

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 364/09
5274408 and 5274409

BETWEEN MANUILANI TIELU
Applicant

WILLIAM TUPOU
Applicant

AND CHIEF EXECUTIVE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: R A Monaghan

Representatives: M Ryan, counsel for applicants
B Smith and L Pound, counsel for respondent

Investigation Meeting: 18 September 2009

Supplementary
memoranda and
exchanges on scheduling: 5 and 9 October 2009

Determination: 13 October 2009

**DETERMINATION OF THE AUTHORITY ON APPLICATIONS FOR
INTERIM REINSTATEMENT**

Employment relationship problem

[1] Manuilani Tielu and William Tupou were employed in the Department of Corrections (“Corrections”) as prison officers. They were dismissed following an investigation into the death in custody of a prisoner. The death occurred in or near the upper west landing of B Block at Auckland Prison, the area of the prison where Ms Tielu and Mr Tupou worked. The death occurred while they were on duty.

[2] They say their dismissals are unjustified and seek reinstatement. They have raised additional personal grievances alleging Corrections affected their employment to their disadvantage by its unjustified actions, as well as alleging breaches of the

employment agreement on Corrections' part. Although they have filed separate employment relationship problems, both concerned essentially the same set of facts and are being heard together.

[3] Ms Tielu and Mr Tupou also seek orders for interim reinstatement. This determination addresses the applications for orders for interim reinstatement.

[4] The issues to be addressed in determining the applications for orders for interim reinstatement are:

- (a) whether there is an arguable case of unjustified dismissal;
- (b) whether the balance of convenience favours the applicants or Corrections; and
- (c) where overall justice lies.

Background

[5] The following account of the background facts is based on the parties' affidavits, filed for the purposes of the interim applications.

[6] The death occurred on Sunday 1 March 2009. Mr Tupou was a Corrections Officer ("CO") on duty, and Ms Tielu was a Senior Corrections Officer ("SCO") on duty. When the deceased's body was discovered the police were called. In addition, Corrections regards a death in custody as one of the most serious events that can occur in a prison. It also began its own fact finding inquiry.

[7] The resulting fact finding report, dated 2 March 2009, found a face to name muster check was recorded as carried out at 8.00 am and a prisoner location check was recorded as carried out at 9.00 am. The record showed all prisoners had been located and sighted. The report effectively identified 9.30 am – 11.00 am as the critical period as far as the deceased's movements were concerned. The deceased was one of a group of 6 prisoners on the upper west landing who remained 'unlocked' after 9.00 am, while the remaining group of 6 prisoners was locked in the cells. CCTV footage showed the deceased entering and leaving the nearby showers between 9.30 and 10.00 am.

[8] Just before 10.00 am the deceased entered the showers again, where he remained during a changeover between the groups of locked and unlocked prisoners which occurred at 10.00 am. A prisoner location check was recorded as conducted at that time, and recorded that all prisoners were sighted. However the CCTV footage showed the deceased leaving the showers just after 10.00 am, so he could not have been sighted. His body was found in the showers after his absence was noted during the next check conducted shortly after 11.00 am.

[9] The deceased was to have been locked up again at 10.00 am. Checks should have identified not only that he was not in his cell, but that other prisoners were not where they should have been.

[10] The report included the following comments, which were among the matters the applicants have raised as being indicative of organisational failures at the prison:

“[The staff] have been operating modified routines because of the new chapel group initiative and these new routines need to be formalised one way or another. There is some weakness around the lockup of prisoners when changing over one group of 6 for the other on the landing. Location checks appear not to have been done correctly.”

[11] As a result of the findings an employment investigation began into the actions and inactions of Ms Tielu, Mr Tupou, and a third CO also on duty on the upper west landing that morning. The officers commenced stress leave. All were represented by their union. On 3 April 2009 Ms Tielu and Mr Tupou were suspended pending the outcome of the employment investigation into the death in custody and their alleged failures to follow operating procedures that day.

[12] According to policy contained in B.03 of the ‘A and B Block desk files’ annexed to the affidavit of Kelly Puohataua, the acting prison manger for Auckland prison at Paremoremo:

- (a) face to name muster checks require officers to work in pairs, the use of a photographic muster board, that officers be satisfied every prisoner has been identified by sight, checks to be carried out with the frequency detailed in the desk files, and that the SCO ensure the checks are conducted and recorded in accordance with ‘the regulations’; and

(b) prisoner location checks are a form of muster check, are used to monitor and verify the location of prisoners during the hours of unlock according to a schedule, with a maximum period of one hour between checks, and results must be recorded and certified as correct or incorrect.

[13] National policy available to staff through the 'Cornnet' intranet system also covers these matters, at section B.03.

[14] The investigators reviewed the documentation and the CCTV footage, and interviewed a number of witnesses including the applicants. In reliance on the footage and the interviews in particular, they concluded that Mr Tupou and the third CO had failed to complete a face to name muster and location checks prior to or following the death in custody.

[15] The investigators also concluded Ms Tielu had not completed any checks on the upper west landing herself, and that she had given false information in that she signed the record showing a face to name muster and location checks had been completed on the morning of 1 March. She had also failed to ensure the face to name muster and location checks were carried out.

[16] These findings led the investigators to conclude Mr Tupou breached the code of conduct in committing acts of negligence or unsafe practice which seriously affected security, and failed to comply with Corrections' policies, procedures, operating instructions or rules. Their findings concerning Ms Tielu led them to a similar conclusion regarding negligence and unsafe practice, as well as finding a breach of the obligation not to give false information or make any false declaration.

[17] The investigators' report was forwarded to the parties and to Jeanette Burns, assistant regional manager for Area 1, Northern Region. By letters dated 20 May 2009 Ms Burns informed Ms Tielu and Mr Tupou of her view that the actions outlined in the report amounted to a serious breach of the code of conduct which may lead to their dismissal. She offered the opportunity to make submissions on the findings and on the proposed disciplinary action. The officers remained suspended on full pay.

[18] Ms Burns met separately with the three officers concerned, and their union representative, on 15 June 2009.

[19] Ms Tielu's explanation was: she was not the most senior officer on duty on 1 March; she was relatively inexperienced and had not been working in B Block for long; she had not been inducted into B Block; the desk file and other B Block documentation was insufficient in respect of the required procedures; and other factors meant she was not to blame for what occurred. She told Ms Burns she was trusted and well-liked, and in turn trusted her staff to do their jobs correctly.

[20] Ms Burns was concerned by Ms Tielu's failure to take responsibility. Further, she did not accept that Ms Tielu was unaware of required procedures as they had previously been carried out correctly, or that Ms Tielu was entitled to take her officers at their word in respect of the completion of the procedures. Corrections had been reinforcing to senior officers for several months that simply taking officers at their word was not acceptable. It was incumbent on senior officers to assure themselves checks had been carried out correctly – whether by accompanying the officers concerned, checking or re-checking themselves, or conducting random audits. Finally, Ms Burns found Ms Tielu was the most senior officer on duty at the time, and had allowed events to occur in which important checks were not carried out or not carried out correctly.

[21] Ms Tielu's failure to take responsibility, together with her misconduct, led Ms Burns to decide she no longer had trust and confidence in Ms Tielu.

[22] Mr Tupou's explanation was similar to Ms Tielu's regarding inexperience and the lack of induction into B Block, as well as uncertainty about procedures. Ms Burns' reasons for not accepting these explanations were again similar. In addition Mr Tupou felt that, as a new officer in the Block, he had no option but to follow the procedures carried out by other staff at the time and to assume those procedures were correct and sufficient.

[23] Ms Burns was also concerned about Mr Tupou's failure to accept responsibility. Further, she considered it likely that, if Mr Tupou had carried out the required check at 10 am and sighted prisoners in their cells, he would have noted the

deceased's absence immediately. His actions contributed directly to the death in custody. Finally Ms Burns was concerned that Mr Tupou had misrepresented to Ms Tielu that a prisoner location check had been conducted, when that was not the case.

[24] For these reasons Ms Burns concluded that both officers had breached the code of conduct and were guilty of serious misconduct. Both officers were informed on 16 June 2009 of Ms Burns' conclusions, and of her decision that their employment was terminated as of that date.

Arguable case

[25] Mr Ryan submitted that the applicants have an arguable case in that: Corrections had failed to act on its knowledge that a 'hit' was being planned by inmates in B Block, and had failed to pass on to staff its knowledge that the deceased had previously hidden in the shower block; there was understaffing, which was exacerbated by the introduction of the chapel group and the lack of incorporation into prison routines of any associated procedures; and there were two sets of policy documents containing prison procedures which were inconsistent with each other particularly in respect of the breaches Corrections relies on here.

[26] The applicants also drew attention to reported statements allegedly made by Corrections' Chief Executive Officer before their dismissals, saying the alleged statements indicated the outcome was predetermined.

[27] Corrections denied all of the above matters, but Ms Smith accepted for the purpose of the applications for interim reinstatement only that the applicants have met the low threshold for establishing an arguable case.

The balance of convenience

[28] Corrections argued strongly that the balance of convenience favoured it. Ms Burns referred again to the reasons why she did not accept the explanations Ms Tielu and Mr Tupou gave for their conduct, and characterised the conduct as taking shortcuts and involving an element of dishonesty. In the context of reinstatement, she could not have the officers back in their roles when they had demonstrated their

preparedness to take shortcuts, compromise safety, and not take responsibility for their actions. Moreover, their actions and inactions contributed directly to a death in custody. The importance of maintaining safety and security, together with the lack of trust and confidence in both officers, meant additional staff would have to be allocated to supervise or 'shadow' them should they be reinstated. Corrections does not have the resources to do this.

[29] Regarding the possibility of garden leave, or reinstatement to the payroll only, Ms Burns expressed concern about the expenditure of public money in circumstances such as the present. She was also concerned about the message that could be sent to other employees if a failure to comply with procedures, resulting in a death in custody, led nevertheless to reinstatement.

[30] Ms Tielu and Mr Tupou gave the barest of information in support of their argument that the balance of convenience favoured them. They appeared to rely on an assumption that the fact they had been dismissed was itself sufficient to found an order for interim reinstatement. While I acknowledge that the exercise of a right to work is valuable, there was little more than assertion to the effect that the loss of employment could not be compensated by a remedy such as damages for example.

[31] The investigation meeting for the substantive matter was scheduled for November 2009 and has now been rescheduled for dates in December 2009. Had it been possible to schedule an investigation at an earlier date, I would have found there is too little information about the balance of convenience as it affects the applicants in general, and the suitability of damages as a remedy in particular, to tip the balance in their favour.

[32] Otherwise many of the concerns Corrections has raised about the seriousness of the conduct alleged, the result in that a prisoner died, and the effect on staff discipline and morale can be addressed in the substantive matter.

[33] The concerns about the need to shadow the applicants if they were to return to work can be addressed by reinstating them to the payroll only pending the substantive determination. While I acknowledge the fiscal constraints on or concerns about even

that outcome, the rescheduled investigation meeting remains only a few months away and priority will be given to issuing the substantive determination.

[34] Accordingly I find the balance of convenience slightly favours Ms Tielu and Mr Tupou.

Overall justice

[35] Assessing overall justice involves stepping back and assessing the relative strength of the parties' cases, as well as taking account of the matters just addressed and any other relevant matters.

1. Relative strength of the parties' cases

[36] In effect there is no dispute that certain checks were recorded as having been carried, and in particular that prisoners were sighted, when that was not the case. There is no dispute that as SCO Ms Tielu signed off the checks without making any independent assessment of them and apparently in reliance on the word of the CO only. The remaining issues concern the extent of the applicants' culpability in these matters and how that was addressed in the decision to dismiss.

[37] I am unable to assess the strengths of the applicants' arguments regarding their lack of culpability in the absence of full evidence and argument, although I can say that on the facts as they currently appear there is room for a finding at least of contributory fault on the applicants' part. Even if that finding were made in the substantive matter, however, it would not necessarily lead to a finding that reinstatement was not practicable.

[38] The decision of the Employment Court in **Madar v P & O Services Limited**¹ was cited in support of a submission that the ultimate likelihood of reinstatement is slim, and that this weighs in Corrections' favour in the interim application. If the matters bearing on lack of culpability are not accepted in the substantive determination then reinstatement is unlikely. Again at this preliminary stage I cannot assess the strength of the associated arguments.

¹ [1999] 2 ERNZ 174

2. Overall assessment

[39] Overall, final outcome of this matter will probably turn on the extent of the applicants' culpability in respect of actions and inactions that have effectively been admitted. The actions and inactions are very serious on their face, but have yet to be placed in the context the applicants are contending. Accordingly while there appears to be a strongly arguable case at least for the existence of contributory fault, the strength of the applicants' cases otherwise is less clear.

[40] I have also found the balance of convenience slightly favours the applicants.

Conclusion

[41] For the above reasons I order the reinstatement of Ms Tielu and Mr Tupou on an interim basis pending determination of the substantive matter, on the condition that they be reinstated to the payroll only.

[42] I remind Ms Tielu and Mr Tupou that they have both filed undertakings as to damages.

Costs

[43] Costs are reserved pending a final resolution of this matter.

R A Monaghan

Member of the Employment Relations Authority