

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 130
3015951

BETWEEN JCE
 Applicant

A N D THE CHIEF EXECUTIVE OF THE
 DEPARTMENT OF CORRECTIONS
 Respondent

Member of Authority: Peter van Keulen

Representatives: Anne Toohey and Rachelle Boulton, Counsel for Applicant
 Andrew Shaw, Counsel for Respondent

Investigation Meeting: 16, 17, 18 and 19 April 2018, 4 May 2018 and 1 June 2018 at
 Christchurch

Submissions Received: 8 June 2018, 27 June 2018 and 13 August 2018 for Applicant
 15 June 2018 and 20 August 2018 for Respondent

Date of Determination: 7 September 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In June 2012, a prisoner at Otago Corrections Facility assaulted JCE, a Corrections Officer.

[2] What transpired from that day over a period of three years was a decline in JCE's mental health culminating in an attempt to take his own life in July 2015.

[3] Ultimately, JCE accepted medical retirement and left his role as a Corrections Officer.

[4] JCE blames his employer, the Department of Corrections, for the assault, for failing to look after him on his return to work after the assault and for the loss of his career.

[5] JCE raised personal grievances for unjustified action causing disadvantage and unjustified dismissal and has lodged his statement of problem in the Authority on the basis of these grievances as well as a claim for failing to meet the implied contractual duty and the statutory duty to provide a safe workplace.

[6] Corrections denies that it has any liability for what occurred, it says it acted as a fair and reasonable employer could have done in all the circumstances and that JCE's employment was terminated by agreement with him following a medical retirement process.

[7] On my analysis, the statement of problem has three claims that I need to investigate.

[8] The first two claims are based on the unjustified action causing disadvantage grievance and the breaches of the implied and statutory duties – these are essentially the same claim¹. At its simplest the issues are:

- (a) Did Corrections fail to provide a safe work place for JCE in respect of the assault, and if so, was this a breach of any duty or obligation owed to JCE;
- (b) Did Corrections fail to provide a safe work place for JCE in respect of his return to work, and if so, was this a breach of any duty or obligation owed to JCE?

¹ See *FGH v RST* [2018] NZEmpC 60

[9] The third claim is the unjustified dismissal grievance. The issue for this claim is, if there was any failure by Corrections, did that failure lead to JCE's resignation such that it amounts to an unjustified dismissal.

[10] If JCE is successful with any of his claims, I will then need to consider what remedies he may be entitled to. This assessment has a number of complicating issues depending on what part(s) of JCE's claims are successful and the extent of the injuries he can be compensated for given the Accident Compensation Act 2001.

Non-publication

[11] Given the nature of this claim and the sensitivity surrounding the assault, the impact on JCE and the security policies and processes for Corrections it is appropriate that I prohibit from publication certain matters that the parties presented as evidence and the witnesses discussed in the investigation meeting.

[12] Pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication:

- (a) the name of JCE, the applicant in the application before the Authority, and any information which may lead to his identification – he is referred to as JCE in this determination;
- (b) the details of JCE's medical conditions including any current diagnosis and historical assessments, except for anything that I specifically set out in this determination;
- (c) the details of Corrections' policies and practices relating to safety of staff, security of prisoners and the operation of the custodial units, except for anything that I specifically set out in this determination.

[13] This non-publication necessarily means that I will not address in detail all of the evidence including some matters that are relevant to my determination. To the extent I am able to, and in accordance with s 174E of the Act, my written determination sets out findings of fact and law, expresses conclusions on issues necessary to dispose of the matter and makes orders accordingly but for the reasons stated above, it does not record all of the evidence and submissions received.

Safe work environment

[14] JCE claims Corrections has breached a number of contractual and statutory duties owed to him in terms of providing a safe work environment. The alleged breaches are of:

- (a) Clause 1.6.1 of the Department of Corrections, Frontline Staff, Collective Agreement.
- (b) Section 56 of the State Sector Act 1988.
- (c) Section 6 of the Health and Safety in Employment Act 1992.
- (d) The implied duty to provide a safe workplace.

[15] In *FGH v RST*² the Employment Court summarised the basis for claims relating to the provision of a safe work environment as follows:

[191] An employer's failure to provide a workplace which meets health and safety requirements may be a ground for an unjustified disadvantage claim.

[192] As already noted, Ms Dyhrberg acknowledged for RST that it had a legal responsibility as an employer to take all reasonable practical steps to prevent harm to an employee which it foresaw or could reasonably have foreseen at the time.

[193] She said this important duty is derived from a number of sources. Section 56 of the State Sector Act 1988 requires the Chief Executive of a Government department to act as a good employer, which amongst other things requires the operating of a personnel policy containing provisions requiring good and safe working conditions.

² [2018] NZEmpC 60

[194] I note that this obligation receives expression in the applicable collective employment agreement, which at cl 7.1 stated that the employer was committed to being responsible for a healthy and safe workplace environment.

[195] But, as the Court of Appeal explained fully in *Attorney-General v Gilbert*, the relevant obligations are actually spelt out in some detail in the health and safety legislation – the Health and Safety in Employment Act 1992. This statute of course applied until 3 April 2016; the Health and Safety at Work Act 2015 (HSW Act) governed the position thereafter. The Court of Appeal went on to acknowledge that the duty to take reasonable steps to maintain a safe workplace is also a term now implied by common law into employment contracts, in recognition of their special nature.

[16] In this case, I have almost exactly the same situation as in *FGH*, the statutory obligation under the State Sector Act, recognised in the applicable collective agreement and the statutory obligation under the Health and Safety in Employment Act.

[17] The end result, as expressed by the Court in *FGH*, is that Corrections had an obligation to take all reasonable practical steps to maintain a safe workplace, a workplace that meets health and safety requirements. And a failure to provide this may give rise to an unjustified action causing disadvantage grievance and/or a breach of an employment agreement.

[18] The question of what are reasonable practical steps is informed by foreseeability and the circumstances prevailing at the time. As the Court of Appeal said in *Attorney-General v Gilbert*³ at [83]:

... The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks.

[19] Or as the Employment Court stated in *Alan Robinson v Pacific Seals New Zealand Limited*⁴:

[29] The requirement to take all practicable steps to ensure an employee's safety only arises where an employer knows, or ought reasonably to know, about the circumstances giving rise to the risk of harm.

³ [2002] 1 ERNZ 1

⁴ [2014] NZEmpC 99

[20] So, there are two parts to assessing what are reasonably practical steps. First, an employer need only protect employees against risk of harm that is foreseeable. Second, what the employer must do to protect employees against that harm is take steps that are proportionate to the known risk, i.e. do what is reasonably practical in the circumstances.

[21] Then, in *Pacific Seals*, the Employment Court went on to say:

[31] ... Rather the plaintiff asserts that the defendant has breached its implied HSE obligations to him. It is for the plaintiff to satisfy the Court (on the balance of probabilities) that a compensatable breach has occurred, not for the defendant to establish that it has not.

[22] To succeed in his claims relating to the assault and his return to work JCE will need to show that, on the balance of probabilities, Corrections breached its contractual duties, both implied and actual. That is, that Corrections failed to take reasonably practical steps, in the circumstances, to protect JCE from a foreseeable risk of harm.

Assault on JCE

[23] In terms of the assault I am satisfied from the evidence I heard that the circumstances prior to the assault were:

- (a) JCE was working in J wing of Unit 34, a unit that housed high security prisoners. This is one of two wings in Unit 34.
- (b) Unit 34 had 84 prisoners, 42 of whom were in J wing. Of these 42 prisoners a portion were locked in their cells, approximately 15 were exercising in a secure yard supervised by another Corrections Officer (CO1) and up to 10 prisoners were unlocked (i.e. not secured in their cells) and inside J wing in Unit 34 on recreation time. JCE was supervising this last group of prisoners.
- (c) The secure yard adjacent to J wing had two locked doors between it and J Wing. Effectively CO1 was removed from JCE, located outside the J wing building through two locked doors.

- (d) There was one other Corrections Officer (CO2) assigned to J wing but he had not been in J wing in the hour prior to the assault. There was no evidence given by anyone from Corrections about where CO2 had been.
- (e) Unit 34 has a control room between the two wings and this was staffed by another Corrections Officer (CO3). There is a locked door between the Control Room and each of the wings. CO3, working in the control room monitored both wings in Unit 34 but was not able to leave his post to assist any Corrections Officers in Unit 34.
- (f) The effect of this staffing allocation was that in the hour prior to the assault JCE was supervising up to 10 prisoners, who were unlocked from their cells, on his own. He was the only Corrections Officer inside J wing.
- (g) Just prior to the assault on JCE, CO2 returned to Unit 34 and took over the supervision of prisoners in the secure yard attached to J wing from CO1. CO1 went into J wing and through to the control room to take a short break.
- (h) This change in personnel had no effect on JCE's status; JCE remained alone, supervising up to 10 unlocked prisoners inside J wing.

[24] JCE's account of what occurred immediately prior to the assault was that he was working on a risk assessment for a prisoner as well as supervising those prisoners on recreation within J wing. JCE was concerned about some tension within J wing as certain prisoners with a gang affiliation were starting to use what he described as stand over tactics within the wing. He de-escalated this by moving prisoners on from interactions but he felt his control was slipping. JCE called CO3, in the control room and requested that another Corrections Officer be sent in to J wing to bolster the situation.

[25] At this point JCE says he made the decision not to retreat into the control room as he thought that would compromise prisoner security; withdrawing was, in his mind, a last resort.

And, after moving various prisoners on from their interactions all of them had dispersed except for one prisoner who spoke to him.

[26] When that conversation ended, JCE returned to his risk assessment work. It was then, whilst he was sitting at a desk with his back to the prisoner that the prisoner came up behind him and assaulted him.

[27] The detail of the assault is not material to my investigation. It was severe and JCE suffered physical injuries.

[28] As the assault occurred, CO3 sounded the alarm and CO1 responded from the control room.

[29] JCE says Corrections failed to take all reasonably practical steps to prevent a foreseeable risk of harm to him at work, being the assault on him by a prisoner. So, it breached its duty to provide him with a safe work environment. Specifically he says Corrections breached its duty by not meeting the minimum staffing numbers such that he was supervising unlocked prisoners alone when he was assaulted and by not responding to a call for assistance prior to the assault. Meeting minimum staffing numbers and responding to a call for assistance were reasonably practical steps Corrections should have taken in the circumstances.

[30] The risk of an assault on a Corrections Officer by a prisoner is a foreseeable risk. This was not disputed by Corrections. What Corrections says however is that it had taken reasonable practical steps to prevent an assault by a prisoner as it had met the minimum staffing numbers and it says there was no call for assistance.

[31] More generally, Corrections says it had taken all reasonably practical steps to prevent assaults by prisoners on Corrections Officers as it had done (and continues to do) a number of things including providing training to Corrections Officers and complying with health and safety policies and plans.

[32] I will not consider these general aspects, as it is the two specific allegations that are in issue. I will consider whether Corrections failed to have the correct number of officers allocated to J wing at the time of the assault and/or did officers fail to respond to a call from JCE for assistance, which necessarily involves assessing whether the call was made. If Corrections failed in either of these respects I must then decide if the failure was a breach of the obligation owed, i.e. was each a reasonably practical step Corrections should have taken to prevent the assault?

Staffing numbers

[33] The starting point for staffing numbers in Corrections' prisons is the Workplace Development Project (WDP). WDP was implemented in 2002 as a redesign of prison staffing models so that there was a common staffing model across all prisons. I understand from the limited evidence on the formulation of WDP that Corrections developed WDP with the assistance of Deloitte Consulting.

[34] Essentially WDP formulated minimum staff numbers based on ratios of Corrections Officers to number of prisoners whilst prisoners are unlocked, and the minimum number of Corrections officers assigned to an area whilst prisoners are unlocked.

[35] Corrections then consulted with the unions (CANZ and PSA) over its implementation. The unions both say this consultation was limited and amounted more to the provision of information rather than consultation as it was clear Corrections intended to implement WDP.

[36] Corrections says WDP had been continually updated since 2002 to reflect changing needs.

[37] In order to determine the issue of the correct staffing numbers I need to ascertain what the WDP model required for allocation of Corrections Officers to J wing in Unit 34, in June 2012.

[38] In this regard there are three relevant matters that assisted my interpretation and application of WDP in June 2012.

[39] First, in October 2007, the Unions raised an issue about the allocation of Corrections officers in line with WDP in the Otago Corrections Facility high security units. At the time Corrections were only allocating 2 Corrections Officers to each unit meaning there was only one Corrections Officer in each wing and there was one other Corrections Officer in the control room. As the Union's stated in a memo dated 16 October 2006, this meant:

These officers are unable to immediately assist one another in the event of an emergency.

CANZ and P.S.A. contends that the configuration requires 2 officers to be positioned each side on grounds of H&S plus the PPS policy that there must be two officers during the unlocking of prisoners and recreation.

[40] Corrections responded to this concern in a letter dated 8 March 2007. This recorded:

With regard to the high security units, upon operational advice that the officer in the [control room] could not "readily assist" unit staff, the [control room] was reclassified as housing control. This means that the operating parameter ratio only applies to each pod and an officer is needed in the housing control. This results in two officers per pod and one in the housing control, for a total of five officers on duty.

[41] The reference to pods in the letter is to each wing within each high security unit.

[42] The result of this exchange was that WDP was implemented for high security units (such as Unit 34) so that there were two Corrections Officers assigned to each wing.

[43] The second relevant matter is a Resource Allocation Model for Corrections officers issued on 29 June 2012. The document purported to capture the then current use of WDP model ten years after implementation.

[44] Whilst this model was issued after the assault on JCE, it outlines the use of WDP at the time of the assault.

[45] The third matter is a document from August 2002, which is titled Workplace Development Staff Resourcing Model User Guide and is essentially a user guide for WDP.

[46] The operation of WDP as set out in the Resource Allocation Model requires that a unit cluster of high security prisoners must have a staff ratio of one Corrections Officer to 15 unlocked prisoners and a minimum of two Corrections Officers during any unlock period.

[47] On the face of it, this appears relatively straightforward. J wing in Unit 34 is a unit cluster for the purposes of WDP. It is also a high security unit. So the staffing numbers set out above apply. On this basis, it appears that Corrections had met its obligations as JCE had a ratio of one to ten unlocked prisoners and CO1 had a ratio of one to 15 unlocked prisoners. And there were three Corrections Officers assigned to J wing, JCE, CO1 and CO2.

[48] The difficulty with applying this to the circumstances is that of the three Corrections Officers assigned to J wing, CO2 was not in J wing and then only in the exercise yard attached to J wing and CO1 was in the exercise yard attached to J wing and then in the control room.

[49] In short, the issue is how is the minimum requirement of two Corrections Officers assigned to a unit cluster applied in terms of physical location of those Corrections Officers. The complication with this application is WDP and the Resource Allocation Model describe ratios by reference to clusters not physical location. I need to determine if a unit cluster encompasses the group of prisoners housed in J wing regardless of location or if it extends only to the prisoners actually unlocked and physically in J wing. If the latter applies, then I need to determine what the parameters of J wing are for the purposes of WDP and the Resource Allocation Model.

[50] In the end, I found the first step of this analysis to be relatively simple. Two things assist my interpretation and application of this. The User Guide describes a Custodial Support Model – this is the use of Custodial Support Units assigned to different functions such as prisoner reception and release, Control Room, visits, yard supervision and court related tasks.

This indicates that WDP provides for additional staff to be assigned to coordinate these activities outside of the physical location that the prisoners are housed, and guidelines are provided for staffing numbers for the various activities. The second aspect is the consultation over the WDP implementation in 2007 and 2008 regarding whether a Corrections Officer in the control room could be part of the ratios. This clearly indicates that a Corrections Officer stationed in the control room could not be part of the ratios. The correspondence also refers to staffing in each pod, which I assume is a reference to J wing.

[51] All of these things indicate that the ratios apply to the number of Corrections Officers assigned to the number of unlocked prisoners or assigned to an area – that area being each wing for high security units.

[52] In order to decide if Corrections had the correct staffing ratios for an area, that area being J wing, I must now decide what J wing encompasses for the purposes of WDP and the Resource Allocation Model.

[53] The consultation between the unions and Corrections over staff allocation in 2007 and 2008 is useful as far as it shows the circumstances and knowledge of the parties around the implementation of the WDP.

[54] What the consultation shows is an agreed view that one of the issues the WDP allocation needed to address was safety of Corrections Officers in terms of assistance they could provide to each other particularly if an incident occurred. The consultation assists my interpretation further as it shows that two Corrections Officers being assigned to a wing addresses safety – this is also clear from the allocation itself under the Resource Allocation Model – and two Corrections Officers being accessible to each other addresses safety.

[55] It follows that a Corrections Officer in a secure yard removed from another Corrections Officer inside a wing, by two locked doors, is not accessible and this does not address the safety issue in a way that assigning two Corrections Officers to a particular location should address.

[56] The User Guide adds further assistance to my decision on interpretation and application of the WDP and the Resource Allocation Model. The key aspect of this is the User Guide explanation of the Custodial Support Model – which I have referred to above. The Custodial Support Model has recommended staff ratios for the various Custodial Support services, including yard supervision. Yard supervision recommends a minimum ratio of one Corrections Officer to 30 prisoners and a minimum of two Corrections Officers in the yard.

[57] What this shows is that yard supervision is treated separately from supervision of prisoners of a cluster type, in a pod or in this case, a wing. There is an exception to this for stand-alone units but J wing is not a stand-alone unit.

[58] The conclusion I draw from this information is that a yard in which prisoners are supervised is distinct from a cluster group of prisoners. What this means is staffing ratios for the cluster group in J wing does not include any Corrections Officers in the yard adjacent to J wing.

[59] On this basis, I find that Corrections did not meet the staffing ratios for Corrections Officers for J wing prior to the assault on JCE. CO1 was in the yard and CO3 was not in J wing – JCE was alone in J wing and there should have been two Corrections Officers.

[60] Meeting the staffing ratios in the WDP and the Resource Allocation Model is a reasonably practical step that Corrections should have taken and the failure to do so is a breach of its obligations to JCE.

Response to back up

[61] Having reviewed the evidence, I am not satisfied that JCE actually requested back up as he says.

[62] First, JCE's actions immediately prior to the assault are not consistent with calling for back-up:

- (a) CO1, who was going to the control room from the yard, walked past JCE and it appears JCE did not say anything to him about requiring back up - letting CO1 go through the control room for a break is illogical if JCE was concerned at that point in time.
- (b) JCE sitting down at a desk with his back to a prisoner, to write a report when he felt the situation was slipping and back up was required is also illogical.

[63] Second, CO3 says he did not receive a call for back up.

[64] Third, in cross-examination, JCE described the situation immediately prior to the assault as being under control and then it changed in a split second and he was assaulted.

[65] Fourth, my review of the CCTV footage supports JCE's evidence in cross-examination.

[66] For these reasons, I conclude that JCE did not call for back up a short time before the assault. I think JCE's memory has filled in this detail as it appears logical on reflection and even likely to JCE.

[67] On this basis, there is no breach by Corrections in respect of its obligations owed to JCE to provide back up when requested.

Conclusion

[68] By failing to effect the correct staffing ratios Corrections failed to take reasonably practicable steps, in the circumstances, to protect JCE from a foreseeable risk of harm.

JCE's return to work

[69] The possibilities of a Corrections Officers suffering adverse psychological effects because of an assault at work and then returning to work following an assault are both foreseeable risks.

[70] Corrections recognises this in its health and safety policy, its hazard register and a separate policy dealing with counselling in the event of traumatic incidents. And it has a number of processes and recommendations outlined in its policies for dealing with these risks.

[71] There are three areas where Corrections should have responded to JCE in terms of taking reasonably practical steps to protect his mental health:

- (a) His return to work in the short term;
- (b) Various aspects of JCE's work performance and behaviour over the period from July 2012 until January 2015;
- (c) Advising JCE of the refusal of ACC cover for PTSD suffered as result of the assault.

JCE's return to work in the short term

[72] JCE was injured in the assault and was taken to hospital but subsequently discharged. JCE returned to work nine days after the assault.

[73] Immediately after the assault, Corrections carried out a debrief and prisoner interview, a use of force review, a fact finder review, and a health and safety review. All of these are procedures mandated to occur after an incident such as an assault on a Corrections Officer. All of these steps required little involvement of JCE – he was interviewed for the fact finder review but that appears to be his only involvement in any post assault analysis. My assessment of these processes is that they were about establishing what occurred for health and safety and prosecution purposes, not for establishing JCE's state of health and assessing his return to work or considering what assistance he may require.

[74] Corrections confirmed there was also a team debrief following the incident but JCE was not involved in this as he was off work at the time.

[75] When JCE returned to work, he was rostered onto the control room in Unit 34. JCE worked in the control room until 1 July 2012 when he went on pre-arranged leave.

[76] Corrections says it rostered JCE onto the control room rather than into J wing, in order to ease him back to work, as was customary.

[77] The only support provided to JCE on his return to work was in respect of his physical injuries and the ACC cover he received for that. Corrections is an Accredited Employer for ACC, taking on the responsibilities of ACC and Care Advantage was Corrections agent for ACC purposes. Care Advantage contacted JCE to discuss any assistance he required. The evidence shows that little was gained from the interactions other than confirmation that JCE received ACC cover for the physical injuries he suffered and his claim was subsequently closed on 6 July 2012.

[78] The lack of action by Corrections in respect of assessing JCE's post assault health and his return to work evidences a number of failings by it. Corrections' various policies including its Health and Safety Policy and the policy on Specialist Counselling in the Event of Traumatic incidents required it to do more. Added to this there was evidence from a Senior HR Advisor in Corrections about expected practices on return to work and managing employees after a traumatic incident, which also identified more should have been done.

[79] In summary Corrections' failings included:

- (a) There was no debriefing of JCE on his return to work.
- (b) There was no return to work plan for JCE, Corrections simply put him in the control room for a short period without any discussion. The Senior HR Manager outlined his view of an informal process that Corrections could have adopted for JCE. He suggested at least a discussion with JCE on his return to

work about his placement, a daily review for a short period of time and then a “wrap up” discussion at the end of the first two weeks and a review when integrated back to normal role.

(c) There was no counselling offered to JCE. In particular, Corrections failed to follow its policy on Specialist Counselling in the Event of Traumatic incidents. This policy required Corrections to report the assault through the PS National Office Incident Line, which would then activate a process for an EAP assessment and a recommendation for counselling, including a schedule of counselling covering daily, weekly and then monthly counselling sessions following the assault. Corrections did not report the assault and no assessment for counselling was ever completed for JCE.

(d) When JCE returned from his leave in July 2012, there was no direct follow up with him. Corrections suggested it did monitor JCE’s behaviour whilst he was at work but there was no evidence that this actually amounted to any constructive monitoring and assessment of JCE.

[80] In my conclusion, Corrections failed to take reasonable practical steps to protect JCE’s mental health when he returned to work. It should have done all of the four requirements listed above, debrief JCE, discuss and manage JCE’s return to work, report the assault and ensure that a counselling assessment was undertaken and counselling services put in place for JCE and then undertake ongoing monitoring and follow up with JCE. None of this would be particularly onerous and most of it is required in Corrections’ policy and processes.

JCE work performance and behaviour

[81] Then there were a number of signs that JCE was not coping with his return to work over the medium term:

(a) JCE used an excessive amount of leave particularly in 2013.

- (b) There were at least four incidents in August and September 2013 where JCE responded disproportionately to relatively straightforward events that occurred at work.
- (c) JCE complained about work life balance in 2013 and sought to be transferred to a unit with better hours and shifts.
- (d) In December 2014, there were complaints about JCE's behaviour at work.
- (e) In a meeting in December 2014, about the complaints, JCE raised the issue of lack of support from Corrections post assault, for the first time.

[82] In my view, Corrections failed to respond adequately to these events. It should have been monitoring and reviewing JCE's work and behaviour, but even if it was not these were signs that all was not right with JCE.

[83] Corrections suggested that the behaviour it witnessed was not out of the ordinary for JCE, that JCE was a very private and somewhat withdrawn individual and he was prone to mood swings. JCE did not seek assistance or ask for help so Corrections did not know he was not coping with work after the assault.

[84] I do not accept these arguments. Whilst there is an onus on JCE to protect his own health and safety at work I do not think this absolves Corrections from doing what is reasonably practicable. In this case, it would have been reasonably practicable to intervene with JCE when he was taking excessive leave or when he reacted adversely at work or when he raised a lack of support following the assault, albeit some time after the assault.

[85] Corrections also contends that it did respond appropriately when it became aware of issues with JCE.

[86] First Corrections required JCE to attend counselling with a compulsory referral to EAP. This was at least something constructive for JCE and an appropriate response but in many respects it was too little, too late.

[87] Second, in early 2015 in response to the December 2014 meeting and the complaints about JCE's conduct at work, Corrections required JCE to attend an assessment with an occupational specialist to determine his fitness for work. Corrections described this as an assessment to see what was wrong with JCE (if anything) so it could then work out what it could do to support him. I do not accept this. The referral to the occupational specialist was the first step in Corrections' procedure for compulsory medical retirement.

[88] Whilst there was a tension for Corrections by this time between continuing to support, and to some extent tolerate JCE, as an employee, there was also a view, I believe, that compulsory medical retirement might be the best option. I do not accept it was an option taken as a step to protect JCE from a foreseeable risk, rather it was primarily a step taken with a view to ending JCE's employment with Corrections.

ACC cover

[89] In July 2015, a decision was reached that JCE was not eligible for ACC cover in respect of psychological injuries he suffered from the assault, in particular for the Post Traumatic Stress Disorder that he was diagnosed with.

[90] Corrections was involved in the decisions made about how that news would be delivered to JCE. It is clear from the evidence that Corrections was concerned about how JCE might react to the news.

[91] In this regard, I accept that there was a foreseeable risk of harm to JCE on the delivery of this news and Corrections should have taken reasonably practical steps in the circumstances to protect JCE from that harm.

[92] I am not minded to set out the detail of what occurred. Whilst it is relevant to my determination, I wish to protect JCE's privacy and health around this aspect in particular. In summary, I find Corrections should have done more to protect JCE from an adverse response

to the news that ACC cover was being declined. Its failure to do so is a breach of its obligations to JCE.

Conclusion

[93] Corrections failed to take reasonably practical steps, in the circumstances, to protect JCE from a foreseeable risk of harm, being any psychological impact of the assault and his subsequent return to work.

Unjustified dismissal

[94] The issues to be resolved for the unjustified dismissal claim are:

- (a) Was the employee dismissed; and
- (b) If so, was the dismissal justified, with the onus resting on the employer to show its actions were justified in line with the test for justification and the duty of good faith set out in the Act?

[95] I am not satisfied that the circumstances of JCE's compulsory medical retirement can give rise to an unjustified dismissal.

[96] As a fundamental point, technically JCE was not dismissed, he accepted medical retirement.

[97] But even from a justification perspective JCE's claim cannot succeed. Procedurally there were no real issues and ultimately this was resolved by acceptance of retirement by JCE. Substantively the dismissal was justified based on the medical conclusions.

[98] That the underlying reason for dismissal was caused by Corrections' failings is addressed in the unjustified disadvantage and breach of contract claims.

Remedies

[99] Having determined that Corrections breached the duties it owed to JCE such that he has a personal grievance for unjustified action causing disadvantage I may award any of the remedies provided for under s 123 of the Act. In this regard, JCE seeks compensation and reimbursement. In terms of the breach of contract claim, JCE also seeks contractual damages being special damages for the additional legal fees for dealing with the compulsory medical retirement process and medical expenses in relation to this matter.

Effect of the Accident Compensation Act 2001

[100] JCE suffers from PTSD as a result of the assault. Whilst his initial application for ACC compensation related to PTSD was declined this was subsequently reversed and JCE has received ACC compensation through Corrections (as an ACC accredited provider). What this means is JCE has cover for a personal injury, PTSD, under s 21B of the Accident Compensation Act and I cannot award remedies for this injury⁵.

[101] The medical evidence shows that JCE also suffered from a Major Depressive Disorder, but that this disorder arises from the assault and the actions or failings of Corrections on his return to work.

[102] I accept that the Major Depressive Disorder is not a personal injury as defined in the Accident Compensation Act⁶, primarily because the expert evidence concludes that it did not arise from a single event, and I can award remedies for this.

[103] In addition, the medical evidence and other evidence shows that JCE suffered other psychological and emotional effects as a result of the assault and Corrections actions on his return to work, for which I can also award remedies.

⁵ Accident Compensation Act 2001, s 317.

⁶ Accident Compensation Act 2001, s 21B.

Compensation

[104] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act. What I must consider is the effects of Corrections' failings on JCE and then I must assess the compensatory value of those effects. What I must do as well is separate out, from that compensatory value, any part that relates to the PTSD as I can only award remedies for injury to feelings that disjunctive from the PTSD.

[105] I have considered the comprehensive medical evidence, the evidence from JCE's mother and JCE's evidence. In summary JCE suffered significant psychological harm (even excluding the PTSD) and this manifested in many ways and caused even more harm, including ultimately the loss of his career, his independence, his confidence and his normal way of life that he enjoyed prior to the assault. The attempted suicide sums up the complete loss JCE felt (and expressed in his evidence) even before he accepted medical retirement.

[106] After weighing all of the evidence and separating out what I consider arises out of or is symptomatic of the PTSD I consider \$30,000.00 to be the appropriate value of the compensatory sum.

Reimbursement

[107] JCE seeks reimbursement for the earnings he has lost as a result of Correction's unjustified actions, pursuant to s 123(1)(b) of the Act.

[108] There are two issues with this. First, there is no finding of unjustified dismissal so I must be satisfied that JCE's loss of remuneration is occasioned by the unjustified actions. And, second, I must again consider the impact of JCE's ACC cover for PTSD, including the remuneration he received from Corrections as an ACC accredited provider.

[109] I find that Corrections' unjustified actions, which resulted in JCE suffering PTSD and the major depressive disorder, caused his compulsory medical retirement. So whilst the

medical retirement was not an unjustified dismissal the unjustified action ultimately caused the justified dismissal and the subsequent loss of remuneration.

[110] I am satisfied that JCE has a personal grievance and he has lost remuneration as a result so pursuant to s 128 of the Act I must award JCE at least the lesser of his actual loss or three months ordinary time remuneration.

[111] Before I assess the quantum of any award of reimbursement of lost remuneration I must address the implication of JCE suffering PTSD and whether, because this is a personal injury, I am prevented from awarding any reimbursement at all. I have already identified that I cannot award remedies for JCE's PTSD but I do not believe this extends to any award for reimbursement. This is because JCE's medical retirement was occasioned by not just PTSD but rather the major depressive disorder and other effects from his return to work and Corrections' failings during this period. In fact in my view PTSD cannot have been the primary cause of JCE's inability to work for medical reasons because immediately following the assault and for a period of three years JCE did work. Rather it was the failure to support and protect JCE on this return to work over the three year period that culminated in his medical retirement. And I am not precluded from awarding remedies for this.

[112] The next aspect to consider is the implication of JCE receiving ACC earnings related compensation during the period he was unable to work.

[113] Based on Judge Inglis' (as she was then) reasoning in *Judea Tavern Limited v Patricia Jesson*⁷ I believe there is no legal impediment to awarding lost remuneration to JCE. That he was in receipt of ACC earnings compensation is not, in this case, a bar to lost remuneration being awarded.

[114] As Judge Inglis said in *Judea Tavern*, an applicant who has received ACC earnings compensation can still be awarded compensation for lost remuneration because the liability to pay that lost remuneration rests with the employer. There may be a question of repayment of

⁷ *Judea Tavern Limited v Patricia Jesson* [2017] NZEmpC 82.

ACC earnings compensation but that is a matter for any applicant and the Accident Compensation Corporation⁸.

[115] Corrections has raised a relevant issue in respect of this aspect. It says, as it has already paid JCE ACC earnings compensation, any subsequent order for payment of lost remuneration may only cause double recovery. In this regard Corrections has paid JCE 100% of his wage entitlement whilst he was employed and eligible for ACC compensation and 80% of his wage entitlement from 5 October 2015, the date of JCE's medical retirement until 29 January 2018, when JCE obtained new employment.

[116] There is a balance to be struck here. JCE should not be in a worse position regarding remedies because Corrections was an accredited ACC provider rather than if his case fell squarely in line with *Judea Tavern* i.e. he received ACC earnings related compensation directly from the Accident Compensation Corporation. Yet, I accept there is an element of double recovery in JCE's claim.

[117] Standing back from this matter and applying equity and good conscience to it, I have concluded that I can resolve this conflict by applying s 128 of the Act and calculating JCE's actual loss by taking account his ACC earnings related compensation paid to him by Corrections.

[118] Whilst this is not the normal approach and may conflict with case law, I do not believe there is a legal impediment on me doing this – in the words of Chief Judge Goddard in *Murray v Attorney General* I can ignore a rule of law if in equity and good conscience it is appropriate to do so. The only proviso is I should not contravene New Zealand Statute law or the terms of an employment agreement.⁹

[119] Applying this rationale I calculate JCE's actual loss to be 20% of his wages from medical retirement until he commenced new employment, being \$26,061.54.

⁸ *Judea Tavern Limited* at [40].

⁹ *Murray v Attorney General* [2002] ERNZ 184.

[120] This sum is more than three months ordinary time but I consider it appropriate to exercise my discretion to award the greater amount in this case.

Special damages

[121] JCE seeks special damages for breach of contract relating to the legal fees he paid for assistance with the compulsory medical retirement process. I am not satisfied that this is an appropriate remedy to award in light of the rationale applied by the Employment Court in *Stormont v Peddle Thorp Aitken Limited*¹⁰.

[122] JCE's counsel has also requested medical costs for expert evidence in my investigation meeting as special damages. I will not deal with this now but rather as part of any application for costs, should one be made.

Contribution

[123] As I have awarded remedies to JCE, I must now consider whether he contributed to the situation that gave rise to his dismissal.¹¹

[124] This assessment requires me to determine if JCE behaved in a manner that was culpable or blameworthy, and this behaviour contributed to the unjustified dismissal occurring.¹²

[125] There was large amount of evidence about JCE's personality, behaviour and mental health that Corrections says supports its submission that JCE contributed to his grievance and his loss.

[126] The first point I make about this is that contribution deals with contribution to the grievance not the loss , so I am not required to consider any submission based around JCE's

¹⁰ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71

¹¹ Section 124 of the Act.

¹² *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

personality type or pre assault mental health increasing or impacting his reaction to the assault and return to work.

[127] The second point is that JCE contributed to his grievances in two respects:

(a) He failed to take appropriate steps when dealing with the prisoner who assaulted him, immediately prior to the assault, including removing himself from the potential harm.

(b) He failed to report any impact his return to work was having on his mental health nor did he request any assistance such as EAP.

[128] I find that JCE took appropriate steps with his interaction with the prisoner immediately prior to the assault and given my conclusion on the sudden escalation that led to the assault I also find that he did not fail to take appropriate steps to prevent the assault. In this regard, I find there is no culpable or blameworthy behaviour by JCE.

[129] I accept that JCE did not report any adverse consequences of his return to work to Corrections except when he sought a transfer to a different unit, believing he needed a better shift pattern for work life balance issues, and when he raised directly the issue of not being supported by Corrections in December 2014.

[130] However, this behaviour is not culpable or blameworthy. The real issue is JCE was struggling to understand himself what was happening; he sought to deal with it as best he could, primarily by taking time off from work. It appears to me that he did not know what the issue really was and therefore he did not know what he needed to ask for in terms of assistance.

[131] In both instances there is no behaviour, which warrants a reduction in remedies for contribution.

Conclusion

[132] Corrections failed to take reasonably practical steps, in the circumstances, to protect JCE from a foreseeable risk of harm at work. Corrections has breached its contractual duties owed to JCE and it has acted in an unjustified way causing disadvantage to JCE's employment.

[133] In satisfaction of these claims Corrections must pay JCE:

- (a) \$30,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
- (b) \$26,061.54 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000.

Costs

[134] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[135] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority