

**NOTE: This determination
contains an order prohibiting
publication of certain
information at [1]-[2]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 373
3214180

BETWEEN	ANTONIOS ZIOGAS Applicant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Regena Sommers counsel for the Applicant Peter Chemis and Jessica Taylor, counsel for the Respondent
Investigation Meeting:	13 and 14 August 2024 in Wellington and by AVL
Submissions and further information received:	6 October 2024, 21 March 2025 and up to 24 June 2025 from Applicant 18 October 2024 and 5 March 2025 from Respondent
Determination:	26 June 2025

DETERMINATION OF THE AUTHORITY

Non-publication

[1] A non-publication order was made at the investigation meeting under clause 10, schedule 2 of the Employment Relations Act 2000 (the Act) preventing publication of the names or identifying details of any prisoners referred to in the evidence.

[2] The Chief Executive of the Department of Corrections (the Department) application for a non-publication order was not opposed. It is accepted publication of prisoners' names in the context of resolving an employment relationship problem between the parties in this matter would be an unwarranted intrusion of the privacy of others who are not central to the dispute and are in the custody of the Department. Taking that into account, I consider the public interest in full reporting and open justice would be displaced in this case by the need to ensure the privacy of others who are not parties to this dispute and made the order set out above.

Employment Relationship Problem

[3] Mr Ziogas was employed by the Department as a Corrections Officer for approximately 20 years until his resignation on 9 May 2023. Before resigning Mr Ziogas had worked in the Parole Board team for approximately four years.

[4] Mr Ziogas says his resignation should be treated as a constructive dismissal because the Department breached its duties of good faith and fair dealing when it rotated him from the Parole Board team to another prison unit. These breaches amount to unjustifiable disadvantage and were sufficiently serious to make it reasonably foreseeable he would resign.

[5] Mr Ziogas seeks lost wages and compensation for humiliation, loss of dignity and injury to feelings. He no longer seeks reinstatement.

[6] The Department says it did not breach any duties to Mr Ziogas when it rotated him out of the Parole Board team. It acted in accordance with rotation policy and guidelines and if there were any defects in the process, these were minor. Even if there had been a breach of duty in relation to rotation, it did not cause Mr Ziogas to resign and it was not foreseeable he would resign.

The Authority's investigation

[7] For the Authority's investigation written witness statements were lodged from Mr Ziogas and Steve Morgan. Suzanne Abraham, Ryan Yang, Pitau Hitaua, Rodney Morkel and Dominic Norona were summoned by the applicant and gave written and/or oral evidence. Cedrick David and Robert Anesi lodged sworn affidavits but also attended and gave evidence. On behalf of the Department written statements were lodged from, Dennis Goodin, Symon Leggett, Uila Kirifi and Reupena Ah-Young. All witnesses attended in person (other than Mr Kirifi who attend by AVL), and answered

questions under oath or affirmation from the Authority and the parties' representatives. The representatives also gave oral and written closing submissions.

[8] There was agreement between the parties a further three witnesses who were current employees of the Department would not give evidence on the basis the Department agreed they were rotated into the Parole Board team to increase staffing levels after Mr Ziogas was rotated out.

[9] Mr Ziogas was initially self-represented and leave was given at the first case management conference for Mr Ziogas to lodge an amended statement of problem. The investigation meeting set down for 17 October 2023 was adjourned to 20 February 2024 due to delays in the evidence being exchanged and Mr Ziogas obtaining counsel in September 2023.

[10] The Department requested a further adjournment due to operational requirements and there were ongoing difficulties with the exchange of evidence. A new date of 13 August 2024 was set down. There was a change in counsel for the Department less than a week before the investigation meeting and supplementary evidence was lodged from Mr Goodin and Ms Abraham.

[11] The Authority made orders after the investigation meeting for further information from both parties. In light of the further information received additional written submissions were requested and to clarify the basis on which the Department relied on to rotate Mr Ziogas.

[12] As permitted by s 174E of 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.

The issues

[13] The issues requiring investigation and determination were:

- (a) What were the reasons for Mr Ziogas' resignation?
- (b) Was Mr Ziogas' resignation caused by a breach of duty by the Department?
- (c) If there was a breach of duty was it of a serious nature that would mean it was reasonably foreseeable Mr Ziogas would resign?

- (d) If there was no constructive dismissal, was Mr Ziogas disadvantaged in his employment by the actions taken and decisions made by the Department when applying the rotation policy to him?
- (e) Has Mr Ziogas contributed to the situation he found himself in and, if so, should any remedies awarded be reduced?
- (f) Should either party contribute to the costs of representation of the other party.

Rotations

[14] The Department moves employees in and out of roles from time to time and refers to that as rotation. There are two relevant documents that were described as guidance documents and not policies. The first is the Custodial Rotation Practice Guidance (the Rotation Guidance) to be read in conjunction with the earlier Custodial Rotation Practice Guidelines – Information for Managers (2015 Guidelines). Rotation is described as:

Rotation is formal process by which custodial staff can be rotated throughout the various units, roles and responsibilities either on a prison site or within a region. Practice guidance has been developed to assist regions to make fair and informed decisions on rotation and is aimed at supporting nationally consistent rotation decisions.

[15] The purpose of rotation is to enable and support regional and site accountability, provide flexibility in meeting all operational requirements, ensure on-going staff safety, enable staff development and any specific training requirements for individuals to be considered and met, and to assist with career development.

[16] The Rotation guidance documents apply to all custodial staff with more than 12 months experience. There are no hard and fast rules about how frequently rotation should occur or how many staff should be rotated at any one time. Each site has the autonomy and flexibility to determine what is appropriate. Decisions on individual rotation placements are said to involve balancing operational requirements, business needs and aims and aspirations of staff. All custodial staff are recorded as having direct input into the rotation process through the opportunity to identify or express interest in particular placements.

[17] Expressions of Interest (EOI) are called for once a decision has been made to consider a person in a role for rotation. A Rotation Committee considers the EOIs and

makes recommendations to the Prison Director or Deputy Prison Manager on the rotation of staff from one location into another on each site. The Prison Director or Deputy Prison Manager make the final decision.

[18] The 2015 Guidelines are recorded to not be binding although the Rotation Guidance is to be read in conjunction with the 2015 Guidelines. The 2015 Guidelines aim to support nationally consistent rotation decisions with the objective recorded as being to assist Prisons to easily implement rotation and help those involved to make informed, transparent, robust and fair rotation decisions. The steps in the rotation process are set out as follows:

- (a) Expressions of interest (EOI)
- (b) Consideration of EOI
- (c) Recommendations/decision making
- (d) Notification
- (e) Reviews (if applicable)
- (f) Payroll and Organisation Charts amendments

[19] Several managers gave evidence about rotation. Ms Abraham was the Deputy Prison Director at the time Mr Ziogas was considered for rotation. She raised the issue regarding the amount of time the Parole Board Officers and Prosecution team had been in those roles which led to Mr Goodin, the Acting Prison Director deciding to convene a Rotation Committee at that time.

[20] There was an individual employment agreement between Mr Ziogas and the Department and he accepts as a general rule all custodial staff are able to be rotated.

Mr Ziogas is rotated out of the Parole Board team

[21] At the time Mr Ziogas resigned he was one of two Corrections Officers who made up the Parole Board team. He had been a Corrections Officer for almost 20 years and placed in the Parole Board team for approximately four years. The Parole Board team worked Monday to Friday 8.00am to 4.00pm. Mr Ziogas' personal circumstances meant the hours in the Parole Board team allowed him flexibility which he said was necessary at times. The previous Deputy Prison Director confirmed he was aware of

Mr Ziogas' circumstances and this together with his high performance in the team had informed earlier decisions to leave Mr Ziogas there.

[22] The previous Deputy Prison Director's evidence was that while Mr Ziogas' manager (Mr Ah-Young) was aware in general terms of Mr Ziogas' personal circumstances, the Deputy Prison Director managed the issue directly because of the nature of it and they were friends. He also confirmed rotation was considered in September 2021 as a result of the Making Shifts Work implementation. Mr Ziogas has submitted an EOI seeking to remain in the Parole Board team. He also said the Rotation Committee in 2021 placed weight on Mr Ziogas' personal circumstances to allow him to remain there despite having already been there for several years at that time.

[23] There are no records of that decision or Mr Ziogas' previous EOI and this information was not passed on after the previous Prison Director left and Mr Goodin took up the position of Acting Prison Director.

[24] Several witnesses also gave evidence of Mr Ziogas' work ethic and high standards. He was regarded highly for his integrity and work as a Parole Board Officer. The references Mr Ziogas attached to support his EOI application reflected this view was held externally as well as internally.

[25] Mr Goodin became the Acting Prison Director in May 2022. After having the issue raised with him by Ms Abraham and noting rotations had not been happening at that prison, he convened a rotation committee to consider a number of roles including Mr Ziogas'. Mr Ah-Young was the Security Manager at the time and he was one of the managers Mr Ziogas reported to. He was on the rotation committee along with Uila Kirifi and two others. Mr Goodin and Ms Abraham did not sit on the Committee but Mr Goodin made the final decision based on the recommendation from the Committee.

[26] On 17 June 2022, Mr Ah-Young informed Mr Ziogas he was to be considered for rotation and several days later an email went to all staff inviting expressions of interest. Mr Ziogas submitted a written EOI for Parole Board Officer because he wanted to remain in that role. He accepts he did not refer to his personal circumstances or the last Rotation Committee decision some nine months earlier or the fact he says he was told he could remain there.

[27] The Rotation Committee met and made a decision to rotate Mr Ziogas out of the Parole Board Officer role and into another position. Mr Goodin approved six

Corrections Officers for rotation following the Rotation Committee recommendations. Mr Ziogas was the only person to be rotated from the Parole Board team. Mr Ah Young explained in his evidence the decision was made because Mr Ziogas had held that placement for four years and it was felt this was unfair on other staff members and not in line with the rotation guidance.

[28] On 31 July 2022, this decision was conveyed to Mr Ziogas by Mr Ah-Young and Mr Kirifi. Mr Ah-Young said Mr Ziogas appeared not to be happy with that news. Mr Ziogas went home sick. He says Mr Ziogas returned to work soon after and he spoke to him on site on 5 August 2022 to advise him of the unit Mr Ziogas would move to. Mr Ziogas went on sick leave from 12 August 2022 and did not return to work.

[29] Mr Ziogas said he went to tennis with Mr Ah-Young after he had been told there would be an EOI for his position. Mr Ziogas says he challenged Mr Ah-Young that night about the EOI for his role and says Mr Ah-Young told him it was just him moving. Mr Ah-Young could not recall that conversation. Mr Ziogas recorded a note on his phone after that conversation that only emerged at the investigation meeting.

[30] On 5 August when Mr Ah-Young called him to confirm which unit he was going to, Mr Ziogas says he told Mr Ah-Young he knew he needed day shifts due to his situation and asked why he had not been given an opportunity to discuss this or to be consulted on where he was going or the hours who would be working. He says Mr Ah-Young said “it is what it is”.

[31] Mr Ah Young was rotated from the role of Security Manager from 5 September 2022 and no longer involved other than providing information to Human Resources (HR) when responding to Mr Ziogas’ request for a review of the EOI process and personal grievances.

[32] Mr Ah-Young denied any knowledge of Mr Ziogas’ personal circumstances and could not recall what Mr Ziogas says he said to him on 17 June or 5 August. He also denies they were friends or that they had discussed anything to do with the EOI other than the formal communications about the process. He agreed they did play tennis outside of work together.

Mr Ziogas raised a personal grievance

Personal circumstances

[33] Mr Ziogas was not happy about the decision. His evidence and submissions were unequivocal that his personal circumstances should have been taken into account by the Rotation Committee because he needed the flexibility of the Parole Board shift pattern as his personal circumstances were ongoing.

[34] Mr Ziogas did not include reference to his personal circumstances in his written EOI because he did not think he needed to and I will return to that below. He also maintains Mr Ah-Young knew of his circumstances because they were friends, and said he spoke to Mr Ah-Young about it on the 17 June when he was first formally advised about the EOI process. He responded to Mr Ah-Young saying the process was unfair because he had recently applied to remain in the position and been confirmed in the role due to his family situation. What he was referring to was the Rotation Committee decision after the Making Shifts Work implementation. He says Mr Ah-Young told him this was for transparency and reminded Mr Ziogas he could apply for his position and there were two positions available. Mr Ziogas also says he said to Mr Ah-Young “this is bullshit and you are moving me because of my mates and who have been suspended” or words to that effect. He said Mr Ah-Young replied “it is what it is”.

[35] Mr Ah-Young could not recall any of that conversation other than him telling Mr Ziogas about the EOI and that Mr Ziogas did not appear very happy. Mr Ah-Young also said he had no knowledge as to why Mr Ziogas took an extended period of leave in 2021. Mr Ziogas says Mr Ah-Young knew that was a direct result of the personal circumstances he was referring to.

[36] At this point I note Mr Ah-Young’s oral evidence was difficult in places to follow because he could not remember many things including the conversation at tennis. For completeness having heard all of the witnesses’ evidence in this matter and reviewing the text messages between Mr Ziogas and Mr Ah-Young, I am satisfied Mr Ah-Young did know generally of Mr Ziogas’ personal circumstances, but he did not know all the detail.

[37] Mr Ziogas’ submissions and evidence were clear in that he believed his personal circumstances should have been taken into account by the Department when it considered whether or not to rotate him away from the Parole Board team. He says the

details were known by Mr Ah-Young and the Department in general because flexible arrangements had been accommodated in the past to allow him to balance both his work and personal obligations.

Mr Ziogas says there was an ulterior motive behind the rotation decision

[38] Mr Ziogas was also very clear he believed he was rotated because of his friendship with some members of staff who were under investigation at that time. Mr Ziogas points to several things that happened as confirmation of this. Another Corrections Officer told him he was being moved before Mr Ah-Young spoke to him meaning it had been discussed that he was to be moved. However, Mr Ah-Young informed him the same day and the other Corrections Officer did not know much more other than an EOI was going out so not much turns on that.

[39] Mr Ziogas also says he was not given an opportunity to respond after Mr Kirifi and Mr Ah-Young informed him of the decision on 31 July 2022. He was told he had submitted a good EOI but the decision had been made to rotate someone else into the Parole Officer role and that was the end of the process. He has noted the written record of the rotation decision signed by Mr Goodin records the unit he is going to with a date in the next column but Mr Ah-Young told him that had not been discussed at that point. Mr Ah-Young did tell him on 5 August where he was going and Mr Ziogas says it was one of the harder units to work on. On 9 August the other Corrections Officer in the Parole Board team told him he was staying in that team and no one from prosecutions was moving either.

[40] The evidence from others was consistent about Mr Ziogas being vocal around this time about his belief the decision was predetermined and the reasons for that. Mr Ziogas also explained in his evidence how the inconsistencies he could see in what he was being told strengthened his view the decision was already made before he submitted his EOI and therefore the process was predetermined and not fair or transparent.

Mr Ziogas requests a review of the decision and raises a personal grievance

[41] On 5 August 2022, Mr Ziogas emailed HR stating that he requested a review of the EOI process for the Parole Board Officer role. He was not happy with the response he received and 9 August he replied to HR:

This situation had triggered issues from the past ...

Without consulting me as to what it was about and my current family situation as per my email you had my contact number I was expecting you to call me for clarification. This just goes to show that none of you are concerned with my mental health and wellbeing.

I will be lodging a grievance in the next couple of days.

[42] HR replied on the same day and informed him there was no right of review for an EOI:

...there is no right of review on an EOI process. The [name of prison] management team also have the ability to rotate staff into units where there is a need. You were advised on 31 July that you would be rotated out of the parole board role and further advised on five August that for the next roster you would be in [name of unit] with effect from 12 September. I do not see that this is unreasonable.

[43] On 16 August 2022, Mr Ziogas raised a personal grievance with the Department claiming he was disadvantaged when it transferred him to another location without consultation, predetermined the outcome of the EOI, did not give him a chance to be heard, allowed other staff to know about the EOI before him, did not put proper weight on his personal circumstances, allowed disparity of treatment, used the EOI process for improper purpose, bullying and failed to provide a safe workplace for him.

[44] He recorded the events leading up to the rotation decision he said showed the decision was predetermined and said management knew about his personal circumstances and the impact had been huge. He said there was no reason to remove him from his current position. The reasons for the rotation he said were a farce and unfair.

[45] On 20 September 2022, Mr Leggett, Director of People and Capability, requested a meeting with Mr Ziogas in response to the personal grievance letter. They met on 22 September and Mr Norona attended as a support person. Mr Leggett recorded the conversation and completed a hand written note.

[46] Mr Ziogas says he told Mr Leggett about his personal circumstances and why he needed to stay in the Parole Board role. He understood the outcome of the meeting would be that Mr Leggett would explore options with Mr Goodin, look to find a compromise and get back to him. Mr Leggett's evidence differed in that he says Mr Ziogas never mentioned his personal circumstances that would have required him to work day time shifts Monday to Friday and he would not have promised to look into "compromises" because that was not something he was able to do.

[47] In listening to the recording of the meeting Mr Leggett indicates he will talk to others and get back to Mr Ziogas and Mr Norona is correct when he says Mr Ziogas did mention his family circumstances but he did not elaborate. The reference to personal circumstances is brief and general. Most of the meeting was about the reasons why Mr Ziogas says the decision to rotate him was predetermined and related to other things that had occurred at the prison.

[48] Mr Leggett did not get back to Mr Ziogas who remained on sick leave until Mr Ziogas followed up, which prompted a brief phone call from Mr Leggett and then the formal written response to Mr Ziogas' personal grievance. The Department did not accept Mr Ziogas had a personal grievance claim. Among other things it was stated that under the Custodial Practice Guidance there is no requirement for consultation prior to initiating rotation and the Department does not need agreement to rotate a Corrections Officer out of a role. Mr Ziogas was also advised if he had any questions or wished to discuss the matter further then a meeting with Mr Goodin could be arranged. That offer was not taken up.

[49] Mr Ziogas remained on sick leave with medical certificates from his doctor. On 19 January 2023, the Department emailed seeking to meet with him and obtain information about his medical fitness to return to work. On 20 February 2023, he lodged a disadvantage personal grievance claim in the Authority. There was further discussion over email about leave entitlements and on 28 February 2023, he was informed he had run out of leave. He says he was placed on leave without pay. He resigned on 9 May 2023. On 22 June 2023 his statement of problem was amended to include a constructive dismissal claim.

Constructive Dismissal

[50] Constructive dismissal refers to a situation where, as a result of an employer's action or inaction, an employee's job or workplace becomes untenable, and they are left with no option but to resign.

[51] The Court of Appeal in *Auckland Shop Employees v Woolworths (NZ) Ltd* set out three non-exhaustive categories of constructive dismissal:¹

¹ *Auckland Shop Employees v Woolworths (NZ) Ltd* [1985] 2 NZLR 372, [1985] ACJ 963 (CA).

- (a) An employer gives the employee a choice between resigning or being dismissed.
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- (c) A breach of duty by the employer leads an employee to resign.

[52] Ms Sommers submits this matter falls into the third of these categories, that there was a failure to consult properly with Mr Ziogas which was unreasonable and a breach of the duty of fair dealing and good faith. This caused Mr Ziogas to resign.

[53] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* held that the correct approach is to firstly conclude whether the resignation has been caused by a breach of duty on the part of the employer. In determining that matter all of the circumstances of the resignation have to be examined, not simply the communication of the resignation. The Authority needs to then assess whether the breach of duty by the Department was of sufficient seriousness to make resignation reasonably foreseeable.²

[54] Mr Ziogas has the burden of establishing his resignation was actually a constructive dismissal.

What was the reason for Mr Ziogas' resignation?

[55] Mr Ziogas says the Department and the Rotation Committee knew of his personal circumstances but ignored those when it decided to rotate him. In particular, the previous Deputy Prison Director and Mr Ah-Young knew of his circumstances and the reasons he needed daytime shifts and some flexibility to be able to take leave at short notice. He also reminded Mr Ah-Young at the time and then after the decision was made Mr Ah-Young and Mr Kirifi about his need for those hours. Mr Ziogas says he also understood after the implementation of Making Shifts Work in September 2021 he would remain in his role and Mr Morgan's evidence was consistent about this.

[56] There was also the conversation with Mr Ah-Young at tennis. He says Mr Ah-Young told him it was only Mr Ziogas being rotated out before the rotation committee made its decision. That conversation together with the fact he had heard rumours he

² *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168.

would be moved out of his role, the other investigations at the prison and his friendship with the Previous Deputy Prison Director and then finding out Mr Yang was staying in the Parole Board team led Mr Ziogas to believe the decision was predetermined because it was made for an ulterior motive.

[57] Mr Ziogas made an information request at the same time he raised his personal grievance claim with the Department. As a result of an error in an email address Mr Ziogas' information was sent to the wrong email address. The Department apologised. Mr Ziogas also says he did not receive all the information he requested and those matters were addressed through a different process but contributed to how Mr Ziogas was feeling about his employer.

[58] Because Mr Ziogas was away from work on sick leave for an extended period of time, the Department took steps to communicate with him about obtaining medical information so it could better understand the issue keeping him away from work for so long. Mr Ziogas was wary of that process and how his medical information would be treated and nothing was advanced. He was then told he had no sick leave left and placed on leave without pay.

[59] It was Mr Ziogas' firmly held view the decision to rotate him was predetermined and unfair because relevant matters such as his personal circumstances had not been taken into account and there was an ulterior motive to the rotation decision. That view together with the series of interactions with the Department about his concerns and then being placed on unpaid leave is what caused Mr Ziogas to resign.

[60] I am satisfied the cumulative actions of the Department caused Mr Ziogas to resign.

Was resignation caused by a breach of duty by the Department?

[61] There are mutual obligations of good faith in s 4 of the Act requiring parties to employment relationships to be active and constructive in maintaining a productive employment relationship. There are also other implied duties on employers to be fair and reasonable and not to damage the relationship of confidence and trust between and employer and employee.

[62] In particular, in s 4 of the Act, employers have an obligation to consult with employees before making a decision that will or is likely to have an adverse effect on

the continuation of an employee's employment. Consultation includes access to information about the decision relevant to the continuation of an employee's employment and an opportunity to comment on the information before the decision is made.

[63] The consultation obligation also applies to the matters listed in s 4(4) of the Act. This is a non-exhaustive list but includes a proposal by an employer that might impact on employees including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer's business.

[64] Section 103A is also relevant because it sets out the test to be applied when considering whether an employer's actions are justified. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time. In applying the test for justification the Authority must consider the matters set out in s 103A(3) of the Act. The Authority may consider any other factors it thinks appropriate (s103A(4)) and minor defects in the process followed cannot render an action unjustifiable if these did not result in the employee being treated unfairly (s103A(5)).

[65] The Department's guideline documents on rotation do not specifically refer to an obligation under s 4 of the Act to consult but it is set out that it provides that opportunity through the EOI process. Mr Ziogas was offered that opportunity and submitted an EOI for the Parole Board Officer role. A problem for Mr Ziogas is that he did not record any information about his personal circumstances in his EOI.

[66] By Mr Ziogas' own admission these were personal matters which was why he says he did not elaborate on the detail in his EOI. Mr Ziogas also did not discuss with Mr Ah-Young that he wanted Mr Ah-Young to raise the matter on his behalf but had an expectation this would happen.

[67] In relation to the conflicts in the evidence between Mr Ziogas and Mr Ah-Young those remain but it is not necessary to resolve them as it does not advance matters for Mr Ziogas because he had an obligation to raise his personal circumstances if he had additional matters he wanted taken into account.

[68] There were also other things Mr Ziogas relied on at the investigation meeting which the Department did not know about. The previous EOI in September 2021 and the assertion Mr Ziogas could stay in the Parole Board team were not raised at the time.

It transpires the previous Deputy Prison Director had paper documents in his office confirming the decision to leave Mr Ziogas in the Parole Board team in 2021. Mr Goodin was unaware of this because it was not raised with him.

[69] With regard to the Department having an ulterior motive and predetermining Mr Ziogas' rotation, Mr Goodin's evidence was very clear about the reasons for Mr Ziogas' rotation. When Mr Goodin arrived at the prison the investigation Mr Ziogas links to the ulterior motive for rotating him, had been running for some time. Mr Goodin played no part in those investigations and was unaware of a close relationship between Mr Ziogas and others or any rumours.

[70] Mr Ziogas said Mr Goodin gave him a verbal warning around the same time but Mr Goodin explained that incident. Mr Goodin had a professional conversation with Mr Ziogas about an interaction Mr Ziogas himself had relayed to Mr Goodin. The matter was left there and no warning was issued or in place.

[71] Furthermore, witnesses gave evidence of Mr Ziogas' good reputation. Mr Goodin said the Department was surprised by his resignation and it had hoped he would return to work. Consistent with this Mr Goodin's evidence was the Department had not been opposed to reinstatement when this formed part of Mr Ziogas' claim.

[72] I have reached the conclusion the Department does have an obligation to consult and Mr Ziogas' personal circumstances were likely relevant to the rotation decision but Mr Ziogas did not raise them. While I appreciate the point there may have been some sensitivities making it difficult to discuss the matter, it is hard to find a breach of duty or unreasonableness by an employer for failing to take into account matters it did not have knowledge of. Mr Ziogas cannot rely on Mr Ah-Young raising those matters on his behalf without instructing him to do so.

[73] In respect of predetermination, the guideline on rotation is clear there are no hard and fast rules as to how often rotation takes place. The general principle is rotation is healthy for several reasons in the prison environment and each site is able to determine which roles are considered for rotation and how often according to its operational requirements.

[74] The steps taken leading up to the recommendation of the Rotation Committee and the decision being signed off, complied with the guideline documents on rotation. Mr Ah-Young's comments at tennis may have made it sound like a predetermined

decision to Mr Ziogas, however, this is explained by Ms Abraham and Mr Goodin's evidence which was very clear about the reason for considering Mr Ziogas for rotation. The amount of time Mr Ziogas had been in the role was the reason for considering his role for rotation. This is consistent with the guideline documents and the principles the Department sets out in relation to rotation.

[75] It has not been established the rotation decision was predetermined or that the Department failed to consult with Mr Ziogas. In these circumstances the Department acted reasonably and cannot be said to have breached its obligation of good faith and fair dealing towards Mr Ziogas.

[76] Mr Ziogas was not constructively dismissed.

Was Mr Ziogas disadvantaged by the Department's actions?

[77] Although I have found the Department did not breach any duty owed to Mr Ziogas when it made the decision to rotate him, the steps taken when Mr Ziogas asked for a review raise the question as to whether one or more of Mr Ziogas' conditions of employment were affected to his disadvantage.

[78] Under section 103(1)(b) of the Act a personal grievance for unjustified disadvantage requires that an employee's employment, or one or more conditions be affected to the employee's disadvantage by some unjustifiable action by the employer. The Authority must consider the factors set out in 103A of the Act on an objective basis and it may take into account any other factors it considers appropriate.

[79] The 2015 Guidelines (for managers) provides for reviews. The Rotation policy records the Department is committed to having transparent, informed, robust and fair rotation processes and decisions. It is the responsibility of the line manager to retain decisions and maintain accurate records. HR are responsible for providing advice, support and assistance to managers and staff in regard to the rotation process.

[80] When HR responded to Mr Ziogas' request for a review he was informed there was no right of review. This was incorrect. There is a review process provided for in the 2015 Guidelines (for Managers). Under the heading "Opportunity to Review Rotation Decisions" it is recorded:

Any staff members who have concerns, regarding any rotation decision applicable to them, can raise this with their line manager in the first instance. If this does not resolve the concern, their line manager can refer the staff

members concern and submissions along with the line managers recommendation to the Rotation Committee or Prison Director, as appropriate for further feedback.

[81] This did not happen and I am satisfied a fair and reasonable employer in the context of a workforce that is regularly rotated would comply with its own guidance documents and allow for review of rotation decisions. A referral of the concern together with a submission to either the Rotation Committee or Mr Goodin at that point would have provided the opportunity for the information gaps both parties had about each other's position to be rectified.

[82] Mr Goodin and Mr Ah-Young were asked for information to assist with response to Mr Ziogas' request for a review and his personal grievance. Emails record them providing detailed explanations of the process and the decisions made that were consistent with the evidence they gave at the investigation meeting. However, there was only one document held by the Department about Mr Ziogas' rotation. It recorded the resulting staff movements after decisions was made and appeared to be created for the purposes of rostering. The Department did not hold any documents or minutes from the Rotation Committee's deliberations or reasons for the recommendations it made to Mr Goodin.

[83] The Guideline document also records a Union representative will be present during Rotation Committee meetings. The evidence at the investigation meeting was this is now common place but there was no union representative at the Rotation Committee considering Mr Ziogas' EOI. This is a safeguard regarding fairness and transparency incorporated into the guidance documents. Mr Pitau gave evidence about his role as the union representative on rotation committees. He said he is not there to make a decision but to make sure the process is transparent and fair and if he has any concerns he has an opportunity to raise these. He was not involved in Mr Ziogas' rotation committee.

[84] Denying Mr Ziogas a review, failing to keep written records and not having a union representative present for the Rotation Committee deliberations were all matters the Department's guidance documents required. The Department by not complying with its own guidance documents disadvantaged Mr Ziogas.

[85] Mr Ziogas also recorded in his response to HR and his personal grievance letter an additional matter that he expanded on at the investigation meeting. This arose out

of concerns he had about where he was transferring to and that because of the additional matter the unit was going to was not a safe workplace for him. The Department did not engage with him on that matter and simply recorded in the formal response to his personal grievance it did not have any information which suggested he was unable to transfer to the unit it had rotated him into. I note this was not emphasised by Mr Ziogas and he was able to expand on this at the investigation meeting nonetheless no further questions were asked of Mr Ziogas about this at the time he raised it. A fair and reasonable employer would have engaged on this issue given how it was worded on the two occasions when he recorded it in writing and I find Mr Ziogas was further disadvantaged by this.

[86] Mr Ziogas also raised a grievance in his amended statement of problem lodged on 22 June 2023. While he had recorded in an email to Mr Anesi his understanding that he had accrued leave available it became clear to him after he resigned he had at least 20 days long service paid to him in his final pay. However, he was told in February by email he had no leave left and placed on leave without pay. Because he could not have known this until his final pay I am satisfied he has raised this disadvantage within the 90-day time period, and he was disadvantaged in his employment by not being provided accurate information about his leave balance while he was on sick leave.

[87] For completeness there was no evidence of bullying which formed part of Mr Ziogas' personal grievance claim and while disparity was raised in the letter, the evidence and submissions were not developed on this point.

[88] While I have not found Mr Ziogas was constructively dismissed, I am satisfied he was unjustifiably disadvantaged by the failures of the Department to comply with its own guidance on rotation regarding reviews and union representation. There was no record of the Rotation Committee's deliberations or reasons and it failed to engage on the additional matter connected with where Mr Ziogas was transferring to. Incorrect information was also provided about his leave balances at a time when that was important because the next step was placing him on leave without pay. These were more than minor defects in processes and decision making by the Department. This is particularly so in the context of the process the Department had gone through with Mr Ziogas and the concerns he was raising. These disadvantages resulted in unfairness to Mr Ziogas.

Remedies

[89] Mr Ziogas seeks lost wages and compensation for humiliation, loss of dignity and injury to feelings caused by his grievance. He says throughout the process and in the aftermath he was physically sick, could not sleep, lost weight and was extremely stressed. Medical certificates were provided for the duration of time he was on sick leave. Mr Ziogas' general practitioner provided written confirmation to the Authority of Mr Ziogas seeking and receiving medical advice and treatment for work related stress during the relevant period.

[90] There are five instances set out above where Mr Ziogas was disadvantaged in his employment that are related but also separate from the underlying reasons for his resignation. It is appropriate to consider compensation for these disadvantages in the round. Given the findings above and the stress and humiliation experienced by Mr Ziogas flowing from the disadvantages and with reference to other similar cases, I consider an appropriate award under s 123(1)(c)(i) of the Act to be \$12,500.00.³

[91] No order is made in relation to lost wages because it has not been established that the reasons for Mr Ziogas' resignation were caused by the Department. In the circumstances set out above there is insufficient information to be satisfied Mr Ziogas has lost remuneration as a result of his disadvantage personal grievances.

Contribution

[92] Under s 124 of the Act, contribution to the situation that gave rise to the personal grievance must be considered. I note that Mr Ziogas was offered two opportunities to meet with Mr Goodin to discuss his concerns but not until much later after the Department had refused to conduct a review and formed a view on his personal grievance. In these circumstances the disadvantages stem from the Department not following its own guidance and failing to provide accurate leave balance information. Mr Ziogas has therefore not contributed to his disadvantage personal grievances.

³ *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162] and see for example *Wiles v Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123.

Orders

[93] The Chief Executive of the Department of Corrections is ordered to pay Mr Ziogas within 28 days of this determination compensation under s 123(1)(c)(i) of the Act in the amount of \$12,500.00.

Costs

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

[95] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the party seeking costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum the other party will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[96] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁴

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁴ www.era.govt.nz/determinations/awarding-costs-remedies