

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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**Prohibition on
Publication see
paragraphs 2 and 32**

BETWEEN

REX GEORGE FIELD
Applicant

AND

CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: P R Stapp

Representatives: Phillip Drummond for the Applicant
David Traylor for the Respondent

Investigation Meeting: 12 October 2010 at Palmerston North

Submissions by : 12 November 2010

Determination: 21 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Field commenced employment with the Department of Corrections on 24 March 1998. He was an Acting Principal Corrections Officer (PCO) at Manawatu Prison, Linton.

[2] Mr Field was dismissed on 4 September 2009 following an investigation held into an allegation of sexual harassment that had been made by a colleague (by consent name withheld and subject to a prohibition on publication). Mr Field denied the allegations and has claimed that Corrections did not provide sufficient detail and specificity of the allegations during its investigation and disciplinary process.

[3] A personal grievance was first raised by the Public Service Association on Mr Field's behalf, and more details were provided on 23 October 2009. That was responded to by the Department on 16 November 2009. There were then delays before the matter was filed in the Authority on 2 August 2010. The parties attended mediation. It now falls to the Authority to make a determination on the matter.

The issues

[4] The issues in this matter include:

- (a) Whether there was sufficient evidence for the assistant regional manager to reasonably conclude that Mr Field had sexually harassed the complainant.
- (b) Did the factors found amount to serious misconduct?
- (c) Would a fair and reasonable employer have dismissed Mr Field in all the circumstances?
- (d) If there is a personal grievance, the applicant is seeking reinstatement. The respondent claimed that reinstatement is not practicable.
- (e) Finally, what other remedies apply?
- (f) Both parties are seeking costs.

The facts

[5] Manawatu Prison is divided into a number of Units. Mr Field was based in the "C Unit". That Unit is divided into two parts: "CA" and "CB". Mr Field was based in the CA part of the unit at the prison.

[6] Between 7 November 2008 and 1 December 2008 there was a sequence of events which occurred that involved the complainant, another Corrections Officer. That officer (the complainant) has alleged that Mr Field was trying to have some relationship with her and when she rejected that he made her work environment difficult.

[7] The Corrections managers recorded from the complainant that she had some serious allegations against Mr Field that included him allegedly trying to get some

type of relationship going with her and that she had rejected his advances. The complainant also referred to the work environment being made very hard. In addition, the complainant said that Mr Field showed up uninvited at her house. The complainant invited him inside for a drink and at the time she thought that that was the best thing to do and because she had visitors there at the time.

[8] In a letter dated 27 November 2008 the complaint was formally raised in very general terms by the complainant. The complainant's complaint was initially made in a short letter as follows:

27 November 2008

I wish to formally lodge a complaint of harassment against Acting Principal Corrections Officer Rex Field at Manawatu Prison.

During the time I have been working at Manawatu I have been subjected to sexual physical and verbal harassment/abuse by this Officer.

[9] The complainant discussed her complaints with a Correction's HR adviser, and from 1 December 2008 the complainant was rostered to work in B Unit instead of C Unit as a response to the complaint.

[10] The assistant regional manager decided to appoint an employment investigator to investigate the complaints (internal memorandum dated 28 November 2008). This set out the terms of reference for the investigation. The investigator appointed came from another prison, and had not previously met Mr Field or the complainant. The purpose of his appointment was to bring an objective and unbiased perspective to the investigation into the complaints. The complainant was advised of this decision.

[11] Mr Field was advised on 1 December 2008 of the formal complaint against him and that there would be an employment investigation into the complaint. The complainant's letter dated 27 November 2008 and a copy of the terms of reference for the investigation were provided to Mr Field. He was also informed that the complaint was considered a serious matter and that if the allegations were proved, they might constitute serious misconduct which could result in disciplinary action up to and including dismissal. Mr Field was also advised of his right to have representation and that there was the availability of the employment assistance programme.

[12] On 3 December 2008 Mr Field was provided with a summary of what had happened in relation to the complainant's complaint up to that date. The employment investigation was carried out, which included a review of all the relevant documentary evidence and interviews with twenty people, including Mr Field. A number of specific allegations were made by the complainant during her interview with the investigator and she relied on diary notes. One of her complaints was that she had been asked by Mr Field if she was gay and on another occasion had made a derogatory comment. Also, she complained of an incident involving a mock control and restraint (C & R) exercise initiated by Mr Field against her and an issue over the use of a sandwich machine. Another matter included an allegation that Mr Field made an offensive comment to a transsexual prisoner. The complainant made numerous other complaints about Mr Field's behaviour towards her in her work.

[13] During the investigator's inquiries a number of officers raised various matters and expressed views about Mr Field's behaviour, one officer raised some historical issues about him, other officers never saw any inappropriate behaviour, and others supported Mr Field.

[14] Mr Field was provided with the applicant's allegations by the investigator. Mr Field admitted asking if the complainant was gay, and that he visited her home, and he acknowledged that he had driven past her home with the unit manager on another occasion. He denied the other allegations.

[15] A report was completed and provided to the assistant regional manager on or around 12 February 2009. This report included the evidence that had been collected, the people interviewed, the various disparities in evidence and a number of factual findings.

[16] The report's conclusions included:

- 1) That there was no first hand accounts of Mr Field's behaviour as alleged by the complainant.
- 2) That there was corroborative evidence that on the balance of probabilities sexual harassment, threatening, abusive or insulting behaviour towards the complainant did occur and he may have breached Corrections' Code of Conduct.

3) The mock C & R incident was a common occurrence in the prison.

[17] It is common ground that this report and the attachments to it were provided to Mr Field. In a letter dated 25 February 2009 the assistant regional manager stated:

*I advise that **I have accepted the facts and findings** outlined in the report. (Emphasis added)*

[18] She went on to say:

Prior to making a decision on the outcome of the investigation, it is your right to make submissions on the findings of the report.

[19] Mr Field was invited to make submissions on the report. Mr Field provided his written submissions on 18 March 2009. A meeting was then held between the assistant regional manager and Mr Field on 1 April 2010 and the purpose of that meeting was for her to seek clarification on a number of issues raised by Mr Field in his written submissions. Mr Field was assisted and supported by another colleague at that meeting. He denied the allegations raised by some of the officers interviewed by the investigator. Another complicating feature has been raised by Corrections' witnesses in regard to the 1 April meeting. Both parties have a different recollection about that meeting in as much as Mr Field and his support person have been accused of trying to justify Mr Field's actions, minimising his behaviour and that their body language was inappropriate, such as being "*laid back and their arms were slung over the back of their chairs in a casual and seemingly arrogant manner*". He was not asked to answer these at the time.

[20] Mr Field produced a written document ("*some points to note and summary*") in reply. He acknowledged during the Authority's investigation meeting that he did receive the complainant's statement provided from the employment investigation.

[21] The assistant regional manager decided that before she could reach any decision she needed to undertake further inquiries arising out of Mr Field's submission. Mr Field was informed that further inquiries would be undertaken. Those inquiries involved the assistant regional manager meeting with seven people, including Mr Field and the complainant. The further inquiries occurred between 1 April 2009 and 27 April 2009. Mr Field was given the interview notes. They were produced in the Authority's investigation.

[22] In the meantime, Mr Field instructed an employment law firm, which commenced acting for him. That law firm was provided with the documentation produced in the course of the employment investigation and the documents produced in the course of the assistant regional manager's further inquiries. The law firm made a request for details and specificity on the allegations Corrections was relying on.

[23] Mr Field and his lawyer were that Corrections would provide advice in writing of any preliminary view on the outcome of the investigation and that that would involve an invitation to meet and discuss the view before a final decision was made.

[24] In a letter dated 11 June 2009 the assistant regional manager wrote to Mr Field's lawyers and reiterated:

*I have already indicated, having reviewed Mr Field's submissions, I undertook further investigation, and the outcomes from this, and all relevant documentation, has now been provided to you. **I have earlier advised that I have accepted the findings in the report. The additional information appears to support these findings.** (Emphasis added by me)*

I therefore propose to make a decision on whether Mr Field's behaviour constitutes serious misconduct and if so what the appropriate penalty should be. This could include a formal warning or dismissal.

[25] The assistant regional manager did not explain how she had reached her own findings and conclusions, especially in regard to credibility.

[26] Mr Field's lawyers wrote to Corrections on 23 June 2009. The lawyer's letter expressed a concern regarding the acceptance of the findings in the report. The lawyer protested that the assistant regional manager had accepted the conclusions of the report without providing an opportunity to comment on the further information that was being relied upon.

[27] On 8 July 2009 the assistant regional manager clarified what she meant by saying she had accepted the findings in the report:

That this was not intended to be a statement that I believe the findings in the report to be correct. It was intended to indicate that I have received the report, reviewed it, and decided against sending the matter back to the investigator for further investigation.

[28] The assistant regional manager accepted she could have been clearer in explaining that position. She says that she expected submissions to be made by Mr Field on the contents of the report.

[29] On 9 July 2009 Mr Field's lawyer protested again and took exception to the words used by the assistant regional manager and did not accept her explanation because her two comments about accepting facts and findings outlined in the report appeared to be clear and unequivocal statements. A submission was provided by Mr Field's lawyer to Corrections on 28 July 2009 that made primary submissions, covered the investigation process, complained about pre-determination, raised issues about the questioning of witnesses, refuted the acceptance of the report and commented on the report's conclusions. The submission raised that Corrections had ulterior motives and had not complied with the Code of Conduct. Mr Field's lawyers raised with Corrections the following considerations:

- (a) That the investigation process was fatally flawed, involving ulterior motives and pre-determination. The ulterior motives claim had been previously raised by Mr Field on 1 April when he raised that he believed the complainant made her complaint because he had raised an issue about her and the management of a prisoner and a matter concerning ACC. Also Mr Field believed that one of the corrections officers may have been influenced by the fact Mr Field was a member of the PSA whereas that officer was a member of the Corrections Association. These have not been pursued and no evidence called to give them any substance.
- (b) That the investigation process was interfered with;
- (c) That a number of potential witnesses were not interviewed;
- (d) That the investigator's style of questioning and appearance was clearly biased;
- (e) That the findings in the report could not be justified on the evidence that was gathered;
- (f) That there was insufficient evidence to make any findings against Mr Field;

- (g) That any disciplinary outcome against Mr Field would be unjustified and unreasonable;
- (h) That there was a culture within the prison involving “black humour” and sexual banter that should have been taken into account.

[30] The letter also pointed out some serious concerns regarding the matters put to some witnesses and that insinuations had been made that could have given rise to Mr Field being prejudiced, such as suggestions of previous allegations from other employees and where leading questions had been asked by the investigator. The letter should have alerted the assistant regional manager to what Mr Field’s lawyer at the time considered were serious issues arising about the complainant’s credibility given that her complaints were not supported by other witnesses, that there was a lack of first hand evidence and that there were questions arising about the evidence from other witnesses. Finally there was an issue about the complainant’s motives towards Mr Field in regard to an issue about the management of another prisoner and the ACC matter.

[31] On 20 August 2009 the assistant regional manager set out her response to Mr Field’s lawyer’s submissions (28 July 2009). This is an important letter because it sets out some important findings reached:

- a. That the assistant regional manager refuted that there had been any interference in the investigation.
- b. That the assistant regional manager considered that the complainant had genuinely made a complaint which was not being driven by anyone else and that there were no ulterior motives.
- c. That the assistant regional manager took into account the character references and that the appropriate witnesses had been interviewed.
- d. That the assistant regional manager explained that the witnesses not interviewed were people not able to provide specific information in regard to the allegations. Corrections rejected the complaint about witnesses not being interviewed that Mr Field had named. Its position was that it was unnecessary to interview them, including Mr Field’s girlfriend.

- e. That the assistant regional manager rejected the claims the investigator predetermined an outcome and had been unfair and biased because of the investigator's experience and because he had no previous connection with Manawatu Prison.
- f. That the assistant regional manager responded to various matters in regard to credibility involving Mr Field, the complainant, and other corrections officers.
- g. That the assistant regional manager outlined the evidence she relied upon and which supported the complainant's allegations. The information included:
 - i. Mr Field's admission he went to the complainant's home. It was deemed inappropriate and or not normal to visit a female officer at home.
 - ii. Mr Field's explanation that he was on his way to visit his girl friend was rejected.
 - iii. Mr Field admitted driving past the complainant's home after the complaint had been made. He explained that he had been driven by another officer past her home while he was the passenger.
 - iv. That there was corroborative evidence from another corrections officer of inappropriate behaviour involving Mr Field making sexual references about the complainant. Also, this officer recalled Mr Field making other comments but could not recall the exact words and that he warned Mr Field that it was inappropriate to have a sexual interest in the complainant and he advised the complainant not to put up with Mr Field's comments.
 - v. Character evidence involved various opinions and allegations. Other witnesses however stated that it was common that there was black humour and banter throughout the prison.

[32] The 20 August 2009 letter also served to put Mr Field on notice as to Corrections' preliminary view in regard to a decision on the outcome. There was an arrangement between Mr Field's lawyer and the assistant regional manager that her final decision would be conveyed through Mr Field's lawyer. The preliminary view read as follows:

It is my view that there is evidence that supports the allegations that Mr Field has sexually harassed (name withheld and prohibited from publication). In particular I have found the following:

- (a) That Mr Field has admitted that he attended (the complainant's) home uninvited which she clearly found offensive and unwarranted, and despite this he then admitted to driving past her home again after the complaint was made;*
- (b) That Mr Field made inappropriate sexual comments and innuendo targeted specifically at (the complainant); and*
- (c) That (the complainant) found this behaviour unwanted, offensive and repeated to such an extent that it had a detrimental effect on her.*

I consider that in acting in the above way, Mr Field has breached Principle Two of the Department's Code of Conduct. Subjecting colleagues, offenders, stakeholders or members of the public to harassment is unacceptable.

As outlined above, I have not found evidence to prove or disprove the other allegations made by (the complainant).

I do not accept Mr Field's explanation of his behaviour, that it was "just" sexual banter and black humour consistent with the culture of the Prison. As can be seen by the Code of Conduct and the Department's policy on sexual harassment, it is simply not considered to be acceptable behaviour at any location within the Department, at any time.

Accordingly, my preliminary view is that the allegation in relation to sexual harassment is proven, that Mr Field's actions amount to serious misconduct and that the appropriate sanction for that conduct is dismissal. I have based this view on all the information available to me, including the evidence collected in the employment investigation report, my subsequent inquiries, and your lengthy submissions.

Before I make a final decision I would like to hear your submissions on this view and why you believe Mr Field should not be dismissed ...

[33] Mr Field's lawyer responded on 3 September 2009. The submission focused on three allegations in reply to Corrections. In essence, Mr Field's lawyers were saying that there was no detail and specificity provided by Corrections to justify the

conclusions reached and any detrimental effect upon the complainant's work. It also challenged Correction's conclusions that the reasons it relied on could be considered sexual harassment.

[34] On 4 September 2009 Corrections dismissed Mr Field and confirmed the decision in writing. Since the dismissal Mr Field has instructed new lawyers and the parties attended mediation to try and sort the employment relationship problem out, without success. It now falls on the Authority to make a determination.

Determination

[35] My consideration is whether Corrections has shown it conducted a full and fair investigation and the decision was justified considering all the circumstances on an objective basis. In addition as there was a serious allegation Corrections needed to have sufficient proof of the allegation to a high degree.

[36] The internal employer's investigation was delegated to a regional manager who did not have any prior knowledge of Mr Field. In addition Mr Field was given all the material and relevant information to comment on as the investigation progressed. Mr Field was given the complaint. There were no flaws in that part of the investigation. It was open to Corrections to involve an outside investigator from another prison. That was not challenged either, I hold, until later. I hold that the investigation was thorough given that there were a large number of people involved and interviewed. Also, I hold that there was insufficient evidence to challenge the investigator's impartiality, and in any event the assistant regional manager's process should have protected Mr Field from any prejudice. The investigator's report was produced that concluded that there was no first hand accounts of Mr Field's behaviour as alleged by the complainant; that there was corroborative evidence that Mr Field had engaged in was sexual harassment and threatening, abusive and insulting behaviour did occur. The report also concluded that Mr Field may have breached the code of conduct.

[37] The assistant regional manager accepted the facts and findings from the report and I am supported in this conclusion by the unambiguous nature of her written comments. Her comments could have only related to the finding contained at clause 12.12.2 in the report and summarised above. This did not particularise any of the alleged conduct upon which the investigator had concluded amounted to sexual

harassment and threatening, abusive or insulting language towards the complainant. Indeed the assistant regional manager has left the matter very confused when she says:

That this was not intended to be a statement that I believe the findings in the report to be correct. It was intended to indicate that I have received the report, reviewed it, and decided against sending the matter back to the investigator for further investigation.

[38] Also, the assistant regional manager accepted she could have been clearer in explaining that position. She says that she expected submissions to be made by Mr Field on the contents of the report. It does seem that the assistant regional manager embarked on her own enquiry on the basis of the report and the findings because she decided not to send it back to the investigator, which she was entitled to do. This would have been a protection for Mr Field in regard to his complaint that the investigator was biased. However, I hold that she had already decided to accept the findings and conclusions of the report subject to any submissions from Mr Field on the outcome. It would have been difficult for Mr Field to identify the component parts of the report being relied upon by the assistant regional manager, but he should have reasonably concluded she had decided to rely on the whole report when she informed him that she had accepted its findings and conclusions. An employer is entitled to rely on a whole report, but of course would need to make its own conclusions where there was any dispute over the findings or where the findings and conclusions were inconclusive and or qualified. In this case Mr Field denied most of the allegations. In addition he had officers who supported him.

[39] Despite the findings and Corrections' acceptance of the report concluding that there was evidence of Mr Field engaging in threatening, abusive and insulting language towards the complainant, during the course of the Authority's investigation the HR manager involved in Corrections process could not identify any evidence of any threatening, abusive or insulting behaviour being directed at the complainant. This would have had to affect the outcome.

[40] The next step was that the parties met on 1 April to discuss the findings and Mr Field's written response. Nothing more was particularised about what the assistant regional manager was considering from the detail. In further correspondence the assistant regional manager repeated her view that she had accepted the findings in the report. In the exchange of correspondence that followed it seems that the assistant

regional manager categorised Mr Field's alleged behaviour as misconduct, where there is a distinction in the code of conduct between that and serious misconduct. In fact what I understand of the policy is that the disciplinary procedure for misconduct is used for matters relating to serious misconduct, for example sexual harassment.

[41] One incidence of misconduct would not make an employee liable to dismissal and that was what Mr Field, and his advisors, thought was the issue. It transpired that it was not as such, but I am satisfied that Mr Field would have known that the allegations of sexual harassment would constitute serious misconduct if proved. He more than likely would not have been aware of what detail Corrections had decided to rely upon because he was not told, except for the three general conclusions reached by the assistant regional manager. What those conclusions were based on was never clarified properly.

[42] The assistant regional manager's approach may have been confusing, but I hold that where she had accepted the findings of the investigator's report nothing more could be clearer than not only would that have included the findings in the conclusion at clause 12, but indeed the entire report. This need not be fatal in as much as Mr Field was on notice that if the allegations were proved they might constitute serious misconduct under the code of conduct. Of course the obligation rested on Corrections to provide the details about what it was relying on, especially since that request had been made. Moreover there had been a severe attack made on the investigation and the report in Mr Field's lawyer's letter dated 28 July 2009.

[43] In Corrections' letter dated 20 August 2009 the assistant regional manager made some conclusions based on her further enquires of the people she interviewed, including Mr Field and the complainant. She preferred the information she received from those people and that there was evidence to support the allegations. However she limited her matters to the three conclusions. Also she concluded that the evidence on credibility related to Mr Field's behaviour being "...border line or marginal, offensive, and sexist", without the detail, other than that Mr Field participated in black humour or banter. From the latter she concluded that Mr Field probably did act in the way complained about by the complainant because of the information she obtained in her interviews, except that she has not explained how she reached that position other than by drawing an inference from the alleged incidences referred to (and that must have also included the matters in the report). This was is not sufficient to prove the

complainant's allegations occurred, especially given the seriousness of them. Where there was conflicting evidence in regard to the mock C & R exercise and an incident involving a sandwich maker she put these to one side in her decision making. On other matters she believed the complainant was genuine, without any ulterior motives and that there was no credibility issues between the complainant and other officers. However, she did not explain why and what it was about Mr Field that caused her to make adverse findings about him. Her evidence is affected by at least one officer who could not recall and denied making a comment that the complainant had said had been made. Also, the evidence between different officers interviewed seems to be conflicting and lacking in clarity in regard to any details. Others clearly supported Mr Field as a professional officer. One witness had definite opinions about Mr Field's behaviour, but how the difference between Mr Field's denials and that witness's information was determined is absent from any assessment made by the assistant regional manager.

[44] Despite the notes produced of the separate interviews (22 April to 27 April) the assistant regional manager had with corrections officers she did not identify enough information on what she was relying on to support her conclusions, I hold. It is not enough for her to rely on me to go through these and make my analysis of the detail she might have been relying on because Mr Field had denied most of the allegations. I accept that the assistant regional manager made some analysis of the information available to her in her letter dated 20 August. In particular she relied on one witness in providing information that supported the complaint and that other witnesses attested to borderline, marginal, offensive and sexist behaviour. However, these were opinions and inferences and affected by a culture of black humour and banter that had been tolerated. There had been no prior complaints and no proper and formal follow up on matters referred to. Therefore a fair and reasonable employer would not have categorised them as serious misconduct.

[45] Also, in the letter (20 August 2010) Corrections made its preliminary view available to Mr Field and this was limited to three conclusions. The relevant part can be summarised as follows where Corrections found that Mr Field:

- a. Admitted he attended the complainant's home uninvited. He then admitted to driving past her home after the complaint had been made.
- b. Made inappropriate sexual comments to the complainant [at work].

- c. The complainant found Mr Field's behaviour unwanted, offensive and repeated to such an extent it had a detrimental affect on her.

[46] These are the crystallised conclusions and matters Corrections has relied on. Firstly, on its own Mr Field's visit to the complainant's home would not amount to sexual harassment, given that she invited him in and other people were present. He left soon after. There have been no findings as to what his motives were. Also it is his evidence that he said he offered to leave was not challenged. In addition it emerged that Mr Field drove past the complainant's home on one occasion. He acknowledged that he did drive past the complainant's home, but explained that he did so when a colleague (the unit manager) took him past her home on their way back to Palmerston North from a work engagement. He was not driving the vehicle. This was confirmed and involved his unit leader. No one could explain whether or not the complainant was even at home when he was driven past. He did not repeat either of the above.

[47] Secondly, there were no details particularised of what the alleged inappropriate sexual comments and innuendo directed at the complainant were that the decision maker was relying on, except it has been left to me to infer that they were from the report and backed up by the assistant regional manager's further interviews. Mr Field's lawyer at the time replied and explained:

- a. That Mr Field's visit did not fall within sexual harassment policy.
- b. That Mr Field did not sexually harass the complainant by driving past her home.
- c. That there had been no specific findings made available on what the alleged sexual comments and innuendo were.
- d. That the department was applying the wrong test on sexual harassment.

[48] Certainly there were some reasons provided by the assistant regional manager, but Mr Field could rightly be confused by what she was referring to, because she had outlined various matters in her letter dated 20 August and at the same time had accepted the findings and conclusions of the investigator's report. It has to follow that she was conducting her own enquiry as the decision maker, but it does seem that Mr Field was expected to reply to everything raised against him from the report.

Corrections does not appear to have addressed those issues and did not provide any particulars of the sexual comments and innuendo relied upon. As such I can only conclude that she took into account considerations in reaching her conclusions from the report and her own interviews, but without being specific enough given the gravity of the complaints made.

[49] Furthermore the assistant regional manager took into account the affect of Mr Field's behaviour on the complainant. Corrections has relied on indirect evidence for this and drew inferences without providing any evidence as such and by not providing the detail that was being relied upon. I hold that this did not help as to determining whether the conduct complained of occurred.

[50] The assistant regional manager provided key evidence during the Authority's investigation in regard to her reasoning when she stated:

The evidence in support of a finding that Rex had not sexually harassed [the complainant] was Rex's own evidence, the evidence of some of his colleagues, and the absence of corroborating evidence in relation to some of [the complainant's] specific allegations. (Statement of Evidence at paragraphs 37 and 38)

[51] This was significant because the assistant regional manager, the decision maker, had noted that there was an absence of first hand evidence in regard to the complainant's specific allegations. Moreover, the reasoning failed to take into account that there were incidences the complainant had complained about and that according to the complainant the incidences had been witnessed, but the witnesses contradicted that in as much as they could not remember or were adamant that they had not witnessed such incidences at all. In such circumstances a fair and reasonable employer would have taken this into account as it was a factor in Mr Field's favour. It would have been unfair also if historical matters had been included without Mr Field having any input and it was not enough to expect him to second guess what Corrections was pursuing. A proper assessment of the evidence would have meant that the assistant regional manager's decision would have involved a finding more likely in line with misconduct for which a different range of options would apply and would have impacted on her decision.

[52] Another matter involved the assistant regional manager using information that she believed involved another corrections officer backing up some of the behaviour complained about. However that corrections officer did not witness any alleged events that had taken place. In fact the investigator's report found no first hand account to support any of the complainant's allegations. The same corrections officer in fact contradicted the complainant on one matter. That corrections officer had no recollection of making a particular alleged comment. This calls into doubt the information the assistant regional manager was relying on and thus would have impacted on any finding on the matter of credibility and as to who to believe.

[53] The assistant regional manager did have available the information that Mr Field asked "... *whether she was gay*" in regard to the allegation of him making a sexual comment and innuendo. Mr Field did not deny that but provided an explanation at the time that the question needed to be put into context. The words as such do not fall within the terms of Corrections' policy and do not amount to sexual harassment. There were no other comments allegedly made by Mr Field relied upon by Corrections. On its own this would not have justified a dismissal.

[54] The assistant regional manager took into account "*engaging in banter around the workplace that may be considered to be of an inappropriate nature*". The evidence available at the time does not support Corrections' findings of serious misconduct over this for the following reasons:

- a. There were no particulars provided and put to Mr Field at the time the assistant regional manager was considering the issues, especially in regard to what it was she was relying on. Since she was the decision maker she was required as a fair and reasonable employer to detail the matters being complained about.
- b. There was no analysis of whether the banter fell within and or outside the sexual harassment policy.
- c. The conclusion was qualified: *that may be considered to be of an inappropriate nature*.
- d. The preliminary view reached by the assistant regional manager was based on a limited consideration and did not involve banter around the workplace. There were no submissions requested on the banter

allegation. Banter was accepted as common place in the workplace and therefore there needed to be a detailed analysis of what was being alleged. This was not done.

- e. Corrections had the responsibility to decide what matters it was going to pursue and provide Mr Field and his representatives with the details. It did not sufficiently do this, I hold. It moved from a complaint into a general enquiry.

[55] The assistant regional manager also relied upon “*evidence of a number of people interviewed of [Mr Field’s] behaviour around the prison was borderline, marginal or offensive or sexist*”. This finding can not be relied upon to support a finding of serious misconduct because:

- a. No specifics were provided. No details of who said what and to who were provided and therefore relied on. Even so on the matters able to be drawn from the investigator’s report and from the assistant regional manager’s interviews Mr Field denied any wrong doing.
- b. It appears no specific details were put to Mr Field during the assistant regional manager’s consideration to enable him to comment, explain etc other than for him to guess what to respond to.
- c. There was no analysis provided on whether the alleged behaviour being relied upon was outside the sexual harassment policy, yet it is the breach of this policy which led to the conclusion that there had been serious misconduct warranting termination of Mr Field’s employment.
- d. The assistant regional manager’s preliminary view, which she has relied on for the finding of sexual harassment made no mention of a finding of sexual harassment based on a claim that Mr Field’s behaviour was “*marginal, offensive, sexist*”.
- e. The assistant regional manager had to be relying on the investigator’s report for the numerous complaints from the complainant and the statements from some officers but never included them in her preliminary conclusions.

[56] There were a number of alleged incidences and I am not at all sure which ones she relied on, whether they were matters included in her follow up with some of the officers she interviewed and how she came to the conclusions that she did because the details have not been outlined. Also it appears from the investigator's report that there were some historical matters raised by at least one officer. The assistant regional manager has not included any of these in her findings and certainly has not provided any detail as to their significance in her conclusions (when she accepted the findings and conclusion in the investigator's report). If in fact they were elements in the conclusions Mr Field can certainly be aggrieved that the detail was not put to him. Finally not all the allegations have been supported by all the officers concerned. I am left to conclude that the assistant regional manager's reliance on them is that she has been influenced and taken into account irrelevant matters to reach her conclusions in the absence of witnesses and with out enough evidence.

[57] The assistant regional manager also took into account Mr Field's behaviour in regard to a transsexual prisoner. The difficulty that Corrections has in regard to this matter is:

- a. That there was inadequate attention given to the context for the comment Mr Field made.
- b. That it did not form part of the preliminary view reached by the assistant regional manager as to sexual harassment and what particular conduct Corrections found to amount to sexual harassment.
- c. That Mr Field was not asked to make a comment and his lawyer's letter dated 3 September did not address it.
- d. Since there was no request to comment on it and it did not form part of the preliminary decision on findings Corrections can not reasonably rely on it forming part of the alleged sexual harassment.
- e. There were other issues relating to Mr Field and the complainant in regard to her dealings with a prisoner that seem to have been avoided and any possibility of ulterior motives for the complaint being made was ignored.

[58] In conclusion there are a number of shortcomings. These are:

- a. Particulars were not satisfactorily provided by the assistant regional manager and even if she was relying on the report a fair and reasonable employer would have detailed the allegations that she had accepted so that it was clear and unambiguous.
- b. The report's findings relied upon by Corrections that there was "*threatening and abusive and insulting behaviour*" were not backed up with the evidence being relied on for such a claim.
- c. The report concluded that there may have been a breach of the code of conduct. This was not enough to support the assistant regional manager's findings in regard to the code and the sexual harassment policy. Furthermore there was not sufficient reasoning provided as to how Corrections concluded that there had been a breach of Corrections' code and what that breach had been based on.
- d. The assistant regional manager accepted the findings and facts in the report before giving Mr Field the opportunity to comment and or explain. This was poorly worded in her letters if she did not mean it. I hold this does not assist the justification of Corrections' actions. Furthermore it has left an untidy impression of predetermination in the matter and notwithstanding the assistant regional manager interviewed 7 people and provided her own response dated 20 August. Unfortunately for the assistant regional manager she repeated her position in further correspondence: "*I have earlier advised that I have accepted the findings in the report*". This makes it more than likely that is exactly what she did, I hold.
- e. There was confusion about what grounds were being relied upon. In other words whether misconduct had occurred (which is confirmed in the Corrections code as being different to serious misconduct). The true position was that Corrections was referring to serious misconduct, but the assistant regional manager called it misconduct because she was following the misconduct disciplinary process. This has resulted in confusion in regard to applying misconduct where Mr Field was being disciplined in regard to serious misconduct without any details to support Corrections' conclusions.

- f. One of the behaviours complained about (going to the complainant's home) does not amount to sexual harassment in terms of the Corrections policy. This is because this was not behaviour of a sexual nature; it was not repeated and there has been no evidence produced that it had a detrimental affect on the complainant in her performance and work under the requirements of the policy. I am being asked to draw inferences from the indirect evidence provided and I hold that it has not been sufficient to meet the test, where the proof needs to be sufficient to meet the gravity of the allegations. I am also supported by the complaint being made five months later.
- g. Corrections did not apply the test as written in accordance with its policy. Rather it applied a test of behaviour claimed to have a detrimental affect on the complainant, whereas the policy required the effect to be assessed on the "*recipients work performance or environment*". In the current situation it has a bearing because the complaint was about Mr Field going to the complainant's home after work hours, but where he was invited inside and this occurred five months before the more general complaint was made. Also, there was no evidence that the complainant was even at home when he was driven past her home (it was his admission) for this matter to have had any impact on the complainant and to have any relevance in regard to her complaint. As a reason it hardly holds up when it involved his unit manager driving the vehicle at the time.
- h. Finally, the process has all the elements of Mr Field being advised of the allegations, an opportunity to get representation, an opportunity to respond and reply for input and comment. He also had an opportunity to make submissions which were taken into account and from which further investigations were carried out and a preliminary view was reached and submissions invited on that. However, Mr Field was never given the opportunity to know what the actual detail was that Corrections was relying on. In this regard the assistant regional manager was relying on the investigator's report and she had accepted the findings and conclusions in that report. She certainly did not provide the required detail on what she was relying upon and what her

findings were to support the seriousness of the allegations relating to the breach of the sexual harassment policy and code of conduct. The three main matters referred to do not constitute breaches of the harassment policy in the absence of detailed incidences being relied upon, I hold. I hold that Mr Field was left exposed to a moving feast of issues that had not been clearly enough defined and consistently applied.

Conclusion

[59] Corrections has not been able to satisfy me that it could establish to the necessary standard that Mr Field was in fact guilty of serious misconduct when the evidence available at the time was based on any number of incidences that had not been detailed sufficiently and were lacking in first hand accounts of any harassment against the complainant. The evidence had the appearance of being consistent with harassment, but was not sufficient evidence of harassment, I hold.

[60] For all the above reasons Mr Field has a personal grievance of unjustified dismissal.

Remedies

[61] I now turn to remedies. The respondent has opposed reinstatement because:

- a. It would send the wrong message.
- b. It would make the complainant's position untenable and cause her health issues to recur.
- c. It would be difficult for Corrections to ensure the complainant was safe at work and to ensure that there was no further sexual harassment.
- d. Mr Field is not the kind of Corrections Officer Corrections wants in its employment because of his attitude.

[62] The respondent has not sufficiently supported that reinstatement would be impracticable, I hold. My reasons are:

- a. That there was no evidence from the operational managers (such as the prison manager and the unit manager). This would have been important

because they run the prison and have day to day management over the prison officers and roster arrangements.

- b. That the complainant was not called by Corrections to try and establish some facts around the allegations against Mr Field and to support any conclusions relied upon to justify its actions. Also there was no direct evidence about her health. I accept that there is no evidence of any direct link between the complainant's allegations and her sick leave, but there was obviously cause for concern about their contact in the work relationship that was sufficient to bring about their separation because of the complaint that was made.
- c. That the assistant regional manager's and HR manager's evidence has to be tempered by the fact that the assistant regional manager was the decision maker and the HR manager assisting in Corrections' investigation and disciplinary process were involved in the investigation and disciplinary process and this does leave open the suggestion that they have an important interest in the outcome. On the other hand they are both experienced managers. There is enough evidence that the behaviour in the prison involves general banter and black humour that included Mr Field; that decisions were based on indirect evidence; that unfair inferences were made; and that witnesses did not provide first hand accounts of Mr Field's alleged behaviour against the complainant.
- d. That Mr Field continued to work during the investigation and alternative arrangements were managed so that Mr Field and the complainant could avoid each other. If there had been any contact between them no examples of any inappropriate behaviour have been provided. Indeed Mr Field continued in his employment during Corrections' investigation that involved at least 10 months.
- e. That the complainant was moved elsewhere in the prison to avoid the applicant. There were roster arrangements put in place for them to avoid each other. I also accept that the prison is a large place of work and it is possible for a separation to be managed and Mr Field would not be reporting to the managers involved in this matter.

- f. That Mr Field has also shown a willingness to cooperate and act appropriately and attend any training required. This partially answers the attack made on Mr Field's attitude. His attitude at the 1 April meeting has to be seen in the context of some very serious allegations made against him and his defence of them when he was denying any wrong doing. As his attitude has been described as laid back and arrogant Corrections has dealt with Mr Field and his support person in the past and there has never been any complaint about him being uncooperative before the Authority's investigation. Also the description of his behaviour at that meeting was an opinion and no issue as such was taken with it at the time. Therefore I hold it is not relevant now.
- g. No other corrections officers were called to give any evidence to assist given the background information of their involvement.

[63] There was no evidence in the investigation that Mr Field had been guilty of serious misconduct or blameworthy conduct in the nature of sexual harassment. It is a matter of fact that Mr Field visited the applicant at home uninvited and was invited inside out of work hours. This is not blameworthy conduct. There was also evidence that whilst he denied harassing the complainant there were issues about his behaviour, which involved banter and black humour in the workplace applying to a number of people. The absence of witnesses with some direct evidence means that I can not reach a conclusion on the many incidences in the background. Thus they can not be blameworthy conduct.

[64] I accept that there is the risk that Mr Field's reinstatement may cause tension given the evidence from the two Corrections' managers about how they feel about him and the involvement of the other witnesses and the complainant. However the work culture is more a matter about general behaviour and applying the Corrections' code to everyone. I note that for a prison officer of Mr Field's experience and length of service he is expected to exercise appropriate standards of behaviour to avoid any likelihood of these types of allegations being laid against him again.

[65] Mr Field's judgement of visiting the complainant at home uninvited was inappropriate without good cause and without an adequate explanation, I hold. Furthermore, his travelling past her home was also a poor exercise of judgement that

could have reasonably been averted and avoided by him. The impact of him being involved in passing the complainant's home can not be gauged because of the lack of evidence, but the fact that he was involved in being driven past her home was unwise, especially since Mr Field should have gauged that the complainant had an issue about his behaviour towards her at work, given the information that is associated with this matter resulting in an internal investigation and a report. His comments and behaviour associated with any banter and black humour in the work place have also left him open to criticism, and particularly that he lacks personal leadership and responsibility. There have been divisions created by the whole situation. Since there has been no proved sexual harassment and breach of the code of conduct however I have decided that no contribution is required.

[66] Corrections can not be surprised because they did not call the complainant and any other witnesses who could help establish and support that it would be impracticable to reinstate Mr Field. This decision has also impacted on an assessment of contribution. If Mr Field fails to adhere to the standards required by Corrections it has the full range of sanctions available to it in its disciplinary code.

[67] I hold that Mr Field is to be reinstated to his former position or a position no less favourable as soon as possible and by mutual arrangement.

[68] Mr Field is entitled to lost wages, but reduced in exercising equity and good conscience that relates to his responsibility to mitigate losses. His claim was for 30 weeks wages based on \$78,800 in the last financial year before his dismissal (not challenged) and took into account his failure to mitigate fully his losses by his own calculation. This needs to be reduced further, I hold, because there were delays because of his decisions. Mr Field has had no income to offset the liability faced by the respondent. The dismissal occurred on 4 September 2009. The application was lodged in the Authority on 2 August 2010. It took approximately 47 weeks to file the matter and to seek reinstatement. In total Mr Field has been out of work for at least 57 weeks at the time of the Authority's investigation meeting. Mr Field has acknowledged that there was a delay caused by a change in his representation and an adjourned mediation. He conceded that he has not discharged his obligation to mitigate by searching for other employment between the time of the dismissal and the investigation meeting, because he wants his job back. Given the absence of mitigation and Mr Field's own delays it is my assessment that he is entitled to 23

weeks wages under the Act (including 3 months plus a further 10 weeks wages for the time between the filing of the application and the Authority's investigation date agreed to by both parties for a full hearing). The sum is \$34,853.84.

[69] In regard to compensation for hurt and humiliation I hold that Mr Field is entitled to compensation because:

- a. There has been an impact on his feelings because of the dismissal.
- b. I accept he has been hurt by the dismissal.
- c. There has been a financial impact that I accept would cause anxiety and embarrassment because his income ceased.

[70] My assessment is that his claim is within the range of awards made and I fix his sum of compensation at \$8,000. Corrections is required to pay Mr Field \$8,000 compensation under s 123 (1) (c) (i) of the Act.

[71] I accept the claim for the lost benefit for superannuation since he has been reinstated and the loss is directly attributed to his dismissal and was an entitlement applying to him before his dismissal. Again I leave that sum to be calculated on the 23 weeks wages granted. Leave is reserved for any other issues arising out of this claim.

[72] I agree that costs should be reserved as requested by both parties.

Summary of orders

[73] I order The Chief Executive of the Department of Corrections to:

- a. Reinstatement Mr Rex George Field to his former position or a position not less advantageous as soon as possible and by mutual arrangement.
- b. Pay Mr Field \$34,853.84 (23 weeks) compensation for lost wages.
- c. Pay Mr Field the sum of \$8,000 compensation for humiliation and hurt under s 123 (1) (c) (i) of the Act.

- d. Pay the claim for superannuation contribution for 23 weeks pay under s 123 (1) (c) (ii) for lost benefit. Leave is granted to return to the Authority if a determination on the sum is required.

[74] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority