

**NOTE: This determination
contains an order prohibiting
publication of certain
information at paragraphs [11]
and [12]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2025] NZERA 607
3142581

BETWEEN	JUNIOR TAUFUA Applicant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Claire English
Representatives:	Barbara Buckett, counsel for the Applicant Karen Radich, counsel for the Respondent
Investigation Meeting:	18 and 19 March and 29 May 2025 in Wellington
Submissions received:	Up to 23 September 2025 from Applicant Up to 25 September 2025 from Respondent
Determination:	30 September 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Junior Taufua, worked as a Senior Corrections Officer for the respondent department at Rimutaka Prison, joining the Department in September 2016 and becoming a Senior Corrections Officer in 2019. On 8 August 2019, Mr Taufua called lock up, but one particular prisoner JFX, resisted returning to his cell by grabbing

and holding onto nearby railings. Mr Taufua used force to get JFX into his cell. JFX let go of the railing and both him and Mr Taufua fell. Another prisoner who had not yet been locked up took this opportunity to attack another corrections officer. Mr Taufua wrote an incident report expressing the view that he used minimal force in his interactions with JFX.

[2] On 17 September 2019, Mr Taufua again called lock up. A prisoner YFM was in the kitchen area using the phone. He then moved around the area and returned to the kitchen and picked up a bowl of noodles. Mr Taufua considered that YFM was resisting the lock-up order, pinned him against the bench and grabbed him by the t-shirt. Mr Taufua then took YFM out of the public area holding him by his t-shirt, and left him to speak with his senior, another corrections officer. Mr Taufua made a file report of this incident, and was prompted to make an incident report a couple of days later.

[3] The Department undertook a review into these two incidents. On 6 November 2019, allegations of assault of the prisoners were formally raised with Mr Taufua, and he was sent home. Following a meeting with his representative on 11 November 2019, Mr Taufua was reassigned to work at the gate house. Later, he was permitted to return to work with prisoners.

[4] An investigation process took place. This was delayed by the 2020 lockdown among other things. On 22 September 2020, the Department conveyed its preliminary view to Mr Taufua that he had used unnecessary force on the prisoners in breach of policy. Following detailed correspondence between the parties and a substantive meeting where Mr Taufua was again represented, Mr Taufua was dismissed on 11 November 2020.

[5] Mr Taufua was later charged with assault. This matter was adjourned to allow the criminal matter to proceed. I am advised that matter was dismissed after the prosecutor decided not to proceed.

[6] Mr Taufua raises claims of unjustifiable dismissal, that he suffered an unjustified disadvantage in relation to the process that resulted in his dismissal, and that he suffered a breach of good faith in relation to a failure to promptly provide relevant information prior to dismissal.

[7] Mr Taufua seeks reinstatement. He also seeks compensation for hurt, humiliation, and injury to feelings, reimbursement of lost wages, and costs.

[8] The Department denies the claims. It says that Mr Taufua was dismissed for using unreasonable, unnecessary and disproportionate use of force on two prisoners, and that this was a reasonable conclusion for the Department to make. It further says that Mr Taufua's conduct amounted to serious misconduct and dismissal was justified. It denies any breach of good faith or unjustified disadvantage occurred and says that the process it followed was fair and reasonable.

The Authority's investigation

[9] For the Authority's investigation written witness statements were lodged from Mr Taufua, and on his behalf by his partner, and Mr Gary Keenan who also worked for the Department. For the Department, evidence was given by Ms Vivian Whelan, the General Manager of Rimutaka at the time and decision-maker, Mr Dennis Goodin, the General Manager of Rimutaka at the time of the investigation meeting, Mr Robert Hoogenraad, Principal Advisor, Tactical Operations; and Mr Albert Anthony Van Der Zwan, Senior Employment Investigator. All witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave closing submissions.

[10] 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.

[11] The Department applied for permanent non-publication orders, covering the identity of any prisoners involved whether directly or indirectly, and other staff, and the inside of prison units, all of which are variously identified and/or shown in documents and camera footage. It is appropriate that these orders are granted, as there is no public interest in details, which are peripheral to Mr Taufua's claims, being made public. Permanent non-publication orders are accordingly made, and the file is not to be searched without consent of the Authority. This determination has been written such that the names of the two prisoners involved have been replaced with randomly-generated three-letter acronyms.

[12] Mr Taufua has also requested that his name and identifying details are subject to non-publication orders, and it is submitted on his behalf that these are becoming more commonplace, and he is entitled to a right to privacy over how his employment ended. I find that there are no particular reasons why Mr Taufua's own name should be subject to a non-publication order, particularly in circumstances where he has chosen to contest the ending of his employment in an open forum, and where matters involving him have already been filed in other parts of the court system. However, I have chosen not to record some details of his evidence that contain identifying information in this determination, and I have likewise chosen not to name his partner in this determination.

The issues

[13] The issues requiring investigation and determination were:

- (a) Was Mr Taufua unjustifiably dismissed?
- (b) Was Mr Taufua unjustifiably disadvantaged?
- (c) Was there a breach of good faith by the Department?
- (d) If the Department's actions were not justified, what remedies should be awarded, considering:
 - Reinstatement;
 - Lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
 - Compensation under s123(1)(c)(i) of the Act
- (e) If any remedies are awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Taufua that contributed to the situation giving rise to his grievance?
- (f) Should either party contribute to the costs of representation of the other party?

Background

[14] Mr Taufua was a Senior Corrections Officer. Mr Taufua's evidence was that he had received training in acceptable use of force, and that what was described as a "spontaneous" use of force might be needed if a prisoner was resisting following the orders of a corrections officer or safety was at risk. His evidence was to the effect that there were inherent safety issues to be aware of as a corrections officer and that prisoners could be unpredictable. Therefore, use of force was a tool available when required.

[15] The first incident occurred on 8 August 2019 in respect of JFX. Mr Taufua noted that he had called lock up, this being a 10 minute warning to allow prisoners to collect what they need and return to their cells. He then called final lock up. Mr Taufua said he felt it was important that the lock up procedure was completed in a timely way as delays could have negative flow on effect for the rest of the day. A group of prisoners were sitting together on the top landing and Mr Taufua heard someone say “last one to lock up wins”. Mr Taufua described this as a game for JFX. Mr Taufua began trifling prisoners into their cells. Mr Taufua spoke with JFX and began guiding him into his cell. JFX turned away, and held onto the nearby railing. Mr Taufua described this as active resistance which necessitated a use of force. He grabbed hold of JFX to pull him into his cell. JFX was at that point not holding on to the railing, and both he and Mr Taufua fell. Another prisoner who had not yet been locked up came running and hit another corrections officer in the confusion. That other officer was injured. The prisoners were all then returned to their cells. Mr Taufua accepted that at no time did he turn on his body camera.

[16] Mr Taufua filed an incident report. He said in that report he had used minimal force on JFX, and he maintained at the investigation meeting that this was the case, on the grounds that JFX was unpredictable, had a history of assaults, and was being non-compliant. During the disciplinary process, Mr Taufua also pointed out that JFX had been imprisoned at least nine times, and had a “history of belligerence and non-compliance”. He pointed out that if JFX had been holding on to the rail tightly, it would not have looked as though excessive force was being used.

[17] The second incident occurred on 17 September 2019 in respect of YFM. Mr Taufua again noted that YFM was an unpredictable prisoner. YFM had been on the phone, and in Mr Taufua’s view was agitated. Again, Mr Taufua had called the 10-minute lock up warning. YFM then ran up the stairs, and along a balcony, and back down into the kitchen area. Mr Taufua attempted to “head him off”, but YFM returned to the kitchen area and picked up his bowl of prepared noodles. Mr Taufua moved swiftly and it appears he effectively pinned YFM against the kitchen bench (Mr Taufua accepts he “held [YFM] against the wall of the kitchen” and “pinned him against the wall” while grabbing hold of his t-shirt. Instead of returning YFM to his cell, Mr Taufua took YFM out of the public area, and brought him to speak with another corrections officer so he could calm down. This took YFM out of the area of the prison secured by

CCTV. YFM was returned to his cell shortly thereafter. Mr Taufua accepts that at no time did he turn on his body camera.

[18] Mr Taufua did not file an incident report as he took the view that this was the responsibility of the other corrections officer, who was his senior. He filed one a couple of days later when prompted. Mr Taufua said that YFM was “actively resisting and threatening violence”, and the force he used was necessary and reasonable in the circumstances. He also described YFM as “manipulative” and “unpredictable” during the disciplinary process.

Analysis

[19] I will first consider if Mr Taufua was unjustifiably dismissed. The test is whether the Department’s actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. I must consider whether the Department:

- a. sufficiently investigated the allegations against Mr Taufua;
- b. raised the concerns that it had with Mr Taufua before taking action against him;
- c. gave Mr Taufua a reasonable opportunity to respond to its concerns; and
- d. genuinely considered Mr Taufua’s explanations before reaching the decision to dismiss him.

[20] I may also take into account any other factors I consider relevant. On 11 November 2020, Mr Taufua was dismissed, for assaulting both JFX and YFM, and for failing to provide the appropriate incident report and failing to use his body camera in respect of YFM. The final decision letter dated 11 November 2020 stated:

You have consistently maintained that you did not assault anybody. Your view that the level of force you use in the discharge of your duties is appropriate is most concerning. I understand that is your genuinely held belief but it is not supported by the facts.

The men in our care are psychologically and physically vulnerable and they rely upon us to protect them. It is understood that sometimes it is necessary, reasonable, and proportionate to spontaneously use force to establish and gain control of a prisoner to avoid injury to others or to avoid potential security breaches. However, frequent and/or excessive use of force to control the men in our care under circumstances when it is not necessary, reasonable or proportionate and when there are other options available is entirely unnecessary....

Your inappropriate behaviour falls well below the standards of behaviour expected of an employee of the Department of Corrections and is a clear breach of the Department's Code of Conduct. Your unacceptable behaviour constitutes serious misconduct and I have decided that a sanction of dismissal on notice is warranted.

[21] The decision to dismiss Mr Taufua was made by Prison Director Vivien Whelan, who signed the 11 November letter. In her in-person evidence, Ms Whelan described the prison environment as challenging, but emphasised that prisoners were in the Department's care, and that violence by corrections officers towards them was not an acceptable solution. Instead, it was something to be used as a last resort, when other options had failed. Her evidence on this point was supported by the evidence of the current General Manager Dennis Goodin¹ who took the view that while acknowledging some inherent danger in the corrections office role, this made de-escalation and avoidance of violence all the more necessary for both the welfare of prisoners and the safety of staff. In giving their evidence, both drew upon their many years of experience in the Department including in operational roles.

[22] This may be contrasted with Mr Taufua's evidence which suggested an acceptance that use of force was merely one of the tools available to him.

[23] I have considered whether the decision to dismiss Mr Taufua was one open to a fair and reasonable employer at the time. In doing so, I have considered the evidence before me from all witnesses, including viewing the CCTV footage of the two incidents with JFX and YFM which was played at the investigation meeting. I have also considered carefully what I consider to be a key submission for Mr Taufua, that he was the person responsible for making the decision to use force "in the moment" and there is an element of unfair hindsight in the subsequent scrutiny that has been applied to his actions.

[24] The submissions on Mr Taufua's behalf suggesting that his own view of the acceptability of his actions must be accepted by the employer and by the Authority significantly downplay the seriousness of the matter. It is not disputed that Mr Taufua used force against two prisoners in circumstances where he believed they were reluctant to follow or were resisting following his orders. What is in dispute is whether the Department was entitled to dismiss him as a result, for unacceptable and inappropriate

¹ The title of Prison Director has been replaced by the updated title of General Manager, with the underlying role remaining the same.

use of force, or whether the Department, having a workplace policy that was not “zero tolerance” towards violence for various reasons, was bound to accept Mr Taufua’s own assessment that his use of force was reasonable and did not justify any sanction. Or in the alternative if sanction was justified, which Mr Taufua does not accept, the allowable sanction must be less than dismissal.

[25] Having acknowledged all this, I find that the decision to dismiss was one that was open to the Department in all the circumstances. As the dismissal letter makes clear, the Department found that Mr Taufua’s actions fell outside the range of acceptable behaviours. Mr Taufua may consider that his actions were acceptable, and the submissions on his behalf emphasise that he himself considered his actions acceptable, however, this is not the determining factor. On an objective view of the matter, the Prison Director considered that Mr Taufua’s behaviour was not acceptable in that workplace. Having viewed the CCTV footage and considered the other evidence presented to me, there is nothing to suggest that this conclusion was so out of the ordinary or so unsupported by evidence that it could be said to be substantively unjustified. In both cases, Mr Taufua used obvious non-trivial physical force (that is, physical violence) against prisoners in a way that was sudden, surprising, and in circumstances where there appeared to be other options open to him. The decision that his behaviour was unacceptable is one that was clearly open to the Prison Director to make.

[26] Having reached the conclusion that the dismissal was substantively justified, I must also consider the claims made on Mr Taufua’s behalf that the decision was procedurally flawed, and to an extent that renders the decision unjustifiable overall. The statement of problem at paragraph 1.1 claims as follows:

- a. The decision to dismiss was not one that a fair and reasonable employer could have come to in all the circumstances;
- b. The alleged behaviour did not constitute serious misconduct;
- c. The investigation disciplinary process [sic] resulting in the dismissal was conducted in an unfair and unreasonable manner;
- d. There was no exploration of alternatives to dismissal;

- e. The outcome was disproportionate to the circumstances if the circumstances warranted sanction (which they did not);
- f. The respondent acted in breach of its own policy in effecting dismissal.

[27] In relation to the first of these claims, I have already found above that overall, this was a decision that a fair and reasonable employer could have come to in all the circumstances.

[28] The second claim is that the alleged behaviour did not constitute serious misconduct. The behaviour in this case is the use of physical violence against prisoners, and whether the level of force used against prisoners by Mr Taufua was necessary, reasonable, and proportionate in the circumstances. I am not persuaded that the Department condones use of force against prisoners as a general practice or to the extent that it could reasonably be said that Mr Taufua's use of force could not constitute serious misconduct. Indeed, the submission that Mr Taufua's actions could not constitute serious misconduct suggests an inability by Mr Taufua to deeply reflect on the seriousness of his actions.

[29] The third claim is that the 'investigation disciplinary process' was conducted in an unfair and unreasonable manner. Details of this claim were set out in submissions filed for Mr Taufua, and I have considered these various points beginning at paragraph [45] below.

[30] The fourth claim is that there was no consideration of alternatives to dismissal. I find this claim is not made out on the evidence. The decision-maker Ms Whelan was able to explain the consideration she gave to her decision, which is supported by the contents of the letter of dismissal. Insofar as this is a submission that the decision-maker had a closed mind, or that the decision-maker did not genuinely consider Mr Taufua's explanations, I find that the evidence does not support the idea that such failures occurred. Ms Whelan was able to describe the steps she had taken to consider his comments. The evidence was that she reached a different view on the seriousness of his behaviour than his own. However, this was a view that she was entitled to reach. No claim is made out.

[31] The fifth claim is that the outcome (of dismissal) was disproportionate to the circumstances if the circumstances warranted sanction (which Mr Taufua submits they

did not). I have already set out above my view that the decision to dismiss Mr Taufua was a decision which was within the range of outcomes that a fair and reasonable employer could have reached in all the circumstances at the time. Insofar as this claim is a further attempt to argue that the decision was not one that a fair and reasonable employer could have made, I have already reached a contrary view as set out above. In submitting that Mr Taufua's actions did not warrant sanction, this restates and reinforces the divide between the parties, with Mr Taufua being of the view that his conduct was not seriously blameworthy, and the Department taking a contrary view. I have already found that Mr Taufua's actions were of a type and nature to warrant sanction. Mr Taufua maintaining that his actions were proper and the Department should accept them does not move the discussion forwards.

[32] The sixth claim is that the Department acted in breach of its own policies in effecting dismissal. This is set out in the statement of problem as claims that:

- a. Mr Taufua was entitled to take the actions that he did in accordance with the Department's policy;
- b. the delay between the events occurring and the eventual dismissal was such that dismissal could not properly occur;
- c. the Department failed to seek Mr Taufua's view as part of its preliminary inquiries including being dismissive of reports more favourable to Mr Taufua; and
- d. the decision-maker slavishly followed the findings of the investigator.

[33] I will consider these claims in turn.

[34] The Department has a policy which provides for spontaneous use of force. This was not in dispute. However, the decision-maker found that the way Mr Taufua acted was not in accordance with that policy. Instead, she found that the level of force used by Mr Taufua was excessive, and not reasonable or necessary in the circumstances. At the risk of repetition, this was a decision open to her, and it is also a decision which I view as reasonable in the circumstances, particularly after viewing the CCTV footage.

[35] There was a delay between the two incidents occurring on 8 August and 17 September 2019, and the dismissal itself on 11 November 2020. In particular, Mr Taufua emphasised that he had continued to work for the Department following the two incidents, and that this was an indication that the Department did not as a matter of fact

take matters seriously and he had proven himself by working without further incident during this time.

[36] The first question is whether by allowing Mr Taufua to continue working, the Department effectively fettered its own discretion to terminate Mr Taufua's employment at a later date. I find this was not so. Suspension was proposed and Mr Taufua was made aware at the beginning of the process his employment was at risk. Mr Taufua and Ms Whelan then reached agreement that Mr Taufua would carry out alternate duties as an alternative to suspension, and he spent time working in the gatehouse where he had no prisoner supervision duties, only returning to that role once the prisoners in question were no longer in the same block. He was also asked to ensure his on body camera was active at all times, which was not the case previously. He agreed to this condition also.

[37] The Department did not consider it could or should allow Mr Taufua to continue in his same role and working in the same way given the concerns that had arisen. Although it did not suspend him, it did not allow matters to continue as they had before, and Mr Taufua was aware of this and agreed to it. I find this does not prevent the Department from later reaching the conclusion that Mr Taufua could not properly continue in his original role.

[38] The second question is whether the delay was so significant and so unreasonable as to render the ultimate decision to dismiss Mr Taufua unjustified. The delay was explained to me in evidence as being caused by a variety of practical factors including the on-going impact of Covid-19 lockdowns and workflow commitments and other unavailability of and by various people involved in the investigatory process. The delay, while perhaps unfortunate, was a result of unusual circumstances occurring at the time. It was not unexplained. It did not act to prevent Mr Taufua participating in the Department's process nor did it prevent him from accessing representation and support. Throughout this time, he continued in employment and pay as agreed. Overall, I decline to find that the delay had any particular or adverse effect on the process itself, or the conclusions reached as a result.

[39] Finally, come to consider the submissions that the Department failed to seek Mr Taufua's views at appropriate times, failed to consider comments by him and/or favourable to him, and that the decision-maker slavishly adopted someone else's views.

These claims are not made out on the evidence. The Department did consider Mr Taufua's views and reports favourable to him. The Department simply took a different view of the seriousness of the complaints against Mr Taufua. Significant back and forth correspondence occurred between the parties, with Mr Taufua providing detailed responses to the concerns against him at key points. In the end, the Department did not accept or agree with Mr Taufua's position and nor was it obliged to do so.

[40] In particular I find that the allegation that the decision-maker slavishly followed a report provided to her rather than forming her own views is not made out on the evidence. Ms Whelan explained succinctly how she had considered Mr Taufua's position, and why she believed that dismissal was necessary. This is summed up in her written evidence where she states that in a meeting with Mr Taufua, "he did not reflect on his own conduct or apologise for that. Rather he still believed he had not assaulted either prisoner...[which] was most concerning and was not supported by the facts."² Her in-person evidence was consistent with the detail set out in the prior dismissal letter of which she was the author. I am of the view that Ms Whelan formed her own views on the matter as she was obliged to do.

[41] In submissions for Mr Taufua filed after the investigation meeting, it is submitted many times that Ms Whelan was biased against Mr Taufua. This is a serious allegation, and not consistent with the claims in the statement of problem.

[42] One of the reasons given for accusing Ms Whelan of bias relates to Mr Taufua's response to the preliminary view letter. Mr Taufua provided a substantive written response, which included comments about the employment investigation reports. Ms Whelan provided this response to the employment investigator and asked him to consider them and to consider making any necessary changes to the employment investigation reports. Ms Whelan explained that she would normally have expected this to occur earlier in the process, however, this was the first time that Mr Taufua had responded to the employment investigation report.

[43] It was submitted for Mr Taufua that Ms Whelan should not have sought the views of the employment investigator, and by doing so, she had failed in her duty to consider Mr Taufua's response herself. This submission is not persuasive. On receiving comments from Mr Taufua about both the employment investigation report

² Ms Whelan's witness statement dated 27 February 2025, at paragraph 24.

and her own preliminary view letter, Ms Whelan put those comments to the author of the employment investigation report and asked him to consider adjusting or amending his report before continuing with the process. There is an obvious benefit to Mr Taufua in her so doing, rather than Ms Whelan simply saying that the time for critically considering the employment investigation report had come and gone. In addition, this suggests that Ms Whelan took Mr Taufua's comments seriously and considered them worthy of further reflection and advice. This does not suggest disregard or bias.

Other Matters raised in the statement of problem

[44] The statement of problem raises a claim that the Department unlawfully repudiated the employment contract. This is denied by the Department and not specifically pursued further in submissions. I consider that this claim, such as it is, has effectively been considered as part of my below comments, and as far as I am required to make a finding on it, is not made out.

Other matters raised in submissions on behalf of the applicant

Matters relating generally to policies and procedures

[45] That there was contrary evidence before the Authority about how the Department's policies applied. Also, there was internal confusion and inconsistencies in understanding within the Department itself which Mr Taufua was entitled to benefit from. I disagree that this was what the evidence showed. What the evidence did show was that Mr Taufua viewed use of force (physical violence against prisoners) as a tool available to him and was supported in this view in the Authority by the older officer who was one of his trainers. This was not a view shared by the current and previous Prison Directors, who viewed use of force as a last resort and something all officers should be focused on avoiding.

[46] That the Department could not "capitalise" on deficiencies in training and/or rely on the wording of its policies where those "did not align with [Mr] Taufua's own training. This mis-states the evidence given and the position of the Department. It again suggests that the Department and the Authority were obliged to accept Mr Taufua's view of his own conduct, which I have found not to be the case.

[47] That just because Ms Whelan and/or the employment investigation report writer may have taken a different approach, this does not make the option taken by Mr Taufua an assault, or inconsistent with policies and procedures. This mis-states the reason why

Mr Taufua was dismissed which is as set out in the dismissal letter quoted above, as well as the seriousness of his undisputed actions.

Matters relating to CCTV footage and information relied on

[48] That the process was flawed because CCTV footage does not convey verbal cues and prompts (in other words, the CCTV footage was silent, with no sound recording available), and this led to an unfair assessment of Mr Taufua's actions. The evidence was that CCTV footage was not the only evidence which was considered by the Department, and again this understates the seriousness of Mr Tuafua's undisputed actions.

[49] That the CCTV footage was incomplete as it was without audio, and Mr Taufua was not given the opportunity to go through the footage with both the employment investigator and Ms Whelan and tell them what had occurred. There is no indication that the Department relied on the (silent) CCTV footage exclusively, and the totality of the evidence shows that it was only one of the factors taken into account by Ms Whelan in making her decision. Again, this submission goes back to the idea that if the Department had truly taken Mr Taufua's views into account, he would not have been subject to sanction. I have already held that his undisputed actions objectively justified sanction, and I remain of that view.

Matters relating to the alleged failure of the Department to consider Mr Taufua's views

[50] That the process was flawed because the Department failed to assess Mr Taufua's actions against his own understanding. I do not accept this is an accurate statement of what occurred, nor do I accept that the Department was obliged to agree with Mr Taufua's assessment of his own actions.

[51] That the failure of the Department to consider Mr Taufua's "perceived cumulative assessment" of events was a fundamental error. I do not accept this is an accurate statement of what occurred, nor do I accept that the Department was obliged to agree with Mr Taufua's assessment of his own actions.

[52] That in respect of the Operational Review into the incident with YFM, the reviewer could not have fairly reached the view that further investigation was needed if he had spoken with Mr Taufua. This submission assumes that the reviewer would have uncritically accepted and agreed with Mr Taufua's account, which is speculative,

and which the reviewer was not obliged to do. In addition, a conclusion that further investigation was needed in circumstances where a prisoner has been subjected to use of force by a Senior Corrections Officer is not an unreasonable conclusion for the reviewer to have reached.

[53] That Mr Taufua obtained a positive report on his actions by Mr Keenan, an employee of the Department who had trained him. The Department in response sought its own report (from Mr Hall who passed away prior to the Authority hearing), and this was done for the improper purpose of rebutting the report favourable to Mr Taufua provided by Mr Keenan. Seeking more advice, especially more targeted advice, on information provided by Mr Taufua is not an improper purpose. Rather, it shows the Department considered submissions on behalf of Mr Taufua were worthy of serious consideration and testing.

[54] That there was no reasonable basis for Ms Whelan not to accept the favourable report provided by Mr Keenan in full, and the fact she did not demonstrates she was biased against Mr Taufua. Again, this restates the idea that Mr Taufua's actions were not deserving of sanction, which has already been determined.

Matters alleged to amount to breaches of good faith

[55] That Mr Taufua was not informed of or involved in the initial event reviews of the two incidents, amounting to the Department conducting a "secret investigation" which was in breach of its good faith obligations. The Department accepts that Mr Taufua was not involved in the initial event reviews of the incidents with the prisoners. Ms Whelan's evidence is that as Director, she is entitled to call for event reviews when something has happened in the prison and as Director she wants more information. The purpose of the review is to look at procedures and processes and the policy is that staff and prisoners are not interviewed for such a review. In accordance with this policy, it is accepted that Mr Taufua was not interviewed and nor was anyone else.

[56] The submission on behalf of Mr Taufua is that the Department breached its duty of good faith by not consulting with Mr Taufua before deciding to commence a disciplinary process against him. I do not accept that the Department following its own policy for a type of "desktop review" designed to inform the Prison Director is a breach of good faith. It will not always be necessary to formally speak with or interview an employee before making a decision to commence disciplinary proceedings, especially

in circumstances where there is little confusion over the events in question. I also note that Mr Taufua had already provided his own contemporaneous incident reports prior to this. No breach of good faith occurred.

[57] That the Department delayed completing its event review, and actioning any “lessons learnt”. This is said to be a breach of the Department’s policy which required this be done “as soon as practicable” and if this had been done in a timely way in relation to JFX, it might have influenced Mr Taufua’s decisions in the case of YFM which occurred some 5 weeks later on 17 September. The incident with JFX occurred on 8 August 2019, and the review was not completed until 10 October 2019, some 9 weeks later. It is plausible that Mr Taufua may have gained some benefit from a “lessons learned” process in relation to JFX. The question then becomes was a timeframe of 9 weeks so unreasonable as to amount to a breach of policy by the Department. On balance, I find that it was not. While it would have been ideal for matters to have been completed sooner, the applicant has not been able to point to any particular reason why it is said this did not occur “as soon as practicable” which is what is required by the policy rather than a focus on specific dates or timeframes. No claim is made out.

[58] That Ms Whelan failed to disclose all communications with her manager, and this was also a breach of good faith. This submission is made in reliance on a general assertion by Mr Taufua’s counsel that Ms Whelan’s evidence was “tellingly vague and evasive”. I do not agree with this characterisation of Ms Whelan’s evidence and without more, there is no true foundation for this submission.

Allegations of Bias

[59] That the decision to commence a disciplinary process in relation to both JFX and YFM was an obvious attempt to bolster the pre-determined outcome, was biased, and was for an improper purpose. These submissions are made on the basis that no sufficiently immediate action was taken in regard to the incident with JFX, therefore raising disciplinary concerns at the beginning of November was “unfair”, “biased” and “for an improper purpose”.

[60] This allegation is similar to the previous one in that it is essentially a submission that the Department delayed for so long in raising disciplinary concerns relating to JFX that the point had been reached that they could no longer be fairly raised. The incident with JFX occurred on 8 August, the review was finalised on 10 October, and

disciplinary allegations were first put to Mr Taufua on 6 November 2019, three months later. I have considered whether a delay of three months amount to a delay of such significance that it means that disciplinary concerns cannot be properly or fairly put. In the circumstances, I find the answer must be no. The delay was not excessive in all the circumstances, which included that the decision-maker Ms Whelan was following the Department's own policy to have an event report put before her to inform a decision whether or not to take further action. It was reasonable for Ms Whelan to have taken this step rather than to have either rushed to judgment or to have ignored what appeared to be even at an early stage, concerning incidents about prisoner well-being.

[61] I am not persuaded by the submission that the only reason Ms Whelan could have had for raising disciplinary concerns in relation to the incident with JFX was the need to "bolster a pre-determined outcome". Both incidents were objectively potentially concerning.

[62] That the Department was biased against Mr Taufua, including because the dismissal letter referred to concerns that Mr Taufua had further assaulted YFM when he had taken YFM out of view of the Department's CCTV cameras. Banging and raised voices were heard, and when he returned to the wing, YFM had had a change of shirt and the bandage on his hand removed. It is submitted that in the absence of CCTV footage, the Department could never be sure what had occurred, and the inclusion of this concern as part of the disciplinary process had therefore tainted it.

[63] Again, this understates the seriousness of the admitted and undisputed events that occurred, which I have found were sufficient to justify dismissal.

[64] That the dismissal letter set out five allegations against Mr Taufua, and not all of these allegations can be substantiated, meaning that if even one of those five allegations could not have been fairly upheld, then dismissal could not have been an option open to a fair and reasonable employer. Specifically, Ms Whelan accepted there was no CCTV footage to support the allegation that Mr Taufua had further assaulted YFM when Mr Taufua had taken YFM out of view of the Department's CCTV coverage, and that there was no absolute requirement for Mr Taufua to turn on his body camera. This submission mis-states the reason why Mr Taufua was dismissed, which I have found was as set out in the dismissal letter itself and quoted above. It was not solely because Mr Taufua did not turn on his body camera when circumstances indicated, or because he had taken a prisoner out of view of the protective range of the

CCTV coverage. It was because the decision maker found Mr Taufua's "view that the level of force you use in the discharge of your duties is appropriate is most concerning...[and his]... inappropriate behaviour falls well below the standards of behaviour expected of an employee of the Department".

[65] That the appendices to this Operational Review were not provided to Mr Taufua until after he was dismissed and this is a breach of policy and of good faith obligations. I find this claim is not made out on the facts. Equally, it was not explained how this was said to adversely impact Mr Taufua. No claim is made out.

Allegation that Mr Taufua was not advised of his right to silence

[66] That Mr Taufua was not advised of his right to silence when he ought to have been, and he ought to have been so advised because the employment investigator used the term "assault" thus a higher standard of proof was required. This is not a submission that Mr Taufua was entitled to a right to silence in respect of a criminal investigation into his actions, but a submission that the Department did or should have used a "higher standard of proof" in the employment investigation because the word "assault" was used, and this then required the Department to advise Mr Taufua of a right to silence.

[67] There is no indication that the Department applied anything other than the standard civil test of "balance of probabilities" during the employment investigation. While assault has a meaning in criminal law, there is no indication that the Department considered it was using that definition. The word "assault" is used interchangeably with the phrase "use of force" which is terminology used in the Department's policies. I am not persuaded that Mr Taufua had a general right to silence in respect of the employment investigation that the Department was obliged to advise him about, and note that this seems to have been raised for the first time in submissions.

Matters arising from the employment investigation

[68] That Mr Taufua was not given the opportunity to comment on the identity of the employment investigator, who was employed by the Department and therefore not truly independent. Also that Mr Taufua disagrees with the employment investigator's interpretation of policy, his interpretation of the incident with YFM, that he did not engage with Mr Taufua adequately to properly understand his viewpoint and that collectively these matters mean that the employment investigation was flawed. Overall these are complaints that the process was flawed because the Department (through the

actions of Ms Whelan and the employment investigator) took a different view of events from Mr Taufua's own view. This does not mean that Mr Taufua's view was not seriously and genuinely considered, as I have already set out above.

[69] That the employment investigator did not consider the past history of the prisoners particularly YFM, and that if he had done so, he would have agreed with Mr Taufua that Mr Taufua's use of force was appropriate. Mr Taufua expressed negative views about JFX and particularly YFM during the disciplinary process and the investigation meeting. He made it clear that he considered both prisoners had a tendency towards disobedience and violence and this was one of the reasons why he used force against them. The employment investigator considered past history to be less relevant. This is again a re-statement of the argument that the Department should have adopted Mr Taufua's own views and that its failure to do so meant that his view was not seriously considered. I have already set out why I do not accept this submission.

[70] That the Department did not consider other options short of dismissal. I find this claim was not supported by the evidence. Ms Whelan's explanation of her reasons for dismissal included that she concluded that Mr Taufua had not reflected on his own behaviour and that she could not therefore have trust and confidence in him to act appropriately in the future, making it unsafe for him to remain in the prison environment.

Matters arising from the disciplinary process

[71] That Mr Taufua was not given the opportunity to discuss the investigation report before the disciplinary process continued. Ms Whelan's evidence was that Mr Taufua, who was represented at the time, declined to comment on that report, but did later provide a substantive reply to matters raised in both it and the preliminary view letter as I have mentioned above. I find again that this submission is not made out on the facts, and as the decision-maker Ms Whelan allowed and considered Mr Taufua's comments on both documents.

Conclusions

[72] Standing back and considering matters overall, I conclude that:

- a. Mr Taufua's actions were sufficient to amount to serious misconduct, and were sufficiently serious to justify dismissal.
- b. The Department engaged in a thorough investigation and employment process. It was carried out within the Department's policies. Mr Taufua was appropriately involved in this, and he and his representative engaged with the process at the time.
- c. Although this process took some time, and the Department found ways for Mr Taufua to maintain his active employment as an alternative to suggestion during this time, these factors do not mean that the Department was prevented from ultimately dismissing Mr Taufua.
- d. The decision-maker Ms Whelan, took advice in an appropriate way, actively considered Mr Taufua's position, and nevertheless reached her own decision that dismissal was necessary and appropriate. She did not rely inappropriately or exclusively on the opinions of others or on the CCTV footage. She did take into account Mr Taufua's views and submissions made on his behalf.
- e. The decision to dismiss was a decision that was within the range of options available to the Department acting as a fair and reasonable employer in all the circumstances at the time.

[73] Mr Taufua's personal grievance claim of unjustified dismissal, unjustified disadvantage and breach of good faith are not made out. No orders are made.

Costs

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

[75] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondent 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 applicant 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.

[76] 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.³

Claire English
Member of the Employment Relations Authority

³ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1