

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 134
3119955

BETWEEN

GARY STOCK
Applicant

AND

THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Nicola Craig

Representatives: Grant Macdonald, counsel for the applicant
John Rooney and Darren Gunasekara, counsel for the respondent

Investigation Meeting: 31 March 2021

Submissions received: 8 March 2021 and at the investigation meeting for the applicant
At the investigation meeting for the respondent

Date of determination: 8 April 2021

DETERMINATION OF THE AUTHORITY

- A. Gary Stock's application for interim reinstatement is declined.**
- B. Costs are reserved.**

What is the employment relationship problem?

[1] Gary Stock was a Residential Manager at Auckland Region Women's Correction Facility (ARWCF), working for the Department of Corrections

(Corrections). He was summarily dismissed by the Acting Prison Director on 22 October 2019.

[2] On 24 September 2020 Mr Stock's claim for interim reinstatement and unjustified dismissal was initially lodged in the Authority. Urgency was not sought but Mr Stock still wished to pursue his interim claim. Mediation was then held but did not resolve the claim.

[3] The Authority sought affidavit evidence. Affidavits were received from Mr Stock (first, second and third)¹, Stephen Parr (Prison Director at ARWCF) and Gregory Macdonald (Regional HR Manager for the Department of Corrections).

[4] Submissions for Mr Stock were filed in advance of what was to be an investigation meeting on 11 March 2021 to hear submissions. That meeting was adjourned in the absence of opposition, to enable Mr Stock to file his affidavit in reply to Corrections' affidavits. An investigation meeting for submissions was held on 31 March 2021.

[5] I have dealt with this application for interim reinstatement on the basis of untested evidence and submissions. Some matters are disputed and cannot be decided on the basis of such evidence.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[7] The issues for determination in this interim reinstatement matter are:

- (a) Is there a serious question to be tried, in that does Mr Stock have an arguable case for unjustified dismissal and for permanent reinstatement?
- (b) Where does the balance of convenience lie?
- (c) Where, standing back and considering the case, the overall justice lies until the substantive matter is determined.²

¹ The second affidavit lodged was not provided in sworn form, but was confirmed by Mr Stock under oath at the investigation meeting. For convenience I refer to it as the second affidavit.

² For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863 and *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36.

[8] Some factors are relevant under more than one head but I have focused my discussion in one area of the determination.

What was Mr Stock's work history?

[9] Mr Stock worked for Corrections for around 27 years. Fifteen of those years were as a manager.

[10] Mr Stock's Residential Manager role reported to the Deputy Prison Director (DPD), who reported to the Prison Director. Mr Parr describes the role is described as helping to ensure that the prison's practices and procedures in place to ensure prisoner and staff safety are followed. It is a senior role with oversight and responsibility over the actions of others. Mr Parr assess it as requiring good judgement and decision-making, along with role-modelling of good leadership and best practice.

[11] There was some evidence regarding Mr Stock's disciplinary history although the parties did not entirely agree. Mr Stock had a relatively recent written warning and at least one letter of expectation.

What were the allegations?

[12] Concerns were brought to Mr Parr's attention.³ He describes these being about Mr Stock's conduct impacting on the prison's safe and efficient functioning. A 8 July 2019 letter set out five allegations covering events from 6 May to 2 July 2019. Those items ultimately substantiated by Corrections were that Mr Stock failed:

- (i) to pass on information about the formal withdrawal of a serious complaint of sexual allegations against another Corrections officer in a timely manner;
- (ii) to follow instructions from the Prison Director and apply the agreed approach as per multi-disciplinary team discussions when moving a prisoner;
- (iii) to follow instructions to provide information to the Acting DPD about a prisoner by a stated deadline, having the potential to impact on that prisoner's safety of a prisoner; and to follow the Acting DPD's

³ Mr Parr was at that time the Acting Prison Director but is now the Prison Director.

instruction to obtaining approval on a plan to move a prisoner, prior to moving that prisoner between units.

[13] Corrections appears to have regarded the second item as particularly serious as there was a prisoner on prisoner assault involving that prisoner the same day she was moved. Mr Stock accepted that he failed as per the third item.

What process lead to Mr Stock's dismissal?

[14] Mr Stock was represented throughout the process by a union organiser.

[15] Corrections' letter of 8 July 2019 detailed the allegations and portions of the Code of Conduct, as well as attaching documents.

[16] A meeting between Mr Parr, Mr Macdonald, Mr Stock and his union representative was held on 20 August 2019.⁴ Mr Stock responded to each of the allegations individually, giving his side of the story.

[17] Mr Parr wrote on 29 August 2019, setting out over several pages what he understood Mr Stock's responses to be and what his own considerations and views were. Four out of five allegations were found to be upheld. The preliminary view was that Mr Stock's actions represented a serious breach of the Code of Conduct, undermined trust and confidence and amounted to serious misconduct. The proposed sanction was dismissal.

[18] Due to a period of annual leave and after discussion with the union, the next meeting was not held until 1 October. Mr Stock, his representative, Mr Parr and Mr Macdonald met. The union provided a letter setting out Mr Stock's responses and other points. Mr Stock spoke.

[19] Corrections informed Mr Stock at a meeting and by letter of 22 October 2019 that he was summarily dismissed.

⁴ References to Mr Macdonald are to Mr Gregory Macdonald (the Corrections' HR Manager), rather than to Mr Grant Macdonald (Mr Stock's representative in this proceeding).

What is the first question?

[20] I assess whether Mr Stock has an arguable case for unjustified dismissal, as well as an arguable case for permanent reinstatement if he is later found to have been unjustifiably dismissed.

Is there an arguable case regarding unjustified dismissal?

[21] Corrections concluded there were several instances of Mr Stock's conduct breaching its Code of Conduct which amounted to serious misconduct and he did not produce any evidence to refute that. Mr Parr's view is that Mr Stock and his representative failed to express concern during the disciplinary process that he was not able to adequately defend against or provide information about the allegations.

[22] For Mr Stock it is argued that even the established conduct was more in the nature of performance concerns or misconduct but not serious misconduct. He is also critical of several aspects of the process and argues that some of those aspects impinge on the dismissal's substantive justification.

[23] Mr Stock believes that Mr Parr was effectively the complainant in the second allegation and thus should not have been the decision-maker. Mr Parr denies being the complainant, as all the allegations were received from a number of staff. Mr Parr's instructions do form the basis of the second allegation. It may be that Mr Stock did not dispute the instruction and there was insufficient connection to what was at stake for Mr Parr to need to step aside. However, it is difficult to be certain of this on the basis of the current evidence.

[24] Submissions for Mr Stock question the decision to deal with five allegations together and not commence until some weeks after the incidents occurred. There is no maximum number of instances of alleged misconduct that can be dealt with together. However, it is arguable on the basis of the limited evidence that a process should have been started earlier with regards to the May 2019 incidents.

[25] It is further argued that there was no investigation. Mr Parr refutes this claiming to have undertaken a comprehensive process designed to investigate whether the allegations could be substantiated and if so, whether a disciplinary outcome might be justified. It is evident that written material regarding events was collected and provided

to Mr Stock. However, it is arguable that more should have been done to document discussion with those involved or to interview witnesses.

[26] Mr Stock's position is that his responses were not taken into account. Mr Parr's evidence was that he considered all the material put for by and on behalf of Mr Stock. One of the allegations was not upheld as a result of Mr Stock's responses. There was somewhat confused evidence regarding whether an email either by or relating to the Acting DPD was provided by Mr Stock or referred to at a Corrections meeting. That will need to be resolved at the Authority's substantive investigation meeting.

Conclusion on arguable case of unjustified dismissal

[27] Having considered all the evidence and submissions for Mr Stock and the responses from Corrections, I accept that Mr Stock has an arguable case that Corrections did not act as a fair and reasonable employer could have done regarding and therefore he was unjustifiably dismissed. On the basis of the material before me, I would not however describe this as a strong case.

Is there an arguable case for permanent reinstatement?

[28] I now examine whether it is reasonable and practicable to reinstate Mr Stock, taking into account that reinstatement has returned as a primary remedy.⁵ I look at the feasibility or practical workability of re-imposing this employment relationship, noting that it is not sufficient to show resistance and strained circumstances to avoid reinstatement.⁶

[29] Mr Stock was a very long serving Corrections' employee who had worked in several roles but is seeking reinstatement to his managerial role at ARWCF.

[30] Although Corrections still operates with managers at the tier Mr Stock was in, there are no such roles vacant at ARWCF. Under other circumstances this apparent failure to hold open Mr Stock's job might well be criticised. However, as outlined below under the delay question I currently make no negative comment regarding Corrections' actions in this regard.

⁵ Section 125 of the Act.

⁶ *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Ltd v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at p 8.

[31] The absence of a vacant role makes it impracticable for Corrections to reinstate to Mr Stock's previous role or to another similar managerial role at ARWCF. It was suggested from the bar that there could be another role or roles coming up soon and so Mr Stock could be slotted in. However, without evidence that is unsatisfactory.

[32] At the investigation meeting the possibility of reinstatement to another prison was raised for the first time. Corrections' witnesses had understandably not covered the prospects and potential difficulties of reinstatement to a different prison in their affidavits. I am unable to find reinstatement to another facility practicable.

[33] Additionally Mr Stock in an affidavit, more than once describes factual evidence from Mr Parr, who is currently the ARWCF Prison Director, as not true. Mr Parr is the senior manager at the prison and Mr Stock is seeking to go back into a managerial role two steps down from Mr Parr. Alleging untruths is likely to affect the practicality of re-imposing the employment relationship, where trust and confidence are required.

[34] Having concluded that reinstatement on an interim basis is not practicable I do not explore the issue of reasonableness at this point. Training and supervision requirements which could have been considered here are discussed below.

Conclusion on arguable case for reinstatement

[35] I conclude the Mr Stock has not met the test of having an arguable case for permanent reinstatement.

What is the balance of convenience?

[36] In the event that I am wrong about the arguable case for permanent reinstatement, I now move on to weigh Mr Stock's interests and those of Corrections, including a consideration of the adequacy of damages.

Mr Stock

[37] Mr Stock provides relatively sparse evidence regarding his reasons for seeking reinstatement and the impact that not being reinstated would have on him. He enjoyed his job and believes he did it well.

[38] It appears Mr Stock may not initially have intended to seek interim reinstatement. An email he sent shortly before his departure from Corrections indicates he was in no rush to come back (from suspension) and was considering his options in business. I have no evidence regarding whether he pursued this option further.

[39] At some point which is not identified, Mr Stock obtained a truck driving job which he still holds. Minimal detail is provided about that. For example, it is not clear whether it is a full time role or what the wage or salary rate is.

[40] Mr Stock says that he is receiving less than half the salary now that he did at Corrections. No documentary evidence was filed to support this. His third affidavit refers to the removal or reduction of income almost causing the loss of his home and having to re-mortgage to retain it. He refers to his and his wife's plans being seriously upended but does not identify what those plans were. It is not clear that there are on-going financial difficulties.

[41] Mr Stock's representative suggested that bank statements could be filed. However, Mr Stock had already had three opportunities to file affidavit and documentary evidence. I was also concerned that bank statements of themselves may not explain the reasons for re-mortgaging or the wider financial position.

[42] Mr Stock's motivation for seeking interim reinstatement appears to have come from an event at his marae. An unidentified ARWCF staff member disclosed at the marae that Mr Stock had been dismissed for serious misconduct. This causes Mr Stock and his wife significant distress as his mana was lessened due to the inference that he had done something shameful to lead to dismissal.

[43] However, there is no evidence that any disclosure was caused by Corrections. Mr Stock disclosed his own sacking to three Corrections colleagues by email and I cannot rule out that it was his disclosure which lead to the marae disclosure.

[44] In terms of the adequacy of damages, I accept that any damage to Mr Stock's mana would be difficult to compensate by damages. By contrast his financial loss should be compensatable.

Corrections

[45] I now assess any detriment which Corrections would or could suffer if Mr Stock is reinstated. I take into consideration that Corrections is a substantial governmental body with a large number of employees.

[46] Corrections currently has no ARWCF vacancy at Mr Stock's former level.

[47] Corrections' witnesses point to significant training having been required by the relatively recent changing of the organisation's practices. Affidavit evidence describes a considerable additional burden on Corrections if it had to train Mr Stock separately from others who have already received the training. This would include a five-day initial course with a pass or fail outcome. The course must be undertaken in Wellington requiring travel and accommodation.

[48] Although training expenses could be seen as manageable within a large organisation, I must still weigh them in the balance.

[49] In reply Mr Stock provides examples of situations where he successfully undertook considerable learning in a new area. His representative argues that prisons are still fundamentally operated in the same way as they always have been.

[50] Corrections would want to keep Mr Stock from active duties until a course time could be arranged and he had attended and passed the course. It would also want to be satisfied that Mr Stock was able to implement lessons learned from training in active duties. Given the dismissal was based on failure to follow instructions, extra time would be likely. That position seems reasonable.

[51] In addition, given the reasons for dismissal, Corrections considers that supervision would be needed. That requires a suitable person to dedicate time to the task.

[52] Corrections' emphasises that the imposition of these time and resources would be on an interim basis with no certainty that Mr Stock's reinstatement would become permanent.

[53] Corrections also relies on its lack of trust and confidence that Mr Stock will take lessons from the required training on board and carry out his duties in a way that will

minimise the risk of harm to prisoners or staff. The job had an “on the floor” component making it a high trust role, according to Corrections.

[54] Corrections’ view of the serious nature of Mr Stock’s misconduct is emphasised, along with his perceived failure to take responsibility for his shortcomings and their potential impacts. Mr Stock’s contribution to the situation includes at least one of the incidents which he accepts occurred, albeit not rating it as seriously as Corrections does.

Delay

[55] Part of the balance exercise is consideration of delay in the filing of the interim reinstatement application.

[56] The letter from Mr Stock’s union raising the unjustified dismissal personal grievance was received on 7 November 2019. It includes a claim of reinstatement, without reference to interim reinstatement. Corrections responded on 4 December 2019, including expressing its view that reinstatement was not justified.

[57] No explanation was offered by Mr Stock for the absence of an interim reinstatement application shortly after his dismissal, at which point he was represented by his union.

[58] Whilst the union was still involved, mediation occurred on 11 March 2020. Mr Stock says he wanted to pursue his grievance but his union was not prepared to support him past the mediation stage. At some unidentified point a colleague at his new workplace referred him to Grant Macdonald.

[59] Mr Stock describes being pushed into taking action by the marae incident. However, he does not identify when that incident occurred.

[60] I appreciate that two COVID-19 lockdowns occurred in Auckland in 2020 although there is no evidence of them particularly contributing to the delay.

[61] Mr Stock met with Grant Macdonald in the first week of June 2020, some three months after mediation. After about four weeks Mr Stock received a call from Grant Macdonald saying he had tried to contact the union organiser but got no response. He asked Mr Stock to follow up, which he did. The paperwork was provided. The two

met in early September 2020. The claim was sent to the Authority on 24 September 2020 and the first affidavit followed a few days later.

[62] In conclusion, for unidentified reasons Mr Stock did not seek interim reinstatement shortly after his dismissal. On the basis of the evidence before me I cannot accept that Mr Stock promptly pursued obtaining legal representation after his union informed him that it would not take his case past mediation. Although reinstatement was mentioned as a remedy in November 2019 there is no evidence of any other indication to Corrections of this remedy being sought, particularly after the March 2020 mediation, until this claim was served on Corrections in around early October 2020.

[63] In the absence of evidence regarding when Mr Stock's previous role was filled, at this stage I do not find that Corrections acted wrongly in filling the position. Mr Stock can be seen to have contributed to the situation he finds himself in by not applying for interim reinstatement earlier.

Status Quo

[64] A related question is which party the status quo favours. Usually in interim reinstatement applications the status quo is having the employee still on the job being paid as that was the situation shortly before the application is made. However, here the status quo prior to the application was Mr Stock being away from Corrections for an extended period with another job and his role at Corrections having been filled.

Conclusion on balance of convenience

[65] I acknowledge that Mr Stock has the potential to suffer some damage if he is not reinstated. However, in light of the modest nature of his evidence, the delay and the current absence at ARWCF of a manager role at his former level I must conclude that the balance of convenience favours Corrections.

Where is the overall justice of the case?

[66] If I am wrong regarding the balance of convenience I go on to consider the overall justice of the case.

[67] In terms of the merits, I do not assess Mr Stock's grievance nor his chance of gaining permanent reinstatement as particularly strong.

[68] Mr Parr believes that Mr Stock's return would create a significant burden at the expense of prisoners and other staff. There is a suggestion that instances of assaults have had some connections to Mr Stock's failure to follow procedures. However, in the absence of specific examples, I can give little weight to that evidence.

[69] Overall there is nothing in this consideration which would persuade me that Mr Stock's reinstatement application should be granted.

Should Mr Stock be reinstated?

[70] As outlined above, I accept that there is a serious question to be tried regarding whether Mr Stock was unjustifiably dismissed by Corrections. However, on the evidence before me I do not consider that Mr Stock has established a serious question to be tried about permanent reinstatement. I have also concluded that the balance of convenience favours Corrections and the overall justice assessment does not persuade me otherwise.

[71] I decline Mr Stock's application for interim reinstatement.

What are the next steps?

[72] An Authority officer will contact the parties' representatives to set up a case management conference, where arrangements will be made in the lead up to a substantive investigation meeting. This will include a discussion about the prospect of further mediation.

Costs

[73] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority