

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION (REFER PARAGRAPH 3)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 161
5444918**

BETWEEN	KRISHAN MUTHU Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Greg Bennett, Advocate for Applicant Greg Cain, Counsel for Respondent
Investigation Meeting:	7 & 8 April 2014 at Auckland
Submissions received:	8 & 10 April 2014 from Applicant 8 & 10 April 2014 from Respondent
Determination:	28 April 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Krishan Muthu, was employed as a Catering Instructor by the Respondent, the Chief Executive of the Department of Corrections (the Department) from 23 January 2012 until his employment was terminated on 9 January 2014. Mr Muthu claims that he was unjustifiably dismissed.

[2] The Department denies that Mr Muthu was unjustifiably dismissed and claims that he was justifiably dismissed for serious misconduct.

Prohibition on publication

[3] I order that the name of the prisoner involved in this matter is not to be published. The prisoner is to be referred to as Prisoner B, a letter bearing no relationship to the prisoner's actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

Issues

[4] The issue for determination is whether or not Mr Muthu was:

- subjected to an unlawful imprisonment on 29 August 2013
- Unjustifiably dismissed.

Background Facts

[5] Mr Muthu was offered employment as an Offender Employment Catering Instructor (Training Focus) on 6 December 2011 and commenced employment with the Department on 23 January 2012 at the Spring Hill Correctional Facility (Spring Hill). Mr Muthu was a member of the Corrections Association of New Zealand (CANZ).

[6] Mr Muthu received an Offer of Employment by letter dated 6 December 2011, enclosed with which was a copy of the Department's Code of Conduct. On 7 December 2012 Mr Muthu signed an Employee Acknowledgement Form, acknowledging that he had received, read and understood the Code of Conduct. The Code of Conduct sets out the expectations of the employees including:

Uphold the policies, procedures and standards of Corrections

Be honest and truthful and do the right thing, even when no-one is looking

[7] Mr Muthu initially attended the staff training college in Paremoro Prison in Auckland where he was required to pass the 7 week course which focuses on security. On 12 March 2012 Mr Muthu commenced a two week induction programme in the Spring Hill Kitchen during the course of which he and Mr Jimmy Bryne, Principal Instructor of Catering and Laundry at Spring Hill, both signed his Health and Safety Workbook to indicate that he had received training in various areas including

Security - prison (patrols, check points) and personal behaviour around prisoners; and

Tool policy – CIE policy, managing tools in the workplace

Spring Hill

[8] Spring Hill is a correctional facility accommodating approximately 1100 prisoners and 400 staff members. The prisoners progress through various stages of imprisonment from Assessment (formerly High Security), and graduate to handcuff units and then to Internal Self-Care to External Self-Care.

[9] Spring Hill delivers on-the-job training in the prison kitchen which allows prisoners to experience a real work environment while obtaining qualifications on the New Zealand Qualifications framework.

[10] Mr Muthu worked as part of a team of five instructors, four of which worked in the kitchen, and one in the laundry. The role of the instructors was to provide on-the-job training for the prisoners who worked in the kitchen providing approximately 3.000 meals for prisoners and staff a day, whilst ensuring their safe and secure containment. The instructors worked under the supervision of Mr Bryne.

[11] The four instructors in the kitchen work three different shifts: 6 a.m. to 2 p.m., 8 a.m. to 4 p.m. and 10 a.m. to 6 p.m. Due to the overlap in shift times there are at least two instructors in the kitchen between 8 a.m. and 4 p.m. The prisoners who work in the kitchen use knives which are classified as High Risk Tools (HRT). The first instructor to arrive each day was required to carry out a number of checks including a HRT check, which is recorded on the HRT Register. Once these checks are completed, the instructor communicates via radio that they are ready to receive the prisoners who are to work in the kitchen.

[12] The prisoners start arriving from about 6.30 a.m. and begin preparing food for the day. They work three different shifts but often come and go depending on other commitments such as medical appointments and classes.

[13] During his induction, Mr Muthu was ‘buddied up’ with other instructors. He spent 6 shifts with Mr Teri Oariki who was the most experienced instructor at that time, and also buddied up for one shift each with the other instructors, including Mr Derrick Fale and Mr Kevin McCarthy.

[14] Originally Mr Muthu's role had been classroom based, however due to a shortage of instructors in the kitchen; he had commenced working full-time in the kitchen on 3 December 2010. Prior to this he had occasionally covered shifts in the kitchen and laundry.

Written Warning for discrepancies in time sheet

[15] It was common practice for the instructors to record their weekly worked hours on their time sheets in advance, and for Mr Byrne to approve them at the end of the week. Mr Byrne said he would query any overtime entered on a timesheet with the instructor concerned, and he would sometimes make amendments if the instructor had made a genuine mistake.

[16] Mr Muthu had recorded on the time sheet for the week ending Wednesday 22 May 2013 and week ending Wednesday 12 June 2013 that he was on site for 8 hours each day on Thursday 16 May and Friday 7 June 2013, however Mr Byrne said there was no record of Mr Muthu entering or exiting the site on those dates.

[17] Mr Byrne explained that when an employee arrives on site at Spring Hill for their shift, they enter the gatehouse, go through security (and a metal detector) and then swipe their 'FOB' or electronic key to gain access to the holding room. They are then given access to the Key Press room by Master Control. Once in the Key Press room, employees are required to swipe their FOB again and enter their identification number. The employee is then required to enter a pin number and their 'key bunch number'. The keys that they are entitled to use are then released from a locked cabinet to them.

[18] The Audit User Transactions Report records the time that the employee logs on to the system and retrieves their keys. It also records when the employee logs off and returns the keys at the end of the shift. Consequently employees cannot enter the site or pick up their keys without being recorded on by the Audit User Transactions Report.

[19] Mr Byrne said he been unaware that Mr Muthu had not worked the two days in question as he had been on leave at the time, however he had been advised of this by another employee who had told him that Mr Muthu had been discussing the fact that he had been paid for hours he had not worked.

[20] Mr Byrne said there had been no indication that Mr Muthu had made a mistake on his time sheet, no one had been called in to cover his shifts on the days in question and Mr Muthu had not informed him that he had time off work on those days.

[21] After he had checked Mr Muthu's time sheets with the Audit User Transactions Report records, Mr Byrne said he had realised that there was a major discrepancy which did

not appear to him to have been a mistake, and he had issued Mr Muthu with a 'Please Explain' letter on 28 June 2013.

[22] The 'Please Explain' letter outlined the allegation that Mr Muthu had claimed payment for two 8 hour days whilst allegedly being absent from the site, invited him to attend a meeting on 2 July 2013 with Mr Byrne and Mr Dean Hyde, Senior Human Resources Advisor, and informed him that he was entitled to have a support person with him at the meeting.

[23] The scheduled meeting took place on 9 July 2013. Mr Muthu, who was accompanied by Mr Len Phillips, CANZ representative, submitted that the timesheet had been a genuine oversight on his part and that Mr Bryne was equally responsible by not correcting the time sheet. During the meeting Mr Muthu had questioned whether the issue had been a "*cultural thing*" as he alleged that Mr Byrne had amended the timesheets of certain other staff members when discrepancies arose.

[24] Mr Hyde said that following the meeting he had advised Mr Byrne that the issue could be regarded as serious misconduct and that it should be escalated to Ms Tracey Tangihaere, Acting Manager Offender Employment and Rehabilitation, who held the appropriate delegations for dealing with the issue. Mr Hyde said he had also escalated the matter to Ms Tangihaere because he had been concerned that Mr Bryne had in effect been accused by Mr Muthu of being racist by reference to the "*cultural thing*" remark.

[25] Ms Tangihaere wrote to Mr Muthu by letter dated 29 July 2013 informing him that he was required to attend a meeting with her and Mr Hyde on 1 August 2013. In the letter Ms Tangihaere advised Mr Muthu that the Department was viewing the matter as potentially serious misconduct and that dismissal was a possible outcome.

[26] Mr Tangihaere and Mr Hyde met Mr Muthu on 1 August 2013; he was again accompanied by Mr Phillips. During the meeting Mr Muthu again claimed that the timesheet discrepancy had been an honest oversight and that he took responsibility and accountability for what had occurred.

[27] He also stated that Mr Byrne should have taken responsibility and amended the timesheets, and further that he had advised Ms Raewyn Jamieson, the Northern Region Catering Manager at the time, by text message that he had been absent from work.

[28] After hearing from Mr Muthu, Ms Tangihaere said she had formed a view that Mr Muthu had been deliberately dishonest based on the Audit User Transactions Report records.

[29] Ms Tangihaere said she had accepted that Mr Muthu had sent a text message to Ms Jamieson, however this was not relevant to her decision on the basis that because Mr Byrne was the person authorised to approve the timesheets, Mr Muthu was required to inform him when he had been absent from work due to sickness.

[30] Ms Tangihaere had also taken into consideration the fact that Mr Muthu could have amended his timesheets when he returned to work, and also that when he had received his payslips for the two relevant pay periods, that he failed to inform Mr Byrne that there had been a mistake.

[31] Ms Tangihaere said she had proposed to issue Mr Muthu with a written warning for a 12 month period, however after a discussion with Mr Muthu and Mr Phillips, she had agreed to reduce the written warning period to 6 months.

[32] The written warning was confirmed in a letter dated 2 August 2013 which stated that:

as the allegations were deemed proven, it has been decided that the two days are to be reinstated formally as Sick Leave and you are to be issued with a Written Warning, which has a term of six months.

High Risk Tools Policy

[33] Mr Bryne said that prisoner violence is a significant risk at Spring Hill, and procedures are in place to keep staff and prisoners safe, with the security of knives and other HRT a high priority. He explained that this risk was highlighted on 2 June 2013 when a gang-related riot broke out at Spring Hill and 27 prisoners ran free in the courtyard of two cell blocks lighting fires and smashing the facilities for more than 8 hours. Three Department staff and two prisoners were injured as a result of the riot.

[34] The CIE Tool Control Policy is commonly referred to as the High Risk Tool Policy. It outlines the requirements for the identification and monitoring of HRT within Offender Employment.

[35] The purpose of the policy is to: *“ensure designated tools and equipment are accounted for at all times to prevent theft and subsequent misuse that may compromise the safety of staff and prisoners and the security of the institution”*.

[36] Mr Byrne explained that there is a selection procedure in place to determine which prisoners may work in the kitchen, and knives are only issued to authorised prisoners. Before a prisoner is authorised to use a knife, that prisoner must complete a Unit Standard training course, and the secure use of knives is emphasised as part of the prisoner induction process.

[37] The prisoners are made aware that they are responsible for any knife issued to them and are told not to lend their knife to other prisoners. If they no longer require the knife, need to go to the bathroom or have finished their shift, they must return the knife to the instructor.

[38] Mr Byrne said that any prisoner who breached these rules could face disciplinary action ranging from a warning to dismissal from working in the kitchen and confinement in their unit. Notices to this effect were displayed in several areas of the kitchen.

[39] The names of those prisoners given permission to use knives are identified on an approved issue register which was attached to the inside of the HRT Cabinet, also known as the 'knife press'. The knife press is kept locked at all times and only an instructor can open it to issue or replace a knife.

[40] Mr Byrne said that each approved user is allocated a number which corresponds to a numbered magnetic disk, and when a prisoner is issued with a knife, an instructor places the appropriate disk on the shadow board in the place vacated by the knife. On return of the knife, the disc is removed and the knife placed back in its position on the shadow board.

[41] The HRT policy provides that: "*instructors must undertake tool checks in accordance with the timeframes identified in the CIE High Risk Tool Register*".

[42] Mr Bryne said that two forms are used to monitor the HRT, these are the High Risk Tools Register and the Kitchen Daily Muster. The forms are updated when prisoners change jobs or leave and when knives are removed or replaced due to damage. The forms also advise the staff of the importance of following the process, and outlines what actions they need to take if they find that a tool is missing.

High Risk Tools Register

[43] Mr Bryne explained that all HRT are identified and listed on the HRT Register which shows the tool, the number available in the particular location, how they are counted and the frequency of checking. This information is also displayed on the inside of the HRT cabinet door.

[44] Instructors are required to check the tools in the HRT cabinet as well as any other tools stored in the secure cupboards and filing cabinets in the staff office.

[45] Instructors conduct HRT checks during the day and record these on the HRT Register. The instructor working on the early shift (6 a.m. – 2 p.m.) is responsible for checking and signing off the HRT Register first thing in the morning.

[46] This instructor hands-over to the instructor working on the late shift (10 a.m. – 6 p.m.) when the instructor on the late shift checks the HRT and signs off the HRT Register. Mr Bryne said this usually occurs at the beginning of the late shift but may vary if the kitchen is especially busy. It is important that the new instructor is satisfied with their HRT check before taking over from the previous instructor. The instructor also checks the HRT and signs the HRT Register before they leave at 6 p.m.

[47] Mr Bryne said that all instructors are aware that when they sign the HRT Register, they acknowledge that all the HRT are accounted for.

[48] The HRT Register also states that hourly checks are to be conducted for knives and other identified HRT. The time of these checks are recorded on the Kitchen Daily Muster Sheet in the appropriate box.

Kitchen Daily Muster Sheet

[49] Mr Bryne explained that prisoners move in and out of the kitchen throughout the day. The Kitchen Daily Muster sheet is used to record the prisoner musters and HRT musters done throughout the day.

[50] A prisoner muster is a check of the number of prisoners in the kitchen. Instructors are required to record on the Kitchen Daily Muster Sheet the time of the muster, how many prisoners are in the kitchen and which unit they are from.

[51] As well as the three daily HRT checks, instructors must also complete HRT musters at the same time as the prisoner muster checks are completed. The instructor is required to do a physical count of the twenty six HRT housed in the HRT cabinet in the kitchen.

[52] The instructor records on the Kitchen Daily Muster Sheet the number of HRT that are in use, the number that are still in the cabinet and the total number of HRT before signing the relevant box.

[53] Musters are done hourly but at a random time within the hour so that prisoners cannot predict when the next check will be. Muster checks are also conducted when vehicle movements occur. In this way Mr Bryne stated that if a HRT does go missing, instructors can easily determine when the HRT was last accounted for, and locate the tool as soon as possible.

[54] Mr Bryne explained that the procedure was highly rated in audit checks carried out by Quality Assurance; however it was undergoing a constant process of updating and refinement.

[55] Mr Byrne highlighted in this respect an incident which had occurred in January 2011 when a knife had gone missing. As a result the HRT procedure, which had been regarded prior to the incident as more robust than that on other sites, was changed in a number of significant ways, including that the frequency of knife checks was increased from three checks daily to hourly checks.

[56] The changes were notified to all relevant employees including Mr Muthu by way of an email dated 29 May 2011.

Incident on 28 August 2013

[57] On 28 August 2013 Mr McCarthy started his shift in the kitchen at 6 a.m. and finished at 2 p.m. Mr Fale started his shift at 8 a.m. and finished at 4 p.m. Mr Muthu commenced his shift at 10 a.m. and finished at 6 p.m. making him the last instructor in the kitchen on that day.

[58] Mr Muthu said that when he commenced his shift he had signed the HRT Register to indicate that he had done a physical check of the HRT, ticking each HRT off before taking over from McCarthy.

[59] Towards the end of his shift on 28 August 2013 Mr Muthu had again signed the HRT Register at 5.30 p.m., ticking off each HRT and signing the Register to indicate that he had physically checked all of the HRT.

[60] Mr Muthu had also signed the Kitchen Daily Muster Sheet at 1.50 p.m., 2.45 p.m., 3.40 p.m., 4.35 p.m. and 5.30 p.m. on 28 August 2013; however he had failed on each occasion to record his physical count of the HRT on the Kitchen Daily Muster Sheet.

Events 29 August 2013

[61] On the following day, 29 August 2013, Mr McCarthy had commenced his shift at the start of the day and had completed a HRT check, identifying that one knife was missing from the knife press. The magnetic disc in the place where the knife should have been identified the knife as having been allocated to Prisoner B.

[62] Mr Byrne said that Mr McCarthy had followed the proper procedure when a knife is missing. He had called Principle Corrections Officer (PCO) Ramendra Kumar and informed him that a kitchen knife was missing, and might be with Prisoner B. He had then telephoned Mr Byrne and informed him of the missing knife.

