IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 30
5151063

	BETWEEN	DAVID WINDER Applicant
	AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent
Member of Authority:	Robin Arthur	
Representatives:	Bryce Quarrie for Applicant Emma Warden for Respondent	
Investigation Meeting:	7 September 2010 in Whangarei	
Determination:	20 January 2011	

DETERMINATION OF THE AUTHORITY

A. **The decisions of Department of Corrections representatives about Mr Winder's physical capacity in December 2008 were not unjustified.**

B. **Mr Winder's personal grievance application is declined.**

Employment Relationship Problem

[1] David Winder has worked as a corrections officer at the Ngawha Prison since 2006. In October 2007 he suffered a back injury while lifting cartons at work. He was then off work for around 12 months for three reasons – a period of recovery from a back injury, awaiting and then recovering from surgery for an earlier shoulder injury, and a period recuperating from a recurrence of rheumatic fever.

[2] In September 2008 his GP considered Mr Winder was able to return to full

duties but his managers in the Department of Corrections (the Department) decided he could return to work only on a light duties basis. He returned to work in October 2008 but continued to seek a return to full duties.

[3] The point of contention was Mr Winder's capacity to carry out, if necessary, control and restraint (C&R) procedures to deal with violent or otherwise unmanageable behaviour by prisoners. The ability to carry out C&R is an essential part of a corrections officer's duties. It potentially involves being able to physically restrain a prisoner in both an impromptu situation (such as an unanticipated violent outburst) and in planned team actions (such as removing an agitated and uncooperative prisoner from a cell). Managers were concerned that in both such circumstances any limitation to Mr Winder's capacity risked affecting the safety of the individual prisoner involved, other prisoners, other staff and himself.

[4] After meetings with his unit manager and a human resources advisor in November and December the Department sent Mr Winder a letter on 4 December 2008 which, after reviewing reports from two specialist occupational physicians, concluded that his "*medical issues*" did not permit him to do full duties without risk to himself or others at the prison. He was told that the options were for him to apply for medical retirement or for the Department to "*invoke involuntary medical retirement*". The applicable collective employment agreement allowed for the Department to require corrections officers to retire on medical grounds in certain circumstances.

[5] Mr Winder sought legal advice. In response to a letter from his representative, the Department wrote that Mr Winder had refused to attend a further meeting to discuss those options and it had "*no option now but to apply for involuntary medical retirement*". The letter, dated 15 January 2009, said Mr Winder would be informed of his "*last day of duty*".

[6] Through his representative Mr Winder then lodged a personal grievance application in the Authority. The matter was referred to mediation which resulted in the parties commissioning a third specialist opinion. That opinion advised Mr Winder was able to return to full duties and the parties acted on that advice.

[7] While the problem of the alleged dismissal, or intention to dismiss, was

thereby resolved, Mr Winder continued with a claim for compensation for the distress caused to him by the Department's actions. He said he was unjustifiably disadvantaged by the Department failing to act as a fair and reasonable employer would have by, firstly, refusing to allow him to return to full time duties and, secondly, seeking to impose a medical retirement.

Issues

[8] The issues for investigation and determination by the Authority were:

(i) Did the Department fail to act as fair and reasonable employer would have done in reaching the conclusion that Mr Winder was not fit for full duties and should be medically retired (on either a voluntary or involuntary basis); and

(ii) If so, did those unjustified actions cause distress to Mr Winder for which he should be compensated?

The investigation

[9] The following witnesses provided written statements and, under oath or affirmation answered questions from the Authority member and the parties' representatives: Mr Winder, his former wife Rhonda Zielenski, the Department's human resources advisor Sharon Tuheke and Mr Winder's former unit manager Toga Va'atu'itu'i. Mr Va'atu'itu'i was heard by telephone as he was on secondment to a role in Vanuatu at the time of the Authority investigation.

[10] A witness statement was lodged for Jeanette Burns who had been the Department's northern region assistant manager at the relevant time. It was not necessary to interview Ms Burns about her statement but I have taken account of paragraphs in it – which Mr Winder accepted were accurate – about the role of Corrections Officers and the C&R procedures.

[11] I did not pursue evidence from former prison manager Jonathan Howe who was the signatory on the Department's letters of 4 December 2008 and 15 January 2009 to Mr Winder or his representative. I was satisfied that Mr Howe's role was largely limited to that of a signatory and implementing recommendations from Ms

Tuheke and Mr Va'atu'itu'i. It was the actions of the latter two officials, taken on behalf of the Department's chief executive, that were really the subject of review under the statutory test of justification.

[12] The parties provided closing submissions in writing on the facts and law.

Assessing Mr Winder's work capacity

[13] I do not accept the Department's submission that Mr Winder cannot, at law, have suffered any disadvantage because his conditions – including the continuation of his employment – were not substantively different by the time of the Authority investigation than prior to his October 2007 injury. The security of Mr Winder's employment and the basis on which he was working was affected to his disadvantage from the time of the Department's decision that he could return to work in October 2008 only on a light duties basis and through to its advice in its letter of 15 January 2009 that the Department would seek to end his employment on the basis of involuntary medical retirement. However I accept the Department's submission that such disadvantage is not of itself prohibited. What must be established is whether that situation was caused by some unjustified action of the Department. That test is on the objective basis of whether a fair and reasonable employer would have taken the actions and made the decisions in that period that the Department – through the actions of Ms Tuheke and Mr Va'atu'itu'i – made.

[14] It would, for example, be an unjustified action to breach the terms of fair treatment and mutual trust and confidence implied into Mr Winder's employment agreement. An incidence of such fair treatment, in a situation of this sort, would be to seek medical opinions about Mr Winder's capacity to carry out his normal duties and then to assess such medical opinions and make decisions based on them in a fair and rational manner.

[15] At the heart of Mr Winder's case was an assertion that the Department's representatives had drawn unreasonable – or at least unduly overcautious – conclusions about the content of the medical advice available to them.

[16] The advice available to Mr Va'atu'itu'i and Ms Tuheke included information

from two specialists and Mr Winder's GP.

[17] Occupational physician Dr John Monigatti in his July 2008 report concluded:

> *[Mr Winder's mechanical back pain] tends to follow a remitting and relapsing course with flare-ups often provoked by routine movements such as bending and lifting … Between attacks, individuals can function fairly normally. They learn how to protect their backs during lifting, twisting and bending and try to avoid injudicious movements.*
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> *Mr Winder is keen to return to work. In my opinion, within a month (to complete shoulder rehabilitation) he could manage all of the duties in the job description apart from those of control and restraint. He is unlikely to regain that particular capacity in full, and if physical restraint and pursuit is an essential requirement of correctional facility work then the job may be beyond him. I do not anticipate any legacy from the shoulder surgery and as his back discomfort settles he is likely to be no worse off then before the episode last October, at which time he was working without limitation.*
>
> *A potential solution, raised by Mr Winder, was that he work permanently on night shift or in the gatehouse, where the demand for control and restraint activity is likely to be much less.*

[18] Because Mr Winder was not happy with Dr Monigatti's conclusions regarding his capacity for C&R work, he sought an examination and second opinion from occupational physician Dr Tim Sprott. Dr Sprott's opinion, dated 12 September 2008 and provided to the Department, concluded Mr Winder was:

> *… now fit to perform his normal work. In my opinion he would now be physically capable of performing control and restraint using the techniques he has been trained in. The issue that Corrections has to consider is what is the risk to David and others if David had a relapse of mechanical back pain performing control and restraint. There are a number of factors that influence this risk. These would include the frequency of episodes of pain, his susceptibility to potential triggers, the predictability or otherwise of his mechanical low back pain, his level of fitness and the characteristics of each episode of control and restraint and the severity of the episodes. Clearly these variables are hard to predictable [sic] and hard to control.*
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> *But it must also be considered that all Corrections Officers performing control and restraint are at some risk i.e. the risk is not zero for any officer. The issue is, is David at a level where the risk is unacceptable? It is hard to quantify precisely and thus a qualitative risk assessment can only be provided. It is my assessment that David can perform restraint and pursuit but that he would be at a greater risk than a Corrections Officer who is yet to have mechanical or other forms of low back pain. On balance of probabilities, I would consider that this risk is at or below an acceptable level and thus his*

> *medical fitness for the role should be reconsidered.*

[19] Doctor Sprott then recommended some measures to minimise risk – including some physical exercise and working for six weeks on night shift – after which he assessed Mr Winder would be "*fit to return to his normal day shift duties*".

[20] On 29 September 2008 Mr Winder's GP issued a medical certificate declaring him fit to return to full duties from 6 October.

[21] On 1 October Dr Monigatti provided a further opinion in answer to questions from the agency which managed the Department's ACC and work injury programme. Dr Monigatti noted Mr Winder was prone to mechanical back pain when performing activities such as heavy lifting or forceful bending and stated:

> *Control and restraint situations require such movements and so are more likely than physically undemanding tasks to provoke acute flare-ups of back pain. These attacks may, or may not, be disabling.*
>
> *Causing a symptom is different from causing an injury. I do not consider that being in a control and restraint situation puts Mr Winder at greater risk of injury to his back than it would anyone else. If you are asking whether the back pain would make him less capable of defending himself and thus at greater risk of being hurt by a prisoner I would have to say "yes" although his recovery time from such injury would be normal.*
>
> *Whether or not the risk is an unreasonable one to take, or a risk that cannot be reduced by the employer taking reasonable measures, is of course a matter for the employer to decide. In my opinion, an episode of back pain sufficient to cause impairment would render Mr Winder unfit to respond to callout.*

[22] Mr Va'atu'itu'i decided on the basis of the opinions of Drs Monigatti and Sprott – and particularly the extracts cited above – that the risk was "*far too great*" for Mr Winder to continue his employment. The Department's letter of 4 December described the physicians as having "*concurred that the risk posed [wa]s below an acceptable level*".

[23] Mr Winder considered Dr Sprott's opinion supported his return to full duties within a short time. He believed Mr Va'atu'itu'i and Ms Tuheke either ignored Dr Sprott's assessment or purposely chose to read it in a way supporting their contrary view.

[24] In the course of meetings during 2008 between Mr Winder, his representatives and the Department's representatives there was debate on whether aspects of the medical advice were ambiguous. There was, for example, disagreement over what was meant by Dr Sprott's reference to the risk in C&R situations being "*at or below an acceptable level*". While it was not accurate, I find, for the Department representatives to say the physicians had concurred on the point, there were other aspects of Dr Sprott's report which supported a conclusion that the risk was too great of Mr Winder not being able to perform effectively in a C&R situation. Both physicians did concur that the assessment of that risk ultimately rested with the Department.

[25] On balance I consider a fair and reasonable employer would have reached the same conclusion as the Department on the basis of the reservations expressed by both physicians and the operational requirements of a prison. Accordingly I cannot say the actions of the Department's representatives in making that assessment were unjustified, even if they did cause disadvantage to Mr Winder at the time. And that conclusion is not changed by the fact that the Department later, in mediation, agreed to review its position and abide by a further opinion to be provided by a third physician. That opinion concluded Mr Winder could deal with C&R situations. Acting on the basis of a new, later opinion was simply an instance of good faith behaviour rather than an indicator that the earlier decision, made on the basis of information then available, was unfair or unreasonable at that time.

How the Department dealt with Mr Winder

[26] Apart from the substance of the Department's decision – which I have found justified – Mr Winder had some complaints about how he was dealt with during the process, including what he considered to be pressure to seek retirement on a voluntary basis and failure to deal through his legal representative during December 2008 and early January 2008.

[27] I do not find in the written or oral evidence any significant unfairness in how the Department representatives dealt with Mr Winder. Prior to his return to work in October 2008 his input was sought and considered before a decision was made that he

should return on light duties in the meanwhile. In meetings in November and December he was accompanied by his wife and a union representative. Notes of those meetings, accepted as generally accurate, confirm issues were fully canvassed, his views noted and explanations sought and given.

[28] There was a conflict in the evidence of Mr Winder and Mr Va'atu'itu'i as to whether Mr Va'atu'itu'i had insisted that a meeting in January 2009 go ahead without proper arrangements for Mr Winder's legal representative to attend. The evidence was insufficient – beyond assertion and denial – to resolve that point. Importantly the disputed meeting did not go ahead.

[29] There was similar difficulty over the issue of whether the Department had properly and promptly acknowledged that Mr Winder was legally represented from early December 2008 and should have dealt with him only through his legal representative. Mr Quarrie wrote letters to the Department on 3, 12 and 17 December 2008 and 6 January 2009. Department representatives said those letters were not received before 7 January. However the evidence on whether the problem was with transmission or receipt of the correspondence was insufficient to resolve that issue.

[30] What was clear was that Mr Winder told Mr Va'atu'itu'i on 1 December that he was making arrangements to see his lawyer that day and Mr Winder was granted leave for the afternoon to do so. In that respect he was assisted, not hindered.

[31] There was however an error, I find, in the approach taken in a letter of the Department to Mr Quarrie on 15 January. It referred to Mr Winder having refused to attend a meeting on the previous day, as his lawyer could not be present, and that there was no option now but to apply for involuntary medical retirement. The letter, drafted by a former human resources advisor, said Mr Winder would be informed of "*his last day of duty*". That was, as Ms Tuheke acknowledged at the Authority investigation, "*not a good expression*". The reference to a 'last day' was, at best, premature and presumptuous. The preparation of a retirement proposal, for approval by a senior Wellington-based official, had yet to be completed, and Mr Winder could reasonably have expected an opportunity to comment on the content of that document before it was submitted for consideration.

[32] However it was an error which was overtaken by the event of Mr Winder's application to the Authority and referral to mediation which resulted in measures enabling his employment to continue. I do not consider it would warrant a finding of unjustified action.

Determination

[33] For the reasons given I find Mr Winder does not have a personal grievance in respect of the actions of the Department prior to his reinstatement to full duties.

[34] Accordingly no compensation for distress caused to him during that period can be awarded. I note that even if I had found unjustified actions by the Department, I would not have found the evidence sufficient to accept Mr Winder's claim that the stress relating to the future of his employment caused his separation from his wife and should be recognised in any award of compensation. While both Mr Winder and Ms Zielenski felt the pressures on them because of the employment issue was a decisive factor in their separation, such a conclusion for the purposes of awarding compensation would require less subjective evidence. Such evidence might include an assessment by a suitably qualified counsellor or health professional of the weight of that factor against others in their relationship and in other aspects of their lives.

Costs

[35] Costs are reserved. If there is an issue as to costs, the parties are invited to resolve it between themselves. If they are not able to do so, the Department may lodge and serve a memorandum within 28 days of the date of this determination. Mr Winder would then have 14 days from the date of service to lodge a reply memorandum. No application will be considered outside this time frame. My preliminary view (subject to any additional information which might be in any memoranda on costs) is that this is a case where costs should lie where they fall.

Robin Arthur
Member of the Employment Relations Authority