preparing a diagram and having the participants' indicate where they were standing on the day in question in the room. A diagram of the room

to show where the participants were standing was not prepared as part of the disciplinary investigation. No dimensions of the room were taken. I think a reasonable and fair employer would have considered a diagram and dimensions in terms of the room as particularly important in this case.

[71] I turn to the three participants that Mr Leslie said in his report say Mr Mitchinson definitely did not take part. Mr Lee was adamant that Mr Mitchinson did not participate so there is no difficulty with Mr Leslie's conclusion about Mr Lee.

[72] Ms Mason was asked whether she saw Mr Mitchinson participate in any training at all, including warm ups. She answered no. Ms Mason was not asked, as some other participants were, whether she was able to clearly see Mr Mitchinson at all times and whether he could have undertaken some exercise without her seeing him. She was asked if she could recall Mr Mitchinson suffering any injury that morning and replied *no, he did not participate*.

[73] Ms Mason said that she could recall what happened with Mr Mitchinson during the course of the morning. She said Mr Lee asked for a declaration of injuries and Mr Mitchinson said he had a problem with his knee and was asked to go and report to his manager.

[74] Importantly the declaration of injuries is something that occurs at the start of C & R training. Mr Mitchinson said that he arrived late to training at about 8.05am. Another participant Mr Ballantyne confirmed that Mr Mitchinson arrived during the warm up exercises. The exercises take place after the participants at training are asked about any injury that precludes them from training. Mr Lee said in his evidence to the Authority that Mr Mitchinson had arrived late to C & R training so he would not have been specifically asked at the same time as the other participants about an injury.

[75] Ms Mason was therefore mistaken about the time of the exchange with Mr Lee. Having been mistaken about that matter, then a fair and reasonable employer would have considered the possibility that her recollection was less reliable because of a real possibility that she may have assumed Mr Mitchinson left before the warm up exercises had even started.

[76] All that could fairly and reasonably be concluded from Ms Mason's interview was that she had not seen Mr Mitchinson participate in warm up exercises. A

conclusion that Ms Mason said that Mr Mitchinson definitely did not participate is going too far.

[77] Mr Anderson answered no to the question whether he saw Mr Mitchinson participate in training at all. When asked whether he recalled Mr Mitchinson suffering any injury that morning, he answered *no – he didn't participate in warm ups etc (as far as I recall)*. Mr Anderson was not asked if he could see Mr Mitchinson at all times and whether Mr Mitchinson could have undertaken exercises without Mr Anderson seeing. Again there is some confusion as to the exchange. Mr Anderson said *when Pat asked him about injuries George said he did have one said he couldn't do the course*. A conclusion that Mr Anderson said that Mr Mitchinson definitely did not participate is over-stated.

[78] Mr Soper and Mr Ithell were adamant in their interviews that Mr Mitchinson had undertaken some of the warm up exercises that they saw. Mr Mitchinson was as well.

[79] Mr Soper said, when asked if he recalled what happened with Mr Mitchinson during the course of the morning, *did hands – then tried to rotate his knee – took hand off leg and said “something has gone pop!”*. He said in terms of any discussion with Mr Lee – *said to Pat Lee “I can't do this” Pat said “it's no good being here – go and see your manager.”* Mr Soper said that Mr Mitchinson had indicated he had injured his knee to Pat Lee during the warm-up and he recalled that Mr Mitchinson returned one hour later and talked to Mr Lee. Mr Soper was not asked whether he could see Mr Mitchinson at all times.

[80] Mr Ithell said in his interview that Mr Mitchinson *did some of the warm up exercises that I saw*. He accepted that Mr Mitchinson could have done some exercise that he did not see because he was exercising as well. He also said he was not able to clearly see Mr Mitchinson at all times but was aware of his presence at all times. I do not find that a fair and reasonable employer would conclude that statement was contradictory and simply dismiss it on that basis.

[81] Mr Leslie said in his report that two others present say that they did not see him [Mr Mitchinson] participate in warm-ups.

