

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 295
3144625

BETWEEN

TERESSA TYER
Applicant

AND

CHIEF EXECUTIVE OF THE
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Gerardus Elwell, counsel for the Applicant
Peter Chemis, counsel for the Respondent

Investigation Meeting: 22 June 2022

Submissions Received and further information received: 8 July 2022 from the Applicant
27 July and 22 December 2022 from Respondent

Date of Determination: 7 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Teressa Tyer was employed at the Department of Corrections (Corrections) as a Corrections Officer for 28 years until 25 November 2019 when she was dismissed on medical grounds. At all times Ms Tyer was covered by a collective agreement between Corrections and the Corrections Association of New Zealand which had a specific medical retirement provision.

[2] Ms Tyer suffered a non-work injury when she fractured her ankle in 2019 after she fell on some stairs. Rehabilitation was not straight forward and there were various medical

interventions to address a series of issues that hindered her recovery. After two years, she was advised that ankle fusion surgery was her best treatment option and also her best chance at getting back to her full duties. It was during this period while Ms Tyer was awaiting surgery that she was dismissed.

[3] Ms Tyer says Corrections could have awaited the outcome of her ankle fusion surgery and estimated recovery time before making a final decision. At the time of her dismissal, she had been on light duties for eight months in the Kaupapa Māori Pathway Unit. However, ultimately the ankle did not heal within the four to six month timeframe allowed for by her surgeon. At the investigation meeting, approximately 18 months after she was dismissed, Ms Tyer confirmed she was still not fully fit to undertake her role. However, Ms Tyer believed she would have extra time from the proposed date of her operation in which to recover fully and then pass the Physical Readiness Assessment (PRA), an additional requirement for all employees working in the custodial environment.

[4] In these circumstances Ms Tyer considers she was unjustifiably dismissed and seeks reinstatement, lost wages and compensation.

[5] Corrections says it acted reasonably and fairly in reaching the decision to dismiss Ms Tyer because of the amount of time she had been away from her substantive position, the advice from her surgeon about her prognosis following surgery, in particular, that she needed further time to rehabilitate post-surgery and the fact it could no longer support her carrying out light or alternative duties. In any event those light duties did not constitute a substantive role and it had reached a point where arranging cover for her role was no longer sustainable.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Ms Tyer, Lindsay Tyer, her husband, Darren Huff, Principal Corrections Officer and Paul Vlaanderen, Residential Manager (now retired). Ms Tyer and Mr Vlaanderen gave evidence in person and answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave written and oral closing submissions.

[7] Having regard to s 174E of the Act, it has not been necessary to refer to all the information placed before the Authority in this matter. All material provided has been considered.

[8] As permitted by 174C(4) of the Act, the Chief of the Authority has decided exceptional circumstances exist to allow this written determination to be issued outside the three month timeframe required by s 174C(3) of the Employment Relations Act 2000.

Medical disengagement or retirement

[9] It is well established an employer is not bound to hold a job open indefinitely for an employee who is unable to attend work. An employer will be justified in dismissing an employee for long term absence where it can be shown the decision was substantively and procedurally justified.¹

[10] Section 103A of the Employment Relations Act 2000 (the Act) provides the test for justification of any dismissal. The test requires the Authority to determine whether the employers' actions, and how the employer acted, were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal or action occurred.

[11] Clause 9.2.2 of the Collective Agreement provided for medical retirement:

An employee may be required to retire on medical grounds following a medical assessment by two independent medical practitioners. In such cases, retiring leave will be allowed as provided in Clause 7.8 of this agreement.

[12] Corrections were rightly concerned about the amount of time Ms Tyer had been unable to fulfil the duties associated with her substantive position, and given an employer is not required to hold a job open indefinitely, consideration of medical retirement was reasonable in the circumstances.

[13] Ms Tyer accepts that but takes issue with the timing of the decision to implement the medical retirement process and its analysis of her medical prognosis. Having been a Corrections Officer for just over 28 years at that point, she had spent almost two years trying to rehabilitate her ankle injury and her surgeon had finally recommended an ankle fusion as her best chance at returning to full duties. Ms Tyer was clear with Corrections throughout that despite the setbacks with her ankle she was committed to returning to her role or another role in Corrections and her employment was terminated while she was waiting for that surgery.

¹ *Canterbury Clerical Workers IUOW v Andrews and Beaven Ltd* [1983] ACJ 875 at 877, *Motor Machinists Ltd v Craig* [1996] 2 ERNZ 585 (EmpC) at 92; *Dunn v Waitemata District Health Board* [2014] NZEmpC 201.

[14] Ms Tyer's claim therefore raises several issues with the decisions Corrections made and the process it followed. She says the decision to dismiss her was unjustified because the medical evidence was interpreted incorrectly. She considered the prognosis was positive. She also says the decision to dismiss her was premature because other options were not sufficiently considered, and the time allowed for her to pass the physical readiness test was not taken into account.

Ms Tyer's situation

[15] After fracturing her ankle in 2018 Ms Tyer needed surgery to repair it. However, the bones did not heal in a proper alignment and further surgery was required to correct that in July 2019. There were several significant setbacks. An infection developed, and further surgery was required to remove the pins which had been inserted to help with the realignment. Then she had two falls, one at home and one at work and as a result she required additional time off to rest the ankle. Following that came the recommendation in July 2020 she have ankle fusion surgery.

[16] Throughout the process, Ms Tyer remained committed to returning to her role and consistently communicated this to Corrections.

[17] Discussions with Ms Tyer about return to work started eight months after the injury. In July 2019, the then Acting Prison Manager wrote to her seeking a prognosis from her medical specialist about when or if she would be able to return to her substantive role given she had now had the corrective surgery in June 2019 to realign the bones.

[18] Corrections wrote multiple letters to Ms Tyer from the eight-month mark until termination. Of note not all of those letters pointed out the medical retirement provision in the Collective Agreement but they did record that medical retirement might be an option if she was unable to fulfil the full requirements of her role. The other options also set out were a gradual return to work on light/alternative duties and redeployment to another role through a contestable recruitment process.

[19] In June 2019, it was known another surgery was planned for later in 2019 to remove the pins from her ankle. Her medical certificate at that time said she was unfit for work up until 29 October 2019 because further surgery was required.

[20] The parties met on 13 July 2019 and Mr Vlaanderen, who had taken over as the prison manager, wrote to Ms Tyer on 13 November 2019 and set out what was discussed. Ms Tyer indicated she was hoping to return to light duties in January 2020 and then look at passing the PRA and become certified to carry out “control and restraint” duties, 12 months from there. She also had a medical certificate clearing her to commence a graduated return to work programme from 25 November 2019.

[21] Mr Vlaanderen recorded in his letter that because she had recently met with her surgeon, he would hold off making a “preliminary decision” about her ongoing employment until she had attended the return-to-work meeting. He provided a target date for her to return to full duties being 28 February 2020 saying if she did not have full medical clearance by that date, he would need to continue the process regarding her inability to fulfil the full requirements of her role.

[22] Ms Tyer did commence the gradual return to work for a period of three months until 18 February 2020 when she suffered further setbacks, and her medical advice was to keep off her ankle and not to weight bear. Surgery to remove the pins was by then scheduled for 9 March 2020.

[23] Ms Tyer had the surgery and started a second return to work on light duties from May 2020 which continued through to 13 January 2021 when she was dismissed. Mr Vlaanderen provided dates he expected Ms Tyer to have returned to her full duties by. The date was pushed out several times. These were 28 February 2020, end of March 2020 and 22 June 2020.

[24] On 16 June 2020, Ms Tyer’s medical certificate provided she was fit for work eight hours each day and five days a week from 22 June 2020 to 6 July 2020 with restrictions. The restrictions prevented her from engaging in any lifting, forceful movements, or heavy physical work, and required no prolonged walking or standing. It also stated that her ankle would not get better than it was currently and suggested she would need a permanent post which allows her to operate safely. This was the point in time when Ms Tyer’s general practitioner sought a review from the surgeon.

[25] Ultimately the recommendation from her surgeon was to undergo an ankle fusion surgery as this was her best chance at resuming her full duties as a Corrections Officer.

[26] Given the content of this new medical certificate, Corrections wanted to discuss the situation formally with Ms Tyer, including the possibility of her being medically retired. From its perspective it had started actively engaging with her about returning to her full duties from approximately March 2019.

[27] They met on 5 September 2020 after which Corrections decided to commence the medical retirement process. It directed Ms Tyer to undergo the medical examination to assess whether given her injury she continued to meet the requirements of her role as a Corrections Officer. There was a short delay in receiving the medical report requested from her general practitioner before they met to discuss the medical information on 3 November 2020. The preliminary view was issued after that concluding medical retirement on notice was the appropriate outcome. This was communicated to Ms Tyer on 3 December 2020. There was an opportunity for further feedback. The final view confirming she was to be dismissed was dated 13 January 2021.

[28] On the whole the process Corrections followed in terms of raising its concerns and seeking Ms Tyer's response to those concerns was straightforward. However, while I refer to these issues in more detail below, I note at this point:

- a preliminary view was initially contemplated by the decision maker, before medical reports were obtained;
- the expected return to work dates were not informed by medical advice (other than the 22 June date);
- the correct provision in the Collective (that enabled Corrections to compel employees to undergo the medical assessments) was not referred to in the correspondence requiring Ms Tyer to undergo the medical assessment; and
- the requirement in the Collective for assessment by two independent medical practitioners was not complied with.

The medical information

[29] The Collective Agreement required a decision to dismiss on medical grounds be based on two medical assessments from independent medical practitioners. Corrections relied on letters from Mr Dray, Ms Tyer's surgeon and a report from Dr Carney, her general practitioner.

Ms Tyer says she read their information as being positive because she says they said after ankle fusion surgery, she would be able to get back to work within four to six months. This surgery she was told gave the best chance at returning to work fully fit. It continued to be her view that it was usual practice to be allowed approximately 12 months after a return to light duties, to pass the PRT test, giving her an extended time frame to return to the custodial environment.

[30] Corrections on the other hand formed the view that the medical information supported its decision to medically retire Ms Tyer on the basis it was likely her medical condition would continue into the foreseeable future, there was no certainty as to when Ms Tyer would return to work, and an absence of a further six months could no longer be sustained.

The general practitioner's report

[31] Dr Carney's report, dated 9 October 2020, noted Ms Tyer had sustained a very severe injury to her ankle which unfortunately did not heal properly after her first operation in July 2018. Despite further corrective surgery in June 2019, the pain in her ankle had persisted as a result osteoarthritis had developed caused by damage to the joint. His only concern about her position having reviewed the Corrections Officer position description was Ms Tyer's ability to meet the physical challenges of the role, should she be involved in a confrontation with a prisoner:

As things stand at present she would risk further injury if she was to be caught up in a confrontational situation especially with a violent prisoner or when confronted by a group. The other aspects of her work are not of any major concern save that at present she will suffer more pain with prolonged standing and walking.

[32] His view as to the prognosis after the fusion surgery was the same as Mr Dray in that after the fusion surgery he did "not expect any significant limitation to her ability to fully carry out her duties" but he could not guarantee there would no complications from the surgery and referred to the correspondence from Mr Dray which he attached.

[33] He summarised by saying a full return to work was anticipated once the bone fusion had healed and while Mr Dray had indicated a likely timeframe (of six months) this may vary depending on Ms Tyer's individual response.

The surgeon's report

[34] Having decided not to request a report from Mr Dray, Corrections instead relied on his brief letter dated 4 September to Ms Tyer and his letters to her and her general practitioner on 23 July and 4 September 2020.

[35] In the 23 July communication to Ms Tyer, Mr Dray stated:

The options from here are that I inject some cortisone in your ankle which may well settle things down, for on average three months, but it is only a temporary fix and ultimately, the best solution is probably going to be an ankle fusion which unfortunately takes three months to heal and means you will be off work for five or six months whilst it heals then you get walking again.

[36] In his letter of 4 September 2020 to Dr Carney, under the heading “prognosis and proposed management”, Mr Dray set out the prognosis as follows:

I have warned Teressa there is a small but significant risk of non-union, infection and long term the risk of adjacent joint arthritis. However, I think the most likely outcome is a good result – resolution of her pain, ability to walk without a limp and able to get back to full prison duties eventually, probably six months after the surgery.

[37] And in his letter to Ms Tyer of the same date:

This is to confirm that I saw you today and I have applied to ACC to do left ankle fusion surgery. You would be off full duties about six months, but hopefully be able to return to some non-prisoner contact duties after 4-5 months. The most likely outcome is you would be able to return to full duties howe, and able to walk without pain or a limp and perform your usual prison duties.

[38] Mr Vlaaderen’s final letter relied on the medical reports as a rationale for the dismissal because they were not favourable from a time perspective. He had advised Ms Tyer at their meeting the private sector would not allow someone to be off for three years and set out his view that Corrections had been more than reasonable.

[39] Mr Vlaaderen recorded his rationale in the preliminary view as follows:

Based on the reports from both Mr Dray and Dr Carney there is still some uncertainty (even with the necessary surgery) regarding not if, but when, you will be able to return to full duties.... However I have reached a point where, in the absence of any certainty around a return to full duties, I simply can no longer sustain your absence.

[40] In the final letter it was characterised as follows:

This would mean that it would take your total absence from your Corrections Officer role to a month shy of three years and, even then, the professional medical evidence available to me does not give me any certainly [sic] that a return to full duties will actually be achieved.

[41] And:

Based on the medical opinions of Dr Carney and Mr Dray it is clear that your medical condition is likely to continue into the foreseeable future and there is no guaranteed certainty around there being a clear return date for you to safely return to your pre-injury, substantive role.

[42] What these excerpts show is a progression in Corrections' view of the medical information from an "uncertainty" about a return date to a likelihood the medical condition would continue. Read as a whole and taken together the medical advice was that the surgery was *likely* to be a success. There was a "small but significant risk" to Ms Tyer of three things post-surgery but they are not explained in any detail or in terms of the degree to which they would affect her ability to work. This is possibly because full reports were not requested from Mr Dray asking specific questions, instead there was reliance on letters to Ms Tyer and to her general practitioner.

[43] In short, I do not consider Corrections adopted a correct interpretation of the medical information. The progression from "some uncertainty" as to when she might return to work to a conclusion that her medical condition was "likely to continue" into the foreseeable future is at odds with what was recorded. Mr Dray's letter recorded the most likely outcome to be "a good result" with Ms Tyer returning to full prison duties probably six months after the surgery.

[44] In addition, the medical information did not comply with the requirements of the Collective Agreement. Mr Dray's information was not advice provided to the employer for the purpose of understanding Ms Tyer's prognosis and ability to carry out her substantive duties because it was advice to Ms Tyer as a patient.

[45] While Mr Dray was the surgeon, neither Mr Dray or Dr Carney were independent medical practitioners, in the sense that Ms Tyer was their patient. In addition, regarding post-surgical complications, Dr Carney relied on Mr Dray's advice, meaning there was in effect, only one medical view provided on that aspect of the matter. Corrections did not have in front of it the medical information envisaged by clause 9.2.2 of the Collective.

[46] Ms Tyer was given an opportunity to raise any issues and she raised a concern about using her general practitioner to do an assessment, given he did not have specialist orthopaedic

knowledge. However, this was glossed over on the basis Corrections already had the surgeon's report in the form of the letters from Mr Dray. She was then required to attend her general practitioner for the purposes of an assessment and this, together with using her surgeon's letters, overlooked the formal requirement in the Collective for two independent assessments.

Alternative duties or redeployment

[47] Ms Tyer had two periods of time on light duties. The first was the three-month period (25 November 2019 to 18 February 2020) in the Control Room of the Youth Unit which was followed by three months off for a further surgery and the Covid-19 lockdown period also intervened. The second was an eight-month period from May 2020 to dismissal on 13 January 2021, when she assisted the Kaupapa Māori Pathway Project although this was not an actual or vacant role. Ms Tyer was in the middle of the second period of light duties when she was required to undergo the medical assessments and then medically retired from her employment.

[48] Mr Vlaaderen also discussed with Ms Tyer the option of redeployment to a case manager role, sent her a vacancy for a fixed term case manager role and encouraged her to apply. Ms Tyer applied but did not get it. Ms Tyer said at the stage she was mobilising on a knee scooter. She had just had the pins from her ankle removed so she did not expect to be successful because of the requirement she be medically signed off as fully fit for full duties. This would have included passing the PRA after she was signed off as medically fit to return to her duties.

[49] In relation to alternatives to dismissal Corrections said it was constrained by the requirement in the Public Service Act 2020 because any redeployment was required to be by way of a contestable recruitment process. I note the obligation in that Act to advertise vacancies to ensure fairness in the employment process for all public service employees with a caveat that this occur "if practicable".²

[50] The position appeared to be that because of that statutory obligation, Corrections had no lawful ability to appoint Ms Tyer to another position. Mr Vlaaderen accepted he did not take any specific advice on the application of that provision or what the "if practicable" exception might mean for an employee in Ms Tyer's circumstances.

² Public Service Act 2020, schedule 8, clause 1.

Did the physical readiness assessment allow additional time for Ms Tyer to recover?

[51] The purpose of the PRA is to ensure that custodial staff are fit to carry out their roles and come to the aid of other staff when necessary. It is described in the Collective as a “safety initiative”. It was Ms Tyer’s understanding there was a grace period in which employees were permitted to pass the PRA so that before returning to her substantive role, because it was a custodial role, she would have been given extra time to meet the requirements and pass this test.

[52] The other aspect to that submission from Ms Tyer was her anecdotal evidence that others were accommodated on light duties for long periods of time. Mr Vlaaderen accepted others were also on light duties but said they were all managed appropriately, and he could not comment any further. While disparity was not formally raised, I have noted Ms Tyer’s observation.

Process

[53] When considering the requirements of s103A of the Act, 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 Ms Tyer being treated unfairly.

[54] There were a number of steps taken that fall into the category of process errors. The letter commencing the medical retirement process relied on the wrong provision. The clause referred to deals with employees who suffer an injury at work and are required to undergo a medical examination to assess the employee’s suitability for a work-based rehabilitation programme. The letter should have referred to clause 9.2.2 that deals with medical retirement because that was the basis on which Corrections was engaging with Ms Tyer.

[55] While this may seem like a technicality, and it was remedied in the later letter, the employer in this case, was not able to require an employee to undergo a medical assessment and provide information from that medical assessment to the employer as a general right so identifying the source of the power to require an employee to do something is important.

[56] Once the medical information was received, it was not the information envisaged by clause 9.2.2 of the Collective and I have found above it was not interpreted objectively. Corrections faced challenges in covering Ms Tyer’s absence while she was away from her

substantive position, and it was reasonable to be engaging with Ms Tyer about her prognosis and return to her substantive position. However, again because of the serious consequences for Ms Tyer of the decision that would be made at the end of the medical retirement consultation process, following the process set out in the Collective would have ensured procedural and substantive fairness for Ms Tyer.

[57] More significantly the medical retirement process was in effect commenced well before Ms Tyer was informed it had started and before any medical reports were requested. Mr Vlaaderen's letter of 13 November 2019 and his email to her on 20 September 2019 refer to holding off on any "preliminary view" regarding Ms Tyer's ongoing employment but at the same time setting dates on which she was required to have been fully fit to resume her full duties.

[58] Mr Vlaaderen set several dates requiring Ms Tyer to be fully fit to return to her substantive role without consultation or being informed by medical information about her injury at those points in time and this likely resulted in unfairness to Ms Tyer. As a consequence, they were unachievable timeframes for her to have returned to her substantive role, fully fit.

[59] Corrections' evidence was that alternatives to dismissal were considered to the extent it would no longer accommodate Ms Tyer on light duties. Other than one secondment opportunity for which Ms Tyer could not fulfil the prerequisite to be signed off as fully fit, no other options were discussed. Corrections was aware at that time the ankle fusion surgery was required.

[60] While the process followed by Corrections once it decided to call for medical reports appears to be a reasonable set of sequential steps setting out its position and seeking Ms Tyer's responses, the issues identified collectively amount to flaws that were more than minor, and I consider they have impacted unfairly on Ms Tyer.

Was the decision to dismiss reasonable?

[61] Corrections says it was in a position to "fairly cry halt"³ in all the circumstances including Ms Tyer's inability to do her job for a lengthy period, her upcoming operation and further necessary rehabilitation. Further, she was accommodated on light duties for a three

³ *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124 at 127.

month and then eight-month period and redeployment was open to her through a contestable recruitment process. She applied for one position but was unsuccessful. Corrections was in the position of needing to fill her substantive role and faced challenges that impacted on the running of the prison in finding cover for her in her substantive role.

[62] There are seven key principles an employer should consider before terminating for medical incapacity set out in the case of *Lyttleton Port Company Limited v Arthurs*.⁴ At the time the decision was made, Ms Tyer was on the cusp of having surgery so Corrections could either wait another four to six months and keep consulting and discussing the situation or medically retire Ms Tyer. At the time the medical retirement process was formally commenced it was known Ms Tyer needed further surgery so was not going to be able to perform her substantive duties for at least another 12 to 18 months.

[63] An organisation even a large organisation such as Corrections is not required to keep a job open indefinitely and the employment relationship is a two-way street, but this is not a situation where there had been a lack of positive engagement from Ms Tyer. The underlying issue was an accidental non-work injury for which the prognosis with the ankle fusion surgery was good at the time medical retirement was pursued by the employer.

[64] The impact on the organisation was a factor and a genuine concern Corrections had to consider. In the final letter it set out the true impact on other staff as a factor as well as the operational running costs for that site. Those impacts it said were significant and unsustainable because of her total absence away from her role so it seems that the length of time away from her substantive role was really the rationale for her dismissal.

[65] However, length of time away from work was only part of the story. The nature of the position Ms Tyer held, the terms of the Collective requiring a specific process to be followed, the length of time she had held the role (28 years) and the likelihood alternatives to dismissal existed (taking into account the size and nature of the employer), are all factors that are relevant to what can be considered to be reasonable in the circumstances.

[66] It was accepted the nature of her front-line position as a Corrections Officer necessitated a degree of physical fitness in order for her to be able to respond to situations where restraint and control were required. Ms Tyer's submission was that she could still perform work for

⁴ *Lyttleton Port Company Limited v Arthurs* [2018] NZEmpC 9 at [35].

Corrections while she was injured given the nature of the organisation, and the addition of the PRA test should have meant she was allowed extra time from the point she was signed off as fully fit. She said the medical evidence indicated she would be able to return to full duties within a reasonable time after her ankle fusion surgery.

Conclusion

[67] Ultimately the defects identified were both substantive and procedural and resulted in unfairness to Ms Tyer. A fair and reasonable employer when engaging with an employee about medical retirement could be expected to formally commence the process for medical retirement set out in the Collective before engaging with an employee about making preliminary decisions concerning return to work following an injury. It could also be expected the requirement in the Collective to obtain two independent medical assessments from suitably qualified independent medical practitioners, be adhered to.

[68] Then, because the medical prognosis was said to be central to the decision making in this case, the advice provided needed to be carefully and objectively considered given the decision to terminate Ms Tyer's employment predominantly turned on that advice. I agree with Ms Tyer that the medical prognosis could be viewed as favourable, despite Corrections' view that it was not. Corrections could have used independent assessors, but it did not. It could have sought further clarification from the surgeon, but it did not.

[69] In any event it appears the overall length of time away for Ms Tyer's substantive role was the deciding factor in the end with no reference to what was an acceptable period initially to adopt a wait and see approach or what allowance could be made for the additional requirement that Ms Tyer pass the PRA.

[70] This was again problematic because having accommodated Ms Tyer for the extended period of time it did, with surgery in contemplation, described as her best chance to resume full duties, making the decision to terminate employment in the period while Ms Tyer was awaiting surgery, was likely premature. This is especially so when the medical prognosis indicated a full return to work in six months was likely.

[71] In reaching this decision I have taken into account the nature of Corrections as an employer and Ms Tyer's length of service. Corrections is a large employer with such size and

resources that it could have accommodated Ms Tyer and considered her more carefully for redeployment before deciding to terminate her employment.

[72] The complicating factor in this case is that Corrections were right because Ms Tyer was not fully fit for full duties six months after her surgery, however, the decision making must be justifiable in the circumstances at the time and in this case, Corrections has not been able to justify its actions at the time.

[73] Ms Tyer has been successful in bringing her claim for unjustified dismissal and is entitled to an assessment of remedies for her personal grievance.

Remedies

Reinstatement

[74] Reinstatement is the primary remedy for unjustified dismissal. Reinstatement was not raised as a remedy that was being claimed until the investigation meeting.

[75] Given the timing of raising the claim and Ms Tyer's oral evidence at the investigation meeting, confirming she remains on ACC, my conclusion is that reinstatement is neither practical or reasonable in the circumstances.

Compensation for humiliation and loss of dignity

[76] Ms Tyer's coverage under the Accident Compensation Act 2001 (AC Act) means no award can be made for personal injury.⁵ However, compensation can be awarded for non-economic loss suffered by her falling outside that Act.

[77] Ms Tyer was disappointed, angry and burst into tears when she was notified of Corrections' decision to end her employment. She gave evidence that she came to believe that engaging with the process was futile because she felt no-one was listening to her and Corrections just wanted rid of her. Family noticed that she became withdrawn and unhappy which was a marked change from her usual happy and confident disposition. She also considered the decision was pre-determined and while I have not found predetermination, I have found the process to have been flawed in a way that impacted unfairly on Ms Tyer. The timing of the dismissal decision also clearly impacted on her. She was notified of her dismissal

⁵ Accident Compensation Act 2001, s 317.

when she had been working for eight months on light duties and was due to have her surgery the next day. Ms Tyer also ended up in a position where she was not able to receive a 28-year service award.

[78] Considering the humiliation, distress and loss of dignity experienced by Ms Tyer and the general range of awards in similar cases, an appropriate award of compensation under s 123(1)(c)(i) of the Act was \$20,000.00. This is the amount Corrections must pay Ms Tyer as compensation for humiliation, loss of dignity and injury to her feelings.

Lost wages

[79] The Act permits reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. I note the principle discussed in *Judea Tavern*⁶ that there should be no deduction from a calculation of lost remuneration for payments such as AC Act payments. That would seemingly apply in this case.

[80] Ms Tyer was receiving payments under the AC Act for a non-work injury. Corrections as an Accredited Employer under the ACC Accredited Employer Programme, did not fund her AC Act entitlements but it did make the weekly compensation payments to her and then recovered those funds from ACC. I was told this was normal practice for an accredited employer when cover was for a non-work injury.

[81] Ms Tyer was dismissed just prior to her scheduled ankle fusion surgery. In these circumstances she was not able to actively seek new work, in part because of the surgery, but given Ms Tyer has lost wages as a result of the grievance, s 128(2) of the Act requires the employer be ordered to pay the employee the lesser of a sum equal to that lost remuneration or to three months ordinary time remuneration. I consider lost wages in an amount equal to three months remuneration to be appropriate.

Notice period

[82] In submissions on Ms Tyer's behalf, four weeks' notice was also claimed on the basis it was not paid to her. Corrections submitted this claim had not previously been made and that

⁶ *Judea Tavern Ltd v Jesson NZEmpC 82 at [40]*.

Ms Tyer had confirmed she had in fact been paid her four weeks' notice period at the investigation meeting.

[83] The final view letter stated that she was medically retired on notice from the date of the letter which was 13 January 2021, and her final day of employment was the same day. It also recorded that she would receive a one-off payment of "79 days pay as per her entitlement." That appears to be a medical retirement payment she was due under the Collective that was calculated according to length of service.

[84] Without further information I am unable to understand whether notice was paid correctly and because payment of four weeks' notice is a wage arrears claim, I consider it appropriate to reserve leave for Ms Tyer to come back to the Authority specifying what is sought and the reasons why she says it was not paid, if required.

Orders

[85] Ms Tyer's claim that her dismissal was unjustified has been successful and remedies are appropriate. I order that:

- (a) The Department of Corrections is to pay lost remuneration for a period of three months following Ms Tyer's dismissal, including any contributions it is required to make to a superannuation fund and payment of holiday pay for the same period.
- (b) The Department of Corrections is to pay Ms Tyer compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c)(i) of the Act of \$20,000.00.

[81] Leave is reserved for Ms Tyer to return to the Authority with regard to the claim for payment of wage arrears, being her four week notice period.

Costs

[82] 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, Ms Tyer 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 the Department

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.

[83] 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.⁷

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁷ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1