[63] Mr Byrne said he had immediately informed Ms Tangihaere and gone to Spring Hill in line with procedure. At the same time, Mr McCarthy had commenced a search of the

kitchen area whilst PCO Kumar interviewed Prisoner B who initially denied that he had removed anything from the kitchen the previous day, but when advised that there was a knife missing, realised that he had placed it on top of the hood fans in the kitchen and had forgotten about it.

[64] At approximately 6.25 a.m. PCO Kumar had escorted Prisoner B to the kitchen where he took the knife from the top of the hood fans and handed it to Instructor McCarthy who returned it to the knife press.

[65] Mr Byrne said he had advised all the staff involved to complete incident reports as and when they arrived for their shifts. At 11.50 a.m. he advised Mr Muthu that he would be required to attend a meeting that morning.

Meeting 29 August 2013

[66] Mr Muthu said he had been taken to a room in the Self Care Unit of Spring Hill, the door of which had to be unlocked from the outside. He said he did not believe that he would be able to leave the room.

[67] Mr Hyde said he, Mr Byrne and Ms Tangihaere had met with Mr Muthu in a meeting room rather than the kitchen area to ensure privacy. Like all the doors at Spring Hill, Mr Hyde said the door to the meeting room had to be unlocked from the outside, however all doors could be opened from the inside. Moreover the room had been frequently in use by employees as a lunch room.

[68] Mr Hyde further stated that Mr Muthu would have been familiar with the fact that all doors at Spring Hill could be opened from the inside. Mr Muthu confirmed that he had received an induction, and that he knew the Spring Hill site well.

[69] During the meeting Mr Muthu had been advised of the nature of the allegation against him and that the Department was considering suspension. As a consequence Mr Muthu was advised that he was to be placed on special leave with pay in order that he could take advice and prepare submissions in relation to the proposed suspension. Ms Tangihaere confirmed the advice in a letter addressed to Mr Muthu and dated 29 August 2013 in which she set out the allegation as being:

I have been advised of an incident involving your alleged failure to comply with the Departments operating procedures in respect to the checking and management of high risk tools within the kitchen during the 'PM' shift on 28 August.

This allegation is of a serious nature and presents a potential significant security and safety breach. If substantiated, this may constitute a breach of the Code of Conduct which could result in a

disciplinary outcome ranging from no further action through to dismissal.

[70] The letter also advised Mr Muthu of his right to representation at the meeting to consider suspension to be held on 2 September 2013, and that EAP (Employee Assistance Programme) Services were available to him.

Suspension 2 September 2013.

[71] At the meeting to consider the issue of suspension Mr Muthu was accompanied by Mr Gary Cliffe, Senior Corrections Officer (SCO) and CANZ representative, and Mr Hyde was present with Ms Tangihaere.

[72] During the meeting Mr Muthu presented a written submission in respect of the proposed suspension in which he stated:

As per my Desk File instructions for the shift I was rostered to work on the day of the incident, I carried out my first Muster and High Risk Tools check at 1300 hrs. All Knives were accounted for.

I then carried out a second check at 1445 hrs and all knives were accounted for. The Knife press was secured by me at this time and until the end of my shift I had not unlocked the Knife press to remove any knife and did not issue the missing knife to any prisoner.

On the basis that at 1445 hrs all knives were accounted for and I had not unlocked or issued any knives out I signed the High Risk Tool check sheet at 1745 hrs prior to finishing my shift.

[73] Following an adjournment during which she and Mr Hyde had considered Mr Muthu's written submissions, Ms Tangihaere said she had decided that he should be suspended on full pay for the duration of the employment investigation because she had been concerned that Mr Muthu's presence in the kitchen whilst an investigation was being undertaken could have a negative impact on the investigation.

Investigation Process

[74] Mr Hyde said that on 2 September 2013 he had instructed Mr Colin Ropiha to run the investigation into the incident which had occurred on 28 August 2013. He explained that Mr Ropiha had been chosen as he is a Principal Custodial Advisor, based at the Central Regional Office, a high ranking custodial officer with a good knowledge of the Department and of high integrity with had experience of running investigations.

[75] On 3 September 2013 Mr Hyde met with Mr Ropiha to discuss the Investigation Terms of Reference as set out in an internal memorandum from Ms Tangihaere into the: *“Alleged failure to comply with Departmental operating procedures in respect of the checking and management of ‘High Risk Tools’.*

[76] Mr Ropiha said he had commenced the investigation process by obtaining various documents from Mr Hyde including:

- the suspension letter sent to Mr Muthu;
- the letter advising Mr Muthu that the investigation was being undertaken dated 5 September 2013;
- Minutes from the meeting that took place on 2 September 2013;
- A copy of the submission letter from Mr Muthu dated 2 September 2013;
- The Incident Reports dated 29 August 2013 completed by Mt Muthu, Mr McCarthy, Mr Kumar and Mr Bryne;
- The iCAT 2013 Check of Offender Employment Tool Management for May, June, July and August 2013; and
- The Deskfile instruction ‘pm’ instructor.

[77] Mr Ropiha said during the investigation he had spoken to Mr Byrne to gain an understanding of the HRT procedures, and had interviewed Instructors Mr Fale, Mr McCarthy and Mr Muthu to determine the facts and whether or not they understood and generally complied with the HRT procedures.

[78] Mr Ropiha said he had also interviewed Prisoner B as the knife had been allocated to him. In addition he had reviewed the HRT Register and Kitchen Daily Muster Sheets as well as CCTV footage in order to determine if Mr Muthu had followed the procedures in place.

[79] Mr Ropiha said that when he had interviewed Mr Muthu on 9 September 2013 he had admitted to him that on 28 August 2013 he had failed to follow the HRT procedures in a number of respects.

[80] Mr Muthu confirmed at the Investigation Meeting that during his interview with Mr Ropiha he had told Mr Ropiha that he:

- was aware that when he conducted his hourly Prisoner Muster check he was also required to complete a HRT Muster check; and
- acknowledged that he was required to record the result of the check on the Kitchen Daily Muster Sheet;

[81] Mr Ropiha said Mr Muthu had also explained to him that he had not sent any prisoners through the metal detector or rubbed them down in the search room prior to them leaving for the evening as the procedures required. From his observation of the CCTV footage which showed Mr Muthu unlocking the gate and letting the prisoners through, Mr Ropiha said it was clear that Mr Muthu had failed to do any form of search in accordance with the HRT Policy.

[82] After completing the Investigation Report, Mr Ropiha said he had emailed and also handed it to Mr Hyde on 17 September 2013. The Investigation Report recorded Mr Ropiha's findings which were that Mr Muthu:

- Said that he had conducted an HRT Muster check at 1p.m. and at 2.45 pm and on both occasions all of the knives were in the cabinet, but he did not record the result of these checks on the Kitchen Daily Muster sheet;
- did not complete hourly HRT Musters at 1.50 p.m., 3.40 p.m., 4.35 p.m. and 5.30 p.m. when he signed the Kitchen Daily Muster sheet;
- did not physically check the HRT Cabinet at 5.30 p.m. when he signed the HRT Register and indicated all of the HRT were accounted for;
- gave as the reason for neglecting to do a physical check of the HRT at 5.30 p.m. that he had not issued any knives to any prisoner after completing his last check at 2.45 p.m. However Mr Ropiha noted that Instructor Fale was working in the kitchen until 3.45 p.m. and could have issued prisoners with knives;
- acknowledged that when he signed the HRT Register he was accepting that all of the HRT were accounted for; and also
- the CCTV video footage showed that Mr Muthu conducted no searches on the prisoners prior to them leaving the area.

[83] Mr Ropiha said he was of the view that it was irrelevant who had issued Prisoner B with a knife on the basis that had Mr Muthu followed the HRT procedures he would have discovered that a knife was missing and that it had been issued to prisoner B.

[84] Mr Hyde said he had emailed a copy of the Investigation Report to Mr Muthu on 19 September 2013 for his input and feedback, and Mr Muthu provided his submission on the Investigation Report on 23 September 2013 in which he had stated:

... I do not dispute the evidence. I do however contend that had I been dealt with fairly & consistently, this incident would not have happened. I believe PI Byrne should take responsibility for the part he has played in this incident.

[85] Mr Hyde said he had email Ms Tangihaere the Investigation Report and Mr Muthu's submission on it on 24 September 2013.

Meeting held on 25 September 2013

[86] Ms Tangihaere and Mr Hyde met with Mr Muthu and Mr Cliffe on 25 September 2013. Ms Tangihaere advised Mr Muthu and Mr Cliffe that she had considered the Investigation Report and Mr Muthu's submission.

[87] Ms Tangihaere had further advised that her preliminary decision was that the allegations were substantiated and amounted to serious misconduct which justified summary dismissal. She also advised Mr Muthu that he had an opportunity to comment on the preliminary decision before the Department made a final decision at a preliminary response meeting to be held on 26 September 2013.

[88] Mr Muthu was provided with a letter dated 25 September 2013 confirming the preliminary decision. In that letter Ms Tangihaere had stated:

In regards to the disciplinary action, I have considered the range of sanctions available and the seriousness of the substantiated allegations. I have also noted that you have a 'live' written warning on your personal file issued on 2 August in respect of the discrepancies in your Time Sheets; the point was made during this process that it was the Department's view that you had failed to maintain relevant standards, notably:

-Be honest and truthful and do the right thing even when no one is looking.

As this written warning was issued for a period of six months, it is 'live' and concerns a matter of a similar nature i.e. the incorrect completion of documentation; the Department is within its right to take this warning into account as it considers the potential outcome of this matter.

[89] On 26 September 2013 Ms Tangihaere said she had received a telephone call from Mr Greg Bennett from Abbey Employment Law Specialists (AELS) asking that the meeting to be held that day be postponed until 2 October 2013, to which the Department had agreed and confirmed by email dated 26 September 2013.

[90] On 30 September 2013 Mr Bennett had emailed and requested additional documents, to which request Ms Tangihaere had responded by emailing to AELS the CIE Tool Control Policy and Mr Muthu's time sheets.

Meeting held on 2 October 2013

[91] On 2 October 2013 Ms Tangihaere and Mr Hyde met with Mr Muthu, Mr Bennett and Mr Cliffe to hear Mr Muthu's response to the preliminary decision. During the meeting Mr Bennett alleged that the process followed by the Department was flawed claiming:

- Mr Muthu was unlawfully detained on 29 August 2013;
- There were doubts surrounding Prisoner B's honesty as to what he had been using the knife for;
- Instructor McCarthy started early on 29 August 2013 (5.50 a.m. as opposed to 6.00 a.m.) because he knew the knife was missing;
- The written warning for discrepancies in relation to Mr Muthu's timesheets was a separate issue; and
- Ms Tangihaere had formed an incorrect view by reading the report.

[92] Ms Tangihaere said she had concluded the meeting by thanking Mr Bennett for the submissions and advising that the Department would consider them and respond in the following week. Mr Bennett had confirmed that he would be available for a follow up meeting on 22 October 2013.

Events following 2 October 2013

[93] Mr Hyde said that Ms Tangihaere had discussed the submissions made by Mr Bennett with him, and their joint view had been that the claims were unsupported by the facts and did not directly address the allegations.

[94] Ms Tangihaere said that before she could formulate a response however, Mr Bennett had raised a personal grievance on behalf of Mr Muthu dated 3 October 2013 in respect of Mr Muthu's suspension and the alleged unlawful detention.

[95] Ms Tangihaere said she had responded to the personal grievance by addressing each of the issues raised by Mr Bennett in the personal grievance:

- In response to the claim that Mr Muthu had not been provided with a copy of the warning for time sheet discrepancies, Ms Tangihaere stated that Mr Muthu had been emailed a letter dated 2 August 2013, confirming that he had been issued with a warning for a term of six months. Although Mr Muthu had been on leave at the time he had emailed a copy of the email to his personal address on 13 August 2013;
- In response to the claim that the warning was an excessive penalty, Ms Tangihaere stated that the Department had originally considered a 12 month warning period as it considered the issue had been very serious as Mr Muthu's actions amounted to time theft as well as a failure to record accurate details on an important document. However a compromise on a six month term had been reached after consultation with Mr Muthu and his CANZ representative with a view to providing Mr Muthu with a second chance to correct his behaviour.
- In response to the concern expressed over the Department speaking to Mr Byrne after the disciplinary meeting, Ms Tangihaere stated that the Department had a right to discuss and convey information of an operational or employment nature with Mr Byrne in his capacity as Mr Muthu's direct manager.
- In response to the claim that Mr Muthu was unlawfully detained, Ms Tangihaere stated that the venue for the meeting had been a normal meeting place within the prison confines. Mr Muthu had been able to leave at any time, he had received a site induction and knew Spring Hill well.

- In response to the claim that the Investigation Report failed to address fundamental issues such as why Prisoner B had placed the knife on a ledge above his head rather than on the bench, Ms Tangihaere said she had not responded on the basis that she considered it irrelevant to the allegation that Mr Muthu had failed to adhere to HRT policy.

[96] Mr Bennett had concluded the personal grievance letter by seeking remedies and requesting mediation and Ms Tangihaere had confirmed in her response that the Department was prepared to attend mediation.

[97] On 4 October 2013 Mr Hyde emailed AELS to confirm that a meeting would take place on 22 October 2013.

[98] On 21 October 2013 Mr Hyde received a telephone message from Mr Bennett advising of his inability to attend the meeting scheduled to take place the following day, 22 October 2013, and suggesting mid- November 2013 as an alternative.

[99] On 14 November 2013 Mr Hyde emailed Mr Bennett and scheduled a meeting for 22 November 2013 for the purpose of informing Mr Muthu of the Department's final decision.

[100] On 15 November 2013 AELS emailed Mr Hyde and Ms Tangihaere advising that 22 November 2013 was not a suitable date for Mr Bennett, however a date in early December 2013 would be suitable.

[101] In that email AELS also requested a report on a number of issues to which Mr Hyde had responded. These issues included (i) why the investigator had written his own comments into the investigation report; (ii) whether the CCTV footage had been viewed and why they (Mr Muthu and Mr Bennett) had not been permitted to view it; (iii) whether the Department had considered the fact that Mr Muthu had been detained; (iv) whether the investigation report had been updated; and (v) if Ms Tangihaere had been replaced as the decision maker.

[102] Mr Hyde had responded: (i) no evidence of this had been provided; (ii) the CCTV footage had been viewed by Mr Ropiha and by Ms Tangihaere and had been available for viewing at the 22 October 2013 meeting which Mr Bennett had refused to attend; (iii) Ms Tangihaere had provided a response to this issue; (iv) the Department did not think it was necessary to update the investigation report; and (v) as Ms Tangihaere had the appropriate delegations, she would continue as the decision maker.

[103] In the same letter Mr Hyde said he had invited Mr Muthu and Mr Bennett to view the CCTV footage and attend a rescheduled meeting.

[104] On 18 November 2013 Mr Hyde received an email from AELS seeking confirmation of postponement of the 22 November 2013 meeting, to which he had responded by agreeing to a meeting in mid-December 2013.

[105] On 28 November 2013 Mr Hyde emailed Mr Bennett seeking confirmation of his dates for availability in mid-December 2013 in order to confirm a meeting and to arrange for the viewing of the CCTV footage.

[106] On 29 November 2013 Ms Tangihaere received a request from AELS to view the CCTV footage and the advice that the viewing and the conclusion meeting would have to be delayed until the middle of January 2014 due to Mr Bennett having suffered an injury.

[107] On 6 December 2013 Ms Tangihaere responded to the email by letter dated 6 December 2013 scheduling a meeting to take place on 11 December 2013.

[108] On 9 December 2013 AELS raised another personal grievance by letter which also stated that the meeting date of 11 December 2013 was unsuitable.

[109] Ms Tangihaere said she had responded in full to all the issues raised in the 9 December 2013 letter. In particular she had noted her concern that Mr Muthu had tried to apportion the blame on to his colleagues, and stated that in her view, the Department had followed a fair and reasonable process and that Mr Muthu had no grounds for a personal grievance.

[110] On 9 December 2013 Mr Hyde confirmed that the CCTV footage would be available for viewing the following day and rescheduled a meeting to 16 December 2013 for the Department to provide the final decision to Mr Muthu.

[111] On 10 December 2013 Mr Muthu, Mr Bennett and Mr Cliffe viewed the CCTV footage at Spring Hill and visited the Kitchen to clarify the camera angles.

[112] On 10 December 2013 Mr Hyde received an email from AELS demanding the “*documents that the decision maker has seen*”, and stating that the meeting scheduled for 16 December 2013: “*WILL NOT proceed*” unless these documents were provided.

[113] On 12 December 2013 Mr Hyde emailed Mr Bennett to confirm that a meeting to conclude the process was rescheduled to 6 January 2014.

[114] On 18 December 2013 Mr Bennett emailed Mr Hyde to advise that the meeting scheduled to take place on 6 January 2014 did not suit him and suggested alternative dates of 8 or 9 January 2014. Mr Hyde responded by confirming that the meeting would take place on 9 January 2014 as requested.

[115] On 27 December 2013 Ms Tangihaere received a letter from Mr Bennett demanding to engage in urgent mediation prior to advancing to the final decision. In the letter Mr Bennett outlined a number of claims that:

- Mr Muthu was unlawfully detained;
- The investigator did not consider the significance of the prisoner's actions on the CCTV footage as he was not cooking mince;
- Prisoner B's evidence was false;
- The Investigation Report was prejudicial and the outcome was premeditated; and Prisoner B was a central part of the investigation

[116] On 7 January 2014 Ms Tangihaere informed AELS that the Department did not agree to urgent mediation as there was a meeting scheduled for 9 January 2014. Ms Tangihaere said that it had been the Department's view that the request was in all likelihood another delaying tactic designed to frustrate the process.

Meeting held on 9 January 2014 in respect to the Final decision

[117] On 9 January 2014 Mr Hyde and Ms Tangihaere met with Mr Muthu and Mr Bennett to inform Mr Muthu of the final decision.

[118] Ms Tangihaere said that in making the final decision she had reflected upon the finalised Investigation Report, Mr Muthu's written submission dated 23 September 2013 and his later submissions.

[119] She had been satisfied that the Investigation Report established that Mr Muthu had failed to follow the Department's HRT policy by:

- a) Failing to record the HRT musters he claimed to have completed at 1p.m. and 2.45 p.m.on 28 August 2013;
- b) Failing to complete hourly HRT musters at 1.50 p.m., 3.40 p.m., 4.35 p.m. and 5.30 p.m.on 28 August 2013; and

- c) Failing to physically check the HRT Cabinet at 5.30 pm. on 28 August 2013 despite indicating that all HRT were accounted for and signing the HRT Register.

[120] Ms Tangihaere said she had considered that Mr Muthu had admitted to these failings in his incident report on 29 August 2013, and in his interview with Mr Ropiha on 9 September 2013. She did not accept his argument that because all HRT were accounted for at 2.45 p.m., he did not need to check the HRT Cabinet again that day. Mr Muthu acknowledged that he was not the only one in the kitchen that could issue knives.

[121] As a result of Mr Muthu's failure to adhere to these operating procedures a knife had been unaccounted for. Mrs Tangihaere said that in the prison environment, this is an extremely serious matter, and she concluded that this constituted serious misconduct for the following reasons:

- a) Mr Muthu had breached the Department's Code of Conduct by failing to adhere to the Department's procedures and by failing to maintain the integrity of the Department's processes.
- b) Mr Muthu failed to meet the Department's expectations of him ensuring the safety and wellbeing of not only himself, but also that of his colleagues and prisoners; and
- c) Mr Muthu failed to provide an adequate and reasonable explanation for his error, therefore indicating a lack of appreciation and consideration of the serious nature of the consequences for his inaction in respect of the checking and management of HRT.

[122] Ms Tangihaere said she had considered whether there was a valid explanation for Mr Muthu's failings and whether there were any mitigating factors, but she had not been convinced by any of Mr Muthu's arguments.

[123] Ms Tangihaere said she had further taken into consideration whether there was a valid explanation for Mr Muthu's conduct surrounding the documentation and management of HRT, which mirrored his failure to comply with the requirement to complete his time sheets correctly and honestly.

[124] Ms Tangihaere concluded that as a result of Mr Muthu failing to follow important procedures, the Department had lost trust and confidence in him.

[125] Ms Tangihaere said she was also disappointed that Mr Muthu had attempted to shift the blame to his colleagues and the prisoner in his charge. She considered that the prisoners who undertake employment and training do so on a voluntary basis and are enthusiastic about learning a new skill; there was therefore no incentive for Prisoner B to risk losing his place in the kitchen. Mr Byrne and the other kitchen instructors regarded Prisoner B as capable and reliable.

[126] It was therefore her view that it was more likely that Prisoner B had made an honest mistake rather than being involved in a conspiracy against Mr Muthu, and in fact there was no evidence of a conspiracy against Mr Muthu.

[127] Ms Tangihaere considered that Mr Muthu's failings constituted a breach of the Code of Conduct and amounted to serious misconduct. On this basis she concluded that Mr Muthu should be summarily dismissed.

Determination

Was Mr Muthu unlawfully imprisoned on 29 August 2013?

[128] The New Zealand Bill of Rights 1990 states at section 22: *Liberty of the person* – *Everyone has a right not to be arbitrarily arrested or detained.*

[129] The relevant test is a mixed objective/subjective test as stated by the Court of Appeal in *R v M*¹. The Court of Appeal further defined the test in *Everitt v A-G*² and *R v Koops*³ such that the perception of the person detained weighs against the mere factual issue of whether the person was free to leave, stating in *Everitt v A-G*⁴:

A common sense and practical approach is required. ... As was said in Police v Smith & Herewini [1994] 2 NZLR 306, 316, what beyond that constitutes a sufficient restraint on liberty to come within the guarantee of s 22 of the NZBORA, will depend on the circumstances of the case and will involve consideration of the nature, purpose, extent and duration of any constraint.

