

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 734  
3074872

BETWEEN                      DAVID WALFORD  
Applicant

AND                              DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority:        Jenni-Maree Trotman

Representatives:             Jeff Goldstein and Jane Taylor, counsel for the  
Applicant  
Andrew Shaw, counsel the Respondent

Investigation Meeting:       4 and 5 December 2019

Submissions and further    4, 5, and 9 December 2019 from the Applicant  
Information Received:       4, 5, 9, and 10 December 2019 from the Respondent

Date of Determination:       23 December 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] David Walford was employed by the Department of Corrections (Corrections) as a Corrections Officer. He held this position from 25 May 2015 until his employment was terminated on 5 September 2019 by way of summary dismissal. He claims that he was unjustifiably dismissed and asks the Authority to order permanent reinstatement and remedies.

[2] Corrections denies Mr Walford's claim. It maintains that Mr Walford's conduct amounted to serious misconduct, which was proven in its investigation and disciplinary processes, and that the disciplinary action of summary dismissal was one that a fair and reasonable employer could have done in all the circumstances at that

time. It opposes Mr Walford'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 Walford unjustifiably dismissed?
- b. If Mr Walford was unjustifiably dismissed, do his actions amount to egregious conduct, such that he should not be entitled to any remedies?
- c. If Mr Walford was unjustifiably dismissed, and he is entitled to remedies, what remedies should be awarded?
- d. If any remedies are awarded:
  - i. Should they be reduced for blameworthy conduct by Mr Walford that contributed to the situation that gave rise to his personal grievance?
  - ii. Is it practicable and reasonable to reinstate Mr Walford?
- e. Should either party contribute to the costs of representation of the other party?

### **Background**

[5] Mr Walford commenced employment with Corrections in May 2015 as a Corrections Officer. At the time of his dismissal he was working at Christchurch Men's Prison in its Kauri 1 Unit (the Unit). The Unit is designated as a voluntary protective custody unit, meaning that the prisoners housed there are in need of protection from other prisoners, for example sexual offenders or those who were in danger from prisoners with gang connections. The Unit houses prisoners with security classifications ranging from minimum to high.

*The events on 29 March 2019*

[6] On 29 March 2019, while working in the Unit, Mr Walford was approached by a Prisoner. To protect his privacy, I shall refer to the complaining Prisoner as Prisoner V. Prisoner V complained that another prisoner, who was managing the kit locker that morning (Prisoner T) had sworn at him and had refused to exchange a sweatshirt for him. Mr Walford told Prisoner V to stay where he was and said that he would address the issue. He then walked to the kit locker to speak to Prisoner T. Prisoner V followed him and a verbal exchange took place.

[7] What took place next is partially in dispute. However, having carefully reviewed the evidence, I find it more likely than not that the following occurred:

- a. Prisoner V was talking with Mr Walford in the kit locker. As they were walking out of the kit locker Mr Walford pushed the Prisoner. His push resulted in the Prisoner falling over onto the concrete floor. I pause here to note that this conclusion is consistent with the CCTV footage that I viewed, what Mr Walford told his colleagues shortly after the incident, and the incident report Mr Walford completed on the day that provided "...I push him back but he came back swinging at me so I push him back and he fell over".
- b. While Prisoner V was on the ground, he was kicking out at Mr Walford. Mr Walford can be seen to try to swipe the Prisoner's legs away from him. He then grabbed hold of the Prisoner's lower leg and turned him around 180 degrees before releasing him. He then attempted to pick him up under his armpits, and then to drop him from a small height onto the concrete floor. He then tried to pick him up again and dropped him again resulting in the Prisoner falling onto his right side with his right hand beneath him.
- c. Using his left hand the Prisoner then grabbed Mr Walford's testicles. Mr Walford grabbed the Prisoner's left hand releasing the Prisoner's grip from his testicles. Having restrained the Prisoner by holding his hand, Mr Walford then slapped him twice on the head. He then kicked the Prisoner's left shoulder with his foot and then walked over him and away from the scene.

### *Initial investigation*

[8] Following the incident, Corrections' Acting Residential Manager Glen Perry reviewed the relevant CCTV footage of the incident to ascertain what occurred and to ensure that the footage was saved. In doing so Mr Perry viewed three different CCTV cameras that showed different angles of the incident. The footage on two of those cameras was either blocked by a stairwell or only showed the heads of individuals, which could not be identified from the footage. The third camera provided the clearest footage of the incident. Mr Perry arranged for this footage to be saved and it was used for Corrections' investigation and disciplinary process and during the Authority's investigation.

[9] After reviewing the CCTV footage Mr Perry notified the Prison Director, Joanne Harrex, of the events. Ms Harrex viewed the footage herself and then wrote to Mr Walford. Her letter alleged he had used "inappropriate force on Prisoner [V] on Friday 29 March 2019". The letter provided the following information in terms of the alleged events:

From what I understand, you were locking prisoners on the lower landing in Kauri 1, when you became engaged in a verbal exchange with a prisoner [Prisoner V].

I can clearly see that during the course of that exchange you and the prisoner have made your way along the landing to the kit locker where it appears you have pushed the prisoner to the ground then dragged him a short way then appear to have struck the prisoner more than once. Once other staff have arrived, the prisoner is walked back to his cell and locked. The prisoner has sustained an injury to his arm that has been treated by medical.

[10] The letter went on to refer Mr Walford to the relevant sections of the Code of Conduct that Corrections considered may have been breached and to advise him that if the allegations were substantiated it may constitute misconduct or serious misconduct resulting in disciplinary action up to and including dismissal. Mr Walford acknowledged to the Authority that he was familiar with the requirements set out in the Code.

[11] Ms Harrex then advised that she would initiate an employment investigation and would appoint an investigator. She concluded by advising that she was considering suspending Mr Walford and, pending a meeting, he would be on paid

special leave to enable him to seek advice and prepare submissions on the issue of suspension.

[12] On or about 1 April Mr Walford and his representative viewed the CCTV footage of the incident.

#### *The suspension*

[13] On 4 April Mr Walford and his representative met with Ms Harrex and Chris Kibblewhite (Senior HR Advisor) to discuss the proposed suspension. After providing Mr Walford with an opportunity to provide submissions on why he should not be suspended, Ms Harrex advised Mr Walford that he would be suspended on pay while an investigation took place. She also informed him that the matter had been referred to the police. His suspension, and the reasons why, was subsequently confirmed in writing.

#### *The investigation*

[14] On or about 4 April Polly Cunningham was instructed to conduct an employment investigation to establish the circumstances and facts surrounding the allegation that Mr Walford may have “used inappropriate force on Prisoner [V] on Friday 29 March 2019.” Ms Cunningham is the Regional Director of Practice Delivery for the Southern region. She has worked for Corrections for just under 20 years.

[15] That same day Ms Cunningham viewed the CCTV footage and then interviewed Prisoner V, Mr Perry, and a corrections officer who was partnered with Mr Walford on the day of the incident. This corrections officer did not provide evidence and therefore I shall refer to him as Officer R. Several days later she also interviewed Mr Cranstoun, the Corrections Officer/Instructor who was present during the incident. Copies of Ms Cunningham’s typed notes were provided to Mr Walford.

[16] On 10 April Ms Cunningham interviewed Mr Walford. At the commencement of the meeting Ms Cunningham went through the CCTV footage with Mr Walford in the security office. This lasted around 24 minutes. They then moved to another building and continued the interview.

[17] During the second half of this meeting Mr Walford asked Ms Cunningham to interview three prisoners who were present at the time and viewed the events. As none of these prisoners provided evidence I shall refer to them as Prisoner T, Prisoner O and Prisoner R. Ms Cunningham spoke with the first two of these prisoners. She could not explain why she did not speak with the third.

[18] Following the interviews, and reviewing of the CCTV footage and relevant documentation, Ms Cunningham completed her investigation report on 3 May. Her report made the following findings of fact and conclusions as to the allegations:

8.1 With regard to the allegation that Corrections Officer David Walford used inappropriate force on Prisoner [V], I find that on the balance of probability it is likely that this did occur.

8.2 It is considered that Corrections Officer David Walford is an experienced officer who is fully trained. At the point the prisoner starts to lash out from his position on his back on the ground, it is considered that it would have been appropriate to stop any contact with him at that point.

8.3 Furthermore as the prisoner's behaviour continues, there are several points where the officer has physical contact with the prisoner whilst he is on the ground, where he could have ceased contact and stepped back.

*The events that followed receipt of the investigator's report*

[19] On 3 May Ms Harrex, in her role as decision maker, wrote to Mr Walford and asked for his written submissions on Ms Cunningham's report. He provided these in writing on 16 May and orally, through his representative, at a meeting on 5 June.

[20] On 20 June, pursuant to an agreement reached between the parties, Corrections verbally conveyed to Mr Walford's representative that Ms Harrex's preliminary decision was that he had used inappropriate force against Prisoner V, that his actions amounted to serious misconduct and dismissal was the appropriate sanction. This information was conveyed to Mr Walford via an email from his representative.

[21] On or about 24 June Mr Walford changed representatives. By letter of that same date his new representative requested documents relevant to the allegations against Mr Walford. These included a copy of relevant workplace rules and policies, a copy of "all diary and other notes, emails, correspondence, statements and any other documentation whatsoever relating to the DC's investigation whether held electronically or in hard copy", and a copy of the video footage.

[22] On 9 July Ms Harrex wrote a lengthy and detailed letter to Mr Walford outlining her preliminary view that Mr Walford had used inappropriate force on Prisoner V and had failed to meet the standards set out in the Code of Conduct. The letter concluded by inviting Mr Walford to provide submissions on the preliminary decision before close of business on 29 July. Mr Walford was advised he could watch the CCTV footage again if he wished.

[23] On 29 July Mr Walford provided his response. In summary this confirmed:

- a. Mr Walford deeply regretted the incident.
- b. He should have disengaged and walked away.
- c. He made a mistake in not walking away at appropriate times and said “I express my sincere regret that this did not occur. I accept that I made the wrong decision at the time. However, I have learnt from my mistakes and will not repeat them.”
- d. Disciplinary action was appropriate but he did not want to lose his job. He considered a warning or final written warning was appropriate and he would undertake further training if necessary to ensure no further incidents occurred.
- e. He referred to sanctions against others in other cases including where a prisoner was handcuffed and punched and the corrections officer concerned received a warning.

[24] On 20 August Corrections contacted Mr Walford and informed him that Ms Harrex was in a position to make a final decision. Mr Walford was invited to meet with Ms Harrex prior to the final decision being made. This offer was declined.

[25] On 5 September the parties met. Ms Harrex read from a pre-prepared letter that detailed her final view of the employment matter, namely that Mr Walford had used inappropriate force on Prisoner V and had breached various provisions of the Code of Conduct that she outlined. She responded, in depth, to Mr Walford’s submissions given to the preliminary view letter and informed him that she had decided to dismiss him effective immediately. Ms Harrex stated that he would be

paid four weeks' wages in lieu of notice and then handed him a copy of the letter she had read out.

[26] On 9 September 2019, Mr Walford raised a personal grievance.

**Issue One: Unjustified dismissal?**

[27] The onus falls upon Corrections to prove that its actions in dismissing Mr Walford were justified. The applicable legal standard required is the balance of probabilities.

[28] 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.

[29] 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.

[30] 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>

[31] 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.

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



## **Analysis**

[32] Comprehensive and helpful submissions were filed by both parties following the completion of the Authority's investigation meeting. Having carefully considered those submissions, and the evidence, I am satisfied on the balance of probabilities that Corrections' decision to dismiss Mr Walford was not within the range of responses open to a fair and reasonable employer. That is because the process that was followed by Corrections was seriously flawed.

### *Relevant documentation not provided*

[33] Corrections failed to provide Mr Walford with all relevant information. This failure denied him an opportunity to comment on information before a decision was made. For example, it failed to provide him with:

- a. The relevant sections of the Prison Operations Manual, particularly Clause IR.02.03 and Clause IR.02.R01.02.04. These clauses provided for when staff may use force and set out examples of prison behaviour and examples of intervention strategies. Corrections said it relied on these clauses when determining that Mr Walford had used inappropriate force.
- b. Prisoner V's medical notes of 29 March and associated photographs of injuries. Ms Harrex' evidence was that she formed the view that the injuries particularised in these documents were evidence of the injuries suffered by Prisoner V during the incident on 29 March. She, and Ms Kibblewhite, accepted they viewed these documents prior to Mr Walford being dismissed and considered these documents were relevant to the investigation. During the Authority's investigation Mr Walford pointed to several discrepancies with this material that suggested the injuries were not all sustained at the time of the incident.
- c. Ms Cunningham's handwritten notes of the interviews. Although Corrections provided its typed witness notes to Mr Walford, it failed to provide Ms Cunningham's handwritten notes. These notes were relevant because the typed records of her meetings with Prisoner T and Prisoner V

were inconsistent with her handwritten contemporaneous notes in two material ways.

- i. First, in relation to the allegation of grabbing of Mr Walford's testicles - the notes Ms Cunningham wrote when she met with Prisoner V do not record him being asked or responding with any evidence about the allegation he grabbed Mr Walford's testicles. However, the typed notes record "He said at no point had he grabbed DW with his hands, but that he used his arms as well to fend him off".
  - ii. Second, in relation to the allegation of pushing the Prisoner to the ground - the handwritten notes taken when Ms Cunningham met with Prisoner T record him saying Prisoner V "pushed Dave the CO who then pushed him back". Yet the typed notes record "He then pushed Dave the CO who then pushed him back *to the ground*".
- d. A Police report that set out the evidence the Police had collated and the Police's findings in terms of the events of 29 March. The evidence that Prisoner V gave to the Police contradicted what Ms Cunningham had recorded in her typed notes and in her report. In Ms Cunningham's typed notes, and her report, she recorded that the Prisoner had denied grabbing Mr Walford's testicles yet the Police report recorded he had admitted this. Ms Harrex and Ms Kibblewhite accepted that they reviewed this report before Mr Walford was dismissed. They agreed the report was relevant and it should have been provided to Mr Walford.
- e. The assault complaint referral forms lodged by Corrections with the Police. These forms contained information that contradicted Ms Cunningham's findings. The forms recorded that Mr Walford had "suffered minor bruising to his shins and pain to his groin" whereas Ms Cunningham formed the view that he had not been injured. In the evidence she provided to the Authority she said:

Mr Walford could also not be seen to react to any pain himself during the incident and did not appear to be in any pain after the event. I therefore

concluded that Mr Walford's slapping to the head of Prisoner [V] was inappropriate force.

*Corrections did not sufficiently investigate the allegations*

[34] Corrections did not sufficiently investigate the allegations against Mr Walford.

[35] First it engaged an investigator who did not, on balance, have "the necessary investigative skills and experience to investigate the particular issue" as required by its "Procedures for Managers addressing concerns about conduct and behaviour" (the Procedures Manual).

[36] Ms Cunningham accepted she had never received any training on how to conduct an investigation and had never undertaken an investigation without a Senior HR Advisor being present. She said she was taken on because of her ability to show compassion. It became apparent under questioning that she had little understanding of her role, was unfamiliar with the Procedures Manual, and took guidance from Ms Kibblewhite who sat in on most of her meetings with witnesses and assisted her to write her investigation report. She said she spoke with Ms Kibblewhite about whom to interview, what documents were relevant, and talked over discrepancies with her when writing her report.

[37] Second, Corrections did not follow the process set out in the Procedures Manual. The Procedures Manual set out the scope of an investigation, providing that this would typically involve the investigator:

- Gathering relevant evidence
- Interviewing the complainant (if any) and/or relevant witnesses
- Reviewing any relevant documentation or other evidence
- Providing the staff member with all material and evidence gathered: including copies of witness interview notes. This should be provided sufficiently in advance of the interview to give the staff member a fair opportunity to review and consider it, and to seek legal advice, should they wish
- Interviewing the staff member concerned or giving them an opportunity to respond to the material gathered and interview notes taken to date; making sure to put each allegation, and relevant evidence gathered, to the staff member. This includes inferences that may be drawn from the evidence (e.g. that the conduct in question was deliberate). Where the allegation has a number of elements to it, each element must be explored.

- Re-interviewing individuals where new information emerges or where conflicts in the evidence need to be further explored as should the context in which the events unfolded. The quality and credibility of the witnesses' evidence should be assessed.

[38] The evidence was:

- a. Ms Cunningham did not ask for any additional documents other than that provided by Ms Kibblewhite. Under questioning she acknowledged that she knew there were additional documents, such as the Assault Complaint Referral Forms, but did not ask for a copy of this. She agreed under questioning that these forms were relevant in that they recorded Mr Walford having sustained injuries and also that Prisoner V “has a history of volatile and at times irrational outbursts with staff”.
- b. Ms Cunningham did not interview individuals who were identified as relevant and who would have been able to clearly see what had occurred. For example Prisoner R who was within feet of the incident throughout its duration. Ms Cunningham accepted under questioning that she had noted this Prisoner down in her list of people to interview and should have interviewed him.
- c. Of the individuals Ms Cunningham did interview:
  - i. She only asked surface level questions and did not address in any detail the allegation of inappropriate force. Ms Cunningham said she understood her role was to hear from witnesses as to their version of events and to reach a conclusion based on that evidence. She said she was not aware that she was required to test the evidence, or put any discrepancies to the witnesses for their response.
  - ii. During Ms Cunningham’s questioning of Mr Cranstoun, the written transcript shows Ms Cunningham leading him and putting words in his mouth. Materially, for example, when recounting what had initially happened Mr Cranstoun said that Prisoner V “come flying back – saw him go back and hit the floor”. However, Ms Cunningham subsequently said to Mr Cranstoun:

Right back to the doorway right at the start the very first thing that you saw was the push and then saw the prisoner fall back on the ground.

Mr Cranstoun responded “I knew it wasn’t a trip”.

- iii. Ms Cunningham did not address the discrepancy between Mr Cranstoun’s oral evidence and the incident report where he stated that he saw the Prisoner “fall backwards onto the ground”. She did not provide him with a copy of his incident report nor provide him with an opportunity to review the CCTV footage. Under questioning from the Authority Mr Cranstoun said he could not recall seeing the Prisoner being pushed.

*Corrections did not sufficiently raise its concerns*

[39] Corrections did not sufficiently raise its concerns with Mr Walford or, as required by the Procedures Manual, put each allegation and relevant evidence gathered to Mr Walford including “inferences that may be drawn from the evidence (e.g. that the conduct in question was deliberate).” I am fortified in this finding by the following evidence:

- a. During Ms Cunningham’s investigation she first considered the level of force used, then whether the force was reasonable in the circumstances, and next what other options were available. Mr Walford was not asked for his response in relation to these matters.
- b. Mr Walford was not provided with an opportunity to respond to any discrepancies or inferences that Corrections had drawn from the evidence. Ms Cunningham accepted she did not put to Mr Walford what Corrections believed the CCTV footage showed, never put to him that he slapped Prisoner V after Prisoner V had released his hand from his testicles, or that she considered he showed no evidence of being in pain. Consequently, Mr Walford could not properly respond to or rebut those views. Ms Cunningham accepted, in hindsight, that she could have done so.

- c. During the investigation Ms Harrex agreed she took into account a number of matters in deciding that Mr Walford had used inappropriate force that had not been raised with Mr Walford prior to his dismissal. For example:
- i. Mr Walford *intentionally* pushed Prisoner V to the ground.
  - ii. Mr Walford had picked Prisoner V up and pushed him down again.
  - iii. Mr Walford had pushed the Prisoner to the ground again after he slapped him.
  - iv. Mr Walford used prolonged and heated use of force on the Prisoner.
  - v. Prisoner V's hands were away from Mr Walford's body at the time he slapped him.
  - vi. Mr Walford was holding Prisoner V's arm while he was slapping him.

*Finding on issue one*

[40] I find that Mr Walford was unjustifiably dismissed. The defects in the process followed by Corrections were not minor and did result in him being treated unfairly. Corrections is a very large public sector employer with an in-house human resources team. Such an employer can properly be expected to conduct an investigation fully and thoroughly especially in circumstances where it has been shown in recent times to know the correct process to follow when conducting an investigation into serious misconduct.<sup>2</sup>

**Issue Two: Entitlement to remedies under s 123**

[41] Where the Authority determines that an employee has a personal grievance it may, in settling that grievance, provide for one or more of the remedies set out in s 123(1) of the Act.

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<sup>2</sup> *Mokaraka v Department of Corrections* [2019] NZERA 544.

[42] In the present case, Corrections maintains that any entitlement that Mr Walford may have had to remedies ought to be extinguished due to his egregious conduct.

[43] In *Xtreme Dining Ltd t/a Think Steel v Dewar* a full bench of the Employment Court considered circumstances where the Authority or the Court might conclude that it should not award any remedies to an applicant notwithstanding a successful finding of a personal grievance.<sup>3</sup> The Court said:

[216] We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with “equity and good conscience”. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

## **Analysis**

[44] I am satisfied that Mr Walford’s conduct, when the whole incident is evaluated, was egregious misconduct. The force that was used by Mr Walford on a 79 year old prisoner was excessive, inappropriate and unnecessary.

[45] The vulnerability of the Prisoner, and the significant power imbalance, is a factor that adds to the egregious nature of the incident. At the time of the incident the Prisoner was 79 and had a number of significant medical concerns. These included dementia, a colostomy bag and other age related health concerns. Mr Walford’s actions endangered the Prisoner and could have endangered himself and other Corrections Officers working in the Unit at the time if the other prisoners had decided to join in.

[46] Mr Walford’s actions are exacerbated by the duration of the incident and the many opportunities he had to de-escalate the situation. This was not a situation such as that which arose in *De Bruin v Canterbury District Health Board* where the employee’s slapping of a patient in response to being spat in the face was viewed as a

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<sup>3</sup> [2016] NZEmpC 136.

natural or instinctive survival response”.<sup>4</sup> The present case is more akin to the situation that arose in *The Chief Executive of the Ministry of Social Development v Ma’Auga Tuilepa*.<sup>5</sup> As was the case there, Mr Walford could have de-escalated the situation using the training he had been provided with so as to have avoided the situation that developed. For example:

- a. While the prisoner was on the ground, and kicking out at Mr Walford, he could have walked past the Prisoner towards Mr Cranstoun who was watching the scene several feet away. However, Mr Walford made no attempt to move away from the Prisoner. Under questioning Mr Walford acknowledged that the Prisoner was being “silly”, that there was no “imminent threat” and he knew the prisoner “thought he was being attacked by me”.
- b. After Mr Walford turned the Prisoner around, Mr Walford had an open escape route that he could have utilised to move away. He agreed he could have walked away at this point but didn’t because he was “dealing with a person throwing a tantrum”.
- c. After picking up the Prisoner, and whilst he was lying on his side and prior to him grabbing Mr Walford’s testicles, Mr Walford had another opportunity to move away. He did not.

[47] In all the circumstances, although I have found that Mr Walford was unjustifiably dismissed on the grounds of the process followed by Corrections, this case is one of the rare situations where I find Mr Walford’s conduct was so egregious that no remedy should be awarded.

### **Costs**

[48] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves, noting that the parties have each been successful to some extent.

[49] If they are not able to do so, and an Authority determination on costs is needed, the parties may lodge, and then should serve, a memorandum on costs within

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<sup>4</sup> *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110.

<sup>5</sup> *The Chief Executive of the Ministry of Social Development v Ma’Auga Tuilepa* [2017] NZEmpC 84.



28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the opposing party 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.

[50] 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>6</sup>

### **Outcome**

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

- a. Mr Walford was unjustifiably dismissed.
- b. No remedies are awarded.
- c. Costs are reserved

Jenni-Maree Trotman  
Member of the Employment Relations Authority

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<sup>6</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].