

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 549
5317822

BETWEEN	GEORGE JENSEN Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	K J Anderson
Representatives:	R Walker, Counsel for Applicant K Radich, Counsel for Respondent
Investigation Meeting:	15 August 2011 at Hamilton
Submissions Received	30 August 2011 and 20 September 2011 for Respondent 13 September 2011 for Applicant
Determination:	22 December 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr George Jensen, claims that he was unjustifiably dismissed effective from 7 May 2010. Mr Jensen asks the Authority to find that he has a personal grievance and award him various remedies including reinstatement to his previous position, reimbursement of lost wages and compensation for humiliation, loss of dignity and injury to feelings.

[2] Conversely, the respondent, the Chief Executive of the Department of Corrections (the Department) says that Mr Jensen has no basis for the claim that he has been unjustifiably dismissed. The Department says that it acted as a fair and

reasonable employer would have done in the light of all of the circumstances. The Department says that the process followed by them was neither unfair nor predetermined.

[3] In addition to the evidence from Mr Jensen, the Authority received evidence for him from Mrs Amanda Jensen and Mr Richard Lange, a Corrections Officer employed by the Department of Corrections at the Tongariro/Rangipo Prison and a member of the Corrections Association of New Zealand (CANZ) Executive.

[4] Evidence for the Department has been given by Ms Yvonne Fuller, the Operational Support Officer, Mr Denis Goodwin, Prison Manager (Acting Prison Manager at the time), Mr Paul Vlaanderen, Assistant Regional Manager, and Ms Lisa Fawcett, Senior Human Resources Adviser.

[5] The Authority has also viewed a copy of a CCTV recording relevant to the matters that brought about the termination of the employment of Mr Jensen. The parties have provided an agreed bundle of relevant documents and comprehensive submissions. All of the evidence and material provided has been closely considered by the Authority, albeit it may not be specifically referred to in this determination.

[6] **Note:** Following the acceptance by the Authority of a consent application from the parties, the following order is made: Pursuant to clause 10 of Schedule 2 to the Employment Relations Act 2000, the publication of any material that identifies or might identify the true identity of the person referred to as Prisoner A in this determination, is prohibited.

Background facts and evidence

[7] Mr Jensen had been employed as a Corrections Officer at Tongariro/Rangipo Prison (the Prison) since 2001 in a variety of roles.

[8] On 16 February 2010, Mr Jensen was transferred from the West Unit to take up duties in the North Unit of the Prison. The evidence of Mr Jensen is that on 17 February 2010 he started work at approximately 1350 hours. He was briefed by the Acting Supervisory Corrections Officer who informed that Prisoner A, who was in the separates unit, had been abusive to other Corrections Officers during the previous shift. During the briefing, Mr Jensen became aware that Prisoner A had not had a shower for some time because other Officers were reluctant to let him out of his cell.

It was subsequently agreed that Prisoner A would be required to have a shower before teatime and that Mr Jensen, accompanied by a Senior Corrections Officer, Mr Hikei Hartley, and Corrections Officer, Mr Shane Pointon would carry out this task.

[9] The evidence of Mr Jensen is that upon arriving at Prisoner A's cell, he informed the inmate that the officers were there to offer him the opportunity to have a shower. Mr Jensen says that Prisoner A responded by swearing at him, but after some coaxing, he agreed to have a shower, albeit he continued to verbally abuse the officers.

[10] Prisoner A apparently asked for some privacy and the three officers moved down the hallway, just out of sight of the Prisoner. In the meantime Mr Jensen checked out Prisoner A's cell. Mr Jensen says that after about 5 minutes he could no longer hear the shower running so he returned to the grill that Prisoner A was behind in the ablutions area and he saw him wrapping toilet paper around the toilet seat and putting paper in the bowl. Mr Jensen says that it appears that Prisoner A was attempting to block the toilet and upon being asked by Mr Jensen what he was doing, Prisoner A told Mr Jensen to "go and get fucked" and continued to wrap paper around the bowl.

[11] The further evidence of Mr Jensen is that he told Prisoner A that if he did not hurry up and have his shower, he would be put back in his cell. With Prisoner A continuing to yell abuse at him, Mr Jensen returned to the cell to continue the checking and searching of it. Mr Jensen says that due to the amount of abuse emanating from Prisoner A, his thoughts were that everything that could be used as a weapon or thrown at the officers should be cleared from the cell before returning him there.

[12] Mr Jensen says that consistent with this thinking, he removed the urine bucket from Prisoner A's cell to the ablutions grill. Mr Jensen says that he thought that the contents of the bucket could be flushed down the toilet in the ablutions area or down the shower drain. The further evidence of Mr Jensen is that:

I had been advised on previous occasions by longer serving Officers, that buckets had been thrown over Officers in the past. However, on re-thinking this particular situation at the time, I returned the bucket of contents to the Prisoner's cell as I felt that the front of the grill had now become an unsafe location signalled by the amount of abuse now directed at me personally.

After a very short period of time I then brought the bucket of contents back to the front of the grill as I felt at the time that once the grill was open, I could quickly enter the ablutions area and get rid of it down the toilet.

In the meantime Prisoner A continued with a tirade of abuse towards me. If it were not for the fact that I knew he hadn't had a shower in days, I would have put Prisoner A back into his cell because of the abuse he was hurling at us. It was at that point that I snapped, I had had enough and moved his clothing from the grill to the ablutions block and then threw the contents of the bucket towards him while he was in the shower.

I was not thinking at the time and I realised almost immediately once my senses cleared, that what I had done was wrong. It all happened very quickly. Immediately afterwards I re-positioned myself to the back of the seps area, allowing SCO Hartley to take control. Prisoner A continued showering himself and told me he wanted to "step me out" one on one in the yard. I just looked at him. SCO Hartley placed him back into his cell and I didn't talk with him or CO Pointon about what happened after the incident.

[13] But the evidence of Mr Jensen is not consistent with the CCTV recording. This shows firstly, that Mr Jensen takes the urine bucket (the bucket) from Prisoner A's cell. He then takes it to the grill of the ablutions area where the Prisoner is having a shower. Mr Jensen then places one hand on the Prisoner's clothes which are hanging on the bars of the grill. He has the bucket in his other hand and is looking at his colleagues and appears to be contemplating some form of action. However, he then returns the bucket to the cell.

[14] Shortly after, Mr Jensen then goes to the grill and pushes the clothes off it onto the floor of the ablution area. While it is difficult to be certain, because there is no sound on the CCTV recording, it appears that Mr Jensen could be provoking the Prisoner. There is certainly some exchange between the two men.

[15] A little time passes and then suddenly Mr Jensen goes into the cell, comes out with the bucket and then quickly proceeds to throw the contents of it through the grill where the Prisoner is having his shower. From the body language of Mr Hartley, it appears he cannot quite believe what Mr Jensen has done. But there is no indication that Mr Jensen or his colleagues are particularly concerned about what just happened.

[16] Upon Prisoner A completing his shower, he is returned to his cell by Mr Hartley. However, before he is locked in one can see that there is a further exchange between Mr Jensen and the Prisoner. The three officers then left the cells area.

The investigation

[17] The evidence of Mr Paul Vlaanderen, Assistant Regional Manager, is that he had become aware of the incident involving Mr Jensen and Prisoner A on 18 February 2010, the day after it occurred. Mr Vlaanderen received a *Notification of Incident* form, dated 17 February 2010, prepared by the Acting Unit Manager who had interviewed Prisoner A (accompanied by a senior Corrections Officer).

[18] Prisoner A had alleged that Mr Jensen had assaulted him by throwing a bucket of urine over him. The Acting Unit Manager subsequently interviewed Mr Jensen who acknowledged that this had happened.

[19] Via a letter from Mr Vlaanderen dated 18 February 2010, Mr Jensen was informed of the allegation made by Prisoner A. The letter informs that:

Having received this information about your alleged actions and considering that, I draw your attention to the fact that you may have breached the second principle of the Department of Corrections Code of Conduct, which states:

Employees should perform their official duties honestly, faithfully and efficiently, respecting the rights of the public, colleagues and offenders.

Specifically, I am concerned with what is alleged. This being:

- Threatening, abusive or insulting behaviour to any person in the workplace.
- Assault on a Prisoner.
- Failure to comply with any of the Department's safety policies, procedures, operating instructions or rules.

I have therefore decided to carry out an employment investigation to establish whether there has been a breach of the Department of Corrections Code of Conduct. I am providing you with an opportunity to provide a response to the allegations at an investigation interview, to be held with Acting Prison Manager Denis Goodin, on Monday 22nd February at 11.00am.

[20] Mr Jensen was also informed that:

Because of the serious nature of the allegation, I advise that suspension is being considered for the following reason:

- The Police are investigating whether you will face any criminal charges.¹ The alleged misconduct, if proven, would mean that you should not have direct contact with Prisoners; and
- Your presence in the workplace may hamper a full and fair investigation.

[21] Mr Jensen was informed that in accordance with the procedures outlined in the policies for managing human resources, it was his right to make submissions on why the suspension should not occur and he had until 11.00am on Monday, 22 February 2010 to prepare a submission. Mr Jensen was informed that the submissions are to be presented to Acting Prison Manager, Denis Goodin, either in writing by the stated deadline or at the investigation interview. Mr Jensen was placed on special leave with pay until Monday, 22 February 2010, to provide him with the time and opportunity to prepare his response to the proposal to suspend him.

[22] Finally, Mr Jensen was reminded that an allegation, such as the one being made by Prisoner A, is a serious matter, which if proven, may constitute serious misconduct in terms of the Department of Corrections Code of Conduct and this could involve disciplinary action up to and including dismissal. Mr Jensen was informed of his right to obtain representation and the availability of the employee assistance programme.

[23] Mr Jensen subsequently went on sick leave and this was acknowledged by Mr Vlaanderen in a letter to Mr Jensen dated 22 February 2010. Mr Vlaanderen also informed Mr Jensen that he intended to proceed with the investigation into the matter involving Prisoner A and that Ms Yvonne Fuller, Assistant Prison Manager, would be responsible.

[24] Following submissions on his behalf, Mr Jensen was suspended from his employment; as notified to him via a letter dated 3 March 2010.

Outcome of the investigation

[25] Ms Fuller prepared a comprehensive report. The conclusions reached are set out at p.9 of the report. They are, in summary:

Mr Jensen used violence or threats of violence against offenders or others in the workplace by planning and throwing the contents of a

¹ It appears that the Police decided not to press any charges.

urine bucket over Prisoner A on 17 February 2010. The above actions constitute serious misconduct as described in the Department of Corrections Code of Conduct.

[26] Mr Jensen was advised of the outcome of the investigation via a letter dated 25 March 2010 from Mr Vlaanderen. Mr Jensen was notified also that:

Prior to making a decision on the outcome of the investigation it is your right to make submissions on the findings of the report. You have until Wednesday 7th April 2010 to prepare your submission. The submissions are to be presented to me in writing by the stated deadline, or at a meeting scheduled for 9.30am on Wednesday 7th April 2010. You will remain suspended on full pay until Wednesday 7th April 2010 to provide the time and opportunity to prepare your response to the findings outlined in the report.

[27] With the assistance of his Union (CANZ), Mr Jensen prepared comprehensive submissions for the consideration of the Department of Corrections. The submissions were given to Mr Vlaanderen on or about 7 April 2010.

Meeting on 23 April 2010

[28] Mr Vlaanderen, accompanied by Ms Lisa Fawcett, Senior Human Resources Adviser, met with Mr Jensen and his representative, Mr Richard Lange, on 23 April 2010. The meeting was recorded and a transcript has been produced to the Authority. The meeting was of approximately 1 hour in duration.

[29] The outcome of the meeting was that Mr Jensen was informed that Mr Vlaanderen had formed a preliminary view that Mr Jensen should be dismissed. The notes of the meeting record Mr Vlaanderen saying:

I cannot send a message that I condone this behaviour. It was an assault which I believe at the higher end of the scale was inhumane treatment of the Prisoner, extremely degrading and offensive, and as an officer that was held in high regard by the staff and given that with your experience, you should have known that your behaviour was unacceptable.

[30] In a letter dated 23 April 2010, Mr Vlaanderen set out the position of the Department in relation to the allegation pertaining to Mr Jensen's actions against Prisoner A. The pertinent extracts from the letter are:

- The second principle of the Department of Corrections Code of Conduct states: Employees should perform their official duties

honestly, faithfully and efficiently, respecting the rights of the public, colleagues and offenders.

- Threatening, abusive or insulting behaviour, including assault on a Prisoner to any person in the workplace is an example of serious misconduct.
- Failure to comply with any of the Department's safety policies, procedures, operating instructions or rules.

As you are aware, I instructed that an employment investigation be carried out to establish whether there has been a breach of the Department of Corrections Code of Conduct. That investigation is complete and you have had an opportunity to present submissions on the investigation report and its findings, both in writing, and verbally at a meeting held today at 1pm. It is my view that there is evidence that supports the allegation that you did assault Prisoner A by throwing a bucket of urine over him whilst he was in the shower in the North Unit separates. In particular I have found the following:

- (a) That you have admitted that you did throw a bucket of urine over Prisoner A, and that you know that this behaviour constitutes assault. You have acknowledged that you know this behaviour was wrong and you understand that this action was both inhumane and unacceptable.
- (b) You are an officer of considerable experience, and were held in high regard by your colleagues. Your actions on 17 February 2010 were unprofessional, and in assaulting this Prisoner, you have knowingly committed an act of negligence or unsafe practice which may have seriously compromised the safety of yourself and your fellow officers. I consider that in acting in the above way you have breached Principle 2 of the Departments Code of Conduct, in particular you have failed to perform your official duties honestly, faithfully and efficiently, respecting the rights of offenders and that these actions constitute serious misconduct.

Accordingly my preliminary view is that the appropriate disciplinary sanction for your actions is dismissal. I have based this view on all the information available to me, including the evidence collected in the employment investigation report and your comprehensive written and verbal submissions. Before I make a final decision I would like to hear your submissions on this view and why you believe you should not be dismissed. Please provide any submissions in writing by Friday 30th April 2010.

[31] Comprehensive submissions on behalf of Mr Jensen dated 30 April 2010 were duly submitted to the Department. The submissions, apart from being comprehensive, also draw the attention of the Department to some other incidents that had occurred within the service that, it was submitted on behalf of Mr Jensen, presented similar circumstances to those that he faced and yet the disciplinary sanction that was imposed upon those particular individuals was a lesser sanction than dismissal.

[32] The submissions for Mr Jensen concluded that:

In the light of the above information, CANZ respectfully requests the issuing of a final written warning and placement on the Tactical Communications course at the earliest opportunity. We feel that given his previous excellent history this is a fair and justifiable expectation. We would also not be opposed to a period of performance management if this is deemed necessary.

[33] The evidence of Mr Vlaanderen is that he considered closely the submissions made on behalf of Mr Jensen but reached the conclusion that the termination of his employment was the appropriate sanction in the circumstances. The confirmation of Mr Jensen's dismissal is set out in a letter dated 4 May 2010. The letter is detailed and comprehensive and addresses the various matters that were raised on behalf of Mr Jensen during various meetings and submissions. The conclusions of the Department are set out under a heading:

Final view

It is my view that the evidence supports the allegations that you did assault Prisoner A by throwing a bucket of urine over him whilst he was in the shower in the North Unit separates. In particular I have found the following:

- (a) The role of a Corrections Officer brings with it a duty of care and an obligation to treat Prisoners humanely. In this case Prisoner A was in your custody and secured behind a locked grill in the shower block of the separates division of North Unit when you assaulted him by throwing a bucket of his urine over him. He was no direct threat to you under these circumstances. The fact that you had total control over the Prisoner and the situation reinforces my view that there has been a serious breach of the Code of Conduct.
- (b) You have admitted that you did throw a bucket of urine over Prisoner A and you know that this behaviour constitutes assault. You have acknowledged that you know this behaviour was wrong and you understand that this action was both inhumane and unacceptable. You have not apologised for your actions at any time.
- (c) You are an officer of considerable experience and were held in high regard by your colleagues. Your actions on 17th February 2010 were unprofessional, and in assaulting this Prisoner, you have knowingly committed an act of negligence or unsafe practice which may have seriously compromised the safety of yourself and your fellow officers. In particular, on the day in question you were in the company of a new officer on his third day of work with the Department and his first day in a custodial unit. I consider that in acting in the above way, you have breached Principle 2 of the

Department's Code of Conduct, in particular you have failed to perform your official duties honestly, faithfully and efficiently, respecting the rights of offenders and that these actions constitute serious misconduct.

[34] The letter concludes with Mr Vlaanderen stating:

My decision is that you are to be dismissed with one months pay in lieu of notice from 7th May 2010.

Analysis and conclusions

[35] Mr Jensen says that his dismissal was unjustifiable, specifically because:

- (a) While his actions constituted misconduct in the circumstances, they could not be considered serious misconduct.
- (b) The actions and processes followed by the Department were unfair and showed that it had predetermined Mr Jensen's dismissal.
- (c) Even if Mr Jensen's actions could be described as serious misconduct, dismissal was not an appropriate sanction in all the circumstances.

[36] Section 103A of the Employment Relations Act 2000 (the Act) provides the test to be applied to a dismissal. In determining whether a dismissal or an action was justifiable, the Authority is required to consider on an objective basis, whether the employer's actions and how the employer acted, were what a fair and reasonable employer would² have done in all the circumstances at the time the dismissal or action occurred.

[37] As was held by the Employment Court in *Air New Zealand v Hudson* [2006] ERNZ 425:

However, the section 103A requirement for the Authority and the Court to stand back and determine the matter on an objective basis by evaluating the employer's actions does not give an unbridled licence to substitute their views for that of an employer. Their role is instead to ask if the action of the employer amounted to what a fair and reasonable employer would have done and evaluate the employer's actions by that objective standard. It may mean that the Court [Authority] reaches a different conclusion from that of the employer but, provided this is done appropriately, that is objectively and with

² Because the dismissal of Mr Jensen occurred prior to 1 April 2011, the new provisions of the Employment Relations Amendment Act 2010 are not applicable.

regard to all the circumstance at the time the dismissal occurred, a conclusion different from that of the employer may be a proper outcome.

[38] The meaning of section 103A was again clarified by a Full Bench of the Employment Court in *Air New Zealand Ltd v V* [2009] ERNZ 185:

The meaning of the text of section 103A is clear on its face and in the light of its common law antecedent. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all the actions of the employer up to and including the decision to dismiss.

[39] As established in *Air New Zealand Ltd v V*, in determining whether or not the actions of the company were those of a fair and reasonable employer in the circumstances, the Authority is required to objectively review [“... all of the actions of the employer up to and including the decision to dismiss.”

[40] In summary, I find that the circumstances applying to Mr Jensen were:

- (a) On 17 February 2010, he was fulfilling his duties as an experienced Corrections Officer.
- (b) Mr Jensen accepts that in the course of carrying out his duties, he threw the contents of a bucket, containing the Prisoner’s urine, at the Prisoner whilst he was behind a locked grill having a shower.
- (c) The CCTV recording shows that this was not simply a spontaneous action on the part of Mr Jensen. Rather, it is more probable than not that he had contemplated carrying out the action a short time sooner but sensibly, thought better of it. This is confirmed by the CCTV recording (at 15:23:58) and also by the statement dated 1 March 2010, given by Corrections Officer, Mr Shane Pointon. He (among other things) states:

As I crossed the yard back towards the separates block I heard expletive filled yelling between two people. On entering the block I observed a heated exchange through the grill between Officer George [Jensen] and the Prisoner. The Prisoner’s demeanour was highly agitated and extremely provocative. This exchange lasted several minutes during which time Officer George picked up the piss bucket and indicated to myself and Officer Hikei [Hartley] that he was going to throw it on the Prisoner who was in the shower.

Officer Hikei motioned with a nod of his head that Officer George should not do this.

The CCTV recording shows that Mr Jensen then returned the bucket to the Prisoner's cell.

- (d) The CCTV recording shows (at 15:25:08) that Mr Jensen then goes to the grill, behind which Prisoner A is showering, and pushes the Prisoner's clothing off the grill, where they were hanging, onto the floor of the ablutions area. Mr Jensen departs from the ablutions area but then a little over a minute later (at 15:26:35), he suddenly picks up the bucket from the Prisoner's cell, moves quickly forward and throws the contents through the grill at the Prisoner.

[41] The Department subsequently suspended Mr Jensen from his employment while an investigation was carried out, the outcome of which was conveyed to Mr Jensen for his submissions. The Department came to a preliminary decision that dismissal was the most appropriate sanction, but before implementing this, the Department sought further submissions from Mr Jensen as to why such sanction would not be appropriate. Having given due consideration to Mr Jensen's submissions, a final decision was made by the Department to terminate his employment.

Was the Department entitled to conclude that the actions of Mr Jensen constituted serious misconduct?

[42] The *Code of Conduct for Department of Corrections* employees (the Code) applied to Mr Jensen as a component of his terms and conditions of employment. The foreword to the Code informs that:

All Department of Corrections employees have a responsibility to maintain proper standards of integrity, conduct and concern for the public interest (section 56(3) State Sector Act 1988).

And:

The nature of our work and the need for us to be positive role models for offenders means our professional and ethical standards must be set high.

[43] At p.17 of the Code the Second Principle provides that:

Employees should perform their official duties honestly, faithfully and efficiently, respecting the right of the public, colleagues and offenders.

And:

That in the performance of their duties employees are, among other things, expected to: adhere to your delegations, not exploiting or abusing any power or authority accorded to you because of your role. Authority includes statutory, delegated and administrative authorities.

[44] At p.19 of the Code under the heading *Respect for the rights of others*, employees are informed that:

You are expected to treat your colleagues, offenders and any people with whom you have official dealings with courtesy and respect.

And that:

Subjecting colleagues, offenders, stakeholders or members of the public to any of the following actions is unacceptable:

- Physical or verbal violence, abuse, intimidation, or threats.
- Confrontational, negative or inappropriate attitudes.

[45] At p.20 of the Code, employees are informed of the importance of role modelling and its influence upon reducing reoffending.

[46] At p.27 of the Code, various behaviours that are deemed to be serious misconduct, which could result in the dismissal of an employee, are listed. Examples of serious misconduct include:

- Violence or threats of violence against offenders or others in the workplace; and
- Threatening abusive or insulting behaviour to any person in the workplace; and
- Failure to comply with any of the Department's safety policies, procedures, operating instructions or rules.

[47] The Department's Human Resources Manual sets out comprehensive procedures for managing misconduct and poor performance, including the ability for the suspension of employees from their employment on pay, and the conduct of

employment investigations; including, disciplinary interviews and disciplinary actions.

[48] In addition to the Code and the Human Resources Manual, the Department and its employees are bound to observe particular statutory requirements that apply to the Public Service generally and to the Department specifically. Firstly, the Prison Services Operations Manual (misconduct) provides that:

9. In the control of Prisoners, staff members must seek to influence those Prisoners through example and leadership and to enlist their willing co-operation.
10. No Officer may take disciplinary action against a Prisoner if the action is retaliatory in nature or inconsistent with acceptable standards of treatment of a Prisoner in similar circumstances.
12. Staff may not deliberately act or speak in a manner which is likely to provoke a Prisoner.

[49] In regard to the operations of the Department, there are two particular and relevant statutory requirements that must be observed. Firstly, the State Sector Act 1988 requires that:

Each Chief Executive must ensure that all employees maintain proper standards of integrity, conduct and concern for the public interest.
(s.56(3))

[50] And the Corrections Act 2004 (at s.5) provides that:

- (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by –
 - (a) ensuring that the community-based sentences, sentences of home detention and custodial sentences and related orders that are imposed by the Courts and the New Zealand Parole Board are administered in a safe, secure, humane, and effective manner; and
 - (b) providing for corrections facilities to be operated in accordance with rules set out in this Act and Regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners; and ...

[51] Then, at s.14 of the Corrections Act 2004, in reference to the powers and functions of Officers, it is provided that:

- (1) An Officer appointed or designated under s.11(1)(b), (2)(b), or (3)(b) to provide custodial services in respect of a prison has the following powers and functions:
 - (a) Ensuring the safe custody and welfare of Prisoners under his or her control:
 - (b) Any other powers and functions conferred under this Act or Regulations made under this Act.

[52] Finally, the Authority has been referred by the Department to the *United Nations Standard Minimum Rules for the Treatment of Prisoners* and a reference to institutional personnel:

All members of the [institutional] personnel shall at all times so conduct themselves and perform their duties as to influence the Prisoners for good by their example and to command their respect.

[53] It is the submission for the Department that Mr Jensen's conduct must be viewed in the light of all of the foregoing provisions which establish the standards that are required of a Corrections Officer. The Department also says that these requirements form part of "all of the circumstances" regarding its decision to dismiss Mr Jensen.

[54] The grounds for a belief that serious misconduct by an employee has occurred must depend on the facts of each case. The employer must have either clear evidence upon which any reasonable employer could safely rely, or have carried out reasonable inquiries which left the employer, on the balance of probabilities, with grounds for believing that the employee was at fault.³

[55] Given the weight of the evidence, including the acknowledgement of Mr Jensen in regard to his actions concerning Prisoner A, I conclude that a full and fair investigation conducted by the Department absolutely disclosed conduct on the part of Mr Jensen that was capable of being regarded as serious misconduct for which a disciplinary sanction would be available.

³ *Airline Stewards and Hostesses of New Zealand IUOW v. Air New Zealand Ltd* ERNZ Sel Cas pre-1991, 1985, [1990] 3 NZILR 584 at 993

Was the dismissal of Mr Jensen an action that a fair and reasonable employer would have taken in all the circumstances?

[56] It is well established that where a serious allegation is the basis of a dismissal, the evidence to support that allegation must be [“... as convincing in its nature as the charge was grave.”⁴

[57] The comprehensive submissions for Mr Jensen argue that a fair and reasonable employer, in all the circumstances, would not have dismissed him. This argument is based on a number of factors.

(a) *The investigation of Mr Jensen’s conduct*

[58] It is argued that there were serious flaws in the investigation conducted by Ms Fuller and that the conclusions she reached were not supported by the evidence she relied on. But I do not find there to be any validity in this proposition. I conclude that Ms Fuller carried out a full and fair investigation and the findings and conclusions that she arrived at were readily available to any objective investigator, given the overall evidence that was available for analysis; including in particular, the graphic content of the CCTV record of events.

(b) *Training*

[59] It is submitted that Mr Jensen was a relatively inexperienced Corrections Officer and it is suggested that he did not have the requisite training, including an appropriate induction into his duties when transferring to the North Unit. However, the weight of the evidence is that Mr Jensen was an experienced officer and while it is obvious that Prisoner A was a difficult and volatile person, there is nothing to suggest that Mr Jensen was uncomfortable or apprehensive in regard to his interaction with the Prisoner. While it seems that the antics of Prisoner A eventually “got under the skin” of Mr Jensen, this was not because of any inadequate training or induction into the day-to-day working environment of the North Unit. It has also been submitted that as a more experienced officer, Mr Hartley should have intervened to diffuse the tensions that arose between Mr Jensen and Prisoner A. I accept that there is some merit in that submission as it appears that Mr Hartley, as the senior officer, adopted a less than active presence in regard to the obvious intentions of Mr Jensen.

⁴ *Honda New Zealand Ltd v. New Zealand etc Shipwrights etc IUOW* [1990] ERNZ Sel Cas 855

Nonetheless, the blame for Mr Jensen's actions cannot be displaced by any inaction on the part of Mr Hartley.

(c) *Nature/seriousness of the misconduct*

[60] It is submitted for Mr Jensen that the Department's claim that Mr Jensen's actions were inhumane and degrading and constituted a violent assault against Prisoner A, are a "gross over-exaggeration." However, I accept that the conclusion arrived at by Mr Vlaanderen, that the action of throwing a bucket containing urine at the Prisoner, who was behind the locked grill, can, by any reasonable assessment, be seen as inhumane, degrading and humiliating for the Prisoner and that the action of Mr Jensen was an abuse of his power over the Prisoner.

(d) *Disparity of treatment*

[61] The submissions for Mr Jensen refer to previous incidents within the Department involving examples of physical assault or similar actions, whereby the employees committing the actions referred to, were not dismissed. The incidents in question were canvassed during the investigation meeting as they were referred to in the written statement of evidence for Mr Lange. He had also referred the Department to these examples via the submissions made on behalf of Mr Jensen prior to his dismissal. One of the incidents referred to by Mr Lange involved a Corrections Officer located at Mt Eden Prison in Auckland. Mr Lange alleges that the officer hit or punched a prisoner and this was captured on a CCTV camera. The officer involved in this incident received a final warning.

[62] A further incident referred to concerned a Corrections Officer employed at the South Unit of the Tongariro/Rangipo Prison. It is alleged that the officer walked into the carving room at the prison and threw a handful of carving chisels on to the floor, took off his uniform shirt and challenged the prisoners present to pick up a chisel and "have a go" at him. The officer subsequently went off work on extended stress leave.

[63] Mr Lange also referred to an alleged incident at the Christchurch Women's Prison where an officer punched a prisoner during the use of a control and restraint procedure on the prisoner. Mr Lange says that this officer received a warning. Mr Lange gave evidence of a further three examples where it is alleged that physical assault was involved between staff members, including a manager in one instance.

[64] The evidence of Ms Fawcett is that the matter involving the officer from the South Unit was discussed when the submissions were received prior to the dismissal of Mr Jensen. However the conclusion was in this case, there were “private and confidential medical issues” involved which distinguished this incident from that involving Mr Jensen. In regard to the incident at Mt Eden, the Department accepted that there had been “significant procedural oversights” in respect to the officer’s training and the management of the disciplinary investigation, as well as “mitigating factors” provided by the officer that made the circumstances different to those of Mr Jensen.

[65] The other alleged incidents raised by Mr Lange are short on tangible evidence as to time and place and when these alleged incidents occurred, to such an extent that little consideration can be given to them in regard to any proven disparity existing.

[66] While the evidence of Mr Lange, and his earlier submissions on behalf of Mr Jensen, refers to various alleged incidents, there is insufficient tangible or probative evidence to prove that any disparity exists to the degree that would make the dismissal of Mr Jensen unfair; particularly in the light of the undeniable proof of his misconduct.

[67] The submissions for Mr Jensen also refer to the increasing aggressive behavioural tendencies of Prisoner A and the stress that Mr Jensen had been under related to his health and personal circumstances. But there is no tangible evidence to suggest that Mr Jensen’s conduct was related to any particular or medically recognised stress being present. And while it is clear that Prisoner A was a volatile inmate and as such he was later removed out of the Tongariro/Rangipo Prison, there is nothing to suggest that his behaviour should mitigate the actions of Mr Jensen in any way. This is particularly so given that Prisoner A was behind a locked grill at the time and of no threat to Mr Jensen or anyone else.

Determination

[68] In determining the question of whether the dismissal of Mr Jensen was justifiable, the Authority is cognisant of the established (and often quoted) finding by the Court of Appeal in *Northern Distribution Union v BP Oil New Zealand Ltd*⁵:

⁵ [1992] 3 ERNZ 483,487

For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look any further than this Court's judgment in *BP Oil New Zealand Ltd v. Northern Distribution Union* [1989] 3 NZLR 580. Definition is not possible for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is an essential of the employment relationship. In the context of a personal grievance claim under the Labour Relations [Employment Relations] Act questions of procedural and substantive fairness are also relevant. In the end the question is essentially whether the decision was one that a reasonable and fair employer would have taken in the circumstances.

[69] In summary, having weighed the overall evidence and the respective arguments of both parties, I find that a fair and reasonable employer, having conducted a fair and full investigation and disciplinary process, and faced with the evidence pertaining to Mr Jensen's action, would have concluded that his conduct deeply impaired or was destructive of the basic confidence and trust that is essential to the employment relationship.

[70] This is particularly so given the responsibility that prison officers have for the inmates who are under their control. While I have no doubt that the behavioural tendencies and aggression of inmates such as Prisoner A, will sorely test the patience and willpower of corrections officers at times, the Department was entitled to have a reasonable expectation that the training and experience of Mr Jensen would have prevented him from acting as he did.

[71] The dismissal of Mr Jensen is regrettable as it appears that in all other respects his previous record as a Prison Officer had been flawless and he had been held in high regard. I accept that this was taken into account by the Department when it arrived at the decision to dismiss. However, balanced against that is the considerable responsibility of the Department to ensure that inmates within its care are treated humanely and are not subjected to retributive actions by prison officers.

[72] I find that the dismissal of Mr Jensen was what a fair and reasonable employer would have done in all the circumstances and hence the dismissal was justifiable. The claims of Mr Jensen are dismissed.

Costs

[73] Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the daily tariff approach of the Authority. In the event a

resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority