

Note: An order prohibiting the publication of certain information appears at [68]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 310
5321321

BETWEEN	FUATAI MISIAITA Applicant
AND	CHIEF EXECUTIVE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	R A Monaghan
Representatives:	A Maelzer, counsel for applicant J Dobson, counsel for respondent
Investigation meeting:	2 July 2012
Determination:	7 September 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Chief Executive of the Department of Corrections (Corrections) employed Fuatai Misiaita as a corrections officer at Mount Eden Prison (the prison). Mr Misiaita had been employed at the prison between 1997 and 2004, and then was re-engaged in 2007. He was dismissed summarily in June 2010.

[2] The incident leading to the dismissal occurred on 14 January 2010. Mr Misiaita was working on the 2pm – 10pm shift in the joint receiving office for Mount Eden and Auckland Central remand prisons. The receiving office is responsible for processing prisoners arriving at both prisons.

[3] An arriving prisoner, S was being questioned by another corrections officer, Rajendra Thakare, as part of a new arrivals risk assessment (NARA). Such assessments are undertaken for all new arrivals to ascertain whether the prisoner is at

risk to himself or to others. The assessment was being carried out in a small interview room, with at least half of the available space being occupied by Mr Thakare and his desk and chair. S was seated at the desk, opposite Mr Thakare and with his back to the door used for access to the room from the foyer area.

[4] The assessment was completed at or about 10.07 pm. Mr Thakare was waiting for the associated paperwork to finish printing so that S could sign it and leave.

[5] Mr Misaiata was not a participant in the assessment process and Mr Thakare had not sought any assistance from him, but he entered the room. He had begun speaking to S in Samoan before he entered and continued as he entered. On his own initiative had come to ask S whether he had seen the nurse, which S and the other arriving prisoners were required to do as part of the arrival procedure.

[6] S responded to the question by suggesting to Mr Misaiata that the answer was obvious and the question was not necessary, and by swearing at Mr Misaiata. Although Mr Thakare did not understand the conversation, he said during the employer's investigation and in evidence that he considered Mr Misaiata's body language aggressive and the tone mocking. S, who had been compliant, was responding reluctantly. For his part Mr Misaiata said in evidence that when he suggested to S there was no need to swear and repeated his question, S said Mr Misaiata better shut up or he would '*eat the chair*' when S stood up.

[7] S signed the necessary document for Mr Thakare, was ready to leave, and moved to stand up. According to Mr Thakare, while S was in the process of getting to his feet Mr Misaiata stepped forward and struck S in the face. Mr Thakare was not able to say whether the blow was delivered with an open or a closed fist, but he said it was a direct and hard blow to the centre of the face. It had sufficient force to cause S, who was a big man, to lose his balance. Either the blow or something in the immediate aftermath also caused S to bleed heavily from the nose.

[8] Mr Misaiata said that as S moved to stand up he was uncertain of whether S would act on the threat to hit him with the chair, but S's hand was on the chair as he stood and Mr Misaiata feared for his safety. As a pre-emptive action, he applied what he called a standard control and restraint (CNR) technique. He placed his left hand

just below S's chin, with his left arm against S's chest, and attempted to push S towards the wall. As he did so, his open right palm reached towards S's face.

[9] A scuffle developed as Mr Thakare and another officer present to collect S after his assessment, Peniamina Vili, restrained S who had become angry. When the on call unit manager at the time, Gary Stock, arrived he took control of S, handcuffed him, and walked him outside into the prisoners' waiting area. According to Mr Stock, during the wait for someone to bring the handcuffs, S was yelling and saying repeatedly: '*you hit me first*'. Exchanges in Samoan and English continued between S and Mr Misiaita. Mr Stock instructed Mr Misiaita several times to leave, which eventually he did. S then calmed down and was compliant.

[10] After an investigation, Mr Misiaita was dismissed on the ground of serious misconduct in that he had assaulted S. He says the dismissal was unjustified principally because the conclusion that he had assaulted S was not one a fair and reasonable employer would have reached. He says the action he took against S amounted to the use of reasonable force in self defence, and Corrections did not properly assess his conduct, or the information advanced in support, in that light.

The Code of Conduct and associated legislative provisions

[11] The Code of Conduct includes in a list of examples of serious misconduct; '*violence or threats of violence against offenders in the workplace*'; and '*threatening, insulting or abusive behaviour to any person in a workplace.*'

[12] The Code of Conduct also requires corrections officers to recognise the vulnerability of people under its care and control, and to show respect for and protect their dignity.

[13] Thirdly the Code of Conduct requires officers to be familiar with and apply any legislation affecting their work. The legislation includes the Corrections Act 2004, which identifies a general purpose of the corrections system as being to ensure that community based and custodial sentences are administered in a safe, secure, humane and effective manner, and provides:

- that employees such as corrections officers have the function of ensuring the safe custody and welfare of prisoners under their control;¹
- in respect of the use of force that,
 - no officer may use physical force in dealing with a prisoner unless the officer has reasonable grounds for believing the use of physical force is reasonably necessary,
 - the circumstances where such reasonable grounds might exist include acting in self defence, and
 - if physical force is reasonably necessary, then no more force than is reasonably necessary may be used;² and
- that no officer may deliberately act or speak in a manner likely to provoke a prisoner³.

The law and the issues

[14] The applicable test of the justification for the dismissal, being the test in force at the time of Mr Misiata's dismissal, was set out in s 103A of the Employment Relations Act 2000 as:

... the question of whether a dismissal ... was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[15] When, as here, a serious allegation has been made against an employee, the following statement of principle is also relevant:

... where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave. This does not involve proof beyond reasonable doubt, ... It involves only an awareness ... of the gravity of the allegation and the need, therefore, if the balance is to be tilted in favour of the party alleging the serious misconduct, that the proof of that act must be convincing in the way we have described. That is because the more serious the conduct alleged the more inherently unlikely it is to have occurred and the

¹ s 14(1)(a)

² s 83

³ s 84

*more likely the presence of an explanation at least equally consistent with the absence of misconduct.*⁴

[16] Thirdly, regarding allegations of assault in the workplace, while the standards set out in the Corrections Act are relevant the Employment Court has also said in respect of assaults in the workplace in general:

*An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer no resistance at all, run away ..., or meekly submit to the assault. Such an employee is entitled to take reasonable steps in all the circumstances to avoid actual or imminent assault. Such steps may include what would amount to a technical assault upon the aggressor, pushing the aggressor away, tackling the aggressor to prevent further blows, or the like. No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer.*⁵

[17] Because not every instance of physical force by an employee amounts necessarily to serious misconduct, the employer is obliged to properly inquire into the employee's state of mind at the time the force was used.⁶

[18] In the light of the above, counsel identified the issues jointly as:

- would a fair and reasonable employer have found,
 - Mr Misiaita had assaulted S,
 - the use of force was not justified in all of the circumstances, and
 - that Mr Misiaita's actions amounted to serious misconduct in all of the circumstances
- was a fair and reasonable procedure followed, and in particular,
 - was the information Corrections relied on in reaching its decision convincing, or was it contradictory and lacking in credibility,
 - did Corrections acknowledge it would have preferred to have more information before dismissing Mr Misiaita, and

⁴ This passage from the decision of the Labour Court was quoted in the judgment of the Court of Appeal on the appeal, but not disturbed on that point, in *Honda New Zealand v New Zealand (with exceptions) Shipwrights Union* ERNZ Sel Cas 855

⁵ *Housham v Juken New Zealand Limited* [2007] ERNZ 183 at [24]

⁶ *Chief Executive Department of Corrections v Tawhiwhirangi* [2007] ERNZ 610 at [146]

- if so, what information was being referred to, and should the disciplinary investigation have been reopened before the final decision on misconduct was made; and
- would a fair and reasonable employer have considered that the appropriate outcome was dismissal and in particular,
 - did Corrections place appropriate weight on Mr Misaiata's employment history,
 - were the views of other senior employees relevant and if so were they sought or given sufficient weight, and
 - did Corrections treat Mr Misaiata more harshly than other employees in similar circumstances, and did it fail to investigate sufficiently instances of disparity of treatment raised during the disciplinary process.

Would a fair and reasonable employer have found there was an assault amounting to serious misconduct

1. Was there sufficient evidence for the finding of assault

[19] The decision-maker was Grace Smit, the prison manager at the time. Her findings of fact were based on: a report prepared by a unit manager from another prison, who together with a co-investigator conducted a detailed investigation; the transcripts of the interviews conducted during the investigation; and the submissions Mr Misaiata and his union presented to her in respect of the findings in the investigators' report. The material was discussed at a meeting on 11 May 2010.

[20] In support of Ms Smit's conclusion that there was clear evidence available to support a finding that an assault occurred, Corrections pointed in submissions to Ms Smit's findings that: there was a consensus that Mr Misaiata struck S in the face; S was struck with such force that, although he is a big man, he stumbled or lost his balance and in addition he bled heavily; and Mr Thakare's account was particularly reliable.

[21] As a background to her finding Ms Smit noted that S was not in an aggressive mood prior to the altercation with Mr Misiaita; Mr Misiaita had no reason to be in the interview room at the time of the incident, but chose to enter and engage with S; Mr Misiaita was the aggressor in that he advanced into the room and engaged with S; S was not observed to be acting in a threatening or aggressive way immediately before being struck; Mr Misiaita did not leave the vicinity when instructed to do so, and continued to aggravate S; and S had a good disposition with other staff once Mr Misiaita had been removed.

[22] Those findings were reasonable and supported by the evidence available to Ms Smit, except that even if from the employer's point of view Mr Misiaita had no reason to be in the interview room, his reason for being there was harmless. He was enquiring about whether S had seen the nurse, and the parties' interactions in response to that enquiry led to the incident.

[23] The finding that Mr Misiaita struck S in the face was supported by the evidence available to Ms Smit at the time. Although there was some inconsistency about whether the blow was made with an open hand or a closed fist, aside from Mr Misiaita the two people best able to comment were S and Mr Thakare. Both described a deliberate and hard blow, not the attempted CNR manoeuvre Mr Misiaita described. In that he agreed there was a significant 'hit on the mouth' Mr Vili supported those accounts. A second prisoner, V, who was outside the room waiting for his assessment, also said S was punched.

[24] Mr Misiaita himself gave differing accounts of precisely how he made physical contact with S but in general he described to Ms Smit a movement in which he sought to push S up against the wall, placing one hand across S's face and body and then bringing his other hand up to S's face to complete the movement. The movement he described was not consistent with the accounts of the other witnesses, and does not explain satisfactorily the strength of the blow observed by the witnesses. It was reasonable to consider Mr Misiaita's account of the physical contact unreliable.

[25] These accounts were sufficient to meet the requirement that, where a serious allegation is made, the evidence in support must be as convincing as the allegation is grave. There was nothing in the information available to Ms Smit or to the Authority

to amount to a credible suggestion that the blow Mr Misiaita struck was the result of his hand coming into contact with S's face while in the process of applying a CNR hold. S was hit deliberately.

[26] I conclude that a fair and reasonable employer would have found that Mr Misiaita assaulted S.

2. Was there sufficient evidence to find the use of force was not justified

[27] During the investigation phase Mr Misiaita told the investigators he went into the interview room to ask S whether he had seen the nurse, and in reply S swore at him and pointed out that as he was seeing the assessor he could not be seeing the nurse. Mr Misiaita responded by telling S there was no need for that sort of language, and repeated his question. Statements given to the investigators by the speakers of Samoan who were present indicate an exchange of insults followed.

[28] Mr Misiaita also told the investigators that, after signing the assessment documents, S:

... turned around and told me when I stand up you'll be eating this chair and I was fearing for my safety at that point and that's when after that he stood up and I grabbed him and pushed him against the wall. I wasn't really sure if he was going to follow on with what he was saying he was going to do but to me I'd rather stop him there ...so not only was I fearing for my safety I was being intimidated and I was abused and I don't really know why he abused me with this abusive language and that when the whole thing started.

[29] Despite the interviews being extensive and statements such as the above in particular being made, the investigators did not address in their report the information about the alleged threat or make any assessment of Mr Misiaita's response to the threat if it was made. They addressed only whether an assault had occurred, and with limited analysis in support concluded there was an assault. In turn they said Mr Misiaita had breached the Code of Conduct.

[30] The failures to address whether the force was used in self defence, and whether the force used was reasonably necessary, were serious flaws in the report. Mr Misiaita says the bare conclusion that an assault had occurred, as well as an earlier

conclusion of a similar kind by a unit manager, established a mindset which affected Ms Smit in her decision-making and was unfair.

[31] Both Mr Misiaita and his union raised the alleged threat with Ms Smit in their submissions to her on the report. They said S had threatened and verbally assaulted Mr Misiaita so that he feared for his safety. Mr Misiaita was acting consistently with his training, which was to take control of the situation before the prisoner carried out the intentions he had voiced. He was concerned because he knew of other officers who had been assaulted by prisoners. Mr Misiaita apologised if his actions were inappropriate and said he would not act in that way again.

[32] In commenting on the fears Mr Misiaita had for his safety, and his resulting actions, the union added that if there was more than one response to the threat as assessed the matter was one for debriefing and if necessary retraining. This was a performance issue rather than a misconduct issue. It was not appropriate to punish Mr Misiaita.

[33] Ms Smit responded by turning directly discuss appropriate responses in the event a threat had been made. She asked Mr Misiaita what other options were available to him. Mr Misiaita replied that normally he would walk away, but the area in the interview room was small and he had limited opportunity to move. S had made it clear that when he got up he would hit Mr Misiaita with the chair, so as soon as S got up Mr Misiaita 'pushed' - or as the union put it 'shoved' - him. Mr Misiaita said he had a split second to decide what to do to protect himself, and in hindsight would have done the same thing again.

[34] Ms Smit did not consider Mr Misiaita's actions were an appropriate response to S and believed an alternative response should have been considered. I understood it to be common ground that officers are expected to attempt to de-escalate possible incidents by attempting to calm a prisoner, by walking away, by requesting assistance, or if necessary by selecting a form of control and restraint appropriate to the level of threat posed by the prisoner.

[35] Taking into account her findings about the background to the assault, Ms Smit considered that Mr Misiaita had provoked and antagonised S and continued to do so

after the assault. These factors, together with her reliance on Mr Thakare's observations of the interactions between Mr Misiaita and S before the assault occurred, meant she did not address the nature of the alleged threat to Mr Misiaita or even whether it had been made⁷. Her focus instead was on how Mr Misiaita had responded given his perception of a threat to his safety.

[36] In general an assessment of the nature of a threat is relevant to an assessment of whether the response to the threat was reasonable. Failing to assess the nature of the threat is likely to lead to a flawed assessment of the response. However the significance of the flaw in the context of a decision to dismiss in these circumstances is a matter of fact and degree.

[37] In this case I do not consider the failure to assess the nature of the threat was sufficient to vitiate Ms Smit's findings about the response. Mr Thakare's observations, for example, were the observations of an independent bystander. I accept they were relevant to whether S was exhibiting any physically threatening behaviour, although to the extent they went beyond that Mr Thakare's inability to understand Samoan means they should not have been given further weight. In addition the alleged threat was made in circumstances where: Mr Misiaita had not walked away when he could have; three other officers (including the officer accompanying V) were in the immediate vicinity and could have assisted promptly if necessary; and aside from the mere act of standing up S had not made any move suggestive of any intention of becoming violent. In particular, beyond merely placing his hand on the chair as he stood, S had done nothing to indicate he was about to pick the chair up and use it as a weapon.

[38] For these reasons I find that, as she was obliged to, Ms Smit inquired into Mr Misiaita's state of mind at the time the force in question was used. I do not accept that for her part she proceeded on the basis of any mindset suggested by the earlier reports. Assuming the existence of a threat, she found in effect that more force was used in response than was reasonably necessary. Her conclusion that the use of force was not justified in the circumstances was the conclusion a fair and reasonable employer would have reached.

⁷ In his interview with the investigators S denied threatening to hit Mr Misiaita.

3. Did the actions amount to serious misconduct in all of the circumstances

[39] Ms Smit's preliminary view was that Mr Misaiata's actions could amount to serious misconduct and that dismissal was an appropriate outcome. Her reasons were that Mr Misaiata had struck S and then continued to provoke him, Mr Misaiata's use of force was not reasonable in all of the circumstances and his actions were not an appropriate response to S, and alternatives to these actions should have been considered. She also took into account that:

- Custodial officers are in a position of power over prisoners, and there is an expectation that their actions towards prisoners will be appropriate and reasonable;
- She could not see that Mr Misaiata showed any remorse, or acceptance that his actions were inappropriate,
- Corrections officers are expected to make sensible decisions, de-escalate situations and have greater control over a situation; and
- She had a concern about Mr Misaiata's judgment and decision-making, with reference to Mr Misaiata's statement in submissions that with hindsight he would not have acted any differently, and comments by his union that adopting passive options can be counter-productive.

[40] The union prepared written submissions on why Mr Misaiata should not be dismissed, which were discussed at a meeting on 27 May 2010. The submissions acknowledged a power imbalance between officer and prisoner but said the relationship was reversed when a violent prisoner threatened to assault an officer doing his duty. After a long day both prisoners and staff were tired, and S had used words that were particularly insulting in the Samoan language and culture. The use of the words convinced Mr Misaiata that S felt angry and violent and was seeking to provoke a response. Mr Misaiata responded by trying to soothe S, but the insults escalated. Both were trapped in a small space with limited opportunity to retreat.

[41] The comment about the adoption of passive options was explained as a reflection on what would happen if officers having to make instant decisions about what to do in a potentially violent situation were to face the prospect of those decisions being second guessed later.

[42] Further to whether Mr Misiaita was remorseful, there was no evidence Mr Misiaita would not reflect on his actions, and the use of violence was incompatible with his Christian beliefs.

[43] Finally, Mr Misiaita's union raised with Ms Smit that there was a CCTV record of a unit manager shoulder charging a staff member and knocking him flat on his back. That person was not dismissed. The union submitted that the even-handed application of policy on threatening behaviour required that Mr Misiaita not be dismissed either.

[44] Ms Smit gave her final decision on 2 June 2010. She said:

- She struggled to see evidence that Mr Misiaita had exercised his awareness of the balance of power in the relationship between an officer and a prisoner;
- Threats and abuse are inherent characteristics of working in a high risk prison environment, and Mr Misiaita had not instilled confidence that he would manage similar situations differently from the situation with S;
- Although Mr Misiaita argued S was aggressive and intimidating, the factual accounts indicated Mr Misiaita advanced on S from outside the interview room, engaged in a two way altercation, on entry to the room struck S first as S was rising from his chair, was told several times to move away from S, and continued to aggravate S;
- There was no reason for Mr Misiaita to be in the room at the time, having been outside the room just before the altercation began and able to walk away if he chose; and
- Officers are expected to behave in a manner that is a positive influence towards prisoners, but there was no evidence Mr Misiaita was aware of these values or would act differently in future.

[45] Ms Smit concluded Mr Misiaita had committed serious misconduct in that he had used violence against an offender, and used threatening, abusive or insulting behaviour to a person in the workplace. She confirmed her decision at a meeting and in a letter dated 2 June 2010, advising that Mr Misiaita's employment was terminated with effect from that date.

Was a fair and reasonable procedure followed

1. Was the information Corrections relied on convincing

[46] The principal concern raised in respect of the procedure followed in the decision to dismiss was with the quality of the information on which the decision was based, and whether other information was properly considered.

[47] I accept that contradictory statements were made to the investigators, and that some of the statements lacked credibility. Some of the contradictory or less than credible statements amounted to red herrings or did not in any event affect the employer's decision and I have not addressed them. Otherwise the quality of the information relied on in concluding an assault occurred has been discussed above.

[48] The extent of the consideration given to Mr Misiaita's statement that he acted in self defence has also been discussed above. I have found it was open to Ms Smit to conclude that the force Mr Misiaita used was not reasonable.

[49] For the reasons set out in that discussion, I find the information on which Corrections relied was as convincing in its nature as the allegation of assault was serious.

2. Did Corrections acknowledge it would have preferred more information

[50] Although Ms Smit observed at the 2 June meeting that more information would have been preferable, she said she was reflecting on the absence of any CCTV footage or a sound recording (no such material had ever existed). She considered there was sufficient information on which to make a decision without this material, and did so. I do not regard this as an admission from the employer that it was making a decision on the basis of inadequate information.

3. Should the disciplinary investigation have been reopened

[51] It was not suggested to Ms Smit at the relevant time that she should interview any other person or seek any other information. There was no suggestion, for

example, that the investigators had failed to interview someone who should have been interviewed, and I would say the interview process itself was very thorough. There was no suggestion any relevant information had not been made available and could be obtained. There was no reason to reopen the disciplinary investigation.

Would a fair and reasonable employer have considered dismissal appropriate

1. Was appropriate weight placed on Mr Misiaita's employment history

[52] Ms Smit took into account Mr Misiaita's employment history, including his length of service, but concluded that his actions constituted serious misconduct and that dismissal was the only appropriate outcome. She said that, consistently with the way in which she approaches such matters, she considered a range of sanctions but concluded the misconduct was such that lesser disciplinary sanctions than dismissal were not appropriate. A high level of trust was necessary in an environment like the prison environment, and she had lost that trust in Mr Misiaita.

[53] It was apparent from her evidence that a factor weighing heavily with Ms Smit was the importance of recognising the purpose of the corrections system as being to ensure the safe, secure, humane and effective administration of sentences. This includes recognising the imbalance between the power held by officers and prisoners respectively in the prison environment, and if officers are at times under threat from prisoners they are expected to exercise good judgment in their responses. From the incident itself, and Mr Misiaita's responses to the discussions arising from the submissions on his behalf, Ms Smit was not satisfied Mr Misiaita was recognising or would recognise these matters.

[54] It was fair and reasonable to conclude that Mr Misiaita's employment history did not outweigh these factors.

2. Were the views of other senior employees relevant

[55] Mr Misiaita says that, despite Ms Smit's view of his trustworthiness, other senior managers continue to have trust in him. Mr Stock, for example, gave evidence

that he was not asked about Mr Misiaita's employment record, or whether he would be prepared to continue to work with Mr Misiaita. He said he was willing to do so.

[56] However Mr Stock was not Mr Misiaita's usual manager, rather he was the on call manager at the time. The usual manager was the co-investigator. Mr Stock also said he thought the incident was one involving self defence. Since he had neither observed the incident nor conducted any investigation he was not in a position to form that conclusion.

[57] The submission that the views of other senior employees were relevant relied on the decision of the Employment Court in *Secretary for Justice v Dodd*⁸, a case in which the employee had conceded she was guilty of serious misconduct as defined in the applicable code of conduct but said that in the circumstances dismissal was not the appropriate sanction. The employee was a respected and high-performing manager who had breached her obligations when obtaining information about a family member. In an attempt to resolve a genuine dilemma she had exercised poor judgment.

[58] Among other things the court addressed the decision-maker's assertions of loss of trust and confidence. It found that if he had consulted with other senior managers knowledgeable about the employee, her performance, her insight into her misconduct and her promises not to re-offend he would not have concluded there was such a loss of trust and confidence that she should be dismissed.

[59] I do not read the decision in *Dodd* as requiring a decision-maker to canvass the views of senior managers, or invite anything resembling a vote on the matter, before making a decision to dismiss. Instead the decision urges employers to consider alternatives to dismissal even when misconduct has occurred, and to consider in the context of the overall employment relationship whether trust and confidence can reasonably be said to have been lost as a result of the misconduct in question. The approach involves assessing the nature and circumstances of the misconduct, and whether there is any real likelihood of a repetition of it, with reference to the employee's overall conduct and performance. Depending on the circumstances the considered views of other managers, particularly those working directly with the

⁸ [2010] NZEmpC 84

employee when the employer is a large organisation and the decision-maker is not familiar with the employee's qualities, may be relevant to that assessment.

[60] Here Mr Misiata did not invoke in his support the considered views of the managers who worked directly with him. In relation to his misconduct, he was not facing a dilemma of the kind faced by the employee in *Dodd*. He continued to maintain he had applied reasonable force in self defence, in the face of evidence showing the force he used was more than reasonably necessary. In maintaining this position he caused Ms Smit to question his judgment and to lack the confidence that he would not act similarly again.

[61] In those circumstances and at the time Ms Smit was the person best able to make that decision. At the time she was not offered, or given any reason to seek, any other views, and for the reasons I have indicated the view Mr Stock offered to the Authority was of limited assistance.

3. Was there disparity of treatment

[62] The legal test applicable to allegations of disparity of treatment in a claim of unjustified dismissal is set out in *Chief Executive Officer Department of Inland Revenue v Buchanan (No 2)*⁹. The test poses three questions, namely, -

- is there disparity of treatment?
- if so, is there an adequate explanation?
- if not, is the dismissal justified notwithstanding the disparity?

[63] Further to the third question, even without an explanation the existence of disparity does not necessarily render a dismissal unjustified. All of the circumstances must be taken into account.¹⁰

[64] Ms Smit said that before making her decision she discussed with a human resources advisor whether the sanction of dismissal was consistent with actions taken in other cases in which she and the advisor had been involved. She said of the

⁹ [2005] ERNZ 767 (CA); leave to appeal declined in [2006] NZSC 37; [2006] ERNZ 512

¹⁰ *Samu v Air New Zealand Limited* [1995] ERNZ 636

particular incident raised by the union that both of the individuals involved were issued with disciplinary warnings. Further, although the incident had occurred she did not consider the facts to be comparable. Because it involved two staff members the incident did not bring into question the inherent power imbalance between officers and prisoners which weighed considerably with Ms Smit. Secondly, Mr Misiaita had been in control of the situation in that he chose to enter the interview room, to engage with S, and not to walk away when he could have.

[65] In that the incident involved an assault in the workplace, it is comparable with the incident here. There was little detailed information about it, but I do at least accept that the element of abuse of power was not present. In that respect a limited explanation of the disparity was provided.

[66] In addition several cited determinations of the Authority involved dismissals of Corrections employees for assaulting prisoners or in one case a former colleague. In general Corrections considers such assaults to be serious and has responded accordingly. In that context the sanction applied to Mr Misiaita was consistent, and I do not regard the response to the incident raised by the union as sufficient to call in question the justification for the sanction applied here.

Was the dismissal justified

[67] For the above reasons I conclude that Mr Misiaita's dismissal was justified.

Order prohibiting publication

[68] I confirm an order made under clause 10 Schedule 2 of the Employment Relations Act prohibiting the publication of the names of the prisoners referred to in this determination by letters of the alphabet.

Costs

[69] Costs are reserved.

[70] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority