Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 110
5581082

BETWEEN	MR X Applicant
A N D	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	David Appleton
Representatives:	Jenny Guthrie, Counsel for Applicant Peter Chemis and Ella McLean, Counsel for Respondent
Investigation Meeting:	21 & 22 March 2017 at Dunedin
Submissions Received:	10 May and 8 June 2017, from the Applicant 30 May 2017, from the Respondent
Date of Determination:	3 July 2017

DETERMINATION OF THE AUTHORITY

A. The Applicant was not unjustifiably dismissed.

B. Costs are reserved.

Prohibition from publication order

[1] The pleadings and the written and oral evidence presented to the Authority in this matter related to conduct by the applicant which caused distress to two individuals. They also disclosed personal information about those individuals which it is not in the interests of justice to be published.

[2] Accordingly, pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act), I prohibit from publication on a permanent basis any information that identifies, or may reasonably be anticipated to identify, the applicant, and the two aforementioned individuals.

[3] For the avoidance of doubt, that information shall include, but not be limited to:

(a) Addresses or former addresses of the three individuals;

(b) Roles held or formerly held within the Department of Corrections by the three individuals; and

(c) Locations at which the three individuals work or formerly worked.

[4] In this determination, the applicant shall be referred to as Mr X and the two individuals as Ms Y and Ms Z respectively.

Employment relationship problem

[5] Mr X claims that he was unjustifiably dismissed from his employment with the Department of Corrections (the Department) on 17 July 2015. He seeks reinstatement to his former role, together with reinstatement of all entitlements, including accrued sick leave used whilst he was prevented from attending work pending a psychiatric assessment. Mr X also seeks reimbursement of lost wages, together with interest, compensation, the imposition of a penalty on the respondent for breach of good faith and recovery of his legal costs.

[6] The respondent denies that Mr X was unjustifiably dismissed, asserting that he was dismissed for serious misconduct after a fair and reasonable process had been followed.

Brief account of the events leading to the dismissal

[7] Mr X held a senior supervisory (but not managerial) role within the Department. For some years, he had been living with Ms Y but later started having an affair with Ms Z while he was still living with Ms Y. Both Ms Y and Ms Z were employees of the respondent. Up until the incidents leading to the dismissal, Mr X

had an unblemished record with the Department since the commencement of his employment in 1999.

[8] In December 2013, Ms Y discovered Mr X and Ms Z in bed together. Unsurprisingly, the relationship between Mr X and Ms Y broke down and Mr X left the shared home. During the course of 2014, the relationship with Mr X and Ms Z became difficult and in late October 2014, Mr X understood that Ms Z wished to end their relationship. This hit Mr X very badly. According to his evidence, on the night of 27 October 2014:

> That night I was in a distressed state, my world was falling apart. I had walked away from everything in my life to be with [Ms Z]. My children, family and close friends had turned their backs on me given what I had done to [Ms Y].

[9] The following morning, on 28 October 2014, Ms Z was travelling to Invercargill for her work. Mr X felt a strong desire to speak to Ms Z but she declined. Her text message to Mr X said that she needed *"time out"*. Mr X then texted Ms Z to say that he was going to drive to Invercargill and Ms Z asked him not to, stating:

> This would not help anything and only scares me. Please do not come.

[10] The Authority saw copies of the text messages sent by Mr X to Ms Z during the evening and night of 28 October. It is clear from the text messages that he drove to Invercargill despite Ms Z asking him not to, and continued to text her and call her throughout the night and into the following morning. According to the evidence of Ms Z, Mr X texted her 28 times that night and tried to call her 18 times.

[11] During the same evening, Mr X also called and texted a mutual colleague asking her where Ms Z was, and turning up at the colleague's home in Invercargill. Ms Z's evidence is that she felt insecure and frightened because she could not believe his behaviour, and because the lengths that he had gone to in order to meet her made her fear what he might have done had he found her in Invercargill. Ms Z said that she was so concerned by Mr X's behaviour that she asked for her name to be changed at the hotel that she was staying at in Invercargill and for the hotel reception not to put any calls through to her room. She says that she was told later by the hotel manager that a man had called twice and tried to be put through to her.

[12] At 06.49 hours of the morning of 29 October 2014, Mr X sent the following text to Ms Z:

> I am going to have to tell work what is happening given we both work for the same place.
>
> Not sure what I am going to say as I don't know either.
>
> Do you hate me? If so what did I do?
>
> Maybe it's time for some truths … I feel that I have never been honest with a number of people about us. Maybe it's time to. But would rather talk with you first.

[13] The colleague of Mr X and Ms Z who had been contacted on the evening of 28 October 2014 advised Mr Jack Harrison, a senior manager in the Department who headed up Mr X's local line management chain. Mr Harrison's evidence was that he spoke to Mr X the following morning about him contacting Ms Z and their mutual colleague, and Mr X acknowledged that he was having difficulty accepting that Ms Z did not want the same things from the relationship as he did. Mr Harrison says that Mr X assured him that he would modify his behaviour. Mr Harrison then spoke to Ms Z to advise her of Mr X's undertaking and to determine if she wanted anything else to be done at that stage. Ms Z wanted him to be aware of what had happened but did not want anything further to be done at that stage.

[14] On 3 November 2014, Mr X and Ms Z met at Ms Z's house. Ms Z says that, during this meeting, she told Mr X that she wanted to end the relationship. Mr X continued to call Ms Z in subsequent days, and one of these calls was overheard by a colleague of Ms Z. According to Ms Z, she cried following this phone call as she felt that the constant calls and harassment were never going to end.

[15] According to Mr X, on 4 November he was in a distressed state and had spoken to Ms Y several times by phone as well as his counsellor. One of them spoke to the Police worried that Mr X may be suicidal. The Police finally caught up with Mr X and took him to the Emergency Psychiatric Services Department of the local hospital for an assessment. Mr X was sent home with medication.

[16] According to Mr X, on 6 November a member of his line management told Mr X that he should forget about Ms Z and get on with his life. According to Mr X, between 6 and 14 November, he worked 84 hours including overtime and callbacks. This was because he was under financial pressure having to pay for his lodgings, as

well as half of the rent on Ms Y's house and half the mortgage in a home jointly owned with Ms Y.

[17] On 13 November 2014, Mr X tried to call Ms Z and did not get a reply, so turned up at her home. She allowed him to come in but their conversation deteriorated into a bitter argument at the end of which Ms Z asked Mr X to leave. Mr X then went around to Ms Y's house and a couple of hours later he was served with a trespass notice by the Police which Ms Z had issued prohibiting him from visiting her property.

[18] Mr X continued to text, call and email Ms Z. According to Mr X:

> I very much regret the emails and texts sent to [Ms Z]. They were needy, desperate and at times nasty, on a personal level. They were sent when I was in a very dark place.

[19] The Authority saw copies of these emails and I note that one of the emails was sent to Ms Z at her work email address. That particular email was conciliatory in tone but an email which he sent to her private email address on 5 November 2014 contained the following passages:

> I am returning to work tomorrow. I intend to be honest and open about what has happened to me (some are aware of something as havn'been to work for 2 days) from the type of relationship, highly sexual, BDSM, a number of stays at Tawse Manor right through to me scaring you by coming to Invercargill and your genital herpes.
>
> …
>
> People on both sites will become aware – we will be at morning tea for a while I suspect. To be honest doesn't bother me. Invercargill is worse for that. …
>
> Will be showing this to Jack [Harrison] as well so has the full picture on what has transpired.

[20] On 5 November, Mr X sent Ms Z another email which implied that he was going to tell other people apart from Mr Harrison about personal matters.

[21] On 17 November 2014 Mr X called in sick and went to the Emergency Psychiatric Services as a voluntary inpatient. He was admitted as an inpatient and prescribed anti-depressants.

[22] On 21 November 2014, whilst he was a voluntary inpatient, Mr X sent an email to Ms Z at her work address which contained reference to Ms Z having genital

herpes, and intimate details of their sex life. This email also made reference to Ms Z's dog saying *"she has limited time"*. Ms Z saw this as a threat. This was the last email that Ms Z received from Mr X.

[23] Mr X was released from the psychiatric unit on or around 27 November 2014 and had a conversation with a colleague about wanting to make a posting on Facebook. This colleague later wrote an email to the Department which says that she had advised Mr X against this.

[24] On 30 November 2014, Mr X visited the house he co-rented with Ms Y and became upset when he saw that Ms Y was now living with another male. Mr X said he became angry because he had been paying half of the rent, and because Ms Y had not told him about this. He apparently phoned Ms Y and told her that *"she would be sorry"*. As a result of this, he was issued with a Police Safety Order prohibiting him from going to the house for five days. Mr X had also telephoned Mr Harrison when he saw the man at Ms Y's house, and Mr Harrison arrived at the property after the PSO had been issued. Mr Harrison encouraged Mr X to go back to the hospital, although he refused to do so. Mr X was also called by the psychiatric nurse asking him to return, and again he declined.

[25] That night (30 November), Mr X made a posting on Facebook which stated that Ms Z had genital herpes, which he believed he also had. This posting also made reference to Ms Y living with the other male and Mr X paying half of the rent of the property. It is not necessary to replicate the text of the Facebook posting, which was reasonably long, but it was written in a coherent and articulate manner. Mr X very shortly afterwards made another posting to Facebook which showed photographs of both Ms Y and Ms Z, identifying them both by name.

[26] The following morning, a member of staff emailed Mr X's line manager to tell her that he had seen the Facebook postings. The colleague wrote:

> So if I found it, it will be gossip if not already around site.

[27] According to Mr X, his posting was *"a way to reach out to my friends and those concerned about me as to what was happening in my life"*. He said that his profile was not public and that his post would only have been seen by his Facebook friends. It is clear, however, that many of his Facebook friends were colleagues and former colleagues. Mr X said that he tried to remove the posting around 6am the

following morning and by 9.30am had closed his Facebook account. He says he deeply regrets the hurt that the Facebook posting caused Ms Y and Ms Z.

[28] On the night of 1 December 2014, Mr X voluntarily returned to the psychiatric unit.

[29] Mr X was given permission to leave the psychiatric unit on the morning of 2 December in order to get a warrant of fitness for his car. Whilst he was away from the hospital, he received a message from his landlady which caused him to believe that she was going to evict him from his lodgings. He says that he then went to a local beach and then made an attempt to kill himself by overdosing on his heart medication and sleeping pills. However, before doing this, he sent an email to a work colleague advising her of his intentions.

[30] As a result of the email to the colleague, Mr X was located and taken to hospital. He woke up the following day and decided to discharge himself without permission. He said that he retrieved his car and then got a phone call from the Police and told them that he was returning to the psychiatric hospital.

[31] Mr X was then arrested for breaching the Police Safety Order issued on behalf of Ms Y by naming her in the Facebook posting. He was then presented to a Judge who declined to grant a protection order in favour of Ms Y but increased the Police safety order for a further three days.

[32] On the same day, Mr X was given a letter by the Police stating that Ms Z had made a complaint to them about him in relation to harassment. The letter warned him not to have contact with Ms Z or else he would be charged with criminal harassment.

[33] Mr X then voluntarily returned to the psychiatric hospital with the Police where he was given a psychiatric assessment, and issued a certificate under s.10 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 stating that there were reasonable grounds for believing that he was mentally disordered and that it was desirable that he be required to undergo further treatment and assessment. He was therefore detained in the psychiatric unit of the hospital for a five day period. This period was later extended for a further 14 days. He was therefore compulsorily detained in hospital from 3 to 22 December 2014.

[34] Following the Facebook posting, on 4 December 2014 Ms Z wrote a formal complaint to the Department against Mr X. In the complaint, she stated that she had been *"bullied, emotionally blackmailed, harassed, stalked and verbally threatened by him"*. She also stated that Mr X had told her that he was *"going to destroy me emotionally"*.

[35] On 30 November 2014, Ms Y had emailed a colleague complaining that Mr X had hacked into her Facebook account, and that she no longer felt safe. On 2 December 2014, Ms Y emailed Mr Harrison stating that she was going to take further steps to ensure her safety once the Police Safety Order had expired and then said:

> I would appreciate you taking any further necessary steps to ensure my safety when I am back at work and on site.

[36] Mr Harrison replied to Ms Y stating the following:

> As discussed obviously we are really concerned about the latest developments and the impact that [Mr X's] actions have had on you. I have viewed the Facebook postings and from our discussion yesterday I have assured you that we will act on these as inappropriate behaviour and an employment process will commence. I may need to hold back on that until it is considered an appropriate time given his current condition but be assured we will not tolerate that kind of action by any of our staff. Please keep me and/or [Ms Miles] posted with any action Police commit to taking as well as that may also inform the employment process.
>
> Be assured we will take what ever steps necessary to ensure your safety at work.

[37] On 9 December 2014, Mr Harrison visited Mr X at the psychiatric unit to advise that he had received the complaint from Ms Z which would need to be investigated. He gave Mr X a letter to that effect. This letter stated that Mr Harrison's first concern was for Mr X's health but that, once his health had improved, the employment concerns needed to be discussed with him. The letter also stated that, while Mr X was absent from work, he was not to enter any Departmental premises until the Department had received a comprehensive medical assessment which indicated that his health was such that he could return to work.

[38] On 18 December 2014, Mr X was assessed as fit to return to work by the hospital psychiatrist (Dr Strong) subject to the employment assessment.

[39] In early January 2015, Ms Y decided to give her relationship with Mr X another chance.

[40] On 16 January 2015, Mr Harrison wrote to Mr X saying that he had decided that the employment concerns that he referred to in his letter of 9 December warranted an employment investigation. The specific allegations that were to be investigated were as follows:

> You harassed [Ms Z] during the period October to December 2014 by means of phone calls, texts, e-mails, face to face contact and a Facebook posting.
>
> Had the following issued against you by the police:
>
> - Trespass notice in respect of [Ms Z]'s home address;
> - Harassment notice in respect of [Ms Z];
> - Police safety order in respect of [Ms Y];
> - And were arrested and found to have breached the safety order.

[41] Mr Harrison informed Mr X that he had arranged for a Regional Intelligence Manager, Mr Tony Wilson, to conduct the employment investigation and he attached the terms of reference of the investigation. The letter stated that Mr X was not to be interviewed by Mr Wilson until the Department had received a comprehensive medical assessment indicating that his health was such that he could return to work and be reasonably expected to participate in the investigation process. In the meantime, Mr Wilson was to conduct interviews with the other staff named in the terms of reference. The letter invited Mr X to identify any additional individuals who he would wish to be interviewed as part of the process.

[42] The letter reminded Mr X that, if proven, the allegations were likely to amount to serious misconduct under the Department's Code of Conduct and to demonstrate behaviour that fell below their expectations. He stated that these were specifically, but not limited to:

> **Inappropriate behaviour or relationships (internal or external)**. *Failing to maintain professional boundaries with prisoners or offenders. Failing to respect the rights, privacy and dignity of any other person.*
>
> **Careless or unsafe behaviour**. *Any behaviour resulting in a potential or actual threat to the health and safety of any individual or to security of professional/performance standards.*

> **Reputational issues**. *Actions that bring Corrections into disrepute or negatively affect the public perception of Corrections or the Government.*

[43] The letter said that serious misconduct, where proven, could result in penalties up to and including dismissal and that "such actions" had the potential to undermine the trust and confidence necessary between him and the Chief Executive of the Department of Corrections.

[44] Mr X was at that time on sick leave, and Mr Harrison stated in the letter that he would review the matter of suspension after he had received the comprehensive medical report and reminded him that he had the right to seek the support of his union or other support person. He also referred him to the EAP to gain counselling support should he wish to.

[45] The terms of reference sent to Mr Wilson set out the allegations and requested that Mr Wilson interview Mr X, Ms Y and Ms Z as well as three colleagues of Mr X and Ms Z who had been involved at various points, together with any other person who he considered may have information relevant to establishing the circumstances and facts. He was also to interview any person nominated by Mr X as having information relevant to the investigation. Mr Wilson was to be assigned the support of a senior human resources adviser, Mark Godwin, and was then to prepare a written report including Mr Wilson's conclusions as to whether or not the allegations had been substantiated on the facts or on the balance of probabilities.

[46] In February 2015, Mr X was assessed by a registered clinical psychologist and cleared to return to work. Upon receipt of the report from the clinical psychologist (Dr Hunter), Mr X was suspended by the Department.

[47] In February and March, the key witnesses were interviewed by Mr Wilson, including Mr X. Mr X was sent a transcript of the interview and, on 10 April, Mr Wilson completed his employment investigation report which was sent to Mr X by Mr Harrison. The investigation report set out the procedure followed; a summary of the evidence collected and additional information; identified some disparities in the evidence and Mr Wilson's findings of fact and conclusions as to the allegations. Mr Wilson's conclusions were as follows:

> I find the allegation that [Mr X] harassed [Ms Z] during the period October to December 2014 by means of phone calls, texts, emails, face to face contact and a Facebook posting is upheld.

> I find the allegation that [Mr X] had issued against him by the Police a trespass notice in respect of [Ms Z]'s home address, a harassment notice in respect of [Ms Z] and a Police Safety Order in respect of [Ms Y] is upheld.
>
> I find the allegation that [Mr X] had been arrested and found to have breached the safety order is upheld.

[48] The investigation report contained notes of interviews with 10 individuals, six of whom had been referred to in the original terms of reference and a further four interviewed at the request of Mr X.

[49] In his letter to Mr X attaching the investigation report, Mr Harrison summarised the conclusions of Mr Wilson. It also noted a request from Mr X that Mr Harrison be interviewed and that Mr X had concerns regarding Mr Harrison's involvement in matters subject to investigation and the fact that he was also the decision-maker. Mr Harrison said that, given the sensitivities regarding the matter, he was of the view that he remained the decision-maker. However, he did offer in his letter to ask another person to make the decision if Mr X was of the view that he had not been impartial. He said that, if Mr X wished him to continue to be the decision-maker, Mr X was to make written submissions in regard to the information contained in the report before Mr Harrison made any decisions as to what, if any, disciplinary sanction would be appropriate.

[50] On 16 April, Mr Godwin provided to Mr X and his PSA representative, Jo Taylor, a copy of the social media policy. The following passages from the policy are pertinent:

> All Corrections employees are expected to follow these principles when using social media tools as a representative of the organisation or in a private capacity:
>
> …
>
> - Consideration of personal privacy as well as that of the organisation, colleagues, stakeholders, offenders and their families.
>
> The following policy standards must be followed at all times:
>
> - Corrections employees are personally responsible for the content they publish through any social media tool.
>
> …
>
> - Employees are responsible for anything they publish online. Employees can be disciplined by the Corrections for commentary, content, or images that are defamatory, pornographic, breach copyright, or personal privacy rights, harassing, libellous, or that can create a hostile work environment.

> **Personal use**
> …
> • If employees are using social media tools on a private basis they must still consider their association with Corrections.
>
> …
> **Personal use of social media**
> • Even if you are not identified as a Corrections employee on a personal blog, you should assume that readers can and will identify you as such.
> …
> • Personal blogs, postings or websites must not be used to embarrass attack or abuse colleagues.
>
> Employees must respect their audience and must not use ethnic slurs, personal insults, obscenity, or engage in any conduct that would not be acceptable in the Corrections workplace. Employees should remember that readers of social media include stakeholders, the media, current/past/future employees and offenders and their friends and family.

[51] On 24 April 2015, Jo Taylor wrote to Mr Harrison stating that she would be making submissions on the report and requesting an extension of time to do so until 30 April. Ms Taylor also stated the following:

> We take on board your view that given the sensitivities regarding the matter that you remain the decision maker and agree with that.

[52] On 30 April 2015, Ms Taylor wrote to Mr Harrison an eight page letter making written submissions on the investigation report. The letter raised a number of issues disagreeing with some of the findings of the report and also raising the following:

(a) That Mr X had been suffering from a number of stressors in his life;

(b) That the harassment notice referred to in the report was in fact an harassment warning;

(c) That Mr Harrison's version of events should have been investigated;

(d) That disparities in evidence should have been put to Ms Y, Ms Z and Mr Harrison to be further investigated;

(e) That no reference was made in the Facebook posting to the Corrections Department itself;

(f) That it was not Mr X's intention to embarrass Ms Y or Ms Z in the Facebook posting;

(g) That the Facebook posting was made by somebody who was distraught;

(h) That Mr X could not be held responsible for the act of collection and wider dissemination of the screen shot of the Facebook posting;

(i) That at the time Mr X was admitted to the psychiatric unit, he met the diagnostic criteria for an acute adjustment disorder;

(j) That Ms Y now supported Mr X and lived with him;

(k) That no protection order had been issued;

(l) That the harassment was *"at the lower end of the continuum"*;

(m) That Mr X had no previous warnings after 16 years of service;

(n) That since being discharged from the psychiatric hospital he had made good progress in reducing the stressors that contributed to his mental health difficulties.

[53] Ms Taylor referred to the recommendation of Dr Hunter that Mr X be allowed to return to work and that she believed it highly unlikely, given the supports and strategies that had been put in place, that there would be a repeat of the behaviour. As well as the letter of support from Ms Y, Ms Taylor also included a letter from Dr Hunter referring to the counselling sessions that Mr X had been having with her.

[54] On 7 May 2015, Mr Harrison replied to Ms Taylor acknowledging the points she made but saying that he did not believe any changes were required to the investigation report, other than a minor change correcting an error. Mr Harrison stated that he would consult with the regional and national offices, HR team and employment advisers before reaching a decision as to his preliminary view on the appropriate sanction.

[55] On 5 June 2015, Mr Harrison wrote to Mr X with his preliminary view. With regard to the first allegation that Mr X harassed Ms Z, Mr Harrison reviewed the key findings of Mr Wilson and Mr X's key submissions and found that the pattern of

Mr X's actions and behaviours at the time were experienced as and perceived by Ms Z as harassment, as they were unwanted by her. Similarly, the Facebook posting was experienced as and perceived by her to be harassment. Mr Harrison noted that members of Corrections staff had access to the Facebook posting in their own right and he concluded that aspects of the social media policy had been breached. With respect to this allegation, Mr Harrison concluded as follows:

> It is my view that the evidence against you in relation to this allegation is sufficient in that the pattern of your behaviour through phone calls, texts, e-mails, face to face contact and a Facebook posting was in total unwanted by [Ms Z] and made her feel unsafe. On this basis, while I note that you have said that your behaviour was *"as a result of a relationship breakdown"*, I have decided that this allegation is substantiated.

[56] With respect to the allegation that Mr X had a trespass notice, harassment notice and Police safety order issued against him, Mr Harrison again reviewed the key findings of Mr Wilson and the submissions made by Mr X. Mr Harrison accepted that the *"*harassment notice*"* was a warning but found that Mr X's actions were viewed by the Police as being of sufficient seriousness and concern as to justify the issuing of the warning. Mr Harrison concluded that the wording of the warning letter underlined the seriousness with which the Police were treating the matter.

[57] Mr Harrison rejected the view that he should have been interviewed with respect to the issuing of the Police safety order as it had already been issued by the time he arrived at the house in question after having been telephoned by Mr X. Mr Harrison noted that a Police Safety Order is an on-the-spot order issued by a qualified constable who has reasonable grounds to believe that an order is necessary to ensure a person's safety. Mr Harrison found that this allegation was also substantiated.

[58] With respect to the third allegation that Mr X was arrested and found to have breached a safety order, Mr Harrison also found that this allegation was substantiated.

[59] Mr Harrison then went on to consider the terms of the Code of Conduct. Mr Harrison stated that, as an employee of the Department, there was a very high standard of professional and personal behaviour expected of Mr X both in the workplace and outside of it, in particular in maintaining and role modelling high standards of integrity, presenting himself in a way that enhanced his credibility and supported the Department's success. It was Mr Harrison's view that Mr X had

committed conduct that fell below the Corrections Department's expectations and that he had therefore breached the Code of Conduct. He also felt that Mr X's actions could have brought the Department into disrepute and/or negatively affected the public perception of the Department.

[60] Mr Harrison stated that he had taken into account Mr X's 16 years of service, the submissions presented by Mr X and the comments of the three mental health professionals who had assessed Mr X at various points. He noted an admission by Mr X that, in at least once instance, he had made a comment to Ms Z that was intended to hurt her. Mr Harrison believed that the various actions taken by the Police were a clear indication of how they viewed Mr X's actions; i.e. that they were deliberate and calculated with the aim of causing distress or feelings of "unsafety".

[61] Mr Harrison found that, even allowing for the influence of Mr X's acute adjustment disorder at the time, he was not convinced that Mr X was truly taking accountability for his actions, despite the senior role which he held within the Department.

[62] Mr Harrison's letter concluded as follows:

> Given these circumstances, after reviewing all of the relevant information and considering all of the allegations together with the seniority of your role within the Department, I have decided that the Department can no longer hold the required level of trust and confidence in you to perform your role as [withheld].
>
> I have considered the range of disciplinary sanctions available in these circumstances however in light of the seriousness of the situation; [sic] my preliminary view that Summary Dismissal is the appropriate disciplinary action.

[63] Mr Harrison gave Mr X an opportunity to comment on his preliminary view.

[64] On 12 June 2015, Mr Harrison met with Mr X and two officials from the PSA, and was accompanied by Mr Godwin. At this meeting, the PSA officials raised four "cases" which they stated showed that there was disparity of treatment between the proposed outcome of Mr X's disciplinary investigation and the outcomes of four other employees.[1]

[1] At the Authority's investigation meeting Mr X stated that he was no longer relying on the 4th comparator case.

[65] The first comparator was referred to as *"Case 1"*, which involved a staff member of the same level as Mr X against whom allegations of bullying and harassment had been made by a female member of staff following a relationship breakdown. The assertion was that this officer had not been suspended, but had been allowed to go on an international secondment, despite a trespass notice having been taken out against the individual. The PSA said that it was not aware of any sanctions having been taken against the staff member. It was Mr Harrison's response that the complainant in Case 1 had maintained all along that she had wanted the matter to be resolved at *"the lowest possible level"* and that, whilst he accepted that there were similarities with Mr X's case, there were also differences which contributed to how it was dealt with.

[66] Case 2 involved a male staff member who had carried out an assault on a female staff member, who was his partner. That officer retained his job, received a final written warning and was placed on night watch for six months.

[67] Case 3 involved a senior male Corrections officer who had acted inappropriately towards a female member of staff, who had complained. The PSA said that it was *"common knowledge"* that the senior Corrections officer got off with a *"slap on the wrist"* and that there was no investigation.

[68] The notes of the meeting on 12 June 2015 refer to Mr Harrison saying that *"the employment landscape has changed since 15 January 2014"*. In his written evidence to the Authority, Mr Harrison explained that, by this, he was referring to the former employee of the Department of Corrections, Edward Livingstone, who murdered his two children and then killed himself in front of his ex-wife on 15 January 2014.

[69] Mr X says that Mr Harrison said that there was no longer as much *"local discretion"* in employment cases since that murder/suicide. Mr Harrison's evidence is that, as a result of the Livingstone case, there was now a greater scrutiny of decisions as some of the *"warning signs"* had not been spotted at site level with respect to Mr Livingstone, who had not been dismissed for a breach of protection orders preceding the murder/suicide. Mr Harrison also said that it was standard practice for decisions on disciplinary sanctions to be reviewed by both the Regional and National Office advisers and that this practice preceded the Livingstone tragedy.

[70] Mr Harrison also agreed to the PSA making written submissions, which were received by Mr Harrison on 26 June 2015. These submissions referred to the *"intensely personal relationship breakdown"*, and the submission that it was not Mr X's intention to cause Ms Z to be upset and concerned by the Facebook posting. It referred to the fact that Ms Y was upset that personal and out-of-work incidents could lead to Mr X's potential dismissal and that Ms Y felt *"misinformed and misled about what was going to be asked at her interview, her role in the investigation and how her information was going to be used as part of the employment investigation"*. They stressed that Ms Y had not made a formal complaint about Mr X.

[71] The PSA referred to the disparity of treatment that they had raised at the meeting and also referred to mitigating circumstances, including Mr X's length of service, the large amount of overtime he had been doing (260 hours overtime between January and 17 November 2014), that the Facebook posting had not gone beyond the Department and that Mr X had been suffering from a mental disorder at the time the behaviours occurred. They requested that a lesser penalty than dismissal be imposed.

[72] The PSA's letter also enclosed a letter from Mr X to Mr Harrison which stated that he deeply regretted the hurt, fear and distress that he had caused a number of people by his actions, in particular to Ms Y and Ms Z. He stated that he had come to understand the impact of his actions on others prior to being discharged from hospital, which gave him the motivation to seek counselling. He stated that he was sorry for the distress and hurt that he had caused and looked forward to the possibility of continuing his role at Corrections, which he was passionate about and loved.

[73] On 13 July 2015, Mr Harrison wrote to Mr X advising him that Mr X's behaviour was such that it continued to cause Mr Harrison significant concern and to question whether the Department could continue to have trust and confidence in his ability to perform his current or any role and to meet the expectations required as an employee of the Department. He therefore continued to believe that summary dismissal for serious misconduct was appropriate in all the circumstances and that Mr X's conduct had been such as to destroy the mutual trust and confidence which was essential to the employment relationship. He stated that the employment agreement with the Department was therefore terminated with effect from Friday, 17 July 2015.

[74] In his letter, Mr Harrison addressed the various submissions made by and on behalf of Mr X. Some of these points will be examined below as they formed the rationale for Mr Harrison's decision to dismiss Mr X.

[75] A letter from Mr X's solicitors, Webb Farry Lawyers, raising a personal grievance was sent to Mr Harrison on 25 August 2015. This personal grievance raised a number of alleged flaws in the investigation and the conclusions.

The issues

[76] Mr X has a number of arguments for asserting that his dismissal was unjustified. These can be summarised as follows:

(a) The investigation failed to distinguish between private matters and matters relevant to employment;

(b) Mr X's conduct did not have the potential to bring the Department of Corrections into disrepute;

(c) The factual finding that the allegation of harassment against Ms Z had been established was flawed;

(d) Even if there had been harassment of Ms Z, the respondent failed to explain how this out-of-work conduct was relevant to the discharge of Mr X's employment;

(e) Allegation 2 did not amount to matters for which Mr X could be disciplined, including:

(i) The trespass notice had not been issued by the Police;

(ii) There is no such thing as a *"harassment notice"*; and

(iii) The issuing of a Police Safety Order is not evidence of an offending or particular behaviour;

(f) Allegation 3 did not amount to a matter for which Mr X could be disciplined as the respondent failed to identify how Mr X's arrest amounted to a breach of the Code of Conduct;

(g) In general, the respondent failed to show how each allegation amounted to a breach of the Code of Conduct;

(h) There was a failure to consider how any breaches of the Code of Conduct amounted to serious misconduct;

(i) There was a failure to properly take into account relevant matters such as his mental health, his overtime hours and the rehabilitative steps he took when determining the sanction to be imposed upon Mr X;

(j) There was bias and predetermination;

(k) Mr Harrison was acting as a supportive manager to Ms Y and Ms Z during the course of events that led to Mr X's dismissal;

(l) Mr Harrison was unduly influenced by the views of other employees; and

(m) There was disparate treatment between Mr X and other employees.

