

humiliation and his legal costs.

[5] Corrections' statement in reply denies its actions in investigating allegations against Mr Gregory and deciding to dismiss him were unjustified. It says its managers followed a fair process and complied with the principles of natural justice to reach a substantively justified decision. It opposes the remedies sought, including reinstatement on any basis, interim or permanent.

Interim reinstatement application

[6] Mr Gregory lodged an application for interim reinstatement pending hearing of his personal grievance claim. He provided the required undertaking as to damages.

[7] Mediation occurred between the parties on 22 December 2008 without resolving the interim or substantive issues.

[8] By telephone conference arrangements were made for lodging of Correction's statement in reply and affidavits regarding the interim reinstatement application, and for an investigation meeting to hear submissions on the application. Timetable directions for an investigation meeting on Mr Gregory's substantive claim were also set for a number of further written witness statements to be lodged and for the meeting to occur on 22 and 23 April 2009.

[9] The evidence considered in the interim reinstatement application comprised:

- (i) an affidavit lodged by Mr Gregory with his application on 16 December 2008; and
- (ii) a statement lodged on 30 January 2009 by Corrections' Area 3 assistant regional manager Vicki Muir and affirmed as her affidavit at the investigation meeting; and
- (iii) various relevant documents were attached to the statement of problem and to the affidavits.

[10] The parties' representatives provided written synopses and oral submissions on the application for interim reinstatement.

Principles on interim reinstatement

[11] Section 127 of the Act requires the Authority to apply the law relating to interim injunctions having regard to the object of the Act. This requires the Applicant to have an arguable case to be determined through subsequent investigation. An assessment is to be made of how best to regulate the positions of the parties until that subsequent investigation and determination of the substantive issues is made. That assessment is referred to as the balance of convenience. Whether effective remedies, other than interim reinstatement, are available to the Applicant must be considered as part of that assessment. Finally the Authority is to take a global view of the justice of the case and decide what should be done to attain that. Throughout the objects of the Act are considered, including under s3 for employment relationships to be built on good faith behaviour and under s101 to recognise the importance of reinstatement as a remedy.

[12] As noted by the learned authors of Brookers' *Personal Grievances*, (Wellington, 2002) at 11.3.06:

the Court ha[s] drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula. In reality the considerations of whether there is an adequate alternative remedy, where the balance of convenience lies, and the overall justice of the case will often overlap.

[13] The investigation is confined to the untested evidence contained in the affidavits of various witnesses, considering the parties' submissions and reaching a determination after weighing the available information and applying the relevant principles.

[14] If an order for interim reinstatement is to be made, it may be subject to any conditions the Authority thinks fit.

Does Mr Gregory have an arguable case?

[15] In considering whether there is an arguable case the Authority's role is to see whether, assuming Mr Gregory can prove all the facts he alleges, his case has some serious or arguable, but not necessarily certain, prospect of success. His case is not, at

this stage, weighed against any defence which Corrections may have except as to fundamental issues such as jurisdiction (which is not in issue here).¹ In a personal grievance of this type, the onus is on the employer to justify the dismissal both procedurally and substantively. The threshold of ‘arguable case’ is usually met once a grievant disputes the basis of the purported justification and seeks to put the employer to proof of it.

[16] From the papers lodged to date, Mr Gregory’s dispute as to the justification of his dismissal can be summarised as follows:

- (i) Corrections was unfair to conclude his communications with the female partner of a prisoner were inappropriate because (a) it was the woman who initiated the conversations, (b) those conversations did not impact on his ability to carry out his duties, and (c) his contact with her was condoned by the provision in Corrections’ conduct code on dealing with the public; and
- (ii) Corrections was unfair to conclude he inappropriately accessed the computer system to research information on a gang because (a) he did not actually gain any information from the system and (b) a number of prisoners associated with that gang were on his unit; and
- (iii) Neither allegation, if analysed separately, was sufficiently serious to justify dismissal; and
- (iv) Corrections should not have “lumped together” the two allegations in coming to a decision to dismiss him; and
- (v) In coming to its decision to dismiss him Corrections should not have relied on two earlier final written warnings to him as he had raised employment relationship problems about those warnings which had not yet been resolved; and
- (vi) Corrections should have adopted the sanction of transferring him to another prison as his employment issues only arose since his transfer to the Auckland Regional Women’s prison.

[17] Mr Ryan’s submissions highlighted two planks of Mr Gregory’s case as establishing an arguable case.

¹ See *X v Y Ltd & NZ Stock Exchange* [1992] 1 ERNZ 863, 872-873

[18] Firstly, on procedural issues, Mr Gregory says Corrections improperly gave weight to earlier warnings about which he had raised personal grievances through his Corrections Association representative.

[19] Secondly, on substantive issues, he says the conduct considered by Corrections' managers to be inappropriate did not amount to breaches of the code of conduct.

[20] Ms Smith's submissions accepted that – for the purposes of the interim reinstatement application only – Mr Gregory has established an arguable case, albeit a weak one. The substance of Corrections' argument against interim reinstatement relied on the other tests.

[21] I agree Mr Gregory has an arguable case.

Where does the balance of convenience lie?

[22] I consider the balance of convenience – in the sense of detriment or injury – lies with Corrections for the following reasons.

[23] Mr Ryan submitted that Mr Gregory was disadvantaged in seeking alternative employment to mitigate his losses as he had effectively been "*institutionalised*" by his length of service. Mr Gregory, at 51 years of age with 26 years of service with Corrections, had no training or skills for any other form of employment and was under significant financial stress as the major income earner of his household with his partner and their two-year-old son. He was a trustee of a rental property and responsible for meeting the shortfall between rental income and mortgage payments which, along with other property expenses, totalled \$1000 a month.

[24] Mr Gregory averred that he would experience real difficulty obtaining alternative employment in the current economic market. However I accept Ms Smith's submission that there was no evidence before the Authority that Mr Gregory have even attempted to find work, and none that suggested he had been unable to do so because of his service, his dismissal or the current economic recession.

[25] While I accept that he bears a financial burden while awaiting determination of his case, the investigation meeting on his substantive claim is scheduled to be held in the relatively short period of ten weeks.

[26] A greater risk of detriment or injury, I find, lies with Corrections if it were required to reinstate Mr Gregory in the meantime. This relates specifically to the loss of trust and confidence in him by Ms Muir – the Corrections’ decision maker on his case – and on which his dismissal was based.

[27] It is not enough, however, for Corrections to merely assert such a loss of trust and confidence for it to be a reality. Corrections must be able to point to some established conduct by Mr Gregory that is incompatible with continued faithful discharge of the employee’s duties.²

[28] I find, on the basis of Ms Muir’s affidavit evidence and attached documents, that this threshold has been met in the particular circumstances of this case, emphasising that it is a conclusion reached only on an interim basis.

[29] The specific conduct, which I accept may amount to being incompatible with faithfully performing duties, is Mr Gregory’s view regarding contact or communication with the partner of a prisoner and which was one of the reasons for his dismissal. During Corrections’ inquiry Mr Gregory acknowledged the contact with the woman occurred – which included phone calls to her and visiting her at her home. He visited her there shortly after she had been arrested in a police drugs raid and charged with offences for which she was on bail. There was a real prospect that the woman, if convicted, would become a prisoner at the unit on which he then worked. This is also the woman to whom he said he would make some inquiries about a man who was a member of a gang and who had some connection with the property at which she had resided at the time of the police raid. This man’s name was among the records that Mr Gregory later searched on the Corrections computer system.

[30] He was adamant that contact with this particular woman was compatible with his performance of duties and posed no threat to the integrity of his position or

² *Orme v Eagle Technology Group Limited* (unreported, EC Wellington, WEC40/95, 15 June 1995, Goddard CJ).

Corrections. He told the Corrections' investigator: "*She is a member of the public until convicted and I will not change the way I act for anybody in that relationship*".

[31] Ms Muir's evidence was that this statement:

"indicated not only that Mr Gregory failed to accept the seriousness of his actions or his responsibilities as a PCO for the Department, but further and perhaps more seriously, that he was not willing to change or modify his actions as a result".

[32] It is possible that the Authority's later determination on the substantive issues may find her conclusions were not fairly and reasonably reached or that Mr Gregory's actions and subsequent views did justify Corrections' decision to dismiss him for breaches of its code of conduct. However, at this interim stage, I accept there is a real risk that, if reinstated now, Mr Gregory could repeat those actions given the views he holds.

[33] In the context of Corrections' responsibility for the safety and security of prisoners, visitors (including prisoners' partners) and staff, I accept such a risk should not be borne on an interim basis. I accept Ms Muir's evidence that such a cautious approach is warranted by the potentially serious ramifications when something goes wrong in Corrections' work and the high standards of conduct and exercise of judgement expected of its officers. Ms Muir says that this risk would require Corrections to deploy additional staff to supervise or manage Mr Gregory if he were reinstated on an interim basis. I accept, as a factor weighed in the balance, that it is not reasonable to place that burden on Corrections.

[34] I have considered the potential effect interim reinstatement might have on various third parties – including Mr Gregory's own partner and child, Corrections staff and prisoners – but find, on balance, it does not favour one party over the other.

[35] Mr Ryan submitted that the balance of convenience favoured Mr Gregory because alternative remedies would be inadequate. If Mr Gregory's personal grievance succeeded, Mr Ryan suggested eventual remedies were likely to be "*capped*" at six month lost wages and a "*tariff*" amount of distress compensation which he described as inadequate for the loss of a job after 26 years service. However I do not accept that the possible range of remedies in such circumstances is so limited, subject to what account might also need to be taken of mitigation and contribution.

[36] More importantly, there is no damage to the possibility of later permanent reinstatement in this particular case if reinstatement is not granted on an interim basis. Ms Smith submitted that the PCO role was “*generic*” and there was “*no prospect*” that Corrections would not be able to permanently reinstate Mr Gregory to a PCO role if the Authority ultimately so ordered. I note too that an earlier case confirms that even an absence of some years, or the need for training or retraining, is not a “*serious obstacle*” to the practicability of eventual reinstatement of a corrections officer.³

[37] Ms Smith submitted that the prospect of interim reinstatement of Mr Gregory on a ‘garden leave’ basis was unpalatable because, firstly, it sent other staff the wrong message about acceptable conduct and, secondly, the “*general public would take a dim view*” of such expenditure in the current difficult economic times.

[38] While I agree ‘garden leave’ is not appropriate, it is for neither of those reasons. Rather it is for factors related to the overall strength of the respective cases, considered under the heading of overall justice to which I turn now.

Where does the overall justice of the case lie?

[39] I consider the overall justice in this case lies with Corrections.

[40] At this early stage – with written witness statements yet to be lodged and all evidence yet to be tested in the Authority’s investigation – Corrections’ case appears stronger and this has some bearing on the ultimate likelihood of reinstatement.

[41] This is because the preliminary evidence suggests a very detailed investigation was made by Corrections and there appears relatively little dispute about the facts on which its decisions were based. The differences focus on the conclusions drawn.

[42] There are two obvious evidential difficulties for Mr Gregory. Firstly there is an apparent connection between the two subjects of the allegations made – the prisoner’s partner asked him for information about a man and Mr Gregory searched for information about that man on the computer system. Secondly, Mr Gregory

³ *Woud v Department of Corrections* [2005] 1 ERNZ 314 (EC, Goddard CJ) at [94].

accepts he visited the woman shortly after she was charged on drug-related offences. The issue on the second point will be around the applicability in those circumstances of the code of conduct provisions regarding conflict of interest and integrity.

[43] There is one factor mentioned in Ms Smith's submissions, based on Ms Muir's evidence, which I expressly decline to weigh in the overall justice on this particular application. It was a reference to "*potential negative media publicity and political consequences*" for Corrections.

[44] This related to Ms Muir's affidavit evidence that Corrections had not voluntarily elected to reinstate Mr Gregory to its payroll pending the Authority's substantive hearing because to do so could expose the Minister of Corrections to a question in Parliament about this employment issue and how public money was being spent. She also opined that, in the present economic climate, the public would not find it acceptable for Mr Gregory to be reinstated on an interim basis.

[45] Those may well be factors that validly influence Corrections' officials. However political convenience is not a factor the Authority can properly consider in relation to an application before it. To do so would be contrary to the separation of powers in our nation's constitutional arrangements. The independence required of the Authority also means such applications are to be determined on the basis of the evidence and established legal principles, not what is alleged to be 'public opinion'.

Determination

[46] For the reasons given, including particularly the relatively short time to the investigation meeting and my finding that the balance of convenience lies with Corrections meanwhile, I decline to grant Mr Gregory's application for interim reinstatement.

Further investigation

[47] Timetable directions are in place for the lodging of witness statements and additional documents before the investigation meeting scheduled for 22 and 23 April 2009. Mr Ryan has advised that Mr Gregory may lodge an amended statement of

problem (to be done by not later than 6 March) and, if this is done, Corrections may lodge an amended statement in reply (by no later than 27 March).

Costs

[48] Costs in respect of the interim reinstatement application are reserved pending resolution of Mr Gregory's substantive personal grievance application.

Robin Arthur
Member of the Employment Relations Authority