

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 305
3193739

BETWEEN

JOHN ROBERTS
Applicant

AND

THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Rachel Larmer

Representatives: Jim Roberts and Matthew Morrissey, counsel for the
Applicant
Karen Radich, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 17 February 2023 from the Applicant
17 March 2023 from the Respondent
12 April 2023 from the Applicant

Date of Determination: 13 June 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr John Roberts, is employed as a Corrections Officer (“CO”) at Northland Regional Correctional Facility (“NRCF”). The Applicant is a member of the Corrections Association of New Zealand (“CANZ”), which is also referred to as “*the Union*” in this determination.

[2] The Applicants’ employment was covered by the Collective Agreement between the Department of Corrections Frontline Staff (Prisons Based) and CANZ, which at the material time was dated 2017-2019 (“*the CA*”).

[3] The Department of Corrections is referred to as “*the Department*” in this determination. The Chief Executive of the Department of Corrections is referred to as “*the Respondent*” in this determination.

[4] The Applicant has made a number of claims against the Respondent that arise from an incident that occurred on 27 November 2018, during which he sustained a work related injury. The Respondent challenged the Authority’s jurisdiction to investigate any of the Applicant’s substantive claims.

[5] The parties agreed that the Authority should issue a preliminary determination on the disputed jurisdiction issues before the substantive claims were investigated.

Applicant’s claims

[6] In his Statement of Problem that was lodged with the Authority on 7 October 2022, the Applicant claimed:

- (a) The Respondent breached clauses 1.5.2, 6.1.3 and 6.1.4 of the applicable Collective Agreement in the period leading up to “*the incident on 27 November 2018*”, (this incident is discussed later);
- (b) The Respondent breached its Code of Conduct “*the Code*” (this was a breach of contract claim for which the Applicant was claiming general damages for the emotional harm he said the breach of contract had caused him) because it failed to:
 - (i) Act as a good employer and work with employees in good faith;
 - (ii) Model the standards of behaviour described in the Code;
 - (iii) Treat all employees fairly and provide a safe work environment; and
 - (iv) Address any behaviour that is inconsistent with the Code and manage it objectively;
- (c) The Respondent’s failure to reply to the Applicant’s personal grievance on 14 December 2018 meant he was further disadvantaged in his employment, as per his personal grievance letter dated 11 November 2019;
- (d) The Respondent’s failure to top up the Applicant’s earnings to 100 percent of his total gross earnings from the ACC assessed 80 percent was a breach of “*the*

personnel policy” that he said clause 1.5.2 in the CA required the Department to have put in place;

- (e) He was entitled to a 100 percent top-up of his total gross earnings either via the Respondent’s personnel policy, or if that did not require it to top up his wages to 100 percent of his total gross earnings, then he should recover 100 percent of his total gross earnings by being awarded damages for his breach of contract claim;
- (f) That penalties should be imposed on the Respondent for the breaches of clauses 1.5.2, 6.1.3, 6.1.4 of the applicable Collective Agreement and for breaches of the Department’s Code of Conduct he claimed had occurred;
- (g) He should receive general compensatory damages associated with each breach that was established, for the emotional harm he said the Respondent’s breaches had caused him; and
- (h) Remedies for his unjustified disadvantage claim of compensation for the shortfall between what he was paid by the Respondent while on ACC and 100 percent of his total gross earnings, plus an award of distress compensation.

Respondent’s position

[7] The Respondent disputed that the Authority had jurisdiction over any of the claims that the Applicant had raised in his Statement of Problem.

[8] The Respondent said he had not raised the personal grievance within the 90 day statutory time limit required by s 114(1) of the Employment Relations Act 2000 (“*the Act*”) and that it did not consent to him raising his personal grievance out of time.

[9] It was also denied that the Applicant had been unjustifiably disadvantaged by its actions, so there was no basis for awarding any of the remedies he had claimed.

[10] The Respondent also disputed that the Applicant was able to bring penalty claims, because the action had been commenced more than 12 months after the alleged breach had occurred, or damages claims as they were statute barred. The Respondent also disputed the Authority’s jurisdiction to investigate the Applicant’s claims.

The Authority’s investigation

[11] The Authority held a Case Management Conference (“CMC”) with the parties on 6 December 2022.

[12] During the CMC the status of the 14 December 2018 email was discussed because there was an apparent issue as to whether or not that email was sufficient to have raised a personal grievance for the Applicant.

[13] The Applicant's counsel told the Authority during the CMC that the 14 December email CANZ sent the Department identified the union's concerns about the leadup to the incident involving the Applicant, but was not being relied on as the raising of a disadvantage grievance.

[14] The Applicant therefore confirmed to the Authority that he was not pursuing the 14 December 2018 email as a personal grievance claim. It was however the basis of his personal grievance for unjustified disadvantage, that CANZ raised on his behalf in its letter dated 11 November 2019 to the Respondent.

[15] This was recorded in paragraphs [5] to [7] of the Directions of the Authority dated 6 December 2022 that was issued to the parties after the CMC.

[16] It was agreed that the preliminary jurisdiction issues would be determined 'on the papers'. The parties agreed to file one joint bundle of documents that contained the relevant evidence they wanted the Authority to consider when determining the preliminary issues.

[17] The Respondent filed two affidavits on 17 March 2023. The first was from Mr Alastair Riach, who at the material time was the Acting Regional Commissioner for the Northern Region but who has subsequently retired. The second was from Amodhini Manampery, who is the Payroll Operations Manager for the Respondent. The Applicant was given an opportunity to file an affidavit, but elected not to do so.

[18] Both parties filed written submissions.

Material facts and relevant background

[19] On 10 October 2018 a prisoner was transferred from the Auckland Prison to NRCF as a result of the prisoner's security classification being downgraded from "*high*" to "*low-medium*", as that change made it more appropriate that he be housed in a low security prison.

[20] On 1 November 2018 the Applicant conducted a security classification review at NRCF under which he said the prisoner should be classified as "*high security*". This security classification was accepted by the Acting Principal Corrections Officer, at that time.

[21] On 5 November 2018 the Custodial Systems Manager reviewed and decided to override the NRCF security classification the Applicant had completed for the prisoner. That decision meant the prisoner retained the original “*low-medium*” security rating he had been given by Auckland Prison, and which had resulted in the transfer to NRCF.

[22] The basis of that decision was that although there had been some concerns raised about the prisoner’s behaviour after transferring to NRCF, they were considered by the Custodial Systems Manager to be “*low level concerns*” that should not lead to the prisoner’s classification being increased to “*high security*”, as the Applicant and the Acting Principal Corrections Officer had recommended.

[23] Typically reclassification reviews are conducted for prisoners six monthly, or when there was a significant shift in the prisoner’s behaviour. The “*low-medium*” security classification was not reviewed in the weeks after it had been confirmed as “*low-medium*” by the Custodial Systems Manager (“*the CSM*”).

[24] The prisoner had been at NRCF for little over a month and usual practice was to give a prisoner an opportunity to improve their behaviour. Although file notes had been made about the prisoner by staff, it was considered that the issues noted did not indicate a significant enough change in the prisoner’s behaviour to warrant a review or change in the security classification that had resulted in the transfer.

[25] On 27 November 2018 an incident involving the prisoner took place. The root cause of the issue appeared to be that the cleaners had opened more than three cells for cleaning, in order to complete their duties more quickly. That was against the applicable safety procedures at NRCF, which only allowed three cells at a time to be unlocked for cleaning.

[26] While multiple cells were unlocked, the prisoner became aggressive. He was seen in another person’s cell, which was not permitted, so he was approached about that transgression. The prisoner pushed past the Applicant and started making his way back to his own cell at which point Corrections staff pursued the prisoner and initiated a “*use of force*” event.

[27] The Applicant fell over during this ‘use of force’ incident and broke his scapula (shoulder) bone, thereby sustaining work-related injuries. He was off work from 27 November 2018 to 3 May 2019 (being assessed as fully unfit to work) and he returned to work on reduced duties from 7 May 2019 to 22 July 2019 (after being assessed as partially unfit).

[28] The Department is “*An Accredited Employer*”, which means it is responsible for calculating and directly paying its employees’ weekly compensation when they are unable to work due to an injury that was covered by the Accident Compensation Corporation (“ACC”).

[29] Under s 32 of the Accident Compensation Act 2001 (“*the ACA*”), weekly compensation is calculated at 80 percent of the employee’s average earnings. However, the Department had a more generous arrangement in place that involves topping up the compensation in certain circumstances. This is discussed later.¹

[30] On 14 December 2018 Mr Beven Hanlon, an Industrial Officer with CANZ Union, wrote to Mr Riach to raise a number of issues. These included allegations the NRCF Custodial Systems Manager’s (“*CSM’s*”) overriding of the Applicant’s security classification for the prisoner from high security to low-medium security was inappropriate and had created a safety issue that had resulted in the incident in which the Applicant had been injured.

[31] Staff at NRCF believed that Auckland Prison had manipulated the prisoner’s security classification in order to move him from Auckland Prison to NRCF. That view was not shared by the Manager Custodial Practice, nor by the reviewers who had completed a “*wholistic operational review of the systems and processes related to the events involving [prisoner] in the Northern Region, November 2018*”, (“*the Review*”).

[32] The Review accepted that while the prisoner’s security classification was complex, the initial security classification completed by Auckland Prison in May 2018, which had allowed for the transfer of the prisoner to NRCF in October 2018, was:

- (a) “*completed within acceptable parameters and guidelines*”;
- (b) reasonable, in terms of having reduced the prisoner’s security classification to “*low-medium*”; and
- (c) “*appropriate as determined by the Custodial Practice Manager*”, meaning the override of the “*high*” security classification that Applicant had done at NRCF of the prisoner was considered to be an acceptable decision based on the information that was available about the prisoner at that time.

[33] Mr Hanlon’s email of 14 December 2018 stated that the Union’s concerns went further than just complaints about the CSM, but related to the entire site management team. Concern

¹ See paragraphs [102] to [116] of this determination.

was raised around a direction issued to staff by managers regarding the non-wearing of stab resistant body armour (“SRBA”) at the front gate of the Prison and other instructions that had been given to Corrections Officers by management.

[34] Mr Hanlon also expressed concern about the high assault rate on prisoners and staff, which he attributed to “*an incompetent management team*” who he asserted “*needed to be removed*”. Mr Hanlon recorded that many staff were extremely unhappy that after the prisoner incident the CSM had been given a role as an adviser in Auckland (for a few months), when they had wanted him disciplined by the Department.

[35] CANZ said that it was “*investigating our options in regard to a Labour Inspector prosecution or even private prosecution over the reclassification matter*”. It must therefore have been aware, as at 14 December 2018, of the existence of potential health and safety related legal claims against the Respondent.

[36] Mr Riach lodged an affidavit with the Authority on 17 March 2023, sworn on 6 March 2023, that said:

It was never made clear to me though that CANZ was representing John Roberts. My understanding was that CANZ was raising general ongoing complaints about what they had heard or thought was occurring at NRCF. My impression was that they were primarily concerned with site leadership at NRCF.

[37] Mr Riach said he was supposed to meet with Mr Hanlon at NRCF on 9 January 2019 and again the next day at the Northern Regional Office on 10 January 2019, but that Mr Hanlon did not attend either of those meetings.

[38] The Authority was provided with correspondence exchanged between CANZ and the Department, where the union had sought updates on the concerns it had raised on 14 December 2018.

[39] Mr Riach advised Mr Hanlon on 31 January 2019 that an Incident Cause Analysis Method (“ICAM”) was being completed for the 27 November 2018 prisoner incident. ICAM is a health and safety analysis tool, which uses a 360 view to determine what happened in a particular incident.

[40] The Department did not notify WorkSafe of the incident, as it did not consider it met the criteria for a notifiable event. CANZ was advised of that by Mr Riach in an email dated 5 February 2019.

[41] Mr Riach said in his affidavit that he often met with Mr Hanlon face to face, because they were working together closely around a complex Auckland Prison matter. Mr Riach said he would take those opportunities to update Mr Hanlon on progress with the NRCF issues as well. Mr Riach also provided the Authority with some notes he had taken between 19 and 21 March 2019 during one of his meetings with Mr Hanlon.

[42] CANZ was advised of the findings of the ICAM report in a summary recorded in an email that Mr Riach sent to Mr Hanlon on 24 April 2019. Mr Hanlon responded the same day, taking issue with the report and noting that nothing had been done to ease CANZ's members' concerns or to address their lack of confidence in local managers and Head Office.

[43] On 2 May 2019 Mr Riach advised Mr Hanlon that once the Applicant had received the ICAM report he could meet with the Acting Prison Director to discuss it. The Applicant made an Official Information Act ("*OIA*") request, which was responded to by the NRCF Acting Prison Director on 11 June 2019.

[44] On 11 June 2019 the Applicant received a response to the OIA request, which resulted in him being emailed the ICAM report dated 22 March 2019 and the initial health and safety investigation.

[45] The Review recorded that it was not clear that the incident involved "*an assault on staff*", as it appeared the Applicant was injured as a result of the use of force, rather than by an attack by the prisoner. Despite that, it was also noted that the prisoner had been reclassified with a "*maximum security*" classification, part of which was based on there having been "*an assault on staff*" which had resulted in the prisoner being transferred back to Auckland Prison in November 2018.

[46] The Review found that:

NRCF staff could have engaged with [prisoner] in a different way before and during the incident. Tactical Communications Options and de-escalation techniques could have been more effectively to diffuse the situation.

[...]

The injury sustained by [the Applicant] was likely due to the Use of Force during the incident and not as part of an 'assault on staff' by the prisoner.

[47] The Review also noted various other matters that needed attention. This included use of duress alarms, on-body cameras, use of pepper spray, offender notes, handcuffs, tactical

communication options, the debrief process and post incident follow-up. The Dynamic Appraisal of Situational Aggression (“*DACA*”) was also raised, along with all other issues that were relevant to the incident either contributing to it, or which warranted further consideration, as a result of the incident.

[48] The Review recorded that the prisoner had withdrawn from the situation (meaning the cell he should not have been in) and had started to make his way back to his own cell. The Review considered that at this point, other options may have allowed the prisoner to settle down, but noted that these were not taken.

[49] For instance, staff could have allowed the prisoner space to continue to de-escalate, as any threat arising from his conduct had been reduced by his moves back to his cell. However, staff had pursued the prisoner and undertaken a ‘control and restraint’ technique, which is a physical restraint. That approach was considered disproportionate to the level of threat the prisoner posed at the time.

[50] The Respondent’s position was that staff could have chosen a more appropriate option, which would have negated the need to engage in ‘control and restraint’ of the prisoner. That view was based on the fact all Corrections Officers are trained in de-escalation techniques to enable them to engage with prisoners in a safe manner, and to mitigate and manage risk.

[51] On 11 November 2019 CANZ raised concern with the Respondent about its failure to take sufficient steps to address the concerns Mr Hanlon had raised in the 14 December 2018 email, which it described as “*a personal grievance*”.

[52] The Applicant’s position is that the Department’s “*multiple breaches of its obligations and its failure to acknowledge those breaches, remedy them or resolve his concerns*” had caused him a great deal of “*emotional harm*”.

[53] The Applicant said that the prisoner should never have been classified as low-medium. He therefore believed the Respondent had not taken sufficient steps to ensure his health and safety, thereby failing to keep him safe, in breach of its obligations to do so. The Applicant said his distress had been aggravated by the Department’s failure to accept responsibility for its breaches or to resolve his issues.

[54] The Applicant received weekly compensation from ACC while he was medically incapable of performing his work. He said the Respondent failed to top his earnings up to

100 percent of his total gross earnings while he was receiving weekly compensation for the injuries he received during the November 2018 incident. The top up that he received was to his base salary only, so it did not include overtime he had worked in the lead up to his injury.

The issues

[55] It was agreed at the CMC held on 6 December 2022 that the Authority should issue a preliminary determination on the following jurisdiction issues:

- (a) Does the Code of Conduct provide a legal basis for the Applicant to bring a breach of contract claim against the Respondent?
- (b) Were any personal grievance claims raised within the 90 day time limit required by s 114(1) of the Act?
- (c) Is there any legal basis for the Applicant to claim a “*top up*” of his weekly accident compensation payments to the amount of his total gross earnings prior to his injury?
- (d) Is the Applicant barred by s 317 of the ACA from an award of damages and/or compensation for the claims he has made in his Statement of Problem?
- (e) Are the Applicant’s penalty claims time barred? and
- (f) If so, should the Authority extend time for the Applicant to commence his penalty actions?

Does the Code of Conduct provide a legal basis for the Applicant to bring a breach of contract claim against the Respondent?

[56] The Department’s Code of Conduct applies to behaviour of the Respondent’s employees, contractors, consultants and volunteers. The Code of Conduct refers to “*managers, leaders and senior staff*” using the Code to help employees understand and apply the stated principles to their work. It is therefore a guidance document only.

[57] There is no suggestion within the Code of Conduct that an employee could bring a breach of contract claim against the Respondent for a manager’s alleged breaches of the principles in the Code. Employees have the personal grievance provisions in the Act available to them to address concerns they have about a manager’s conduct towards them.

[58] The Applicant's claim that clause 1.5.2(a) of the CA required the Respondent to operate a personnel policy containing provisions for the fair and proper treatment of employees in all aspects of their employment, including provisions regarding "*good and safe working conditions*" did not give the Code of Conduct the status of a contractual document.

[59] While the Respondent had a duty under the CA to comply with the State Sector Act 1988 ("*the SSA*"), which required it to act as a good employer in respect of all its dealings with its employees and with CANZ, this in itself also did not turn the Code of Conduct into a contractual document.

[60] Clauses 1.5.1, 1.5.2 and 1.5.3 of the CA did not cause the Code of Conduct to become a contractual term. These are 'good employer' clauses that cross-reference the SSA, they are not included in the CA as a means of imposing the Code of Conduct as a contractual obligation on the parties.

[61] The Code of Conduct was not a contractual document, because it had not been negotiated and settled between the employer and employees, either collectively with the union or individually with the Applicant. Nor is it an implied term of the CA. If the parties had intended the Code of Conduct to become a contractual document, then that could and should have been referred to in the CA.

[62] Clause 2.2.4 of the CA reserved the Department the right to plan, manage, organise and decide upon operations and policies, provided it dealt with the union and its members in good faith. Clause 2.2.5 of the CA recorded that the Department recognised that the employment conditions recorded in the CA could only be changed by negotiation and agreement.

[63] In the Employment Court decision in *Jensen v Attorney-General* (who was sued in respect of the Chief Executive of the Department of Corrections), the Employment Court specifically considered the Respondent's Code of Conduct.²

[64] The Court in *Jensen* noted the evidence of Mr Slater, the then CANZ Secretary, who confirmed in the *Jensen* matter that the union did not consider the Respondent's policy manuals

² [2003] 2 ERNZ 36.

to have contractual effect. The Court acknowledged that was consistent with its previous judgments in *NZALPA IUOW v Air New Zealand Limited* and *Palin v Air New Zealand Limited*.³

[65] The Employment Court in *Curtis v Carter Holt Harvey Limited* held that unless a policy document was incorporated by reference in the applicable employment agreement, then it would not be expressly binding.⁴

[66] The Code of Conduct is a policy document that sits outside of the CA, so it can be varied and changed from time to time, at the Respondent's discretion. It therefore cannot form the basis for the breach of contract claim, that the Applicant identified in the Statement of Problem.

[67] The Authority finds that the Applicant does not have any cause of action against the Respondent available to him based on the Code of Conduct, and as such the Authority does not have jurisdiction under s 161(1)(r) of the Act to consider such a claim. Nor is a breach of a Code of Conduct a claim for which a penalty might be ordered under s 161(1)(m)(i) of the Act.

[68] Accordingly, the Authority does not have jurisdiction to investigate or determine the Applicant's Code of Conduct claim.

Were any personal grievance claims raised within the 90 day time limit required by s 114(1) of the Act?

[69] Section 114(1) of the Act requires a personal grievance claim to be raised with the employer within 90 days of it arising, or coming to the employee's attention, whichever is the later.

[70] There is one alleged personal grievance claim that the Applicant claims is before the Authority and that is the alleged personal grievance dated 11 November 2019. However, that alleged grievance relied on a personal grievance having been raised on 14 December 2018, so the Authority needs to address the 14 December 2018 email.

[71] The 14 December 2018 letter was sent by the Union's Industrial Officer, so he was well aware of, and familiar with, the process for raising personal grievances. The Applicant's

³ *NZALPA IUOW v Air NZ Ltd* [1992] 1 ERNZ 880 and *Palin v Air NZ Ltd* unreported, Colgan J, 7 July 1995, AEC66/95.

⁴ [2007] ERNZ 233 at [40].

submission that he raised a personal grievance in the email CANZ sent Mr Riach on 14 December 2018 is not accepted.

[72] The email of 14 December 2018 did not refer to the Applicant, except in passing to identify him as the CO who had been injured. It did not raise a personal grievance on his behalf. There was no explanation or suggestion that the Applicant had been unjustified disadvantaged in relation to his employment, under s 103(1)(b) of the Act, and there were no remedies sought for him in CANZ's 14 December 2018 email.

[73] The focus of CANZ's email was stated in the subject line which said "*Request formal investigation and stand down of a manager*". The Respondent did embark on a formal investigation, but it declined to stand down the manager, as CANZ had requested.

[74] Mr Riach, from 20 August 2018 until 10 March 2019 the Acting Regional Commissioner who CANZ had written to on 14 December 2018, corresponded with the Union until 2 May 2019 about the various issues it had raised. He said it was never made clear to him by CANZ that it was representing the Applicant. Mr Riach thought CANZ was raising general ongoing complaints about a range of matters that concerned its members.

[75] That was a fair and reasonable view, based on the content of the communications that were exchanged between CANZ and the Respondent.

[76] Instead of raising a personal grievance for the Applicant, the 14 December 2018 letter was a broad and general communication about a number of safety concerns at NRCF and about complaints the Union and its members had about the entire management team.

[77] The 14 December 2018 email did not satisfy the requirements of s 114(2) of the Act. The words "*personal grievance*" are not referred to anywhere in the email, nor was the type of grievance stated, nor were the remedies that would be sought for a personal grievance claim set out or identified in the email.

[78] Even if there had been a valid personal grievance claim, it was not filed with the Authority within the requisite three years' period required by s 114(6) of the Act.

[79] The Authority considers that the letter of 11 November 2019 is problematic in terms of the submission that it had raised a personal grievance for the Applicant. It did not in itself purport to raise a new or separate personal grievance, but instead referred back to the email dated

14 December 2018, which was incorrectly stated to have raised a personal grievance for the Applicant.

[80] The 11 November 2019 letter outlined options for resolving that earlier alleged “*personal grievance*”. The problem with that was the 14 December 2018 letter had not raised a personal grievance on behalf of the Applicant, so the Respondent was not required to take action to resolve a personal grievance that had not at that point been raised with the Department.

[81] There was also no “*action*” in the 90 day period leading up to 11 November 2019 which occurred or came to the Applicant’s attention, which was capable of amounting to a personal grievance. Another problem is that the grounds the Applicant advanced in his submissions for his personal grievance claim are not contained in the letter of 11 November 2019.

[82] In particular, the 19 November 2019 letter did not purport to raise a grievance for “*inaction*” as a continuous cause of action or for “*a failure to investigate and hold the managers responsible accountable*”. These are new claims that are made for the first time in the Applicant’s jurisdiction submissions.

[83] The personal grievance claim raised in the Statement of Problem which was lodged on 7 October 2022 states:

The Respondent’s failure or refusal to respond to the Applicant’s personal grievance meant that he was further disadvantaged in his employment as communicated to the Respondent in the letter dated 11 November 2019.

[84] That is the only reference made in the Statement of Problem to the letter dated 11 November 2019. However, as the Authority has already stated, there was no personal grievance claim raised on 14 December 2018 for the Respondent to have responded to.

[85] Accordingly, the alleged failure to respond to a personal grievance that was not raised cannot logically give rise to another personal grievance claim for not responding.

[86] The reference in the Statement of Problem that was made to the 14 December 2018 letter said:

Beven Hanlon, notified the Respondent of CANZ and the Applicant’s concerns, and raised an unjustified disadvantage grievance on the Applicant’s behalf that Mr Richards’ failure to take all practical steps to keep staff safe and failing to follow national policy resulted in the Applicant sustaining serious injuries following an assault while in his employment. [...] CANZ also requested a full

health and safety investigation regarding the 27 November 2018 assault on the Applicant.

[87] Claims that are made for the first time in submissions do not comply with the requirement in s 158 of the Act for proceedings to be commenced by “*the lodging of an application in the prescribed form*”.

[88] The prescribed form is “*Form I*” in the Employment Relations Authority Regulations 2000 (“*the Regulations*”), which requires a party in the Statement of Problem to “*state details fully, fairly and clearly*” of the employment relationship problem they want investigated and determined.

[89] Clause 5 of the Regulations requires the party commencing proceedings to file an application that complied with the Regulations. That has not occurred regarding the alleged unjustified disadvantage claim that the Applicant has submitted the 11 November 2019 letter raised.

[90] If the Applicant is relying on the 11 November 2019 letter to have raised a personal grievance claim, then 90 days back from that is 14 August 2019. The action alleged to have amounted to personal grievance must have therefore occurred on or after 14 August 2019. No such action is alleged to have occurred in the 11 November 2019 letter.

[91] The 11 November 2019 letter referred to an email from Mr Riach dated 24 April 2019 which confirmed that an ICAM report had been completed, and a subsequent response from the Chief Custodial Officer on 24 July 2019, which did not agree with the Review findings. Both of those actions occurred well before the 90 day point by which a personal grievance claim needed to have been raised.

[92] By 14 August 2019 the Applicant had received a redacted copy of the ICAM report (that occurred on 11 June 2019 pursuant to an OIA request) and despite him continuing to work in the Northern Regional office, Mr Riach heard nothing further about the Applicant’s or CANZ’s concerns.

[93] The Authority accepts the Respondent’s submission that any alleged non-action perceived by the Applicant during that period (i.e. post-14 August 2019) was not an “*action*” as required by s 114 of the Act in relation to the raising of a grievance. The Applicant’s claim that “*nobody [had] ever been accountable*” and that an investigation had not been conducted was not accepted.

[94] The fact that the Respondent declined to discipline another employee, who CANZ and the Applicant wanted held responsible for the 27 November 2018 incident, did not comprise a potential disadvantage to the Applicant under s 103(1)(b) of the Act, because it did not adversely affect his terms and conditions of employment.

[95] The Authority also noted that the letter dated 11 November 2019 did not purport to raise a personal grievance on the grounds that are now advanced by the Applicant in his submissions.

[96] In particular, there was no grievance raised on the basis of ‘nobody had ever been accountable’, nor any grievance raised about alleged ‘inaction’ or a lack of investigation to discipline the managers CANZ claimed were responsible for the incident, nor any other reference as to what might have comprised a continuous course of action.

[97] The Authority therefore did not accept that the Applicant had suffered an ongoing disadvantage that had continued from either 14 December 2018 or 11 November 2019 to the lodging of the Statement of Problem on 7 October 2022. Rather, the concerns noted in the letter dated 11 November 2019 all related to what occurred in the leadup to the incident which had occurred on 27 November 2018, a year earlier, not its aftermath which is what the Applicant sought to rely on in his submissions.

[98] The 11 November 2019 letter referred back to what it said was the 14 December 2018 disadvantage grievance, but it did not raise a new grievance. The 11 November letter said that NRCF should have eliminated the health and safety risks the prisoner’s conduct raised by refusing to the transfer of the prisoner. The prisoner’s transfer had occurred on 10 October 2018, which was 13 months prior to the 11 November 2019 letter.

[99] The letter of 11 November 2019 did not comply with s 114(2) of the Act, because it failed to make the Respondent aware that the Applicant alleged he had been unjustifiably disadvantaged in his employment within 90 days of that date. The 11 November 2019 letter did not identify any inaction or lack of investigation within a timeframe which might conceivably be linked to the raising of an alleged personal grievance on that date.

[100] The Authority did not accept that there had been some ongoing course of conduct which extended the times raised in the personal grievance past the 90 day time period specified by s 114(1) of the Act. The Authority is therefore not satisfied that any personal grievance claims have been raised within the 90 day statutory time limit required by s 114(1) of the Act.

[101] Accordingly, the Authority does not have any jurisdiction to investigate any personal grievance claims that may have been raised in the Applicant's Statement of Problem.

Is there any legal basis for the Applicant to claim a "top-up" to his weekly Accident Compensation payments to 100 percent of his total gross earnings prior to his injury?

[102] The Respondent is an accredited employer, which directly pays injured employees any accident compensation payments that are due to them.

[103] Under the ACA the Applicant was entitled to weekly compensation calculated at 80 percent of his average earnings. The Department's ACC Partnership Programme Accredited Employer Claims and Case Management Manual recorded:

ACC legislation requires the Department of Corrections to pay the first week's pay in relation to a work injury. Any subsequent weekly compensation entitlement is 80 percent of the claimant's normal average weekly earnings.

[104] There are short-term and long-term calculations, as per clause 34 of Schedule 1 of the ACA. These were explained in the affidavit filed by Amodhini Manamperu as follows:

- (a) The Department pays the first seven days of absence for a work-related injury;
- (b) Week 2 through to week 5 – is paid based on short-term earnings calculation at the date of injury; and
- (c) Week 6 onwards – is paid based on long-term earnings calculation at the date of injury.

[105] The short-term calculation is the average of four weeks' earnings prior to the date of injury. The long-term calculation is an average of 52 weeks' earnings prior to the date of injury. These values are indexed for inflation at 1 July each year.

[106] Under the ACA the s 32 weekly compensation is calculated at 80 percent of the employee's average earnings, up to a maximum cap per week.

[107] Whilst a Department employee is fully incapacitated, and the 80 percent of the employee's average earnings is less than an employee's 100 percent of base salary, then the Department pays a "top-up" to 100 percent of the employee's base salary.

[108] There are employees in the Department who earn more than their base salary by 'Acting Up' in a temporary role, or working overtime and call-backs and the like. Where 80 percent of

an employee's average earnings is higher than 100 percent of their base salary, then they are paid at the 80 percent average earnings figure while incapacitated. However, this only applies while the employee is fully unfit, and not attending work at all.

[109] At the point the employee becomes partially fit to work, and recommences work on a RTW programme, then they are paid 100 percent of their average earnings, even if they are working part-time or are on light duties.

[110] The Department pays employees who are fully unfit to work the higher of 80 percent of their average earnings (assessed at date of injury) or 100 percent of their base pay. It is only once they have commenced a RTW programme and are back at work working part-time on light duties, that this increases to 100 percent of their average earnings (assessed at the date of injury).

[111] The pay records established that the Applicant was fully unfit from 27 November 2018 to 3 May 2019 and partially unfit (on a return to work) from 7 May 2019 to 22 July 2019. The ACC Case Management Manual refers to the legislative provision of 80 percent of the claimant's normal average weekly earnings.

[112] The "*top-up*" to 100 percent of base salary is noted in some information pages for staff that relate to the Department being an accredited employer. There are no other policy or contractual documents in which the ACC 'top-up' is recorded.

[113] There is no contractual obligation in the CA for the Respondent to pay the Applicant 100 percent of his total gross earnings while he was on ACC. The top-up appears to be a discretionary benefit that is given to all employees as part of the Respondent's role as an accredited employer.

[114] Where an employee who is receiving accident compensation payments has average earnings less than 100 percent of their base salary, then the Respondent topped up their weekly compensation so that it amounted to 100 percent of their base salary. When the employee recommenced work they were paid 100 percent of their average earnings, even if they were on light duties or part-time work.

[115] In other words, the Respondent has decided to provide more than is legally required under the ACA. Accordingly, the Applicant's claim that the Respondent had to 'top up' his ACC payments to equal his total gross earnings is without a contractual or statutory basis. These

circumstances therefore cannot give rise to a claim against the Respondent for not giving him more than the benefit it had voluntarily elected to give employees.

[116] The Authority does not have jurisdiction to consider this claim.

Is the Applicant barred by s 317 of the ACA from an award of damages and/or compensation for the claims he has made in his Statement of Problem?

[117] Section 317 of the ACA bars claims for personal injury where there has been coverage given under the ACA to an injury.

[118] The Chief Judge in the Employment Court in *Robinson v Pacific Seals* said:⁵

Section 317 prevents an employee who has suffered a personal injury from receiving damages for the injury's effects, such as loss of earnings, distress, embarrassment and humiliation because such consequences are exclusively compensatable under the accident compensation legislation.

[119] The Statement of Problem alleged that the Respondent breached various clauses of the CA by failing to provide a safe workplace in relation to the 27 November 2018 incident. The Applicant claimed general and compensatory damages for these alleged breaches.

[120] The Respondent's submissions that the alleged breaches are "*directly and indirectly*" fundamentally tied to the 27 November 2018 incident and the injury suffered, succeeded. The Applicant has already been compensated for the injury he suffered as a result of the 27 November 2018 incident, because it was covered by the ACA.

[121] The problem with the Applicant's claim is that although he said it is not related to his personal injury, it is expressly tied to a claim for general compensatory damages that arises from the 27 November 2018 incident. The Authority therefore agrees with the Respondent this means the claim is barred by s 317 of the ACA.

[122] The Authority accepts that if contractual breaches that have caused quantifiable loss to an employee are entirely independent or 'disjunctive' of the personal injury they sustained then s 317(3) of the ACA would not bar the employee from seeking compensatory damages in those circumstances.

[123] The Applicant is relying on the fact that there was an incident on 27 November 2018 that injured him to give rise to his claim for compensatory damages. The Authority therefore did not

⁵ [2014] NZEmpC 99 at [43].

accept that the separation that was necessary of his claim from the injury he was compensated for was possible in this case.

[124] The incident causing the injury to the Applicant was “*directly and indirectly*” connected to, and arises out of, his covered personal injury. As such, the Applicant cannot claim separate damages for any breaches that gave rise to that incident and his consequent injury, because that was covered by the ACA.

[125] The Applicant has not identified any damages or compensation that do not fall within the s 317 of the ACA restriction.

[126] The Authority finds that it does not have jurisdiction to investigate or determine the Applicant’s damages and/or compensation claim.

Are the Applicant’s penalty claims time barred?

[127] Section 135(5) of the Act requires an action for the recovery of a penalty to be commenced within 12 months (with some limited exceptions) of when the cause of action first became known to the person bringing the action, or should reasonably have become known to them.

[128] The penalties sought by the Applicant in paragraph 3 of the Statement of Problem all directly concerned the incident that occurred on 27 November 2018, or the leadup to the incident on that date. Two of those penalty actions directly refer to “*the November 2018 assault*”.

[129] The penalty actions were commenced on 7 October 2022 when the Applicant lodged the Statement of Problem with the Authority. That was almost four years after the November 2018 incident and a period of 34 months and ten days after the 12-month filing deadline for commencing a penalty action.

[130] The Applicant’s penalty claims are clearly out of time.

Should the Authority extend time for the Applicant to commence his penalty actions?

[131] The Applicant said that although on the face of it the time bar was absolute, the Authority should still exercise its broad discretion under s 219 of the Act to extend the time within which he was permitted to commence his penalty action.

[132] The timeframe for commencing an action for penalties under s 135(5) of the Act is a specific statutory timeframe, which is clearly expressed by Parliament in the context of s 135.

Extending those times would defeat Parliament's intention regarding the precise time limits that are associated with penalty claims.

[133] The Authority notes that the Applicant has not yet made an application to extend time for commencing a penalty action under s 135(5) of the Act, and s 219 required the discretion to extend time to be exercised "*upon the application of any person*".

[134] The Employment Court observed in *How v Campin* that even if the 12 month statutory timeframe required by s 135 of the Act may have been capable of extension, but because no reasons had been given for that, the request was declined.⁶

[135] The same reasoning applied to this matter. First, no application for an extension of time has been made. Second, there have been no reasons put forward to explain the very extensive delay. Third, the Authority is not satisfied that this would be an appropriate matter within which to exercise its discretion.

[136] The Health and Safety at Work Act 2015 provides a mechanism for health and safety breaches to be addressed by way of a legislative prosecution regime. The Union were aware of that as at 14 December 2018.

[137] The Authority does not consider it appropriate in a matter like this to extend the timeframe for commencing penalty actions associated with alleged breaches of health and safety, when CANZ clearly was considering what if any legal remedies it should pursue back in its email of 14 December 2018.

Finding on penalties claims

[138] The Authority finds that all of the penalty claims in the Statement of Problem are out of time, and are therefore outside of the Authority's jurisdiction to consider.

[139] This is not an appropriate matter in which to extend the Applicant's time for commencing his penalty actions by almost two years. Accordingly, the Applicant's penalty claims cannot proceed.

⁶ [2010] NZEmpC 51 at [15].

Summary of outcome

[140] The Authority does not have jurisdiction to investigate or determine any of the claims the Applicant has made in his Statement of Problem. In particular:

- (a) The Code of Conduct cannot give rise to a breach of contract claim, because it is not a contractual term of the Applicant's employment. Accordingly, there was no legal basis for the claims involving alleged contractual breaches of the Code;
- (b) No personal grievance claims were raised within the statutory timeframe required by s 114(1) of the Act and the Respondent did not consent to any personal grievance claims being raised out of time;
- (c) There is no legal basis for the Applicant's claim that he should have his weekly Accident Compensation payments topped up to 100 percent of his total gross earnings;
- (d) Section 317 of the ACA bars the Applicant from seeking damages and/or compensation for the breach of contract claims in the Statement of Problem because they all directly or indirectly relate to the 27 November 2018 incident, for which he was granted coverage under the ACA. The claims are so closely connected to the injury that it would be artificial to extrapolate out any compensatory damages that were not already covered by accident compensation payments;
- (e) The penalty claims in the Statement of Problem were not commenced within the 12 month statutory timeframe required by s 315(5) of the Act; and
- (f) There was no good reason to extend the time for the Applicant to commence his penalty actions beyond the statutory 12 month time limit.

What costs should be awarded?

[141] The Respondent as the successful party is entitled to a contribution towards its actual legal costs. The parties are encouraged to resolve costs by agreement. If that is not possible, then costs will be determined based on an exchange of costs memoranda.

[142] For the purposes of assessing costs, the Authority will treat this matter as involving a half-day investigation meeting. Accordingly, the notional starting point for assessing costs in this matter will be \$2,250, being half of the current one day notional daily tariff of \$4,500.

[143] The parties are invited to identify any factors that they say should result in the notional starting tariff being adjusted.

[144] The Respondent has 14 days within which to file cost submissions and the Applicant has 14 days from receipt of the Respondent's cost submissions within which to file his cost submissions. No submissions will be considered outside of this timetable, without the prior leave of the Authority.

Rachel Larmer
Member of the Employment Relations Authority