The underlying legal framework

[77] In considering whether the respondent unjustifiably dismissed Mr X, it is necessary to take into account the mutual duty of good faith, set out in s.4 of the Act and s.103A of the Act. Section 4(1A) of the Act provides as follows:

> *(1A) The duty of good faith in subsection (1) –*
>
> *(a) is wider in scope than the implied mutual obligations of trust and confident; and*
>
> *(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
>
> *(c) within limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –*
>
> > *(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
> >
> > *(ii) an opportunity to comment on the information to their employer before the decision is made.*

[78] Section 103A of the Act provides as follows:

> *(1) For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
>
> *(2) 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.*
>
> *(3) In applying the test in subsection (2), the Authority or the Court must consider –*
>
> > *(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
> >
> > *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
> >
> > *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
> >
> > *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
>
> *(4) In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
>
> *(5) The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
>
> > *(a) minor; and*
> >
> > *(b) did not result in the employee being treated unfairly.*

Failure to distinguish between private matters and matters relevant to employment

[79] Mr X asserts that the events that occurred between him and Ms Y and Ms Z amounted to private conduct and that no attempt was made in the disciplinary process

to separate private matters and matters that were relevant to Mr X's employment. He asserts that, in order for out-of-work conduct to justify employment disciplinary action:

(a) The conduct must have the potential to bring the employer into disrepute; or

(b) There must be a sufficient nexus between the employee's conduct and their employment such that:

(i) The conduct affects the employee's ability to perform their role; or

(ii) The conduct undermines the employer's necessary trust and confidence in the employee.

[80] Mr X asserts that the conduct did not have the potential to bring the Department into disrepute and that there was insufficient nexus between his out-of-work conduct and his employment.

[81] It is my finding that it was a fair and reasonable conclusion of the respondent that Mr X's conduct did both have the potential to bring the Department into disrepute and that there was a sufficient nexus between his out-of-work conduct such that the trust and confidence in him as an employee was destroyed.

Mr X's conduct did not have the potential to bring the Department of Corrections into disrepute

[82] With respect to the allegation that the conduct did not have the potential to bring the Department into disrepute, I am mindful of the evidence of Mr Harrison who stated the following in evidence:

> Prisons are very difficult and dangerous places. In this environment, it is necessary to have layered and detailed procedures and policies in place and to insist on strict compliance. A clear command structure and a culture that supports this structure is also very important. While we look after our people in what is a difficult and sometimes stressful environment, the highest standards of compliance and behaviour are required and very little quarter can be given.
>
> In this difficult and potentially dangerous environment, a supportive and trusting team culture is critical. Staff are dealing with some of New Zealand's most dangerous individuals on a daily basis and must know that they can rely on their colleagues.

[83] Mr Harrison gave evidence of how much work has been carried out in relation to the Department's expectations of its staff and that the Department has been working hard to create a more professional culture within the prison environment and to educate staff about their responsibility to model acceptable behaviour and communicate in a way that encourages mutual respect.

[84] Ms Guthrie refers in her submissions to the case of *Wikaira v Chief Executive of the Department of Corrections*[2], in which Chief Judge Colgan, at paragraph [158] stated the test that the employer must apply when deciding whether an employee's conduct risks bringing the employer's reputation into disrepute. This is as follows:

> From this, I conclude that a fair and reasonable employer, considering whether an employee's conduct brought, or risked bringing, the employer into disrepute, must consider objectively several factors. These are whether a neutral, objective, fair-minded and independent observer, apprised appropriately of the relevant circumstances, could have considered the relevant actions to have brought, or to be a reasonable risk of bringing, the employer into disrepute.

[85] Applying this test, I find on balance that it is satisfied. I find that there was a real risk that, had the general public found out that Mr X, who held a senior position within the operational side of the Department of Corrections, had, within a short space of time, been issued with a trespass notice by another member of staff, a letter from the Police warning him against harassing that same member of staff and a Police Safety Order in respect of a different member of staff which he breached leading to his arrest, the public would have entertained serious doubts as to the reliability of the management of the Corrections facility in which Mr X worked.

[86] Even if the facts summarised in the above paragraph had remained private, Mr X's posting in Facebook of intimate details about the two other members of staff made it much more likely that the general public would have become aware of a significant dysfunctionality between Mr X on the one hand and two colleagues, Ms Y and Ms Z, on the other. Mr X had compounded this behaviour by posting photographs of both Ms Y and Ms Z at the same time as his posting about those intimate details. Ms Guthrie says in her submissions that there was no media

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[2] [2016] NZEmpC 175

attention, unlike in the case of *Hallwright v Forsyth Barr Ltd*[3]. However, there was social media attention, which cannot be discounted.

[87] Mr X said in evidence that he only had around 50 Facebook friends at the time, and that the posting was not public. However, this is frankly either disingenuous or naïve. Posting the details that he did to a forum of 50 people is a guarantee that that information was going to spread quickly beyond that circle, either online, or by word of mouth. That is the reality of human nature. What Mr X did is no different from standing in a bar filled with 50 people that he knew and announcing these intimate details at the top of his voice. Furthermore, because of the way Facebook works, anyone "reacting" to the posting (such as by liking it, or commenting on it), is likely to have made that posting available to all of that person's Facebook friends as well. This is exactly how information goes "viral" within a matter of hours.

[88] Therefore, I am entirely satisfied that the respondent's conclusion that Mr X's actions were capable of bringing the Department into disrepute is a finding that a fair and reasonable employer could have made in all the circumstances.

[89] With respect to the argument that there was an insufficient nexus between Mr X's behaviour and his employment, I reject that argument as well. I have set out above examples of threats made by Mr X to Ms Z to publicise details of her sex life to his colleagues. It is absolutely clear what he was doing when he referred to "morning tea" for example. He also emailed Ms Z at her workplace email address. On 28 October 2014, when he drove to Invercargill and sent Ms Z 28 texts and made numerous calls to her, she was visiting Invercargill for work purposes, and he involved a work colleague in trying to track her down.

[90] Furthermore, the Facebook posting was to a group of Facebook friends who included employees of the Department of Corrections, and so Mr X brought the matter into the workplace.

[91] In addition, both Ms Y and Ms Z referred to their colleagues and their managers, seeking help, as a direct result of Mr X's actions. For example, Ms Y emailed Mr Harrison asking him to ensure that she was kept safe at work. Ms Z wrote a detailed letter of complaint in relation to Mr X's behaviour.

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[3] [2013] NZEmpC 202.

[92] Of course, Mr X had personal, out-of-work relationships with both Ms Y and Ms Z. However, Ms Y and Ms Z were also employees of the Department of Corrections. This fact adds an additional dimension to the matter which demanded a greater restraint upon Mr X as he owed duties to his employer and was subject to its policies. The fact that an employee is in a private relationship with a colleague whom he harasses outside of work does not exempt that harasser from the consequences of his actions in a workplace setting.

[93] This is self-evident given that harassing behaviour outside of the workplace cannot simply be forgotten and put aside by the victim when he or she arrives at work. The email to Mr Harrison from Ms Y asking him to keep her safe is a vivid illustration of this. She was scared that Mr X would cause her harm (whether physical or emotional) in the workplace. She harboured this fear entirely because of his behaviour outside of the workplace.

[94] I am entirely satisfied that there is a sufficient nexus between Mr X's conduct outside of the workplace and his employment within the workplace. Furthermore, I am entirely satisfied that that conduct was sufficient to cause the respondent to lose trust and confidence in Mr X and that that conclusion by the respondent was one that a fair and reasonable employer could have made in all the circumstances.

The factual findings that the allegation of harassment was established against Ms Z was flawed

[95] In his letter dated 5 June 2015 to Mr X, Mr Harrison referred to the findings of Mr Wilson who had noted the definition of harassment as defined by the Harassment Act 1997. This was stated as being:

> A pattern of behaviour (two or more separate acts within a 12-month period) directed at someone which makes that person feel distressed or unsafe.

[96] Mr Harrison stated that the definition and examples given in the warning letter were focused on how the recipient experiences and perceives any actions or behaviour which informs whether or not harassment has occurred. Mr Harrison then set out the evidence that Mr Wilson had heard of the effects on both Ms Y and Ms Z of Mr X's conduct. This evidence came not only from Ms Y and Ms Z themselves, but from other employees who were interviewed who had had conversations with Ms Z and seen the effect on her.

[97] It was entirely clear from the findings of the investigation report, which were accepted by Mr Harrison, that both Ms Y and Ms Z (but Ms Z in particular) had felt a high level of concern and anxiety, as well as distress from Mr X's actions. These were compounded by Mr X's posting on Facebook of intimate details relating to Ms Z. Indeed, the discomfort shown by Ms Z when giving evidence to the Authority (with Mr X absent during that evidence, by consent) shows that the effects are still felt over two years later.

[98] Ms Guthrie says that the respondent did not consider whether Mr X intended and/or was aware of the extent of the impact his actions had on Ms Z at the time he carried them out. She also refers to *mens rea*, although it is not clear whether she is submitting that such a concept applies to an employment disciplinary process. In addition, Ms Guthrie gives no authority for asserting that an employer has to be satisfied that an employee intends to cause another alarm or distress before it may conclude that harassment has occurred. In any event, Mr X did admit he wished to hurt Ms Z, and those intentions can reasonably be inferred from some of his emails to her.

[99] Given the plethora of information provided to the Authority which had come out of the employment investigation into Mr X's behaviour and Ms Z's complaint, I am satisfied that there was ample evidence to show that Ms Z had been subjected to actions which amounted to harassment by Mr X. Of course, the Authority has no jurisdiction to consider whether Mr X had breached the Harassment Act 1997. However, applying the normal standards expected of an employee in any workplace, let alone a senior employee in a sensitive workplace such as a Department of Corrections facility, I am satisfied that Mr X's actions did amount to harassment in the everyday sense of the word, as the actions were unwanted, unreasonable and sustained.

[100] Accordingly, I am satisfied that a fair and reasonable employer could have found, in all the circumstances, that Mr X had subjected Ms Z to unwanted behaviour amounting to harassment.

The trespass notice was not issued by the Police

[101] It is true that the trespass notice was issued at the behest of Ms Z. However, this is just one small element of the overall picture that the respondent took into

account when reviewing whether the actions of Mr X amounted to serious misconduct. Indeed, the fact remains that Ms Z was persuaded that the issuing of a trespass notice was an appropriate measure to take. I believe that, in all the circumstances, a fair and reasonable employer could have taken this fact into account.

The harassment notice

[102] It is true that the Police did not issue Mr X with a *"harassment notice"* but rather a warning letter advising him of the definition of harassment under the Harassment Act. However, it did this because the Police constable who issued the warning letter was satisfied that Ms Z was at risk of Mr X committing a criminal offence in relation to her. Indeed, the letter from Constable Davis stated that the circumstances complained of by Ms Z, including several emails being sent to her and the Facebook posting, comprised part of an ongoing pattern of harassment which was unwanted and unnecessary, and that *"these circumstances amount to criminal harassment"*.

[103] Again, whilst the investigation report made a minor error of terminology, it was entirely appropriate for the report to take the letter into account in assessing whether or not Mr X had harassed Ms Z. The letter was part of the factual matrix which the respondent was not only entitled to take into account but was, indeed, obliged to in the light of the complaint from Ms Z. Ms Z's complaint was a serious one and warranted a thorough investigation.

[104] I therefore reject the suggestion that the respondent was not entitled to rely upon the letter of warning in respect of harassment from the Police in reaching its conclusion that Mr X had harassed Ms Z, and find that it was an action that a fair and reasonable employer could have taken in all the circumstances.

The Police Safety Order

[105] Mr X argues that Police Safety Orders are issued on-the-spot, that there is no right of appeal to it and that it was issued on untested evidence. Therefore, the issuing of the Police Safety Order was not evidence of any offending or particular behaviour, and so it was unfair for the respondent to rely on it to determine that Mr X had committed "an act of domestic violence".

[106] There is no finding in the investigation report to say that Mr X had committed domestic violence against Ms Y. However, again, the issuing of the Police Safety Order was part of the factual matrix that was relevant in the inquiries that Mr Wilson was making to determine whether Mr X's conduct amounted to breaches of the respondent's policies and Code of Conduct. It is clearly a highly relevant fact. Furthermore, unless Mr X presented evidence to show that the Police Safety Order had been issued erroneously, the respondent was entitled to take it into account and rely on it as evidence of inappropriate behaviour towards Ms Y.

[107] Therefore, I find that the respondent taking the Police Safety Order into account in its findings was an action that a fair and reasonable employer could have taken in all the circumstances.

Being arrested for having breached a Police safety order did not amount to a matter for which the applicant could be disciplined

[108] Mr X argues that the respondent has failed to identify how Mr X's arrest amounted to a breach of the Code of Conduct.

[109] The Code of Conduct includes what it calls *"*reputational issues*"*. These are *"*actions that bring Corrections into disrepute or negatively affect the public perception of Corrections or the government*"*. Examples are then given. Mr X argues that there was no nexus between his private conduct and his employment. However, I have already found that there was sufficient nexus between his actions and his employment. I have also found that his actions were capable of bringing the Department of Corrections into disrepute in light of his behaviours, the consequences of those behaviours, his senior position and the expectations of the public in relation to members of the Department's staff. I am therefore entirely satisfied that Mr X's arrest was capable of causing reputational damage to the Department of Corrections and that his arrest therefore amounted to a breach of the Code of Conduct.

[110] Therefore, on the balance of probabilities, Mr Harrison's finding that Mr X's arrest was a breach of the Code of Conduct was a finding that a fair and reasonable employer could have made in all the circumstances.

The respondent failed to show how each allegation amounted to a breach of the Code of Conduct

[111] I do not consider that it was necessary for the respondent to show that each allegation amounted to a breach of the Code of Conduct. It was necessary for it to be satisfied on reasonable grounds that Mr X had committed serious misconduct. This it did in respect of the harassment of Ms Z. However, I am satisfied that a number of the allegations also amounted to breaches of the Code of Conduct.

Failure to consider how any breaches of the Code of Conduct amount to serious misconduct

[112] I accept that it could not reasonably be the case that every breach of the Code of Conduct committed by Mr X would of its own amount to serious misconduct. Indeed, this was conceded by Mr Harrison in evidence, who said that the issuing of a trespass notice, harassment letter and PSO were not enough for him to have found serious misconduct.

[113] In *Honda New Zealand Ltd v NZ Boilermakers Union*[4] the Court of Appeal endorsed the following words of the Labour Court:

> A charge of the greatest gravity had been levelled against the worker and the burden of justifying the dismissal was, of course, on the respondent employer. It is well settled that the standard of proof which the employer must attain is the civil standard of balance of probabilities rather than the criminal standard of beyond reasonable doubt; however, 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.

[114] The allegations against Mr X consisted of three parts, as set out in the letter to Mr X dated 16 January 2015 and the terms of reference. Mr Harrison said in his evidence that he treated the first allegation (that Mr X harassed Ms Z by means of phone calls, texts, e-mails, face to face contact and a Facebook posting) as having been serious enough alone to have warranted a finding of serious misconduct. I agree with this.

[115] There is no dispute that Mr X carried out the actions that the Department found to be harassment. Mr X also conceded in his oral evidence that, in hindsight, his actions up to and including the Facebook posting, and including his following of

[4] [1991] 1 NZLR 392 (CA) at 394

Ms Z to Invercargill and his texting her incessantly that night, amounted to harassment.

[116] The point at issue, therefore, is whether that harassment amounted to serious misconduct. I am satisfied that the finding of harassment of Ms Z by Mr X, and the actions that led to that finding of harassment were serious enough to amount to serious misconduct. In finding that, I take into account the persistence of the actions, their nature and the effect they had on Ms Z.