¹ *R v M* [1995] 1 NZLR 242 at pg 245

² [2002] 1 NZLR 82 (CA)

³ [2002] 19 CRNZ 309

⁴ [2002] 1 NZLR 82 (CA) at para [7]

[130] In the present case Mr Muthu had been advised of the purpose of the meeting. He confirmed at the Investigation Meeting that he had undergone an induction process upon his appointment and that he knew the layout of the Spring Hill site well. Mr Hyde said that the meeting room used for the meeting held on 29 August 2013 was also one used by employees taking their lunch break.

[131] Mr Hyde also said that all doors at Spring Hill could be opened from the inside. Mr Muthu had taught in a class room setting prior to moving to work in the Kitchen, and I consider that he would have been very familiar with the fact that whilst doors in the Spring Hill site need to be unlocked from the outside, all can be opened from the inside.

[132] To fulfil the requirements of unlawful detention Mr Muthu must have had a reasonably held belief that he was not free to leave⁵. Mr Muthu confirmed at the Investigation Meeting that he had not mentioned to Ms Tangihaere, Mr Hyde or Mr Byrne that he believed he was locked in, nor did he ask at any time during the short meeting if he could leave.

[133] In the circumstances I do not find that Mr Muthu had a reasonable held belief that he was not free to leave had he wished to do so.

[134] I determine that Mr Muthu was not unlawfully imprisoned by the Department.

Was Mr Muthu unjustifiably dismissed by the Department?

[135] Mr Muthu was dismissed on 9 January 2014. The Test of Justification in s103A Employment Relations Act 2000 (the Act) states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[136] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. The Department must establish that the dismissal was a

⁵ R v M [1995] 1 NZLR 242

decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[137] In accordance with s 103A (3) of the Act the Authority must also consider whether:

(a) ... *the employer sufficiently investigated the allegations against the employee ...*

(b) ... *the employer raised the concerns that the employer had with the employee ...*

(c) ...*the employer gave the employee a reasonable opportunity to respond to the employer's concerns ...*

(d) ... *the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee ...*

[138] The implication of the test of justification in s 103A was considered by the Employment Court in *Angus v Ports of Auckland Limited*⁶. The Employment Court stated:⁷

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified.

[139] Mr Muthu during the Investigation Meeting confirmed that he understood the rationale behind Spring Hill operating procedures, specifically that the procedures in relation to HRT were designed to ensure the safety and wellbeing of employees and prisoners.

[140] Mr Muthu also confirmed that he understood that in accordance with the procedures as set out in the HRT Tool Policy and the HRT Register he was required to conduct hourly HRT Musters and record the result of these checks on the Kitchen Daily Muster sheet. He was also required to complete a physical check of the HRT cabinet at the end of his shift and record this check on the HRT Register.

[141] The investigation carried out by Mr Ropiha found that Mr Muthu had failed to follow procedures as supported by his admissions in the witness report dated 29 August 2013, his

⁶ [2011] NZEmpC 160

⁷ *Angus at para [23]*

interview with Mr Ropiha on 9 September 2013, and the email from Mr Byrne dated 29 May 2011.

[142] I further note that in his submissions made on 23 September 2013 on the Investigation Report, Mr Muthu confirmed that he did not dispute the evidence and accepted the seriousness of the breach.

[143] Mr Muthu admitted that although he conducted the required HRT Musters at 1 p.m. and 2.45 p.m. he had not recorded the results of these checks on the Kitchen Daily Muster sheet in accordance with the requirements. He did not complete the required hourly HRT Muster checks at 1.50 p.m., 3.40 p.m., and 5.30 p.m..

[144] Further, and of great importance, was the fact that he did not physically check the HRT Cabinet at 5.30 p.m. when he signed the HRT Register to indicate that he had checked it and all of the HRT were accounted for.

[145] I find that Mr Muthu failed to follow procedures designed to ensure the safety and wellbeing of employees and staff and that he had deliberately falsified the records to indicate that he had carried out the required checks.

[146] His failure to do so could have resulted in the safety and wellbeing of all employees and prisoners at Spring Hill being put at risk.

[147] In these circumstances I find that the Department's conclusion that Mr Muthu had failed to adhere to the HRT checking procedure and breached the Code of Conduct, thus constituting serious misconduct and fundamentally damaging the trust and confidence essential to an employment relationship, to have been a conclusion that a fair and reasonable employer could have reached in all the circumstances at the relevant time.

[148] I further find that the Department carried out a fair process:

- Mr Muthu had been advised of the allegations against him and the possible outcomes, and advised of his right to have representation which he had at the suspension meeting and every subsequent meeting;
- Mr Muthu had been provided with an opportunity to address the issue of suspension prior to a decision being made;
- The Department carried out a comprehensive investigation which had been lead by an experienced and senior officer who was impartial;

- Mr Muthu had been provided with a copy of the Investigation Report and the opportunity to provide submissions on it;
- Following the preliminary decision and prior to the final decision, Mr Muthu had been provided with an opportunity to present submissions on the preliminary decision;
- All requested documentation had been provided in a speedy manner by the Department;
- All issues raised by Mr Bennett on behalf of Mr Muthu in the various letters, emails and personal grievance letters had been responded to and addressed by the Department;
- The CCTV footage had been made available to Mr Muthu for viewing; and
- Full consideration had been given to Mr Muthu's submissions prior to the final decision being made.

[149] There had been a lengthy period between the announcement of the preliminary decision on 25 September 2013 and the announcement of the final decision on 9 January 2014. I observe that the reasons for the delay are to be attributed to Mr Muthu and his representative Mr Bennett. On this basis I find no fault for the considerable delay to lie with the Department.

[150] I determine that Mr Muthu was justifiably dismissed by the Department.

Costs

[151] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority