

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 87
3010491

BETWEEN IAN HEINE
Applicant

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

Member of Authority: Peter van Keulen

Representatives: Nicole Ironside, Counsel for Applicant
Peter Chemis and Ella McLean, Counsel for Respondent

Investigation Meeting: 7, 8 and 9 March 2018 at Nelson

Submissions Received: 9 March 2018 for Applicant
9 March 2018 for Respondent

Date of Determination: 11 June 2018

DETERMINATION OF THE AUTHORITY

- A. To the extent that there are separate grievances for unjustified action causing disadvantage, which I have jurisdiction to consider, Corrections did not act in an unjustified manner, and Mr Heine's unjustified action grievances are dismissed.**

- B. Corrections unjustifiably dismissed Mr Heine. In satisfaction of this grievance Corrections must pay Mr Heine \$10,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.**
- C. Corrections did not discriminate against Mr Heine and his grievance based on discrimination is dismissed.**
- D. There is no basis to award penalties and Mr Heine's claims for penalties to be imposed are dismissed.**
- E. I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] The Chief Executive of the Department of Corrections employed Mr Heine as a Corrections Officer from November 2000; during his employment, he also temporarily filled the role of Acting Senior Corrections Officer.

[2] From 2007 until 6 January 2017, Mr Heine worked at the Otago Corrections Facility. During the time that Mr Heine worked at the Otago facility, he suffered from an ankle injury and developed osteoarthritic changes to his neck. Both of these conditions had an impact on his ability to perform his functions as a Corrections Officer.

[3] As a result Corrections undertook a number of steps with Mr Heine including placing him on light duties and obtaining various medical assessments. In December 2016, Corrections decided Mr Heine was medically incapacitated and he should be medically retired, as he was unable to fulfil the functions of his role.

[4] It is the handling of these two medical conditions as they affected his work and his compulsory retirement that gives rise to Mr Heine's various complaints against Corrections. Mr Heine says the process by which Corrections handled his medical conditions over the years amounted to ongoing unjustified actions causing disadvantage to him. He also says his compulsory retirement was an unjustified dismissal and discrimination based on disability.

[5] Corrections says the compulsory medical retirement of Mr Heine was justified and it denies any discrimination. It also says Mr Heine cannot pursue his unjustified action causing

disadvantage grievances as they relate to matters pre-dating the compulsory medical retirement process, as he did not raise those grievances within the requisite 90-day period¹.

[6] In order to resolve this employment relationship problem I must consider claims based on the alleged unjustified disadvantage grievances, an unjustified dismissal grievance, a discrimination grievance and various breaches of duty including good faith and obligations under Mr Heine's employment agreement.

[7] The issues arising for the unjustified disadvantage grievances are:

(a) Were personal grievances for unjustified action causing disadvantage raised within the requisite 90-day period – this turns on whether the actions complained of form a course of conduct ending with Mr Heine's dismissal, as personal grievances were raised within 90 days of the termination of Mr Heine's employment.

(b) If I can deal with the unjustified action grievances then I must consider:

- i. What are the actions Mr Heine complains of and did they occur;
- ii. If the actions did occur, did they cause disadvantage to Mr Heine's employment or a condition of his employment; and
- iii. If so, were Correction's actions justified?

[8] The issues for the unjustified dismissal include:

(a) Did Corrections follow a fair process in coming to the conclusion that Mr Heine was medically incapacitated and should be compulsorily retired; and

(b) Was the decision to retire Mr Heine, justified?

[9] The issues for the discrimination claim include:

(a) Does Mr Heine have a disability;

¹ Section 114 of the Employment Relations Act 2000.

(b) Was Mr Heine's dismissal (by compulsory retirement) by reason of his disability;

(c) If so, do the circumstances mean Corrections could treat Mr Heine in this way i.e. is one of the exceptions made out?

[10] The issues for the alleged breaches of duty include, for each allegation:

(a) What is the duty owed;

(b) Did Corrections breach that duty:

(c) If so, does the breach justify a penalty being imposed; and

(d) If so, what quantum should any penalty be?

Unjustified action causing disadvantage

Did Mr Heine raise his personal grievances within the 90-day period?

[11] As explained briefly above, Mr Heine suffered an ankle injury whilst working and developed osteoarthritic changes to his neck. The key events in relation to these two conditions relate primarily to the medical reports received, Mr Heine's failure to undertake control and restraint training² and Corrections responses to both the reports and Mr Heine's failure to undertake control and restraint training.

[12] The various complaints Mr Heine makes that support his grievances for unjustified actions causing disadvantage stem back to 2012. The actions complained of include³:

(a) Failure to schedule Mr Heine for Control and Restraint training from March 2012;

² Control and restraint training is an important and mandatory part of a Corrections Officer's training. It occurs on a regular basis – every 12 months - and a Corrections Officer must complete this training in order to be up to date on appropriate control and restraint techniques. If a Corrections Officer is not up to date on his/her control and restraint training then Corrections' view is that he/she poses a health and safety risk to himself/herself and others.

³ I have omitted from this list actions complained of that relate primarily to the unjustified dismissal grievance, such as predetermining that Mr Heine would be terminated by compulsory medical retirement prior to completing the medical incapacity and medical retirement process. I have also omitted complaints about the conduct of Michael Fitzgerald, as these cannot form part of an unjustified disadvantage grievance.

- (b) Treating Mr Heine as “supernumery” in 2013, contrary to the medical evidence;
- (c) Treating Mr Heine as medically incapacitated and commencing a medical retirement process from January 2013, contrary to the medical evidence;
- (d) Considering Mr Heine to be permanently medically incapacitated from February 2013, contrary to the medical evidence;
- (e) Seeking medical assessments of Mr Heine in April 2013 and October 2014 for potential medical retirement procedures without there being any existing diagnosis of medical incapacity;
- (f) Providing incorrect information regarding Mr Heine’s regular job in a return to work script in May 2014;
- (g) Maintaining that Mr Heine had mobility issues after he was certified for normal duties in July 2014;
- (h) Disciplinary action undertaken against Mr Heine in May 2016.

[13] Mr Heine raised his personal grievances on 3 March 2017. The events complained of above occurred more than 90 days prior to 3 March 2017. Therefore, on the face of it, to the extent Mr Heine relies on these complaints for independent unjustified disadvantage grievances, he failed to raise these grievances within the requisite 90-day period.

[14] However, Mr Heine says the events complained of form part of a course of conduct leading to and linked to the events that continued within the 90-day period. This means I can consider the complaints as part of the grievance or as evidence supporting the grievance irrespective of whether they occurred within 90 days prior to the grievance being raised⁴.

[15] There is a difference between events, which are merely part of the background context because they are related to the complaints, and those that become part of, or inform, the grievance because they are part of an actionable ongoing course of conduct.⁵ In order to be

⁴ *Coy v Commissioner of Police* [2015] NZEmpC 35, *Waugh v Commissioner of Police* [2003] 1 ERNZ 235, and *Beattie v Premier Events Group Limited* [2012] ERNZ 257

⁵ *Ale v Kids at Home Ltd* [2015] NZEmpC 209

part of the unjustified grievance, events that occurred outside of the 90-day period prior to the grievance being raised must be sufficiently close in time and quality to the events occurring within the 90-day period that all of the events constitute a continuing course of related conduct⁶.

[16] I am not satisfied that the events Mr Heine complains about meet this criteria. In closing submissions, counsel for Mr Heine described the course of unjustified action as designating Mr Heine as permanently medically incapacitated, removing him from front line duties and not allowing him to do control and restraint refresher training. Essentially the course of conduct is treating Mr Heine inappropriately in light of his medical condition.

[17] In contrast, the events within the 90-day period - which are not identified above - that are the basis for the alleged unjustified disadvantage grievance and unjustified dismissal, are that Corrections carried out the compulsory medical retirement process unjustifiably.

[18] The only events that are part of, or inform, the grievances raised are those that are part of the medical retirement process. The key question then is when does the medical retirement process commence. I will discuss the Corrections policy that applies to compulsory medical retirement and the applicable process further below, for now, it is my conclusion that the medical retirement process commenced on 24 October 2014 when Corrections obtained a report from Dr Nick Yarnall, an Occupational Medical Specialist. This report concluded that Mr Heine was permanently medically incapacitated; this was the first assessment by a medical professional that Corrections relied on in the medical retirement process.

[19] Therefore, the events that form part of the continuing course of conduct and are therefore part of the grievance raised in time by Mr Heine, are those events that relate to the medical retirement process from 24 October 2014.

[20] Another factor arises when considering the unjustified disadvantage grievance. By concluding that the continuing course of conduct that is the basis for Mr Heine's grievance is the medical retirement process, I have narrowed the scope of my investigation and effectively eliminated the need to determine a separate unjustified disadvantage grievance.

⁶ *Waugh and Premier Events*

[21] Subject to two distinct grievances raised within the 90-day period that I deal with below, the events complained of, that I can consider, are complaints about the medical retirement process; the medical retirement process is also the basis for the unjustified dismissal grievance. It follows that these events do not form a separate unjustified disadvantage grievance but rather are part of the unjustified dismissal grievance. So, I will consider the events complained of in my determination of the unjustified dismissal grievance.⁷

Unjustified disadvantage grievances raised within time

[22] There are two sets of actions that Mr Heine complained about within the 90-day period:

- (a) After Mr Heine had been given notice of termination of his employment Corrections kept him rostered on to work over the Christmas/New Year period:
- (b) Corrections failed to provide Mr Heine with his long service medal.

[23] I accept that both of these actions occurred although the second was remedied in that the long service medal was provided, it was just some time after Mr Heine's employment ended.

[24] However, I do not accept that these actions were unjustified. The rostering of Mr Heine to work after he was given notice of termination was done following normal Corrections processes and protocols. I also accept that the apparent delay in providing Mr Heine with his long service medal was the normal period in terms of medals being awarded and then presented to employees⁸.

[25] My conclusion then is that these two separate unjustified action causing disadvantage grievances are not substantiated and they are dismissed.

⁷ Given this conclusion it follows that even if all of the complaints could be classified as part of the ongoing course of conduct, that course of conduct is about unjustified dismissal. Therefore, either way, there is no separate unjustified disadvantage grievance for me to determine.

⁸ There is also the question of whether the action complained of actually occurred whilst Mr Heine was employed.

Unjustified dismissal

[26] As a dismissal has occurred the onus shifts to Corrections to show that the dismissal is justified. In order to address this I must consider:

- (a) Whether the retirement process conducted by Corrections was fair; and
- (b) Whether the decision to retire Mr Heine was substantively justified.

Did Corrections follow a fair process in coming to the conclusion that Mr Heine was medically incapacitated and should be compulsorily retired?

[27] The starting point for any assessment of whether Corrections conducted a fair process when deciding to medically retire Mr Heine is to consider its compliance with the relevant policy. A fair and reasonable employer must comply with its own policy. A failure to do so is likely to render a dismissal unjustified⁹.

[28] The relevant policy is a document titled “Procedures for Managing Medical Incapacity & Medical Retirement”. The policy identifies that it applies to staff that are unable to meet the requirements of the position held, and for custodial staff (this includes Corrections Officers) this includes the requirement to undertake control and restraint duties when required.

[29] The policy deals with managing temporary medical incapacity and managing permanent medical incapacity. For permanent medical incapacity, the policy sets out the options for managing this as providing support for employees to secure alternative employment within Corrections, voluntary medical retirement and compulsory medical retirement.

[30] The policy deals with compulsory medical retirement in section 8. This states that compulsory medical retirement is likely to be initiated by Corrections where an employee who meets the criteria for permanent incapacity has not accepted or sought alternative employment within Corrections and has not sought voluntary medical retirement. The policy then sets out what is required for the consideration of medical retirement – this being assessments from two medical professionals.

⁹ *Lewis v Hawick College Board of Trustees* [2010] NZEmpC 4 and *Hayllar and Matene v The Goodtime Food Company Limited* [2012] NZEmp 153

[31] Applying the policy to formulate how compulsory medical retirement should be processed or implemented, I conclude the following:

- (a) The employee must meet the criteria for permanent medical incapacity – medical incapacity meaning “inability due to illness or injury to safely fulfil the normal requirements of the position”.
- (b) The employee must have applied for and not accepted alternative employment within Corrections or not applied for an alternative position;
- (c) The employee must have not sought voluntary medical retirement;
- (d) Corrections must have assessments from at least two medical professionals with specialist expertise in the area of the employee’s incapacity;
- (e) The employee’s relevant Regional Manager must obtain the medical advice and make an appropriate recommendation;
- (f) The General Manager must approve any compulsory medical retirement.

[32] The policy does not set out a detailed process that Corrections must follow such as consultation with employees. So the relevant provisions of the Employment Relations Act 2000 (the Act) must guide the question of how the process must be implemented¹⁰.

[33] On my assessment the process for medical retirement requires:

- (a) Ensuring Mr Heine meets the criteria for medical retirement to be considered – this is the requirements set out in [31](a) – [28](d) above;
- (b) Corrections must outline to Mr Heine what it is contemplating in terms of compulsory medical retirement, explain the possible implications of a finding of permanent medical incapacity and give all of the information it has that is relevant to compulsory medical retirement, to Mr Heine for him to consider and respond to;

¹⁰ Applying s 103(A) and s 4(1A) of the Employment Relations Act 2000.

- (c) Corrections must then give Mr Heine a reasonable opportunity to respond to the information and the proposed medical retirement, before it makes its decision to retire Mr Heine;
- (d) Corrections must consider properly any feedback given by Mr Heine before it makes its decision to retire Mr Heine; and
- (e) Corrections must then make its decision in line with the policy.

[34] I must determine if there have been any failings by Corrections in any of the steps above, and if so, whether those failings render the process unfair so that the dismissal is unjustified?

Did Mr Heine meet the criteria for medical retirement to be considered?

[35] In a report dated 24 October 2014, Dr Yarnall concludes that Mr Heine is permanently medically incapacitated. He stated, “Mr Heine is unable to safely fulfil the normal, full, requirements of a corrections officer...”. And he said:

Given the nature of Mr Heine’s ongoing symptoms, I would regard the restrictions, those principally due to his cervical spondylosis (arthritis of the neck) to be permanent and therefore it would be appropriate to give due consideration as to whether his work in the control room can continue on a long term/permanent basis.

[36] In a subsequent report dated 10 November 2014, produced after Dr Yarnall was able to review Mr Heine’s GP records, Dr Yarnall concluded:

The conclusions of my previous report remain unchanged, and I share Dr Cunningham’s opinion that Mr Heine’s participation in future Control and Restraint (and C&R training) is not appropriate, given the likely exacerbation of his long term symptoms.

These ongoing restrictions should be regarded as permanent and therefore it needs to be determined whether the Department of Corrections, as Mr Heine’s employer, find it practicable to accommodate these restrictions on a permanent basis.

[37] After receiving Dr Yarnall’s assessments, in December 2014, Corrections initiated a meeting with Mr Heine to discuss the situation, i.e. discuss the assessment of medical incapacity and the conclusion that Mr Heine could not fulfil his role as a Corrections Officer and consider the options open to resolve this.

[38] I read Mr Heine's complaints about the process up to this point to be that he did not meet the criteria for medical retirement to be considered, this includes:

- (a) There was no initial assessment of medical incapacity to trigger the medical retirement process, effectively there was no basis for Corrections requiring Mr Heine be assessed by Dr Yarnall in October 2014.
- (b) Mr Heine was not properly informed about the purpose of the December 2014 meeting.
- (c) The December 2014 meeting was flawed because Corrections was relying on two assessments that Mr Heine was medically incapacitated when there was only one.

[39] I do not agree with Mr Heine's views.

[40] First, I do not accept that Corrections was required to have an earlier assessment of medical incapacity before it could require Mr Heine to be assessed further. In late 2014, Mr Heine had not undertaken Control and Restraint training for some time. He had been carrying out duties either in a prisoner facing role without having completed the requisite training or on light duties, which was not sustainable long term. Corrections was entitled to take steps to understand if Mr Heine could complete Control and Restraint training or in order to find out if there was another solution to an unacceptable work arrangement that had evolved over time. It is not clear to me that Corrections had in mind, at the time of instructing Dr Yarnall, that it would proceed with a medical retirement process.

[41] Second, the evidence shows Mr Heine's union representative was given information about the December 2014 meeting and he was aware of the purpose of the meeting.

[42] And, third, Corrections was not relying on two assessments of medical incapacity for the December 2014 meeting. The meeting was in response to Dr Yarnall's assessment that Mr Heine was unable to fulfil the functions of a Corrections Officer. It was not a discussion about medical retirement, which would require two assessments, but rather a discussion about permanent medical incapacity and what options were available. The reference to two medical reports in the December 2014 meeting was to two assessments concluding that Mr Heine

should not undertake Control and Restraint training if he was required to participate in the training in the role of the prisoner.

[43] The result of the December 2014 meeting was that Mr Heine would apply for an alternative position in Corrections. Mr Heine was interested in the GPS monitoring team based in Wellington and said he would apply for a role in that team.

[44] What followed from this was a long period where little was achieved. Mr Heine applied unsuccessfully for an alternative role within Corrections. Corrections appear to have done nothing further about Mr Heine's medical incapacity and non-completion of Control and Restraint training simply letting Mr Heine continue to work as Corrections Officer on "light duties" in the control room.

[45] Then, in May 2016 Corrections decided to re-activate the medical incapacity discussions with Mr Heine. Mr Heine was invited to a meeting on 1 June 2016.

[46] Following this meeting Corrections through Jack Harrison, the Prison Director at the Otago Corrections Facility, arranged an interview for, and then a subsequent trial in, an alternative role in a Wellington Corrections facility.

[47] Mr Heine turned down this role and that left Corrections with few alternatives but to look at progressing compulsory medical retirement. As a result it told Mr Heine that he would need to have a further medical assessment.

[48] Mr Heine's complaints about this part of the procedure are again that he did not meet the criteria to be considered for medical retirement as Corrections had not followed the policy requirements. This is premised on the delay and then the failure to assist Mr Heine with finding alternative employment.

[49] I accept Mr Heine has a basis to complain about the delay in the process, but I am not satisfied that this changes the initial finding of medical incapacity or impacts on Corrections ability to rely on it.

[50] I do not accept that Corrections failed to assist Mr Heine with finding alternative employment.

[51] So, I accept at this stage Corrections had a basis to consider Mr Heine for medical retirement – it had an assessment that he was permanently medically incapacitated and Mr Heine had not accepted alternative employment. Corrections was entitled to proceed with the compulsory medical retirement process by obtaining a further medical assessment in July 2016.

[52] Mr Heine then complains about the second medical assessment on the basis that Dr Scott Newburn, who was instructed, was not an appropriate specialist. The policy requires two assessments from independent medical practitioners with specialist expertise. I am satisfied on the evidence I heard that Dr Newburn meets this criteria and therefore his report is acceptable.

[53] Dr Newburn's report concluded that Mr Heine was unable to safely fulfil the normal requirements of a Corrections Officer and that this was a permanent restriction.

[54] So, at this stage Corrections has two assessments from appropriate medical specialists which concluded that Mr Heine was permanently medically incapacitated and Mr Heine had not accepted alternative employment so Corrections was able to proceed with the medical retirement process.

Did Corrections outline to Mr Heine what it is contemplating in terms of compulsory medical retirement, explain the possible implications of a finding of permanent medical incapacity and give all of the information it had that was relevant to compulsory medical retirement, to Mr Heine for him to consider and respond to?

[55] I am not satisfied that Corrections meet its obligations in regard to fully explaining the medical retirement process and providing relevant information to Mr Heine. I do however accept Mr Heine was aware of the process and the implications.

Did Corrections give Mr Heine a reasonable opportunity to respond to the information and the proposed medical retirement, before it made its decision to retire Mr Heine?

[56] The evidence is equivocal on this point but Mr Heine did meet with Corrections to discuss the medical assessments and medical retirement. Mr Heine was represented throughout this process. So, I conclude he did have an opportunity to discuss the medical retirement proposal and provide feedback on it.

Did Corrections consider properly any feedback given by Mr Heine before it made its decision to retire Mr Heine?

[57] Again, the evidence is somewhat equivocal on this, largely because by this point there is little that could be said or done to avoid compulsory medical retirement. The short point is there was little, if anything, that could be said by Mr Heine to influence the outcome of the medical retirement process.

Corrections make its decision in line with the policy?

[58] Mr Heine alleges that Corrections did not get the proposed compulsory medical retirement approved correctly. This is a technical argument that turns on the interpretation of the relevant position required to sign off. I am satisfied that Corrections did get medical retirement signed off appropriately through the relevant Regional Manager and General Manager.

Did any failings by Corrections render the process unfair such that the dismissal (retirement) is unjustified?

[59] Counsel for Corrections says the process for Mr Heine's medical retirement was long, spanning some years however it was otherwise unremarkable. Counsel says Mr Heine knew what was occurring and he was appropriately informed throughout. He submits that any defects in the process were minor and did not result in Mr Heine being treated unfairly, and therefore in line with s 103A(5) of the Act, these defects cannot give rise to an unjustified dismissal.

[60] Counsel refers to *Chief Executive of Unitec Institute of Technology v Henderson*¹¹, *Kaipara v Carter Holt Harvey*¹², and *Waterford Holding Limited v Morunga*¹³ and submits that the Employment Court has set out, through these decisions, that unless the defects in a process are such that they influenced the outcome, they are minor and did not result in an employee being treated unfairly.

[61] I accept that there is a basis to conclude this from these decisions. In particular in *Kaipara*, the Court stated:

¹¹ [2007] 8 NZELC 98

¹² [2012] NZEmpC 40

¹³ [2015] NZEmpC 132

Compliance with fair and reasonable procedures is not, and never has been, a requirement simply for its own sake. For it to constitute a personal grievance of unjustified dismissal, it is usually necessary that procedural unfairness be such that it would have brought about a substantive outcome that was unfair or unreasonable.

[62] Corrections' position is that Mr Heine's dismissal was substantively justified based on the medical assessments and the circumstances – it was not safe for Mr Heine to be placed in a prisoner facing role and his continued employment could not be accommodated on the basis of light duties in the control room. Therefore, any defects in process are of no consequence and cannot make the dismissal unjustifiable.

[63] I accept, as discussed below, that the decision to retire Mr Heine was substantively justified. I also accept there is a basis to conclude that, as a result, any procedural failings must be minor and did not cause any unfairness. But I do not accept that this necessarily follows. To find this would mean that any situation where dismissal can be substantively justified (where for example, there has been an admission of serious misconduct or there is a sound business case for redundancy with no redeployment opportunities) would mean an employer could dispense with any form of process and this cannot be correct.

[64] Further, based on *Waterford*, other Employment Court decisions¹⁴ and the Court Of Appeal in *Waitakere City Council v Ioane*¹⁵ it is possible to reach a conclusion of unjustifiable dismissal based solely on procedural grounds.

[65] And s 103A(5) of the Act requires the defects to be minor *and* to not result in the employee being treated unfairly. It is wrong to conclude the first limb is made out because the second is – that is, minor should not be assessed on the basis of the result of the actions not causing any unfairness as this renders “minor” redundant in the test – I would otherwise merely need to be satisfied that there is no unfairness resulting.

[66] And, it seems to me there can be unfairness to an employee in a process notwithstanding that the outcome of the process is justifiable.

[67] It may be the case, as it often is with unjustified dismissal, that the process is so flawed that there is no basis to conclude that a decision to dismiss is something a fair and reasonable employer could have come to. However, whether the process is so flawed as to

¹⁴ See for example, *Air NZ v Hudson* [2006] 3 NZELR 155

¹⁵ [2005] 2 NZELR 575

render the substantive reason for dismissal to be unjustifiable is a different assessment and not one that I need to make in order to conclude that a dismissal is unjustified from a procedural aspect irrespective of outcome.

[68] In this case I am satisfied that the procedural failings were more than minor and they did cause unfairness to Mr Heine and therefore his dismissal was unjustified.

Was Mr Heine's compulsory retirement substantively justified?

[69] As explained I do not need to decide the dismissal was substantively unjustified because of a flawed process in order to find there is an unjustified dismissal. It is also the case that I do not need to find that a dismissal is substantively unjustified just because there is a flawed or unfair process.

[70] This case is a rare example where despite a flawed and unfair process I can accept that the decision to dismiss is still substantively justified. I conclude that a fair and reasonable employer could rely on the medical assessments and the circumstances at the time to conclude that Mr Heine was medically incapacitated, that this was permanent and that he could not safely carry out his role as a Corrections Officer. In the circumstances, medical retirement was the only remaining option. The decision to dismiss Mr Heine was substantively justified.

Discrimination

[71] Sections 104 – 106 of the Act deal with discrimination and are to be read with the relevant provision of the Human Rights Act 1993.

[72] Section 104 provides that an employee is discriminated against in their employment if their employer dismisses them by reason directly or indirectly of their disability.

[73] So, I need to determine if Mr Heine was disabled and if so if he was dismissed by Corrections by reason of his disability. If this was the case it is possible that Corrections could dismiss Mr Heine by reason of his disability if the exceptions in s 29 of the Human Rights Act are met.

Did Mr Heine have a disability?

[74] I accept that Mr Heine had a disability.

Was Mr Heine's dismissal (by compulsory retirement) by reason of his disability?

[75] Mr Heine was not dismissed because of his disability. I accept Counsel for Corrections submission that Mr Heine's case is not one where there is a causative link between the disability and the dismissal, rather this case is in line with *Idea Services Ltd v Crozier*¹⁶. In *Crozier*, Ms Crozier was dismissed because she was unable to perform tasks required in her role such as restraining clients, tracking clients and actively participating in physical activity. The Court said she was not treated differently to any other employees, as all employees were required to perform these tasks. As she was unable to do these tasks, she was dismissed – the dismissal was not because she was disabled rather because she could not fulfil the requirements of her role.

Do the circumstances of Mr Heine's dismissal mean Corrections could treat Mr Heine in this way?

[76] Given my conclusion it is not necessary for me to consider whether an exception applies but I note that again this case is similar to *Crozier* and had there been discrimination I would conclude that the exception in s 29(1)(b) of the Human Rights Act would apply.

Breaches of Duty

Good faith

[77] In order to impose a penalty for a breach of the duty of good faith I must be satisfied that the failure by Corrections to comply with the duty of good faith, in the course of consultation over Mr Heine's medical retirement, was "deliberate, serious and sustained" or intended to undermine the employment agreement.¹⁷

[78] The word "deliberate" requires proof of intention; this means proof that, in the course of consulting with Mr Heine, Corrections intentionally failed to comply with the duty of good faith.

[79] Alternatively, I need to be satisfied that, in the course of consulting with Mr Heine, Corrections intentionally undermined the employment agreement with Mr Heine.

¹⁶ [2017] NZEmpC 77

¹⁷ Section 4A of the Act

[80] On the evidence I heard I am not satisfied that Corrections intended to breach the duty of good faith; the breach is not deliberate and there is no basis to impose a penalty¹⁸. In addition, I am satisfied that Corrections did not intend to undermine the employment agreement and there is no basis to impose a penalty¹⁹.

Breach of employment agreement

[81] On evidence I heard I am not satisfied that there were any breaches of Mr Heine's employment agreement that justify a penalty being imposed.

Remedies

[82] As Mr Heine has succeeded with his unjustified dismissal grievance, I must consider what remedies he is entitled to.

Compensation

[83] Turning first to consider compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act, Mr Heine describes the effects of the process and the dismissal on him as:

- (a) He suffered mental anxiety and stress;
- (b) Being kept in a state of uncertainty, with his life "put on hold", this being upsetting, stressful and humiliating;
- (c) The termination was humiliating and insensitive and he was left with no support;
- (d) His self-confidence was shattered and his ability to focus and concentrate was diminished;
- (e) He suffered financial difficulties.

[84] In deciding the level of compensation Mr Heine is entitled to based upon the loss of dignity, humiliation and injury to feelings described above, I have considered *Waikato*

¹⁸ See for example *Bourne v Real Journeys Limited* [2011] NZEmpC 97

¹⁹ See for example *Gilbert v Transfield Services (New Zealand) Limited* [2013] NZEmpC 71

*District Health Board v Kathleen Ann Archibald*²⁰. In that case Chief Judge Inglis, referred to middle of the middle as \$20,000.00 and this is the starting point for my assessment.

[85] I do not think the level of loss of dignity, humiliation and injury to feelings in Mr Heine's case to be on a par with that considered by the Chief Judge. I consider it to be quite a bit lower. I assess the level of compensation to be \$10,000.00.

Reimbursement

[86] As Mr Heine's dismissal was substantively justified he is not entitled to any reimbursement.

[87] As an aside, Mr Heine was paid 13 weeks salary as part of the compulsory medical retirement. It appears to me that had I found that his dismissal was not substantively justified it follows that he would not have been entitled to the medical retirement payment but he would have been entitled to reimbursement of 13 weeks lost remuneration i.e. he would be in the same position he is now.

Contribution

[88] As I have awarded remedies I must consider whether Mr Heine has contributed to the situation that gave rise to his unjustified dismissal.²¹

[89] When assessing if Mr Heine's actions contributed to the situation that gave rise to his grievance I am looking for a causal link between his actions and the situation that gave rise to the unfair process. If I am satisfied that there is a link, then I must consider whether the behaviour was culpable or blameworthy, which would require a reduction in remedies.²²

[90] I do not accept that Mr Heine's actions contributed to the unfair consultation. Mr Heine cannot be criticised for the consultation or his part in it.

²⁰ [2017] NZEmpC 132

²¹ Section 124 of the Act.

²² *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

Determination

[91] To the extent that there are separate grievances for unjustified action causing disadvantage, which I have jurisdiction to consider, Corrections did not act in an unjustified manner, and Mr Heine's unjustified action grievances are dismissed.

[92] Corrections unjustifiably dismissed Mr Heine. In satisfaction of this grievance Corrections must pay Mr Heine \$10,000.00 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[93] Corrections did not discriminate against Mr Heine and his grievance based on discrimination is dismissed.

[94] There is no basis to award penalties and Mr Heine's claims for penalties to be imposed are dismissed.

Costs

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

[96] If they are not able to do so and a determination on costs is required, 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