

Attention is drawn to the
order prohibiting publication
of certain information

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 110
3050494

BETWEEN STACEY HUDDY
Applicant

AND THE CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS
Respondent

Member of Authority: Andrew Dallas

Representatives: Marty Braithwaite, advocate for Applicant
Tara Downes and Juliet Dobson, counsel for Respondent

Investigation Meeting: 12 and 13 June 2019 in Christchurch

Submissions: 28 June 2019 and 19 July 2019 for the Applicant
12 July 2019 for the Respondent

Determination: 6 March 2020

DETERMINATION OF THE AUTHORITY

Non-publication order

[1] Under cl 10(1) of the Second Schedule to the Employment Relations Act 2000 (the Act), I prohibit from publication any evidence which may identify any current or former prisoner held in custody by the Department of Corrections (Corrections) and various documents lodged in the course of proceedings, now held in the Authority's file, and marked "not for publication".

Employment Relationship Problem

[2] Stacey Huddy says she was unjustifiably dismissed from her employment by Corrections as a corrections officer at Paparua Prison, a large prison for male prisoners located in the southern outskirts of Christchurch. Ms Huddy said her dismissal resulted from a seriously flawed investigatory process and was substantively unjustified. In settlement of her claims against Corrections, Ms Huddy sought reinstatement, various compensatory remedies and the imposition of penalties under the Employment Relations Act 2000 (the Act) for breaching her employment agreement.

[3] Corrections denied Ms Huddy's dismissal was unjustified, resisted all her other claims and opposed the granting of any remedies to her or the imposition of penalties against it.

Issues

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

- (i) Was Ms Huddy's dismissal, and how the decision was made by Corrections, what a fair and reasonable employer could have done in the circumstances at the time;
- (ii) If Corrections' actions in dismissing Ms Huddy did not meet the standard of a fair and reasonable employer, what remedies should be awarded, considering:
 - (a) Reinstatement;
 - (b) Lost wages; and
 - (c) Compensation under s 123(1)(c)(i) of the Act.
- (iii) If Ms Huddy is successful in her person grievance against Corrections, did she contribute to the situation giving rise to this?;
- (iv) In taking the actions it did against Ms Huddy, did Corrections breach the collective agreement governing her employment such that a penalty or penalties should be imposed?;
- (v) Should the Authority exercise its discretion and award part or all of any penalties to Ms Huddy?; and
- (vi) Should costs be awarded to the successful party?

The Authority's investigation

[5] During the Authority's investigation meeting, I heard evidence from Ms Huddy, Ms Huddy's mother, Corrections Association of New Zealand (CANZ) union delegate, William Kavanagh, a principal corrections officer, a senior corrections officer and for Corrections: acting prison director, Louise Dierck, operational performance adviser Lesley Bell and human resources adviser Christine Kibblewhite.

[6] Having regard to s 174E of the Act, I have not referred to all the evidence or other information provided to the Authority in this determination, However, I record I have carefully considered all material placed before the Authority. Further while I have also not referred to all submissions advanced by the representatives during my investigation, I record I have fully considered these.

[7] This determination is issued outside of the statutory three month timeframe provided by the Act. However, to the extent that exceptional circumstances are required to exist for this to be issued, these do exist.

What caused Ms Huddy's employment relationship problem?

[8] Ms Huddy was initially employed by Corrections in a "civilian" role of property officer. She held this role for approximately six years before commencing with the department as a corrections officer on 16 October 2017.

[9] Ms Huddy was a member of the Corrections Association of New Zealand (CANZ), one of two public sector unions representing corrections officers, and her employment was governed by the Department of Corrections Frontline Staff (Prison-based) Collective Agreement, 2017 – 2019 (the collective agreement). Ms Huddy worked in the Remand Unit, which is also known as "Charlie Unit".

[10] On 1 June 2018, a probation officer in a location outside of Christchurch advised his manager that he had been told by Prisoner J, who had been recently released from the custody of Christchurch prison, that he was in a relationship with Ms Huddy and that they had been “together for four months”. Evidently upon review, Prisoner J had provided Ms Huddy’s address and phone number as an approved person on a prison document.

[11] This information was communicated to Ms Kibblewhite, in her capacity as human resources adviser for Christchurch prison, via email and she was asked to contact the “Integrity Support Team” (IST) and the appropriate manager at the prison. Ms Kibblewhite then cross-referenced the mobile number provided by Prisoner J on the prison document for Ms Huddy with her payroll records and found they matched. Ms Kibblewhite then requested the IST conduct some initial inquiries including reviewing the prisoner telephone monitoring system (PTMS), which records all incoming calls to prisoners and all outgoing calls made, for calls made by Prisoner J to Ms Huddy’s mobile number.

[12] Ms Kibblewhite then communicated the preliminary information to Ms Dierck and another senior manager at the prison. Ms Kibblewhite said that she vividly recalled Ms Dierck’s reaction to the information which included saying words to the effect of “I cannot believe this” and “I just don’t believe this”. Ms Kibblewhite advised Ms Dierck that she did not have all the information and advised her not to do anything further until further information had been received from the IST.

[13] Ms Dierck said her reaction upon hearing from Ms Kibblewhite about involvement of Ms Huddy in the situation was derived from her knowledge of her and the fact she had specifically asked for Ms Huddy to work at Charlie Unit. However, Ms Huddy said that Ms Dierck had overstated any knowledge she had of her. Ms Huddy also contested Ms Dierck’s involvement in her being deployed to Charlie Unit. She was supported in this regard by the evidence of the Principal Corrections Officer, who had, on his account, been causative in the selection of Ms Huddy for the role.

[14] On 6 June 2018, Ms Huddy was invited to an “informal” discussion with Ms Dierck. Ms Dierck said that as she did not expect the matter to contain any substance and expected it to be resolved quickly it was not necessary to involve Ms Kibblewhite and Mr Kavanagh or another union representative. Ms Huddy said she was not given pre-warning of the meeting or advised what the meeting was about. As Ms Huddy was a member of CANZ, cl 11.1.1 of the collective agreement required that Ms Dierck to advise of her “right to request CANZ assistance or representation at any stage”.

[15] Ms Dierck said during the meeting she “simply” showed the email containing the information provided by Prisoner J to the Probation Officer to Ms Huddy. Ms Dierck said Ms Huddy said she refuted the information and said she just knew Prisoner J through Charlie Unit and prior to that through the prison’s property office. Ms Huddy said that Ms Dierck also asked her if she had written or telephoned Prisoner J. Ms Huddy advised Ms Dierck that she had not. Ms Huddy did not, however, advise Ms Dierck that she had received uninvited phone calls from Prisoner J because she was surprised by the question.

[16] Ms Dierck said she believed Ms Huddy. Ms Dierck said she thought that perhaps Ms Huddy had been set up. The pair discussed Ms Huddy’s safety and Ms Huddy advised she would change her mobile phone number and close her “Facebook” account. Ms Dierck said the “informal” meeting then ended.

[17] Ms Huddy discussed the meeting with her Principal Corrections Officer. She disclosed to the Principal Corrections Officer that she had not advised Ms Dierck she had received phone calls from Prisoner J. The Principal Corrections Officer then accompanied Ms Huddy back to Ms Dierck’s office where Ms Huddy told her about the *calls*. Ms Dierck said that Ms Huddy told her she had only received *one* call. Ms Dierck said she told Ms Huddy that it was not “good” she had received telephone calls and not advised her line manager. Ms Dierck said she declined Ms Huddy’s offer to provide her phone records because she did not think it was necessary.

[18] When I asked Ms Kibblewhite about this “informal” meeting between Ms Huddy and Ms Dierck, she said that she advised Ms Dierck not to engage in this informal process with Ms Huddy. Despite the apparent “informal” nature of the meeting, Ms Dierck took notes of the meeting.

[19] On 8 June 2018, Ms Kibblewhite received a report from IST that showed that 454 calls had been placed through the PTMS to Ms Huddy's mobile number. Ms Huddy's mobile number was one of Prisoner J's approved numbers albeit under a different name: Stacey [Smith].¹ The report from IST showed that Ms Huddy had accepted a number of these calls and spoke to Prisoner J for lengths of time between 1 minute and 15 minutes (being the maximum allowable prisoner call time). IST had also analysed the contents of two of the telephone calls between Prisoner J and Ms Huddy. Corrections would ultimately suggest there were a number of further examples of an inappropriate relationship. However, some of these, at least, based on evidence received from corrections officers during the investigation meeting appear to form part of general interactions between prisoners and corrections officers.

[20] However Ms Huddy did accept she spoke to Prisoner J twice upon release from prison; although Ms Huddy said that Prisoner J called from a private number and she believed it to be a work call.

[21] During the investigation meeting, the automated message that prefaces a telephone call made from a prison was played on several occasions and was the subject of other evidence. In summary, this evidence disclosed that it is clear that a person receiving a telephone call from a prison clearly knows they are receiving such a call and has to take a positive step to connect to the prisoner making the telephone call from within the prison.

[22] Ms Dierck said she reacted to the report with total surprise and shock. Ms Dierck said that "it was at this time that [she] realised [she] needed to deal with the issue seriously and [she] therefore decided to start a formal disciplinary process". Ms Huddy contended the disciplinary process actually started with the "informal" meeting on 6 June 2018.

¹ The number was listed with reference to "Stacey [Surname]" being Prisoner J's surname.

[23] On 12 June 2018, Ms Dierck and Ms Kibblewhite met with Ms Huddy and Mr Kavanagh. Ms Huddy was advised the allegations to be investigated were that Ms Huddy:

- (i) may or may have been in an inappropriate relationship with an offender/prisoner, namely Prisoner J;
- (ii) failed to declare a conflict of interest in relation to Prisoner J.

[24] Ms Dierck said she advised Ms Huddy that if the allegations were substantiated they may breach Corrections' code of conduct and be misconduct or serious misconduct warranting disciplinary action, including dismissal. Ms Dierck also advised Ms Huddy she was considering suspending her.

[25] On 14 June 2018, Ms Dierck and Ms Kibblewhite met with Ms Huddy and Mr Kavanagh to discuss possible suspension for Ms Huddy. As Prisoner J had already been released and due to rumours already swirling in the prison, alternatives to suspension were discussed. Ultimately, Ms Huddy was not suspended but provided with alternative duties in the Gatehouse, which among other things, involved limited prisoner interaction. Ms Dierck would confirm Ms Huddy's alternative work arrangements in writing on the same day.

[26] Ms Kibblewhite was involved in finding a person to carry out the employment investigation on Ms Dierck's behalf. After discussion between Ms Kibblewhite and Ms Dierck, Ms Bell was appointed as investigator. Ms Kibblewhite said she knew Ms Bell's history and experience in conducting reviews. However, at the time of her appointment and during the employment investigation into Ms Huddy, Ms Bell did not hold the position of "manager" as required by clause 11.1.4 of the collective agreement. This clause relevantly provided: "[b]efore any substantive disciplinary action is taken an appropriate investigation is to be undertaken by a manager".

[27] Mr Kavanagh raised concerns about Ms Bell's appointment as investigator. He said he was aware she did not hold a manager position. Mr Kavanagh said he also reviewed the prison's organisational chart, which confirmed Ms Bell's position was not that of a "manager". Additionally, a Corrections policy document entitled "Responding to Employee Conduct and Behaviour" which was provided to the Authority referred to the investigator as "another person (or persons)". However, this was also seemingly inconsistent with the requirements of the collective agreement.

[28] In her evidence to the Authority, Ms Bell described the process she undertook to arrive at both her preliminary investigation report and her final report. She obtained Prisoner J's telephone number request form to gain an understanding who signed-off on Ms Huddy's mobile number being an approved number. She also interviewed the Probation Officer, Prisoner J and listened to approximately 20 telephone calls from the PTMS. Ms Bell described these as a "snapshot" of the 454 calls made by Prisoner J to Ms Huddy and were taken from the beginning, middle and end of the relevant time period the calls were made (7 February 2018 to 29 May 2018). Ms Bell said it was not necessary to listen to all calls because the "snapshot" or "sample" "clearly and strongly indicated an inappropriate relationship".

[29] Ms Bell also interviewed Ms Huddy in the presence of Mr Kavanagh and Ms Kibblewhite. Ms Kibblewhite said she attended to "ensure the meeting ran smoothly and I took notes". Ms Bell typed summaries of some of the telephone calls she listened to and invited Ms Huddy to provide feedback; which she declined to do. Ms Bell also provided various pieces of information to Ms Huddy including the statements obtained from the Probation Officer and Prisoner J (which contained a claim he had manipulated Ms Huddy).

[30] Ms Bell did not interview Ms Huddy's Senior Corrections Officer or Principal Corrections Officer; both may have been able to shed light on what interactions were occurring, if any, between Ms Huddy and Prisoner J in Charlie Unit. Indeed, both officers expressed surprise at not being interviewed as part of Ms Bell's investigation in their evidence to the Authority.

[31] The Principal Corrections Officer was spoken to during the employment investigation by Ms Dierck after he sent her an email expressing confidence in Ms Huddy but acknowledging she had made a "silly mistake". Ms Dierck said she did not respond to the email but advised the Principal Corrections Officer that she regarded the email as inappropriate because the officer was not aware of all the facts.

[32] Ms Huddy's Senior Corrections Officer was also spoken to by Ms Dierck during Ms Bell's employment investigation (Ms Dierck seemed to be suggesting this meeting occurred on or about 31 August 2018, after the investigation was completed). The Senior Corrections Officer described this as being "summonsed" to a meeting with Ms Dierck. As the Senior Corrections Officer was unaware of the reason for the meeting, the officer asked Ms Dierck if she needed to be a support person to which she received an "LOL" ["laugh out loud"]. During the meeting, the Senior Corrections Officer said Ms Dierck initially engaged the officer in a conversation about conflicts of interest in a "hypothetical sense". In response to which the officer said she asked if the meeting was about Ms Huddy. The officer said Ms Dierck confirmed that it was and asked if Ms Huddy had anything to do with Prisoner J "outside the wire". The Senior Corrections Officer told Ms Dierck that the officer had not seen anything or any conflict of interest between Ms Huddy and Prisoner J. The officer said this ended the conversation because Ms Dierck turned away to look at her computer. This left the officer with the impressions that what was said had "not fitted" with what Ms Dierck wanted to hear.

[33] No statements were taken from the Senior Corrections Officer or Principal Corrections Officer and seemingly no notes of these discussions were made by Ms Dierck.

[34] Ms Bell interviewed a corrections officer that both Ms Huddy and Prisoner J said may have approved Ms Huddy's telephone number on Prisoner J's form without following the correct process. However, Ms Bell said she was then "unable to contact" the corrections officer to get the officer to confirm the statement. Ms Bell said that "on advice" the officer's statement was set aside and not relied on. Mr Kavanagh claimed that the corrections officer told him that the officer refused to sign the statement because it was "not an accurate account". Mr Kavanagh said that when he asked Corrections to see the statement he was told that it did not exist.

[35] However, Ms Bell said in her evidence she did not interview another corrections officer identified by Prisoner J as being a person who possibly checked Ms Huddy's telephone number on the approved contact form because "he was rostered off on the day the approved contact form was completed, so clearly he had not approved it".

[36] As well as attending the interview with Ms Huddy, Ms Kibblewhite provided other forms of support to Ms Bell during the investigation. Ms Kibblewhite said Ms Bell provided her with a copy of the draft report prepared to both proofread and provide a general "sense" check. Ms Bell said Ms Kibblewhite said the report "captured everything" and she also confirmed that Ms Huddy had signed the code of conduct acknowledgment.

[37] Ms Bell then finalised the report and it was provided to Ms Dierck. Ms Kibblewhite said was absent from the office after the delivery of the final report, so two other senior human resources staff assisted Ms Dierck for the remainder of the process.

[38] Upon its ultimate completion, Ms Huddy and Mr Kavanagh were provided with Ms Bell's investigation report. The report concluded that both allegations were made out "on the balance of probabilities".

[39] Mr Kavanagh, who represented Ms Huddy throughout Ms Bell's investigation said that:

- (i) Ms Bell's manner during her investigation was "accusatory rather than investigatory";
- (ii) Ms Bell failed to investigate matters that should have been explored including interviewing the Principal and Senior Corrections Officers;
- (iii) the Probation Officer who was interviewed by Ms Bell acted as a support person for Prisoner J when he was also interviewed by her;
- (iv) the claim Prisoner J manipulated and was "stalkerish" towards Ms Huddy was not investigated;
- (v) Prisoner J was not asked if he a physical relationship with Ms Huddy (clear implication that there was or had been).

[40] On 17 August 2018, Mr Kavanagh provided Ms Dierck with a written submission on Ms Huddy's behalf. In addition to re-litigating the substance of the allegations, including with reference to the forgoing, a central criticism advanced in the submission was that Ms Bell's report contained a significant amount of "opinion".

[41] Ms Dierck said she carefully considered the submission before arriving at the preliminary view that the two allegations were substantiated against Ms Huddy and that she should be dismissed. This was communicated to Ms Huddy via letter dated 4 September 2018.

[42] On 19 September 2018, Ms Dierck met with Ms Huddy and Mr Kavanagh to receive Ms Huddy's response to the preliminary view that she should be dismissed. Ms Huddy advanced the following submissions:

- (i) Corrections had not specified the type of "inappropriate relationship" she had with Prisoner J;
- (ii) dismissal was too harsh and that she would benefit from a second chance with further "Getting Got" training;
- (iii) Corrections had not followed a fair procedure and Ms Huddy had not been invited to bring a representative with her to the "informal" meeting on 6 June 2018;
- (iv) the Principal Corrections Officer and Senior Corrections Officer had confidence in her;
- (v) she had accepted responsibility for receiving telephone calls and not telling her managers but that any relationship between her and Prisoner J was not inappropriate.

[43] Mr Kavanagh would also come to allege a disparity of treatment between Ms Huddy and other corrections officers who found themselves in similar situations. This would also be raised on Ms Huddy's behalf during the investigation meeting.

[44] After the meeting, Ms Dierck said she decided to listen to some of the telephone calls between Ms Huddy and Prisoner J despite reviewing the transcripts of the calls listened to by Ms Bell. Ms Dierck listened to two calls in total. She described the first as containing “general chat”. However, Ms Dierck said she was “absolutely appalled by the content of the [second] phone call” and said the exchanges between Ms Huddy and Prisoner J suggested to her it was “very clear” they were “having an inappropriate relationship”. Ms Dierck said as a result of listening to those telephone calls it confirmed her preliminary view there was an inappropriate relationship and she “could no longer have trust and confidence in her”.

[45] Ms Dierck said she seriously considered Ms Huddy’s submissions but they did not change her view about Ms Huddy’s dismissal. A further meeting was held between Ms Dierck, Ms Huddy and Mr Kavanagh on 18 October 2018. Also in attendance was Regional Human Resources Manager, Southern Region, Laurayne Devery, who was standing in for Ms Kibblewhite. During the meeting, Ms Dierck expressed her final view that Ms Huddy had not maintained professional boundaries with Prisoner J, had breached Corrections’ code of conduct as a result, and should be dismissed on notice by Corrections on four weeks’ notice with effect from 18 October 2018. This was subsequently confirmed in writing.

[46] Ms Huddy said she cooperated fully with Ms Bell’s investigation. Ms Huddy said she made appropriate concessions during the investigation including that she played some role initially, and inadvertently, approving a phone number one digit removed from her actual number for Prisoner J – which Corrections alleged was subsequently altered to her number - but did not carry out the necessary subsequent checks on the number. Ms Huddy would, however, strenuously deny she ever provided Prisoner J with her number in the first instance. She also said she was not responsible for the claims made by Prisoner J to the Probation Officer, including physical contact, which she said were a fiction.

[47] Ms Huddy said any training given by Corrections including “getting got” related to scenarios other than the one she found herself in. She said she felt trapped by Prisoner J’s repeated calls and that she tried to deal with the situation as best she could including by humouring him. Ms Huddy would acknowledge in hindsight she should have spoken to senior officers. When Prisoner J was released from prison, Ms Huddy said she changed

her mobile phone number. Ms Huddy said she was shocked by the decision to dismiss her and suggested the outcome had been pre-determined by Ms Dierck.

The Authority's view of Ms Huddy's employment relationship problem

[48] To the extent Corrections could claim there was a valid substantive reason for dismissing Ms Huddy, I find it was completely undermined by the employment investigation it carried out. In my view, Corrections' investigation was defective in several significant respects which resulted in unfairness to Ms Huddy such as to render her dismissal unjustified. These defects of process were:

- (i) While Ms Dierck characterised the 6 June 2018, which actually occurred in two parts, as "informal" and not part of the disciplinary process, I find this was contradicted by the following:
 - a. Ms Kibblewhite advising Ms Dierck not to engage in an informal process with Ms Huddy (presumably to avoid a finding such as this);
 - b. Ms Dierck taking notes of the meeting and then using these to help substantiate the allegations against Ms Huddy;
 - c. Ms Dierck telling Ms Huddy that it "did not look good", or words to the effect, during the second part of the meeting (when it must have been very apparent to Ms Dierck how inappropriate the meeting was or had become.
- (ii) In any event, I find regardless of whether the meeting of 6 June 2018 was "formal" or "informal" that Ms Dierck was required by cl 11.1.1 of the collective agreement to advise Ms Huddy of her "right to request CANZ assistance or representation at any stage" and she did not do so.
- (iii) The appointment of Ms Bell as investigator was made in breach of cl 11.1.4 of the collective agreement which required her to be a "manager"; which by her own admission and that of other Corrections witnesses she was not;
- (iv) The complete disregard by Corrections of Mr Kavanagh's concerns about breaches of the collective agreement in respect of Ms Huddy. This is also evidence pointing towards a pre-determined outcome in my view;
- (v) The failure by Ms Bell to interview Ms Huddy's Principal Corrections Officer and Senior Corrections Officer about, at least, their observed interactions between Ms Huddy and Prisoner J;

- (vi) The apparent entry of Ms Dierck, as ultimate decision-maker, into Ms Bell's investigation when she interviewed Ms Huddy's Senior Corrections Officer (and failed to take any notes or produce the same) and, at least, had an email exchange with the Principal Corrections Officer;
- (vii) The failure by Ms Bell to review CCTV footage from Charlie Unit for interactions between Ms Huddy and Prisoner J which could have also assisted Ms Bell in her investigation.
- (viii) Ms Bell failed to locate a corrections officer for whom she prepared a draft statement about his knowledge about who may have approved Ms Huddy's telephone number for Prisoner J to confirm its veracity. The failure here by Ms Bell lends weight to the contention advanced by Mr Kavanagh that the corrections officer told him he was not happy with the statement's contents.
- (ix) Ms Bell's premature, blanket credibility finding about Prisoner J meant she did not properly investigate:
 - a. how Prisoner J obtained Ms Huddy's phone number;
 - b. Prisoner J's identification of a corrections officer as potentially being a person who approved Ms Huddy's phone number for him. Ms Bell said this corrections officer was rostered off on the day approval was given so "clearly he had not approved it". This is a significant assumption to make in the absence of speaking to the officer or, at least, investigating whether the roster was accurate;
 - c. Prisoner J's claim that he "manipulated" and was "stalkerish" towards Ms Huddy;
 - d. Whether Prisoner J had been in a physical relationship with Ms Huddy (this was significant because there was a clear implication from Corrections that there was or had been).
- (x) The Probation Officer interviewed by Ms Bell about the information he received from Prisoner J and Ms Huddy also acted as a support person for Prisoner J when he was interviewed by Ms Bell;

- (xi) Ms Bell conducted an insufficient investigation of the telephone calls between Ms Huddy and Prisoner J so as to be reasonably satisfied they demonstrated an inappropriate relationship. While there was a dispute in the evidence about how many Ms Bell actually listened to (either 20 or 30 phone calls), at most this constituted approximately 3% of the total telephone calls made or 4.5% of telephone calls answered;
- (xii) When Ms Bell prepared a synopsis of 13 telephone calls she had listened to, she failed to disclose transcripts or summaries for a further 7 or 17 calls to Ms Huddy and her representative.
- (xiii) Aspects of the prepared synopsis were deficient through failure to accurately record entire conversations or identify non-affirming, passive or muted responses by Ms Huddy;
- (xiv) Ms Kibblewhite provided human resources support to both Ms Dierck (which included advising on the appointment of Ms Bell as investigator) and Ms Bell, (including proofreading and sense checking her report). Given two human resources employees were deployed to assist Ms Dierck at the end of the process when Ms Kibblewhite was absent, it is clear this separation of roles could have occurred much earlier. While continuity can be important in some employment investigations; discontinuity was necessary here to ensure fairness to Ms Huddy.

[49] Finally, for completeness, while Ms Huddy has been found to have been unjustifiably dismissed on the basis of an unfair and procedurally deficient employment investigation, she also raised the issue of disparity of treatment between herself and other corrections officer. However, upon assessment of the evidence provided by the parties, including that subsequently produced by Corrections, I find the argument falls at the first hurdle of the test enunciated by the Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan*² being that there must have been a disparity of treatment.

² (No 2) [2005] ERNZ 767 (CA)

Remedies

Reinstatement

[50] Ms Huddy sought reinstatement effectively as a primary remedy. At the time of Ms Huddy's dismissal, section 125(2) of the Act provided the Authority *may* reinstate an employee who is found to have a personal grievance if it is practicable and reasonable to do so. This is the applicable law in the matter before the Authority.

[51] Corrections strongly resisted Ms Huddy's reinstatement saying she could not be trusted to maintain appropriate relationships which in turn gave rise to significant safety concerns for both Ms Huddy and her colleagues in a custodial environment.

[52] However, against this, Corrections have been found to have engaged in a flawed process to dismiss Ms Huddy. Ms Huddy has indicated her strong desire to return to the workplace and also to undertake any appropriate training. And her claim for reinstatement is also bolstered by supportive evidence provided by the Principal Corrections Officer, Senior Corrections Officer and Mr Kavanagh.

[53] Standing back and looking at the evidence as a whole, I am not satisfied that reinstatement even if it were reasonable, would be a practicable remedy. The ability to maintain appropriate boundaries in a fluid and complex custodial environment is one of the essential characteristics of a corrections officer. As Corrections is not able to continuously monitor the almost constant interactions between its staff and prisoners, it relies, as it must do, on the training and judgment of those staff to ensure appropriate boundaries are maintained. I am satisfied that Corrections provided Ms Huddy appropriate training. However, I am not satisfied that Ms Huddy used appropriate judgment and if reinstated into a dynamic custodial environment I am not confident that sufficient levels of trust and confidence between Corrections and Ms Huddy can be rebuilt and maintained. Unfortunately, for Ms Huddy this is a sad end to her career as a corrections officer.

[54] While I have declined to reinstate Ms Huddy, this is not to say that she would not be a valuable employee in any non-custodial environment because I am confident she would be. Ms Huddy came across during the investigation meeting as a diligent, hardworking person with a very pleasant disposition.

Reimbursement for lost wages

[55] Having found Ms Huddy was unjustifiably dismissed by Corrections, the Authority must, even if it awards no other remedies, order payment of the lesser of a sum equal to lost wages or three months ordinary time wages if it finds she has lost wages as a result.

[56] I am satisfied Ms Huddy made a reasonable attempt to mitigate the loss of her employment. In doing so, I accept Ms Huddy evidence's that the effect the dismissal had on her undermined her ability to find alternative employment for a reasonable period after her dismissal.

[57] I award Ms Huddy three months' pay (13 weeks ordinary time wages) as reimbursement for lost wages under s 123(1)(b) of the Act. I am also satisfied that Ms Huddy should receive any applicable holiday pay and KiwiSaver entitlements on this sum. The amounts of holiday pay and KiwiSaver should be calculated with reference to the award of lost wages.

Compensation for humiliation, loss of dignity and injury to feelings

[58] Ms Huddy sought compensation for humiliation, loss of dignity and injury to feelings. She sought a sum of \$20,000 arising out of her dismissal. Ms Huddy said that her dismissal had a devastating effect on her. She said she loved her job and it was a cruel blow to be dismissed from her intended life career. Ms Huddy said she was an honest person and believed her honesty was used against her during the employment investigation. She described her humiliation at being forced to explain to her family and friends that she had been dismissed; something that was not easily explained given her passion for her job. Ms Huddy said she had trouble sleeping in the months following her dismissal, cried constantly and stayed home to avoid fears she was being judged.

[59] I do not doubt Ms Huddy's evidence, supported by that of her mother who provided a compelling account of the effect of the dismissal on her daughter, caused her humiliation in the face of work colleagues, family and friends, significant worry and loss of sleep. Consequently, I am satisfied that an award of \$20,000 as compensation for that humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act is appropriate.

Contribution

[60] Having found that Ms Huddy is entitled to remedies for her personal grievance, I am required by s 124 of the Act to consider whether her actions were causative and blameworthy of the situation she found herself in.

[61] Ms Huddy accepted she made errors of judgment and behaved unwisely in respect of her interactions with Prisoner J. However, she said the damage she caused was to herself and not every element of blameworthy conduct should be reflected in reduced remedies. Not unsurprisingly, Corrections said, conversely, that this was a case which required a “significant finding of contribution”.

[62] There is no doubt that Ms Huddy failed to exercise proper judgment in respect of Prisoner J. However, I have some sympathy for Ms Huddy. She was drawn in by a confident, manipulative (by his own admission) prisoner and believed she could manage and control the emerging situation. As things began to spiral, it must have become increasingly clear to Ms Huddy that the reality was far different. Ms Huddy had been “got” by Prisoner J but did not take any appropriate steps to deal with the increasingly dangerous situation she found herself in. Given she was a relatively new employee, the first error of judgment was potentially understandable when viewed in context but the second was not. Ms Huddy had very supportive managers in the form of her Senior and Principal Corrections Officers. She also had her union and it was clear from the evidence Mr Kavanagh was a capable and knowledgeable union representative. Ms Huddy could have taken any or all of these people into her confidence and asked for help. She did not and to that extent her conduct is blameworthy, but not exceptionally blameworthy, because the appeal for help may have resulted in a different or lesser outcome than that of her dismissal.

[63] Ms Huddy has lost her career and been denied her primary remedy of reinstatement. With that in mind, and considering the remaining basket of remedies to be awarded, I have decided to only reduce her remedy of compensation for hurt and humiliation and not Ms Huddy’s lost wages remedy. This approach is consistent with that taken by the Court in *Maddigan v Director-General of Conservation*.³ So then, all relevant matters considered, I reduce Ms Huddy’s compensation for humiliation, loss of dignity and injury to feelings by 20% for contribution.

³ [2019] NZEmpC 190

Penalty for breach of collective agreement?

[64] Ms Huddy sought penalties for breach of the collective agreement. Her union CANZ which negotiated the agreement was not a party to the proceedings. Ms Huddy and Corrections are no longer in an employment relationship, and this determination does not re-establish one. However, Corrections and CANZ do have an ongoing employment relationship.

[65] Having found that Corrections breached clauses 11.1.1 and 11.1.4 of the collective agreement and that this contributed to the finding that Ms Huddy was unjustifiably dismissed, I am satisfied that Corrections understands its default and will ensure it complies with all its contractual obligations, including clauses 11.1.1 and 11.1.4 of the collective agreement going forward. Consequently, I decline to award penalties in the circumstances.

Summary

[66] The remedial orders made are for Corrections to settle Ms Huddy's personal grievance by paying her the following amounts:

- (i) three months' pay (13 weeks ordinary time wages) and any applicable holiday pay and KiwiSaver entitlements on this sum; and
- (ii) after a deduction for contribution, \$16,000 as compensation for humiliation, loss of dignity and injury to feelings.

Costs

[67] Costs are reserved. The parties are invited to resolve the matter between them. If they are unable to do so, Ms Huddy has 28 days from the date of this determination in which to file and serve a memorandum on costs. Corrections have a further 14 days in which to file and serve a memorandum in reply.

[68] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.⁴

Andrew Dallas
Chief of the Employment Relations Authority

⁴*PBO Ltd v Da Cruz* [2005] 1 ERNZ 808 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135.