NOTE: This determination contains an order prohibiting publication of certain information at [1] and [164] – [173].

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE

[2026] NZERA 402
3314060

	BETWEEN	RAKAI TAWHIWHIRANGI Applicant
	AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Barbara Buckett and Lucy Fisher, counsel for the Applicant David Traylor, Lewis Miller and Nikki Farrell, counsel for the Respondent
Investigation Meeting:	20, 21 and 22 May 2025 in Wellington
Submissions and information received:	5 August, 6 August, 19 August 2025 and 9 June 2026 from the Applicant 22 July and 18 August and 5 November 2025 and 5 March and 16 June 2026 from the Respondent
Determination:	23 June 2026

DETERMINATION OF THE AUTHORITY

Non-publication orders

[1] Under clause 10 of schedule 2 of the Employment Relations Act (the Act) non-publication orders are made in relation to names and identifying details of the prisoner [NWM] and a Corrections Officer [GQF] involved in the incident and all

other Corrections employees referred to in the evidence who did not give evidence. The reasons are set out below.

Employment Relationship Problem

[2] Rakai Tawhiwhirangi was dismissed on 19 July 2024 at the conclusion of an employment investigation into concerns about his conduct. The concerns arose after an incident on 28 April 2021 while the prisoner, referred to as NWM in the determination, was being received into the prison. Mr Tawhiwhirangi struck NWM once in the throat to stop her spitting at him. Corrections investigated its concerns in relation to this incident and concluded both of its allegations were made out, the conduct amounted to serious misconduct and the appropriate outcome was dismissal on notice.

[3] Through a separate process Mr Tawhiwhirangi was also investigated and prosecuted by Police for assaulting NWM in relation to the same incident. The District Court judgment records Mr Tawhiwhirangi successfully defended the criminal charge on the basis of the defence of self-defence. He was found not guilty and the charge was dismissed.[1]

[4] Mr Tawhiwhirangi says the District Court finding is relevant because it is conclusive evidence the force he used at the time was justified in the circumstances and that he complied with relevant policy. He also points to numerous flaws in the investigation process and says his dismissal was both substantively and procedurally unjustified and that Corrections breached its contractual and good faith obligations towards him. He seeks reinstatement to his role as well as a number of other remedies set out in his statement of problem.

[5] Corrections says it did not breach any of its obligations towards Mr Tawhiwhirangi. The approach Corrections took was to consider Mr Tawhiwhirangi's conduct against the framework of policies, including its Prison Operations Manual and its policies on use of force and training as well as s 83 of the Corrections Act 2004. The employment investigation concluded Mr Tawhiwhirangi used unjustified and/or unreasonable force on the prisoner and failed to report the incident in accordance with

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[1] *New Zealand Police v Rakaihoea Tawhiwhirangi* [2023] NZDC 16375 [25 May 2023].

the Prison Operations Manual. Mr Tawhiwhirangi's actions were considered to be serious misconduct and Corrections say dismissal was an appropriate outcome open to it.

The Authority's investigation

[6] For the Authority's investigation written witness statements were lodged from Mr Tawhiwhirangi and Lynda Wooldridge. On behalf of Corrections statements were lodged from Phillipa Carey, who was the Prison Director, Jacqueline Howcutt, the current Prison Director and Robert Hoogenraad, Principal Advisor Tactical Operations.

[7] All witnesses answered questions under oath or affirmation. Oral and written submissions and reply submissions were provided by both parties. Corrections also provided a copy of the CCTV footage of the incident in the Receiving Office on 28 April 2021. There was a delay caused by technical difficulties preventing the Authority accessing and viewing the CCTV footage. It was also necessary for the respective recordings of the meeting on 30 January 2024 to be provided to the Authority because of a conflict in a material fact in the transcripts provided by the parties.

[8] 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.

Issues: The issues identified for investigation and determination are:

(a) Was Mr Tawhiwhirangi unjustifiably disadvantaged and/or unjustifiably dismissed?
(b) Did Corrections breach the Collective Agreement?
(c) Did Corrections breach its statutory obligation of good faith in ss 3 and 4 of the Act?
(d) If Corrections is found to have acted unjustifiably what remedies should be awarded to Mr Tawhiwhirangi, considering:
    (i) Reinstatement;

(ii) Lost wages;

(iii) Lost benefits including retirement or long service leave; and

(iv) Compensation under s123(1)(c)(i) of the Employment Relations Act 2000 (the Act);

(e) Should a penalty be applied to Corrections for a breach of good faith?

(f) Should an award of damages be made against Corrections for breaches of contract?

(g) Should interest be awarded?

(h) Should any non-publication orders be made?

(i) If any remedies are awarded, should they be reduced because of conduct by Mr Tawhiwhirangi that contributed to the situation giving rise to his grievances?

The incident on 28 April 2021

[9] On 28 April 2021, Mr Tawhiwhirangi was involved with three other Corrections Officers processing NWM when she arrived at Arohata. At that time Mr Tawhiwhirangi worked in the Intervention Support Unit (ISU) at Arohata Prison. His evidence was that Ms Carey, Prison Director, asked him to assist with receiving NWM into the prison that day. He says it was his understanding the Principal Corrections Officer (PCO) in the receiving area did not wish to deal with NWM that day. Ms Carey's evidence was in conflict with Mr Tawhiwhirangi's on this point because she says she did not ask Mr Tawhiwhirangi to assist. In fact Ms Carey's evidence was that she was unaware NWM had returned to Arohata until she received NWM's complaint about Mr Tawhiwhirangi.

[10] On 13 May 2021, Ms Carey became aware of a complaint from NWM arising from an incident with Mr Tawhiwhirangi on 28 April 2021. NWM described what happened in her written complaint to Police as a "karate chop" to the throat. Ms Carey viewed the CCTV footage and checked for incident reports and briefings. She was alarmed by what she saw on the CCTV footage and the absence of any reporting. Based on both those pieces of information Ms Carey decided to commence an investigation.

An employment investigation started

[11] On 14 May 2021, Ms Carey wrote to Mr Tawhiwhirangi advising him of NWM's complaint about the incident in the Receiving Office. The letter advised that as a result of Corrections' concerns the matter was being referred to Police, an employment investigation was commencing and it was proposed he be suspended from work. The letter stated Ms Carey had viewed the CCTV footage and it appeared to show the following:

> (a) Soon after you and NWM and GQF enter the Receiving Office you give what looks to be a 'karate chop' to NWM's throat.
> (b) GQF immediately steps between you and NWM during which you appear to continue talking.
> (c) NWM becomes visibly upset and holds on to her throat.
> (d) [Another Corrections Officer] who is behind the counter in the Receiving Office is seen to give NWM an asthma inhaler.
> (e) At one point you move close to NWM and give her a hug.

[12] Two allegations with reference to the Code of Conduct, Prison Operating Manual and the Corrections Act 2004 were set out:

> **Allegations**
>
> As a result of the information available to me including the CCTV footage, I can advise that I have serious concerns about your alleged behaviour during and after this incident on 28 April 2021. Specifically it is alleged that:
>
> > You may have used unjustified and/or unreasonable force on a wahine in our care
> >
> > You may have failed to report the incident in accordance with the Prison Operations Manual.

[13] The letter invited Mr Tawhiwhirangi to let Ms Carey know when he wanted to review the CCTV footage and she would make arrangements to facilitate this. A copy of NWM's written complaint, the relevant sections of the Prison Operating Manual and the Corrections Act 2004 were attached to the letter.

[14] On 19 May 2021, after hearing from Mr Tawhiwhirangi and his union representative, Ms Carey decided suspension was appropriate. That decision with reasons was sent to him on 24 May 2021. Mr Tawhiwhirangi's representative advised Corrections he would not be participating in an employment investigation until the outcome of any police investigation was known. Ms Carey recorded in her 24 May

letter (about suspension) the employment investigation would continue as far as practical without Mr Tawhiwhirangi's participation.

[15] The terms of reference for the investigation were drafted and provided to Mr Tawhiwhirangi. An investigator was appointed. By July 2021, the investigator had completed what he could of the employment investigation. This included interviewing NWM, GQF and the other two Corrections Officers who were present in the Receiving Office on 28 April 2021. Once it was known Police were going to charge Mr Tawhiwhirangi the employment investigation was paused until the outcome of the criminal prosecution.

The District Court decision

[16] Mr Tawhiwhirangi was charged with common assault under s 196 of the Crimes Act 1961. The District Court decision is dated 25 May 2023, which was approximately two years after Mr Tawhiwhirangi had been suspended from work. Mr Tawhiwhirangi did not deny he had intentionally applied force to NWM but maintained he was justified in using self-defence in the circumstances.

[17] Corrections Officers are authorised under s 83 of the Corrections Act 2004 to use force on prisoners but they are criminally responsible for any excess of force used.[2]

[18] Judge Davidson described what was depicted on the CCTV footage in this way:

> [12] These events are captured on closed-circuit television footage which I viewed several times. It is clearly the best evidence of what actually occurred. The oral evidence from the defendant and Corrections Officer must be regarded as the best efforts given over two years after the incident itself. NWM went into the receiving office first. The defendant followed. NWM turned to face the defendant. Their faces were close. The description of being up-front and personal comes to mind.
>
> [13] The footage makes it clear that NWM was speaking, but because there is no associated audio it is not known exactly what she was saying. The defendant says that at this stage he believes she was shaping to spit at him again. He said he could hear the noise associated with her gathering spit in her mouth. He reached out with his left hand thrusting towards her throat. Corrections Officer [GQF] intervened between both. She was facing the defendant. Corrections officer [GQF] then escorted NWM to a chair at the counter; NWM sat down; the defendant can be seen consoling NWM soon after.

