

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**NOTE: This determination
contains an order prohibiting
publication of certain
information**

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

[2021] NZERA 336
3085314

BETWEEN

DUANE FARRELL
First Applicant

CORRECTIONS
ASSOCIATION OF NEW
ZEALAND
Second Applicant

AND

CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Marija Urlich

Representatives: Sam Houliston and Eloise Callister-Baker, counsel for
the Applicants
John Rooney and Mary Breckon, counsel for the
Respondent

Investigation Meeting: On the papers

Information and submissions received: 8 May, 10, 13 and 16 July 2020 from the First and
Second Applicant
26 June, 16 July and 4 August 2020, from the
Respondent

Determination: 30 July 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Duane Farrell has been employed by Corrections since 2013 holding the role of Senior Corrections Officer (SCO) since August 2017. In early 2018 through 2019, with the assistance of Corrections Association of New Zealand (CANZ), he says he raised personal grievances and that in 2017 he raised personal grievances himself with his

managers about matters which negatively impacted his employment. He says, in the alternative, Corrections have consented to the raising of the personal grievances through its actions. He does not seek the Authority exercise its jurisdiction to grant him leave to raise any personal grievance out of time.

[2] Corrections accepts Mr Farrell has raised within the statutory 90-day period personal grievances for unjustified disadvantage in relation to an alleged suspension on 16 March 2018 and overpayment of wages and alleged breach of the Wages Protection Act 1983 relating to the pay period April 2018.

[3] It says the matters the subject of the overpayment disadvantage claim are settled between the parties and the Authority does not have jurisdiction to deal with this claim.

[4] In addition Corrections says Mr Farrell has failed to raise the following personal grievances within the statutory 90-day period:

- (i) alleged failures of Corrections to provide information in 2017;
- (ii) failures to provide a safe work place in and around the incidents in April 2017;
- (iii) unfair disciplinary process commenced in March 2018 and suspension on 6 April 2018;
- (iv) removal of duties in March 2018;
- (v) failures to provide a safe workplace leading to incidents on 7 and 9 March 2018;
- (vi) unlawful wage deductions in breach of the Wages Protection Act 1983 in February 2019;
- (vii) failure to top up ACC payments to 100% of average earnings in April 2017;
- (viii) failure or refusal to provide information in March and April 2018 concerning communications and interactions with Police and

withholding of information in and about October 2017 whilst volunteering information to the Police; and

- (ix) failing to pay average earnings for suspension periods 15 March 2018 and 6 April 2018.

[5] Corrections does not consent to the raising of the personal grievances out of time and denies it has consented to the raising of the personal grievances (i) – (ix) by attending mediation or otherwise.

[6] This determination deals only with the preliminary jurisdictional issue of whether Mr Farrell has raised personal grievances within the statutory 90-day timeframe.

The Authority's investigation

[7] By consent the preliminary issue is determined on the papers. The Authority has received the affirmed evidence of Mr Farrell, Bevan Hanlon, Lynette Cave, Sara Dawson, Valerie McHardy, Andrew Langley and Alastair Raich.

[8] 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. It has not recorded all evidence and submissions received. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions.

[9] As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Act.

Non-publication orders

[10] Under clause 10 of the second schedule of the Act and as recorded by minute dated 5 August 2020 a non-publication order in relation to any personal information about a prisoner disclosed in documents provided to the Authority including but not

limited to the name, location of imprisonment, nature of offending, date of birth or photograph is granted not being opposed.

Issues

[11] The issues requiring investigation and determination are:

- (i) Did Mr Farrell raise personal grievances [4] (i) – (ix) for unjustified actions causing disadvantage within the statutory 90-day period with Corrections?
- (ii) If Mr Farrell's personal grievances are out of time did Corrections consent to any grievances being raised out of time?

Relevant law

[12] Section 114 of the Act provides that a personal grievance must be raised with the employer within a period of 90 days. The period begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised outside the statutory timeframe.

[13] The grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance the employee wants the employer to address.¹

[14] In relation to s 114(2) and how a grievance is raised the Employment Court said in *Creedy v Commissioner of Police*:²

It is the notion of the employee wanting the employer to address the grievance that means that it should be specified sufficiently to enable the employer to address it. So it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment ... As the Court determined in cases under the previous legislation, for an employer to be able to address a grievance as the legislation contemplates, the employer must know what to address. I do not consider that this obligation was lessened in 2000. That is not to find, however, that the raising cannot be oral or that any particular formula of words needs to be used. What is important is

¹ Section 114(2) of the Act.

² *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

that the employer is made aware sufficiently of the grievance to be able to respond as the legislative scheme mandates.”

[15] In *Creedy* the Court held that a brief letter from the employee’s barrister advising the employer that his client had a personal grievance based on unjustified disadvantage did not meet the statutory requirements for raising a grievance. The grievance is raised with the employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance the employee wants the employer to address.

[16] In *Chief Executive of Manukau Institute of Technology v Zivaljevic* Judge Holden summarised the applicable principles:³

The grievance process is designed to be informal and accessible. A personal grievance may be raised orally or in writing. There is no particular formula of words that must be used. Where there had been a series of communications, not only would each be examined as to whether it might constitute raising the grievance, but the totality of those communications might also constitute raising the grievance.

It does not matter what an employee intended his or her complaint to be, or his or her preferred process for dealing with it in the first instance. It also does not matter whether the employer recognised the complaint as a personal grievance. The issues are whether the nature of the complaint was a personal grievance within the meaning of s 103 of the Act and, if so, whether the employee’s communications complied with s 114(2) of the Act by conveying the substance of the complaint to the employer.

It is insufficient for an employee simply to advise an employer that the employee considers that he or she has a personal grievance, or even specifying the statutory type of personal grievance. The employer must know what it is responding to; it must be given sufficient information to address the grievance, that it is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance.”

[17] In personal grievances where the conduct leading to the grievance has continued over a period (as it is understood Mr Farrell to allege for at least part of his claim) the employee is required to submit the grievance within 90 days of the most recent occurrence. However, this may not preclude the Authority from taking account of the earlier incidents as part of a course of conduct or as being relevant to the amount of any compensation awarded. In a disadvantage grievance the Authority can hear evidence of events that occurred outside the 90-day period as long as these were connected to events

³ [2019] NZEmpC 132, at [36]–[38].

within the period so as to establish a course of conduct that can be evaluated as the basis for the grievance.⁴

How does Mr Farrell say the personal grievances (i) – (ix) for unjustified actions causing disadvantage were raised?

[18] Mr Farrell and CANZ say he raised personal grievances for unjustified actions causing disadvantage during his employment relating to events which occurred during the period April 2017 through to 2019. Given the span of time, the number of grievances that are said to have been discretely raised and the nature of the communications between the parties it is necessary to set the context out in detail.

April – December 2017

[19] Mr Farrell says he first became aware Corrections had concerns about his safety due to an unspecified threat on 16 August 2017 and that he raised a personal grievance in respect of this on 1 September 2017 by email to the prison director:

Hi

As you may be aware I was recently removed from [...] due to concerns for my safety.

I was informed on 16.08.17 by the Duty PCO that I would be working temporarily in [...]. Only 30 minutes later I was informed by the same Duty PCO that I would be required to work in [...] but no information was given as to why.

Due to the lack of information I was receiving I asked to see the paperwork detailing my relocation. I then talked with my Manager who also could not give me any information. Later that day I had a meeting with my Manager who drafted a risk assessment during the meeting and said he would get back to me with further information. I was later informed that I could return to work in [...] to run DTV only from 28.08.17.

On 23.08.17 I received a letter offering the position of SCO, which I accepted. I then received an email confirming that my placement as an appointed SCO would commence in [...].

I am still waiting to receive formal information about my relocation and the reasons behind this. I am also conscious that the recent concern for my safety has impacted on my placement as an appointed SCO. I would like some clarity on this as I feel I have not been kept well informed. This issue is currently causing me concern and is affecting not only my work but my time at home also.

⁴ *Premier Events Group Ltd v Beattie (No 3)* [2012] NZEmpC 79.

I look forward to commencing my new position as SCO and hope to have this matter resolved promptly.

...

[20] Mr Farrell says he raised a personal grievance in this letter by:

- raising concerns about his relocation on 16 August 2017 having received no reasons for the change in working conditions; and
- requesting information regarding his relocation and the reasons such action had been taken.

[21] Later on 1 September Mr Langley replied by email:

Hi Duane

Thanks for your email.

I was under the impression that you had been fully briefed about the threat towards you ... and that [...] had involved you in the writing up of the threat assessment? I'm sure you will appreciate and understand that the decisions to place you in other units has only been a temporary one designed to keep you safe.

Your appointment as an SCO is unconnected and placement is subject to where vacancies exist which is why you will transfer to the [...] following the successful completion of the promulgation period.

Happy to discuss further if that will help you understand things better.

Thanks.

...

[22] The next correspondence between the parties was on 21 November 2017 when Mr Farrell wrote to Mr Langley:

Andy,

I would like to formally request all incident reports, cctv footage and on body camera footage pertaining to the incident on 20/04/17 whereby I was assaulted by prisoner [...]. I believe it was at approximately [...] AM. Please also include the logs of whom the on body cameras were assigned for that period.

You may recall that shortly after returning to full duties from the injuries I sustained in this incident I was removed from my normal area of work due to an identified risk from [...]. Some time after a risk assessment was completed and the guidelines were set for where I could and could not work. I have since been informed that these guidelines are no longer in place. I would

therefore like to view the follow up risk assessment that deemed the risk to be no longer prevalent. And would also like to view the information obtained that led to the initial findings of this risk in July.

Following my recent meeting with [...] I understand that the Department of Corrections is expecting that I continue to work until otherwise advised. I would therefore like to have the risk surrounding my work re-assessed to ensure that it is safe and reasonable for me to continue to work during this time.

I hope to here back from you soon.

[23] Mr Farrell says he raised a personal grievance in this letter by:

- stating his concern that he was moved from his usual place of work due to a risk to his health and safety;
- stating his concern steps in the 18 August threat assessment had not been followed;
- requesting information held by Corrections about the threat; and
- requesting another threat assessment be carried out.

[24] By way of letter dated 5 December Mr Langley replied:

Dear Duane

Thank you for your email of 21 November 2017, requesting all incident reports, CCTV footage, and on body camera footage of the prisoner assault on you from April this year. Your request has been considered under the Privacy Act 1993 (the Act).

Please contact Security Manager...to arrange a time to view the relevant footage.

Regarding your request for incident reports, please find these attached. You will note that some information has been withheld under section 28(1)(a) of the Act, to protect the privacy of natural persons, including that of deceased natural persons.

Since your appointment to the position of Senior Corrections Officer, you have been moved to the [...]. Given your placement in a unit where there is little to no [...] activity, the [...] is an area that is deemed safe to your work. This is providing you remain in your allocated unit and do not place yourself in a compromising position by venturing into high risk areas.

Please be advised that I have asked your Residential Manager...to conduct a new threat assessment to confirm your current placement is suitable and that all appropriate measures have been taken to ensure your safety in the workplace.

I hope this information is helpful. Should you have any concerns with this response, I would encourage you to raise these with the Department. You have the right to raise any concerns regarding this response with the Privacy Commissioner....

If you have any further questions please do not hesitate to get in touch.

...

Events March 2018 – April 2019

[25] On 15 March 2018 Mr Farrell was suspended from usual duties by Corrections. There is no dispute CANZ raised a personal grievance in respect of this suspension by way of letter dated 16 March and having reviewed the correspondence I accept that is the case.⁵

[26] On 29 March Corrections commenced a disciplinary process against Mr Farrell and he was suspended from duties on 6 April. Mr Farrell says CANZ raised a personal grievance by way of email dated 13 April by raising concerns including:

- advising the meeting to discuss the suspension could not proceed due to the flawed process to date;
- Corrections role in respect of the current Police investigation and/or decision to prosecute; and
- seeking information regarding the issues raised concerning the Police.

[27] Mr Farrell says further personal grievances arose from Corrections failure to provide a safe workplace and relate specifically to assaults he suffered on 7 and 9 March whilst at work. He says these personal grievances were raised by way of email dated 15 March when CANZ wrote to Corrections raising “Official complaint against Auckland Prison PD and request for investigation into the treatment of Duane Farrell by this SMT” by:⁶

- confirming Mr Farrell had been assaulted twice on 7 and 9 March whilst at work;
- describing Corrections failure to protect Mr Farrell’s safety at work as an “absolute disgrace’ and that “no steps” had been taken to protect him;

⁵ Common Bundle of Documents 17 April 2020 pages 341-348 and 386-389.

⁶ The subject line of the email of that date.

- identifying as a hazard CANZ's members' inability to use force in light of the lack of managerial support;
- stating Corrections had prioritised the welfare of the person who had assaulted Mr Farrell over that of Mr Farrell; and
- asking Corrections to look into a situation where Mr Farrell had been assaulted twice in one week by the same person, identify the steps taken by Corrections to provide a safe workplace in the known context of these assaults.

[28] By email dated 27 March Corrections Regional Commissioner, Ms Burns replied "Val McHardy has been undertaking a review into your concerns and in relation to the employment matter." The letter records Ms McHardy and Mr Hanlon had met "regarding her findings to date and a potential way forward".

[29] Mr Farrell says that by email dated 5 April 2019 CANZ conveyed on his behalf to Corrections a personal grievance for unlawful deductions in breach of the Wages Protection Act in respect of pays in April 2018 and February 2019 which crystallised on or around 20 February 2019 when he realised his pay had dropped.

[30] With respect to ACC top up payments not received in and around May 2017 Mr Farrell says he raised personal grievances for these failures with Corrections variously through May 2017 and on 14 June and 14 November 2017.

[31] Knowledge of the events which gave rise to a personal grievance, Mr Farrell says, concerning Corrections communication and interaction with the Police in October 2017 and subsequent and failure to provide related information arose on 28 March 2018 when requests for information were made.

[32] Mr Farrell says a personal grievance was raised and acknowledged by Corrections with respect to the removal of his control and restraint instructor role on or about 22 March 2018 by letter dated 14 August 2018. He says Corrections acknowledgment and consent to the raising of this personal grievance is contained in an email dated 27 September 2018.

[33] Whether payments received during two suspension periods (15 March and 6 April 2018) were not calculated at Mr Farrell's average pay amounting to a disadvantage were, he says, raised on 9 September 2019 and acknowledged by Corrections by email dated 13 September 2019 when it suggested the parties meet to discuss these issues.

Implied Consent

[34] In the alternative, Mr Farrell and CANZ say Corrections have consented through conduct over a substantial period of time to the personal grievances narrated above being raised. They point to:

- the engagement of Corrections in correspondence with Mr Farrell and Mr Hanlon with an expressed view to resolving the issues and over the relevant span of time without any suggestion matters had been raised out of time or that any delay prevented engagement on those issues;
- the two mediations the parties have attended – 3 December 2018 and 5 April 2019 – where Mr Farrell's concerns, in their full range were covered; and
- the first challenge to raising was made by statement in reply dated 28 January 2020.

Discussion

2017 Unjustified actions – relocation and threat assessment management

[35] To raise a personal grievance there must be sufficient information communicated to the employer that a grievance is being raised in relation to the events which Mr Farrell wanted addressed. Corrections understanding as to whether the communications amounted to a raising of a personal grievance is not determinative of the issue. As stated in *Creedy* an employer "must be given information to address the grievance, that is to respond to it on its merits with a view to resolving it soon and informally, at least in the first instance."⁷ This is what occurred in respect of Mr Farrell's concerns about relocation and appointment to SCO the factual basis of which I am satisfied crystallised on 16 August when he was told he was to be relocated (16

⁷ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [37].

August). His email to Mr Langley dated 1 September set out his concerns regarding these issues, including the negative impact on him and that he wanted Corrections to take action in respect of those issues. This correspondence was within 90 days of the events coming to his attention.

[36] With respect to Mr Farrell's concerns about the threat assessment and the management of such I am satisfied the factual basis for any personal grievance arose in October when he became aware of changes to the 18 August threat assessment or, the application of the threat assessment. He had discussed with the residential manager that a threat assessment needed to be completed on 16 August, the assessment was completed on 18 August and provided to him 12 September. The Authority understands Mr Farrell's grievance to be the application of the threat assessment to circumstances which were not known to him until October 2017. Mr Farrell's communication with Corrections regarding these concerns are emails dated 21 November and 18 February 2018 the former of which falls within the statutory 90-day period of the concern crystallising.⁸

[37] Does the 21 November email communicate sufficient information to Corrections that a grievance is being raised in relation to the events which Mr Farrell wanted addressed? I accept Mr Farrell raises in the email concerns about how the threat assessment has been applied and the reasons why and asks for a re-assessment of such to ensure "...it is safe and reasonable for me to continue to work...". I am satisfied a personal grievance has been raised because the email provides sufficient information to address the grievance, a serious one, which sets out Mr Farrell's concerns about his health and safety at work and how Corrections was dealing with that, and seeks resolution.

[38] I do not accept the correspondence relied on (Mr Farrell's emails 1 September and 21 November 2017) raised personal grievances arising from the assaults Mr Farrell sustained in April 2017 or the circumstances of those assaults. The focus of the concerns raised by Mr Farrell in the correspondence 1 September and 21 November are events after he returned to work in August following the assaults in April 2017.

⁸ Refer paragraphs [37] and [38] Mr Farrell's affidavit dated May 2020.

Does the 15 March 2018 letter raise personal grievances for failure to provide a safe workplace in respect of the 7 and 9 March 2018 assaults?

[39] Yes. The letter clearly sets out Mr Farrell's concerns, conveyed by his Union, arising from the 7 and 9 March 2018 assaults, that Corrections was failing to provide a safe workplace and sought action to resolve those concerns. I am satisfied Corrections appreciated the seriousness of the issues raised because it advised by email dated 27 March 2018 that it had commenced a review into the concerns.

Does the 13 April 2018 email raise a personal grievance regarding commencement of a disciplinary process on 29 March 2018 and the suspension 6 April 2018?

[40] Yes. The email raises specific concerns about the disciplinary investigation commenced by Corrections in late March/early April against Mr Farrell namely, that the events purported to be the subject of a disciplinary investigation had not yet occurred and given the outcome of Corrections investigation into the subject events Mr Farrell was indemnified under the CEA. The email raises concerns about the impact of the disciplinary investigation on Mr Farrell. I am satisfied the purpose of raising of the concerns is to persuade Corrections to stop the disciplinary process because, in the view of Mr Farrell and CANZ, it was unfair and unreasonable. This is the resolution that was sought.

[41] With respect to the Police information request, there is no grievance raised in respect of that because the concerns are anticipatory – the email is clear next steps would depend on the information provided.

Does the 14 August 2018 email raise a personal grievance for removal of the control and restraint role?

[42] I am satisfied it does. The letter is a continuation of the resolution/review process commenced by Mr Hanlon, Ms Burns and Ms McHardy to address the numerous issues concerning Mr Farrell's employment arising from his concerns about his safety at work, disciplinary processes and breaches of terms of employment. The raising of concerns about the removal of the control and restraint role in this process

was appropriate and reasonable given the clear understanding between the parties about how Mr Farrell's concerns were to be handled.

Does the 5 April 2019 email raise a personal grievance for unlawful deductions?

[43] No. The 9 September 2019 email includes "...he [Mr Farrell] has had money unlawfully deducted from his pay not once but twice without notice" the context of which is the 5 April email (and email trail). I am not satisfied there is sufficient information contained in the 5 April email to allow Corrections to know Mr Farrell was raising a personal grievance in respect of those issues because the focus of the email is the payment rather than the underlying obligation and the 9 September email falls outside the 90-day statutory time frame.

Was a personal grievance raised for failing to pay top up payments?

[44] No. The 14 November 2017 letter, which I accept sets out Mr Farrell's concerns about correct pays and delays in progressing resolution of that issue, relates to pay in May 2017 and is therefore outside the 90-day statutory timeframe. There is insufficient evidence of the detail of the issues being raised in May and June 2017 to satisfy the Authority a personal grievance was raised by those interactions.

Was a personal grievance raised in respect of failure to provide information about communications and interactions with Police in October 2017?

[45] Mr Farrell says these issues did not crystallise until the 28 March 2018 event when it became apparent the referred interactions and communications dated back to October 2017. My view of the 13 April email is expressed at [41] above. The 15 March precedes the crystallisation date. I am not satisfied a personal grievance has been raised in respect of information requests as claimed.

Was a personal grievance raised by email dated 9 September 2019 in relation to average pay during the March 2018 suspension?

[46] The 9 September email raises a concern "Instead of this Corrections have thrown Duane to the wolves, they have reduced his wages to than (sic) 80% of his average pay. This has placed significant financial pressure on Duane and restricted the

amount of money Duane has been able to get...”. The impact of the concern is clearly stated. That Mr Farrell and CANZ want the issue resolved is also clear. The difficulty with this purported personal grievance is it relates to payments made in March 2018 and is time barred by the statutory 90 day period. The 13 September email from Mr Pattinson is not sufficiently clear on its face to amount to a consent for the matter to be raised out of time. Though it is accepted Corrections agrees to meet to discuss this issue (along with others) its position is reserved.

Has Corrections, by its actions, consented to all the personal grievances being raised out of time?

[47] This is not a situation where an extension to file out of time has been expressly or impliedly consented to because it is not understood Mr Farrell and CANZ’s to have sought such consent.

[48] It is accepted Corrections has been aware of and actively engaged with Mr Farrell and CANZ regarding his concerns about his employment with a view to resolving those issues. It is not accepted such general engagement is consent for specific personal grievances not been raised within the 90-day time period.

Outcome

[49] Mr Farrell has raised personal grievances for unjustified actions causing disadvantage for:

- (i) alleged failures of Corrections to provide information in 2017 as described in [36] and [37] above;
- (ii) unfair disciplinary process commenced in March 2018 and suspension on 6 April 2018;
- (iii) removal of duties in March 2018; and
- (iv) failures to provide a safe workplace leading to incidents on 7 and 9 March 2018.

[50] The personal grievances numbered (ii), (vi), (vii), (viii) and (ix) at [4] have not been raised and Corrections have not consented to their being raised out of time.

[51] A case management conference is to be convened with the parties to discuss directions to progress the substantive application.

Costs

[52] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority