

**NOTE: This determination contains an order in paragraph [6] prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2024] NZERA 331  
3085314

BETWEEN

DUANE FARRELL  
First Applicant

CORRECTIONS  
ASSOCIATION OF NEW  
ZEALAND INCORPORATED  
Second Applicant

AND

CHIEF EXECUTIVE OF THE  
DEPARTMENT OF  
CORRECTIONS  
Respondent

Member of Authority: Marija Urlich

Representatives: Sam Houliston and Eloise Callister-Baker, counsel for  
the Applicants  
John Rooney and Mary Breckon O'Sullivan, counsel for  
the Respondent

Investigation Meeting: 19 – 22 April 2022  
16 May 2022 (by audio-visual link)  
2 February 2024

Information and submissions received: Up to and including 2 February 2024

Determination: 7 June 2024

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**DETERMINATION OF THE AUTHORITY**

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## **Employment Relationship Problem**

[1] Duane Farrell has been employed by the Department of Corrections (Corrections) as a corrections officer (CO) since April 2013, and since August 2017 as a senior corrections officer (SCO), working in a corrections facility operated by Corrections.<sup>1</sup> He brings personal grievance claims before the Authority for determination, claims for breaches of express provisions of the relevant collective employment agreements, together with a claim that Corrections failed to provide him with a safe workplace. Remedies including an award of damages are sought. Mr Farrell's union, the Corrections Association of New Zealand (CANZ) also brings claims for breach of the relevant collective employment agreements and an award of damages. Penalties are also sought.<sup>2</sup>

[2] Corrections says its actions in all the circumstances at the time of the relevant events were fair and reasonable and there is no valid legal basis for the claims brought by Mr Farrell and CANZ.

[3] This employment relationship problem was the subject of a preliminary determination in which the Authority found Mr Farrell had raised personal grievances for unjustified action causing disadvantage and leave to bring other personal grievances out of time was declined.<sup>3</sup>

## **The Authority's investigation**

[4] In the course of investigating this employment relationship problem the Authority received evidence from the following witnesses some of whom, by consent, gave their evidence by audio visual link:

- Duane Farrell
- Mrs Farrell
- Alan Whitely, CANZ
- Beven Hanlon, who was a CANZ Industrial officer during the period of the employment relationship problem

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<sup>1</sup> Corrections Act 2004, s 5(1)(b).

<sup>2</sup> Mr Farrell and CANZ accept the penalty sought for a breach of the Wages Protection Act 1983 is unable to be progressed because it was raised outside the statutory timeframe.

<sup>3</sup> *Duane Farrell & Anor v Corrections* [2021] NZERA 336.

- Dr Zihan Zhang, Mr Farrell's doctor between August 2018 and October 2019
- Lizette van Zyl, who provides EAP services to Corrections staff including Mr Farrell
- Gail Adams, a corrections officer and co-worker of Mr Farrell
- Andrew Langley, Corrections prison director
- David Bullians, Corrections residential rehabilitation manager
- Michael Harvey, Corrections residential manager
- Trudi Amos, Corrections manager people services and system improvement
- Solomon Nui, Corrections regional manager
- David Pattinson, Corrections prison director

[5] 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. In determining this matter, the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions. As permitted by s 174C(4) of the Act, the Chief of the Authority has decided that exceptional circumstances exist to allow this written determination to be issued outside the three-month timeframe required by s 174C(3) of the Act.

### **Non-publication orders**

[6] Under clause 10 of the second schedule of the Act a non-publication order in relation to the following is made and is to apply to this determination and information provided to the Authority during the course of the investigation:

- (i) the detail and content of intelligence reports and threat assessments;
- (ii) all prisoner details including but not limited to the name, location of imprisonment, nature of offending, date of birth or photograph; and
- (iii) the name and identity of the Corrections officer identified at paragraph 253(b) of Corrections closing submissions.

## Issues

[7] The issues requiring investigation and determination are:<sup>4</sup>

### *Mr Farrell*

- (a) Was Mr Farrell unjustifiably disadvantaged and/or was Corrections in breach of its obligations at clause 6.2.1 of the (2017 Collective Agreement) by failing to immediately (and continuing to fail to) provide information to Mr Farrell in relation to serious threats to his safety at work during 2017 (including in June 2017, July 2017 and August 2017)?
- (b) Did Corrections breach clause 6.2.1 of the 2015 Collective Agreement by failing to eliminate risk or take reasonably practicable steps to minimise risk in relation to the 20 April 2017 incident?
- (c) Did Corrections fail to take reasonably practicable steps to provide Mr Farrell with a safe working environment leading to the 7 March 2018 incident (in breach of clause 6.1.4 of the 2017 Collective Agreement and implied obligations at common law)?
- (d) Did Corrections fail to take reasonably practicable steps to provide Mr Farrell with a safe working environment leading to the 9 March 2018 incident (in breach of clause 6.1.4 of the 2017 Collective Agreement and implied obligations at common law)?
- (e) Was Mr Farrell suspended on 15 March 2018? If so, was he unjustifiably disadvantaged?
- (f) Was Mr Farrell unjustifiably disadvantaged by Corrections' actions:
  - (i) in commencing a disciplinary process into Mr Farrell's conduct on 29 March 2018; and
  - (ii) suspending him on 6 April 2018?

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<sup>4</sup> The determination of remedies and penalties is reserved.

- (g) Was Mr Farrell unjustifiably disadvantaged in his employment due to the removal of the Control and Restraint trainee instructor duties on 22 March 2018?
- (h) Did Corrections fail to correctly 'top up' Mr Farrell's earnings to 100 percent from the ACC assessed 80 per cent?
- (i) Did Corrections incorrectly pay Mr Farrell during his suspension from 6 April 2018?

CANZ

- (a) Did Corrections breach clause 6.2.1 of the 2015 Collective Agreement in relation to the 20 April 2017 incident?
- (b) Did Corrections breach clause 6.1.4 of the 2017 Collective Agreement in relation to:
  - (i) the 7 March 2018 incident?
  - (ii) the 9 March 2018 incident?
- (c) Did Corrections have an obligation under the Collective Agreement to share intelligence information with the second applicant in a meaningful way? If so, did the respondent breach its obligations?

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

#### *Collective employment agreements 2015 and 2017*

[8] The parties' written terms of employment are set out in the relevant collective employment agreements.<sup>5</sup> Clause 6.2.1 of the 2015 collective employment agreement provides:

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<sup>5</sup> Department of Corrections Frontline Staff Collective Agreement 2015 – 2017 and the Department of Corrections Frontline Staff Collective Agreement 2017 – 2019.

The Department is committed to safe and healthy workplaces. Compliance with the applicable legislation, including the Health & Safety in Work Act 1992 and subsequent amendments or replacements is required.

[9] Clause 6.1.4 of the 2017 collective employment agreement provides:

The Department's duties include:

- providing and maintaining a safe working environment for employees and others in the workplace; and
- providing and maintaining facilities for the welfare of employees while at work; and
- providing all necessary training and instructions to employees; and
- making sure machinery and equipment is safe; and
- making sure working arrangements are not hazardous; and
- providing procedures to deal with work emergencies; and
- making sure health and safety employee engagement; and participation processes are in place.

[10] Clause 6.1.6 of the 2017 collective employment agreement provides:

Employees will follow the department's health and safety policies and procedures and will take reasonable care to look after their own health and safety at work, their fitness for work, and the health and safety of others.

[11] The Department of Corrections Frontline Staff (Prisons Based) Collective Agreement CANZ 16 June 2017 – 30 June 2019 provides:

#### **11.0 Principles for disciplinary matters**

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

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

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

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

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

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

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

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

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

### *Job description*

[12] Mr Farrell's senior corrections officer job description is dated December 2014 and applied to him from 23 August 2017 when he was promoted to that role. The job description lists key accountabilities broadly described as to 'Ensure Security' and 'Provide Care'. Under the heading 'General Accountabilities' is the requirement to be familiar and comply with the Department's Code of Conduct, related documents and policies and procedures relating to the position of Corrections Officer and to help maintain a safe working environment by adhering to the Department policies and procedures. The heading 'Role Purpose' provides:

The Senior Corrections Officer is responsible for ensuring the security and care of offenders and supporting their rehabilitation and pathway towards an offense free lifestyle.

The Senior Corrections Officer achieves these accountabilities by having a thorough understanding of custodial management systems and procedures and by having the right relationship with offenders. The Senior Corrections Officer supports Corrections Officers to develop the right relationship with offenders, visitors and other staff.

As a visible leader, Senior Corrections Officers are the first point of contact, supervision and assurance for Corrections Officers on a shift.

### *Policies and procedures*

[13] The prison operations manual provides at page 1 "...instructions to Corrections employees on the day-to-day activities relating to managing a prison".

[14] IR.05.06 of the prison operations manual establishes the role of the Post Incident Response Team:

1. The Post Incident Response Team (PIRT) is notified where required to support prison staff according to requirements.
2. The PIRT coordinator is to arrange, where practicable, the attendance of a member of the PIRT team at the operational debriefing and will then coordinate a Peer Support briefing.
3. ...

4. The purpose of the PIRT scheme is to provide support to staff enabling them to successfully integrate back into work and regain effective well being and performance as soon as possible after a serious incident.
5. All staff involved in an incident where physical force has been used shall have access to medical, emotional and psychological support and the Post Incident Response Team (PIRT).

[15] The Authority has been provided with the following Corrections' policy and procedure documents:<sup>6</sup>

- i) Managing threats to staff policy
- ii) Policy and guidelines responding to assaults and serious assaults 2015
- iii) Custodial Practise Manual
- iv) Health and Safety Management System Policy/Manual
- v) Responding to employee conduct and behaviour policy
- vi) ACC partnership programme accredited employer claims and case management manual
- vii) Desk top prompt titled 'Hierarchy of Controls' - November 2018
- viii) Risk action plans for the prison in which Mr Farrell works 2017 – 2019
- ix) Tactical operations manual for guidance - January 2018
- x) Infection control guidelines and procedures - 18 January 2019
- xi) Prisons Operations Manual 7 May 2021

## **Background**

[16] Corrections' functions include the management of people serving custodial sentences.<sup>7</sup> As a corrections officer (and senior corrections officer following promotion in August 2017) this is the work Mr Farrell performs and has done throughout his employment with Corrections. The prison working environment is a highly secure and dynamic one which can be dangerous. It is one where prisoners' conduct is closely monitored to ensure their safety and that of staff. This employment relationship problem arises from a number of serious incidents arising from prisoner conduct which resulted in Mr Farrell being assaulted. His personal grievances and the claims of breach of

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<sup>6</sup> For completeness, Mr Farrell's employee learning history 25 March 2015 – 6 July 2022 was also provided.

<sup>7</sup> Above n1, at s 6.

contract arise from the circumstances which gave rise to these assaults and Corrections' response to and support of Mr Farrell subsequent to these events.

[17] As stated above the prison environment is, by its nature, highly secure. This determination has been drafted in a way which seeks to preserve the integrity of the security systems which are relevant to the matters for investigation and determination.

*20 April 2017 – Mr Farrell is assaulted at work*

[18] On 20 April 2017 a prisoner attacked Mr Farrell during the course of his duties. He suffered a serious injury for which he was required to be off work for almost four months, returning to work on 8 August 2017.

[19] After the assault Mr Farrell was escorted to the medical unit by a manager and a nurse. He was told by a nurse to 'shake it off' and to wait in the duty supervisor's office while a corrections officer was organised to drive him to hospital. Mr Farrell told his superior officers he believed he had suffered a significant injury and asked several times for an ambulance to be called to transport him to hospital. This request was denied. His injury was not medically assessed or treated at the on-site health-centre. It is common ground that at this time treatment of staff was not part of the role of the on-site medical team. The PIRT procedure was engaged after the 20 April incident.

[20] Events proximate to the 20 April assault are relevant. Two days before, on 18 April an incident occurred which involved corrections officers controlling and restraining several prisoners.<sup>8</sup> Mr Farrell was involved in restraining a prisoner peripheral to the main incident. Subsequent to the assault suffered by Mr Farrell on 20 April (which again involved the restraint and control of a prisoner) in May 2017 a corrections officer was assaulted.<sup>9</sup> Mr Farrell says the assaults on corrections officers subsequent to these control and restraint events are no coincidence. He says following the assault of 18 April, it was readily anticipatable by Corrections that retaliatory action would be taken by other prisoners against corrections officers, particularly given the prisoner cohort involved and the level of tension in the unit.

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<sup>8</sup> Mr Farrell accepted during the course of his oral evidence to the Authority that the events occurred two days apart.

<sup>9</sup> Control and restraint is an intervention strategy used to bring a prisoner under control using approved techniques.

[21] Corrections says the health and safety risks around the events were dealt with appropriately and in accordance with the policies and procedures in place at that time. For completeness, the above April and May incidents of prisoner on staff assaults were the catalyst for development of a strategy to improve staff and prisoner safety, and reduce the risk of assaults on staff through increased use of de-escalation techniques, and an emphasis on staff to report all incidents no matter how minor.<sup>10</sup> This strategy was put in place from the end of May 2017. In addition, and in response to the April and May assaults, prisoner management techniques including stringent prisoner management routines, reduced prisoner association numbers, staff vigilance, and use of situational awareness were implemented. The information before the Authority suggests that up to 30 May 2017 the reported incidents of violence towards staff (both serious and non-serious) by prisoners had decreased from the same period in the year before and the April and May assaults accounted for a significant portion of the reported serious incidents.<sup>11</sup>

[22] While he was off work Mr Farrell accessed counselling services through the Corrections employee assistance programme (EAP). He continued to do so from April 2017 until August 2021. Initially Mr Farrell discussed with the counsellor his attack at work and the injuries he had suffered. Mr Farrell received earnings related compensation payments during his recovery period. Mr Farrell has concerns about the management of his injury by the organisation contracted by Corrections to provide such services as an ACC accredited employer. While these concerns are not directly before the Authority it is appropriate to record Mr Farrell was dissatisfied with how his injury was managed and holds concerns this may have delayed his recovery and pain from his workplace injury.

[23] In June and July 2017 information came to Corrections attention that there was a specific, likely threat against Mr Farrell.<sup>12</sup> This was not drawn to Mr Farrell's attention while he was off work or immediately on his return to work. Corrections says because there was no evidence of a risk to Mr Farrell outside work there was no need to discuss the matter with him at that time. It says further that any at work risk had been minimised by then by the implementation of the May strategy. Incident analysis shows

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<sup>10</sup> Intelligence report 8 November 2017.

<sup>11</sup> Intelligence report, 2 June 2017, page 3.

<sup>12</sup> Intelligence reports dated 2 June 2017 page 9 and 7 July 2017, page 9.

the key prisoner cohort had not been involved in any physical violence towards staff in June 2017 and also notes the identified prisoner cohort "...are willing to take further violent steps but will bide their time to allow staff to become more complacent/relaxed before they act. It is **likely** that this group remains an ongoing risk to staff safety".<sup>13</sup>

*8 August 2017 - Mr Farrell returns to work*

[24] After being assessed as fit to return to work Mr Farrell presented to work on 8 August 2017. He did not receive a security or return to work briefing immediately before or on the day of his return. Corrections' witnesses' evidence is they were unaware Mr Farrell was returning to work that day.

[25] On his return Mr Farrell was rostered to work in the same unit in which he was assaulted in April. He says, in general terms, this was appropriate because of his familiarity with the other corrections officers working there and the work systems and his knowledge of the prisoners in that unit. Mr Farrell does not accept that he should not have been provided with the information about the identified security risk.

[26] On 12 August Mr Farrell identified a security risk in the unit in which he was working. He duly reported the risk and Mr Nui, in his role as residential manager, prepared the initial report pending the further assessment and arranged for Mr Farrell to be moved to another unit which was deemed safe. The decision to move Mr Farrell was made by Mr Langley, the prison director, communicated to the duty manager and actioned by Mr Nui. The decision to move Mr Farrell from the unit was made due to the potential threat which had been identified in the intelligence report dated 14 August 2017 which also included a recommendation that Mr Farrell be relocated.

[27] There is some dispute about whether Mr Farrell's discovery of the security risk triggered the move or if a wider circumstance was highlighted by the discovery and this was the trigger. There can be little doubt on the information before the Authority that but for Mr Farrell's identification of the security risk days after his return to work, the specific threats identified in the June and July intelligence reports would not have come to his attention. In addition, the 14 August intelligence report places its assessment of

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<sup>13</sup> Ibid 7 July 2017 report, page 8.

the risk of harm to Mr Farrell within the context of the June and July assessment that he was potentially at risk.<sup>14</sup>

[28] On 16 August Mr Nui asked Mr Farrell to meet him to discuss his initial report document and the further assessment (the threat assessment). Mr Nui showed Mr Farrell the draft threat assessment on his computer screen and they talked it through. The further threat assessment included reference to information received of a potential, specific threat to Mr Farrell. Mr Farrell said this was the first time he understood Corrections had information of the specific threat against him as contained in the June and July reports. He said he did not have sufficient time to consider the information Mr Nui talked through with him, he did not have someone with him who could assist with the process and feels he could not meaningfully contribute to the finalisation of the threat assessment.

[29] Mr Nui completed the threat assessment that day and sent it to Mr Langley. He did not send it to Mr Farrell that day.

[30] In his evidence Mr Nui said from his recollection of the meeting that Mr Farrell participated in the assessment meeting and agreed with his assessment.

[31] On 21 August agreement was reached that Mr Farrell would return to his 'home' unit from the unit to which he had been relocated, but would work in a non-prisoner facing role. This did not occur because on 23 August Mr Farrell was promoted to senior corrections officer and relocated to a unit with a senior corrections officer vacancy.

[32] Mr Farrell said while he accepted the relocation was temporary and was in response to Corrections' concerns about his safety, he was concerned about the decision and had not been provided an opportunity to have input. He said he was alarmed by the information disclosed to him during the 16 August meeting, that he had insufficient information to understand why the relocation decision had been made and did not agree with the relocation proposal because he had not received formal information about the relocation. Nor had he not received sufficient information about the requirements of the relocation, was not clear if the safety concerns were relevant to his appointment as SCO.

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<sup>14</sup> Intelligence report 14 August 2017, page 2.

[33] Mr Farrell had serious concerns that the reason for his movement to different units at this time was not fully communicated to him. He says without all the information he could not understand the nature or extent of any threat against him and this made him fearful and on edge at work. He also says he felt left out of the loop about information relevant to his health and safety, and because he did not have a clear explanation as to the reason for his move, he could not explain to colleagues why he had been moved which caused him embarrassment. In addition, Mr Farrell says he felt angry Corrections could not put in place a robust health and safety plan for him on his return to work from injury.

[34] On 1 September Mr Farrell emailed Mr Langley regarding his removal from the unit and relocation:

Hi

As you may be aware I was recently removed from [...] due to concerns for my safety.

I was informed on 16.08.17 by the Duty PCO that I would be working temporarily in [...]. Only 30 minutes later I was informed by the same Duty PCO that I would be required to work in [...] but no information was given as to why.

Due to the lack of information I was receiving I asked to see the paperwork detailing my relocation. I then talked with my Manager who also could not give me any information. Later that day I had a meeting with my Manager who drafted a risk assessment during the meeting and said he would get back to me with further information. I was later informed that I could return to work in [...] to run DTV only from 28.08.17.

On 23.08.17 I received a letter offering the position of SCO, which I accepted. I then received an email confirming that my placement as an appointed SCO would commence in [...].

I am still waiting to receive formal information about my relocation and the reasons behind this. I am also conscious that the recent concern for my safety has impacted on my placement as an appointed SCO. I would like some clarity on this as I feel I have not been kept well informed. This issue is currently causing me concern and is affecting not only my work but my time at home also.

I look forward to commencing my new position as SCO and hope to have this matter resolved promptly.

...

[35] Mr Langley replied by email later that day:

Hi Duane

Thanks for your email.

I was under the impression that you had been fully briefed about the threat towards you ... and that [...] had involved you in the writing up of the threat assessment? I'm sure you will appreciate and understand that the decisions to place you in other units has only been a temporary one designed to keep you safe.

Your appointment as an SCO is unconnected and placement is subject to where vacancies exist which is why you will transfer to the [...] following the successful completion of the promulgation period.

Happy to discuss further if that will help you understand things better.

Thanks.

...

[36] On 11 September Mr Farrell met with Mr Langley and they discussed Mr Nui's 18 August threat assessment, a copy of which was provided to Mr Farrell on 12 September. The threat against Mr Farrell was assessed as a level 1 threat in the threat assessment template – "life is under specific threat of an act of violence from an individual or group capable of carrying out the threat". This was the first time Mr Farrell was aware there was a level 1 threat against him and that Corrections likely knew the threat existed when he returned to work in the same unit where he had been injured. He said he felt sick knowing he had been allowed to return to work in a unit where he could have been attacked again. He said his reaction to potentially being put in that situation again was more acute because he had already suffered an injury from an assault at work and understood the personal and family impact of such an event.

[37] On 25 September Mr Farrell started working in the unit where he filled the SCO vacancy. It soon became clear the risks identified in the threat assessment had not been fully communicated to senior staff in that unit. For example, Mr Farrell was offered overtime in a unit where a threat to him had been identified.

[38] Mr Farrell's concerns about his safety at work and Corrections' ability to keep him safe at work were escalating. He felt his trust that his employer would keep him safe at work was breaking down. On 14 November he telephoned and then emailed a Corrections welfare officer about his concerns that matters involving his safety had

been handled poorly and caused him stress. He said whilst the welfare officer was very supportive this did not resolve his concerns.

[39] On 16 November Corrections provided Mr Farrell with an escort to a police interview in respect of the 20 April assault. He was told the charges against the prisoner were likely to be dropped and that he would be charged. Mr Farrell said he was alarmed and extremely upset by this turn of events.

[40] On 21 November 2017 Mr Farrell wrote to Mr Langley requesting information from Corrections about the 20 April incident and subsequent events:

Andy,

I would like to formally request all incident reports, cctv footage and on body camera footage pertaining to the incident on 20/04/17 whereby I was assaulted by prisoner [...]. I believe it was at approximately [...] AM. Please also include the logs of whom the on-body cameras were assigned for that period.

You may recall that shortly after returning to full duties from the injuries I sustained in this incident I was removed from my normal area of work due to an identified risk from [...]. Sometime after a risk assessment was completed and the guidelines were set for where I could and could not work. I have since been informed that these guidelines are no longer in place. I would therefore like to view the follow up risk assessment that deemed the risk to be no longer prevalent. And would also like to view the information obtained that led to the initial findings of this risk in July.

Following my recent meeting with [...] I understand that the Department of Corrections is expecting that I continue to work until otherwise advised. I would therefore like to have the risk surrounding my work re-assessed to ensure that it is safe and reasonable for me to continue to work during this time.

I hope to hear back from you soon.

[41] Mr Farrell says he was concerned that he had been moved from his usual place of work due to a risk to his health and safety but that identified risk steps in the 18 August threat assessment had not been followed. He asked for information held by Corrections about the threat and requested another threat assessment be carried out.

[42] On 5 December Mr Langley replied:

Dear Duane

Thank you for your email of 21 November 2017, requesting all incident reports, CCTV footage, and on body camera footage of the prisoner assault on

you from April this year. Your request has been considered under the Privacy Act 1993 (the Act).

Please contact Security Manager...to arrange a time to view the relevant footage.

Regarding your request for incident reports, please find these attached. You will note that some information has been withheld under section 28(1)(a) of the Act, to protect the privacy of natural persons, including that of deceased natural persons.

Since your appointment to the position of Senior Corrections Officer, you have been moved to the [...]. Given your placement in a unit where there is little to no [...] activity, the [...] is an area that is deemed safe to your work. This is providing you remain in your allocated unit and do not place yourself in a compromising position by venturing into high risk areas.

Please be advised that I have asked your Residential Manager...to conduct a new threat assessment to confirm your current placement is suitable and that all appropriate measures have been taken to ensure your safety in the workplace.

I hope this information is helpful. Should you have any concerns with this response, I would encourage you to raise these with the Department. You have the right to raise any concerns regarding this response with the Privacy Commissioner....

If you have any further questions please do not hesitate to get in touch.

...

[43] On 6 December Mr Harvey, on Mr Langley's instruction, completed a threat risk re-assessment for Mr Farrell. This document was not provided to Mr Farrell until after proceedings were filed in the Authority.

#### *Events in 2018*

[44] On 18 February Mr Farrell wrote to Mr Langley with a list of issues which he asked to be addressed:

- i) clarity regarding his movement to the unit from 25 September 2017;
- ii) risks to him from an identified prisoner cohort;
- iii) whether any orders had been loaded into the Corrections management system regarding Mr Farrell and an identified prisoner;
- iv) a detailed plan to be put in place to manage and regularly reassess the risk from an identified prisoner cohort; and

v) the effect an ongoing police investigation may have to his work.

[45] Mr Langley replied on 22 March:

- i) confirming the unit movements following the 14 August intelligence report was due to the number of the identified prisoner cohort in each unit;
- ii) the 18 August threat assessment contained Mr Nui's recommendation for Mr Farrell to work in non-prisoner facing role in the original unit in line with Mr Farrell's expressed view that he felt safer in that unit due to his familiarity with its systems and routines;
- iii) because he had worked in difficult units for a long time it was deemed in his best interests to realign him and develop his capacity by working in other areas of the prison;
- iv) the intelligence documents would be provided to him to view;
- v) there were no orders loaded in respect of Mr Farrell and the identified prisoner;
- vi) inviting him to meet on 6 April to go through the disclosed documents and discuss his concerns and have his line manager present to organise a revised management plan; and
- vii) no Police charges had been laid and if that occurred steps may need to be considered under the 'responding to employee conduct and behaviour' policy.

[46] The proposed meeting on 6 April did not proceed. The disclosed documentation was not reviewed by the parties together until 30 October 2018.

*7 March – Mr Farrell suffers a second assault at work*

[47] In March 2018 Mr Farrell was working in a unit holding more vulnerable prisoners with forensic needs and treatment plans. They are a different cohort of prisoner to those with whom Mr Farrell was working in 2017. On 7 March a prisoner threw urine at another corrections officer which splashed onto Mr Farrell who was standing nearby. The incident report Mr Farrell completed that day records that after the prisoner was escorted to their cell Mr Farrell went to the medical centre where he and the other affected corrections officer received help to clean their arms, they were given an eye wash and advised to go to the doctor. Mr Farrell said when he reported the

event to his senior, Mr Harvey he was told to “stay away” from the prisoner and work behind the desk. Mr Farrell says he was appalled by this response and sought advice from CANZ who suggested he get a medical assessment.

[48] There was no plan to reallocate the prisoner or Mr Farrell or the other affected Corrections Officer. Mr Farrell’s incident report appears to be the only written record of the event and next steps. Mr Harvey accepts he would likely have advised Mr Farrell to stay away from the prisoner, which is a tactic commonly used to allow a cooling down period and avoid escalation of any tension. His evidence is the prisoner could not be reallocated because they were at risk and had complex needs and were therefore in the correct unit.

*9 March – Mr Farrell suffers a third assault at work*

[49] On 9 March the prisoner asked to speak with Mr Farrell. Mr Farrell assessed it as appropriate to do so. He said he did not check with his senior officer first because such an assessment is within his normal range of duties and he had understood the instructions he had received on 7 March were exhausted.

[50] The meeting with the prisoner did not go well. The prisoner spat at Mr Farrell which resulted in a spontaneous use of force by Mr Farrell.

[51] On 10 March Mr Farrell was relocated to another unit. This decision was made by Mr Harvey after Mr Farrell raised concerns about the prisoner’s conduct towards him at the morning debrief.

*13 March 2018 – Corrections commences disciplinary action against Mr Farrell*

[52] Following the incident Mr Langley and Mr Harvey reviewed the video footage of the incident and were concerned it appeared Mr Farrell had not used appropriate de-escalation techniques.

[53] On 13 March Mr Langley wrote to Mr Farrell inviting him to a meeting on 16 March to discuss disciplinary allegations arising from the 9 March incident which might amount to serious misconduct. Mr Langley said in evidence he initially wanted to address the matter at a low level. Mr Hanlon, CANZ industrial officer then emailed Mr

Langley raising concerns about the proposed employment investigation into the 9 March assault and requesting information. An email exchange followed.

[54] On 16 March Mr Farrell met with Mr Langley and his CANZ representative to discuss the concerns Corrections had raised and to view the CCTV and body camera footage. Mr Langley raised suspension or alternatives to suspension. The meeting ended with Mr Farrell being instructed to undertake non-prisoner facing duties in the gatehouse.

[55] As required under Corrections policy, a use of force review was subsequently conducted and completed on 13 April 2018. Mr Langley commissioned the review. It was conducted by another manager and approved by a deputy prison director on 20 April.

*22 March 2018 – change to structure of control and restraint training*

[56] On 22 March Mr Bullians wrote to Mr Farrell and a number of other corrections officers advising the trainee control and restraint instructor role they had volunteered for (and were in the process of completing the relevant training and certification) was being replaced with a role called trainee tactical instructor and they would have to reapply. Mr Bullians' email includes:

For all Trainee CNR Instructors, will now have to reapply for the new trainee Tactical Instructors role to bring into line with the rest of the team. I know some of you may feel disappointed but it is necessary for the Team to move forward under the new role. EOI for Tactical Instructors will go out to all, will advise.

[57] Mr Farrell accepted he was not the only recipient of the email but felt he was being targeted because of the employment matters he was involved in at that time. Corrections says the removal of the control and restraint responsibilities from Mr Farrell had nothing to do with the employment matters Mr Farrell was facing at that time. It says the changes were nationally implemented and introduced as part of modernising the approach to control and restraint training and tuition.

*28 March 2018 – disciplinary meeting regarding the 9 March incident*

[58] On 28 March the disciplinary meeting was held. Mr Farrell attended with Mrs Farrell and supported by Mr Hanlon. Mr Langley, Mr Bullians and the regional manager, Ms McHardy attended for Corrections. At the meeting the CCTV footage and body camera footage of the 9 March incident was viewed to which Mr Farrell provided commentary and answered questions put to him.

[59] Also on 28 March Mr Farrell was charged by Police in respect of the 20 April 2017 incident. He advised Corrections of this by his union representative that day, having advised Corrections the day before, again by his union representative that police intended to lay charges.

*29 March 2018 – Corrections initiates further disciplinary action against Mr Farrell*

[60] On 29 March Mr Langley wrote to Mr Farrell proposing his suspension as a result of the criminal charges. At a meeting on 3 April Mr Farrell was advised he was suspended after his comments opposing suspension had been considered. Mr Farrell attended the meeting supported by his wife Ms Farrell and CANZ representative, Mr Hanlon.

*6 April 2018 – Mr Farrell is suspended*

[61] By letter dated 6 April Mr Langley wrote to Mr Farrell confirming his decision to suspend. The letter confirmed the employment allegations concerned any admission or conviction for criminal offences and any appearance in Court, as a Corrections employee had the potential to bring Corrections into disrepute and/or could amount to a breach of the code of conduct. On 13 April CANZ wrote to Corrections on Mr Farrell's behalf challenging the fairness and reasonableness of commencing an employment investigation and suspension in the circumstances including where Mr Farrell denied any criminal wrongdoing and the matter was yet to go to trial.

[62] Mr Farrell was suspended from his employment from 6 April 2018 until 15 March 2022, following his acquittal from the criminal charge.

[63] On 30 October Mr Farrell and his criminal defence lawyer met with Mr Langley and the Intel Supervisor and reviewed the intelligence reports referred to in the threat assessment.

#### *Events in 2019*

[64] In February Mr Farrell's pay fell below base pay remuneration as provided under the relevant collective agreement. By April Mr Farrell's mental health was suffering. He was diagnosed with depression and attended a doctor for treatment.

[65] On 9 May 2019 Mr Langley provided Mr Farrell with a letter advising he had reviewed his suspension and proposed he return to work on alternative duties. Mr Farrell did not accept this proposal. His view was the proposal did not address the concerns he had raised about his removal from duties and that a non-prisoner facing role would still be a suspension.

[66] On 5 June Ms Cave, Corrections' acting regional manager wrote to Mr Farrell advising she had decided to close the disciplinary action commenced against him on 13 March 2019 and advising no disciplinary action would be taken against Mr Farrell.

[67] On 14 August CANZ wrote to Corrections seeking a review of Mr Farrell's suspension. By letter dated 20 August, Mr Pattinson, then acting prison director, reviewed Mr Farrell's suspension and proposed alternative duties. Mr Farrell's view was the proposal was too close to the scheduled dates of the trial which was absorbing his attention, and his concerns about Corrections' decision to remove him from duties remained unaddressed.

[68] On 9 September Mr Hanlon replied that Corrections had failed to respond to the concerns raised and asked that all allegations to be dropped.

[69] The criminal trial was held from 16 September to 2 October. Mr Farrell was acquitted of all charges. He then took a period of leave.

[70] On 25 November Mr Pattinson wrote to Mr Farrell that he wished to meet with him to conclude the disciplinary investigation initiated on 29 March 2018 and invited him to a meeting to discuss next steps.

[71] On 12 December Mr Farrell met with Mr Pattinson and a Corrections senior human resource advisor. He was accompanied by Mr Hanlon in his role as CANZ industrial officer and Mrs Farrell. Mr Pattinson confirmed the suspension was lifted and Mr Farrell would be on paid special leave until his return to work which would start with his attendance at a 10-week refresher training course. Mr Farrell accepts some training would be necessary to reintegrate him to the workforce following his prolonged absence but says the requirement for him to undergo training with new recruits was humiliating.

[72] On 20 December Mr Pattinson wrote to Mr Farrell confirming he had decided to close the 29 March disciplinary investigation and he was placed on paid special leave until the refresher training course had been completed.

2020

[73] In preparation for Mr Farrell's return to work on 6 January 2020 Mr Harvey completed a threat assessment. The threat against Mr Farrell was assessed as a level 2 which is "life and/or property is under general threat of psychological/physical violence from a person or group capable of carrying out the threat but such person or group have shown no overt intention to carry out the threat".

[74] On 15 March Mr Farrell returned to work. He successfully completed the refresher course over the period 16 March – 3 April and then resumed duties in his usual work location. His concerns about an adequate safe return to work plan continued.

## **Discussion**

*(a) Was Mr Farrell unjustifiably disadvantaged and/or was Corrections in breach of its obligations at clause 6.2.1 of the Department of Corrections Frontline Staff Collective Agreement 2015 – 2077 (2015 Collective Agreement) or clause 6.1.4 of the Department of Corrections Frontline Staff Collective Agreement 2017 – 2019 (2017 Collective Agreement) by failing to immediately (and*

*continuing to fail to) provide information to Mr Farrell in relation to serious threats to his safety at work during 2017 (including in June 2017, July 2017 and August 2017)?*

[75] Mr Farrell's claim is Corrections fell woefully short of its obligation to ensure a safe and healthy workplace for him by its ongoing failure to provide information about risks to him in the workplace in a timely manner.

[76] Corrections submits it proactively shared information regarding potential risks at work to Mr Farrell in a timely manner and confirmed access to requested documentation on 22 March 2018 when it was requested on 18 February 2018. With respect to the intelligence information received, Corrections submits it has proactively approached this also – on 16 August 2017 Mr Nui sat with Mr Farrell and talked through the information contained in the threat assessment.

[77] In June and July 2017 Corrections intelligence reported likely and specific threats against Mr Farrell. It is accepted there was no information contained in those reports which triggered a risk to Mr Farrell outside work and at that time he was not at work. However, there is no information before the Authority that suggests Corrections considered in any reasonable detail the risks identified in the June and July reports in light of Mr Farrell's return to work on 8 August. For example, there was no return-to-work plan developed for him to identify and minimise the specific risks outlined in the June and July intelligence reports.

[78] The information in the June and July reports was relevant and specific to Mr Farrell and reasonable steps should have been taken to ensure his safe return to work in light of that specific information. A process which was available to Corrections is that of the threat assessment. The policy as drafted is employee driven. This begs the question if Corrections holds information relevant to an employee's consideration of triggering a threat assessment by for example incident report or other such mechanism, what obligation does Corrections hold to disclose that information to the affected employee?

[79] In regard to the drafting of the 16 August threat assessment. The evidence is Mr Farrell met with Mr Nui to discuss the threat assessment and was invited to look over

Mr Nui's shoulder at a draft document on his computer screen. The underlining 14 August intelligence report and the June and July reports redacted or otherwise, which informed Mr Nui's drafting of the threat assessment were not made available to Mr Farrell at the meeting. It is difficult to see how Mr Farrell could meaningfully engage with the threat assessment draft when he did not have reasonable access to the underlying material. Mr Farrell's participation in this health and safety process was important, as recognised by the collective agreement, and particularly so given the threat assessment against him was at the highest level.<sup>15</sup> There are no notes of what was discussed at the meeting so it is difficult to resolve the areas in dispute. I am satisfied though that Mr Farrell left the meeting with an understanding that he would be provided with more information about the threat assessment. This did not occur, and he then followed the matter up by emailing Mr Langley on 1 September. Mr Farrell did not receive the threat assessment until 11 September. While it is accepted management needed to know what the threat assessment was, Mr Farrell also needed to know, particularly given the seriousness of the level of threat. Mr Farrell was also entitled to know the basis for the threat assessment with sufficient particularity to allow him to meaningfully engage with steps Corrections took to ensure his safety. This is demonstrated by the confusion apparently created by the directed unit movements.

[80] Mr Farrell has established he was unjustifiably disadvantaged by Corrections' failure to provide him in a fair and reasonable manner with relevant information concerning serious threats to his health and safety at work after his return to work in August 2017.

*(b) Did Corrections breach clause 6.2.1 of the 2015 Collective Agreement by failing to eliminate risk or take reasonably practicable steps to minimise risk in relation to the 20 April 2017 incident?*

[81] Mr Farrell's claim of breach of contract under this head is based on the following events:

- i) Corrections' response to the 18 April event;
- ii) the provision of medical care to him on 20 April;
- iii) his unit relocation in August 2017;

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<sup>15</sup> Collective employment agreement, clause 6.1.6.

- iv) his subsequent relocation to a different unit;
- v) requests for overtime and call-back work;
- vi) information available to his managers;
- vii) the ongoing monitoring of a level 1 threat to him;
- viii) lack of support when he was interviewed by Police in November 2017;
- ix) lack of agreed welfare checks; and
- x) his return to work in March 2020.

[82] Mr Farrell submits there was an ongoing pattern between 2017 and 2020 which shows Corrections failed, despite knowing of the grave risk to him, to ensure his health and safety, that Corrections' engagement with the issues was driven almost exclusively by Mr Farrell and CANZ, which falls well short of the statutory obligations in the HSWA, the relevant collective agreements and the approach a fair and reasonable state sector employer could take.

[83] There is considerable overlap with the personal grievance Mr Farrell has established in respect of information not provided to him in a fair and reasonable manner after his return to work in August 2017. This has impacted issues relating to his unit relocation in August 2017, his subsequent relocation to a different unit, requests made to him for overtime and call-back work, information available to his managers and the ongoing monitoring of the level 1 threat. If the information had been provided in a manner consistent with the obligations contained in the employment agreement, then the risks associated with these other matters could have been minimised because Mr Farrell would have been appropriately engaged in the management of the identified risk. These matters are appropriately addressed under the first established personal grievance.

*Corrections' response to the 18 April event*

[84] This claim does not succeed. There was insufficient evidence provided to support the claim an appropriate response would have been to lock down the affected units and that the steps that were taken were not adequate. The information before the Authority establishes well developed processes were immediately implemented.

*Provision of medical care on 20 April*

[85] Mr Farrell suffered a serious injury on 20 April during the course of his duties. He was not medically assessed by Corrections staff, he waited for a period in an office and was transported to hospital by a staff member.

[86] It is accepted that Mr Farrell asked for an ambulance to be called to transport him to hospital. His expressed preference should have been fairly considered by Corrections. There is insufficient evidence before the Authority that there was a fair assessment of his expressed preference. Corrections was obliged to fairly consider the request and be able to demonstrate it had done so, because how staff are managed after they are injured at work is part of its obligation to provide employees with a safe workplace, provide procedures to deal with work emergencies and maintain facilities for the welfare of employees while at work.<sup>16</sup> This breach of the collective employment agreement is established.

*Lack of support when Police interviewed Mr Farrell in November 2017*

[87] This claim arises from Corrections transporting Mr Farrell to the Police station to be questioned in November 2017, failing to provide support other than access to EAP when he asked on 18 February 2018, and alleged failure to provide support and advice when he was charged including how it would impact on his work.

[88] During this very difficult time Mr Farrell was provided with ongoing access to EAP services and was referred to Corrections' welfare officer which he utilised and gave evidence this was of assistance. Mr Langley replied to the 18 February email on 22 March providing broad information in the event he was charged and processes were put in place following charges being laid. The effectiveness of the welfare checks is addressed above. The employment investigation commenced after charges were laid and is addressed further on in this determination.

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<sup>16</sup> Clause 6.1.4.

*Lack of agreed welfare checks*

[89] Mr Harvey's evidence was he rang Mr Farrell regularly and when he did speak to him, he did not appear to engage. Mr Harvey said he understood his role was to provide operational updates to Mr Farrell and that he was aware he had access to other Corrections' provided support services such as EAP and the welfare officer.

[90] The documentation in support of the welfare check arrangements, purpose, implementation and progress was not extensive. I am satisfied a minimum requirement has been met. Corrections may consider reviewing this process so that those both with operational responsibility, and affected staff have a clear understanding from the outset what the purpose and requirements of welfare checks are, and appropriate recording and monitoring of such checks occurs.

*Return to work in March 2020*

[91] While it is understandable Mr Farrell would experience some disquiet in the return-to-work process it was reasonable for him to undergo some retraining on his return following acquittal. I am satisfied Corrections was open and communicative with him about how he would return to work, that he was provided a fair opportunity to comment and any comments were considered.

*(c) Was Mr Farrell unjustifiably disadvantaged and/or did Corrections fail to take reasonably practicable steps to provide him with a safe working environment leading to the 7 March 2018 incident (in breach of clause 6.1.4 of the 2017 Collective Agreement and implied obligations at common law)?*

[92] This assault occurred during a routine shower and cell clean. Mr Farrell was operating within the system of work in place to minimise risk (for example he was accompanied by another corrections officer). It has not been established what failing in the system of work may have prevented or minimised the prisoner throwing urine at the corrections officer which splashed onto Mr Farrell. The consequences of the event, exposure to bodily fluids, presents a clear health and safety risk. Mr Farrell's reporting of the event to his manager was appropriate as was his lodging of an incident report and attendance at the medical unit and subsequent visit to his doctor were entirely appropriate.

[93] Corrections' position is Mr Farrell had enough knowledge and experience, as a senior corrections officer, to go straight to the medical unit, which he did. Mr Harvey's failure to direct Mr Farrell to medical was unfortunate but does not amount to a breach of obligation. I am satisfied Mr Farrell, as a consequence of his knowledge and experience of Corrections' health and safety systems knew how to identify the risk and take the necessary steps to minimise that risk.

[94] The claims of personal grievance and/or breach of the collective agreement and/or common law obligation do not succeed.

*(d) Was Mr Farrell unjustifiably disadvantaged and/or did Corrections fail to take reasonably practicable steps to provide him with a safe working environment leading to the 9 March 2018 assault (in breach of clause 6.1.4 of the 2017 Collective Agreement and implied obligations at common law)?*

[95] This claim turns on the adequacy of steps taken by Corrections to minimise the risk to Mr Farrell from the prisoner subsequent to the 7 March assault. The immediate, acute risk was likely heightened due to tension between the prisoner and Mr Farrell, particularly given the known circumstances of the prisoner. Reasonable steps to minimise such a readily anticipatable risk would seek to lessen that tension. Mr Harvey's comment to Mr Farrell "to stay away" from the prisoner likely would have gone some way to address the risk. However, as was accepted in evidence the instruction lacked sufficient detail to be a meaningful instruction.

[96] Mr Farrell is entitled to have a safe workplace and that includes a reasonable expectation that Corrections will take active steps to minimise any known risk. This is expressly provided for in the collective agreement.<sup>17</sup> While Mr Farrell had a role to play in keeping himself safe at work so too did Corrections. The assault of 7 March created an acute known risk. Mr Harvey's instruction fell short of a reasonable response to an acute health and safety risk to Mr Farrell. It was too vague and created an ambiguity. What Mr Farrell reasonably needed was a clear instruction to assist with the exercise of discretion in any dealings with the prisoner in the acute period following the assault.

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<sup>17</sup> Corrections Frontline collective employment agreement 2017 – 2019, clause 6.1.4.

This did not occur and amounts to a breach of the employment agreement which has disadvantaged Mr Farrell in his employment.

[97] This personal grievance is established.

*(e) Was Mr Farrell suspended on 15 March 2018? If so, was he unjustifiably disadvantaged?*

[98] The first part of this claim of disadvantage arises from Mr Langley's email dated 15 March 2018 to Mr Hanlon to which Mr Farrell was copied. The letter is written in the context of notice to Mr Farrell on 13 March of an employment investigation commenced by Mr Langley into Mr Farrell's actions during the 9 March assault event and concerns raised by CANZ that an employment investigation was unbalanced and unreasonable given the assault Mr Farrell had suffered. In the same email chain CANZ raises a procedural concern that it was unclear if Mr Langley was informally or formally considering this matter and a request for information to allow Mr Farrell to prepare a response to the allegations.

[99] With respect to suspension or special leave Mr Hanlon wrote to Mr Langley in the late afternoon of 15 March including:

As there is no mention of special leave or suspension in your letter and that you claim that this is still an informal process and Duane has just completed his 2 rostered off days. Duane will be reporting for work at 0800 for his rostered shift and will need to be covered at 11am for the meeting you wish to have with him.

[100] Mr Langley replied later that evening and in respect of what duty Mr Farrell reported to in the morning:

Finally, whilst not specifically mentioned in the letter I informed Duane at our meeting on Tuesday that as a result of the allegations he would be redeployed to non-prisoner facing duties until Friday or he had the option to take special leave to prepare himself prior to our meeting tomorrow. As Duane had two rest days (Wednesday & Thursday) he indicated his preference was to have his two days of rest days and take a day's special leave tomorrow (Friday). My expectation is that he will not report for duty at 0800 hours but arrive to view the footage with [a named PCO] at 09.30am in Dave Bullians office.

[101] Mr Hanlon replied that evening including:

We do not accept that Duane should be on special leave tomorrow and believe this is an early and unjustified suspension. As you have directed him to attend the prison at 0930 tomorrow he will do this but does not take away from the fact that he does not want to be on special leave and does not agree to being on special leave.

[102] The disciplinary meeting proceeded on 16 March. Mr Farrell attended with his CANZ representative who read on his behalf a prepared response to the allegations set out in the 13 March letter. In the written response Mr Farrell summarised the events, denied the allegations and advised that he had acted reasonably in defence of himself and others. Mr Farrell referred questions raised by Mr Langley in the meeting to Mr Hanlon including that the matter would proceed to an employment investigation because Mr Farrell had denied the allegations and Mr Langley was prepared to consider alternatives to suspension such as non-prisoner facing duties.

[103] Following the meeting Mr Hanlon wrote to Mr Langley outlining his concerns about the meeting as reported to him by Mr Farrell and his CANZ representative including that he asked him questions after the statement had been read out when he had been advised that was the only comment Mr Farrell would make at that meeting and that he then moved to suspend him:

...by saying that he had to be moved to another area to work away from prisoners. This again was a decision made immediately following Shane reading the statement. This action and the decision to start an employment investigation are again confirmation of what we had warned of earlier and that you have had a predetermined position on this matter from the start. The fact that you have not followed Corrections policy and have moved directly to suspension is also a clear indication that you had not formed any opinion if these were serious or non serious allegations. Yet without hesitation you have suspended our member. Suspension is reserved only for the most serious of allegations and with reason.

[104] Extracts then follow from the relevant policy – “Responding to employee conduct and behaviour” – which sets out the procedural fairness guidance for suspension and alternatives to suspension. The letter then asserts Corrections is required to follow its policy and had not followed the procedural fairness policy with respect to a suspension or alternative to suspension, and was on notice of CANZ’s view that alternative duties is a suspension. The letter then raised a personal grievance in respect of “...suspend[ing] Duane without following proper process and that this has caused him hurt and humiliation in front of his peers and in front of the prisoner who has physically assaulted Duane on 2 occasions”. The letter seeks compensation of \$5,000

for the hurt and humiliation on Mr Farrell in the workplace and requested the employment investigation stop immediately.

[105] The 2017 collective agreement provides the following in respect of suspensions in the clause dealing with disciplinary processes:

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

[106] In addition to the collective agreement, the policy “Responding to employee conduct and behaviour” includes guidance for the procedure to be followed by an accountable manager, that is the manager with the delegated authority to make such a decision, when considering and investigating employee conduct and behaviour issues. In respect of suspensions the policy provides “Step 2 - Consider Suspension” and includes how the manager may approach alternatives to suspension:

In some cases it may be appropriate to temporarily place an employee on restricted or alternative duties, rather than suspending them. As with suspension, the employee must be given an opportunity to comment on such a proposal, and any concerns should be considered before restricted or alternative duties are implemented.

[107] The policy also provides an employee may be placed on special leave for 48 hours to enable them the opportunity to seek advice and prepare a response to a proposed suspension.

[108] Mr Farrell says his redeployment to the prison gatehouse on 15 March 2018 was a suspension from his usual duties because it deprived him of the “enjoyment of his rights of membership or office”.<sup>18</sup> He says the suspension unjustifiably disadvantaged him in his employment because it was predetermined.

[109] Corrections says offering Mr Farrell paid special leave on 15 March was fair and reasonable and not a suspension. It relies on the paid special leave provisions in clause 7.6b of the 2017 collective employment agreement.

[110] Mr Langley’s evidence is Mr Farrell agreed to special leave for that day and in any event, it is not a disciplinary action and occasioned Mr Farrell no disadvantage.

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<sup>18</sup> *John v Rees* [1970] Ch 345, 397 Megarry J.

[111] In respect of moving Mr Farrell to non-prisoner facing duties, Corrections submits this was not a suspension, that is made clear in the relevant policy under the heading “Alternatives to suspension” and it undertook a full and fair consultation process with Mr Farrell in relation to moving him to non-prisoner facing duties on 16 March and had fair and justified reasons to do so because it was appropriate until the employment investigation was carried out. In the alternative Corrections says it was justified in placing Mr Farrell in non-prisoner facing duties due to its concerns excessive force may have been used. Further Corrections submits Ms Cave’s letter cannot reasonably be inferred not to support Mr Langley’s decision given it was written a year later and included expectations of high standards of conduct.

[112] It is accepted Mr Langley wished to give Mr Farrell an opportunity to prepare for the first investigation meeting at which the allegations and suspension would be discussed. He told Mr Farrell this would be provided by way of alternative duties or special leave. This is what he records in his letter to Mr Hanlon on 15 March – Mr Farrell could elect an alternative. Remaining on usual duties was not part of the proposal. This is not consistent with the policy which requires an employee to be given an opportunity to comment on the proposal to place them on alternative duties and amounts to a breach of the policy. It is not accepted Mr Farrell suffered no disadvantage as a consequence of this breach – CANZ wrote to Mr Langley raising serious concerns of predetermination and the negative impact on Mr Farrell.

[113] The second part of this claim of disadvantage arises from the decision to place Mr Farrell in alternative duties pending investigation of the allegations of misconduct arising from the 9 March event. Mr Farrell says this was unreasonable and unfair because the use of force review was not yet complete and Mr Langley did not fairly consider his opposition to what he believed was a suspension. I do not accept being placed on alternative duties is a suspension – the policy makes this distinction clear. That does not mean the alternative duties may not give rise to a disadvantage. In this case, while I accept working in the gate house denied Mr Farrell the opportunity to fulfil all parts of his role as a senior corrections officer, this disadvantage was justifiable given the circumstances of the employment investigation which had been undertaken including that the prisoner could not be moved from the unit due to his vulnerable state.

[114] Mr Farrell has established a personal grievance for unjustified disadvantage arising from being placed on alternative duties on the 13 March 2018.

*(f) Was Mr Farrell unjustifiably disadvantaged when Corrections commenced a disciplinary process on 29 March 2018?*

[115] On 29 March 2018, after Mr Farrell advised Corrections he had been charged by police in respect of matters arising from the 20 April 2017 incident, Mr Langley wrote to him that he was concerned about this information, in particular that he had been charged with the identified criminal offences and any appearance he may make in Court had the potential to bring Corrections into disrepute. The letter continued that if substantiated his behaviour may constitute a breach of Corrections' code of conduct. The letter then proposed to suspend Mr Farrell and that once the Court process had been finalised Mr Langley would meet with Mr Farrell to see if any further disciplinary investigation was required to determine whether he had breached the code of conduct and if disciplinary action was warranted or the matter could be closed. Mr Farrell was invited to a meeting on 3 April to hear his response to the suspension proposal after which a decision on that issue would be made and reminded Mr Farrell of his right to obtain support, advice and representation, invited him to bring a support and/or representative to the meeting and also reminded him he could access support and counselling service for which contact details were provided.

[116] Mr Farrell submits Corrections' disciplinary process was fundamentally flawed from the outset – Corrections never undertook an investigation into the allegations but the possibility of one was used as reason to suspend Mr Farrell because the police had brought charges against him - and Corrections is unable to establish it has kept a sufficiently open mind to enable a genuine consideration of the issues including:

- i) the allegation that any appearance in Court may amount to a breach of the code of conduct was unfair and unreasonable because as a consequence of the charges Mr Farrell would appear in Court irrespective of his guilt or innocent;
- ii) an employment investigation into the 20 April event had been commenced and concluded and no disciplinary action was taken against Mr Farrell and reframing the events as arising from the police charges is double jeopardy;

- iii) Corrections commenced the process prematurely - Mr Farrell was entitled to be presumed innocent until he pleaded or was proven guilty, and was entitled to maintain his right to silence;
- iv) Mr Farrell's union had raised concerns about his treatment at work on 15 March which were never responded to;
- v) the allegations were inherently speculative and resolvable by conviction or the charges being withdrawn. Other than asserting his innocence, Mr Farrell could not respond to the allegation that he may be convicted of a criminal offence;
- vi) Corrections did not turn its mind to or indeed undertake any investigation into whether an objective observer appraised with relevant detail of the charges could reasonably consider whether it had been brought into disrepute or could be brought into disrepute;<sup>19</sup> and
- vii) whether these were the actions of a fair and reasonable employer in the known circumstances, including the immense pressure Mr Farrell was under responding to the police charges, the concerns as to his state of mind and his conduct during his employment.

[117] Corrections says the disciplinary process was justifiably commenced because it had cause for concern due to the serious nature of the charges, the close connection of the charges to Mr Farrell's role, and concerns for his health and safety. It says these concerns were fairly put to Mr Farrell in Mr Langley's 29 March letter.

[118] The collective agreement provides that before any substantive disciplinary action is taken, an appropriate investigation is to be undertaken by the manager.<sup>20</sup> In this case an investigation of the matters arising from the criminal charges could not be undertaken until matters outside Corrections' control were resolved by either Mr Farrell pleading guilty to one or other of the charges, or was found guilty (or the charges were withdrawn). Mr Farrell's criticism of the employment investigation precedes this stage. He says Corrections' initiation of an employment investigation was unfair and unreasonable because it could not promptly undertake an employment investigation and had no reasonable basis to do so because Corrections had not commenced an employment investigation when it reviewed the events of 20 April. It is understandable

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<sup>19</sup> *Wikaira v Chief Executive of the Department of Corrections* [2016] NZEmpC 175 [161] – [163].

<sup>20</sup> Collective employment agreements 2015 – 2017, 2017 – 2019 clause 11.1.4.

that Mr Farrell felt Corrections' approach did not give him the benefit of the doubt and this offended the principle of innocent until proven guilty. However, in an employment setting the charges were objectively serious. They arose from events in the workplace, and involved people who remained in the workplace and in respect of at least one of the charges, concerned matters which did not directly form part of the 20 April review. For these reasons Corrections' commencement of an employment investigation was a response open to it in all the circumstances.

*(g) Was Mr Farrell unjustifiably disadvantaged when he was suspended on 6 April 2018?*

[119] Corrections proposed to suspend Mr Farrell for the following reasons:<sup>21</sup>

- the serious nature of the allegations meant it was not appropriate for him to remain in the workplace while an investigation was undertaken; and
- his continued "presence in the workplace or contact with colleagues or prisoners might hamper any potential investigation and/or potentially raise a safety risk."

[120] Mr Farrell says the decision to suspend him was unjustified because there was no reasonable basis for Corrections to believe Mr Farrell remaining in the workplace could interfere with the Police process, and Corrections had conducted its own investigation of the 20 April 2017 assault and not commenced any employment investigation against Mr Farrell.

[121] The charges faced by Mr Farrell were serious and arose from events in his workplace involving staff and prisoners in the workplace. Corrections' apprehension that Mr Farrell remaining in the workplace posed a heightened risk to his safety was reasonable and justified a consideration of whether he could remain in the workplace. What could have occurred (and was available for consideration under the suspension policy), was placing Mr Farrell on alternative duties. Given the known circumstances of this matter including that Corrections had not undertaken an employment investigation of Mr Farrell's actions in respect of the events of 20 April, the unknown timeframe of the criminal trial, and likely financial disadvantage Mr Farrell would

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<sup>21</sup> Letter 6 April 2018 Mr Langley to Mr Farrell.

suffer if he was unable to work because he could not access overtime, a fair and reasonable employer could have considered the possibility of alternative duties and put this to Mr Farrell to comment. That offers of alternative duties in place of the suspension was made to Mr Farrell some months into the suspension weighs in favour of this as a reasonable and fair response. This disadvantage personal grievance is established.

*(h) Was Mr Farrell unjustifiably disadvantaged when control and restraint trainee instructor duties were removed on 22 March 2018?*

[122] Though the trainee control and restraint instructor position Mr Farrell had undertaken was voluntary, he says it was a formal position and any change to it including disestablishing the role had to be done in accordance with the consultation process provided under the collective employment agreement, and failure to do so was a breach of clause 10.1.2 of the 2017 collective agreement.

[123] There is no dispute Corrections did not carry out consultation on the change to the role. It submits because the role was a volunteer activity and not part of Mr Farrell's job description clause 10.1 of the 2017 collective employment agreement does not apply. Further, Corrections submits Mr Farrell is unable to establish he was disadvantaged by the changes and points to his and CANZ not raising any concern about the notification at the time and the evidence of Mr Bullians that Mr Farrell would likely have succeeded if had he applied for the new role.

[124] Clause 10.1.2 of the 2017 collective agreement provides:

Where organisational change is being considered that may result in positions no longer existing, consultation with CANZ shall take place in accordance with the Consultation provisions of this Agreement, prior to a decision being made.

[125] With respect to consultation, clause 2.2 of the 2017 collective agreement provides:

- 2.2.1 The process of change is ongoing and should form part of the organisation's continuous improvement. The parties recognise that consultation is an essential part of that process and are committed to effective consultation.
- 2.2.2 Where proposals being considered by the Department may result in significant changes to the organisational structure, staffing or work practices affecting staff, the Department will notify the National Secretary of CANZ and will provide CANZ and staff with meaningful

opportunity to be involved in considering those proposals. In doing so, the Department will:

- a) Ensure that effective consultation occurs; and
- b) Provide CANZ with all relevant information to enable constructive consideration of what is being proposed and the reasons for the proposal; and
- c) Allow a reasonable timeframe for CANZ and staff to respond; and
- d) Keep an open mind and listen to any suggestions; and
- e) Make a genuine effort to accommodate CANZ views.

[126] Given the broad nature of Mr Farrell's role as a senior corrections officer including the emphasis on ensuring security and care of offenders and supporting corrections officers, volunteering to and commencing the training to become a control and restraint instructor fell within the ambit of the role. Given this and the broad consultation requirements when the role was replaced with another structure Corrections was contractually obliged to consult with CANZ and affected employees, including Mr Farrell.

[127] In his evidence Mr Farrell set out matters that would likely have been relevant to a consultation process. He was denied the opportunity to raise these matters with Corrections because it failed to comply with the consultation obligations triggered by the change to the structure (of control and restraint training) which replaced the trainee role with one for which he had to reapply. That the change affected other staff does not obviate the disadvantage Mr Farrell suffered.

[128] Mr Farrell has established a personal grievance for unjustifiable disadvantage.

*(i) Did Corrections fail to pay Mr Farrell correctly during the period he received accident-related compensation payments from April to August 2017?*

[129] Ms Amos gave evidence of how Mr Farrell's accident compensation payments were calculated, including that he was paid his base salary at the higher calculation on the options available, and paid correctly and in accordance with Corrections' policy.

[130] In submissions, it was accepted on behalf of Mr Farrell that Ms Amos' information was correct including the statutory basis on which she outlined how Mr Farrell's compensation had been calculated.

[140] Mr Farrell's claim in relation to accident-related compensation payments is unsuccessful.

(i) *Did Corrections incorrectly pay Mr Farrell during his suspension from 6 April 2018?*

[141] Ms Amos' evidence was Mr Farrell was paid his base salary during the period he was suspended in accordance with the relevant policy. In submissions on Mr Farrell's behalf it was accepted the wage payments he received during the period of suspension were made in accordance with the relevant policy (that is paid special leave calculated at normal rates) based on his annual salary.<sup>22</sup> His claim the suspension prevented him from accessing extra hours is addressed above. Mr Farrell's claim he was incorrectly paid during the suspension from 6 April 2018 is unsuccessful.

### **CANZ's claims**

[142] Breaches of the relevant collective employment agreements have been found in respect of Corrections' interactions with Mr Farrell. CANZ is a party to those collective agreements. In the absence of evidence of clear loss arising from the breaches suffered by CANZ, the claims can be taken no further. There is no such evidence. CANZ's use of resources to support Mr Farrell through the employment relationship problem is an instance of union membership. There is no claim of breach of good faith nor compliance order/s sought.

### **Remedies and penalties**

[143] Mr Farrell has established personal grievances for unjustified disadvantage and is entitled to a consideration of remedies sought including compensation for humiliation, loss of dignity and hurt feelings, reimbursement of lost wages from 6 April 2018 and reinstatement to the control and restraint trainee instructor role (or its replacement). He has also established a breach of the collective employment agreement and is entitled to an assessment of general damages arising. The determination of these remedies is reserved to provide the parties an opportunity to resolve this matter

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<sup>22</sup> Policy - Responding to employee conduct and behaviour.

themselves. If resolution is not possible a timetable for submissions can be made on request and remedies then determined.

[144] With respect to the penalty claim for the established breaches of clause 6.1.4 of the collective employment agreement in respect of events on 20 April 2017 and 7 March 2018, that determination of this is reserved pending parties advice if they seek the opportunity to file submissions.

### **Summary**

[145] Mr Farrell has established the following personal grievances for unjustified disadvantage arising from Corrections failure to:

- (i) provide information in relation to serious threats to his safety at work during 2017;
- (ii) provide a safe system of work following his injury sustained at work on 20 April 2017;
- (iii) provide a safe system of work following the assault he sustained at work on 7 March 2018;
- (iv) fairly and reasonably place him on alternative duties on 13 March 2018;
- (v) fairly and reasonably consider alternatives to suspension on or about 6 April 2018; and
- (vi) fairly and reasonably consult with Mr Farrell about changes to the control and restraint trainee instructor duties.

[146] Mr Farrell has established breaches of clause 6.1.4 of the Department of Corrections and CANZ Frontline Collective Employment Agreement by failing to provide a safe system of work in response to the injury he sustained at work on 20 April 2017 and the assault on 7 March 2018.

### **Costs**

[147] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[148] If parties are unable to resolve costs between them and an Authority determination on costs is needed Mr Farrell may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Corrections would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>23</sup>

Marija Urlich  
Member of the Employment Relations Authority

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<sup>23</sup> For further information about the factors considered in assessing costs see:  
[www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).