

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE**

[2022] NZERA 196
3129576

BETWEEN	JOSEPH KAIRAU Applicant
AND	DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Barbara Buckett and Matt Belesky, counsel for the Applicant Peter Chemis and Jessica Taylor, counsel for the Respondent
Investigation Meeting:	1-2 December 2021 at Napier
Submissions received:	2 December 2021 (at hearing)
Determination:	12 May 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Joseph Kairau was employed by the Department of Corrections (“Corrections”) as an Intelligence Officer from July 1997 until his dismissal on 13 October 2020.

[2] On 30 October 2020, Mr Kairau raised a personal grievance for unjustifiable dismissal, seeking reinstatement, lost wages, compensation and costs. Breaches of good faith are also claimed.

[3] The main contention of the grievance was that there was a genuine dispute about the relevant policy and procedure, such that it was not clear to Mr Kairau what steps were required of him in his role as an intelligence officer, when certain information

came into his possession. Mr Kairau also says the instruction that he then provide the identity to his manager, of the person who provided information to Mr Kairau on a confidential basis, was unlawful.

[4] Corrections say the dismissal for serious misconduct was procedurally and substantively justified and it denies any breaches of good faith. It also says that reinstatement is not possible in the overall circumstances, given the nature of the role and the loss of trust and confidence between the parties.

Issues

[5] The issues for determination by the Authority are as follows:

- (a) Whether the decision of Corrections to dismiss Mr Kairau, and how it reached the decision, was what a fair and reasonable employer could have done in all the circumstances, at the time, including consideration of:
 - What was the misconduct and was it capable of being grounds for dismissal?
 - Was there an unresolved dispute as to the lawfulness of the instruction?
 - Whether Corrections could have reasonably come to its conclusion that Mr Kairau had committed serious misconduct?
 - Whether Corrections' actions met the procedural standards set in s 103A(3) of the Act;
- (b) If Corrections is found to have acted unjustifiably (in dismissing Mr Kairau), what remedies should be awarded to him.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Joseph Kairau, Kay Kairau (Mr Kairau's wife), Dr Blaine Stride, Brett Keetley, and Steve Gibson, Corrections managers. Dr Stride and Mrs Kairau provided evidence by way of signed affidavit or written brief. All witnesses who gave evidence in-person answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral and written closing submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Background

[8] Mr Kairau had worked for Corrections for 23 years. Prior to that he had a career with the New Zealand Police as a qualified detective and a non-commissioned officer.

[9] Mr Kairau said his employment at Corrections was uneventful until approximately 2017 when several things happened, including that there was an employment investigation into his conduct (“the first investigation”). He says for one reason or another, there was a change in attitude by Corrections towards him, adversely affecting the employment relationship from this point onwards.

[10] In terms of what happened next the facts are not in dispute. Mr Kairau was dismissed after a second employment investigation (“the second investigation”) into a concern about how he handled sensitive and confidential information. The information was about a Correction’s employee (employee A) and was provided to Mr Kairau by someone else (person B) who told Mr Kairau they wanted their identity kept confidential because of a fear of repercussions.

[11] Mr Kairau told his employer he could not provide the name of person B, when it was requested, because of the agreement about confidentiality between Mr Kairau and person B. An additional allegation was raised with Mr Kairau as a consequence.

[12] Person B did not give evidence, but I have no reason to doubt Mr Kairau’s account of what Person B requested with regard to confidentiality.

Intelligence and the Integrity Unit

[13] The information about employee A came to Mr Kairau in his role as an Intelligence Officer. It was accepted that from time-to-time intelligence officers would receive concerns about employee conduct and while this was not the focus of the intelligence team’s work, it did happen occasionally.

[14] Corrections say it was accepted practice that in all cases intelligence team members did not investigate concerns about Corrections employees and that these

matters were instead dealt with by an internal integrity group. This approach and practice, it says, was so well understood that it was removed from the Intelligence Manual on the basis it no longer needed to be stated explicitly in the Intelligence Manual, but other policies were also relevant.

[15] Mr Kairau's view was that not all information automatically went to the internal integrity group. While its function remained the same, this group had had several different names, but I will refer to it as the Integrity Unit. While accepting he understood that practice, Mr Kairau's concern was what was expected of him when information did not reach a level of seriousness that he said was required to engage the policy. When information fell below that threshold, the policy was unclear and he noted it had changed recently. He also said if the policy did require information to be provided to the Integrity Unit on all occasions, then he disagreed with that policy.

Prison environment

[16] There was no disagreement between the parties as to the importance in a prison environment of handling this type of information carefully and sensitively.

[17] Brett Keetly, Prison Manager, gave evidence. He said that all custodial intelligence staff are encouraged to have information come to them that may assist in maintaining the rule of law across the various sites. He added this is often done on the basis of confidentiality to ensure the free flow of intelligence. It was not uncommon, in his view, to hear information about Corrections' employees through the intelligence team, because of the nature of their role.

[18] The conundrum that both parties alluded to is that it can be difficult to know how serious a concern is when working from untested confidential information. For example, when concerns are not taken seriously or acted on, small issues can escalate quickly or may turn out after further enquiry to be more serious than first thought.

[19] The corollary to this was also raised which is, if concerns are elevated too soon with insufficient checks as to the veracity and creditability of a concern, there can also be consequences for employees, in that reputations are unfairly tarnished and the effects of this can be long lasting.

[20] An associated risk is that the person providing the information can suffer retaliation in some form or other if the information or issues raised are not handled

appropriately. This means that information can be provided on the basis that the identity of the person providing it would remain confidential.

[21] An issue for Mr Kairau appeared to be whether the common practice of affording confidentiality to informants who provide general intelligence about criminal offending, also applied to information about employees under the new policy.

[22] Corrections say because of these complexities its policies need to be clear, and are clear, about how all information about employees, is to be handled. The starting point, it says, is that all information about employees is to be handled and managed by the Integrity Unit. Staff are actively encouraged to report matters, even trivial and low-level matters. That way the Integrity Unit, which is a standalone team, has visibility and oversight to assess and determine what action needs to be taken in each case. The Integrity Unit is also familiar with employment processes and part of the reason it exists is to mitigate risk appropriately.

The first investigation

[23] It is necessary to discuss the first investigation as part of the factual matrix. It is relevant because Corrections relied on it to support the finding of serious misconduct and dismissal.

[24] The Authority proceeded on the basis that the first investigation was relevant to that extent, but that Mr Kairau was out of time to raise a grievance regarding any issues about that investigation, including the outcome. There was no disagreement from either party in relation to that position.

[25] While it was argued the two investigations involved different conduct, there were similarities to the extent that the concerns in both were about how confidential information about a Corrections employee was handled, and it involved the same policies and procedures, albeit updated in some cases.

[26] The relevant aspects of the first investigation were that on 8 October 2018, Mr Kairau received the final outcome letter. It was concluded that in not handling confidential information about a Corrections employee appropriately, Mr Kairau had engaged in serious misconduct. Mr Kairau purportedly received a warning that was placed on his file for 12 months, but there was no actual written warning as such, only reference to one in the letter. The letter also recorded an expectation that in the future

Mr Kairau was to actively engage with his manager and ensure that he followed an appropriate process which included reporting employee matters to the Integrity Unit. Mr Kairau said in evidence that he did not agree that a warning was appropriate and therefore did not acknowledge or accept it.

[27] Corrections accepted no actual warning to Mr Kairau was issued but say the letter is sufficiently clear that a warning was intended, as were the expectations of Mr Kairau when dealing with information about employees. The letter stated:

To be clear my expectation of you going forward is that you will actively and professionally engage with your manager and will ensure that any information regarding staff is dealt with in the correct manner and reported through the appropriate process which in the first instance is to advise your manager.

The second investigation

[28] The concerns that led to the second investigation arose when the email Mr Kairau sent in an effort to address the issues raised with him by person B about employee A, came to Mr Gibson's attention. At that stage, Mr Gibson was Mr Kairau's temporary manager.

[29] On 31 October 2019, Mr Gibson raised his concern by phone with Mr Kairau that information about an employee had again not been handled correctly. Mr Kairau had set out in an email three concerns that he had resulting from the information person B gave him about employee A. He sent that to the site manager and employee A's manager directly. This was of particular concern to Mr Gibson because of the previous investigation for what he considered to be similar conduct, that included Mr Kairau failing to inform his manager or the Integrity Unit when the information was received. At that stage, Mr Gibson's understanding was that a formal warning was still in place.

[30] Mr Gibson also asked Mr Kairau to provide the name of the person who gave him the information (person B). Mr Kairau refused and explained that person B had asked that their identity be kept confidential and that the information was provided to him on that basis.

[31] Following that phone call, a formal employment process was commenced, and Mr Kairau received by email a letter dated 30 October, alleging misconduct for failing to properly report the information about an employee. The letter referred to the first investigation and the relevant policy and explained that the concern had arisen because the alleged conduct did not comply with that policy or the Code of Conduct.

[32] The letter set out the following:

I note in this regard it is accepted practice within Corrections Intelligence that information relating to staff should be passed on to the Manager of Regional Intelligence and IST. Further, I wish to draw your attention to the written warning which was issued to you by letter dated 8 October 2018. That letter advised you that the Department's expectation of you going forward is that you will actively and professionally engage with your Manager and will ensure that any information regarding staff is dealt with in the correct manner and reported through the appropriate process, which in the first instance, is to advise your manager.

[33] At this stage, Corrections was also of the view that the warning was still in place, but as no warning was ever issued, this position was challenged on Mr Kairau's behalf, once he had legal representation. I accept that no warning was in place, but I consider that the letter setting out expectations and the outcome of the first investigation are still relevant to the matter before the Authority. What it does mean though, is that the weight the employer gave to the warning when it made decisions will need to be considered carefully by the Authority.

[34] The letter also referred to the relevant provisions of the Code of Conduct and set out a proposal to suspend Mr Kairau until the matter could be investigated and invited his response to that proposal.

[35] On 5 November, an additional employment allegation, that Mr Kairau had refused a lawful and reasonable instruction to provide information, was added because Mr Kairau refused to provide the identity of person B to Corrections.

[36] On 6 November, the parties met via audio visual link (AVL), to hear Mr Kairau's response to the suspension proposal. Mr Kairau sent an email after the meeting confirming his explanation to ensure there was no misinterpretation of his comments. In that email Mr Kairau disputed that there was any accepted practice and said he believed he had followed the guidance set out in the policy. He repeated his position that he would not act differently should he be placed in the same situation again and noted that he considered he was working in a hostile environment and that there was an intention to pursue a constructive dismissal. However, he was optimistic and that he hoped the matter could be resolved quickly so he could return to work.

[37] Mr Kairau sent another email providing further explanation:

I admit that this omission is in and of itself accurate. I have deep issues with reporting unsubstantiated information about staff to IST. In choosing not to

notify IST, it follows that I must also avoid notifying my Manager. A situation I find uncomfortable and distressing.

[38] Mr Gibson was surprised by this response. He recalled that Mr Kairau admitted the allegations were correct and then spoke in derogatory terms about the Integrity Unit function by expressing, in strong terms, that he did not trust the Integrity Unit and had no confidence in them. He also said if he was approached by another staff member and heard the same piece of information again, he would do that same thing.

[39] The handwritten notes of JoAnne Harris, HR advisor, record that Mr Kairau was informed at the end of the meeting, that based on what he had told them the decision was to suspend him until they could meet to discuss the substantive allegation. That meeting was scheduled for 13 November 2019.

[40] On 13 November, they met to hear Mr Kairau's response to the allegation that Mr Kairau had failed to report information relating to an employee to his manager or the Integrity Unit. Mr Kairau read his submission. Mr Kairau accepted the allegations were accurate and said the reason for the position he took is that the person who told him about the information was uncomfortable about sharing their observations unless Mr Kairau could undertake that their identity would remain confidential. Mr Kairau says the staff member involved was fearful of retaliation if they were identified.

[41] Through escalating the matter to prison management Mr Kairau considered he had done the right thing because the information was "light", and he did not intend to do anything further with this information. The reasons for any omissions included his view that the provision of intelligence notings to the Integrity Unit were unfair to the staff member the information related to, and at odds with policy.

[42] Mr Kairau also spoke to the fact he felt he was now in a hostile work environment that was uncomfortable and untenable. He raised a disparity issue in comparison with how similar matters had been addressed and he said that not meeting with him face to face for the suspension meeting was unfair. He raised concerns that there had been no welfare checks and noted that others would most likely have received those and spoke to the very real stress he and his family were under in dealing with these employment concerns.

[43] Following that meeting, Mr Gibson and Ms Harris corresponded by email (because a different HR advisor had attended the meeting) and they met to discuss Mr Gibson's thoughts about Mr Kairau's submissions and the policies.

The name of person B

[44] On 21 November 2019, Mr Gibson and Ms Harris met with Mr Kairau again, to hear Mr Kairau's response to the second allegation, that he had failed to follow a lawful and reasonable instruction by failing to provide the name of the person who gave him the information.

[45] Mr Kairau again explained why he did not feel he could disclose the identity of person B and said that he did not believe the policy required him to do so. During the meeting, as a compromise, he offered to provide the identity of person B, if Mr Gibson would keep that confidential. He said he felt obligated to protect person B who he had promised would have their identity kept secret. This, he said, created an ethical dilemma for him and he felt his integrity and professional reputation was at stake. He also made further comment that appears to be off the cuff and negative remarks about why Corrections would want that information and how the matter was being handled.

[46] Mr Gibson refused to give an assurance of confidentiality because it would have been inappropriate to do so. Mr Gibson also said he had received advice that it was likely Corrections would have legal obligations under the Privacy Act to share that information with the employee concerned.

[47] Mr Kairau maintained that he did not consider Corrections request to be lawful or reasonable, and that he was concerned for person B. He asked that Crown Law or the courts to examine the request. Corrections say it was under no obligation to take those steps and did not seek any further advice.

Preliminary view

[48] On 17 December 2019, having considered the submissions, Mr Gibson wrote to Mr Kairau setting out his preliminary view that the conduct alleged had occurred. Therefore both allegations had been upheld and he concluded the conduct amounted to serious misconduct warranting summary dismissal. Mr Kairau was invited to a meeting on 15 January 2020 to hear submissions on the preliminary view.

[49] Mr Kairau engaged legal counsel and made an information request. The meeting was postponed at Mr Kairau's request to accommodate new legal counsel, provision of the information requested and the fact it was the holiday period. On 6 March 2020, Ms Buckettt wrote to Corrections raising multiple matters of concern regarding the investigation and requested mediation. Then Covid-19 lockdowns intervened, mediation was delayed, and the parties were in active communication.

[50] Mr Gibson replied in writing on 12 May 2020 and accepted that letter was delayed but that delay was attributed to his involvement in the Covid-19 response. The parties attended mediation in July and finally met on 28 September 2020 to discuss Mr Gibson's preliminary view. By this stage, Mr Kairau also had secondary employment.

Final meeting

[51] There is a transcript of the final meeting, although it is not verbatim and there is no agreement it is an accurate record of the meeting. What it does show is the parties had differing views as to the purpose of the meeting. Submissions were made on Mr Kairau's behalf including that no options short of dismissal had been considered by Corrections and he had not had an opportunity for discourse.

[52] Mr Kairau spoke towards the end of the meeting and reiterated that he felt he had some discretion to deal with the information he had received because it was not serious and he did not want to bother Mr Gibson with it. He also said he did not know any better at the time, and assured Mr Gibson that he had no problem with Corrections process. Mr Kairau emphasised his length of service at the Department and said he had expected an independent investigation.

Final view

[53] Following that meeting, a final decision was reached by Corrections and recorded in Mr Gibson's letter of 13 October 2020. It is a long letter that traverses the background, summarises Mr Kairau's submissions, responds to the submissions made, sets out the relevant extracts from the Code of Conduct and refers to the first investigation and the warning in place, and then concludes that based on the conduct being in breach of its policies, Corrections can no longer have trust and confidence in Mr Kairau.

[54] After taking into account Mr Kairau's long tenure, the outcome changed to dismissal on notice rather than summary dismissal.

The policies

[55] Corrections' concerns about how the information was handled by Mr Kairau were based on its policies and Mr Kairau disputes those policies for various reasons, which means it is necessary to set out the relevant exerts.

[56] Corrections was responsible for promoting its policies and did so through Tātou, the intranet page, its weekly "Frontline" bulletin and the Chief Executive's weekly email. Staff were responsible for ensuring they were familiar with Policy and their obligations under it.

[57] Mr Kairau said in evidence that he was not sufficiently aware of all the policies to understand Mr Gibson's position because staff were simply left to read and interpret policy by themselves. Mr Gibson noted that Mr Kairau had been involved in the 2017 amendment to the Intelligence Manual when the guidance about what to do with information about staff was removed and had received clear guidance about the expectation on him, should he receive information about an employee in the future.

Intelligence Manual

[58] This manual was directly relevant to the work that Mr Kairau did. Up until 2012 this manual contained guidance for how to handle information relating to staff as follows.

Information Relating to Staff

Corrections Intelligence staff do not intentionally set out to collect information relating to staff. However, in the event that information is received that relates to allegations of staff involvement in criminal activity, or breaching the Department of Corrections Code of Conduct, that information is passed on to the Regional Manager Corrections Services and PSU.

[59] This policy was revised in 2017 and 2018 and that guidance was removed because it was agreed it was such an accepted practice that all staff concerns were forwarded to the Integrity Unit, so that guidance on this topic was no longer necessary in the manual.

Intelligence Collections Framework

[60] The Intelligence Collections Framework listed as a "Guiding Principle" that "safety of human sources (often referred to as "informants") takes priority over intelligence needs."

Responding to Staff Conduct and Behaviour

[61] This policy sets out how staff conduct or behavioural issues are addressed once they are raised, including which matters go to the Integrity Unit for assessment. It defines misconduct or serious misconduct as follows:

Behaviour that:

- Breaches the standards of conduct as described in the Code of Conduct or the State Services Standards of Integrity and Conduct; and/or
- Brings (or could bring) the Department into disrepute, and/or diminish public trust or confidence in the Department.

Some types of behaviour may still amount to misconduct or serious misconduct even where they are not specifically noted in the Code of Conduct.

Concerns or allegations that, if substantiated, may lead to formal disciplinary action against a staff member include misconduct or serious misconduct.

[62] One of the key principles set out is that Corrections will follow a fair and reasonable process if it identifies conduct, behaviour or an activity that is potentially unacceptable or of concern. It also sets out that when conduct relates to fraud, corruption, dishonesty and other criminal activity by staff, these matters are referred to IST (the Integrity Unit) for initial assessment and potential investigation as soon as possible because of their nature and the potential risks they pose to the Department. Staff are then referred to the Addressing Fraud, Corruption, Dishonesty and Other Criminal Activity policy.

[63] It also set out Corrections policy on confidentiality of complainants and witness as follows:

- (8) The Department will disclose the identity of any complainant or witness to the staff member who is alleged to have behaved inappropriately, except where the disclosure poses a genuine risk to the complainant's safety. In such circumstances, the Department will still provide the staff member with sufficient detail about the complaint to enable them to be able to fully respond to it.

Addressing Fraud, Corruption, Dishonesty and Other Criminal Activity

[64] This policy has been in place since March 2019. The relevant exert provides:

Incidents or allegations relating to staff fraud, corruption, dishonesty and other criminal activity can come from a range of different channels, but all must be referred for initial assessment and potential investigation as soon as possible to the Integrity Support Team (IST) because of their nature and the potential risks they pose to the Department...

[65] This policy is supported by a procedure document entitled “How do I raise a concern about fraud, corruption, dishonesty and other criminal activity”, which gives employees six ways to raise such issues, including with a direct line manager, informing another manager or emailing the Integrity Unit. There is also the option of making a complaint through a phone line.

Prisoner Telephone Monitoring

[66] Mr Kairau was an authorised phone monitor for Corrections. The internal intranet page (Tātou), states that if an authorised monitor discovers references to potential staff misconduct, they should email the prison director and the Integrity Team.

[67] Corrections submit these polices supported its submission that Mr Kairau ought to have known and did know that information about staff misconduct, whether a breach of the code of conduct or criminal in nature, was to be notified to the Integrity Team.

Relevant legal principles

[68] The Authority is asked to determine whether Corrections were justified in the decision it made and the actions it took to dismiss Mr Kairau. It is required to apply the justification test which is set out in s 103A of the Act. In applying the test, the Authority does not determine justification by considering what it may have done in the circumstances. It is required under the test 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.

[69] This includes whether the allegations against Mr Kairau were sufficiently investigated, concerns raised with him, whether he had a reasonable opportunity to respond to the concerns and whether such explanations were genuinely considered by Corrections before dismissal. The Authority may take into account other factors as appropriate and must not determine the dismissal to be unjustified solely because of defects in the process if they were minor and did not result in Mr Kairau being treated unfairly.¹

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

¹ Employment Relations Act 2000, s 103A(5).

Serious misconduct

What was the misconduct and was it capable of being grounds for dismissal?

[71] The first allegation was that Mr Kairau had failed to properly report information about an employee to his manager and/or the Integrity Unit.

[72] Stripped away to its bare facts, allegation one was a failure to follow policy. Breach of policy is a breach of various sections of guidance set out in the Corrections' Code of Conduct, in particular, accountability and therefore can be considered to be a matter of misconduct.

[73] While Mr Kairau points out that one policy permitted any prison manager as a reporting option, his concern was not the fact of the policy guidance per se, but the fact that he had identified an exception. When the information about an employee was "light" or at the less serious end of the scale, it was his views that it might not warrant investigation. That was the focus of his objection and the basis of his decision to avoid reporting the matter to the Integrity Unit or to his manager.

[74] The rationale for this position was articulated in Mr Kairau's written submission at the first meeting as follows:

I consider the Intelligence notifications to IST to be premature and inherently unfair to the staff member the information relates to.

...

In the case of Intelligence notifications, there are no preliminary enquiries. Raw unvalidated information is provided. In many cases initial enquiries conducted by a Manager can and in this case did provide plausible and reasonable explanation for the concern raised. Matters can be addressed and resolved at the lowest levels and it can quickly be determined that there is no need for any further action (as was done in this instance).

[75] Mr Gibson did not accept the assertion by Mr Kairau that the information in issue was light, because of what the information suggested and at the time Mr Kairau had considered it to be true and coming from a reliable source. He also noted that in Mr Kairau's later evidence the information as speculative and dubious in nature.

[76] Having read Mr Kairau's email, I agree with Mr Gibson that what is inferred from the information Mr Kairau received from person B, is not necessarily "light" in terms of where it sits on a scale of seriousness, but it is uncorroborated, which was also Mr Kairau's point.

[77] The process Corrections had adopted involved all matters being addressed by the Integrity Unit and the reporting of such matters was designed to ensure managers were aware of issues so concerns could be assessed as they arose and dealt with by an internal integrity team whose function was focussed on maintaining employee integrity. That way Corrections could be confident that concerns were acted on appropriately, that risk was being mitigated and that Corrections was complying with its various statutory obligations.

[78] While the policy does allow for other managers to be informed, on review of these policies, it was not an option for Mr Kairau to not report the matter to either a manager or the Integrity Unit. Mr Kairau made it clear, he was influenced in his decision by his lack of confidence in the Integrity Unit evidenced by how he responded to the concerns being raised with him. He had recorded in writing that he had chosen not to inform his manager because he did not wish to inform the Integrity Unit.

[79] Mr Kairau did not hide how he chose to deal with the information and for various reasons, both professional and personal, he felt obligated to take the position he did. However, at the end of the day it was up to his employer to set out the rules for how information was to be handled. Mr Kairau accepted there was a prior investigation into how he dealt with information about employees and he knew information should go to the Integrity Unit, but did not accept that should be the case in all situations. He also did not accept the outcome of the first investigation. On that basis, that particular breach of policy could be considered to be misconduct.

[80] I agree Corrections could not rely on the warning from the first investigation because it did not exist, but I do not understand the decision maker's focus to have been that narrow. In its written correspondence it was set out that Corrections also took into account the "expectation" that Mr Kairau inform his manager and the Integrity Unit, should he receive similar information in the future, that Mr Kairau disputed the policy, had never accepted responsibility for or shown any remorse in relation to his actions, made it clear he would do the same thing again and never resiled from this position during the process.

[81] I cannot disagree with that position, particularly because the Authority or Court cannot substitute its own decision for those of a fair and reasonable employer in the circumstances. The circumstances at the time were the various obligations on Corrections, and Mr Kairau's steadfast view about the Integrity Unit and his statements

that if placed in a similar situation he would do the same thing again. This caused irreparable damage to the trust and confidence the employer said it could have in its employee, particularly one working in its intelligence team.

[82] Stepping back and taking an objective view of the information available to the decision maker at the time, I am satisfied it was open to the employer to take the position that the meaning of the policies was not in dispute, that the conduct amounted to serious misconduct when Mr Kairau's responses were taken into consideration and it was capable of being grounds for dismissal.

Was there an unresolved dispute as to the lawfulness of the direction?

[83] Mr Kairau says that he should not have been disciplined for failing to follow an instruction that would have required him to disclose the identity of person B. There was no question from his perspective that person B's identity remain confidential. On that basis he believes the instruction was unlawful.

[84] It was also submitted on his behalf that there was no instruction for him to provide the name of the person B, however, I am satisfied that he was asked to do so on three occasions, by both Mr Gibson and the prison manager, and on each occasion he did not furnish the name.

[85] Mr Kairau did offer to provide it on a confidential basis at one of the meetings. The position Corrections took was expanded on further at the investigation meeting but in essence, the name of person B was required to answer an information request from employee A. Advice had been received that there were no grounds to withhold the identity of the complainant so it would likely be provided to the very person the information was about.

[86] Mr Gibson accepted there may well have been good reason in this case to keep person B's identity confidential, but Corrections was unable to assess that, given the refusal to provide the information.

[87] There was no evidence given or any submissions as to what legal framework Mr Kairau was referring to, that he says, required him to keep the information in issue confidential from his employer. What he could say was that he was sure he was right and that it had applied when he was a police officer. He referred to the obligation flowing from it on to him personally.

[88] Whether or not the advice Corrections had received in relation to the information request was correct is a separate matter, but in Mr Kairau's eyes, this only served to escalate his concerns. I agree with Mr Kairau that his concerns were genuinely held. He had personally given an assurance to person B, that he would not provide their identity or any information that might identify them. He articulated that he felt morally, ethically and professionally challenged by this issue.

[89] Corrections acknowledge that there is provision in the policy to keep the identity of complainants confidential, although the policy requires disclosure unless that would pose a genuine risk to a complainant's safety and it is set out as an exception rather than the rule. My assessment is that the combination of policies meant that it was anticipated that the Integrity Unit would make that decision, not the employee who received the information.

[90] Ultimately I am unable to clearly identify what Mr Kairau was relying on to support his position that it was unlawful for him to disclose the identity of person B. The key distinction between what happened and what the policy provided for, was that the decision as to whose identity could be kept confidential, rested with Corrections, and not the individual employee.

[91] In these circumstances, in the absence of any other obligation to maintain confidentiality, I consider the direction was lawful and it follows both allegations, were capable of being grounds for dismissal.

Was serious misconduct a reasonable conclusion to come to?

[92] This was the second time in a 12-month period that Corrections had raised a similar concern with Mr Kairau. I do not accept the submission that they were different concerns for the reasons set out above. Mr Gibson gave evidence that he did not anticipate the matter would end in dismissal when he was preparing to raise the first issue with Mr Kairau and in fact, he was surprised by Mr Kairau's strident response and lack of understanding as to the position his email had placed the organisation.

[93] The firm position Mr Kairau took and the fact it was the second time means it was reasonable for the employer to reach the conclusion that this amounted to serious misconduct, particularly when trust and confidence had been significantly impaired.

[94] At the investigation meeting, Mr Kairau resiled from the firm position he had initially taken and gave evidence that he was coming from a place of anger and defensiveness at that time. Mr Kairau said similar things at the meeting on 28 September 2020.

[95] Mr Gibson's consideration of those submissions is set out in the final letter and he gave evidence about his decision making. He said at no stage during the process was there an acknowledgment of a mistake by Mr Kairau and it was simply not plausible to say there had been no guidance because the main change had been signalled by the policy change and was clearly underscored in the letter Mr Kairau received at the end of the first investigation. By saying that he did not know any better (at the time) but maintaining that the information was at the lower end meant he still did not understand the seriousness. Mr Gibson reached a conclusion that the necessary trust and confidence he needed to have in Mr Kairau, in the intelligence role especially, was deeply impaired at that point. All things considered, I find this was a reasonable conclusion for Mr Gibson to reach at that point in time.

[96] The issue of relying on a warning that was not in place arises for the reasons set out above. On review of the correspondence, it is clear that Mr Gibson relied on a warning but also the mere fact of the first investigation into similar conduct. This together with Mr Kairau's responses to the concerns and refusal to provide the name of the complaint, which Mr Gibson says were strident and surprising, mean that even without the warning, there was sufficient information for the employer to reach the conclusion it did and this is especially so when the responses impacted on trust and confidence in the way that they did.

Process

[97] Mr Kairau also points to several defects in the process and the tenor of the submissions on his behalf, are that taken together, the process flaws mean what the employer did was not what a fair and reasonable employer could have done in all the circumstances at the time and were more than minor, resulting in Mr Kairau being treated unfairly.

Did the employer sufficiently investigate the allegations against the employee?

[98] Mr Gibson did not appear to deviate from the *Responding to Employee Conduct and Behaviour Policy*. He undertook an initial brief assessment to decide what level of

seriousness the alleged conduct would fall into if proven, and sought advice from HR on the best approach in the circumstances. The next consideration was whether non-disciplinary options could be taken or should an employment investigation be commenced and consideration was also to be given to suspension. If there were good reasons, suspension was permitted by the policy until the employment investigation was completed and a decision is made about a disciplinary sanction. Suspension was to be reviewed periodically to ensure the original reasons for the suspension still existed.

[99] An investigation was required when further inquiries were needed to determine whether the alleged conduct had happened. The circumstances were such that there was a dispute about whether there was an exception to the policy but that is different from a dispute about the facts. It was not unreasonable for the employer to proceed on the basis that no investigation was required. What was required instead was a process that ensured there was adequate opportunity for the employee to explain their actions before any disciplinary decisions were made and I am satisfied that is what occurred.

Did the employer raise the concerns with the employee?

[100] The concern about compliance with the policy was raised with Mr Kairau shortly after it became known to Mr Gibson. Mr Kairau's email was sent 11 September 2019, and it came to Mr Gibson's attention on 18 October when it was sent to him by HR requesting a discussion about it. There was discussion with HR about who would be the most appropriate decision maker and it was decided that it would be Mr Gibson. From 24 October to 31 October, HR and Mr Gibson were in discussion about the process to be followed and the issue to be raised with Mr Kairau. A letter was also drafted. Mr Kairau had some leave and returned on 31 October 2019, which is the day Mr Gibson called him to formally raise the concern.

[101] I note that letter was dated the day before the phone call, however, I am confident nothing turns on this. The letter raised the concern to seek a response and although it proposed suspension, Mr Kairau was given an opportunity to respond to that proposition separately.

[102] Mr Gibson became concerned when Mr Kairau would not share the identity of person B with him and while accepting that there may have been good reason not to share the identity, without knowing the circumstances he was unable to make that

assessment. The second allegation was communicated to Mr Kairau in a timely way as soon as it was known there was an impasse between Corrections and Mr Kairau.

Did the employer give the employee a reasonable opportunity to respond to the employer's concerns?

[103] I have addressed this above, but an additional concern was raised about meeting by audio visual technology to hear Mr Kairau's response about the suspension proposal. Given Mr Kairau's concerns and preference for face to face meetings, in-person would have been preferable however, this was about the suspension rather than the substantive issue so I am satisfied it could not have impacted to such a degree that it resulted in any unfairness. Issues to do with welfare while the process was underway were also raised by Mr Kairau but Corrections gave evidence that it remedied that once it was alerted to it.

Did the employer consider other options other than dismissal?

[104] Mr Kairau says that no options short of dismissal were ever contemplated or discussed with him and the letter only alluded to one option, which was summary dismissal.

[105] In *Emmerson v Northland District Health Board*,² the Court accepted that there had been serious misconduct by E (a registrar in the defendant's mental health unit), being wrongful taking of medical script, and wrongful prescription of addictive drugs for her partner. The Court cited *Secretary for Justice v Dodd*³ for the principle that outcomes alternative to dismissal, even in cases of serious misconduct, needed to be considered. In *Emmerson* the employer's Disciplinary Policy, provided that dismissal was a serious matter, "which should occur only when the organisation is satisfied there is no other appropriate means of resolving the situation."

[106] Corrections says that it considered a range of disciplinary sanctions but came to the view that it could not have the required level of trust and confidence in Mr Kairau. Mr Gibson said he considered a final warning, however, based on the first investigation and Mr Kairau's comments about the Integrity Unit and what he would do in the future,

² *Emmerson v Northland District Health Board* [2019] NZEmpC at 34.

³ *Secretary for Justice v Dodd* [2010] NZEmpC at 84

he could not have confidence that Mr Kairau would act appropriately or in accordance with Corrections' policies in the future.

Was the delay in concluding the investigation unfair?

[107] The delay in bringing the matter to a conclusion is an issue that goes to fairness for Mr Kairau. On delving into what comprised the delay, I am satisfied that nothing turns on this. In addition, Mr Kairau had secured secondary employment during this period. Although I accept there was a delay in hearing Mr Kairau's response to the preliminary view that was as a result of a number of contributing factors, as set out above and I do not find it impacted on Mr Kairau to the extent that there was unfairness. A final meeting was held on 28 September 2020 before the final decision was made and communicated to Mr Kairau on 13 October 2020.

Disparity

[108] Mr Kairau says other Intelligence Officers have acted in the same way but have not been dismissed or subjected to a disciplinary process. Mr Gibson gave evidence that he was only aware of one other instance where a broadly similar incident had occurred. The staff member was still in training and they were spoken to and additional support was provided. They understood their mistake and gave assurances it would not occur again.

Breach of good faith

[109] Given the findings above, I do not find that the actions of the employer in this case amounted to a breach of good faith.

Conclusion

[110] Corrections has not acted unjustifiably and Mr Kairau's claim that the dismissal was unjustified is unsuccessful.

Costs

[111] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Corrections may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Mr Kairau would then have 14 days to lodge any reply

memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[112] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Sarah Kennedy
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1