

**Attention is drawn to the order  
prohibiting publication of certain  
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 48A /09  
5146848

BETWEEN

JIMBOB GREGORY  
Applicant

AND

CHIEF EXECUTIVE OF THE  
DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority: Robin Arthur

Representatives: Mark Ryan for Applicant  
Bridget Smith and Isobel Foote for Respondent

Investigation Meeting: 22, 23 and 24 April 2009 in Auckland

Submissions received: 11 May 2009 and 8 June 2009 from Respondent  
28 May 2009 from Applicant

Determination: 10 November 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Jimbob Gregory was dismissed from his job as a Principal Corrections Officer (PCO) at Auckland Region Women's Correctional Facility (ARWCF) on 28 November 2008. He had served 20 years as a prison officer.

[2] A Department of Corrections manager made the decision to dismiss Mr Gregory following an investigation in which she concluded he had breached provisions of the Department's code of conduct. Five reasons were given for the decision:

- (i) Mr Gregory had communicated with a woman (referred to in this determination as Ms A) who was the partner of a prisoner (referred to here as Prisoner Z) when it was inappropriate to do so; and
- (ii) Mr Gregory had not told his manager about his contact with Ms A; and
- (iii) Mr Gregory had inappropriately accessed prisoner records on the Department's computer system; and
- (iv) Comments from Mr Gregory suggested he did not believe his actions were wrong; and
- (v) The "*seriousness*" of Mr Gregory's behaviour and his "*disciplinary history*" over the previous 18 months had significantly eroded the Department's trust and confidence in him.

[3] The Authority declined Mr Gregory's application for interim reinstatement (AA48/09, 13 February 2009).

[4] Mr Gregory's substantive application to the Authority alleged unjustified actions by the Department in dismissing him, issuing him three written warnings between August 2007 and April 2008, and not implementing a performance improvement plan (PIP).

[5] The Department replied that it followed a fair process of investigation, made justified decisions about the dismissal and the three prior written warnings, and had appropriately implemented a PIP with Mr Gregory.

[6] To meet the statutory test of justification under s103A of the Employment Relations Act 2000 ("the Act") for its actions and decisions about Mr Gregory the Department must establish that:

- (i) his contact with Ms A – including an offer to "*ask around*" and "*find out*" about a person named on a warrant to search her house – amounted to breaches of the Department's code of conduct because it was a conflict of interest and a personal or professional situation that might compromise his integrity; and
- (ii) his failure to disclose his contact with Ms B breached the code; and
- (iii) his attempts to access records of prisoners not under his care, for what he said was research about a gang, breached the code; and

- (iv) it reasonably lost further trust and confidence in him because of his comments that he did not believe his actions were wrong (and in respect of one, he would not change in the future); and
- (v) it followed a fair process and natural justice throughout; and
- (vi) it was entitled to take account of Mr Gregory's recent disciplinary history although he had raised a personal grievance on each written warning; and
- (vii) Mr Gregory had not advanced the grievances raised on each warning; and
- (viii) it was entitled to reach the conclusions that were the basis for each of those warnings; and
- (ix) sufficient steps were taken in respect of the PIP for Mr Gregory; and
- (x) it reasonably concluded a decision to dismiss was warranted rather than transferring Mr Gregory to work at another prison.

### **Orders prohibiting publication of certain evidence**

[7] Orders made under clause 12 of Schedule 2 of the Employment Relations Act 2000 (the Act) prohibit publication of the names mentioned in the documents lodged as evidence or referred to in the pleadings or witness statements of (i) prisoners, (ii) Corrections officers and officials (except for those who gave evidence to the Authority's investigation), and (iii) any other individuals (including, as an example only, the name of the wife of a particular prisoner).

### **The investigation**

[8] For the purposes of the Authority's investigation written witness statements were provided by:

- (i) Mr Gregory; and
- (ii) Steve Bradley, a national organiser of the Corrections Association who assisted Mr Gregory with a number of employment issues and attended several disciplinary meetings with him; and
- (iii) Vicki Muir, the Corrections assistant regional manager who conducted the investigation that led to the decision to dismiss Mr Gregory on 28 November 2008; and
- (iv) Tom Sherlock, a Corrections prison manager who conducted two employment investigations into Mr Gregory's conduct and provided a

written report on both occasions – once in May-June 2007 and again in July-August 2008; and

- (v) Jeanette Burns, a Corrections assistant regional manager who in a previous role as prison manager for the Auckland Regional Women's Correction Facility (ARWCF) was the decision-maker on two employment investigations about Mr Gregory's conduct carried out in 2007; and
- (vi) Raewyn Abbott, a Corrections unit manager who in a previous role had conducted investigations into Mr Gregory's conduct and prepared two reports in 2007; and
- (vii) Warren Cummins, Corrections' northern regional manager who was the decision-maker on an investigation of Mr Gregory's conduct concluded in the first half of 2008; and
- (viii) Dianne Hennessey, a senior corrections officer who gave evidence – under a summons issued at the Department's request – of her observations on working with Mr Gregory in which she was critical of his "*demeanour and actions*" with prisoners.

[9] Before preparing this determination I have closely reviewed all the written and oral evidence given and the representatives' closing arguments about that evidence and the relevant legal principles. In accordance with s174 of the Act, I have not needed to set out all the evidence and submissions. I note with regret that preparation of this determination was delayed for a longer-than-desirable period by the demands of other Authority matters and acknowledge the patience of the parties and their representatives.

#### **Did Mr Gregory's contact with Ms A breach the code of conduct?**

[10] In June 2008 the Department's professional standards unit began a preliminary inquiry about information suggesting that Mr Gregory had inappropriate communication with Prisoner Z and Ms A. Ms A was on bail at the time after being arrested in March 2008 on charges of allowing her residence to be used to manufacture methamphetamine.

[11] In May 2008 Mr Gregory's personal mobile phone number was found in Prisoner Z's personal diary during a search of his cell.

[12] Mr Gregory was also mentioned in telephone calls during June between Prisoner Z and Ms A that were monitored as part of prison security. During those calls Prisoner Z told Ms A not to mention Mr Gregory's name. Ms A referred to Mr Gregory telephoning her three times and when he would be back at work. She also mentioned another person whose name appeared on the search warrant when Police raided her house, that she had managed to get a prison record number (known as a PRN) for that person and that Mr Gregory was "*looking into it for her*". It was subsequently established that Mr Gregory had attempted to access prison records for a person of that name on the Department's computer system.

[13] Mr Sherlock's initial inquiry found there was no substantive evidence to confirm the allegation that Mr Gregory had inappropriate communication with Prisoner Z. Some years previously Mr Gregory had an extensive working relationship with Prisoner Z and Mr Sherlock was satisfied Prisoner Z may have at that time legitimately got, and since kept, Mr Gregory's mobile phone number.

[14] However, after interviewing Mr Gregory on the subject, Mr Sherlock ended his inquiry with findings that Mr Gregory:

- (i) had not advised any manager of his relationship with Ms A; and
- (ii) had communicated with Ms A on a number of issues other than normal prisoner-related topics; and
- (iii) had no direct responsibility for issues around Prisoner Z for several years so had no professional need to communicate with any of that prisoner's associates or family; and
- (iv) admitted having been to Ms A's home and spoken with her about issues regarding her arrest and subsequent problems with her children and accommodation needs; and
- (v) only knew Ms A through her visiting Prisoner Z; and
- (vi) had been in regular contact with Ms A since her arrest.

[15] These findings were relied on by Ms Muir in her conclusion, as the Department's decision-maker on this particular employment investigation, that Mr Gregory's conversations with Ms A breached the second principle of the Department's code of conduct:

*This principle covers your general obligation to provide quality service, to respect the rights of others, and to refrain from conduct that might lead to conflicts of interest or your integrity being compromised. ...*

*You must perform your duties honestly and impartially and avoid any personal, financial or professional situations which might compromise your integrity or otherwise lead to a conflict of interest.*

[16] Mr Gregory disputes his contact with Ms A amounted to a breach of the requirements of the code.

[17] The Department accepted, in its closing submissions, that the Code of Conduct does not expressly forbid officers from forming relationships with offenders' families but says the code is clearly not exhaustive. It relies on an understanding by officers – asserted in the evidence of Ms Muir and Ms Hennessey – that maintaining appropriate offender relationships extended to limiting the nature of relationships with offenders' families. There was also some evidence that this is now more clearly identified during in-service training sessions with officers.

[18] While Mr Gregory told the Authority's investigation he did not accept one of the "golden rules" referred to in that in-service training – which states that officer should not enter into any personal or business relationship with prisoners or their families. He says the term 'personal' is inadequately defined.

[19] That particular training was not in place, or at least Mr Gregory had not participated in it, at the time of his most recent contact with Ms A. However it was clear he knew or was aware there were boundaries to be observed in contact with her. This is shown by his comments during the interview with Mr Sherlock that "*it rung the normal alarm bells*" when Ms A telephoned him about her arrest and that Ms A was "*a crim*". He confirmed during the Authority investigation that the reason 'alarm bells' went off was that Ms A was Prisoner Z's partner. I accept the Department's submission that this was clear evidence that Mr Gregory knew the relationship was inappropriate and why.

[20] Mr Gregory's explanation that he treated Ms A no differently than any member of the public – and he was entitled to have the same contact with her that he

could choose to have with any member of the public – is not credible. He only knew Ms A through his professional contact as Prisoner Z's case officer, a role that has ceased at least eight years earlier. Ms A was no ordinary member of the public at the time of his telephone calls and meeting with her in 2008. She was a person charged with a serious drug-related offence and on bail awaiting trial. There was a real prospect that she could be convicted and end up as a prisoner in the very unit in which Mr Gregory worked.

[21] Mr Gregory's comment – in response to her request for information about a person named on the search warrant and for whom she had, from an unknown source, obtained a PRN – that he would “*ask around*” plainly created, at the very least, a perceived potential conflict of interest between assisting Ms A in pursuing a personal interest and his role and responsibilities as an employee of the Department.

[22] I am satisfied the Department's conclusion that Mr Gregory's contact with Ms A breached the code was one that a fair and reasonable employer would have reached in all the circumstances at the time.

[23] There was ample information in what was freely stated by Mr Gregory in his interviews with Mr Sherlock to support that conclusion. He advised that Ms A had tried to call him after her arrest. He had tried to return her calls unsuccessfully. When she rang again they talked about problems with her children and finding accommodation. He told Mr Sherlock that he “*went to her house*” on one occasion and the conversation included whether she could have rented a property from Mr Gregory. They had also discussed whether a relative of Ms A's could provide Mr Gregory with carpet for his property.

[24] These conversations were plainly both personal and professional situations that might compromise Mr Gregory's integrity as a corrections officer and lead to a conflict of interest. The word ‘might’ is the important qualifier in the requirements of the code. Compromise or conflict need not be a certainty but must be a possibility.

[25] The compromise to his integrity was apparent in Ms A's subsequent belief – which she expressed in the monitored calls to Prisoner Z – that Mr Gregory was interested in transactions with her over carpet, could have let accommodation to her

and was conducting inquiries on her behalf about another person which would involve accessing prison records.

[26] In his evidence to the Authority Mr Gregory provided a different explanation about his contact with Ms A at her home than the one he provided to Mr Sherlock and Ms Muir before the Department's dismissal decision was made.

[27] He explained that he was driving through Papakura when he received a call from her. She mentioned her address and he happened to be driving down a nearby street. He then drove round the corner to her house and stood talking to her on the street and not actually going inside the house.

[28] The Authority must assess the justification for the Department's decision on the description and explanation Mr Gregory gave managers at the time. The effect of his later and different evidence to the Authority is to suggest that his conduct in visiting Ms A's address while off duty was spontaneous rather than a deliberate response to an invitation. However it makes no difference to the import of the conversation he then had with her. Even if that different detail were available to the Department, it would most likely have made no difference to its decision then or to my assessment now of that decision as justified.

[29] Ms Muir was entitled to conclude, as she did on behalf of the Department, that an officer with Mr Gregory's length of service ought to have known his contact with Ms A breached the code and that Mr Gregory's actions amounted to serious misconduct.

### **Did the code require disclosure of contact with Ms A?**

[30] Mr Gregory disputes the Department's conclusion that his contact with Ms A breached a requirement under the code of conduct to inform his manager about any relationship that had the potential to affect his work or that of others.

[31] He considers the relevant provisions of the code apply only to relationships with offenders, meaning people under the care of the Department or a prisoner in custody. He argued this did not apply to Ms A.

[32] During the Authority's investigation his evidence was to the effect that the standard of conduct asserted by the Department was not realistic for a prison officer living in South Auckland. He would occasionally come across both former offenders and members of offenders' families in his daily life – at the supermarket or walking through his suburban shopping centre – and could not be expected to report all such interactions or contact.

[33] While I accept Mr Gregory's point about artificial constraints on contact with people in the wider community who are related to offenders, this was not the distinction made by the Department.

[34] The code's concern is clearly about any significant personal, professional, social or financial relationships which might affect the interests or integrity of an officer. This relates to interactions which are more than a casual exchange of a civil greeting in a public place.

[35] Ms Muir, in her evidence, properly accepted the code did not expressly refer to the limits on such relationships being extended to the families and associates of offenders. However I accept her evidence that the code's general intent was clear.

[36] Appropriate boundaries with prisoners' families were necessary to reduce the risk of "*getting got*". That phrase is Departmental jargon for situations or circumstances where a prisoner obtains information or develops a direct or indirect relationship that enables him or her to exert inappropriate influence over an officer. It is regarded as unacceptable because of potential effects on morale between officers, maintenance of discipline among prisoners and, at its worst, blackmail or other corrupt practices.

[37] In that context I accept Mr Sherlock's evidence that, while there might be a "*grey line*" as to whether Ms A was an "*offender*", there was no doubt that Ms A was on a serious drugs charge and could end up in AWRCF where Mr Gregory would likely have dealings with her. If Mr Gregory had informed his manager of his recent and previous contact with Ms A, he "*would have been guided to a better situation than now*".

[38] I accept a fair and reasonable employer would have concluded, as the Department did in light of the specific provisions and general intent of the code of conduct, that Mr Gregory should have known of the risk in the relationship and contact he had with Ms A and should have reported it to a manager for guidance.

**Was accessing prisoner records a breach of the code of conduct?**

[39] Mr Gregory disputes that information he accessed about one prisoner amounted to a breach of the code of conduct as alleged by the Department.

[40] The code states expectations that information systems will be used for the “*business purpose*” for which they are provided and that resources be used only for “*authorised purposes*”.

[41] Mr Gregory denies trying to access the records of a particular prisoner with any intention to provide information requested by Ms A. Rather he says he was researching information about members of a gang in his unit and the particular prisoner was associated with that gang.

[42] Mr Gregory worked in a women’s prison. The record he sought to access, not just once but several times, was for a male prisoner. It was a prisoner with the name which Ms A had asked about. Mr Gregory’s explanation that he tried to look up that prisoner’s records out of “*curiosity*” only is not credible. While he did not search the system until several weeks after he had told Ms A that he would “*ask around*”, he did so soon after returning from work after a previous suspension. He also told Mr Sherlock that he “*did no more*” than tell Ms A he would ask around. In fact he did do more by trying to access those records although he subsequently provided no written or verbal information about that prisoner to Ms A.

[43] I am satisfied a fair and reasonable employer would have doubted Mr Gregory’s explanation and concluded, as the Department did, that his access to those records was not for appropriate business purposes. Accordingly the Department was justified in concluding he breached the code.

### **Was it reasonable to rely on Mr Gregory's comments about his actions?**

[44] Mr Gregory disputes the negative inferences taken by Ms Muir from two particular comments he made during the Department's investigation. Firstly, in relation to his contact with Ms A, Mr Gregory told Mr Sherlock that "*she is a member of the public until convicted*" and he "*will not change the way I act for anybody in that relationship*". Secondly, in relation to searching for information about a particular prisoner, Mr Gregory told Mr Sherlock he did believe it was inappropriate but that "*if I had not been caught it would not have been inappropriate*".

[45] Mr Gregory argues he was entitled to interact with Ms A as he would do with any other member of the public because this was consistent with the presumption of innocence. That presumption is confirmed in the provisions of the New Zealand Bill of Rights Act 1990 and applies to the Department's actions.

[46] I accept the Department's submission that Mr Gregory's apparent lack of perception about the inappropriateness of his actions is at the heart of this case. A further comment recorded in the transcript of his interview with Mr Sherlock confirms that he had no intention of changing his approach: "*I don't give a rat's arse, I'll call anyone I like and that's what I do.*"

[47] These comments about what he saw as appropriate to do in the future were of themselves conduct which deeply impaired or was destructive of the basis confidence or trust that was essential to the employment relationship between Mr Gregory – in his role as a long-serving PCO – and the Department.<sup>1</sup>

[48] I accept a fair and reasonable employer would, as the Department did, take account of those comments in deciding it could not trust Mr Gregory to repeat the inappropriate conduct found to be in breach of its code.

### **Was a fair process and natural justice followed throughout?**

[49] Although Mr Gregory's statement of problem and closing submissions complain of "*procedural unfairness*", the several folders of evidence in this case,

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<sup>1</sup> *Northern Distribution Union v BP Oil NZ Limited* [1992] 3 ERNZ 483, 487 (CA).

viewed overall, do not support that allegation.

[50] Rather it is clear that at each step the Department properly notified Mr Gregory of allegations made against him, conducted a thorough investigation, provided him with a copy of the investigation report and supporting documents, provided him with an opportunity to be represented and provide responses to the relevant decision maker, carefully considered his responses and made further necessary inquiries, reached preliminary decisions on which he had the opportunity to comment, and then fairly advised him of final decisions.

[51] Some specific aspects of procedure are touched on in the remainder of this determination. While there may have been some factual errors or procedural slips made by managers in the course of disciplinary inquiries regarding Mr Gregory's conduct, none amount to fatal flaws which would otherwise render the Department's actions or decisions unjustified.

#### **Was it reasonable to rely on Mr Gregory's recent disciplinary history?**

[52] Mr Gregory says the Department unreasonably relied on the three written warnings issued to him since August 2007 because he had already raised a personal grievance on each of those warnings.

[53] These were:

- (i) A six month written warning issued on 27 August 2007 for being absent from duty and leaving the prison site without his manager's permission – grievance raised on 26 November 2007; and
- (ii) A final written warning issued on 17 January 2008 for failing to carry out his PCO duties – grievance raised on 25 February 2008; and
- (iii) A final written warning issued on 17 April 2008 for harassment of officers – grievance raised on 15 July 2008.

[54] The Department responded to each grievance letter within a fortnight, restating its findings and reasons for the warning. Its reply to each of the first two grievances asked Mr Gregory to be specific about what disadvantage he had suffered and whether he had any new evidence that he wanted the Department to consider. He provided

nothing more, although Mr Gregory says he “*pushed*” his union to do something about his grievances. Mr Bradley accepted in his evidence that no further steps were taken about any of those grievances until Mr Gregory’s application to the Authority after his dismissal.

[55] Mr Gregory, either personally or through his union representatives, had a good faith obligation to be active and communicative about those grievances if he was genuinely pursuing them. The Department had responded promptly on the occasion of each grievance being raised. The dispute resolution provisions of his employment agreement provided for further steps Mr Gregory and his union representatives could have taken. It is not consistent with the good faith obligation to assert that those warnings were somehow put ‘on hold’ indefinitely by formally raising a grievance and then doing nothing more about it.

[56] In these circumstances I accept a fair and reasonable employer would be entitled to take account, as the Department did, of those warnings to the extent they were current or otherwise relevant to the issues being considered at the time of the investigation that ended in Mr Gregory’s dismissal.

#### **Were the written warnings justified?**

[57] While I have found the Department legitimately took account of those warnings in the decision to dismiss Mr Gregory, his present application also included pursuing his earlier grievances about those warnings.

[58] This is not a case about whether there was disadvantage arising from those warnings. A written warning making an employee more vulnerable to dismissal may amount to a disadvantage although there is no material or demonstrable financial loss: *Alliance Freezing Co (Southland) Ltd v NZ Amalgamated Engineering IUOW* [1989] 3 NZILR 785, 789 (CA). Mr Gregory’s issue is whether each of the warnings was justified.

#### *(i) The 27 August 2007 warning*

[59] Mr Gregory submits there is no evidence Ms Burns or Mr Sherlock positively

established he lacked authorisation from his unit manager or the on-call manager to leave the prison buildings briefly on 11 May 2007. He says the Department's finding that he did leave without authority, and the resulting six-month written warning, were both unjustified because of this lack of supporting evidence.

[60] He also has a technical argument that he did not actually leave the prison grounds because he turned around in the car park and returned to work within a few minutes. He did not raise this point with the Department at the time and it is irrelevant now.

[61] Security camera footage confirmed Mr Gregory did leave the prison building that day. It showed he stopped while driving out and returned to the building. He stopped shortly after there was a radio call for him from the on-call manager to come to the prison receiving office.

[62] From their inquiries both Mr Sherlock and Ms Burns concluded Mr Gregory had taken his keys and his radio with him. This accounts for him stopping his car at the time of the radio call from the on-call manager. Mr Gregory said he had left his keys and radio with another PCO whom he had arranged to provide cover for him. However subsequent inquiries could not establish this other PCO was, in fact, on duty at the time.

[63] Mr Gregory cannot now definitely recall why he left the prison building during his shift that day. At the time he explained that he had permission to attend an appointment with someone about installing blinds at a rental property. At the investigation meeting he suggested it may have been to attend an appointment for treatment at a nearby osteopath's practice. On either account he says he stopped in the car park and came back to work because he got a message on his mobile phone cancelling the appointment. He denies stopping because of a radio call at that time because he insists he had left his radio receiver with the PCO covering for him.

[64] An employer investigating suspected misconduct is not required to establish what happened beyond reasonable doubt. Rather its investigation must be sufficient to establish that its conclusions were reached on reasonable grounds and that the decision-maker honestly believed those conclusions were correct.

[65] In this case I am satisfied Mr Sherlock and Ms Burns had made inquiries sufficient to reasonably believe that Mr Gregory's explanation about the radio and keys was not correct. Information about the PCO said to have been providing cover and holding Mr Gregory's radio and keys suggested that person was not in fact on the premises at the time.

[66] I also accept it is more likely than not that inquiries were made of the unit manager and the on-call manager although their responses were not clearly documented. Ms Burns did make an error in later asserting that the unit manager had not given Mr Gregory permission to be off-site because the evidence on that point was not that unequivocal. Rather the unit manager said he could not "recall" giving permission.

[67] However I am satisfied Ms Burns had a reasonable and honest belief for her conclusion that Mr Gregory's actions on 11 May 2007 breached his obligations to faithfully perform his duties in compliance with the Department's operating standards and procedures. In those circumstances the written warning given was justified.

*(ii) the 17 January 2008 warning*

[68] In June 2007 Mr Gregory had reported an incident where two officers were found sleeping on night shift. In the course of the Department's investigation of that matter, which resulted in dismissals of those two officers, concerns were raised about Mr Gregory's performance of his supervisory duties.

[69] In August 2007 Ms Burns commissioned an investigation into allegations Mr Gregory had not maintained proper control of the night watch and had not ensured all staff carried out required routines. That inquiry was to look at whether Mr Gregory complied with written instructions for the night watch on 7 and 8 June when the two officers were found sleeping and his general practice in supervising the timing of prisoner observations, security rounds which are referred to as "pegging", and directions to staff.

[70] The 72-page report of that inquiry, which included interviews with more than

20 officers and managers, set out ten negative conclusions about Mr Gregory's performance of his duties. These included Mr Gregory allowing officers to leave work before the relief shift reported for duty and allowing staff to bring in DVDs to watch while at work.

[71] Mr Gregory's submissions on why the conclusions reached and subsequent warning issued were unjustified may be summarised in these three points:

- (i) While he admitted letting officers go home early, other PCOs and managers also followed that practice without the same criticism; and
- (ii) The necessary procedures were not clear and his performance was assessed against a "desk file" that had been updated with specific requirements that were not in place at the time under investigation; and
- (iii) There was contradictory evidence about whether or not DVD players were allowed to be brought into work and used during working hours.

[72] During the Authority's investigation Mr Gregory accepted that what he required of officers in carrying out 'pegging' rounds and monitoring prisoners was not in accordance with the Department's policies and procedures. He also confirmed that, without authority to do so, he let officers leave before the next shift arrived if they had worked through breaks. He put it this way: "*I fully accept it was wrong but it is what we did*".

[73] That alone justifies the final written warning and 12 month performance plan imposed. He may well be correct about the level of clarity in the 'desk file' of operating procedures at the time but that is not what Ms Burns focussed on in the warning. She identified the high level of trust, responsibility and integrity expected of a PCO with almost 20 years service at the time. Mr Gregory did not need a specific procedure to tell him that letting officers leave a prison before the next shift arrived was unacceptable. A fair and reasonable employer would not expect it or be expected to tolerate something so plainly contrary to the security needs of a prison.

[74] Mr Gregory is also wrong to say that the practice of other PCOs was not considered. It was addressed in the Department's inquiry with the conclusion that others may have committed the same breaches but that Mr Gregory was responsible for setting a low standard which had influenced those other PCOs understanding of

what was permissible.

[75] There was contradictory evidence on whether, when and where bringing and watching DVDs was acceptable for officers on duty at prisons at that time. I also accept Mr Gregory's evidence that he stopped bringing in a DVD player after a manager had issued an instruction not to do so. However the focus on this particular aspect is peripheral to the Department's fairly expressed concern about Mr Gregory's overall attention to ensuring officers properly followed the fundamental safety and security procedures for observations and pegging. That concern justified the warning given.

*(iii) the 17 April 2008 warning*

[76] Some officers interviewed in the course of the Department's inquiry on Mr Gregory's performance of PCO duties made negative comments about his behaviour towards them or other officers. Some of those comments suggested that Mr Gregory used racist language and harassed some officers.

[77] Those criticisms went beyond the scope of the inquiry on PCO duties and the Department decided on a separate inquiry on the allegations of harassment and racist language. It was conducted by Mr Cummins

[78] Over several months the Department sought responses from Mr Gregory about accusations of harassment and racist language. During that time his union representatives contested whether he had been provided with sufficient information about who had complained and what he was alleged to have said and done.

[79] In March the Department summarised the allegations as:

- a. Telling a Polynesian female officer that he "*should just come over there and slap the black out of you*"; and
- b. A Polynesian male officer saying Mr Gregory had called him a "*nigger*"; and
- c. One officer saying Mr Gregory referred to Polynesian female officers as "*chocolate sisters*"; and
- d. A female officer saying Mr Gregory told her, "*you want to take me*

*on, come with everything you've got".*

[80] Throughout Mr Gregory effectively refused to respond or participate in the Department's investigation. He described the investigation report as generalised and vague and he did not accept he had done anything wrong. Mr Gregory requested a transfer to another prison but Mr Cummins refused the request and issued a further 12-month final written warning.

[81] Mr Gregory's criticism of the warning and its justification are:

- a. the selection of officers for interview was biased; and
- b. officers who criticised him were seeking revenge for action he had taken to end what Mr Bradley called an "*overtime scam*"; and
- c. he was not provided sufficient detail to properly respond to the accusations; and
- d. the treatment of him was different from other staff who used similar language without sanction and that difference was inconsistent with a supposed 'zero tolerance' policy; and
- e. he did not use the terms alleged and never used the word "*nigger*".

[82] In his evidence Mr Gregory was not sure about when he did in fact receive the full transcripts of interviews with officers who made complaints about his behaviour and language. However it is clear, at the very least, that he had summaries of those complaints from an early stage. He now accepts those summaries, when compared with the full transcripts, are not inaccurate.

[83] Reading the transcripts of interviews with officers does not support the allegation of bias against Mr Gregory in their selection. A number made positive comments about him or suggested that his use of phrases or words generally seen as racist was meant to be light-hearted and without malice. However even those positive statements do confirm that such language was used and support the allegations made by those officers who found it offensive.

[84] There is no evidence corroborating Mr Gregory's allegation of a conspiracy against him by junior staff. Neither does he have any credible explanation about the evidence of the officers – some antagonistic and others benevolent in their apparent

attitude to him – that he did use the language alleged, other than to say they must be “*mistaken*”.

[85] Mr Gregory is correct in noting that the evidence suggested two other PCOs had used such language but appeared to face no disciplinary consequences. However Mr Cummins evidence was that the situation revealed by the inquiry into Mr Gregory’s conduct was closely followed by an in-service training programme which reinforced standards of behaviour and language. There is also an important difference between those other PCOs and Mr Gregory. His conduct was the subject of multiple complaints by officers.

[86] There were some errors in how the Department handled this inquiry. Ms Burns accepted in her evidence that there was a delay of some months and the complaints should have been raised earlier with Mr Gregory. Mr Cummins accepted that “*poor HR advice*” had resulted in Ms Burns not also investigating a complaint by Mr Gregory against one of the officers who had complained about him. During the inquiry Mr Gregory had been embarrassed about an email which included a note referring to him being under disciplinary investigation, a slip for which the Department apologised.

[87] However the Department’s inquiry is not to be subjected to pedantic scrutiny. I am satisfied the substance of its concerns, and the supporting evidence, was put sufficiently fully to enable Mr Gregory to fairly respond before deciding on its disciplinary action. In hindsight his tactical decision (on union advice) not to reply may now not seem the best choice. However, in the absence of any real reply from Mr Gregory at the time, the conclusions and decision reached by the Department were those a fair and reasonable employer would have made in the circumstances.

[88] Those circumstances include the context of Mr Gregory working in a women’s prison with a high proportion of Maori prisoners and corrections officers of Maori and Pacific Island descent. Racially-based slang and insults might cause particular offence in such an environment. That is so even if such language is sometimes used and even acceptable to some people in other informal social situations if meant humorously or satirically or to show disdain for mainstream standards or norms of social propriety. Examples are readily found in satirical television programmes such

as *BroTown* or the lyrics of hiphop and so-called gangster rap performers.

[89] In this context, a fair and reasonable employer is entitled to decide, as the Department did, that such language is not acceptable from a person in Mr Gregory's position of responsibility for other staff and in a service which requires high standards of personal behaviour and conduct. It was justified in finding his language and behaviour breached the Department's code of conduct expectation to "*treat your colleagues, offenders and any people with whom you have any official dealings with courtesy and respect*".

### **Was Mr Gregory's PIP fairly implemented?**

[90] The written warning issued to Mr Gregory on 27 August 2007 included a 'formal review' for the following six months. This was to include weekly reports assessing his performance.

[91] The final written warning issued on 17 January 2008 noted that he was, at the time, on a performance management plan. This warning provided for fortnightly monitoring of Mr Gregory's performance by his unit manager and a monthly review with his unit manager and Ms Burns. The further final written warning issued on 17 April 2008 noted this regime and required it to run for the remainder of the 12 months.

[92] Mr Gregory says the 12 month PIP was drawn up and properly implemented. However he says the first programme required from August 2007 was not. His unit manager met with him once but was then ill and no further meetings were scheduled.

[93] He criticises the earlier failure to make arrangements as a missed opportunity that exposed him to further performance issues which may not have occurred if the Department had implemented the first required PIP.

[94] I do not accept any unjustified disadvantage arose for Mr Gregory from these circumstances. He has not established any real causal link between the alleged failure to implement the first PIP and his dismissal, except to assert responsibility for his own conduct as a senior and long-serving staff member rests with the Department rather

than himself. Even if there were some potential link, the implementation of the second PIP most likely broke that chain.

[95] I do accept the Department's submission that Mr Gregory did not raise any issues with the implementation of his performance plan during the term of his employment and therefore it was deprived of any opportunity to address any real issue, if there was one.

### **Was it reasonable to dismiss rather than transfer Mr Gregory?**

[96] In deciding to dismiss Mr Gregory in November 2008 Ms Muir rejected a submission from him seeking a transfer to another prison as an alternative to ending his 20 years of service with the Department. He had also sought a transfer in March 2008 during the investigation on the harassment issues.

[97] Mr Cummins refused that earlier transfer request as he considered such a move was not "*viable or desirable*". He explained to the Authority's investigation that he reached that view because he considered a transfer would have enabled Mr Gregory to avoid rather than adopt necessary changes in his conduct and relationship with officers.

[98] Mr Gregory's rationale for seeking a transfer as an alternative to dismissal in November 2008 was that no serious performance issues had been raised with him before he transferred to AWRCF in late 2005.

[99] I am satisfied Ms Muir's reasons for rejecting that request were ones a fair and reasonable employer could have. She considered a transfer was unsuitable because Mr Gregory – whichever prison he might work in – had not shown any understanding of what was wrong with his conduct. He continued to pose a risk of "*getting goat*" due to his attitude that he alone would determine what contact he could and should have with people such as Ms A.

[100] He maintained this view in the Authority investigation. Answering a question on whether he accepted the Department was right to expect he was likely to call Ms A again in light of his "*rat's arse*" comment to Mr Sherlock he said: "*Yes but I still*

*don't see how the Department can tell me who I can and can't ring. I don't accept it."*

[101] In this light Ms Muir was justified in her conclusion that transfer was not an option because there was no sense from his comments that the Department could have confidence Mr Gregory would behave any differently at another prison.

### **Determination**

[102] For the reasons given above I find that Mr Gregory's dismissal by the Department was justified, as were its three earlier written warnings to him and its actions in relation to monitoring his performance.

[103] Accordingly Mr Gregory's personal grievance applications are dismissed.

### **Costs**

[104] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. In the event they are not able to do, the Department may lodge a memorandum as to costs within 28 days of the date of this determination. Mr Gregory will then have 14 days in which to lodge a reply memorandum before the Authority determines costs. No application will be considered outside this timeframe without prior leave.

Robin Arthur  
Member of the Employment Relations Authority