[82] Mr Grey is one of those two others. He said in his interview that he recalled that Mr Mitchinson left near the start [of training] and he said he did not think

Mr Mitchinson took part at all. He said that there was an issue about Mr Mitchinson and he was asked to go and see his manager. Mr Grey could not recall whether he saw Mr Mitchinson clearly at all times or where he was in relation to Mr Mitchinson. Inconsistently with that, he answered no to whether Mr Mitchinson could have undertaken any exercise without seeing him.

[83] Mr Ballantyne was the other person referred to in the report who did not see Mr Mitchinson participate in the warm up. In an email, Mr Ballantyne said at the time of Mr Mitchinson's arrival we (the class) were in the process of doing warm up exercises. He said *at no time was I in a position to see Mr Mitchinson do any warm up exercise.* Mr Ballantyne said that Mr Mitchinson did state that *he could not do that.* Mr Ballantyne said in his email that he took that to mean that he could not do the knee exercises that the class were doing. Mr Ballantyne said that Mr Mitchinson was told to go and see his manager by Mr Lee.

[84] Mr Goetz said in his interview, as to whether he saw Mr Mitchinson participate in any training at all, including warm ups, that *he wasn't there for long – he left and didn't return.* He could not recall anything else in particular.

[85] Mr Leslie and Mr Baker both concluded that nothing was said by Mr Mitchinson to Mr Lee that he had just hurt himself.

[86] Mr Lee was interviewed by Mr Leslie on 14 September 2006 and provided an account of the exchange with Mr Mitchinson in an email to Mr Rickard dated 6 August 2006.

[87] In the email of 6 August 2006, Mr Lee said that *George could [not] even partake in the warm up session stating that he was not able to rotate his knees or ankles and if he received a knock to his leg that would be it.* It was clarified by Mr Lee in a later email that the word *not* was missing. Mr Lee in his email said he advised *George he was not to proceed any further and to advise his U/M that I had removed him from the course.*

[88] This email refers to the same exercises that Mr Mitchinson says he was undertaking at the time he felt the sharp pain in his knee – that is knee rotations followed by an ankle rotation.

[89] In the interview some five weeks later with Mr Leslie, Mr Lee said that

When I started with warm ups I said “come on George let’s get started” and he replied “I can’t do those.” I said “it’s only warm-ups” and he replied “No I can’t do those, if I get a bump my leg is useless.” I then said “ok go and see your manager, I’m not qualified to make assessments (or words to that affect). At that stage he left the training. At approx 10.00am he returned and said he’d seen the doctor (or that he had an appointment) and couldn’t participate further.

[90] Mr Leslie and Mr Baker never analysed the statements on the basis that there was a possibility that all the participants may have been telling the truth as they saw it. The analysis of the statements was undertaken on the basis that the information provided by some participants and particularly Mr Lee was to be believed and the other information was not to be believed.

[91] If the statements had been analysed correctly in an open minded way it would have been clear that only Mr Lee was adamant that Mr Mitchinson had not participated in the warm up exercises.

[92] Mr Ithell and Mr Soper were adamant that Mr Mitchinson had taken part in the warm up exercises as was Mr Mitchinson himself. The other five participants were uncertain or could only say that they did not see.

[93] There was some inconsistency between the statements in terms of when Mr Mitchinson arrived at the C & R and what he said to Mr Lee. Assumptions could well have been made about Mr Mitchinson’s participation because some participants thought Mr Mitchinson arrived when Mr Lee was asking about injuries and also because of the fact Mr Mitchinson was wearing uniform. This was never considered by Mr Leslie and Mr Baker.

[94] Every participant with the exception of Mr Lee was doing their warm up exercises and were not simply focusing on Mr Mitchinson. The warm up exercises did not involve the participants flinging themselves up into the air. It was a rotation of the knees and ankle, a less obvious exercise.

[95] A fair and reasonable employer would have considered the possibility that Mr Mitchinson could have undertaken the warm up exercise without Mr Lee seeing. This was not a possibility mentioned in Mr Leslie’s report or Mr Baker’s decision making.

[96] A fair and reasonable employer would have considered the possibility that Mr Mitchinson could, having arrived late, made his way to the mat and participated for a brief period in some warm up exercises involving rotation of knee and ankle before experiencing pain and stopping. That possibility would have been consistent with Mr Mitchinson's interview with Mr Leslie where he says that *I got straight into it ...I got into knee bends/rotations*

[97] Mr Lee said Mr Mitchinson told him *I can't do those* and stated he was not able to rotate his knees and ankles, and Mr Ballantyne said that Mr Mitchinson said to Mr Lee *he could not do that*. The language is ambiguous. It could mean that Mr Mitchinson did not believe he could undertake the exercise but could equally mean that Mr Mitchinson was advising Mr Lee that he had tried to do the rotation exercise but because of the pain he experienced could not do it. The ambiguity in the language was never taken into account or even referred to by Mr Leslie and Mr Baker and instead the interpretation least favourable to Mr Mitchinson was placed on the exchange.

[98] A fair and reasonable employer would not without good reason have simply dismissed Mr Ithell and Mr Soper's evidence. I accept Miss French's submission that a truthful person is much less likely to make a mistake about seeing something like participation in warm-ups than not seeing something. There was no reason for a fair and reasonable employer to conclude that Mr Soper and Mr Ithell were deliberately lying. Mr Baker would have known that Mr Soper and Mr Mitchinson had been in dispute about a previous matter so there was no particular friendship between the two of them or between Mr Ithell and Mr Mitchinson.

[99] A great deal of emphasis was placed by Mr Leslie and Mr Baker on the C&R injury record book because there was no record that Mr Mitchinson sustained a new injury during training. That record was completed at the start of training by the trainer and is signed by the participants. Mr Mitchinson was late so did not, as the other participants had, sign in terms of any injury. All the report says about Mr Mitchinson is that he was removed from the course due to injury. At the end of the report it states *good day's work no injuries*.

[100] I accept Miss French's submission that the fact that there was no entry in the record is equally consistent with Mr Lee never seeing Mr Mitchinson doing the

exercises as with Mr Mitchinson never having done the exercises, although that possibility was never considered by Mr Leslie or Mr Baker.

[101] In conclusion, the analysis of the participants' interviews was flawed. Evidence favourable to Mr Mitchinson was simply rejected without good reason. The possibility that Mr Lee may not have seen Mr Mitchinson was never referred to and instead Mr Lee's account accepted on the basis that it was more detailed than Mr Mitchinson's although it is unclear how. The ambiguity in the language used was never referred to Mr Leslie or Mr Baker and there was in all the circumstances too much emphasis placed on the injury record book. I do note with respect to the injury record book that in his report Mr Leslie referred under Executive Summary to Mr Lee denying that Mr Mitchinson's participation got further than the standard questions, pre-physical activity, about previous injuries. This is incorrect because Mr Mitchinson arrived after that time.

Leaving the training room

[102] Mr Baker stated in his letter of 27 November 2006 that one of the key factual considerations was that Mr Mitchinson did not report the accident in the appropriate way which gave him cause to seriously doubt the authenticity of his account of events as they occurred on the day.

[103] Mr Baker concluded that Mr Mitchinson did not make anyone aware that he had sustained a new injury at the training because he did not report the accident as a workplace injury and did not complete a work accident report.

[104] Mr Vidler then sent an email to Mr Rickard which he discussed with Mr Mitchinson at 8.18am on 2 August 2006. The email provided:

*Marty,
I have just been informed by the senior C&R instructor Pat Lee that Mr Mitchinson has been declared unfit to complete his refresher course. I have spoke with Mr Mitchinson in connection with this and he wants to know if the department will require a medical certificate to back this assumption of Mr Lee's.*

[105] It is clear that the email is incorrect because Mr Lee did not talk to Mr Vidler. This email was the main reason a statement from Mr Vidler in which he said Mr Mitchinson told him that he had injured his knee at C & R training was rejected.

[106] A telephone conversation took place between Mr Mitchinson and Mr Rickard. Mr Rickard did not accept that Mr Mitchinson advised him during the telephone call that he had sustained an injury at C & R training.

[107] Mr Rickard stated in an email to Mr Baker dated 10 August 2006 that he received a telephone call from Mr Mitchinson at about 8.30am stating that he could not do C & R training as he was carrying an injury and the instructor informed him to leave. Mr Rickard said that he advised Mr Mitchinson that he would need to have a doctor's certificate stating that he could not participate in C & R training.

[108] When interviewed by Mr Leslie on 14 September 2006, Mr Rickard said that Mr Mitchinson stated he could not participate in the C & R training because he could not rotate his knee. Mr Rickard said Mr Mitchinson asked if he needed a medical certificate and Mr Rickard said yes so he could put one on file. He said Mr Mitchinson told him that he could not even do the warm ups but said nothing about being injured at C & R training. Mr Rickard said that Mr Mitchinson did not advise him that he had injured himself during the training at all. He said that interpreted from what Mr Mitchinson was saying that he had a previous injury.

[109] Mr Mitchinson denied when interviewed by Mr Leslie that he had talked to Mr Rickard about an old injury. He did not accept that Mr Rickard had asked him to work in the kitchen and that he had agreed to do so instead of doing C & R training.

[110] A fair and reasonable employer faced with the conflicting accounts of Mr Rickard and Mr Mitchinson would, at least at this point, have realised the need to have some medical information to ascertain if Mr Rickard's interpretation that Mr Mitchinson had had a previous injury was right or not.

[111] Mr Vidler was asked to outline the events of the morning of 2 August 2006 as he recalled them with respect to Mr Mitchinson in a statement to Mr Leslie dated 21 September 2006. I find that a fair and reasonable employer approaching the matter with an open mind would find Mr Vidler's statement important in three aspects.

[112] The first important aspect of Mr Videler's statement is that he said *George said he would go to Medical and fill an accident chit or accident report and he would return after this.* This would indicate that Mr Mitchinson intended filling in an accident form.

[113] The second important aspect of Mr Vidler's statement was that he said *he phoned me later to say that he was off on ACC for a week and would drop the form in.* That would show that Mr Mitchinson was keeping the Department of Corrections informed.

[114] The third important aspect of Mr Vidler's statement concerned an answer to a question from Mr Leslie about whether Mr Vidler understood that Mr Mitchinson had injured himself at C & R training or that he could not participate because of a previous condition. Mr Vidler said *I understood that it was an injury at the C & R – I also know that his knees are bugged. He said something like he'd done his knee in while doing the warm- up.*

[115] Mr Leslie in para.36 of his report states that Mr Noakes of CANZ, who represented Mr Mitchinson, said Mr Vidler and Joanne Purdue, Team Leader Nursing, were crucial to the investigation.

[116] Mr Leslie further states in para.36 of his report that Mr Vidler was subsequently interviewed and added little that was actually crucial to the investigation other than Mr Vidler contradicted Mr Mitchinson's statement that he had been party to the telephone conversation between Mr Mitchinson and Mr Rickard on the morning of 2 August.

[117] Mr Mitchinson however, had never said in his statement or interview that Mr Vidler was a party to the conversation. He had said that Mr Vidler was in the room when he was talking to Mr Rickard. Mr Vidler therefore did not contradict Mr Mitchinson's statement in the manner described by Mr Leslie.

[118] In para.37 of his report, Mr Leslie referred to a telephone conversation between Mr Vidler and Mr Rickard in which Mr Vidler said he did not know any more than was outlined in the email. Mr Leslie also relies on the email sent by Mr Vidler on 2 August to Mr Rickard in which there is no mention of an injury but as already set out is factually incorrect in other aspects.

[119] On 20 November 2006 there was a meeting between Mr Mitchinson and his representative Barry Noakes and John Ithell and Mr Baker and Ms Fitzpatrick from human resources. The notes from the meeting show Mr Vidler's statement that Mr Mitchinson said his knee injury occurred during the warm ups was put to

Mr Baker by Mr Noakes. Mr Baker responded that this statement was contradicted by Mr Vidler in another statement.

[120] The notes from the meeting show that Mr Baker, notwithstanding he had the investigation report to which Mr Vidler's statement was attached, then asked Mr Mitchinson why he had made no reference to an injury to Mr Vidler or Mr Rickard. Mr Mitchinson clarified that Mr Lee asked him to leave the course and that he had sustained an injury and talked to Mr Vidler and told the nurse and she said he did not need another one (accident report) as the old one should do.

[121] Mr Baker then put to Mr Mitchinson that Mr Vidler disputed that Mr Mitchinson had told him about the injury which was incorrect.

[122] Mr Baker concluded that Mr Mitchinson did not say to Mr Vidler that another injury had arisen as a result of his participation in the warm ups. He did not talk to Mr Vidler before reaching that conclusion.

[123] Mr Leslie agreed in his evidence to the Authority that he appeared to have missed one of the important matters in Mr Vidler's statement about going for an accident chit or accident report from Medical. Mr Baker does not refer to Mr Vidler's statement about Mr Mitchinson going for an accident chit or accident report in his key factual conclusions. This was, however, brought to his attention by Mr Noakes at the meeting of 20 November 2006 to show that Mr Mitchinson had every intention of filling out an accident report.

[124] A fair and reasonable employer would not simply have dismissed Mr Vidler's statement on the basis that it added little that was actually crucial to the investigation and was inconsistent with an email that was factually incorrect.

[125] Mr Vidler's statement contained information that was consistent with Mr Mitchinson's version of events that he had advised Mr Vidler of his injury at C & R training and that he intended to go to Medical for an accident chit or accident report. Mr Baker should have inquired further into this matter as it was brought to his attention several times by Mr Mitchinson's representatives and had been dealt with inadequately in Mr Leslie's report.

[126] Mr Vidler's statement also confirmed that Mr Mitchinson had advised him about him being off on ACC for a week. Mr Vidler notified Mr Rickard of that on 2

August 2006 at 11.38am by email. The subject of the email is *George Mitchinson ACC*. The email explains that Mr Mitchinson had been put off by his practitioner for a week; that he has an appointment for 11am on Wednesday, 9 August for a re-assessment and that a medical certificate will be dropped off some time that week.

[127] The treatment of Mr Vidler's statement is a clear example of a closed mind approach to the investigation of the allegation against Mr Mitchinson.

[128] Mr Mitchinson said that he asked the nurse whether he would need to complete an accident form but was told that there was already a medical certificate for his knee so he would be covered. For some reason, although I accept this does not seem to be the situation in other prisons, the nurse did hold some medical information about Mr Mitchinson because she supplied it to Mr Leslie about other injuries at earlier dates to Mr Mitchinson's knee.

[129] Mr Leslie spoke to the nurse, Ms Purdue, as part of his investigation. There is a one line question and answer attached to the investigation report and then signed by Ms Purdue. The question is *do you remember Aug 2 regarding George Mitchinson?*. The answer is *I remember no specifics about the C&R training*.

[130] Mr Baker said to me that he did not consider from that very brief statement that the nurse could even recall Mr Mitchinson visiting. He said he understood from the statement that the nurse denied the visit from Mr Mitchinson but did not consider it relevant in any event whether Mr Mitchinson saw the nurse or not because seeing the nurse was not the correct procedure for reporting a work injury.

[131] Mr Leslie clarified that the nurse never denied Mr Mitchinson visited her on 2 August 2006, but that she could not recall any matters discussed. Mr Leslie also appeared to have asked the nurse some questions which he had not recorded in writing from his interview from her – see para.39 of his report where it states:

When interviewed, Ms Purdue stated that she was not aware that a fresh injury had occurred.

[132] That statement was not recorded as part of the interview and should have been.

[133] The visit to the nurse was important, notwithstanding Mr Baker's view that he did not consider it relevant. The visit was consistent with Mr Mitchinson's version of events as to the steps he took and it was further consistent with Mr Vidler's statement

that Mr Mitchinson was off to Medical to fill out a form. The fact that Ms Purdue could not recall what was said was held against Mr Mitchinson notwithstanding the passage of time until she was interviewed on 26 September 2006.

[134] A fair and reasonable employer would have asked why Mr Mitchinson went to the nurse. If it was not to fill out an accident form, then what was it for? This was never considered.

[135] There were no questions during the investigation about whether Mr Mitchinson was already injured before training and there was no consideration about what his motive could be in falsely declaring an injury at the training.

[136] There was no consideration given as to when Mr Mitchinson decided to say that he injured his knee at the training if in fact he did not do it at the training. There were only about three hours between the C & R training and his appointment with Dr Jones.

[137] I do not find a fair and reasonable employer would have concluded, as Mr Baker did, that the timing of the events, as described by Mr Mitchinson, between commencing the warm ups and Mr Vidler sending the email to Mr Rickard was not feasible without further investigation.

[138] A fair and reasonable employer would further not have taken the statements by one of Mr Mitchinson's representatives, Ken Johnson, at the final meeting on 12 December 2006 about a mistake to relate to the declaring that an injury on the ACC form was work-related. This seemed to have been a factor that influenced Mr Baker as set out in the letter of dismissal dated 14 December 2006. A fair and reasonable employer would have taken those comments to relate to the process for reporting a work accident but not in terms of the filling in of the ACC form. Mr Mitchinson's explanation that he had sustained an injury at C & R training never changed.

[139] There is one final matter, and that is when the Prison was supplied with Mr Mitchinson's first medical certificate. Mrs Mitchinson gave evidence that she was absolutely certain that she had dropped off the first medical certificate to the Prison on Friday, 4 August 2006. Mrs Mitchinson said that she was rostered to work the afternoon shift at Invercargill Hospital and delivered the certificate to the Prison before her shift started. I accept her evidence about that matter.

Conclusion

[140] Mr Mitchinson was facing a serious allegation. For the reasons set out above, I do not find that the investigation into the allegation that Mr Mitchinson was facing was one that a fair and reasonable employer would have carried out in all the circumstances. There were significant flaws in the investigation.

[141] Considered objectively, it seems that Mr Leslie, in investigating the matter, and then Mr Baker in making his decision to dismiss, had their minds turned against Mr Mitchinson so that matters in his favour were not considered or investigated properly and were simply dismissed or ignored.

[142] I do not find that a fair and reasonable employer would have been justified as a result of the flawed investigation into Mr Mitchinson's actions in concluding that there had been serious misconduct and that Mr Mitchinson had falsely declared a work injury. In terms of substantive justification I am not satisfied that if there had been a fair process of investigation a fair and reasonable employer would have arrived at the same conclusion.

[143] Mr Mitchinson did not complete an accident report about his injury but a fair and reasonable employer would not consider that to be serious misconduct.

Was the decision to dismiss justifiable in all the circumstances?

[144] In conclusion, I do not find that, considered objectively, a fair and reasonable employer would have made the decision to dismiss Mr Mitchinson in all the circumstances of this case.

Determination

[145] Mr Mitchinson has a personal grievance that he was unjustifiably dismissed from his employment with the Department of Corrections and he is entitled to remedies.

Contribution

[146] I have concluded that Mr Mitchinson has a personal grievance. I am now required to assess the extent to which his actions contributed to the situation that gave

rise to the personal grievance, and if required, reduce the remedies that would otherwise have been awarded to him.

[147] I have not found that a fair and reasonable employer would have been justified as a result of the investigation in concluding that Mr Mitchinson had falsely declared a work injury.

[148] I find that Mr Mitchinson did not make it clear in the email Mr Vidler sent and checked that he had sustained a new injury that morning at C & R training.

[149] Mr Mitchinson went to see the nurse later that morning and I think, in all likelihood, there was some confusion as a result of that exchange. Mr Mitchinson had followed the process properly on other occasions. Mr Rickard could have clarified any confusion, however, on 2 August when he was advised by Mr Vidler that Mr Mitchinson was on ACC. There is an obligation for parties to an employment relationship to deal with each other in good faith. The duty of good faith requires parties to an employment relationship to be, amongst other matters, responsive and communicative. Mr Rickard should have contacted Mr Mitchinson and asked him why he was on ACC and why there was no accident report.

[150] Mr Mitchinson could then have been asked to complete an accident report at that early stage and the nurse could have been spoken to when her recollection was clear. There could still have been an investigation undertaken if the Department of Corrections felt it still necessary, but there would have been an accident report on file. Mr Mitchinson did, I have found, provide a medical certificate to the Department of Corrections. I do not accept Ms Spackman's submission that Mr Mitchinson contributed by blaming the nurse for failing to follow procedures. He simply provided an explanation.

[151] Instead, and somewhat surprisingly, there was no discussion with Mr Mitchinson about an accident report until after he was suspended on 4 September 2006.