[2] Crimes Act 1961, s 62.

[19] The issue in the District Court was whether Mr Tawhiwhirangi was acting in self-defence. Given the evidence about spitting, and the associated risk of Covid-19, NWM's known history and behaviour earlier in the holding cell, the fact NWM had not been strip searched, the Judge found Mr Tawhiwhirangi had pre-emptively reached out to prevent being spat on again and his reaction could not be considered to be disproportionate to what he thought was about to happen in the circumstances.

[20] Corrections note for the purposes of its employment investigation there is a material factual inaccuracy at [15] of the District Court judgment because it records NWM spat in Mr Tawhiwhirangi's face. The written statement Mr Tawhiwhirangi provided to the employment investigation directly contradicts the evidence referred to in the District Court decision that NWM spat in Mr Tawhiwhirangi's face:

> When we arrived at the receiving office NWM continued making hoicking noises as if in preparation for spitting. As Covid was and still is a risk I was concerned about being spat on and NWM was a known spitter, making threatening noises to spit. I was concerned that she would spit at me. It was only a month prior that NWM had spat on the back of my vest. There is an incident report for this on the 23 March 2021.

[21] However, that conflict was never put squarely to Mr Tawhiwhirangi during the employment investigation because Ms Carey did not refer to the District Court decision in reaching her conclusions about Mr Tawhiwhirangi's conduct.

[22] The District Court decision found Mr Tawhiwhirangi was justified in using force pre-emptively to respond to the circumstances he says he found himself in and that decision was not appealed.

The employment investigation recommenced

[23] On 26 May 2023, at the conclusion of the criminal proceeding, Ms Carey sent an email to Mr Tawhiwhirangi advising him the employment investigation was recommencing because the criminal charges had been disposed of. Mr Tawhiwhirangi would remain suspended. There were difficulties leading to delays in arranging a time for the investigator to meet with Mr Tawhiwhirangi to hear his response to the

allegations and provide an opportunity for him to view the CCTV footage. They met for the purposes of both on 3 October 2023.

Mr Tawhiwhirangi's statement to the employment investigator

[24] Mr Tawhiwhirangi's statement to the employment investigator was that on 28 April 2021, after he was asked by Ms Carey to assist in the Receiving Office, he noted on arrival there was no management plan. He says there should have been one because of what was already known about NWM. He spoke to NWM telling her she needed to calm down and then left GQF and others to deal with her while he observed.

[25] Mr Tawhiwhirangi recalled NWM refused to be strip searched and was kicking at a wall and furniture. As she was moved from the holding cell to the interview room he says she slammed the door with a level of violence that caused the other two officers to go to the other side behind the Perspex screen to protect themselves. He said one of the other officers was fearful for Mr Tawhiwhirangi's safety and put himself between Mr Tawhiwhirangi and NWM at one stage.

[26] The CCTV footage shows GQF walking NWM to the interview room during which time NWM remained agitated. He says during the walk NWM made spitting noise threats and was swearing at Mr Tawhiwhirangi. He says the footage shows NWM preparing to spit just before he responded with the force he applied to NWM. He referred to Covid-19 being a risk at that time and his concern about being spat on. NWM was a known spitter and there had been a previous incident only a month earlier on 23 March 2021. NWM spat on the back of his vest. He also said during Covid prisoners weaponised spitting as a threat.

[27] In terms of his training, Mr Tawhiwhirangi says he considered his tactical options in accordance with the framework that Corrections Officers are trained in. He considered using pepper spray which he had on his belt. He decided against that because of the confined space and the number of people present. He says it was his judgement call to make in accordance with the Tactical Options Framework in accordance with his training.

[28] Mr Tawhiwhirangi says he told NWM to settle and stop the hoicking but she was non-compliant and continued. That is when he spontaneously acted to prevent the spitting by a simple cuffing with an open left hand thrust across her throat to prevent the spitting. He maintains this was not a strike as described by the employment investigator.

[29] He points out the CCTV is not an accurate record of what occurred because it does not have sound so it is not possible to hear the yelling and hoick noises or the extent to which NWM was acting out. For that reason he also says the "record of CCTV" document relied on by the employment investigator was predetermined because it was recorded before hearing from Mr Tawhiwhirangi about what he says the CCTV depicted. Mr Tawhiwhirangi says when you slow the CCTV footage down you can see he did not strike NWM because his hand is open.

[30] I note at this point the District Court decision is clear Mr Tawhiwhirangi applied force to NWM's throat and the evidence it was a slap was not accepted.

[31] After this GQF stepped in and took over guiding NWM to a chair. Mr Tawhiwhirangi says he then stepped over to speak to her gently as she had calmed down. He did not recall her crying and questions why the investigator would say she was crying. He said there were no signs of visible injury and believes none were found after a risk assessment and medical processes.

[32] Mr Tawhiwhirangi ended his statement in this way:

> My actions I believe were permitted by the department policies (tactical options manual guidance) as necessary to prevent the spitting (self defence), to bring the situation under control (active resistance to an order) and not disproportionate to the circumstances as the District Court Judge found them to be. I believed at the time my actions to be justified to prevent an assault on me and to calm the situation. My actions achieved both of those things.

[33] In Mr Tawhiwhirangi's statement he said he could not explain why there was no incident report but his oral evidence expanded on that. It was his expectation one would have been completed by the officers who witnessed the incident and worked in the Receiving Office. He also said he had intended to complete one but it was a minor incident so he either forgot or did not consider it necessary. After the incident he

returned to his area of duty and heard nothing more until he received the letter several weeks later from Ms Carey setting out Corrections' concerns and advising him an investigation was being commenced.

The draft investigation report was finalised

[34] The investigation report was finalised after Mr Tawhiwhirangi provided his response to the investigator. He read out the written statement and answered a small number of questions from the investigator. The investigator was tasked with establishing the circumstances and facts surrounding the allegations that Mr Tawhiwhirangi had used unjustified and/or unreasonable force on NWM and failed to report the incident in accordance with the Prison Operations Manual.

[35] On 28 November 2023, a second draft report was issued in response to the feedback and provided to Ms Carey on 7 December 2023. Ms Carey attached it to her letter inviting Mr Tawhiwhirangi to meet with her to hear his submissions on the investigation findings before she proposed a preliminary view.

Further submissions were made

[36] On 6 December 2023, Mr Tawhiwhirangi's representative conveyed concerns with the final draft report including that Mr Tawhiwhirangi had not been allowed to give a "voice over" explanation of the CCTV footage. Ms Carey met with Mr Tawhiwhirangi and his representative on 30 January 2024. The meeting was recorded. Both the transcript and recording were provided to the Authority. Ms Carey heard Mr Tawhiwhirangi's "voice over" of the CCTV footage during that meeting

[37] Ms Carey also refers in her written evidence to what Mr Tawhiwhirangi told her in the 30 January meeting. This is also audible on the recording of the meeting. Mr Tawhiwhirangi recalled talking to NWM immediately after the incident when he was comforting her. NWM told him she was a battered woman and Mr Tawhiwhirangi replied saying she should have known better then.

[38] On 12 February 2024, Mr Tawhiwhirangi's representative provided further written submissions for Ms Carey's consideration and the written statement from Mr

Tawhiwhirangi. Ms Carey was then unexpectedly away from work but on her return she issued the preliminary view letter on 28 March 2024 and responded to the issues raised by the representative.

The preliminary view - the conduct was serious misconduct

[39] The preliminary view letter set out a summary of the reasons why Corrections found the allegations were upheld and constituted serious misconduct. It was not accepted the force applied to NWM was proportionate. Mr Tawhiwhirangi had used a technique involving the edge of his hand being applied to the throat area. This was not an approved standard of practice, was said to be dangerous and risked harm to NWM. It was also concluded he had not provided an adequate explanation about why other options were not considered to be appropriate, including switching on the Body Worn Cameras Mr Tawhiwhirangi and others were wearing:

- I acknowledge that the use of force was necessary and reasonable if you believed NWM was going to spit at you, however your action was not an approved standard of practice and it does not uphold the requirement in the procedures outlined in the POM IR.02.03 Use of Force.

- The level of force you used, by way of a "karate chop" to NWM's throat – an upward movement of your left hand using the knife edge was also not proportionate to the situation; it was dangerous and it risked serious harm to NWM.

- There were other options available to you to consider given your knowledge of NWM's history as a spitter including but not limited to using a spit hood or pepper spray, and you have not provided an explanation into why you did not consider them to be appropriate.

- There was no Body Worn Camera footage because no-one including yourself as the most Senior Officer present, activated their cameras at any stage. I acknowledge that your spontaneous use of force may not have allowed for activation of your BWC, however, given NWM's behaviour and based on your statement that GQF told you that she saw NWM attempt to spit at you before everyone entered the Receiving Office, you and GQF should have activated your BWCs at that point to de-escalate the situation.

- Your acknowledgement that you did not complete an incident report as required (POM IR.06.01 Immediate reporting).

[40] The nature of Mr Tawhiwhirangi's conduct was said to have undermined the trust and confidence Ms Carey could have in him as an employee. Having considered a range of disciplinary sanctions the preliminary view was that dismissal on notice would be the appropriate outcome.

[41] On 9 May 2024, a meeting to hear Mr Tawhiwhirangi's response to the preliminary view was held. That meeting was also recorded. On 24 May 2024, Mr Tawhiwhirangi's representative asked that a final decision be delayed until they had received a transcript of the District Court hearing. On 12 July 2024, an affidavit dated 11 June 2024 was sent to Ms Carey.

Mr Tawhiwhirangi was dismissed

[42] On 19 July 2024, the final view letter concluded Mr Tawhiwhirangi had used unjustified and/or unreasonable force on a wahine in Corrections' care and had failed to report the incident in accordance with the Prison Operations Manual. This was described as being a breach of the sections in the Code of Conduct "We are Accountable" and "We Make a Difference".

[43] Ms Carey noted Mr Tawhiwhirangi's attention had been drawn to all relevant sections of the Code of Conduct, policies and legislation and concluded Mr Tawhiwhirangi's conduct amounted to serious misconduct. In general terms while it was accepted NWM was being aggressive and difficult to manage during the incident, more was expected of him as an experienced PCO. Ms Carey found Mr Tawhiwhirangi's actions went beyond what was acceptable and professional behaviour.

[44] The way force was applied, using the "knife edge" of his left hand in an upward movement to NWM's throat was not an approved practice as outlined it the POM IR02.03 Use of Force policy. As such Mr Tawhiwhiranigi was neither trained in that technique nor did the policy allow for force to be applied to a prisoner's throat and therefore the force used was not of an approved standard.

[45] Furthermore, it did not defuse the tension or minimise risk and NWM was described as being vulnerable to the situation he created. Mr Tawhiwhirangi also did not comply with the policy which required him to complete an incident report.

[46] The application of force in that way to the throat of a prisoner was described as a "dangerous method that was not proportionate to the situation" that was a breach of the Code of Conduct "We are Accountable" and "We Make a Difference".

[47] The fact no risk assessment was conducted by Mr Tawhiwhirangi was referred to as a further breach of the Prison Operations Manual specifically IR.02.03 which required him to consider whether other options were more appropriate. It was also recorded that he had not acknowledged or accepted any accountability for his actions.

[48] It was noted in the preliminary view letter that Mr Tawhiwhirangi accepted he failed to complete an incident report or to report his spontaneous use of force. In the final view letter other than setting out the incident reporting policy the reasons why Mr Tawhiwhirangi says he was justified in not reporting the matter or Corrections conclusions in light of those reasons were not recorded.

[49] Alternatives to dismissal were referred to as having been considered but given no remorse had been shown Corrections had no confidence a final written warning or demotion would sufficiently mitigate the concerns about Mr Tawhiwhirangi's ability to act safely and professionally towards wahine in the future. The outcome was dismissal on notice effective immediately with four weeks salary in lieu of notice to be paid out along with his final pay.

[50] On 29 July 2024, Mr Tawhiwhirangi's representative raised a personal grievance with Corrections for unjustified dismissal. A statement of problem was also lodged in the Authority on the same day raising unjustified dismissal and disadvantage claims and seeking reinstatement as one of a number of remedies. The accompanying application for interim reinstatement was not progressed by agreement because a date to hear the substantive matter was set down.

Unjustified dismissal

[51] In assessing Mr Tawhiwhirangi's unjustified dismissal the test for justification set out in s 103A of the Act involves determining whether Corrections' actions were what a fair and reasonable employer could have done in all the circumstances at the time. The Authority must consider:

a. Whether, having regard to the resources available to Corrections, did it sufficiently investigate the allegations before taking action against Mr Tawhiwhirangi;

b. Whether Corrections raised the concerns with Mr Tawhiwhirangi before dismissing or taking action against him;

c. Whether Corrections gave Mr Tawhiwhirangi a reasonable opportunity to respond to its concerns before dismissing him;

d. Whether Corrections genuinely considered Mr Tawhiwhirangi's explanation in relation to the allegations before taking action against him.

[52] The test for justification is an objective test and the Authority may not substitute the employer's decision with its own but is required to review the facts on which the decision was made to determine whether an employer acted justifiably. The Authority may also consider any other factors it thinks appropriate (s103A(4)).

[53] Minor defects in the process followed by the employer cannot in and of themselves, render an action unjustifiable if these did not result in the employee being treated unfairly (s103A(5)). It is not for the Authority to substitute the employer's decision with its own and the assessment of the employer's actions under s 103A is an objective one. What is required is an assessment of the substantive fairness and reasonableness of the employer's decision. The Authority is not to engage in minute and pedantic scrutiny to identify failings.[3]

[54] Mr Tawhiwhirangi says Corrections' decision to dismiss him was unjustified for multiple reasons both substantive and procedural listed in the statement of problem. It was submitted inaccurate conclusions were reached by the employment investigator and the decision maker, the District Court decision was ignored when it ought not to have been and that the use of force was justified because it had already been found to be reasonable, proportionate and necessary as confirmed by the District Court.

[55] Corrections say there is no dispute Mr Tawhiwhirangi used force against NWM by striking her in the throat while she stood in front of him with her hands in her pockets. The allegations investigated were whether the use of force was unjustified and/or unreasonable in accordance with its policies and procedures and whether he had failed to report the incident. All the material provided including CCTV footage, the employment investigation and Mr Tawhiwhirangi's responses were considered before Corrections concluded there were breaches of a number of operational policies,

[3] *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160.

including the requirement to submit an investigation report and report the incident. The conduct was considered to be serious misconduct under the Code of Conduct.

[56] Corrections noted significant weight had been placed on the District Court's decision by Mr Tawhiwhirangi but say that decision must be treated with caution because that assessed Mr Tawhiwhirangi's conduct against a different standard of proof and without the benefit of the scope and depth of the investigation Corrections had carried out. Failing to report the incident was not considered by the Court and it would have been wrong for Corrections to have ended its own process based on the outcome of the criminal process.

Corrections revisited the District Court finding

[57] Under section 103A of the Act the Authority's investigation focuses primarily on whether what the employer did, and how it did that, was what a fair and reasonable employer could have done in all the circumstances at the time. In justifying its decision to dismiss Mr Tawhiwhirangi, Corrections had to establish that as a result of a thorough and fairly conducted enquiry it was justified in believing serious misconduct had occurred and that dismissal was the appropriate outcome.

[58] In its communications with Mr Tawhiwhirangi Corrections said the decision maker did not have a copy of the District Court decision and would not rely on it to make decisions about Mr Tawhiwhirangi. Instead, it would investigate whether Mr Tawhiwhirangi's actions were necessary, proportionate, reasonable and justified in the circumstances in line with the relevant polices and processes, including the Code of Conduct. The final view letter reiterated the decision maker had not considered whether Mr Tawhiwhirangi's actions were unlawful because that had already been determined by the Court. It was said the employment investigation was not about whether Mr Tawhiwhirangi broke the law but rather the concerns that his actions were not in keeping with the Tactical Options training and Corrections policies and procedures and Code of Conduct.

[59] Breaches of the Prisons Operations Manual IR.02.02 Use of Force and IR.06.01 Immediate reporting were identified and attention was drawn to s 83 of the Corrections Act 2004. On this basis the allegations that unreasonable and unjustified force was used on a

prisoner and failing to report the incident were found to be upheld. Mr Tawhiwhirangi had failed to meet the standards of behaviour expected in the Code of Conduct under the heading "We are Accountable" and "We Make a Difference" by:

> We are Accountable
>
> (a) not upholding policies, procedures and the standards of Corrections;
> (b) by not performing the duties and obligations of his position as a Principal Corrections Officer to the best of his ability;
> (c) by not remaining professional;
> (d) by not owning his actions and behaviours and acknowledging his mistakes (because he did not use approved intervention models and standards of practice and did not follow procedure when he did not complete an incident report)
>
> We Make a Difference
>
> (a) Failure to maintain and role model high standards of integrity, and failing to present himself in a way that enhanced his credibility when he uses an unapproved standard of practice by way of a "karate chop" to NWM's throat;
> (b) That action (the "karate chop") was unacceptable and did not reflect well on his position at Corrections or diffuse tension or minimise risk using his training and skill;
> (c) His actions showed he was not committed to the health and safety of others especially NWM who was vulnerable to the situation he created;
> (d) He did not act in a way that had a positive impact on the lives and behaviours of offenders by using a dangerous method to apply force that was not proportionate to the situation.

[60] Corrections' conclusions the allegations were upheld were recorded in multiple ways for example:

> - … the body language of you both does not support your submission that there had been an earlier attempt to spit at you, and that you felt under immediate threat that NWM was going to spit at you.[4]
>
> - This statement corroborates the investigators finding, and also my own observation having viewed the CCTV footage on several occasions, that NWM was constantly talking while in the Receiving Office and not making "hoicking" noises as you state. No other witnesses interviewed by the investigator makes any reference to hearing NWM making "hoicking" noises in their statement.[5]
>
> - Any force used has to be proportionate and given the above, yours was not.[6]

[4] Preliminary view letter, p 7.
[5] Preliminary view letter, p 7.
[6] Preliminary view letter, p 8.

- Even if your action was proportionate – which it wasn't – it still required an incident report.[7]

- By using the knife edge of your left-hand upward movement to NWM's throat, you breached the expected conduct of *"We Are Accountable"*.[8]

- I am of the view that you breached the principle "We Make a Difference" and failed to maintain a role model high standards of integrity, presenting yourself in a way that enhances your credibility when you chose an unapproved standard practice by way of a "karate chop" to NWM's throat. That action is simply unacceptable and certainly did not reflect well on your position at Corrections and nor did it diffuse tension or minimise risk using your training and skills… You did not act in a way that has a positive impact on the lives and behaviours of offenders using a dangerous method to apply force it was not proportionate to the situation. [9]

- Your actions in acting unlawfully by using force that was not an approved standard practice, was not proportionate demonstrates a lack of control on your part and had the potential to cause serious physical harm to NWM.

- You did not use approved intervention models and standards of practice and you did not follow procedure when you did not complete an incident report.[10]

- You did not act in a way that has a positive impact on the lives and behaviours of offenders by using a dangerous method to apply force that was not proportionate to the situation.[11]

- Your actions in acting unlawfully by using force that was not an approved standard of practice, and was not proportionate, demonstrates a lack of control on your part and had the potential to cause serious physical harm to NWM.[12]

[61] The letter terminating his employment concluded:

> As a Principal Corrections Officer people look to you for leadership and guidance – our Officers and our wahine – and by your own actions you failed to role model high standards and lead by example. Your actions in acting unlawfully by using force that was not an approved standard of practice, and was not proportionate, demonstrates a lack of control on your part and had the potential to cause serious physical harm to NWM.
>
> …
>
> It is my final view that your action by way of a "karate chop" to NWM's throat demonstrates a failure to respect the basic rights, privacy and dignity of any

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[7] Preliminary view letter, p 8.
[8] Final view letter, p 8.
[9] Final view letter, p 8.
[10] Final view letter, p8.
[11] Final view letter, p9.
[12] Final view letter, p9.

> other person. Your behaviour was unacceptable and potentially dangerous and that is a potential threat to the health and safety of an individual. Further you failed to follow procedures relating to the use of force, thus breaching your responsibilities under the Corrections Act 2004. [13].

[62] What is notable about the reasons for the conclusions reached about Mr Tawhiwhirangi's conduct is that they tie back to the use of force in the moment and the findings on the District Court. Findings that there was no hoicking noise, that Mr Tawhiwhirangi's actions were unlawful, that the strike to the throat was not proportionate to the situation and that he had breached his responsibilities under the Corrections Act 2004 were all matters considered by the District Court. The Court had reached the opposite conclusions.

What did the District Court consider?

[63] Section 48 of the Crimes Act sets out the defence of self-defence:

> **48 Self – defence and defence of another**
>
> (1) Every one is justified in using, in defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

[64] In considering whether self-defence had been established the Court had turned its mind to three questions:[14]

> (a) what did Mr Tawhiwhirangi believe about the circumstances when he used force?
>
> (b) did he use force for the purposes of defending himself?
>
> (c) was the force used reasonable in the circumstances as Mr Tawhiwhirangi believed them?

[65] Whether the application of force was proportionate to the circumstances the person believed themselves to be in at the time and therefore whether it was reasonable to use force in that way at that time are all part of the test for determining whether Mr Tawhiwhirangi could rely on self-defence. The District Court judgment makes it clear Mr Tawhiwhirangi could rely on self-defence because Mr Tawhiwhirangi believed NWM was about to spit on him based on her known history and her behaviour in the

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[13] Final view letter, p 9.
[14] *The Chief Executive of Oranga Tamariki – Ministry for Children v Hill* [2025] NZEmpC 98 at [62].

holding cell and the fact she had not been strip searched. It also found the force he used was for the purposes of defending himself. The Judge concluded Mr Tawhiwhirangi's actions were reasonable and lawful because he pre-emptively reached out to prevent being spat on and that this was not disproportionate to what he believed was about to happen in the circumstances.

Section 83 of the Corrections Act

[66] Section 83 of the Corrections Act 2004 is key to why self-defence was relevant to the employment investigation. Corrections policy Use of Force IR.02.02 stated that staff may use force only when there is no other option and incorporated the words of s 83 of the Corrections Act into the policy:

> **IR.02.03 Use of Force**
>
> 1. Staff may use force only when there is no other option.
> 2. Use of force is the application of approved interventions (refer POM IR.02.Res.01 Intervention strategies and Tactical Options Manual of Guidance) by Corrections staff in situations where it is necessary to establish and maintain control, and minimise the potential for breaches of security and injury to parties directly involved as well as others.
> 3. Physical force may be used when dealing with a person if the staff member has reasonable grounds for believing the force is necessary:
>   (a) in self defence, in the defence of another person or to protect the prisoner form injury, or
>   …

[67] Under s 83 of the Corrections Act, a prison officer or staff member may use physical force in dealing with a prisoner, only if he or she has reasonable grounds for believing that the use of force is reasonably necessary in defence of self or another; to protect the prisoner from injury; in the case of an escape or attempted escape; and prevention of damage to property or resistance to a lawful order. Any such use of force must be no more than is reasonably necessary.[15]

[68] As soon as practicable after the use of force the prisoner must be examined by a registered health professional.[16] Nothing in s 83 limits or affects any provision in the Crimes Act 1961 that makes any specified circumstances a justification or excuse for the use of force or a defence to a charge involving the use of force.[17]

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[15] Corrections Act 2004, s 83(2).
[16] Above, s 83(3).
[17] Above, s 83(4).

[69] If the use of that force is called into question the legislation and Corrections own policy make it clear that self-defence can be relied on as a defence to a criminal charge.

[70] It is accepted the District Court finding was not a complete answer to Corrections concerns and its employment concerns were wider than the application of force in the moment in the Receiving Office interview room. The issue for Corrections was that it predominantly focussed on the same factual matrix as the District Court.

[71] Corrections acknowledged the conduct it considered as an employer arose from the same factual matrix as the criminal charges but submitted its investigation was materially distinct. It is not clear where that distinction was drawn.

[72] On review of the preliminary view letter and the final view letter the conclusions Corrections reached included that Mr Tawhiwhirangi did not have reasonable grounds for believing force was necessary, was not in circumstances where he could rely on self-defence, did not have a reasonably held belief NWM was going to spit on him, that his actions were not proportionate to the situation he found himself in and that he was acting unlawfully. Those findings squarely addressed matters that had already been considered in the District Court.

[73] The law in relation to use of force by Corrections Officers was relevant to Corrections assessment of at least some of Mr Tawhiwhirangi's conduct. Corrections also told Mr Tawhiwhirangi on several occasions it was not considering whether he engaged in an unlawful action because that had already been determined by the Court. However, it is evident this was reconsidered which including whether NWM made hoicking noises, Mr Tawhiwhirangi's belief she was going to spit at him, whether the force used was for the purposes of defending himself and reasonable in circumstances.

[74] The District Court findings of fact and the conclusion the force used was justified and lawful placed limitations on Corrections. It would be hard for Corrections to have been acting as a fair and reasonable employer if it reached conclusions Mr Tawhiwhirangi was acting unlawfully when he applied force to NWM given the District Court findings. This is particularly so when it said it was conducting a

materially distinct employment investigation but focussed on the application of force in the moment and did revisit the District Court findings.

Additional policy breaches

[75] In investigating its concerns in this way it was unclear which other policies Corrections' considered had been breached or how serious those breaches were. A fair and reasonable employer could be expected to have assessed whether the remaining conduct it was concerned about was capable of amounting to serious misconduct, and if that step was satisfied to consider whether dismissal is warranted.

[76] Mr Tawhiwhirangi accepted he breached the requirement to complete an incident report or report the incident but there was no analysis of how serious that was without reference to his actions in general having been unlawful. It transpires that was a major concern for Corrections because of the number of actions incident reporting triggered.

[77] The application of force to the throat of a prisoner was described as a "dangerous method that was not proportionate to the situation" that was a breach of the Code of Conduct "We are Accountable" and "We Make a Difference". However, Corrections accepted Mr Tawhiwhirangi used spontaneous force and Mr Tawhiwhirangi referred to this in his responses noting the Tactical Options Manual of Guidance recorded that Officers may need to use whatever force is necessary to protect themselves or others if an incident required spontaneous use of force. There was no explanation given as to how Corrections reached its conclusion about this in light of Mr Tawhiwhirangi's explanation and the policy.

[78] The fact no risk assessment was conducted by Mr Tawhiwhirangi was referred to as a further breach of the Prison Operations Manual specifically IR.02.03 which required him to consider whether other options were more appropriate. It was also recorded that he had not acknowledged or accepted any accountability for his actions.

[79] There were a number of other policies referenced in passing such as IR.02.01 Responding to minor or unintentional incidents and IR.02.02 Determining appropriate intervention strategy, the Tactical Options Manual of Guidance, IR.02.04 Approval of

planned use of force – Control and Restraint (C&R) and IR.02.05 Deployment of planned use of force (C&R). What was not explained was how breaches of those polices reached the threshold of serious misconduct without reference to the conclusions reached about the use of force in the moment. In that regard Mr Tawhiwhirangi's actions were described variously as "unlawful", "breaching his responsibilities under the Corrections Act", striking NWM was "unreasonable", and the use of force was not necessary "to prevent injury to the people involved" and not proportionate in the circumstances.

[80] Considering there were limitations placed on Corrections by the District Court decision and its own statements about what it was investigating, combined with the failure to clearly identify the remaining breaches of policy arising from Mr Tawhiwhirangi's actions, and whether they reached the threshold for serious misconduct, the investigation Corrections carried out has not met the standard required of a fair and reasonable employer under s 103A of the Act.

