

<p><b>NOTE: This determination contains an order prohibiting publication of the names of the parties and other certain information</b></p>
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**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 169  
3027974

BETWEEN                      AJY  
Applicant

AND                              CHIEF EXECUTIVE OF THE  
DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority:        Marija Urlich

Representatives:              Alex Hope, counsel for the Applicant  
Liz Coates, counsel for the Respondent

Investigation Meeting:        21 – 25 September, 26 November 2020

Submissions and further      2, 7, 29 December 2020 and 28 January 2021 from  
information received:        Applicant  
17 December 2020 and 19 January 2021 from the  
Respondent

Determination:                2 May 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      AJY was employed as a Corrections Officer from 2000 until her dismissal on 11 December 2019 effective 8 January 2020. She had worked for Corrections since May 2000 working at Spring Hill Correctional Facility (SHCF) from November 2014 until her dismissal for serious misconduct. AJY says her dismissal in 2020 was unjustified and that the actions of Corrections in 2017 and 2018 unjustifiably disadvantaged her in her employment. She seeks remedies including reinstatement, lost wages and benefits and compensatory damages.

[2] From October 2016 AJY worked as a Site Prosecutor at SHCF. She says the circumstances of her personal grievances arise from her attempts to improve the prosecutions office at SHCF which Corrections failed to fairly and reasonably respond to, that the stress of seeking to progress these issues in the face of this failure was exacerbated by distressing personal circumstances and physical unwellness which Corrections was aware of or should reasonably have been aware of and which, as events unfolded, have contributed to the disciplinary allegations which led to her dismissal. She says the decision to dismiss her was not one open to Corrections given these circumstances, the flawed investigation Corrections undertook and the failure of Corrections to properly consider and weigh factors which directly affected her decision making at and around the time when the alleged serious misconduct took place.

[3] Corrections denies AJY has been unjustifiably disadvantaged in her employment. It says it actively and constructively addressed AJY's concerns, took appropriate actions to respond to those concerns and engaged with her in good faith. Corrections says some background to AJY's personal grievances for unjustified disadvantage were raised outside the 90-day period and that it has not consented to any personal grievances being raised outside the statutory limitation period.

[4] With respect to AJY's claim of unjustified dismissal, Corrections says the decision to dismiss her for serious misconduct with payment in lieu of notice was a decision a fair and reasonable employer could have made in all the circumstances following a comprehensive investigation process and having fairly considered the issues AJY raised. In the alternative, if AJY's claim of unjustified dismissal is successful Corrections says reinstatement would not be reasonable or practicable, any remedies would warrant substantial reduction to recognise AJY's contribution to the circumstances giving rise to her dismissal and the fact she remained on full pay during the suspension period (May 2018 – December 2019) should be factored in any lost remuneration.

**Non-publication order**

[5] AJY seeks non-publication orders under clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) in the following categories:

- (i) Non-publication of details relating to AJY's personal private, family and health circumstances;
- (ii) Non-publication of the names of individuals who appeared as witnesses for her at the investigation meeting;
- (iii) Non-publication of AJY's name.

[6] An applicant for a non-publication order must establish specific adverse consequences arising from the publication of their identity that would justify a departure from the fundamental principle of open justice.<sup>1</sup>

*Non-publication of details relating to AJY's personal private, family and health circumstances*

[7] AJY seeks non-publication orders of personal private, family and health circumstances covered during the investigation of this employment relationship problem and contained in AJY's witness statements and affidavits and documents identified in the bundle of documents. The order is not opposed by Corrections.

[8] The information identified is private, sensitive and of a highly personal nature. There is no public interest in its disclosure. It is clear to the Authority that this is an appropriate matter in which to issue a non-publication order. The requisite high standard has been met and the interests of justice require non-publication of information of all information relating to AJY's personal private, family and health circumstances.<sup>2</sup>

[9] All information contained on the Authority file and in this determination relating to AJY's personal private, family and health circumstances is subject to a non-publication order issued under clause 10(1) of the Second Schedule of the Act.

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<sup>1</sup> *Crimson Consulting Limited v Berry* [2017] NZEmpC 94 at [96].

<sup>2</sup> *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78] and *XYZ v ABC* [2017] NZEmpC 40, EMPC 69/2017.

*Non-publication of the names of individuals who appeared as witnesses for her at the investigation meeting*

[10] There are no compelling or specific grounds in which to grant non-publication orders for this category of witnesses. The non-publication order sought is declined.

*Non-publication of AJY's name*

[11] Corrections opposes the non-publication order sought in respect of AJY's name. It submits AJY will be obliged to disclose to any future employer the reason why her employment with Corrections ended, a non-publication order will not prevent that and that embarrassment is not a reasonable ground for a non-publication order. Further, Corrections submits any such order would be ineffective due to specific factual matrix of this employment relationship problem which makes the workplace and context readily identifiable and disclosure obligations Corrections has as a public sector employer.

[12] While there is force in the submission's made on behalf of Corrections the private information before the Authority and its highly sensitive nature mean that it is in the interests of justice for AJY's identity to be subject to non-publication. Such information can reasonably be expected to be accompanied by strong privacy considerations. The Authority is satisfied given the nature of this information there is a serious risk that publication of the applicant's identity may offend against those strong privacy considerations.

[13] On balance, the requisite high standard has been met and the interests of justice require non-publication of YJL's identity.<sup>3</sup>

[14] The applicant's identity is subject to a non-publication order issued under clause 10(1) of the Second Schedule of the Act.

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<sup>3</sup> *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78] and *XYZ v ABC* [2017] NZEmpC 40, EMPC 69/2017.

## **The Authority's investigation**

[15] In the course of the investigation the Authority heard evidence from:

- AJY,
- Greg Aitken, a Corrections Officer who worked with AJY as a Site Prosecutor;
- Leanne Bernasconi, a former employee of Corrections and co-worker of AJY;
- Brian Singh, Deputy Prison Director SHCF;
- Neville Shardlow, a Corrections Officer and former co-worker of AJY;
- Mark Gulliver, a former Corrections Officer and co-worker of AJY;
- Christopher Lightbown, Prison Director SHCF;
- Anne Goodin; Senior HR Advisor, Corrections;
- Maree Chetwin, Deputy Regional Commissioner Corrections;
- Terry Buffery, Regional Commissioner – Central Region Corrections;
- Donald Tukula, Corrections Security Manager and AJY's manager at relevant times;
- John Lale Stapleford, Corrections Residential Manager and AJY's manager at relevant times;
- Nick Coston, Corrections employee and Senior Investigator at the relevant time; and
- Longomailea Takataka, Senior HR Advisor, Corrections.

[16] 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. Despite the length of this determination all evidence and submissions received have not been recorded. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and the submissions of their representatives.

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

## The issues

- [18] The issues identified for investigation and determination are:
- a. Did AJY suffer an unjustified disadvantage to her employment arising from:
    - i. a failure of Corrections to properly investigate and take action in relation to issues of workplace safety and bullying in the SHCF prosecutors' office?
    - ii. being removed from the prosecutor role?
    - iii. a failure of Corrections to deal with a health and safety complaint?
    - iv. a failure of Corrections to properly investigate a serious incident causing stigma by association?
    - v. a failure of Corrections to deal with an issue relating to communication with AJY's manager?<sup>4</sup>
  - b. Was AJY unjustifiably dismissed?
  - c. If AJY was unjustifiably disadvantaged and/or unjustifiably dismissed, what remedies should be awarded, considering:
    - i. reinstatement;
    - ii. reimbursement of lost wages and benefits;
    - iii. compensation under s 123(1)(c)(i) of the Act;
  - d. If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by AJY that contributed to the situation giving rise to her grievance?
  - e. Should either party contribute to the costs of representation of the other party?

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<sup>4</sup> For completeness it is recorded a sixth unjustified disadvantage personal grievance concerning inappropriate clothing worn by a manager has been withdrawn.

## **The employment agreement and other relevant documents**

### *Collective Employment Agreement*

[19] The relevant employment agreement is the CANZ collective employment agreement which expired on 30 June 2019 (the CEA).<sup>5</sup> The CEA includes:

#### **1.5 Good Employer**

1.5.1 In accordance with the State Sector Act 1988, the Department will act as a good employer in all aspects of its dealings with its employees and with CANZ as their union.

1.5.2 The Department shall operate a personnel policy containing provisions for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring

a) good and safe working conditions; and

...

d) recognition of the aims and aspirations, employment requirements and the need for greater involvement of the Maori people in the public Service;

...

g) recognition of the employment requirements of women; and

h) recognition of the employment requirements of persons with disabilities.

...

#### **8.1 Confidentiality**

8.1.1 An employee must not publish or disclose any information or knowledge which they may acquire or have acquired during their employment with the Department concerning...prisoners, clients or other staff of the Department.

8.1.2 The above restrictions apply both during employment and after termination.

#### **8.3 Computer systems**

8.3.1 The Department has a policy on acceptable use of technology including E-mail and internet use. These are updated and revised from

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<sup>5</sup>Department of Corrections Frontline Staff (Prisons Based) Collective Agreement CANZ 16 June 2017 – 30 June 2019.

time to time and access and use remains subject to the conditions of the relevant policy.

- 8.3.2 The Departments E-mail systems are only to be used for departmental business and for the distribution of CANZ material... Use of the equipment for private purposes is strictly prohibited.

...

## **8.6 Harassment**

- 8.6.1 Harassment in any form is prohibited.

...

## **11.0 Principles for disciplinary matters**

11. The following principles will be followed when dealing with disciplinary matters

- 11.1.1 The employee must be advised of their right to request CANZ assistance or representation at any stage.

- 11.1.2 The employee must be advised of the specific matter(s) causing concern, and a reasonable opportunity provided to state reasons or explanation.

- 11.1.3 The employee must be advised of the corrective action required to amend their conduct and given a reasonable opportunity to do so.

- 11.1.4 Before any substantive disciplinary action is taken an appropriate investigation is to be undertaken by a manager.

- 11.1.5 Depending on the seriousness of the misconduct an oral warning should usually precede a written warning.

- 11.1.6 The process and results of any disciplinary action is to be recorded in writing, sighted and signed by the employee and placed on their personal file.

- 11.1.7 If the offence is sufficiently serious the employee may be suspended pending an investigation.

- 11.1.8 If the employee is aggrieved by any action taken by the department he/she must be advised of their right to pursue a personal grievance in accordance with appropriate procedure.

...

## **12.3 Raising an Employment Relationship Problem**

- 12.3.1 Where an employee considers they have an employment relationship problem the matter should be discussed with their manager at the earliest opportunity, in an endeavour to resolve the matter promptly by direct discussion.

12.3.2 If the matter is not resolved, the employee should put the complaint in writing to their manager. A further effort will be made to resolve the matter.

12.3.3. In the event the matter remains unresolved, or the employee believes it is inappropriate to raise it directly with their manager because of the nature of the problem, the employee should contact the Regional Manager. If the matter still remains unresolved, the employee should contact the Mediation Services...

#### **12.4 Time Limit for Raising a Personal Grievance**

12.4. If an employee wishes to raise a personal grievance that must be done within 90 days of the date when the alleged grievance occurred or came to the employee's attention, whichever is the later. The grievance is 'raised' as soon as the employee has informed the Department that the employee considers they have a personal grievance they want addressed.

...

#### *Job description*

[20] AJY's job description is dated December 2014. It records her job title as 'Corrections Officer' and lists key accountabilities broadly described as to 'Ensure Security' and 'Provide Care'. Under the heading 'General Accountabilities' is the requirement to be familiar and comply with the Department's Code of Conduct, related documents and policies and procedures relating to the position of Corrections Officer and to help maintain a safe working environment by adhering to the Department policies and procedures.

#### *Code of Conduct*

[21] The Code of Conduct outlines standards of behaviour expected from Corrections employees.

#### *Policies and procedures*

[22] Various policy and procedure documents form part of the parties' employment agreement and are relevant to this employment relationship problem including:

*(i) Privacy guidance*

[23] During the course of a Corrections Officers' duties they will deal with a significant amount of private information. Unsurprisingly, Corrections has comprehensive privacy policy and guidelines including 'Privacy Breaches and IOMs access guidance'.<sup>6</sup> For the purposes of this determination the relevant parts include:

**Purpose**

This document is intended to provide guidance on responding to privacy breaches and inappropriate IOMs access to ensure national consistency.

**Guiding Principles**

- Staff can only access information in IOMs where there is a legitimate work-related purpose (e.g. managing or working with the offender whose details they are accessing).
- Privacy breaches and inappropriate IOMS access are taken very seriously by Corrections.

...

**Types of Breaches**

...

- **Serious Privacy Breach:** a staff member knowingly accesses offender information...

**Guidance**

The Code of Conduct makes it clear that accessing, using or passing on information held in Corrections' systems inappropriately or without authority is serious misconduct.

...

**Serious Privacy Breach:**

- A formal employment investigation/disciplinary process is appropriate for all "Serious Privacy Breaches".
- Investigations and disciplinary processes must comply with the 'Responding to Employee Conduct and Behaviour policy.
- Dismissal is the appropriate starting point when considering disciplinary outcomes for "Serious Policy Breaches."

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<sup>6</sup> IOMS is Corrections information management system.

- Exceptional circumstances may warrant a less severe disciplinary outcome.

(ii) *Disciplinary policy*

[24] The document titled ‘How do Managers address concerns about conduct and behaviour’ sets out detailed procedures to be followed by Corrections in circumstances including investigations into allegations of serious misconduct.<sup>7</sup> In such an investigation the accountable manager who decides to initiate a disciplinary investigation may delegate the employment investigation to another person:

...who is independent, free from any conflict of interest and experienced in conducting investigations. Their role is to investigate the allegations and then report on their factual findings and advise whether they consider the allegations are upheld.<sup>8</sup>

The investigator...could be another Manager in a different area, or someone else with the necessary investigative skills and experience to investigate the particular issue.<sup>9</sup>

[25] With respect to conflicts of interest the accountable manager, along with any person appointed to conduct the employment investigation:

...must not have otherwise been involved in the events or conduct in question, or have a personal relationship or actual or perceived conflict of interest with the staff member to the extent that they would not be reasonably able to nor be perceived as remaining unbiased.<sup>10</sup>

(iii) *Prevention of harassment and bullying policy*

[26] This policy includes:

**Managers responsibility**

If you receive a complaint or allegation of harassment you are responsible for dealing with it promptly and fairly. Your approach will be determined by the seriousness of the behaviour reported.

Some complaints may be resolved by facilitating a resolution between the parties, without the need for a formal investigation. This will depend on the nature of the complaint, and whether the parties agree to this.

**As a manager you should:**

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<sup>7</sup> This procedure document was promulgated in March 2019.

<sup>8</sup> *Ibid* page 14.

<sup>9</sup> *Ibid* page 15.

<sup>10</sup> *Ibid* page 15.

- Take seriously all complaints of...harassment or bullying and seek HR advice.
- Discuss with the complainant how she/he wishes to resolve his/her concerns.
- Make every effort to maintain confidentiality when handling complaints.
- Ensure the complainant has ongoing support and, if necessary, separate the parties involved...
- If necessary, and provided you have the appropriate level of delegated authority, instigate a formal investigation (after discussion with your HR Adviser and manager).
- Ensure procedural fairness for any employee about whom a complaint or allegation has been made.
- Advise the complainant of the result of any investigation.

### **The relevant law**

#### *The test for justification*

[27] When the Authority considers justification for the actions of Corrections including the dismissal decision it does so by applying the test of justification in s 103A of the Employment Relations Act 2000 (the Act). In determining justification of actions or a dismissal the Authority does not consider what it may have done in the circumstances. It is required to consider on an objective basis 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 of the dismissal.

[28] As part of this process the Authority must consider the four procedural fairness factors set out in s 103A(3) of the Act. The Authority may take into account other factors as appropriate and must not determine an action or a dismissal to be unjustified solely because of defects in the process if they were minor and did not result in AJY being treated unfairly.

[29] Corrections could also be expected as a fair and reasonable employer to comply with the good faith obligations set out in s 4 of the Act.

### **Background**

[30] AJY started working with Corrections at Waikeria prison on 15 May 2000 working initially as a Corrections Officer and Sentence Planner. In 2010 she became a

Site Prosecutor, having completed training in that role.<sup>11</sup> In addition, during her time at Waikeria prison AJY trained and was certified as a national prison negotiator. She described her time at Waikeria as follows:

I enjoyed my time at Waikeria Prison. I remember the feeling of completeness when I started as it was more than just a job. The long-serving officers took you under their wings and with pride they showed you how to do the job properly and to always keep yourself safe within the prison environment. They treated you like family.

[31] In November 2014 AJY transferred to SHCF. She transferred for family reasons with her then husband, who was also a Corrections Officer. AJY observed in her evidence soon after the transfer:

I quickly found that Spring Hill Corrections Facility was not the same as Waikeria. On occasions I was left feeling vulnerable and unsupported.

[32] AJY has not sought to highlight specific issues in the first few years of her employment at SHCF. The events she says have are relevant to the employment relationship problem start with her move to the prosecution's office in October 2016.

#### *SHCF Site Prosecutor's office*

##### *Late 2016*

[33] In late September/early October 2016 AJY started working in the prosecutions office at SHCF. The context in which she started work in prosecutions is set out in an email the then Acting Security Manager wrote to Mr Lightbown and Mr Tukula on 6 October 2016:

Hi Chris

In June 2016, Donald Tukula, who was the Security Manager at that time and I discussed succession planning in Security Unit, especially Prosecution...and decided that it was necessary to get some more staff trained in these areas. We had put a plan in place and started working with the Learning and Development Manager of Central Region.

...

I conducted a check of what process had been put in place for prosecution. I found that there was a desk file which was updated in 2014. There are no

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<sup>11</sup> Corrections Officers working as Site Prosecutors prosecute misconduct charges against prisoners relating to breaches of prison discipline. The charges are heard by a Visiting Justice who attends the prison site for the purpose of hearing prisoners who have appealed a misconduct charge or are referred for that purpose.

tasking sheet for day to day work and Prosecution staff managed their work by word of mouth which changed frequently...

I have discussed the situation with CO [AJY] and [the co-worker]. They both informed me that the workload has increased however the workload is manageable with two staff once the tasking sheet is formalised and both staff understand their role. At this stage I am working closely with [the co-worker] and [AJY] to prepare tasking sheet and see what work can be shared. A/PCO Sione Robertson has been informed to check on the wellbeing of CO [co-workers] and [AJY].

[34] It is clear from this email that from at least October 2016 senior management at SHCF were aware that there were resourcing issues facing the prosecution office which had the potential to negatively impact on its efficient operation, that these issues required monitoring including ongoing support for staff working there including AJY. It is also clear that the active management to improve systems in the prosecutions office as described in the above email did not occur as envisioned rather, I observe, it was reactive as issues were raised by prosecutors and in particular AJY.

[35] AJY says she was asked to sort out compliance and best practice within prosecutions. It is clear to the Authority AJY worked hard to make improvements in the operation of the prosecutions office at SHCF. It is also clear this understanding has resulted in issues around communication style surfacing when AJY sought to raise concerns and, because of the manner Corrections approached the issues I find the focus became one of conduct and communication style within the prosecutions team to the detriment of focusing on the issues this conduct highlighted which was a lack of leadership in the team, AJY's attempts to fill (or at least make up for) that leadership role and resourcing of the prosecution team. The following narration illustrates these issues.

[36] On 21 December AJY emailed Mr Stapleford and another manager with responsibilities for the prosecution office:

I was thrown into Prosecution to assist and make the necessary changes to get it up to functioning properly, however, as you are aware Prosecution continues to be run without proper processes being followed. I have made all attempts to implement processes but none of that has been implemented.

At this time and without any formal discussions and the implementing of proper procedures I am not willing to a part (sic) of Prosecution or be a party to what is happening in there.

[37] Mr Stapleford replied by email the same day that “We will need to have this discussion in person rather than via email in January”. A meeting was held in early January. Given the development required in prosecutions it is little wonder there would be matters to discuss and that regular meetings would be necessary.

[38] On 29 December 2016 AJY’s marriage ended. The following day she spoke to her manager on the telephone and advised she was taking leave. She told her manager her marriage had broken up. It is necessary to record AJY’s husband had formed a relationship with a co-worker at SHCF.

[39] The events leading up to the end of AJY’s marriage were distressing and she commenced treatment with her general practitioner and accessed counselling services.

[40] This process led in early 2017 to her disclosing traumatic events from earlier in her life which resulted in a referral to ACC counselling and have ultimately resulted in a formal diagnosis in December 2018 of a number of mental health conditions for which she was prescribed medication and counselling. At the time of investigation AJY was managing these conditions with medication and appropriate support.

2017

[41] On 19 January AJY sent the following email to Mr Stapleford and another manager:

I am requesting an urgent meeting given all 3 x prosecutors are here today to sort out what is going on in Prosecution. I am being placed under unnecessary stress and if this continues I will be having to go on stress leave.

[42] Notwithstanding the ongoing management required to improve processes in prosecutions and the issue of stress being raised a view appears to have been formed that AJY’s raising of concerns about prosecutions was not reasonable. The same day Mr Stapleford copied AJY’s email to Ms Goodin, the human resource advisor allocated to the security team with this covering email:

Myself and [another manager] are having ongoing issues with AJY and [another CO in prosecutions].

We have made some changes to address these issues and held multiple meetings with them.

However AJY has continued to send emails stating we are not supporting her.

The below email being the latest 'Threat'.

It would be good to have a discussion with you at some point around this.

[43] Ms Goodin replied the same day:

Happy to discuss, but in the meantime it might be good to hold a meeting with everyone and file note/record what is said. Given we have put a number of changes in place to address the matter then it would be useful to see what has/hasn't worked, what more can be done. Do they have any ideas, have they got any solutions, etc etc.

I think if it is file noted then we can reasonably show that we have listened, made changes, considered they (sic) views/thoughts, etc and that we have endeavoured to do everything reasonable to resolve the issues.

Are these roles that special skills are required, is it a role that staff could/would be rotated out of?

PS there is no such thing as stress leave, it is leave that is deducted from sick leave.

[44] The sensible suggestion of holding a meeting, listening to and considering the issues raised by AJY in light of steps taken to date and making a file note does not seem to have been followed. The reason why is not entirely clear.

#### *4 February*

[45] AJY injured her right foot on 4 February. The resulting pain and restricted mobility required a period of light duties. The injury was ongoing, with the pain resurfacing in early 2018 the treatment for which became a relevant factor in events which resulted in AJY's dismissal.

#### *March – health & safety tracker #1*

[46] On 7 March AJY raised the first of what would be three incident case reports by way of the Health and Safety Tracker, which is Corrections online system used to track and manage health and safety incidents and which any staff member is able to use. The event summary in the report describes the incident as "Prosecution being disadvantaged in their role", with a sub-category "Office Based Activity: Workload Stress". The incident case report records specific issues - requests for resources and support had been ignored or responded to too late which caused stress including

providing additional or relief prosecution staff to cover escorts and annual leave and a printer and a change to the lock on the prosecution office was required to provide appropriate security. There was also an allegation that AJY had been called the “email queen” which she said she found insulting. The filing of the health and safety tracker followed AJY’s ongoing raising of concerns about prosecutions including advising Mr Stapleford and Mr Tukula she was considering requesting a transfer from prosecutions.

[47] The effect of filing such an incident report was to escalate AJY’s concerns to directly involve human resources, the health and safety team and the welfare co-ordinator. The reported incident was investigated and reviewed by the Acting Residential Manager who did not have direct responsibilities for prosecutions. The findings of this review are set out in a document dated 3 April 2017. The incident review document focussed on whether the issues AJY had raised had been responded to adequately and in a timely manner and if the communications between the parties were professional. The review found the issues had been resolved, that AJY felt safe to raise issues without retribution and that the reviewer could not find evidence of an excessive delay in communications between AJY and the managers. Subsequent criticism by the health and safety team of the review being ‘light’ resulted in its resubmission following consideration of further information including information from AJY.

[48] The review also found communication between AJY, Mr Stapleford and the Security PCO with responsibility for prosecutions was not clear at times and this had caused a deterioration in the relationship, this break down had caused resentment and “may had led to a further deterioration in communications, causing further turmoil to develop and because most of the communications between the parties was verbal this was a challenge to evidence gathering”. The incident review recommended the parties continue to ensure they clearly communicate with each other and consider a conciliatory meeting with human resources to clarify lines of communication and expectations. Again, the kind of structured, facilitated meeting suggested by the review with the prosecutors and their managers did not occur.

[49] Mr Stapleford also completed a review of the health and safety tracker dated 4 April. The health and safety team raised concerns about this approach given AJY had raised allegations against Mr Stapleford and the Security PCO.

[50] On 5 April, subsequent to raising the health and safety tracker, AJY wrote to her managers copying in her union representative listing issues which had arisen during the Visiting Justice hearing the day before and characterising them as “Health and Safety issues, Staff Performance issues, plus they continue to place barriers which is preventing Prosecution from completing there (sic) duties.” It is understood she raised these issues as illustrative of the matters raised in the health and safety tracker. Emails on and around this day from AJY’s union representative, Ms Goodin and a health and safety adviser who was involved in the resolution of the health and safety tracker include:

- recognition that AJY had raised valid issues;
- her concerns needed to be listened to so she would know they were being taken seriously and could be escalated if necessary;
- appropriate staff levels needed to stabilise and if workload was an issue it needed to be assessed and action taken; and
- Mr Stapleford, as a new manager needed some support and his 4 April report should be moderated by another manager to ensure it contained the necessary information and there was no conflict of interest.<sup>12</sup>

[51] On 7 April AJY attended a meeting with Mr Stapleford and another PCO with responsibility for the prosecutions’ office along with a support person who took notes. The formatted notes have been provided and record a detailed and comprehensive list of issues were discussed including staffing levels in the prosecutions team and resourcing and where issues were resolved that was recorded and actions to be taken to progress unresolved issues. The meeting did not address or seek to address the identified communication issues.

*July - Prison Director commissions a review of prosecutions office*

[52] Notwithstanding, in the period April through to the end of June 2017 the documentary record shows AJY continuing to raise issues impacting on the day to day running of the prosecutions office including availability of staff to escort prisoners to Visiting Justice hearings and resourcing. In addition, a security issue with a technical repair of a laptop was raised and AJY had ongoing issues with the stab resistant vest

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<sup>12</sup> For completeness the need for a meeting with AJY concerning her stab proof vest was also raised.

(SRBA) she was required to but unable to wear because it caused her back pain. During this period AJY met with human resource advisor Ms Goodin and discussed a possible transfer to a scheduler role.

[53] On 28 June AJY's union raised the staff escort issue, writing to Mr Lightbown seeking a meeting. Mr Lightbown replied that day that prosecutor numbers had increased from two to three due to the increase in workload caused by remand prisoners being held at SHCF, escort staff were being provided for the Visiting Justice hearing day and to complete other tasks but were not available to prosecutions for a whole shift which appeared to be a concern for AJY.

[54] On 3 July AJY met with Mr Lightbown to discuss the issues with the prosecutions office including matters which in her view remained unresolved from the March health & safety tracker. The issues included availability of sufficient staff to escort prisoners to Visiting Justice hearings, requests for resourcing being dealt with adequately or in a timely manner and communication issues between AJY and her managers. The issue regarding access to a secure laptop by an external technician was also discussed with Mr Lightbown. Also during this meeting the possibility of AJY transferring to the scheduler role was raised as was communicating using the appropriate channels.

[55] Mr Lightbown wrote to AJY on 4 July by way of follow up to their meeting on 3 July responding to specific issues raised, including that the security breach had been appropriately dealt with and advising he had commissioned a review and analysis of the prosecution function at SHCF be undertaken by the Operations and Systems Adviser, that any recommendations would be reported to him which he would discuss with the security manager. The email ends:

Finally, just a reminder to raise issues through the appropriate channels in the future via your PCO and manager. If you feel you need you need you to (sic) can also raise with Brian Singh or myself.

[56] Mr Lightbown's response disappointed AJY and she wrote to the Inspector of Corrections based at national office attaching the email and notes and stating she took offence at his comments regarding the security breach and the comments regarding raising issues appropriately. On 4 July the Inspector replied to AJY that his

responsibility related to prisoners only, that in future communications of this nature should be raised with the prison manager, Mr Lightbown or if she could not, that she should contact the regional office.

[57] AJY also wrote to the Integrity Support Team (IST) that day seeking more information about Mr Lightbown's resolution of the security breach. The IST replied it had considered information about the security breach, AJY's concerns had been recorded, that it was understood her health and safety tracker was being managed by HR, other concerns were being dealt with by Mr Lightbown and there was no reason for IST to be further involved.

[58] Correction's concerns about AJY's communication style were again engaged by this correspondence and in particular raising issues with areas of the organisation not responsible for the matters raised. Ms Goodin asked AJY's union representative to speak to her about the concerns about her using the correct process to escalate issues and that the failure to do so made it difficult to resolve issues. These concerns were not formally raised with AJY though I observe there was clearly an employment relationship problem given the concern seemed to be ongoing for Corrections despite informal reminders to AJY of its preferred communication approach.

[59] On 6 July steps were taken to finalise the first health and safety tracker. AJY was provided an opportunity to view it and provide further comment. She raised concerns about the incident review document and the recommendations contained therein and asked for the health and safety tracker to be reviewed. In light of this the recommendation of the health and safety team was to wait to finalise the health and safety tracker until after the outcome of the prosecution review. This was communicated to AJY on 17 July. The effect of this was the health and safety tracker remained unfinalised - AJY sought an update from the health and safety team on 24 August and 25 September. On 2 October the health and safety team reported to Ms Goodin that a member had met with AJY.

[60] For completeness the last recommendation in the health and safety tracker was for the prosecution team to meet to discuss better communication. Ms Goodin wrote to AJY advising Mr Stapleford would contact her to set up such a meeting.

*14 July - SCO complaint*

[61] On 14 July a senior corrections officer (SCO) raised a complaint about AJY's behaviour towards him including an email that she had recently sent him critical of his actions which was 'reply all' to a number of staff. Mr Stapleford immediately sought HR advice, provided the complaint to AJY and met with her to discuss it on 31 July recording the outcome of the meeting in an email to her later that day. AJY acknowledged the email could have made the SCO feel as he had described in the complaint and that had not been her intention. As the email had been copied to a number of people Mr Stapleford asked AJY to raise concerns with the effected staff member directly or their manager. This was a reminder to AJY because the issue concerning communications had been raised previously with AJY. AJY told Mr Stapleford she had a better understanding of how her emails may come across and she was working on this with the support of a colleague. Mr Stapleford reminded AJY they were one team working together and that EAP support was available. The following day AJY emailed the SCO an apology which he acknowledged and accepted. The matter was resolved.

[62] This complaint was dealt with fairly and consistently with the relevant policy guidelines.

[63] Also on 14 July AJY wrote to Ms Goodin that having given the matter "a great deal of thought" she declined the scheduler secondment offer because it was a temporary position and she had "started to implement processes into Prosecution and want to finish what I started". Ms Goodin acknowledged this advice and no further steps were taken at this stage to move AJY from prosecutions.

*18 July – prosecution review delivered*

[64] The commissioned report was provided to Mr Lightbown and Mr Singh on 18 July. It is a comprehensive document which describes its purpose as "...to provide an overview of the Prosecutions process here at Spring Hill Corrections Facility (SHCF) and provide support for its continued improvement". The issues and recommendations identified in the report mirror the concerns AJY had consistently raised including issues around communication within the prosecution team and managers of the team. It is

noteworthy, as can be seen from the narration, that each time the issues in prosecutions were considered by parties not directly involved AJY's concerns were held to be valid.

[65] On 17 July AJY had written to Corrections seeking to reopen the April health and safety tracker because she believed the "email queen" comment was now supported by sufficient circumstantial evidence. This matter does not appear to have progressed further.

*24 July – medical clearance*

[66] On 24 July by way of medical certificate dated 20 July AJY provided the Department with a medical clearance to work ordinary duties following a period of six weeks wearing a moon boot while receiving treatment for her foot injury. The medical clearance also cleared her to wear a SRBA vest while performing prisoner facing duties. Steps were underway for a custom fitted SRBA vest to be provided to AJY.

*August – prosecution team meeting with Brian Singh*

[67] At the relevant times Mr Singh was the Acting SHCF prison director. In his evidence he said he had dealings with AJY in 2017 and was familiar with the issues concerning the prosecutions office and AJY. In his written evidence he described AJY as a good prosecutor who was 'straight up...and not shy to be assertive with her managers'. He said he found her to be someone who wanted things done correctly and an honest person who operated with integrity. He said he had no issues with her and she did her job really well.

[68] On 14 August 2017 Mr Singh met with the three site prosecutors - AJY, Mr Aitken and the co-worker. He had recently returned to SHCF from a secondment and was asked to hold this meeting with the advantage of bringing fresh eyes to what appeared an intractable issue. He observed the prosecutions team worked in a very small office with no personal space. His view was this poor working environment put a strain on the prosecutions team's working relationships. Mr Stapleford said he took advice from the human resources team to try to address the complaints members of the team, including AJY, were making about each other. Ms Goodin, who was providing HR

support, suggested Mr Singh get involved and have a sit-down meeting with the parties. As noted above she had already provided this advice on a number of occasions.

[69] It is not clear at this time what guidance Mr Stapleford had received to address the report finding that there was a disconnect between the prosecutions team and the security manager and PCO or what steps Corrections had taken to address this issue. Ms Singh's meeting did not.

[70] The notes of the meeting have been provided. Mr Singh allowed the team members to express their concerns and then, essentially, gave them a 'pep talk'. His notes record the outcome of the meeting as "All agreed to work together as a team, to support each other, open communication and to openly discuss and resolve issues."

[71] In their evidence to the Authority AJY and Mr Aitken were unequivocally positive about the meeting with Mr Singh. This is supported by an email Mr Aitken wrote to Mr Singh within hours of the meeting thanking him for his words and that the atmosphere in the office had already turned for the better.

[72] Notwithstanding this positive turn the underlying issues with the prosecutions office were not resolved which included increased workload and strained communication with managers. I am satisfied this has led inevitably to the issues later resurfacing.

#### *5 September – final report SHCF prosecution process*

[73] The final report was delivered on 5 September 2017. The findings and recommendations are worthwhile setting out in full:

#### **Findings**

- 53 There is no issue with the misconduct process on site, just an issue with the implementation of the process which is partly due to inexperience and operational needs.
- 54 There is a backlog of misconducts not entered, misconducts not heard, misconducts withdrawn due to exceeding timeframes, misconducts that still remain open and the increasing list of Visiting Justice hearings.
- 55 The Prosecutions Team had an unhealthy working relationship due to operational disagreements, personality clashes and inexperience which led to decreasing output.

- 56 The Prosecutions Team have a disconnect with the Security Manager and PCO which leads to a breakdown in communication, barriers being put up, working in isolation and the feeling of not being supported.
- 57 The current Prosecutions Office is not suitable for the placement of three desks and storage capacity.
- 58 The introduction of the Third Prosecutor has helped to alleviate some of the backlog.
- 59 Other contributing factors to the backlog are the availability of the adjudicators, the delay in prisoners arriving at the hearings, the unavailability of escorting staff, non replacement of Prosecutors when on leave, personal injury of Prosecutors and the incorrect completion of misconducts by the Residential Units.

### **Recommendation**

60 It is recommended that:

...

- a) The current practice of rostering additional staff to support the Adjudication hearings is continued.

...

- e) Security Manager will review the suitability of the current size of the Prosecutors office, and look at practical alternatives for the most effective use of space management.

- f) Security Manager/PCO conducts regular audits of the Prosecutions Staff workload on a quarterly basis to ensure that all timeframes and requirements are being met.

[74] A copy of the report was provided to the prosecution team on 15 September. The delay was caused by a management review of the report which ‘softened’ the language and depersonalised some of the concerns.

[75] AJY wrote to Mr Lightbown, Mr Singh and the review author that day copying in her union representative “The report is good and we are looking forward to some of the recommendations being put in place.” AJY’s email goes on to breakdown the numbers of misconduct charges dealt with in 2016 with the likely knock-on impact of delay and paperwork compliance into the 2017 year. Her email ends with a request to see the July 2017 report.

[76] Mr Stapleford, who was still in the role of Acting Security Manager said in evidence he reviewed the recommendations. It is apparent he took no active steps to implement all the recommendations or put a plan in place to do so because a few weeks after the report was finalised and distributed to the prosecutions team he moved on from that role and Mr Tukula returned from secondment to the Security Manager role.

*14 September – prisoner incident reported to prosecutions*

[77] A serious incident between prisoners was reported to prosecutions for a misconduct charge. AJY took over the file from the co-worker who had said she would cancel the charge due to filing timeframes not being able to be met. On 21 September AJY wrote to Mr Stapleford regarding concerns she had about the investigation of the incident including securing of evidence. On 2 October she emailed Mr Tukula following up her concerns about the handling of the incident including that she had lodged a complaint with the police. Though she was not directly involved AJY was deeply affected by this event. Corrections' investigation of the event and response to AJY's concerns are discussed further below.

*20 September 2017 - bullying complaint made about the co-worker*

[78] On 20 September 2017 AJY emailed Mr Stapleford raising a complaint of bullying:

Good morning Lale

I am now making a Formal complaint about [a prosecutions co-worker] and her behaviour towards me which I would deem to be bullying. As you are aware I have previous [sic] informed you of [co-worker's] bullying behaviour towards me of not following instructs given by me to follow processes in the Prosecution Officer, her rude behaviour towards me when asked questions and mostly her behaviour of just not speaking to me and giving me the "cold shoulder" treatment. There was a meeting held at Brian Singh's Office with yourself, Brian Singh and the three Prosecutors – [the co-worker], Greg Aitkens and myself in Aug 2017 to what I thought was about [the co-worker's] bullying behaviour to me. However, the meeting was held because [the co-worker] stated she was being bullied by myself. This was and remains a false allegation as it was discovered in this meeting that it was indeed [the co-worker] who was doing the bullying. This information was supported by Greg Aitkens at that time. At this meeting we were all informed to get on with each other or be moved. However, my concerns of being bullied have not been addressed as [the co-worker] is still continuing with these behaviour's [sic] as noted above.

Thank you

Cheers

AJY

[79] Mr Stapleford sought advice from Ms Goodin who said the ‘bullying process’ needed to be followed and that he should acknowledge receipt of AJY’s email and set up a meeting to plan a way forward. Ms Goodin forwarded Mr Singh the email exchange. Mr Stapleford emailed AJY that day acknowledging receipt of the email and that he would follow up with her next week regarding her bullying complaint. The ‘bullying process’ is a reference to the Corrections preventing harassment and bullying policy.

[80] AJY said neither Mr Stapleford nor Mr Tukula spoke to her about a follow up meeting regarding the bullying complaint prior to her subsequent transfer out of prosecutions. I accept this was the case.

[81] On 21 September AJY emailed Mr Stapleford regarding her workload concerns and raising concerns about the suitability of the hearing room allocated for Visiting Justice hearings. On 26 September AJY emailed Mr Stapleford that Mr Aitken was “...a witness to what has been happening in this office”. Mr Stapleford acknowledged the email that day.

*28 September – AJY misplaces her radio*

[82] On 28 September AJY misplaced her radio which she reported the following morning. The radio was found in the rubbish bin in the prosecution office. A missing radio creates an obvious security risk in a prison environment and the incident was investigated. Mr Stapleford conducted the preliminary inquiry and the recommendations set out in his report 2 October 2017 were accepted by Mr Singh and Mr Lightbown which included AJY was to be provided “the opportunity to explain why she had not followed correct radio security protocols and reporting protocols”. Subsequent to this, on 6 October Mr Tukula emailed AJY asking for a meeting. She was not provided an opportunity to have a support person present. It has been acknowledged that this meeting was not appropriately handled including in compliance with obligations owed under clause 11.1.1 of the CEA to provide the opportunity for representation.

*2 October - Mr Tukula meets with AJY and Mr Aitken*

[83] On the morning of 2 October AJY emailed Mr Stapleford that the co-worker had not completed work as instructed for scheduled prosecution hearings on 6, 9 and 11 October 2017. The email was copied to Mr Tukula and Mr Singh.

[84] Mr Tukula emailed AJY back asking to meet that day. By this date Mr Tukula had returned to the security manager role from secondment and Mr Stapleford had moved to another role. Mr Stapleford provided a verbal handover briefing to Mr Tukula. The witnesses could not recall the detail of the briefing. Given the ongoing issues with the prosecutions office including the involvement of the prison director, the health and safety trackers and the involvement of Ms Goodin and the health and safety team, the progress of implementing the prosecution review recommendations, the intervention of Mr Singh, the complaint AJY had faced and the bullying complaint she had raised it is unfortunate a written handover from Mr Stapleford to Mr Tukula did not occur or that the prosecution team were not provided a handover update of the progress of the prosecution office issues. The effect of this is it is not clear what information Mr Tukula had before him when he considered how to progress the issues in the prosecutions office and in particular AJY's involvement in prosecutions. It is accepted throughout 2017 Mr Tukula was aware of the developing situation in prosecutions.

[85] On 3 October AJY forwarded to Mr Tukula an email dated 28 September 2017 that she had sent to the co-worker copying Mr Stapleford, Mr Aitken and Mr Singh. The email is a clear example of the types of concerns AJY had raised consistently since at least March 2017 – procedures put in place to assist with the management of prosecutions files were not followed and relevant information was not passed on to team members.

[86] The co-worker was transferred out of prosecutions on 5 October 2017. It is understood the transfer was at the co-worker's request and followed a meeting with Mr Tukula that day. The effect of the transfer was that AJY was no longer required to work with the co-worker.

[87] Corrections says this was a reasonable practical response to AJY's concerns. It is accepted the transfer of the co-worker would have relieved some of the pressure in

the prosecutions office but it did not address other issues impacting on the team including workload pressure and did not directly deal with the bullying complaint AJY had raised in accordance with Corrections' preventing harassment and bullying policy. The co-worker returned to prosecutions three to four weeks later. Corrections says this was due to resourcing requirements.

*9 October email*

[88] Despite this the issues facing prosecutions were ongoing as vividly illustrated by AJY's concerns expressed in the email sent the following week on 9 October to Mr Tukula, Mr Singh and Mr Aitken concerning a request she had received that morning for the prosecutors to help with the Visiting Justice prosecution scheduled for that day because only one Corrections Officer was available to assist. The impact of the request is members of the prosecution team would have to perform escort duty for the prisoners attending the prosecution hearing that day with the knock-on effect that they could not do their own work. In the email she uses this as an example to express her concern about lack of progress with addressing the ongoing issues faced by the prosecution team:

Hi Donald

I can see [relevant CO] doesn't understand the pressure that Greg and I are under and it is disheartening to be treated like this. Seriously I have been battling this issue since March 2017 with a health and safety tracker, and Junior's report highlighted these issues and made recommendations that have still not been resolved. Both Greg and I are over being treated like this. Thanks

Cheers  
AJY

[89] On 10 October AJY emailed Mr Tukula asking for permission to work overtime on Saturday to catch up with work. In the email she advised she was experiencing high blood pressure due to work related stress. On 24 October AJY raised a concern about steps not being followed concerning bunking of a particular prisoner.

*27 October – health & safety tracker #2*

[90] On 27 October AJY loaded the second health & safety tracker incident report:

### **Description**

I raised this very same matter in March 2017, it was closed off despite my requests to resolve this issue noted in Prosecutions first. Then, I had an opportunity to meet with the PD Chris Lightbown and highlighted my concerns on 3rd July 2017. He stated that he would have a Manager conduct a review and analysis of the Prosecution Function and made recommendation. However, very little has been implemented since this report to assist the prosecutor at Spring Hill Corrections Facility and in some cases it has gotten worse. Prosecutors remain in a small office that is a health and safety risk and the stress levels are at an all time high. The workload has increased but a third prosecutor is not being provided, leaving only two prosecutors to do the work. I have informed my PCO and Security Manager of the stress and want the effects and impact it is having on my health.

### **Actions Taken and Future Recommendations**

I have continued to high-light the ongoing issues in Prosecution since March 2017. I have also advised my PCO and Manager of the stress and my concerns that is going on in the Prosecution Officer (sic) plus the increase in work load with no extra support.

[91] Also on 27 October AJY contacted the Corrections staff welfare coordinator responsible for SHCF seeking urgent support because she was feeling stressed by work pressures and sought to speak with someone on a confidential basis. The welfare coordinator facilitated AJY's access to EAP sessions from then until March 2018. AJY's requests for EAP sessions during this period were approved.

[92] Mr Tukula forwarded the health & safety tracker to Mr Takataka, a Corrections human resource advisor, asking for advice. Mr Tukula's covering email to Mr Takataka included "I am concerned about her [AJY] welfare so am considering moving her out of prosecution on Monday". Attached for Mr Takataka's benefit were file notes of recent discussions Mr Tukula had held with AJY and Mr Aitken on 2, 5 and 17 October concerning prosecutions which included that:

- he wanted them to feel supported at and enjoy their work and have healthy relationships with all their team members;
- he did not want them to continue working together in the current environment because it was unhealthy;
- he was concerned about their welfare because they had been under pressure;
- he had been tasked with finding an alternative office for prosecutions;
- that for the welfare of the whole team the co-worker would no longer be working at prosecutions but he needed to discuss this with her first; and

- communications with team members needed to be professional and respectful and to call the PCO with a concern rather than email a range of parties.

[93] The 17 October events are noteworthy because they involved AJY and Mr Aitken being shown the proposed new prosecution office and their view as to its suitability being sought. I am satisfied this was a positive event because following it AJY wrote to Mr Tukula that day:

I believe that we have managed to resolve a number of issues and I am satisfied with the outcome and as a result of this I will not be going ahead with a PG.

[94] The personal grievance reference is to the issues raised in the 9 October email.

### *30 October*

[95] On 30 October AJY advised she would be on sick leave for the rest of the week returning to work Monday 6 November. This sick leave related to the workplace stress she was experiencing. On the late afternoon Friday 3 November Mr Tukula emailed AJY "...please start at 8am and come to see me in my office. Please don't report to prosecution". On Saturday 4 November AJY emailed Mr Tukula asking why she was to start at 8am and not go to prosecution. She advised she would have a union representative with her, that she was entitled to 10 days' notice of a shift change (start time change from 7am to 8am) and "I find that you doing this to me at 4.32pm on a Friday afternoon is not conducive to my health and wellbeing at this time as I am left wondering and concerned over the weekend what is going on with my role as a prosecutor". Later that day Mr Tukula replied including he was not aware her start time was 8am and to start at 7am, reporting to the gatehouse, that the meeting did not relate to the radio incident and "My meeting with you is about my concern for your welfare. You're welcome to bring a support person, however just want to make it clear this is not a disciplinary meeting". AJY replied that evening including:

...

You sat down with Greg and me and we talked about our concerns in the Office and also concerns about [the co-worker] and her lack of performance, not following processes and bullying behaviour in the Office. You said she would be removed and you would provide us with assistance. Yes, [the co-worker] went but that is all that happened she wasn't replaced. To be honest it has been share hell for the past 8 months with [Mr Stapleford] and [Security PCO] so when you came and talked to us it was like a breath of fresh air. Greg and I felt

listened to and we thought we were going to get support finally but instead [the co-worker] was taken and that's it. It felt like you didn't even listen to Greg or my concerns of what is going on or how it is all impacting on us. Now I'm not allowed to go to the Office and [the co-worker] is so how do you think that makes me feel now...

*6 November 2017*

[96] On this date a meeting was held to discuss concerns Mr Tukula held about AJY's welfare triggered by issues she raised in the second health and safety tracker and the matters discussed with the prosecution team during October. Mr Tukula led the meeting. AJY attended, supported by her union representative. Mr Takataka also attended and made notes of the meeting. The notes make clear the purpose of the meeting was to advise AJY of Mr Tukula's decision to move her out of prosecutions due to the welfare concerns he held arising from the health and safety tracker.

[97] The notes also record AJY raised her bullying complaint and the lack of progress. The bullying policy was discussed and the parties agreed it would be helpful for AJY to meet with Ms Goodin to go through the policy. It is clear little progress had been made with the investigation of AJY's bullying complaint.

[98] Due to the ongoing delay in delivery of AJY's custom SRBA vest she was to work at the Gatehouse, which is the entry and exit to the prison, then move to another role when she received the vest, that she would take leave as booked and the parties would meet again in January to review the situation. The possibility of a transfer to Waikeria was also discussed.

[99] Mr Takataka's notes of the meeting align with the follow-up email the union representative sent later that day to Mr Tukula, Mr Takataka and Ms Goodin. The union representative's email stresses the move was not performance related but to reduce the stress the current workload in prosecutions was causing AJY and requests that "it would be good if the work in the setup of the prosecutions that [AJY] has done could be acknowledged in a letter to her". AJY was not copied into this email.

*7 November – health and safety tracker #3*

[100] On 7 November AJY loaded a third health and safety tracker titled “Prosecutions matters ongoing – third entry as still remains unresolved”. In the ‘what happened’ section AJY referenced the second health and safety tracker which had been closed off by Mr Tukula on 7 November including “CO [AJY] has raised workload with PCO and Manager, mitigations was put in place and CO was happy with this. CO was aware that some of the mitigations would take several weeks to months”, that she was not satisfied with the mitigation steps or her removal from the prosecutions role and the events leading up to it including access to the prosecution folder being removed and new locks being placed on the office and exhibits door while she was on a period of sick leave without discussion or consultation. On 6 November AJY had requested an EAP counselling session. I am satisfied she was distressed about the events immediately leading up to and including her transfer from prosecutions.

[101] In the ‘Immediate action taken’ section the manager added “[AJY] was moved out of Prosecutions during the course of a standard rotation process”.

[102] On 10 November AJY’s union representative wrote to Mr Takataka raising concerns that the reasons for the transfer had been improperly characterised:

[AYJ] was not moved out as part of a standard rotation process and I have attached the email summary I sent about the meeting held on Monday, [AJY] was moved by Donald as he was concerned about her wellbeing, he cannot then place a statement such as he has on the close off of a tracker incident.

The whole management of this and the please explain that [AJY] has received has been unacceptably managed by Donald and he needs to be held account for the blatant lie he has put in tracker, this is a code of conduct matter and how can we have trust and confidence in anything he states from here on in.

[103] The ‘Immediate action taken’ section of the health and safety tracker was changed to ‘[AJY] was realigned to another area due to concerns for her welfare’. I am satisfied this event has further contributed to AJY’s distress about the removal from the prosecutor’s role.

*Transfer request*

[104] On 8 November AJY applied for a transfer to Waikeria prison. On opening the internal link it showed she was not eligible for a transfer until current conduct had been addressed. AJY referred to this her union representative.

[105] On 9 November Corrections confirmed to AJY's union representative that the Waikeria transfer would be considered and there were no current circumstances preventing AJY applying for a transfer. The email is clear AJY needed to complete a transfer application.<sup>13</sup> Whether this information was passed onto AJY is unclear. AJY did not continue with the transfer.

*10 November*

[106] AJY emailed Corrections chief executive on 10 November raising concerns that she had been treated unfairly at SHCF including "I have currently loaded 3 x Health & Safety Tracker with the second one on 27 October 2017 "Prosecution" this one resulted in me be (sic) evicted unfairly from the Prosecution Officer." Her concerns were referred to Mr Lightbown.

*20 November – sick leave*

[107] On 20 November 2017 AJY was certified medically unfit to work from 20 November until 27 November 2017. The medical notes show this leave was related to workplace stress.

[108] A meeting scheduled with Mr Tukula and Ms Goodin to discuss the concerns AJY had raised in her email to the chief executive on 10 November was unable to proceed due to this period of sick leave.

*28 November 2017 – AJY raises personal grievances*

[109] By email dated 28 November 2017 personal grievances were raised by AJY's lawyer on her behalf in the following terms:

---

<sup>13</sup> Email Mr Takataka to CANZ representative 9 November 2017.

...

You will be aware that AJY made complaints about her workload and other matters relating to the prosecutor's role, resourcing and support. Investigations were carried out but recommendations were either not carried out or were carried out too late to be of benefit to AJY.

The effect of the whole process on her has meant that she has suffered stress and has been on sick leave.

### **Grievances**

1. AJY's complaints about health and safety and her job as a prosecutor (sic) were not carried out properly. The investigations were inadequate and closed before recommendations were implemented. Subsequently a further complaint and investigation were delayed resulting in AJY becoming stressed and taking time off work on sick leave. AJY has suffered humiliation, loss of dignity and injury to her feelings.
2. AJY was removed from the prosecutor role without notice or warning. She turned up for work and was told to report to the gate house. She waited there and when she checked her emails she discovered that her access to prosecution files had been blocked. She was then advised that she was being transferred to other duties. When she queried the reason, she was told that it was a routine rotation, however non-one else had been rotated. She subsequently learned that she had been removed from the prosecutor's role because of the complaints she had made. The removal was unlawful and was carried out unfairly as no notice or right to respond was offered to her. As a result of the unjustified and unlawful actions in moving her, AJY has suffered humiliation, loss of dignity and injury to her feelings.

[110] The letter set out remedies AJY sought including reinstatement to the prosecutor role and refunding of sick leave and suggested the parties attend mediation.

[111] On 5 December Mr Lightbown replied to the 28 November letter:

- AJY did not have valid grounds for a personal grievance and had not been disadvantaged in her employment;
- Corrections have acted fairly, reasonably and in good faith towards AJY;
- AJY's concerns had been taken seriously and attempts made to resolve all matters raised by her including undertaking a full review of the prosecutions function on site;
- setting out the events leading up to and including the 6 November meeting and subsequent;
- her movement from the prosecutions role did not disadvantage her because her hours of work, remuneration and other terms and conditions of employment remained the same as did her prior arranged annual leave;

- while he had tried to meet with AJY to better understand and discuss her concerns after she had written to the Chief Executive on 10 November she had declined that offer; and
- he proposed the parties meet prior to attending mediation.

[112] The parties attended mediation however matters were not resolved.

*December 2017*

[113] On 13 December AJY applied for a role as scheduler and loaded a further health and safety tracker concerning clothing worn by a Corrections employee.

*2018 - events leading up to disciplinary investigation and dismissal*

*January and February 2018*

[114] In early 2018 AJY experienced a number of stressful events including experiencing significant pain in her right foot which she had broken in early 2017. The foot injury caused AJY difficulty walking and required a period of sick leave and then a further period off work on ACC up to 19 February. At this time she was referred to a specialist for the pain.

[115] On 21 February AJY's former husband and his partner made a formal complaint about her. In her response of 7 March AJY describes the complaint as false and asked that they be fully investigated to clear her name which AJY says did not occur. AJY says the other parties were provided with support which she was not. She relies on an email from the assigned HR advisor dated 21 February 2018 which she says illustrates this unfair treatment.

[116] Corrections staggered the parties work start time to avoid them having to meet in the carpark or the Gatehouse on arrival at work. This seems to have gone some way to addressing the concerns because it eliminated the chance of the parties meeting in the morning. This matter is not the subject of a personal grievance but it is part of circumstances AJY says are relevant to events which followed and led ultimately to her dismissal for serious misconduct.

*March 2018*

*2 March 2018 – further personal grievances for unjustified actions raised*

[117] By email dated 2 March 2018 AJY, through her lawyer, raised two further personal grievances for unjustified actions. The first has been withdrawn. The second concerned AJY's view a serious event on site had not been properly investigated by the unit manager and Mr Lightbown. The grievance was described as follows:

[AJY] is very upset that this matter has been effectively abandoned and that minimal steps have been taken to prevent a repeat by the same offender. [AJY] is concerned that the poor response reflects badly on all prison staff and her in particular as all corrections officers have duties to protect prisoners. [AJY] seeks compensation and an investigation with the results reported to her.

[118] Mr Lightbown replied by letter dated 19 March. With respect to the personal grievance raised which is before the Authority he replied:

- the matter was being treated very seriously by Corrections;
- steps to investigate the incident were outlined;
- a review was underway of the incident and its handling including a review of processes and practices;
- AJY was reminded of appropriate channels to raise concerns and referred to page 26 of the Collective Employment Agreement;
- AJY had been treated fairly, reasonably and in good faith and Corrections did not consider she had grounds for a personal grievance; and
- seeking further mediation though Mr Lightbown noted AJY had indicated she did not wish to attend further mediation.

*5 March – AJY starts accessing IOMS*

[119] On this date AJY accessed prisoner records and forwarded them to her home email address and her lawyer. She accepted in her evidence to the Authority this action was wrong.

*8 March – EAP sessions*

[120] On this date Corrections approved three more EAP sessions at AJY's request.

*21 March - AJY is prescribed gabapentin*

[121] As stated above AJY injured her foot in 2017. The break took a long time to heal and was painful. She was prescribed a number of pain relief medications including one the side effects of which can include frequent mood changes, anxiety, depression or worsening depression, aggressive tendencies, thoughts of suicide and abnormal behaviours.

[122] AJY was prescribed and started taking this drug on 21 March 2018. She was certified medically unfit to work from 22 March until 3 April. AJY says her mood changes and erratic behaviour at this time are the likely side effects of this medication which were amplified by the mental unwellness she was experiencing. She says these issues contributed and are factors which mitigate the poor decisions she made around this time which led to her dismissal. The general practitioner's letter dated 26 July 2018 describes the pain relief treatment AJY was taking at this time, the effects on her and some data sheet information about the medication and its effects.

*April 2018*

[123] On 3 April 2018 Mr Lightbown wrote to AJY:

Prosecutions office

I am writing to thank you for your hard work in the Prosecutions office at Spring Hill Corrections Facility. Your experience in prosecutions at Waikeria stood out and I am very grateful for the process changes and improvements you have introduced to the site.

I want to acknowledge your dedication and commitment to Prosecutions role at Spring Hill Corrections Facility, you always went over and above the call of duty in your role.

[124] On 9 April Corrections convened a meeting with AJY which she attended with Mr Lightbown, her lawyer and Ms Christini-Crawford, Corrections Regional HR Manager. It appears matters had now progressed to such a stage that Correction sought to take control of the employment relationship, seek to resolve matters with AJY and

‘move forward’. The specific items for discussion included whether AJY could continue working at the Gatehouse, the impact of her ongoing foot injury and continued lack of the necessary custom SRBA vest on a transfer out of Gatehouse, which had been intended as a temporary measure, the ‘learnings’ from the radio incident and the complaints from AJY’s former husband and his partner. The context of AJY’s live personal grievances was discussed and the parties agreed to resume mediation.

[125] On 12 April AJY emailed Mr Lightbown about concerns she had about contaminated evidence. Her view is Mr Lightbown’s lack of action in respect of these concerns led her to approach the Visiting Justice with her concerns on 1 May, events which are detailed below.

[126] On 14 April AJY’s pain medication dosage was increased.

*Events of 1 May 2018 - suspension and disciplinary allegations*

[127] On 12 April AJY emailed Mr Tukula that evidence concerning a prosecution was contaminated and the charges should be withdrawn. Mr Lightbown was copied into the email. AJY was aware of the schedule for the hearing of the charges including when the Visiting Justice would arrive in the prison. Prior to the arrival of the Visiting Justice she printed off two documents which in her view showed the evidence had been contaminated and when the Visiting Justice entered the prison she (AJY) handed the documents to the Visiting Justice and told her the documents related to prisoners appearing at the scheduled hearing that day. AJY accepts she should not have done this but says at the time ‘she did not know what she was doing’.

[128] AJY’s exchange with the Visiting Justice quickly came to light. She was suspended on pay that day and Corrections commenced an employment investigation. AJY did not and does not challenge the lawfulness or reasonableness of her suspension.

[129] Corrections wrote to AJY on 3 May confirming the decision to suspend her on pay, set out the allegations of serious misconduct and the possibility of disciplinary action up to and including dismissal. The 3 May letter also included next steps in the investigation:

I consider these allegations to be serious and I have decided to conduct an employment investigation into the allegations. I will appoint an investigator to conduct the employment investigation who will contact you directly to arrange a time to meet. You will also be given the opportunity to advise the investigator of the names of any people you wish to be interviewed. A copy of the Terms of Reference for the employment investigation will also be provided to you for your information.

[130] There is no dispute Corrections had a reasonable basis to commence an employment investigation into the allegations of serious misconduct.

[131] On 3 May, in a letter with the subject line 'Terms of Reference for Employment Investigation' Mr Lightbown wrote to the manager of IST outlining the allegations AJY was facing, attaching a copy of the 1 May letter notifying AJY of the matters along with relevant documents and requested she undertake an employment investigation (the terms of reference). The terms of reference requested the following investigation methodology be followed:

1. Conduct interviews with any persons, including AJY, and other employees who you consider may have information relevant to establishing the circumstances and facts as above;
2. Conduct interviews with any person(s) nominated by AJY or other witnesses who may be relevant to the employment investigation;
3. Identify and report on any other sources of information that may assist to clarify, confirm or refute anything in relation to the allegations. This should include examination of the following, but not limited to procedures, policies, etc;
4. Identify any further information required to investigate the allegations and establish the facts in relation to above;
5. Advise me of any new or additional issues of concern that arise during your investigation, so that I can make a decision as to how these should be addressed;
6. Ensure that interviews are conducted in a private and confidential manner and that all information relating to the investigation is kept confidential and secure;
7. Prepare a written report of the investigation including:
  - a. The process followed in conducting the investigation;
  - b. A summary of the information obtained;
  - c. An analysis of any inconsistencies in the information; and
  - d. Your findings of fact in relation to the allegations.

[132] The terms of reference make clear the investigator's role is to investigate the allegations and report the facts and not reach conclusions as to whether AJY's actions amounted to a breach of the Code of Conduct or whether misconduct or serious misconduct occurred. The policy document "Responding to Employee Conduct and

Behaviour Policy” was attached and a human resource advisor was allocated to provide HR advice to the investigator. It was made clear AJY was to be provided an opportunity to comment on the draft report before it was finalised and that Mr Lightbown would send the final report to AJY.

[133] On 21 May the terms of reference was updated to record that Nick Coston, a senior investigator at IST would assist the IST manager with the employment investigation. Mr Coston is not a manager.

[134] The terms of reference were to be provided to AJY. This did not occur.

*June 2018 letter – additional disciplinary allegations concerning accessing documents*

[135] By letter dated 14 June Corrections raised additional allegations that between 5 March 2018 and 1 May 2018 AJY:

- accessed offenders’ records without a legitimate business reason or the authority to do so;
- that by accessing this information the privacy and confidentiality of the offenders concerned may have been breached;
- forwarding offender information to her legal representative on 6 April; and
- forwarded private and confidential offender information to her personal email address.

[136] The additional allegations came to light during the course of the employment investigation and were referred to Mr Lightbown for consideration. In the 14 June letter he states this information had given rise to further concerns about AJY’s actions and that if substantiated they may give rise to breaches of specified parts of the Code of Conduct and Corrections Privacy Breaches and IOMS Access guidance.

[137] The terms of reference was further updated on 19 June to include the additional allegations. The updated terms of reference were not provided to AJY or her representative.

*Corrections' employment investigation*

[138] The employment investigation was then undertaken by Mr Coston. The investigation was completed on 22 January 2019 and a copy of the investigation report was provided to AJY on 31 January inviting her to make submissions on the final investigation report. Written submissions in response on her behalf were provided on 26 April 2019 and verbal submissions were made at a meeting convened at AJY's counsel's offices on 9 May 2019.

*18 June 2019 - preliminary decision to dismiss*

[139] On 18 June Corrections wrote to AJY advising it had formed a preliminary view that her actions amounted to serious misconduct and disciplinary action was warranted. The letter proposed dismissal on notice. AJY said she was devastated to receive this advice to such a degree the final meeting had to be rescheduled.

*1 July 2019*

[140] The final decision meeting scheduled for 1 July was unable to proceed because AJY's car had been broken into overnight and she was unable to attend the meeting. Corrections undertook a well-being check by telephone on AJY.

*October 2019*

[141] The final meeting was rescheduled to 4 October 2019. The meeting did not proceed at AJY's request because she was waiting for a psychiatrist report to be finalised and the investigation was not yet complete.

[142] A forensic psychiatrist report was obtained on 11 October 2019 responding to specific issues raised in the preliminary view 18 June.

*October 2019 - the Humankind report*

[143] In October 2019 a report titled 'Humankind – a review of culture and behaviours in Central Region Office, Spring Hill Corrections Facility and the Hamilton Hub' was

released. The report was an independent review of employment and management at SHCF.

[144] On 4 December AJY's lawyer wrote to Corrections submitting on the issues raised by the Humankind report and raising a concern about conflict of interest.

*December 2019 - dismissal*

[145] Corrections dismissed AJY 11 December 2019 with one month's notice.

## **Discussion**

*Did Corrections actions unjustifiably disadvantage AJY in her employment?*

[146] AJY raises five personal grievances for actions of Corrections arising from issues she says occurred while she worked in the prosecution team and her transfer out of that team which she says have affected conditions of her employment to her disadvantage as well as subsequent events involving Mr Tukula.<sup>14</sup> Corrections denies AJY was disadvantaged as claimed. It says it acted as a fair and reasonable employer in relation to these matters raised by way of personal grievance.

*(i) and (v) failure of Corrections to investigate and take appropriate action in respect of workplace bullying and harassment?*

[147] AJY raised a complaint about a co-worker by email 20 September 2017. The complaint placed the issues raised in the context of the same issues having been raised in the past, specific examples of the behaviour were outlined, that she was unclear as to the purpose of the meeting with Mr Singh in August but having accepted Mr Singh's guidance found the conduct continued. Receipt of the complaint was acknowledged by AJY's manager, the then in-coming manager Mr Tukula met with AJY and Mr Aitkin to discuss the complaint and the co-worker agreed to be transferred out of prosecutions, which, as it transpired was a few weeks. Corrections took no further action in respect of the complaint.

[148] Corrections was bound to take a complaint of this nature seriously. The CEA requires Corrections to provide good and safe working conditions (clause 1.5.2.a) and

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<sup>14</sup> Section 103(1)(b) Employment Relations Act 2000.

treat any form of harassment as prohibited (clause 8.6.1). The preventing harassment and bullying policy requires complaints of this nature to be dealt with fairly and promptly and sets out steps to be taken by the manager to do so. In addition, the matters of concern raised by AJY were well known to Corrections because she had repeatedly raised concerns about her co-workers conduct and its negative impact on her in the preceding months. To fail to step back from the detail of the immediate complaint and seek to see it in the context of AJY's ongoing concerns was a serious flaw.

[149] I am not satisfied Corrections has discharged its duty to take AJY's 20 September complaint seriously as it was contractually obliged. While the parties were separated by the temporary removal of the co-worker from prosecutions there is insufficient evidence any further steps were taken as required by the policy. For example, it is not clear on the evidence if the complaint was put to the co-worker to comment on, whether any such comment was not relayed to AJY and AJY was not asked what outcome she wanted from the complaint. These factors, fundamental to dealing with such a complaint, if followed could have contributed to a decision as to whether a formal investigation was necessary. Not being able to establish these steps were taken has left Corrections vulnerable to criticism that AJY's complaint was not fairly dealt with.

[150] How AJY's complaint was handled is to be contrasted with how the complaint about her conduct towards a co-worker was dealt with on and about 14 July. In that situation an informal approach has resolved the complaint, but it is clear the approach was guided by the relevant policy and actively managed by the manager. Corrections is unable to rely on an informal resolution approach in respect of AJY's complaint when there is insufficient evidence it has turned its mind to the substance of the complaint and considered how best to address it within the terms of its policy.

[151] Not responding to AJY's complaint in accordance with the policy has disadvantaged AJY in her employment because the policy formed part of the terms of employment, not applying it fairly was a breach of the policy and AJY has been disadvantaged by this breach because it precluded a fair opportunity to attempt at least to resolve the matter between the parties and I am satisfied damaged AJY's confidence her employer would treat her fairly and reasonably.

[152] The complaint cannot reasonably be seen in isolation from the other ongoing causes of concern AJY raised consistently and in particular the identified need for communication difficulties identified with the managers to be addressed within the 90-day period this problem arose. For example, the clear recommendation in the Prosecution review document for active steps to be taken to address these communication difficulties was not met and appears to have been subsumed by the 14 August meeting. This meeting did not involve all the relevant managers and did not seek to address the communication issues between them and the prosecutors which had been clearly and repeatedly identified. In failing to address this clear need Corrections has breached the obligation to act in good faith towards AJY and I am satisfied she has suffered a disadvantage consequent because her conduct makes clear her confidence that her employer would treat her fairly has been negatively effected.

[153] These personal grievances are established.

*(ii) Removal from the prosecutor role?*

[154] Corrections says AJY was moved from prosecutions as a result of concerns about her welfare which she agreed to with her union representative. Mr Tukula was concerned for AJY's welfare due to her ongoing complaints and despite her assurances to him that she was 'okay' his evidence was his concerns crystallised in late October when AJY submitted a health and safety tracker notification on 27 October 2017 and then went on sick leave. The health and safety tracker notification included:

The prosecutors remain in a small office that is a health and safety risk and the stress levels are at an all time high.

...

I have informed my PCO and Security Manager on the stress and what the effects and impact it is having on my health.

[155] During AJY's sick leave Mr Tukula contacted her at home, left a message on her phone on 3 November and emailed her he was concerned about her welfare and wanted to meet with her on her return to work on 6 November. AJY's access to the electronic prosecution database and office was removed while she was absent from work which, Corrections says, is standard practice.

[156] On 6 November AJY met with Mr Tukula. She attended the meeting with her union representative. Corrections says the purpose of the meeting was to discuss AJY's welfare. Following the meeting AJY's union representative wrote to Mr Tukula, copying in AJY, a summary of the meeting outcomes.

[157] There is no dispute AJY was employed in a generic position of 'Corrections Officer'. It was therefore not a term of her employment that she work in prosecutions. It is, I find, as an aspect of the duty of good faith, a term of AJY's employment that any work rotation would be fair and reasonable and this would be particularly important when that rotation is not as was accepted "...during the course of a standard rotation process".

[158] In this case the rotation was not conducted fairly and reasonably because the decision was made before AJY had a chance to provide information which might be relevant to the decision. I am satisfied this was the case because concrete steps were taken to remove AJY from prosecutions before the rotation was advised to her and the notes of the meeting and the union representative follow up email record the rotation decision was advised at the outset of the meeting.

[159] The opportunity to provide information which might be relevant to the decision to move AJY out of prosecution was important because Correction's position is understood to be that it had taken reasonable steps to address AJY's concerns about prosecutions and was taking positive steps to implement the review recommendations. Corrections ought to have provided AJY an opportunity to provide further information as to why the steps Corrections had taken to date had not addressed her concerns resulting in the escalating action of lodging a health & safety tracker. In addition, AJY had returned from a period of sick leave taken immediately after lodging the health & safety tracker. Given this and the information contained in the tracker about the impact on her health it would have been prudent to ask AJY if she was medically clear to return to work before taking steps to remove her from prosecutions and place her in a different role. It is not clear to the Authority how, on the information before the decision maker he could be satisfied AJY was not able to return to prosecutions but could take up another Corrections Officer role.

[160] AJY said she became upset and tearful after this meeting and felt humiliated because working at Gatehouse had a certain stigma. By way of illustration, she said a co-worker asked who she had “pissed off” to be assigned duties there. I accept this is the case.

[161] This personal grievance is established.

*(iii) Stigma of association - the failure of Corrections to properly investigate a serious incident between prisoners?*

[162] There is no dispute AJY was not managing the incident at issue or specifically involved in it. The prosecutor involvement was to manage any misconduct charge arising from the prisoner conduct.

[163] Corrections says it properly investigated the incident and that there was no ‘stigma by association’ for AJY. It says she was not aware of the processes followed by Corrections in relation to the matter that she raised a concern about.

[164] In a situation such as that raised by this personal grievance the Authority’s role is not to re-investigate the underlying incident. The Authority’s jurisdiction in an unjustified advantage setting is to consider if the actions of Corrections have breached a term of AJY’s employment agreement and if so, if she has suffered a disadvantage as a consequence.

[165] It is accepted an employer has an implied duty not to conduct itself in a manner likely to damage the relationship of trust and confidence.<sup>15</sup> If Corrections had failed to conduct a reasonable investigation into the incident and AJY could establish she was prejudicially affected by that failure then a breach might be able to be established. However, the evidence before the Authority establishes a thorough investigation into the incident was undertaken with a view to improving relevant policies and processes. The evidence does not establish the serious claim the matter was ‘swept under the carpet’. The personal grievance for unjustified action by way of stigma of association is not established.

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<sup>15</sup> See *Malik v Bank of Credit and Commerce International SA (in liquidation)* [1997] 3 All ER 1 (HL).

*(iv) The failure of Corrections to deal with an issue relating to communication with the AJY's manager?*

[166] This grievance concerns communications between AJY and Mr Tukula in the period October 2017 through to 9 April 2018. There is a jurisdictional bar to this claim being brought because it was not raised within the statutory 90-day period. Leave to bring the claim out of time has not been expressly sought by AJY. There are no grounds apparent to the Authority on which to grant leave.

[167] If leave had been granted, the claim that Mr Tukula bullied AJY would not have succeeded. Corrections' submission is accepted that there is no evidence Mr Tukula intended to mislead AJY or conceal relevant information from her.

*Was AJY's dismissal unjustified?*

[168] As the background narration shows AJY's dismissal followed a long investigation process which covered the period 1 May 2018 until 11 December 2019, a period of almost 20 months. During that time the following occurred:

- AJY received two letters outlining allegations of serious misconduct with supporting information (1 May and 14 June 2018);
- Mr Coston undertook and completed an investigation into the allegations which was delivered to Corrections and AJY on 22 January 2019;
- Mr Lightbown formed a preliminary view on 18 June 2019;
- this preliminary view was provided to AJY to allow her to comment;
- AJY provided written statements 1 October 2018;
- AJY, through her lawyer, filed submissions on 26 April 2019, 4 October 2019 and 4 December 2019;
- AJY provided Corrections with medical reports - general practitioner (26 July 2018), psychiatrist report (11 December 2018) and consultant forensic psychiatrist (11 October 2019);
- an external independent review of SHCF "Humankind" was released in October 2019 which formed the basis of further submissions made on behalf of AJY;
- on 4 December AJY made a final written submission through her lawyer for the outcome meeting which was held on 11 December; and

- on 11 December AJY was dismissed on four weeks' notice.

[169] AJY says the decision is flawed and dismissal was not an option for a fair and reasonable employer in the circumstances in the following respects:

*Mr Coston's investigation was flawed*

- was carried out in breach of the CEA because it was not carried out by a manager as required under clause 11.1.4;
- the terms of reference were not provided to AJY until after the investigation;
- Mr Coston unreasonably fettered his own discretion in conducting an investigation into facts only and not the circumstances;
- the context and circumstances of AJY's actions were not investigated; and
- AJY was not provided an opportunity to comment on Mr Coston's interviews with Mr Tukula and Mr Rohrlach before the final report was issued.

*Mr Lightbown was conflicted*

- the conflict, as proscribed in the relevant policy, was drawn to his attention in the 4 December submission;
- AJY emailed him on 12 April 2018 about allegedly contaminated evidence on which he took no action and this inaction led to AJY approaching the visiting justice on 1 May;
- he received and sought to resolve AJY's personal grievance for her removal from prosecutions and conducted the 9 April meeting where the personal grievance, the stab proof vest and the lost radio were discussed.

*Given AJY's circumstances dismissal was not a decision which a fair and reasonable employer could have taken*

- the circumstances were not adequately investigated in the investigation report;
- AJY was therefore required to advance the circumstances; and
- the report held more weight with the decision maker.

[170] Corrections submits AJY's dismissal was substantively justified and the process followed was fair:

*Substantively justified*

- the actions AJY took which led to her dismissal were overwhelming and largely uncontested;
- the issues she has raised are largely argument in mitigation;
- none of the issues raised in mitigation outweigh the serious and valid concerns Corrections held about her actions;
- AJY's actions were deliberate, planned and repeated and reflected a belief that she was entitled to breach policy to further her suspicions or employment claims.

*Fair process*

- the process was thorough and fair;
- who carries out an employment investigation is a judgement of the employer and will depend on the circumstances;
- that Ms Coston conducted the investigation occasioned no disadvantage to AJY;
- there can be no unjustified dismissal where the substantive outcome would have occurred if the process was correct;
- AJY confirmed in evidence she was provided a full opportunity to provide information including the time provided to gather information and provide medical reports; and
- any defects in the process did not result in AJY being treated unfairly.

*Was Mr Coston's investigation flawed?*

[171] AJY has referred in submissions to a determination of the Authority concerning clause 11.1.4 of the CEA.<sup>16</sup> At [48] the Authority found:

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 a defective in several significant respects which resulted in unfairness to Ms Huddy such as to render her dismissal unjustified. These defects of process were:

...

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<sup>16</sup> *Huddy v Corrections* [2020] NZERA 110.

- (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;

...

[172] AJY’s case, it is submitted, in this respect, is identical to *Huddy* and the dismissal is unjustified procedurally because the CEA required a manager to undertake the investigation. Corrections submits AJY’s reliance on *Huddy* is misplaced because in that case the investigation not being carried out by a manager was only one of a number of factors which, when considered in the round, rendered that dismissal unjustified.

[173] I am satisfied the disciplinary investigation undertaken by Corrections was flawed and that those flaws were of such a nature that the reliance placed on it by the decision-maker was not what a fair and reasonable employer could have done in all the circumstances:

- the failure of the disciplinary investigation to be undertaken by a manager was a clear breach of cl 11.1.4. The contractual terms cannot be read down to accommodate the policy which allows the delegation of the investigation task to someone other than a manager. AJY was entitled to rely on Corrections compliance with its contractual obligations;
- the failure to provide AJY the terms of reference (or the revised terms of reference) was a flaw because it denied her the opportunity to understand and comment on the scope of the investigator’s inquiry and to raise concerns about whether the investigation was within that scope; and
- the investigation did not establish adequately the circumstances in which AJY’s actions which were the subject of the disciplinary allegations arose as required by the terms of reference. For example, the investigation did not record consideration of the circumstances of AJY’s personal grievances, the health and safety trackers which document her work-related stress, her health or personal issues or sick leave history or review the documentation of the escalating events in prosecutions through 2017 which resulted in her removal from that role, her personal grievance for that action and her interest in prosecutions matters which led to the subject actions. These issues are part of the circumstances of the actions which gave rise to the serious misconduct allegations. To cleave them off was to unreasonably and

unfairly narrow the scope of the inquiry which I am satisfied was not intended by the terms of reference.

*Was Mr Lightbown conflicted?*

[174] In a disciplinary setting the relevant policy requires that the ‘accountable manager’ that is, the decision-maker, has not been “...involved in the events or conduct in question.” AJY says Mr Lightbown has to the extent she says his lack of action with regard to the allegedly contaminated evidence led to her approaching the Visiting Justice with the information on 1 May and he conducted the 9 April meeting where the 2017 events were revisited and advised there were ‘learnings’ for AJY. Implicit in this submission is that Mr Lightbown was aware of circumstances relevant to AJY’s actions leading up to and relevant to the matters the subject of the disciplinary investigation, that he had been involved in consideration of such including assessing those circumstances and had formed a view of her conduct within those circumstances.

[175] Corrections says the claim Mr Lightbown was conflicted has no reasonable basis because it was raised late in the disciplinary investigation process and so is unlikely to be a genuine of AJY, AJY could not point to any basis for the alleged conflict and Mr Lightbown had no factual involvement in the allegations Mr Coston investigated.

[176] There is no doubt Mr Lightbown was aware of and to a degree involved in AJY’s escalating employment circumstances during 2017 and early 2018. I have found matters during that period were not managed fairly by Corrections or in compliance with the terms of the CEA. I have also found Mr Coston’s investigation was deficient in giving due consideration to those circumstances which I have found were relevant to the disciplinary investigation. Given this and on balance, Mr Lightbown’s involvement as the decision-maker has left Corrections vulnerable to the claim that he was too “...involved in the events or conduct in question”.

*Was the decision to dismiss one a fair and reasonable employer could have made given all the circumstances?*

[177] Given the above, I find the decision to dismiss was not open to a fair and reasonable employer in all the circumstances.

[178] In addition, I find Corrections approach to the medical evidence AJY produced by way of explanation for her actions was not fairly or reasonably considered. The medical evidence explains the conduct within the context of these diagnoses and places the likely cause of the conduct in the context of AJY's very recent mental illness diagnoses in particular "...compromised [AJY's] intellectual functioning and in particular the executive function..." and "heightened [her] sensitivity to potential threats" enough "...to potentially trigger her PTSD symptoms" at the relevant time.

[179] If Corrections had questions about this medical evidence, then they ought to have been put to the opinion writer or considered consulting its own expert. These were not questions AJY could reasonably have been expected to respond to given the expert nature of the matters raised. The failure to do so has further unreasonably narrowed the inquiry to matters which excluded relevant and potentially significant mitigating factors. In addition, clause 1.5.2.h of the CEA provides recognition of persons with a disability. With the recent diagnoses AJY had received and the expert medical evidence that she was suffering these mental illnesses at the time of the alleged serious misconduct she was a person with a disability at that time. It is not clear from the disciplinary investigation how this relevant factor has been assessed and considered. It ought to have been and it is a further flaw in the process.

[180] For these reasons I find Corrections decision to dismiss AJY was not one a fair and reasonable employer could have made in all the circumstances.

## **Remedies**

[181] AJY has established personal grievances for unjustified disadvantage and unjustified dismissal. She is entitled to a consideration of the remedies sought.

### *Reinstatement*

[182] Reinstatement is the primary remedy in proceedings for unjustified dismissal.<sup>17</sup> The remedy of reinstatement is to the employee's former position or one no less advantageous.<sup>18</sup> It must be awarded wherever practicable or reasonable to do so.<sup>19</sup>

[183] AJY submits reinstatement is reasonable and practicable:

- reinstatement is the primary remedy which the Authority must provide where it is reasonable and practicable to do so.<sup>20</sup>
- contributory conduct is an issue going to the nature of the remedy and whether reinstatement is appropriate. Any finding of contribution on AJY's part should not be high or preclude reinstatement because of the impact on her decision-making at the relevant time of her illnesses and pain medication and the stress she was experiencing exacerbated by Corrections failures towards her;
- strong resistance to reinstatement by the employer is not a barrier to reinstatement;
- Corrections has been on notice of her claim of reinstatement since lodgement and sought to be returned to work during her suspension under a return to work plan;
- AJY does not anticipate any animosity if she was reinstated and no evidence of such was adduced. She does not hold a grudge against Corrections as demonstrated by her conduct and demeanour during the investigation hearing. Her physical and mental unwellness has now resolved and she receives ongoing treatment and management of her conditions;
- prior to these events she had worked for Corrections for a long time, had a good work record, enjoyed her work and was recognised for her contribution. Due to her age and skill set she fears she will be unable to

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<sup>17</sup> Section 123(1) Employment Relations Act 2000.

<sup>18</sup> Section 123(1)(a).

<sup>19</sup> Section 125(2) Employment Relations Act 2000.

<sup>20</sup> *Humphrey v Canterbury District Health Board Te Poari Hauora O Waitaha* [2021] NZEmpC 59.

secure alternative employment which she needs to due to her personal and financial circumstances; and

- she has produced her whakapapa and this is relevant to the new prison environment as described by Corrections witnesses;

[184] Corrections says it is neither practicable nor reasonable to reinstate AJY to a Corrections Officer position because:

- given the number of IOMS policy breaches AJY's action cannot be described a "extraordinary or a one off" and Corrections has a concern she may repeat the serious misconduct or commit another equally serious breach of her employment obligations;
- the number of strained working relationships AJY has with colleagues and managers weighs against it being possible for the employment relationship to be successfully re-established;
- the relationship between the parties has clearly deteriorated;
- AJY's confidence that she will be able to avoid the impact of stress and better understands her mental health is entirely untested; and
- AJY has shown she is prepared to breach Corrections legal obligations for her own reasons and could not be trusted to perform the role again.

[185] This employment relationship problem at its heart concerns how issues can be raised and resolved in a workplace setting amongst staff and management in a stressful and challenging work environment. Decisions which may result from such issues will involve judgement calls made within the relevant policy guidelines and high levels of trust and integrity are required to communicate issues professionally and appropriately. In evidence AJY described her belief that practises of Corrections management were "corrupt and unethical" and that she could not have foreseen her "work environment would become a war zone". I am not satisfied these are not views which AJY still holds. Such matters weigh against reinstatement because they indicate reintegration into Corrections would be very difficult for AJY.

[186] AJY faced significant personal challenges which it is accepted she now better understands and manages. Unfortunately, during her employment with Corrections those challenges contributed to conduct which negatively impacted on the workplace and had the potential to significantly cause harm to those in Corrections custody by breaching their privacy and compromising the Visiting Justice process. While it is accepted AJY holds a sincere belief that she can return to work for Corrections I am satisfied these actions have damaged the employment relationship to such a degree that successful reinstatement of the relationship is unlikely to be a possible outcome. It would be unreasonable to order reinstatement.

[187] AJY's claim for reinstatement is unsuccessful.

### *Reimbursement*

[188] AJY seeks reimbursement of earnings lost as a result of her dismissal pursuant to section 123(1)(b) and section 128 of the Act. The period of claim is from 8 January 2020 until the date of hearing a total of \$51,811.83 (gross).<sup>21</sup>

[189] Corrections says AJY has acted unreasonably in failing to mitigate her claim for lost remuneration.<sup>22</sup> Further, Corrections submits if an award of wages is to be made it should be no more than three months' ordinary time given the counter-factual analysis, substantive justification factors and AJY's contribution to the circumstances giving rise to her personal grievances.

#### *(i) Lost wages award*

[190] The evidence of the negative impact of the dismissal, the employment investigation, the events of 2017/2018 leading up to her dismissal during which she suffered disadvantage in her employment on AJY are clear. It is also clear that factors not within Corrections control are likely to have impacted on AJY's ability to mitigate her losses the evidence of which was not strong. Taking consideration of all the relevant factors it is appropriate for the Authority to exercise its discretion and award more than three months lost remuneration as a result of the personal grievance.

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<sup>21</sup> Calculated at \$1,416.73 gross per week.

<sup>22</sup> *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136 at [103].

[191] After reviewing the evidence of loss and AJY's attempts to mitigate that loss the Authority is satisfied she is entitled to an award of lost remuneration of six months lost wages \$34,001.52 (gross).

(ii) *Lost benefits – s 123(1)(c)(ii)*

[192] AJY seeks compensation for loss of a benefit in relation to long service leave and retirement benefits. This claim was not sought in the amended statement of problem or raised at the investigation meeting. No evidence has been produced in support of the claim and Corrections has not had an opportunity to consider or respond to the claim. The claim has not been properly brought and is not allowed.

*Compensation*

(i) *Unjustified disadvantages*

[193] AJY points to the health and safety trackers filed during her employment as evidence of the harm she suffered as a consequence of the unjustified disadvantages she suffered in her employment. These repeatedly refer to the stress she was experiencing in the workplace as a consequence of the situation in prosecutions.

[194] The Authority has AJY's medical consultation records for the period October 2017 through March 2018. These documents all record significant stress caused to her by workplace events.

[195] Corrections cannot be liable in an assessment of compensatory damages for the impact of circumstances outside its control. That said, AJY made Corrections aware of personal stressors (personal and physical) and drew concerns about the workplace and its negative impact on her to its attention through 2017. I am satisfied Correction's actions for which personal grievances have been found were taken with the knowledge of AJY's circumstances including issues which negatively impacted her wellbeing.

[196] In addition, matters entirely within Corrections' control have augmented the negative consequence of the established disadvantages AJY suffered in her employment including:

- not proactively managing the prosecutions situation as identified in October 2016 email to senior managers;

- not ensuring the managers of the prosecution team and the prosecutors were supported and resourced to rebuild the relationships and address the identified communication issues;
- not putting in place a comprehensive plan with the input of the prosecution team to implement the required changes identified in the review document;
- not following the policy guidelines to consider AJY's bullying complaint; and
- inaccurately recording the reason AJY was moved out of prosecutions in a document openly available within Corrections.

(i) *unjustified dismissal*

[197] As a result of losing her income AJY has faced significant financial difficulties as well as emotional distress including the indignity of having to borrow from family to meet outgoings. AJY was a long serving Corrections Officer who enjoyed her work. In submissions AJY emphasised that when she learnt of the preliminary decision to terminate her employment her devastation was such that she was unable to attend the scheduled outcome meeting which was rescheduled. The submission is accepted that it was fortunate for AJY that she was attending counselling and on medication for mental health related matters when she was dismissed.

*Award under s 123(1)(c)(i)*

[198] It is accepted the impact of the unjustified actions which have been established and the unjustified dismissal have had a profound and negative impact on AJY. It is appropriate to assess compensation under this head globally. The Authority is satisfied AJY experienced harm under each of the heads in section 123(1)(c)(i). Having regard to the particular circumstances of this matter AJY is entitled to a global award to compensate the humiliation, loss of dignity and injury to feelings suffered consequent to the established personal grievances of \$30,000.00.<sup>23</sup>

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<sup>23</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 at [237]; *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132 at [66].

*Contribution*

[199] The Authority is required under s 124 of the Act, where it determines an employee has a personal grievance, to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if the actions require, then reduce remedies that would otherwise have been awarded.

[200] Corrections submits AJY's contribution to her personal grievances was significant and her actions were both causative of the outcome and blameworthy. In particular Corrections submits AJY has not accepted responsibility for her contribution to the relationship difficulties which form the basis of her established unjustified disadvantages, she admits all the things she was dismissed for which involve serious breaches of policy and the employment agreement and are blameworthy.

[201] In *Maddigan v Director-General of Conservation* the court held a reduction of 50% is to be reserved for exceptional circumstances and care should be taken before imposing a reduction of 25%.<sup>24</sup> Considering all the relevant circumstance a reduction of 20% of remedies awarded under s 123(1)(i)(c) is appropriate to reflect the contributory conduct.

**Summary of orders**

[202] Corrections unjustifiably disadvantaged and unjustifiably dismissed AJY. The following orders are made:

- a) Within 14 days of the date of determination Corrections is to make the following payments to AJY:
  - i) \$24,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
  - ii) \$27,201.22 for lost remuneration pursuant to section 123(1)(b) and s 128 of the Employment Relations Act 2000.

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<sup>24</sup> *Maddigan v Director-General of Conservation* [2019] ERNZ 550 at 564.

## Costs

[203] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. AJY is in receipt of legal aid.

[204] If they are not able to do so and an Authority determination on costs is needed AJY may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Corrections would then have 14 days to lodge any reply memorandum.

[205] 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>25</sup>

Marija Ulrich  
Member of the Employment Relations Authority

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<sup>25</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].