[152] I find that there is some contribution by Mr Mitchinson when he failed to make the fact that he sustained a new injury clear to Mr Rickard in the email and then by following the usual process. That caused Mr Rickard some confusion.

[153] That confusion could have been resolved on 2 August 2006 or shortly thereafter by a telephone call from Mr Rickard to Mr Mitchinson. I also take into account that Mr Mitchinson spoke to Mr Lee twice, spoke to Mr Vidler, Mr Rickard, and saw the nurse and then his own doctor within a short period after the C & R training. I also note that Mr Mitchinson did attempt to follow the steps outlined in the *What to do if you are injured at work* bulletin issued by the Department of Corrections and then quickly advised Mr Vidler of the outcome of the visit to Dr Jones.

[154] In all the circumstances, I am of the view that contribution should be moderate and I assess contribution at 10%.

Reinstatement

[155] Reinstatement is the primary remedy as provided for in s.125 of the Employment Relations Act 2000.

[156] The Union made it clear as soon as Mr Mitchinson was dismissed that it was seeking reinstatement on his behalf. In those circumstances, I do not find that the Department of Corrections can say that there is no job available for Mr Mitchinson, when it appears that another person was employed to start in the CIE Unit in early September 2007.

[157] Reinstatement is opposed by the Department of Corrections on other grounds as well. Ms Spackman says that the Department of Corrections cannot be confident that Mr Mitchinson will follow proper procedures and refers to the environment in which he works in the kitchen where such procedures are crucial. She submits that he refuses to take responsibility for his actions and the extent to which he has breached his duties as a public servant. She submits that his lack of remorse and continued denials preclude him from reinstatement. She submits that reinstatement can only be provided where practicable and that is not in this case because the Department cannot run the risk of any future lapses by Mr Mitchinson.

[158] I accept Mr Mitchinson's evidence that he genuinely wants to return to work with the Department of Corrections as an instructor. I find that he has realised since his dismissal just how important his position was to him and he now wishes to return.

[159] Mr Mitchinson had a final written warning in late 2005, however this was the first warning he had received in an otherwise blemish-free career in the Department of

Corrections during a six year period. Mr Mitchinson explained that he received a 5% bonus every year until 2006 when he did not receive a bonus. Mr Mitchinson said he raised issues about the final written warning but it was never formally challenged because it fell between the cracks and was overtaken by the events around 2 August 2006. I accept that it is very important for employees to report work accidents properly. Standing back and considering the matter overall, there is no evidence of continued failing by Mr Mitchinson over the period of six years of employment that should make reinstatement impracticable.

[160] I have found that the investigation into the allegation that Mr Mitchinson had falsely declared a work injury was seriously flawed and as a result a fair and reasonable employer would not have concluded that there was serious misconduct. Ms Spackman's submissions about lack of remorse and continued denial must fail.

[161] One final matter that Ms Spackman raised towards the end of her submissions was that if the Authority was considering reinstatement then it should require a medical assessment and clearance for Mr Mitchinson. As I understand the submission, it was in terms of Mr Mitchinson's mental health. Mr Mitchinson has suffered from depression for many years. He said that he managed well with the condition, sometimes without medication, however his dismissal took a far greater toll on his mental and emotional wellbeing than he had ever thought possible. He said it was only when a date was allocated for the investigation meeting by the Authority that he began to pick up. Mrs Mitchinson described it as *the spark began to return to George*.

[162] Dr Jones, although not an expert in the mental health area, knows Mr Mitchinson well as his general practitioner. He was not concerned about Mr Mitchinson returning to work and said in his evidence *if things resolve, reasonable for him to return to work*. I do not consider a medical assessment and clearance is required before Mr Mitchinson returns to work.

[163] I consider reinstatement to be practicable and appropriate in the circumstances of this case. There was no suggestion that Mr Mitchinson was not able to fulfil his duties in terms of working with inmates or other colleagues. I record that Mr Mitchinson said that he did not bear any grudges toward anyone in management at the Department of Corrections. I see no reason why he could not continue to work with Mr Rickard.

[164] I order the Chief Executive of the Department of Corrections to reinstate George Mitchinson to his former position within the CIE Unit at Invercargill Prison under s.123(1)(a) of the Employment Relations Act 2000.

[165] To give the parties some time to make any arrangements, Mr Mitchinson's reinstatement is to be effective from Monday, 19 November 2007 or such date as is agreed by both parties.

Lost wages

[166] One of the issues for the Authority to consider is whether Mr Mitchinson's loss of earnings for the period between his dismissal and the date I have ordered that he be reinstated to his position is attributable to his dismissal.

[167] I accept that as a result of his dismissal Mr Mitchinson became very depressed. He gave evidence about his mental health deteriorating which was supported by Dr Jones and Mrs Mitchinson in terms of Mr Mitchinson not being well enough to contemplate looking for other work.

[168] Mr Mitchinson said that he had to rely on Mrs Mitchinson to do everything because he did not have the energy to do jobs around the house. He said that he was very low, often not getting dressed for days and spending a lot of time in bed sleeping. I have placed weight on Mrs Mitchinson's evidence that Mr Mitchinson would not answer the telephone. This caused Mrs Mitchinson considerable concern when she tried to telephone him. I consider this would have made looking for work very difficult if not impossible. If Mr Mitchinson could not even pick up a telephone, then how could he manage a job interview? Mrs Mitchinson said in her evidence that a house guest was so concerned about Mr Mitchinson that she checked up on him whilst he was sleeping.

[169] I find that the increase in the severity of Mr Mitchinson's depression was as a result of his dismissal and the process leading to that dismissal. His subsequent inability to look for another job to mitigate his loss was also attributable to his dismissal.

[170] In these circumstances, I propose to exercise the discretion in s.128(3) of the Employment Relations Act 2000 and make an order that Mr Mitchinson is entitled to

reimbursement of his lost wages from the date of his dismissal on 14 December 2006 until he is reinstated on 19 November 2007.

[171] At the time of his dismissal, Mr Mitchinson was earning \$57,773 gross per annum. I have calculated the period between the date of dismissal and the date of reinstatement to be 48 weeks and 1 day. I calculate the lost wages for that period to be \$53,551.13.

[172] Taking contribution into account, I order the Chief Executive of the Department of Corrections to pay to George Mitchinson the sum of \$48,196.02 being lost wages under s.123(1)(b) of the Employment Relations Act 2000.

Compensation

[173] Ms Spackman, on behalf of the Department of Corrections, submitted that Mr Mitchinson is not entitled to any compensation for humiliation, loss of dignity or injury to feelings because such an award can only be made for aspects of the respondent's decision/process which are found to be flawed. She submits there is no breach here to which Mr Mitchinson can show he has been humiliated or suffered any loss of dignity.

[174] I do not accept this submission. The investigation process undertaken by the Department of Corrections into the allegation against Mr Mitchinson was significantly flawed and unfair. There was considerable evidence of distress that Mr Mitchinson suffered as a result of his dismissal from both him and his wife. Much of it I have set out above in terms of lost wages.

[175] Mr Mitchinson said that he lost his old confidence and sense of self worth as a result of the dismissal. He described his feelings ranging from anger to humiliation and bewilderment. He withdrew from social contact and clearly experienced a very upsetting time.

[176] Mr Mitchinson claims \$25,000. Reinstatement does go somewhat toward assisting with the distress and I am of the view that a suitable starting point is \$20,000.

[177] Taking contribution into account I order the Chief Executive of the Department of Corrections to pay to George Mitchinson the sum of \$18,000 without

deduction being compensation under s 123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[179] I reserve the issue of costs.

Summary of findings and orders made:

- I have found Mr Mitchinson's dismissal was unjustified
- I have assessed contribution at 10%
- I have ordered Mr Mitchinson be reinstated to his former position. Such reinstatement to his former position to take place on 19 November 2007 or such date as is agreed by both parties
- Taking contribution into account I have ordered Mr Mitchinson be paid \$48,196.02 being lost wages under s 123(1)(b) of the Employment Relations Act 2000.
- Taking contribution into account I have ordered Mr Mitchinson be paid \$18,000.00 compensation under s 123(1)(c)(i) of the Employment Relations Act 2000
- I have reserved the issue of costs.

H Doyle
Member of the Employment Relations Authority