Conflict with Ms Carey's evidence

[81] The decision to have Ms Carey continue as the decision maker, after a conflict was raised between what Mr Tawhiwhirangi and Ms Carey about why Mr Tawhiwhirangi was in the Receiving Office on 28 April 2021, is an additional problem for Corrections.

[82] Ms Carey denies she asked Mr Tawhiwhirangi to attend the Receiving Office on 28 April 2021. During the investigation Mr Tawhiwhirangi's representative requested Ms Carey step aside as the decision maker because she had found herself in the position where she had a concluded view about the facts that led to Mr Tawhiwhirangi's involvement that day.

[83] Ms Carey's evidence in the Authority was that she was confident in her position because she is meticulous with keeping contemporaneous notes and recording key decisions and incidents in her notebook. She says this is especially so in relation to the management of high risk prisoners or planned use of force and there is no record in her notes about NWM on 28 April 2021. She also says if she had directed a particular PCO to oversee a prisoner she would have asked them to report back to her.

Mr Tawhiwhirangi did not report back to her and the fact he failed to report the incident at all she says supports her finding that she did not direct him to attend.

[84] However, Ms Carey explained that ultimately she was confident she could carry on as the decision maker because even if she had directed Mr Tawhiwhirangi to attend that day to assist, that would not have changed her assessment of what occurred that day or the obligation on Mr Tawhiwhirangi to report that use of force.

[85] During the employment investigation Ms Carey declined to remove herself as the decision maker and recorded in preliminary view letter she had not directed Mr Tawhiwhirangi to attend the Receiving Office that day:

> I categorically denied that I asked you to "step in and assist the receiving office staff regarding NWM - a prisoner". Had I asked you to assist, as you say, I would expect you to report back to me - verbal or by way of a completed incident report, and you did not. To the best of my recollection you did not advise me of the incident in the Receiving Office with NWM at any time including when I presented you with the letter on 14 May 2021 that set out the allegations.

[86] Mr Tawhiwhirangi raised on more than one occasion that he was directed to attend the Receiving Office to assist with NWM to explain his presence in the Receiving Office on 28 April 2021. That could be seen to mitigate concerns about why he was there and supported his statement about the difficult behaviour he was responding to. While Ms Carey explained her rationale for why it was reasonable for her to remain the decision maker, the fact her evidence was in direct conflict with Mr Tawhiwhirangi's was inescapable. In reaching the view that she did the inference is that Mr Tawhiwhirangi was not honest because only one of them could have been correct about whether she asked him to attend the Receiving Office.

[87] The final view letter recorded their different views as to why Mr Tawhiwhirangi was there were not relevant to the decision making and proposal of disciplinary sanctions against him. When a decision maker has evidence relevant to a finding of fact that may support one parties case over the other issues as to a perception of bias or alleged pre-determination can arise. That is what has occurred in this case.

[88] The independence of a decision maker that is free from the perception of bias is an important aspect of natural justice and procedural fairness for employers to be

aware of. It has previously been held by the court that it is unwise for a person directly involved in the events to be allowed to make a decision where this can be avoided.[18] In the case of a small employer this may not be able to be avoided but that was not the case for an organisation such as Corrections.

Taking into account the provisions of atawhai or comfort

[89] I also note references to Mr Tawhiwhirangi providing "atawhai" or comfort to NWM after she sat down in the chair following the incident. This was recorded as being inappropriate in the preliminary view letter. Having recorded that conclusion it would be hard for Corrections to say that was simply an observation or that it was not considered by the decision maker.

[90] The issue for Corrections is that this was not recorded as an allegation and Mr Tawhiwhirangi was not advised this was being investigated. Nonetheless it was seen on the CCTV footage and recorded by the decision maker to be inappropriate.

[91] In accordance with s 103A of the Act employers are required to raise their concerns with employees before making a decision or taking action. Acting as a fair and reasonable employer Corrections could not fairly take into account matters not set out in allegations.

[92] Corrections faces a number of difficulties in justifying its action. Having said it was not taking into account the findings of the District Court it considered the same factual matters as the Court and reached the opposite conclusions.

[93] If some of those actions said to be unreasonable and unjustified related to aspects of Mr Tawhiwhirangi's conduct, other than the application of force on NWM, that was not clearly set out. Corrections did not investigate what it said it was setting out to investigate.

[94] Rather than assessing the specified policy breaches on a scale of seriousness for a breach of that type the conclusions reached about the seriousness relied on Mr Tawhiwhirangi's application of force being disproportionate, dangerous and unlawful.

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[18] See for example: *NZ Engineering Union v Fletcher Construction Ltd* [1989] 3 NZILR 279.

[95] While Corrections was correct that the District Court decision was not a complete answer to its employment concerns arising from the incident on 28 April 2021, it would be difficult for Corrections to have reached the conclusions it did without acting unreasonably. It faced further problems in justifying its actions in that it could not show it had followed a fair process when the impartiality of the decision maker had been raised and findings were made about aspects of Mr Tawhiwhirangi's conduct that did not form part of the allegations.

[96] Mr Tawhiwhirangi has been successful with his claim that his dismissal was unjustified. Having reached that conclusion, it is unnecessary to consider the other disadvantages raised on Mr Tawhiwhirangi's behalf. It is noted that the procedure followed by Corrections was on the whole what could be expected of a fair and reasonable employer, other than the matters set out above.

Reinstatement

[97] Having found the dismissal was unjustified Mr Tawhiwhirangi is entitled to an assessment of remedies and he seeks reinstatement. Reinstatement must be both practicable and reasonable and they are two separate requirements. In *Hong v Auckland Transport* the practicableness and reasonableness as it relates to reinstatement were recently described as follows:[19]

> [66] Practicability is not given a narrow meaning. It means more than simply being possible. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible, and have the potential for the re-imposition of the employment relationship to be done or carried out successfully. A wide range of considerations may be brought to bear on the question of practicability, including matters which, although they may not have formed reasons for the dismissal, are nevertheless germane to the prospects of a renewed employment relationship.
>
> [67] Looking at reasonableness, the Court needs to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer, and in some cases, perhaps third parties who would be affected by the reinstatement.
> …

[19] *Hong v Auckland Transport* [2019] NZEmpC 54.

> The Court must broadly inquire into the equities of the parties' cases insofar as the prospective consideration of reinstatement is concerned, and balance the interests of the parties and the justice of their respective cases.
>
> [footnotes omitted]

[98] Corrections say that reinstatement in this case is neither practicable nor reasonable for the following reasons:

(a) Mr Tawhiwhirangi failed to demonstrate insight into his actions which risks a repeat of the same conduct;
(b) As a senior staff member he failed to accept responsibility for not reporting the incident;
(c) The comments he made during the process give rise to real concerns about appropriate conduct in the workplace;
(d) Corrections employee's have a duty of care to people in custody and an obligation to keep them safe;
(e) There are no vacant PCO roles at Arohata;
(f) Reinstating Mr Tawhiwhirangi after he had been absent for approximately four years would pose training challenges and there is new information and training on Trauma Informed Practices;
(g) Reinstatement would send the wrong message to other staff and suggest that inappropriate and unreasonable behaviour goes unpunished and inconsistent with the duty of care towards vulnerable women in custody.

[99] There were multiple submissions on Mr Tawhiwhirangi's behalf on why it was both practicable and reasonable to reinstate Mr Tawhiwhirangi which can be summarised as follows:

(a) Reinstatement is the primary remedy under the Act;
(b) It must be ordered where it is reasonably practicable to do so. The dominant purpose of the legislation is employment protection. This is reinforced by s 157 of the Act;
(c) Unless there is a good reason not to reinstate the default position is reinstatement under the Act. To do otherwise is to create a system of licensing unjustified dismissal;
(d) Corrections is well resourced;
(e) Mr Tawhiwhirangi has worked for 50 plus years and has an unblemished record;
(f) Corrections' evidence regarding vacancies and perceived skills gap is not accepted;
(g) Supervision and monitoring could support reinstatement and mitigate Corrections' concern;.
(h) Reinstatement would have a positive impact on morale;
(i) Mr Tawhiwhirangi with his additional knowledge of the policies and procedures can help a role model other staff members;
(j) Reinstatement balances the competing interests of the parties;
(k) Damages are not an adequate remedy;
(l) It is reasonable and practicable to ensure the equity in relationship given the dismissal was based on flawed interpretations;

(m) This was a one-off event and Correction's submission that he is not safe to work in a woman's prison must fail;
(n) He is willing to go to other sites;
(o) Under section 73 of the Public Service Act 2000, Corrections has good-faith obligations;
(p) Corrections witness who gave evidence regarding reinstatement has not worked with nor does she know Mr Tawhiwhirangi and there is no reasonable basis for the conclusions;
(q) There is no basis for a conclusion that Corrections cannot have trust and confidence in Mr Tawhiwhirangi;
(r) Finding other suitable similar employment elsewhere will be impossible;
(s) Mr Tawhiwhirangi is willing to undergo further training and development and he maintains good relationships with prisoners and staff;
(t) Reinstatement is feasible and necessary in this case to balance the equity and fairness.

[100] Reinstatement is the primary remedy. In the recent decision in *Vegepod NZ Limited v Lowe*[20] the Chief Judge recorded the following:

> [113] Jobs are important and money is often a poor substitute. In this regard the Act has both an educative and regulatory function, which the Court recognises when dealing with applications for reinstatement, both interim and permanent. The point is that, while a claim for reinstatement is to be assessed against its own factual context, attention must also be paid to the impact of such orders more generally in the overall interests of justice. As the Court pointed out in *Ashton v Shoreline Hotel*: "…to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustified dismissals." The same point applies to orders of interim reinstatement.

[101] The unavailability of roles is not a sufficient reason on its own not to reinstate a dismissed employee. In *Genesys Telecommunications Laboratories Ltd v Scott* this issue was addressed:[21]

> [119] Genesys' submission that there is no work available for Mr Scott must be weighed against these objects of the statutory remedy. It is arguable that if the dismissal grievance is made out, Genesys will have taken a step not open to it as a fair and reasonable employer. In those circumstances it is also arguable it would have been the author of its own misfortunes, and it could not therefore assert it would be unreasonable or impracticable to reinstate Mr Scott.

[102] The amount of time an employee is out of the workforce is also a factor that is taken into account if it impacts on the likelihood of successful reintegration.[22] In this case while the length of time passed is due in a large part to the criminal proceeding,

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[20] *Vegepod NZ Limited v Andrew Lowe* [2025] NZEmpC 76.
[21] *Genesys Telecommunications Laboratories Ltd v Scott* [2019] NZEmpC 113.
[22] *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [37].

Mr Tawhiwhirangi has been away from the workplace for approximately five years. In the recent case of *Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children* an absence of six years from the workplace was found to weigh heavily against reinstatement.[23]

[103] Ms Howcutt's evidence was of a major shift in approach in that time. Corrections have identified it is common for females who find themselves in prison to have been victims of abuse and noted the need for staff to be educated about the impacts of trauma when working with women in prison. The 2025 Action Plan reflects these changes in the underlying policy and strategy and as a result Arohata aims to operate with an approximate ratio of 70/30 female to male staff members. Currently all PCO roles of which there are nine, are filled. There are also said to be no vacancies nationally for PCOs.

[104] A wide range of considerations may be brought to bear on the question of practicability of reinstatement including matters that may not have formed the basis for the dismissal but are relevant to the prospects of reinstatement. There are three additional matters that came to light during Corrections' investigation that Corrections say are relevant to the question of reinstatement.

[105] The first is Mr Tawhiwhirangi's actions after the incident when he provided "awhi" or comfort to NWM. The fact this occurred is not in dispute because it is depicted on the CCTV footage. Ms Carey recorded the concern in this way:

> Showing atawhai towards NWM after you had used force against her could be seen as an expression of power over her and/or an attempt to neutralise the effect of the incident. It was not appropriate behaviour.

[106] Although recording this in the preliminary view letter was problematic for Corrections (because it did not form part of the allegations), Corrections' views it as inappropriate conduct in the context of Mr Tawhiwhirangi having just used force on the prisoner. The concern is such that Corrections submit returning Mr Tawhiwhirangi to the same environment with female prisoners is neither practicable or reasonable.

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[23] *Gumbeze and The Chief Executive of Oranga Tamariki – Ministry for Children* [2024] NZEmpC 133 at [189].

[107] The second matter relates to a comment Mr Tawhiwhirangi made to Ms Carey during the investigation. Ms Howcutt gave evidence about the significance of this remark. Mr Tawhiwhirangi was describing to Ms Carey what was depicted on the CCTV footage immediately after the incident. Mr Tawhiwhirangi recalled NWM said to him she thought she was a battered woman and Mr Tawhiwhirangi responded to NWM telling her should have known better then and just let them get on with doing their jobs.

[108] There is no dispute the comment was made. The Authority requested the recordings from the 30 January 2024 meeting because there were discrepancies in the transcripts the parties provided. Mr Tawhiwhirangi's description of the conversation he had with NWM in the immediate aftermath of the incident and his response to NWM's battered woman comment can clearly be heard on the recordings.

[109] Ms Howcutt says this comment suggests an ingrained way of thinking that undermines the current direction Corrections is taking with regard to the custodial environment for women in prison. She says this comment from a PCO who holds a senior leadership role and who others will look to for guidance is concerning and she has doubts whether Mr Tawhiwhirangi could adapt to the current approach.

[110] The third matter raised by Corrections is an earlier comment also made by Mr Tawhiwhirangi. When Ms Carey met with Mr Tawhiwhirangi at the start of the process on 19 May 2021 to discuss the proposal to suspend him, she says Mr Tawhiwhirangi said to her that he was not violent and that he "went to slap her, but missed" and "I've done this to her all the time" or words to that effect.

[111] During cross examination Mr Tawhiwhirangi denied making that comment in that way. He did accept on further questioning from the Authority that he may have said something along those lines but would have referenced being in an altercation with NWM before but not those words. He said the "slap" evidence in the Court. The meeting on 19 May 2021 was not recorded but it appears in Corrections' notes summarising that meeting and Ms Carey's evidence was Mr Tawhiwhiranigi made that remark to her in that meeting.

[112] These comments from Mr Tawhiwhirangi appear to have been spontaneous comments made by him during the employment investigation directly to the decision maker. They were not answers to questions Mr Tawhiwhirangi had been asked and on both occasions he had a representative present with him.

[113] Corrections also raised the issue of Mr Tawhiwhirangi not reporting his use of force as a concern for it should he be reinstated. Corrections says it could not have confidence in Mr Tawhiwhirangi given he failed to report the incident. The use of force reporting ensures senior managers in the prison are aware incidents have occurred and it triggers a number of actions listed in the Prison Operations Manual including:

(a) An immediate needs and placement assessment for the prisoner.
(b) The prisoner must be placed on 15 minute observations.
(c) An information report must be completed by all staff witnesses before the end of their shift.
(d) The prisoner must be interviewed within three hours of the physical force being applied
(e) A team debrief must occur as soon as practicable but within 24 hours of the incident.
(f) A post incident review must be completed.
(g) The use of force register must be completed.

[114] Under s 83(3) of the Corrections Act 2004 a medical assessment is mandatory after force is used on a prisoner. Failing to report the incident meant there was no trigger for a medical assessment. Mr Tawhiwhirangi's evidence was of a routine medical assessment on entry to the prison but it appears the force applied to NWM's throat was not considered during that medical assessment.[24]

[115] Mr Tawhiwhirangi's evidence in the Authority regarding this was that there was never an intention on his part not to report his use of force on NWM. He was called in that day and there were other staff present who worked permanently in the Receiving Office. He expected them to complete the incident report. He noted as a PCO he usually signed the incident reports off.

[116] He also said there are numerous incident reports in relation to NWM and he considered this incident to be a minor because it was just NWM playing up. There was no injury to staff and no injury to NWM and he forgot about it as time went by.

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[24] Investigation Report, p11.

Mr Tawhiwhirangi also referred to the fact he had recently submitted an investigation report in relation to NWM spitting at him to support his explanation for not submitting an incident report.

[117] Corrections do not accept that is an adequate explanation for something so important. He was the employee who applied the force to the prisoner and he had submitted incident reports in the past in relation to NWM. His own evidence about the recent incident report in relation to NWM spitting at him was inconsistent with the assertion the incident on 28 April 2021 was not serious enough to warrant one. It also overlooks the requirement to report use of force on prisoners to the next most senior person[25] as well as the requirement on an officer who uses spontaneous force on a prisoner to "promptly" report it to the prison director and as soon as possible report it to the unit PCO or on-call manager. [26]

[118] In considering whether damages would be an adequate remedy Mr Tawhiwhiranigi is firmly of the view that damages would not be an adequate remedy. His evidence and that of his family underscored the importance of work to him, the impact on his reputation from this investigation and the fact he has dedicated nearly 40 years of his life to a job that he loved. The uncertainty and the prolonged process were described as taking a heavy toll on him and it was submitted on his behalf that reinstatement was the only remedy that could address the impact of the unjustified dismissal because it restores his career, livelihood, reputation and dignity.

[119] It is generally accepted that reinstatement can be challenging for employers after a dismissal decision because what is required of them is a "walking back" from that decision. However, the fact it is challenging is not sufficient to render reinstatement impractical or unreasonable on its own. In the case of *Vegepod* this was explained in these terms:[27]

> [72] …Reinstatement of a dismissed employee is invariably a challenging process for all concerned – the employer, the employee and co-workers. Reinstatement generally only arises as an issue in circumstances where an employer has decided to terminate the employment relationship. Reinstatement requires, by its nature, a walking back. That walking back is often not what an employer wishes to do (hence an order of the Authority or

[25] IR.06.01 Immediate reporting.
[26] IR.02.06 Spontaneous use of force.
[27] *Vegepod NZ Ltd v Lowe* [2025] NZEmpC 76.

> the Court is required) and the walking back is almost always difficult. Nonetheless, Parliament has expressly stated that reinstatement is the primary remedy and can be taken to have understood the difficulties generally associated with such a step.
>
> [73] All of this is relevant to the threshold that must be met when seeking to argue that reinstatement is not practicable and/or reasonable, including on an interim basis.
> …

[120] While reinstatement is the primary remedy, the concerns raised by Corrections are specific to the workplace Mr Tawhiwhirangi would be returning to and appear to be more than a reluctance to walk back from the position it had reached in dismissing him. The evidence was of considerable changes in practice given a shift in the operating strategy and policies. The concern ultimately was the impact on prisoners but also the trust and confidence Corrections could have in Mr Tawhiwhiranigi as a PCO.

[121] Given the nature of the prison environment and Mr Tawhiwhirangi's senior role it is reasonable for Corrections to be concerned about his appreciation and understanding of the importance of both incident reporting and the need for a medical assessment given the obligations on Corrections Officers in the Corrections Act and the nature of the custodial environment. These concerns go towards both practicability and reasonableness of reinstatement.

[122] The amount of time out of the workplace is particularly relevant given Ms Howcutt's evidence of the significant shift in policy and training which means the challenge is not just the length of the time but also a fundamental upskilling that would be required in her view. The spontaneous comments made Mr Tawhiwhirangi during the employment investigation are relevant and count against reinstatement being practicable.

[123] It was submitted on Mr Tawhiwhirangi's behalf that he had demonstrated an understanding and acknowledgement of where he could improve but the evidence as to that was slim. Taking into account the concerns about the spontaneous comments made and the evidence about upskilling, the significance of not reporting the incident and the amount of time out of the workplace reinstatement is unlikely to be workable.

[124] Taking Corrections' concerns into account and balancing them against the submissions made on Mr Tawhiwhirangi's behalf, including his willingness to be retrained, the conclusion reached is that it would not be reasonable or practicable to reinstate Mr Tawhiwhiranigi.

Compensation for hurt and humiliation

[125] Mr Tawhiwhiranigi seeks compensation for humiliation, loss of dignity and injury to feelings in relation to three distinct grievances. The first is recorded as an unjustified disadvantage personal grievance for the unjustified adoption of a seriously flawed investigation report, and unjustified conflation of the investigation and disciplinary processes with the dismissal decision. The second is an unjustified disadvantage personal grievance for the failure to act in good faith because a fair and reasonable employer could have been expected to have acted in good faith and the third is an unjustified dismissal personal grievance.

[126] There is considerable overlap between the two disadvantage claims and the unjustified dismissal grievance such that a globalised amount of compensation is appropriate.

[127] Mr Tawhiwhirangi's evidence of the impact on him due to his dismissal at the end of a long period of suspension was supported by Mrs Wooldridge's evidence. Work was one of the main joys in his life and he says the dismissal was incomprehensible for him. The fiscal and mental strain has been very difficult. Dismissal affected his self-worth and led to a lack of interest in things he is passionate about to the extent his family described him withdrawing from social life and concerns about his mental health and anxiety.

[128] There was humiliation at having a long career come to such an end, feelings of letting his family down and the financial burden and stress from concern about losing the family home and mortgage repayments. He said his mother also passed away during this period and he was unable to grieve and be there for his family. He has lost weight and often found himself unable to sleep thinking about the future.

[129] The total length of time taken to resolve the employment investigation was said to have increased his levels of distress, but this is not all attributable to Corrections. It was at Mr Tawhiwhirangi's request and to his benefit that the criminal matter was resolved first in a way that preserved his right to silence and that can be said to have contributed to the length of time it took to complete the employment investigation.

[130] As a result the extent of the impact on Mr Tawhiwhirangi caused by Corrections' unjustified actions is a subset of the total and the evidence fell short of serious health issues or loss sustained as a result of the employers unjustified actions.

[131] Given the finding above that the dismissal was unjustified, the impact on Mr Tawhiwhiranigi and recent Authority cases I consider a moderate amount that falls within band two of the scale set out by the court[28] in the sum of $20,000.00 to be appropriate compensation for the humiliation, loss of dignity and injury to feelings suffered as a result of Corrections' actions.

Damages

[132] Damages were also sought for not following the procedures in the Collective Agreement, not providing a safe workplace and for non-recognition of Māori cultural implications.

[133] There was very little evidence other than the final decision was delivered by email rather than face to face as to how Corrections failed to comply with the relevant clause in the Collective Agreement that required recognition of Māori cultural implications.

[134] The clause required Corrections to operate policies that recognise the aims and aspirations of Māori, the employment requirements of Māori and the need for greater involvement of Māori in the public service.[29] The evidence did not support the submission there had been a breach in this regard.

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[28] *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [162].
[29] Collective Agreement 2021-2023– policies regarding Māori, cl 1.5.2(d).

[135] To the extent damages could be claimed for the other two matters, the compensation award above is based on the same factual matrix and circumstances and a separate award for damages would not be appropriate.

Lost wages.

[136] Mr Tawhiwhiranigi seeks lost wages up until the date of the determination. The Act permits reimbursement to the employee of lost wages in an amount that is the lesser of the sum equal to lost remuneration or to three months ordinary time remuneration.

[137] Given the finding above that Mr Tawhiwhirangi's dismissal was unjustified, and he has been unable to find new work, I consider an award equivalent to three months wages is appropriate. I decline to exercise the discretion to order a greater amount in the circumstances of this case. While the investigation itself took a long time, what transpired has not given rise to any circumstances that tend to suggest that losses caused by the dismissal have extended beyond the three month period and the evidence did not suggest that.

Loss of monetary benefits

[138] A claim was made for loss of monetary benefits. This was withdrawn on the basis retirement leave was paid out at the end of the employment relationship.

Penalties for breach of good faith

[139] While breaches of good faith can be identified in cases where an employer has not acted as a fair and reasonable employer during an investigation and dismissal, in order to award a penalty under s 4A of the Act the breaches must be deliberate, serious and sustained. It is not apparent the breaches were deliberate or serious or sustained. They arose from the employment investigation that could not have been avoided once the circumstances became known after the event. The length of time taken to complete the investigation was significant but most of the delay is not attributable to Corrections. It is arguable there were very few delays caused by Corrections during the employment investigation. Corrections was in a position where Mr Tawhiwhirangi's right to silence

meant the employment investigation was paused until the criminal charges were disposed of. No penalty is awarded for good faith breaches.

Contribution

[140] Under s 124 of the Act, the Authority must consider whether any remedies awarded should be reduced to the extent to which the actions of the worker contributed to the situation giving rise to the personal grievance. I would need to be satisfied Mr Tawhiwhirangi's actions contributed to the situation that gave rise to the personal grievance and that his actions require a reduction in the remedies that would have otherwise been awarded.

[141] Corrections submitted that if Mr Tawhiwhirangi was successful there ought to be an assessment of contribution. It says Mr Tawhiwhirangi's actions were both the trigger and the cause of any consequences which followed. He used force against NWM in circumstances where alternatives were available and failed to report the incident. These actions it says are directly causative of the outcome and blameworthy.

[142] The approach to contribution was recently summarised in *Sheridan v Pact Group*[30] (citing *Maddigan v Director -General of Conservation* [31]):

- First, was the employee's alleged contributory conduct culpable and/or blameworthy?
- Second, did that conduct create or contribute to the situation giving rise to the dismissal/disadvantage?
- Third, what is a fair assessment of the extent of the contribution?
- Fourth, should the reduction to contribution be applied across one, for some, or all of the remedies ordered in the employee's favour?

[143] Mr Tawhiwhirangi accepts he applied force to NWM and relies on the District Court decision to justify his actions. It has been found above Corrections did not separate its employment investigation from the criminal finding which it said it would do. As a result Corrections has not assessed the seriousness of the breaches of policy that were addressed by the District Court decision from those that were not.

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[30] *Sheridan v Pact Group* [2026] NZEmpC 51 at [97].
[31] *Maddigan v Director -General of Conservation* [2019] NZEmpC 190 at [74].

[144] Nonetheless by his own admission Mr Tawhiwhirangi was very familiar with NWM and the risks associated with managing challenging behaviour. The incident reports recorded and submitted by Mr Tawhiwhiranigi show escalating challenging behaviour in February and March 2021. Mr Tawhiwhiranigi was directly involved in many of those incidents by virtue of being the PCO in the unit where she had been housed.

[145] Mr Tawhiwhiranigi says he was called to the Receiving Office that day because of how difficult NWM could be and the PCO assigned to that area did not want to deal with her. That being the case the policy IR.02.04 and 05 provided for approval for planned use of force (control and restraint) and deployment of planned control and restraint. Mr Tawhiwhirangi's' evidence in the Authority was that he did not consider those policies to be relevant.

[146] The policy IR.02.02 Determining appropriate intervention strategy required Tawhiwhirangi as the most senior staff in attendance to "…plan, and initiate the action required to eliminate or contain the incident.". His evidence was that there was no management plan in place although as he observed how NWM was behaving when he arrived in the Receiving Office, he was thinking about how to bring the situation under control. IR.02.02 (2) and (3) provided:

> 2. If there is no immediate or further risk to any person, property or systems, the officer in charge (first responding officer) should attempt to resolve the issue by using non-physical intervention strategies (refer to POM IR.02. Res.01 Intervention strategies), such as:
>   i. tactical communication (ie de-escalation), or
>   ii. that the prisoner is contained in a safe and secure area.
> 3. Staff may use minor non-threatening physical contact (refer to POM IR.02.Res.01 Intervention strategies) to resolve the incident.

[147] When considering this policy the District Court Judge's analysis of the CCTV footage is relevant:

> [12] These events are captured on closed-circuit television footage which I viewed several times. It is clearly the best evidence of what actually occurred. The oral evidence from the defendant and Corrections Officer [GQF], must be regarded as the best efforts given over two years after the incident itself. NWM went into the receiving office first. The defendant followed. NWM turned to

> face the defendant. Their faces were close. The description of each being upfront and personal comes to mind.

[148] Ms Carey's analysis identified that Corrections policies required more of Mr Tawhiwhirangi given his own account of why he was there, the seriousness with which he considered spitting to have been, the fact he was aware NWM could and did often exhibit difficult behaviours that were challenging for Corrections Officers to deal with, and his level of experience and seniority. It was significant in terms of a risk assessment that NWM was returning to prison that day.

[149] I note at this point submissions were made that Corrections training was not sufficient and/or that Mr Tawhiwhirangi had not received training on the policies. The evidence from Mr Hoogenraad means that submission cannot be accepted. Mr Tawhiwhirangi was up to date with his training and it would be difficult for a distinction to be drawn between practical training on use of force and the policies.

[150] The evidence was that Corrections Officers attend regular training and are certified in Control and Restraint techniques and the policy that underpins that. The policy is directly linked to the Corrections Act which specifies that the least amount of force is to be used on prisoners and only in specified situations such as self-defence. The suite of policies and guidance cover for example non-physical interventions including communication, containment, the use of non-threatening physical contact and planning for use of force in advance of dealing with a situations and assessing risk. The underlying principle of the legislation, the policies and the training is on using the minimal amount of force to bring a situation under control and the importance of planning in advance when the circumstances allow.

[151] Ms Carey gave evidence of her expectation that a Corrections Officer who was observing the situation as it unfolded could have considered leaving NWM in the cell to allow time to resolve a situation, discussing options or a plan with the Corrections Officers who were also present. Once in the room if spitting was a concern simply stepping back from NWM to avoid the risk of being spat at was also an option.

[152] Spit hoods are another option Ms Carey discussed and turning on the Body Worn Cameras that Mr Tawhiwhirangi and the other Corrections Officer's present

were wearing. These options were not considered by Mr Tawhiwhirangi. He did consider pepper spray but discounted it. The point being made was that there many other options short of putting himself in a position directly in NWM's personal space and using physical force or pepper spray to bring the situation under control.

[153] The description above in the District Court judgment of "their faces being close" and of Mr Tawhiwhirangi and NWM being "up close and personal" does not align with the collective guidance set out in the policies and the Corrections Act regarding de-escalation and the requirement Corrections Officers use the least amount of force necessary when dealing with prisoners.

[154] Mr Tawhiwhiranigi accepted he did not report the incident or complete an incident report and policy required that of him.[32] A number of incident reports were provided showing that Mr Tawhiwhiranigi had submitted incident reports about NWM in the lead up the incident on 28 April 2021 including one on 23 March 2021 that records she spat on him on. At the end of that incident report he recorded "she will be charged". It is difficult for Mr Tawhiwhiranigi to maintain the incident was minor in light of that.

[155] Failing to submit an Investigation Report or report the incident because it involved the use of force on a prisoner was significant contributing factor. While Mr Tawhiwhirangi could rely on self-defence to justify his spontaneous use of force on NWM, the policy on the use of spontaneous force (IR.02.R01.02.04 Use of force – unplanned (spontaneous)) required not only reporting to the prison director but also a debrief, updating the use of force register, a use of force review and mandatory recording of the incident in Corrections' IOMS system.

[156] Corrections say the failure to report his spontaneous use of force on NWM has not been explained other than referring to it as an oversight. As set out above that position is difficult to sustain when it is noted a number of incident reports had been recently submitted by Mr Tawhiwhirangi about NWM including one in relation to spitting.

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[32] IR.05.01 – required the officer in charge of the incident to immediately advise the prison director or their delegate immediately following incidents where use of force is used and IR .05.08 required the register to be filled in with the details of any incident where any use of force is used.

[157] Incident reporting also triggered a needs and medical assessment of the prisoner. A medical assessment is mandatory under the Corrections Act 2004 after a Corrections Officer uses force on a prisoner and that assessment did not take place. It also triggered staff debriefs, interviews of staff and the prisoner in the immediate aftermath, post incident reviews and escalation to the Prison Director if required.

[158] Corrections say as the most senior officer present the decisions he made before, during and after the incident on 28 April 2021 did not take into account his training and the relevant policies on use of force. I agree this contributed to the situation that gave rise to the need to use a pre-emptive strike on the prisoner and therefore the situation that gave rise to his personal grievance claims.

[159] The courts have previously held that care should be taken when considering whether an employee's contribution should attract a deduction in remedies. Reduction in remedies of 25 per cent has been considered to be significant.[33] In the case of *Shaw v Bay of Plenty District Health Board* [34] despite finding the employee had been justifiably dismissed the court went on to comment that even if wrongly decided, this would have been a rare case where no remedies would have been awarded. The employee's breaches had occurred over several years, were contrary to the DHB's policies and her professional responsibilities and training, had been carried out for her own purposes and were without any clinical justification.

[160] While this was a one-off incident, Mr Tawhiwhirangi's contributions were contrary to Corrections' policies and training. While his spontaneous use of force in the moment was found to be lawful, he was trained with regard to assessing risk and adopting strategies and using techniques to prevent incidents from escalating but showed little appreciation of the importance of that training and guidance.

[161] Although blameworthiness is not a one sided conversation because of the issues set out above with the employment investigation undertaken by Corrections, Mr Tawhiwhirangi's contribution was significant. There was a failure to assess the situation and consider options short of a confrontation with NWM and this combined

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[33] *Maddigan v Director – General of Conservation [2019] NZEmpC 190 at 75].*
[34] *Shaw v Bay of Plenty District Health Board* [2022] NZEmpC 10 at [162] – [165].

with failing to report the matter led to a situation where it can be said Mr Tawhiwhirangi contributed to the situation that gave rise to his personal grievances.

[162] It was his actions that left Corrections in a position where it had no choice but to investigate the 28 April 2021 incident particularly when the incident was not reported.

[163] With that in mind a 15 per cent reduction for blameworthy contribution is considered to be appropriate.

Non-publication

[164] Interim non-publication orders were made in relation to Mr Tawhiwhirangi, the name of the prisoner referred to in the evidence and any Corrections Officers who did not give evidence. Mr Tawhiwhirangi applied for a permanent non-publication order which was opposed by Corrections.

[165] The Court recently considered the test for granting non-publication orders in *MW v Spiga Limited*[35] and confirmed the fundamental importance of the established general rule of open justice unless there are sound reasons for departing from that rule. There must first be a reason to believe specific adverse consequences could "reasonably be expected to occur" and secondly a weighing exercise is to be undertaken to consider whether those adverse consequences justify a departure from open justice in the circumstances of the case.

[166] The adverse consequences advanced on Mr Tawhiwhirangi's behalf were privacy in relation to how his employment ended, his ability to obtain alternative employment, his safety in the community and the stigma of him being dismissed for violence.

[167] Corrections say the high threshold required to displace the principal of open justice has not been met an no orders for non-publication of Mr Tawhiwhirangi's name should be made.

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[35] *MW v Spiga Limited* [2024] NZEmpC 147.

[168] An order for permanent non-publication is a departure from the fundamental principle of open justice. The standard for departure is a high one but the risk of harm to an individual has been accepted as a sound reason to displace the presumption of open justice. The grounds advanced on Mr Tawhiwhirangi's behalf in relation to privacy and obtaining alternative employment are unlikely to weigh strongly against publication given the importance of open justice. They were general assertions rather than specific consequences that could be pointed to.

[169] On the other hand, noting the custodial environment and the length of Mr Tawhiwhirangi's career the adverse consequences associated with his identity being published in connection with the circumstances that gave rise to the personal grievance claim are stronger grounds and could reasonably be expected to occur.

[170] However, even if those grounds justify a departure from open justice, Mr Tawhiwhirangi's relied heavily on the decision of the District Court to make out his claim that Corrections actions and decision making could not be justified. There was no name suppression in the District Court and this determination necessarily refers to the District Court judgment. An order for non-publication would be futile in those circumstances. The details of the incident on 28 April 2021 are already in the public arena by virtue of the District Court judgment and it is a well settled principle that suppression or non-publication should not be ordered if it would be futile to do so.[36]

[171] Mr Tawhiwhirangi's application for non-publication orders in relation to his name and identifying details is declined.

[172] In relation to the prisoner named in the evidence and the Corrections Officers who did not give evidence an order for permanent non-publication is appropriate. The public interest does not outweigh the associated privacy interests and confidentiality for others to who did not give evidence and/or are peripheral to a case in order to resolve an employment dispute that does not directly involve them.

[173] I consider the presumption of open justice is outweighed in relation to the publication of information that would identify both NWM and GQF and the other

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[36] See for example: *AJH v Fonterra Co-Operative Group Ltd* [2021] NZEmpC 111 and *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94.

Corrections Officers who did not give evidence but were named in the evidence. Non-publication orders are made in respect of them.

Orders

[174] Within 28 days of this determination Corrections is to pay Mr Tawhiwhirangi:[37]

(a) Compensation under s 123(1)(c)(i) of the Act in the amount of $17,000.00 for unjustified dismissal and disadvantage.

(b) Lost wages under s 123(1)(b) and 128 of the Act in an amount of $19,882.50.

Costs

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

[165] If the parties are unable to resolve costs, and an Authority determination on costs is needed, Mr Tawhiwhirangi 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 Corrections 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.

[166] 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.[38]

Sarah Kennedy-Martin
Member of the Employment Relations Authority

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[37] 15 percent deduction for contribution ($20,000 – 15% = $17,000 and $7,773.50 x 3 = $23,320.50 – 15% = $19,882.42).
[38] www.era.govt.nz/determinations/awarding-costs-remedies