

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURĀU ROHE**

[2019] NZERA 544  
3056262

BETWEEN                    THOMAS MOKARAKA  
Applicant

AND                            DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority:      Jenni-Maree Trotman

Representatives:            Gregory Bennett, Advocate for the Applicant  
John Rooney, Counsel for the Respondent

Investigation Meeting:      26, 27 and 28 August 2019

Submissions and further    30 August 2019 from the Applicant  
Information Received:      30 August 2019 from the Respondent

Date of Determination:      23 September 2019

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Thomas Mocaraka was employed by the Department of Corrections as a Corrections Officer at its Northland Region Corrections Facility in October 2009. He held this position until his employment was terminated on 27 November 2018. Mr Mocaraka claims he was unjustifiably dismissed.

[2] Mr Mocaraka's claim is denied by Corrections who maintains that his employment was justifiably terminated on the grounds of serious misconduct following a full and fair investigation and disciplinary process. It opposes Mr Mocaraka's claim for remedies including his application for reinstatement that it argues is neither practical nor reasonable in the circumstances.

[3] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

### **The Issues**

[4] The issues identified for investigation and determination are:

- a. Was Mr Mokaraka unjustifiably dismissed?
- b. If Mr Mokaraka was unjustifiably dismissed, what remedies should be awarded?
- c. If any remedies are awarded, should they be reduced, under s 124 of the Act, for blameworthy conduct by Mr Mokaraka that contributed to the situation giving rise to his grievance?
- d. Should either party contribute to the costs of representation of the other party?

[5] For completeness I record that during the investigation meeting Mr Mokaraka withdrew his application for unjustified disadvantage.

### **Background**

#### *The first complaint*

[6] On 31 August 2018 a corrections officer made an allegation against Mr Mokaraka. This person did not provide evidence and therefore I shall refer to this corrections officer as Person A. The complaint involved allegations of Mr Mokaraka dressing Person A down in front of prisoners, telling her not to think but to do as she's "f\*\*king" told, her being locked in an interview room alone with a prisoner, becoming angry towards her when she queried a decision and telling her to "f" off in front of colleagues.

#### *Preliminary investigation of the first complaint*

[7] Following receipt of the complaint, Andrew Thorne, Mr Mokaraka's manager and the acting Residential Manager, undertook an initial informal investigation. After

discussing the complaint with Human Resources, the matter was referred to Scott Carr. At the time Mr Carr was the Security Manager. After reviewing the complaint, and speaking with the Department's Senior HR advisor Mr Carr decided a formal approach needed to be taken.

[8] On 19 September 2017 Mr Carr wrote to Mr Mocaraka explaining that a complaint had been received from Person A and setting out the nature of that complaint. The letter went on to advise that if the allegations were substantiated then a potential outcome was dismissal.

[9] A meeting was proposed for 29 September 2017 but, as Mr Mocaraka's representative was unavailable, the meeting took place on 6 October. At that meeting Mr Mocaraka read out a prepared statement that denied the allegations and briefly explained why. I have read that statement.

[10] On 11 October 2017 Mr Carr wrote to Mr Mocaraka again. This letter repeated the allegations and what Mr Mocaraka had said through his written and oral submissions at the meeting on 6 October. He went on to advise that as there were two different versions of events he had decided that it was necessary to undertake an employment investigation. He advised that the Investigator would gather the available evidence and provide an impartial view as to whether, on the balance of probability, the allegations could be upheld. However, as the decision maker, he would seek Mr Mocaraka's response to the report before he considered and made his decision.

#### *The formal investigation of the first complaint*

[11] On 22 November 2017 Mr Carr emailed Julianne Epere asking her to conduct an employment investigation into the four allegations made against Mr Mocaraka and attaching a copy of the terms of reference. Ms Epere is a Service Manager for Community Corrections in Kaikohe. She has worked for Corrections for 32 years. She was trained as an investigator in 2013 and has completed 60 investigations since that time.

[12] Ms Epere commenced her investigation on 7 December 2017. She said the process she took in this investigation, and all investigations that she undertook (including a second investigation involving Mr Mocaraka that I shall turn to later in this determination) was the same. Her practice was to first review the terms of

reference and documentation, assess what external evidence was required (including CCTV footage) and to write a list of people she needed to interview. Next she would meet with the person being investigated to discuss her role, and to ask them if there was anybody who they considered she should interview, and would then meet with the complainant and all other witnesses including those identified during the interviews. During all interviews she typed notes and had the witness review the notes at the end of the interview and sign them. All interview notes were sent to the person being investigated as they were completed. They were then interviewed. Thereafter she considered:

All the information I have been given, including any CCTV footage, the information given to me in interviews, any documents including emails. I step back and look for any inconsistencies in the information provided and form a view on my findings.

I then start preparing my investigation report. If an allegation is substantiated, I find it has been “upheld”. I use the terminology “upheld” and “not upheld” in relation to my findings on each of the allegations because that was the terms I was told to use in my original training.

After that I send the final report to the decision-maker. If they have any further questions they can get in touch with me.

From there my part in the process is over.

[13] In terms of the first investigation, Ms Epere said that she first spoke with Person A who provided additional details and dates of when events took place. Thereafter, on 13, 14, 22 December 2017 and 11 and 12 January 2018 she met with 7 other people who had been identified as being potentially relevant to her investigation. During these meetings, she typed what each witness said and then had them sign a copy of the interview statement as being a “true and accurate” reflection of what was discussed.

[14] On 22 January 2018 Ms Epere met with Mr Mocaraka and his representative. Prior to this meeting she provided them with a copy of all of the interview statements from the witnesses she had interviewed. At the conclusion of the interview she printed out the interview statement that recorded what had been said during the meeting with Mr Mocaraka. Mr Mocaraka and his representative then spent around 30 minutes reading through this before it was signed.

[15] Ms Epere’s report was finalised on 16 February 2018 and a copy provided to Mr Mocaraka thereafter. I have viewed this report. It includes a copy of each of the

statements provided by each witness together with all other information relied upon by Ms Epere in reaching her findings. It also sets out what each of the witnesses said and addresses the disparities between the evidence.

[16] In respect of matters material to this investigation, Ms Epere's investigation concluded Mr Mocaraka had potentially risked the safety and security of himself, his colleagues, the prisoners and the prison by failing to follow the unlock procedure where three staff complete separate tasks and by leaving two doors open allowing prisoners access to a restricted area. This resulted in Person A being locked in a room alone with a prisoner.

*Disciplinary process in response to first complaint*

[17] On 27 February 2018, Mr Carr provided Mr Mocaraka with a copy of Ms Epere's report, and invited him to provide his comments on the report by 9 March 2018. He explained that after that date he would consider all of the relevant information, including any submissions Mr Mocaraka wished to make in response to the report, and form a preliminary view. Mr Mocaraka would then have an opportunity to respond to his preliminary view before he reached a final decision.

[18] On 12 March 2018, Mr Mocaraka emailed Mr Carr asking to provide his responses on 19 March 2018. Mr Carr had no issue with his request. On 19 March 2018 Mr Mocaraka's response was again delayed, by consent, to 9 May 2018 due to his representative being overseas.

*A second complaint is received*

[19] On 14 March 2018 a second complaint was received by Corrections about Mr Mocaraka. I shall refer to the complainant as Person B. Person B, a Corrections Officer, alleged that on 12 March 2018 he had viewed Mr Mocaraka enter into a prisoner's cell and attempt to damage a TV cord with his keys. He also alleged he viewed Mr Mocaraka remove a tamper sticker from a radio. Person B went on to allege that Mr Mocaraka had then wrongfully accused the prisoner of tampering with the equipment in his cell.

[20] On or about 26 March 2018 Mr Carr, who by then had been appointed the Residential Manager, was tasked as the decision maker in relation to this claim. On

this date computer records produced to the Authority show that he saved relevant CCTV footage and on-body camera footage (OBC footage).

[21] On 5 April 2018, Mr Carr wrote to Mr Mokaraka to advise him of the complaint and Corrections' concerns. The letter identified four allegations:

- a. Willfully damaged, or attempted to damage, the Departmental and/or prisoner's property;
- b. Attempted to falsely incriminate a prisoner by tampering with equipment in his cell;
- c. Failed to enter all relevant information about an incident that involved a prisoner in his Integrated Offender Management System (IOMS) file. In terms of this allegation Mr Carr noted that "while you noted the original incident concerning the prisoner being issued a jersey in IOMS, this incident was not noted in prisoner ... IOMS file."
- d. Failed to properly secure the compound gate. In terms of this allegation Mr Carr noted that:

I have also viewed the OBC and CCTV footage surrounding this incident which has raised a further issue. The CCTV footage seems to show that you left the compound gate open, which allowed a prisoner to enter the Pukeko sterile area near a guard room.

[22] The letter went on to advise that the CCTV and OBC footage had been saved and was available to view, identified the relevant Code of Conduct principles and explained that, as the allegations were serious, Mr Carr had decided to initiate an employment investigation. In the interim, he advised he was proposing to suspend Mr Mokaraka but would like to hear from him at a meeting on 12 April 2018.

[23] On 5 April 2018, Mr Mokaraka's wife emailed Mr Carr requesting all camera footage for Pukeko South from 12 March 2018 to be saved. The computer records show that Mr Carr attended to this on 9 April. He then responded to Mrs Mokaraka advising that he had saved all available footage but that not all cameras were available, the recordings having been overwritten due to the passage of time.

### *The suspension meeting*

[24] On 12 April 2018, Mr Carr met with Mr Mocaraka to hear his feedback on the proposal to suspend him. Mr Mocaraka was represented by his union representative, and another person attended to transcribe the meeting. I have viewed these notes. The outcome of that meeting was that Mr Mocaraka agreed that it was appropriate that he be suspended on pay while the investigation was undertaken.

### *The formal investigation*

[25] On 9 April 2018, Corrections appointed Ms Epere to commence an initial fact finding investigation into the allegations. The procedure she followed was the same as that which I have detailed earlier in this determination.

[26] Following her appointment, Ms Epere contacted Person B and advised him that she would like to interview him. He responded advising that he had submitted the incident to his manager at the time and attached a copy of his email complaint of 14 March 2018.

[27] Ms Epere then contacted Mr Mocaraka to discuss the investigation and ask him if there was anyone he would like her to interview. Mr Mocaraka asked her where Person B was standing in relation to the Prisoner's cell when he saw him attempting to damage the television cord and remove the tamper sticker from the radio. In response to this request, Ms Epere contacted Person B again. His response was:

I was standing with my back towards Tom, pre-occupied and saw what I thought I saw in my peripheral vision.

[28] Thereafter Ms Epere interviewed two other Correction Officers who were witnesses to the alleged events. A copy of their witness statements, and Person B's emails, were provided to Mr Mocaraka.

[29] Ms Epere then met with Mr Mocaraka. During that meeting Mr Mocaraka and his representative viewed all CCTV and OBC footage. They compared what was on these recordings with Ms Epere's transcription and confirmed her transcription was correct.

[30] I pause here to note that during my investigation I viewed all of the CCTV and OBC footage that was viewed by Mr Mocaraka during this meeting. This was also

reviewed throughout the Authority's investigation meeting. It became evident that material parts of the recordings were inadvertently recorded by Mr Mokaraka. Unbeknown to Mr Mokaraka at the time, the OBC camera is constantly recording but only saves the footage to the hard drive when the on button is pressed. At this point the OBC saves the footage from thirty seconds prior to the "on" button being pushed. The exact timing when the "on" button is switched on is evidenced on the OBC footage by a beeping sound. I shall return to discuss this footage later in this determination.

[31] On 13 May 2018 Ms Epere completed her report. She found all of the allegations were substantiated.

*Disciplinary process in response to second complaint*

[32] On 29 May 2018, Mr Mokaraka informed Mr Carr that his representative (Mr Woodward) was returning from overseas and to send him all the documentation in relation to both investigations.

[33] On 1 June 2018, Mr Carr wrote to Mr Woodward outlining the process to that point and attaching both investigation reports and all relevant documentation. The letter went on to advise that before Mr Carr reached a preliminary view he wanted to hear Mr Mokaraka's comments.

[34] On 13 June 2018 the parties met to hear from Mr Mokaraka. Mr Mokaraka was represented by Mr Woodward. Comprehensive notes were taken of what was said during this meeting that I have read. Mr Carr brought with him a laptop that contained all available CCTV and OBC footage. This footage was the same as that viewed by Mr Mokaraka when he had met with Ms Epere.

[35] Mr Mokaraka directed Mr Carr to video footage that he wished him to view so that he could make comment. The meeting concluded with Mr Woodward advising that he wished to prepare submissions for Mr Mokaraka and to then meet again to talk through those submissions. Mr Carr agreed.

[36] Due to Mr Woodward being unwell, the next meeting did not take place until 24 July 2018. The purpose of the meeting was for Mr Woodward to present submissions on behalf of Mr Mokaraka. Comprehensive notes were taken of what was said during this meeting that I have read.

[37] During the meeting Mr Woodward advised that he had not seen Ms Epere's second investigation report. This was provided to him again and it was agreed that he would just respond to the first allegation which he did. In terms of matters relevant to Mr Mocaraka's subsequent dismissal he accepted that when he walked out of the interview room he left the door unlocked, assuming that Person A was with him and behind him. He acknowledged that it wasn't appropriate to leave her and submitted that it would never happen again. He also advised that both gates were open when he walked through them. He did not open them.

[38] During this meeting Mr Woodward also sought information on what the initial investigation that was undertaken by Andrew Thorne involved. Mr Hargis agreed to have a look on Mr Mocaraka's HR file. In response to questions from the Authority Mr Hargis confirmed he had checked the HR file but there was nothing on that file from Mr Thorn. His evidence was confirmed by Mr Thorn.

[39] On 30 July 2018, the parties met again to hear Mr Mocaraka's feedback to the second investigation report. Comprehensive notes were taken of what was said during this meeting that I have read. During this meeting Mr Woodward provided submissions on Mr Mocaraka's behalf. In summary he submitted:

- a. Mr Mocaraka did not damage the television cord or remove the tamper sticker from the prisoner's CD player and there was no photographic evidence or witness evidence to support the prisoner's and Person B's claim of wilful damage;
- b. Mr Mocaraka removed a piece of cellotape from the CD player but did not interfere with the tamper sticker. Therefore, what Person B claimed to have seen was not what he had seen;
- c. Person B's evidence should not be relied upon. His statement was that his back was towards Mr Mocaraka and that he only "thinks" he saw Mr Mocaraka interfering with the television cord. Person B's later email of 18 April 2018 was inconsistent with his earlier email of 14 March 2018;
- d. Mr Mocaraka was holding the cell key in his hands when in the cell. There was no sawing motion but there was a pointing motion;

- e. Mr Mocaraka regretted saying he would go and take the TV. He said this was not his intention. Mr Mocaraka explained that he took the TV because the prisoner was agitated and that he wanted to inspect it properly in the interview room;
- f. There was no formal record of the tamper sticker being removed from the CD player;
- g. Mr Mocaraka denied that he tried to incriminate the prisoner. Mr Mocaraka claimed that the fact that he filed an IOMS incident but didn't record the temporary confiscation supported his denial of incriminating the prisoner.
- h. Mr Mocaraka acknowledged he had failed to secure the gate but submitted there were mitigating circumstances and explained what these were. He agreed he would secure the gates in the future.

#### *The preliminary decision*

[40] After hearing from Mr Mocaraka, Mr Carr reread all of the documentation, including both investigation reports, Mr Mocaraka's responses, the transcripts of the meetings, email documentation and viewed the CCTV and OBC footage.

[41] On 21 August 2018, Mr Carr emailed his draft preliminary findings, and the reasons for those findings, to Human Resources to obtain assistance with drafting a letter. Before he could finish the letter, he became seriously unwell and was away from work for several weeks.

[42] On 19 October 2018 Mr Carr wrote to Mr Mocaraka with his preliminary view. This was an extensive summary of the process Corrections had followed and the evidence provided. It spanned 11 pages. In terms of the first allegation, Mr Carr's preliminary view in terms of matters relevant to this investigation was that Mr Mocaraka risked his safety and security and that of Person A by allowing a prisoner to be alone with Person A in a locked room. Even if Mr Mocaraka had asked Person A to come with him, he did not check whether she was with him when he left and left the door open. Mr Mocaraka subsequently let prisoners through into the area, still without checking the whereabouts of Person A.

[43] In relation to the second set of allegations, Mr Carr's preliminary view, again in summary, was:

- a. Mr Mokaraka had wilfully damaged, or attempted to damage, Departmental and/or prisoner property.
- b. Mr Carr did not accept that Person B's statements in his email of 18 April 2018 were inconsistent with the complaint made on 14 March 2018. He considered his account of events made sense in terms of all of the other evidence. He also considered, knowing the configuration of the cell, that it was unlikely that Person B was fully back-to-back with Mr Mokaraka while he was at the television. He did not consider there was enough room in the cell to allow for that. Therefore, he formed the view that his evidence could take its place beside the other evidence, and that he would not disregard it.
- c. Mr Carr did not accept Mr Mokaraka's response as to how he had held the key in his hand when unlocking and entering a cell, and in a specific way so that it was available to be used if something untoward occurs. He said he did not find this explanation credible as:
  - i. When Mr Mokaraka entered the cell the door was open, so no key was required;
  - ii. A cell door cannot be locked or unlocked by a key from the inside. Therefore, it would not be normal for an officer to hold a key at all when doing a cell search (and in fact an officer's keys should be secured in their pouch at all times);
  - iii. The CCTV footage showed that as Mr Mokaraka walked to the cell he held out his hands and no key chain is visible.
- d. Mr Carr considered that Mr Mokaraka's explanation that he had the key in his hand while checking the television cord corroborated Person B's report that a key was in his hand while he was checking the television cable in the prisoner's cell. His view was that while in the cell he took his key out of his pouch for the purpose of damaging or attempting to damage the prisoner's television cord.

- e. Mr Carr did not accept that the absence of photographic evidence of damage precluded him from making findings. He believed, based on the evidence, that Mr Mokaraka's keys were used to score or deface a part of the television to justify his removal of the television as per his commentary on his on-body camera.
- f. Mr Mokaraka attempted to falsely incriminate the prisoner - he considered that if it was Mr Mokaraka's intention to remove the television it was likely that the purpose for damaging the television cord was to give him the excuse he needed to remove it. It followed that he removed the television to blame the prisoner for the damage, or in other words, falsely incriminate him, and that was what appeared from the on-body camera footage that he did.
- g. Mr Mokaraka had failed to enter all relevant information about the incident on his IOMS file. All officers know that a core element of their job is to enter incidents into IOMS so that a full picture is built up of prisoner activity, which can inform other officers.
- h. Mr Mokaraka had failed to secure the compound gate. He considered it was Mr Mokaraka's responsibility to ensure that the gate was closed before he proceeded further into the sterile zone. His main concern with respect to this allegation was the significant risk to the safety of the staff and the security of the prison.
- i. Mr Carr concluded the conduct could amount to serious misconduct and that disciplinary action was appropriate.

[44] On 2 November 2018, Mr Carr met with Mr Mokaraka and Mr Woodward (Mr Mokaraka's representative) to hear Mr Mokaraka's responses to his preliminary view. Mr Woodward put his submissions forward verbally and later in writing.

[45] After hearing from Mr Mokaraka, Mr Carr said he reviewed and considered Mr Woodward's submissions and spoke with Ms Epere to discuss some of the feedback including criticisms of her investigation. After considering the evidence he decided Mr Mokaraka had failed to meet Corrections' standards, as expressed in its Code. In particular, he considered his lack of integrity and understanding of the

importance of safety and security, was to such a degree that he did not have trust and confidence in Mr Mokaraka to be a Corrections Officer.

[46] On 27 November 2018 Mr Carr met with Mr Mokaraka and Mr Woodward to advise him of his decision to terminate his employment.

### **Unjustified dismissal?**

#### *The law*

[47] The onus falls upon Corrections to prove that its actions in dismissing Mr Mokaraka were justified.

[48] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must, in determining whether a dismissal is justifiable, objectively determine whether the actions of Corrections, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[49] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[50] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in the employee being treated unfairly.<sup>1</sup>

[51] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

---

<sup>1</sup> Section 103A (5), Employment Relations Act 2000.

### *Analysis*

[52] Mr Mokaraka claims that his dismissal was substantively and procedurally unjustified in a number of ways. In submissions filed on his behalf, he maintains that Corrections did not adequately investigate the second allegation against Mr Mokaraka, Mr Mokaraka did not have a real and timely opportunity to respond to Corrections' concerns, Corrections did not genuinely consider Mr Mokaraka's explanation, or turn its mind to other possibilities, Corrections took into account previous instances of inappropriate behaviour, and Corrections did not have "enough grounds to conclude that Mr Mokaraka had committed serious misconduct that warranted dismissal."

[53] I have carefully considered the submissions made on Mr Mokaraka's behalf. However, for reasons that will become apparent, I am satisfied that Corrections' decision to dismiss Mr Mokaraka was within the range of responses open to a fair and reasonable employer. I do not accept that the matters raised by Mr Bennett in his submissions render the process followed by Corrections, or the decision that it reached, flawed.

### *Person B's evidence*

[54] I understand Mr Bennett to submit that Corrections should not have relied upon Person B's evidence. This is because it did not speak to him and his two emails contradicted each other.

[55] There is no dispute that Person B was not spoken to. Ordinarily it would be best practice to speak with a Complainant. However, in this instance, there were reasons why Corrections did not do so that I find a reasonable employer could have relied upon.

[56] Person B did not want to engage further in the investigation process, he had provided Corrections with a very detailed explanation of the events that had occurred on 12 March that he had not retracted, he had provided further detail in his second email, and his statements were consistent with the CCTV and OBC footage and the statement obtained from the Prisoner. In addition, Corrections had knowledge of the size and layout of the Prisoner's cell. Based on this information, and with knowledge of the positions of the Corrections Officers in the cell, they could assess whether

Person B could have seen what he viewed in his first statement even if this was only in his peripheral vision.

[57] Corrections decision not to interview Person B, and its views regarding the two emails, was known to Mr Mocaraka at the time his responses were sought. The evidence shows that he was provided with a copy of both statements made by Person B and was afforded with an opportunity to respond to those statements which he did during meetings including that on 30 July 2018.

[58] For completeness, it is likely that even if Corrections had spoken with Person B this would not have changed its decision and therefore did not cause any unfairness. Person B gave evidence at the Authority's investigation meeting. He confirmed that the account of facts that he gave in his first statement was correct and said that his second email was intentionally vague. He said he felt that he had already told the full story and didn't want to be involved anymore as he didn't want to be the reason for Mr Mocaraka losing his job. He confirmed that although he had his back to Mr Mocaraka he turned and saw him grinding the black television cord with his keys. He also said that he was the Corrections Officer who had done the daily cell check of the Prisoner's cell that day. He said he had undertaken this shortly before the search took place. There were no issues with either the television or the CD radio prior to the search of the Prisoner's cell as shown on the cell records he completed.

*Evidence from other witnesses*

[59] Mr Bennett submits that the process followed by Corrections was flawed because it failed to speak with the Prisoner's cellmate and also to a Senior Corrections Officer who had knowledge of the events.

[60] This was a concern raised by Mr Mocaraka during the meeting between the parties on 2 November 2018. Following this concern being raised, Mr Carr spoke with Ms Eperere to obtain her view on the relevance of these witnesses to the investigation. After consideration he decided that these two witnesses were not relevant.

[61] I conclude this was a decision that a fair and reasonable employer could have made. Neither the Prisoner's cellmate, nor the Senior Corrections Officer, were present during the Prisoner's cell search. Any knowledge that they had could only have gone to whether the television was damaged or not. Mr Carr already had

sufficient evidence that the television cord was damaged when it left the Prisoner's cell.

[62] The OBC footage recorded Mr Mokaraka showing the damaged cord to the Prisoner and the Prisoner asking him what he had done to it. Mr Mokaraka then told the Prisoner they were going to confiscate the television to get it fixed. He then repeated that they were removing the television because "we think it has been tampered with". The CCTV footage shows Mr Mokaraka showing the cord to the Prisoner's Cellmate. His witness statement recorded that he then replaced the damaged cord before he gave this back to the Prisoner. I was not persuaded when he said his witness statement was an error.

#### *OBC & CCTV footage*

[63] During the Authority's investigation, Mr Mokaraka alleged Corrections investigation of the second allegation was incomplete and unfair in that it had failed to secure all OBC and CCTV footage. In terms of the later, he pointed to two missing CCTV recordings. I was not persuaded by this argument.

[64] First, I was provided with a screenshot of all OBC footage that was recorded at relevant times on the date at issue, 12 March. This footage showed that the only corrections officer recording at material times was Mr Mokaraka. Mr Mokaraka accepted that if any other OBC recordings had been deleted then this record would have shown this. There is no dispute that Mr Mokaraka was provided with his OBC footage of that day.

[65] Second, I considered whether the two CCTV recordings identified by Mr Mokaraka as missing were provided. The first camera footage identified by Mr Mokaraka as missing showed the Prisoner leaving the secure area with the television. Mr Mokaraka confirmed during questioning he had viewed this footage prior to his termination and was provided with an opportunity to comment on this video before the decision was made to terminate him.

[66] There is no dispute that the second camera footage, for camera 1430, is missing. According to Mr Mokaraka this footage would have showed him showing the Prisoner the television cord, the Prisoner apologising to him, and him handing the TV back to him. I am satisfied that this footage was unintentionally overwritten, as

part of Corrections' usual process, prior to Mr Mokaraka making a request for it on 6 April 2018.

*Tampering with the radio*

[67] There is no dispute that Corrections did not rely on the allegation of tampering with the radio when it made its decision to terminate Mr Mokaraka. However, I understood Mr Bennett to submit during the course of the Authority's meeting that the issue of tampering was relevant because, had Corrections investigated, it would have found that the radio had not been tampered with calling into question the evidence of Person B and the Prisoner.

[68] In support of his submission that Corrections had failed to investigate this allegation, Mr Bennett strongly relied on Corrections failure to review the daily search records. The documentation shows that on 30 July 2018 Mr Woodward asked for the daily cell search record. This record contains a checklist of items checked on a daily basis in a prisoner's cell such as whether the electrical equipment is tamper free.

[69] In response to questions from the Authority, Mr Carr said that following this meeting he made a request for the daily cell search records but these were unable to be obtained. During the course of the Authority's investigation these records were located. Mr Carr said, even if he had viewed these at the time, they would not have led to a different outcome.

[70] Having viewed the records, I agree with Mr Carr. Even if these records were obtained and viewed by Corrections prior to making its decision, it is more likely than not that they could not have led to a different conclusion. I am fortified in this finding by the following evidence:

- a. A fully completed cell search record was prepared by Person B just prior to the Prisoner's cell being searched by Mr Mokaraka. This showed no damage or tampering to electrical equipment in the Prisoner's cell.
- b. The cell search records that were completed in the days that followed the incident were incomplete and did not show searches of the prisoner's cell. They could not therefore establish one way or another if there had been tampering/damage or not.

- c. Following Mr Mokaraka searching the prisoner's cell, the OBC footage records Mr Mokaraka discussing the television and the CD Radio and its missing tamper sticker. Under questioning from the Authority Mr Mokaraka accepted a person viewing this recording could have interpreted the exchange between himself and the prisoner as evidencing that the tamper sticker on the radio had been removed.

*Other incidences of inappropriate behaviour*

[71] During the investigation meeting Mr Bennett maintained that Corrections dismissed Mr Mokaraka in reliance on the first and second incident. This is not what the dismissal letter said. The dismissal letter stated:

If I address only the second set of allegations, without considering the first set, I believe that you have failed to meet the Department's standards as expressed in the Code of Conduct, especially with respect to your integrity and your understanding of the importance of safety and security, to such a degree that I do not believe that you will do the right thing, and I firmly hold the view that we can't trust you to be a corrections officer. Thus the trust and confidence essential to maintain an employment relationship has been broken, and the only sanction I can think of is summary dismissal.

[72] However, it appeared to me from the evidence that I heard, from the preliminary indication letter, and from comments made by Mr Carr in reaching his findings on the second allegation, that Corrections may have taken into account the first incident to the extent that it showed carelessness around safety and security.

[73] For this reason, I considered whether it's finding in relation to the first complaint that Mr Mokaraka had potentially risked the safety and security of himself, his colleagues, the prisoners and the prison was one that a fair and reasonable employer could have made. For the reasons that follow, and as indicated to the parties during the investigation meeting, I am satisfied that it was.

[74] The process that Corrections followed in investigating the first complaint was without reproach. Mr Mokaraka was provided with information about the complaint, had opportunities to respond and Mr Carr genuinely considered his response before upholding the allegation. On balance, a fair and reasonable employer could have concluded that Mr Mokaraka had engaged in the alleged conduct in that:

- a. Mr Mokaraka acknowledged during Corrections' investigation that he did not check whether Person A was with him when he left the interview room and left the door open.
- b. Mr Mokaraka was aware that some prisoners were in the sterile area outside the interview room. By not closing the interview door, Mr Mokaraka allowed these prisoners access to the interview room.
- c. Mr Mokaraka then left a security gate open providing an opportunity for other prisoners to enter the sterile area. The issue was not whether he opened it; it was that he should have ensured the security door was closed when he walked through it. Again he did not check whether Person A was with him when he walked through this gate.
- d. Mr Mokaraka's actions allowed prisoners to access the interview room where Person A was located. The situation could have been much more serious had Person A not managed to control the situation and get out of the room.

#### *Finding on issue 1*

[75] I am satisfied that the investigation followed by Corrections was thorough and fair. The outcome that it reached was one that a fair and reasonable employer could have made in the circumstances known at the time. The evidence that Corrections had that Mr Mokaraka had engaged in serious misconduct was as convincing as the charge was grave.<sup>2</sup>

[76] I find Corrections met all of its statutory obligations. It engaged an impartial investigator who thoroughly and properly investigated the allegations and made findings of fact. It met with Mr Mokaraka to hear his responses to the Investigator's findings and considered his responses with an open mind before making preliminary findings and a decision on a sanction. It considered alternatives to dismissal such as a written warning before deciding that dismissal was the appropriate sanction. It then provided Mr Mokaraka with an opportunity to respond to its preliminary view on both the findings of fact and the sanction. Finally it considered Mr Mokaraka's responses with an open mind before making the final decision to dismiss him. Any defects in

---

<sup>2</sup> *The Chief Executive of the Department of Corrections v Tawhiwhirangi* [2007] NZEmpC at [19].

the process followed by the Department were minor and did not result in Mr Mokaraka being treated unfairly.

[77] I find in all the circumstances that Corrections could have made the decision that it did. Mr Mokaraka was not unjustifiably dismissed.

### **Costs**

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

[79] If they are not able to do so and an Authority determination on costs is needed Corrections may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Mokaraka will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[80] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>3</sup>

### **Outcome**

[81] The overall outcome that I have reached is:

- a. Mr Mokaraka was not unjustifiably dismissed.
- b. Costs are reserved.

Jenni-Maree Trotman  
Member of the Employment Relations Authority

---

<sup>3</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].