[117] I refer in particular to the following:

(a) The behaviour that occurred over the night of 28/29 October 2014 which, by most reasonable standards, would have amounted to stalking;

(b) The threats made to Ms Z by Mr X to expose to their mutual work colleagues details of their sex life;

(c) The threat to disclose to their mutual work colleagues details of Ms Z's sexual health;

(d) The sending of emails to Ms Z containing references to these details at her work email address; and

(e) The posting on Facebook of photos of Ms Y and Ms Z and details of Ms Z's sexual health, knowing that the Facebook posting would be seen by members of staff.

[118] These actions alone are capable of amounting to serious misconduct and I am satisfied that the respondent's finding that this was so was one that a fair and reasonable employer could have made in all the circumstances.

[119] I would add that, even if the Code of Conduct extracts cited by Mr Harrison in his letters do not refer to harassment of staff members specifically, it is patently clear that harassment of a staff member is capable of amounting to serious misconduct.

[120] Turning to the social media policy, I am also satisfied that the respondent was correct in finding that this had been breached. This is because of the prohibition that social media must not be used to embarrass, attack or abuse colleagues. I disagree

with Ms Guthrie that the Facebook posting referred to Ms Z in her capacity as an ex-partner alone. As I have found above, she was also a colleague, and her status as a colleague would, I find, have been clearly in Mr X's mind at the time. It is, with respect, disingenuous to argue otherwise.

Failure to give proper weight to the applicant's mental health

[121] It is undoubtedly true that Mr X was diagnosed as suffering from acute adjustment disorder and that he was compulsorily detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

[122] It was Mr Harrison's view that, whilst the fact that Mr X was suffering from acute adjustment disorder may have provided a partial explanation for his actions, it did not in his view completely excuse or justify them.

[123] Mr X's actions occurred over a period of several weeks, during most of which he was carrying out his duties, with no apparent adverse impact upon his discharge of those duties. Furthermore, no clear advice was given to the respondent by either Dr Hunter or Dr Thornton (the doctor who assessed Mr X as fit to leave the psychiatric unit) that Mr X was not aware of his actions, and their consequences during this period.

[124] Mr Harrison also noted that, during his interview as part of the investigation, Mr X had admitted that he had, on at least one instance, made a comment to Ms Z which was intended to hurt her and that Mr X had not attempted to explain his comments as having been the product of his acute adjustment disorder. Mr Harrison also took into account the fact that the Police seemed to have viewed Mr X's actions as deliberate and calculated with the aim of causing distress or feelings of unsafety.

[125] It is Mr X's case that Dr Strong, who had compulsorily detained Mr X, should have been interviewed as only he knew the state of mind of Mr X close to the time when he made the Facebook posting. However, Mr Wilson said in evidence that, when he questioned Dr Thornton, who had more recently assessed Mr X, she said she had reviewed all of the case notes, including those written by Dr Strong. Mr Wilson had no reason to doubt that, and so understood that Dr Thornton's comments in the interview were based on the whole of Mr X's recent case history.

[126] The notes of the interview with Dr Thornton state:

> But she said the condition [of acute adjustment disorder] isn't one that would affect his day to day decision making. Jo [Dr Thornton] confirmed that [Mr X] isn't psychotic and therefore he would know right from wrong and would be able to make most normal daily decisions in a rational, logical way.
>
> Jo said there isn't much else she can add but wanted it confirmed that in her opinion his daily decision making wouldn't have been affected during the October to December period.

[127] The notes of Dr Hunter state that she could not vouch for Mr X's mental state over the period October to December as she did not see him during this time.

[128] In the light of Dr Thornton's statement, which took into account Dr Strong's notes, and in the absence of clear medical evidence to the contrary, I find that Mr Harrison was entitled to form the views that he did, as expressed above. They fall into a range of reasonable responses available to the employer in these circumstances. In other words, I find that a fair and reasonable employer could have reached the conclusions that Mr Harrison reached in respect of Mr X's state of mind in all the circumstances.

Failure to give proper weight to the impact of excessive work hours on Mr X's behaviour

[129] It is clear that Mr X was working additional hours because he was under considerable financial pressure, paying half of the rent towards Ms Y's accommodation, half of the mortgage on a jointly owned property with Ms Y as well as his own boarding costs. It appears that he was told by his manager that he was working excessive hours but also, at his level of seniority, he was expected to regulate his own hours. However, this in itself does not address whether Mr X working such excessive hours could have adversely affected his judgement.

[130] Mr Harrison said in his oral evidence that he did take into account the hours that Mr X worked, as well as whether the combination of hours and his mental health could have affected Mr X's judgement. Mr Harrison judged that the hours worked were not excessive or unusual in the context of the environment in which Mr X worked. I accept this evidence.

[131] I have not seen any cogent evidence that persuades me that Mr Harrison's view that the overtime worked was a significant component to Mr X's mental health

was one that a fair and reasonable employer could have come to in all the circumstances at the time.

Failure to give proper weight to rehabilitative steps taken by Mr X and his ability to be reintegrated

[132] Whilst Mr X had clearly undergone many counselling sessions and appeared now to be very regretful of some of the actions he had taken, Mr Harrison makes reference in his letter of 5 June 2015 to what he regarded as Mr X's *"dismissive responses to the matter of the Facebook posting and the Department's social media policy"*, and what Mr Harrison saw as Mr X's *"apparent disregard for [his] responsibilities as a Corrections employee in this respect"*. Mr Harrison was concerned that Mr X appeared to believe (at the time of the respondent's investigation) that, because all his activities in question took place outside his workplace, were not carried out in work time and did not involve workplace resources, that somehow made them alright and not the concern of the Department.

[133] Mr Harrison concluded that, despite the counselling that had been undertaken by Mr X, and despite his expressions of remorse, he did not truly accept responsibility as an employee of the Department for what he did.

[134] I would concur with this conclusion. The connections between Mr X's actions and his employment are plain, as have been expounded in this determination. It was of concern to the respondent that Mr X could not see how his actions impacted on his employment, or those of Ms Y and Ms Z. This led to the respondent's loss of trust and confidence in Mr X.

[135] Therefore, I conclude that Mr Harrison's failing to be convinced by Mr X's counselling and expressions of remorse to impose a lesser sanction upon Mr X were the conclusions that a fair and reasonable employer could have made in all the circumstances.

Bias and predetermination

[136] Mr X asserts that Mr Harrison was too involved in the events that gave rise to the investigation and therefore he was unable to make objective decisions. Mr X makes this assertion on the basis that Mr Harrison was present at Ms Y's rental property shortly after the Police Safety Order had been issued. However, Mr X knew

about this when he and his representative accepted that Mr Harrison should continue and be the decision maker.

[137] Mr X also refers to an email from Mr Harrison to Ms Y in which Mr Harrison stated:

> We will act on these [Facebook postings] as inappropriate behaviour and we will not tolerate that kind of action by any of our staff.

[138] Ms Guthrie refers to other two emails that Mr Harrison sent to members of the HR team having learned about the Facebook posting. In one he says "without knowing the content of the Facebook page…This has to be a Code of Conduct issue now". Later he states that he would stand Mr X down.

[139] The emails do not show predetermination in my view. First, Mr Harrison had been told the gist of the Facebook postings, and he knew they contained very personal and potentially damaging content about Ms Z. Second, it was plain to anyone that such an action was very likely to lead to an investigation as to whether the Code of Conduct had been breached. Third, it was clearly reasonable to suspend Mr X in the circumstances, to prevent Mr X and Ms Z coming into contact at work.

[140] Mr X also referred to a comment in an email from Mr Harrison to Mr Godwin about Mr X's request that his sick leave be viewed as special leave by saying:

> I note his response shows a continuation of the poor me and entitled attitude that he has been displaying.

[141] Mr X asserts that *"*it is clear from this email that the entire investigation process was predetermined and biased against [Mr X] from the outset*"*. Mr Harrison's explanation for this email is that he was frustrated at the time about the very complicated and difficult situation that had evolved. He said that, when he wrote the email, he had the sense that Mr X had cast himself as the victim in the relationship breakdown and seemed unaware of the impact his actions were having on others. Mr Harrison concedes that it was an unhelpful comment.

[142] I do not accept that these emails, or any other evidence put before the Authority, demonstrate predetermination and bias from the outset. That is significantly overstating the matter. When considering the process that was followed by the respondent, I do not see a predetermined or biased process. The process was thorough, and careful to seek the views of Mr X and his PSA representatives at each

key stage. The evidence demonstrates that Mr Harrison considered each point put to him by the PSA. He offered to stand down as the decision maker. A fair process does not demand that each point raised by an employee is agreed to, but simply that it is given due consideration in good faith. I am satisfied that Mr Harrison did so.

Mr Harrison was acting as a supportive manager to Ms Y and Ms Z during the course of events that led to Mr X's dismissal

[143] It was Mr Harrison's role to be supportive to all of the staff who worked under him. This included Mr X, and Mr Harrison was very supportive of him, taking calls from him about his private life outside of work hours and visiting him in the hospital.

[144] Whilst Mr X would not have known of the contents of the email to Ms Y or the email to Mr Godwin, Mr X was certainly aware of Mr Harrison's general involvement in the issues that were the subject of the employment investigation. Despite this knowledge, Mr X and his PSA adviser decided, after due consideration, that they were happy for Mr Harrison to continue to be the decision-maker.

[145] In short, I do not find that Mr Harrison acting in a supportive way towards Ms Y and Ms Z shows that Mr Harrison was biased. He wrote extensively to Mr X both setting out his preliminary views and his final conclusions. He explained his rationale in some detail and addressed specifically the many submissions made by and on behalf of Mr X. Despite the unfortunate email comment made by Mr Harrison about Mr X, when one stands back and sees the overall approach taken by Mr Harrison, I am satisfied on the balance of probabilities that he gave sufficient consideration to all relevant matters in a reasoned and fair manner.

[146] His findings were ones that a fair and reasonable employer could have made in all the circumstances.

Was Mr Harrison influenced by the views of other employees?

[147] The Authority saw two emails amongst the voluminous disclosure put before it which raised the possibility that Mr Harrison may have been influenced by other staff in his decision to dismiss Mr X. The first email, dated 27 June 2015 from Mr Harrison, referred to him getting a visit from an officer and his union representative making representations about Mr X. The second email from Mr Harrison, dated 7 July 2015, states the following:

> None of the [senior staff] or Mgrs I have canvassed either want him back on site or can see how he could actually come back as they too have lost trust and confidence in him as have I. Even if [Ms Y] has turned hostile the actual complaint was made by [Ms Y] and her allegations were upheld and I know that she has on going concerns about [Mr X] and his possible return to the work place.

[148] Regarding his first email, Mr Harrison said the officer who approached him said he had been seeing Ms Y in a relationship, and he was concerned about Mr X returning in case Mr X made things difficult for him, as Mr X was more senior. Mr Harrison said he had intended to speak to Ms Y about this but decided not to, and so put the representations out of his mind. Ms Y did not state in her evidence that she had been approached by Mr Harrison about the visit from the officer, and I accept that Mr Harrison is likely not to have wanted to complicate matters by doing so. I therefore accept his evidence on this issue.

[149] Mr Harrison said that, in respect of the second email, he had not been canvassing opinions, but had had staff and managers approach him about Mr X. He said that he did not take any account of what the staff had said. Whilst he wanted the support of the Department, he had not been moved from his preliminary view, based on the harm done to Ms Z.

[150] I do not accept Mr Harrison's evidence that he did not canvass the views of senior staff and managers. His email is quite explicit in this regard, and it is not likely to have been a slip. I believe that he did canvass the views of other senior staff and managers.

[151] However, when he had written this email, he had already written his letter (on 5 June 2015) giving his view that Mr X should be dismissed and had already received Mr X's submissions via the PSA. It appears that Mr Harrison was canvassing views to find out whether anyone disagreed with his view that Mr X should be dismissed. They clearly did not. I do not believe that this confirmation of Mr Harrison's view was information that it was necessary to put to Mr X, as Mr Harrison had already reached his preliminary view that he had lost trust and confidence in Mr X prior to the canvassing. The canvassed views confirmed this view, but did not influence him in his view in the first place.

[152] I therefore do not accept that Mr Harrison was obliged to put these canvassed views to Mr X for comment prior to confirming his preliminary decision, or that they show he was unfairly influenced by them.

Disparate treatment

[153] The legal test addressing alleged disparity of treatment between employees by an employer was settled upon in the Court of Appeal case of *Chief Executive of the Department of Inland Revenue v Buchanan*[5]. The test consists of three questions, as follows:

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[154] Most of the evidence relied upon by Mr X in arguing an unjustified disparity of treatment concerned Case 1. This has been summarised briefly above. It is Mr Harrison's case that there was a fundamental difference between Case 1 and Mr X's situation, in that the complainant in Case 1 specifically wanted matters to be kept as low key as possible. This was not the case with Mr X. Ms Z's complaint made no such stipulation and placed no such limitations on the respondent.

[155] However, Mr Harrison also says that the factual circumstances regarding Case 1 and Mr X were different in that matters escalated far more significantly in Mr X's case than they did in Case 1.

[156] In conclusion, I am satisfied that the circumstances between Case 1 and Mr X's situation, while similar, were sufficiently different to justify a different outcome.

[157] Case 2 involved a corrections officer who had been arrested, charged and subsequently discharged without conviction and who had permanent name suppression. The Department had concluded that the officer had breached the Code of Conduct and that what he had done amounted to serious misconduct. There was considered to be a clear connection between the out-of-work conduct leading to the

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[5] [2005] ERNZ 767 (CA)

arrest and the Department's values and purposes. The officer was issued with a final written warning, the District Court Judge's sentencing notes having been influential.

[158] Mr X did not give any evidence as to the impact upon the victim of the assault by the officer in case 2, and I am unable to conclude that case 2 is comparable with that of Mr X, as the respondent clearly took into material account the serious adverse effect upon Ms Z of Mr X's actions in deciding that dismissal was appropriate.

[159] Case 3 involved a senior officer being asked to explain possible sexual harassment or unwanted behaviour. He was given a verbal warning. Ms Guthrie acknowledges in her submissions that this case is not comparable to Mr X's case, and so it does not warrant further investigation as an example of disparity of treatment.

[160] It appears that there may have been a change of policy after the Livingstone tragedy. Even if this change of policy had not been made known to Mr X, I am not persuaded that it would have made any difference to his conduct. This is not the sort of case where, for example, an employer simply changes without notice its policy on drug usage and expects its employees to adhere to the changed policy.

[161] In addition, I am mindful of the case of *Samu v Air NZ Ltd* [1995] 1 ERNZ 636 (CA) in which the Court of Appeal said, at p 639,

> There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.

[162] In summary, I do not believe that Mr X was unjustifiably treated by reference to the two comparator cases he relies on.

Conclusion

[163] In her 60 page written submissions Ms Guthrie very thoroughly identifies and explores numerous instances of what she views as procedural failings, and substantive flaws. I have considered all of these, and addressed most of them expressly in this determination. However, when I step back and view the actions taken by Mr X against Ms Y and Ms Z in their entirety, and the actual and potential harm done by those actions to Ms Z in particular, I am satisfied that, in all the circumstances, a fair and reasonable employer could have found that these actions amounted to serious

misconduct, that it had lost trust and confidence in Mr X and could have dismissed Mr X at the time the respondent did.

[164] I therefore dismiss Mr X's personal grievance.

Costs

[165] Costs are reserved. The parties are directed to seek to agree how costs are to be dealt with between them. However, if they are unable to agree within 14 days of the date of this determination, the respondent may serve and lodge within a further 14 days a memorandum of counsel setting out the contribution towards its costs sought against Mr X, and the basis for that contribution. Mr X may then serve and lodge a memorandum of counsel in reply within a further 14 days.

David Appleton
Member of the Employment Relations Authority