

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Jon Field (Applicant)
AND Department of Corrections (Respondent)
REPRESENTATIVES Kay Stringleman, advocate for the applicant
Karen Spackman and David Traylor, counsel for the respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING Christchurch 1 and 2 November 2006
DATE OF DETERMINATION 2 February 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jon Field worked full time as an instructor at the piggery attached to Christchurch Men's Prison until he was dismissed following an incident between himself and an inmate on 27 May 2005. The Department of Corrections conducted investigations into the incident which included interviewing Mr Field, the inmate and other inmates and staff who were nearby at the time. The interview and investigation processes culminated in a final meeting in October 2005 and a decision announced by letter dated 11 October 2005 to dismiss Mr Field for proven serious misconduct.

[2] In his statement of problem, Mr Field says he used appropriate restraint on the inmate who had advanced towards him in a threatening manner. Accordingly, he did nothing that could amount to serious misconduct. The Department conducted a preliminary investigation. The initial draft report from that preliminary investigation recommended that there was insufficient evidence to escalate the matter into an employment investigation. That recommendation changed after the manager arranged for another investigator to assist the original investigator. Mr Field is critical of the conduct of the preliminary investigation and says that it was unfair because of the involvement of the manager. It will be necessary to detail the conduct of the preliminary investigation to assess whether there is any merit in Mr Field's criticisms.

[3] Following the preliminary investigation, there was a full employment investigation that concluded that Mr Field had punched the inmate. Mr Field is critical of the investigator's decision to prefer the evidence of the inmate over his own account of the incident and says that this assessment is not supported by a fair appraisal of the credibility of the persons involved. But for this assessment of the evidence by the investigator, there could be no finding of serious misconduct on the part of Mr Field to justify his dismissal. It will be necessary to explain the steps taken by the investigator and assess whether his conclusions were fair in light of the test for justification for dismissal.

[4] Mr Field is also critical of the subsequent dismissal decision. In part the criticism is that the flaws referred to above mean that the decision-maker could not fairly rely on the factual

findings from the investigation. He also says that the decision-maker should himself have tested the credibility of the inmates by speaking directly to them and that the decision-maker did not give sufficient weight to Mr Field's evidence and credibility. It will be necessary to review the actions of the decision-maker against the legal standard for justification of a dismissal.

The incident on 27 May

[5] Mr Field normally worked at piggery 2. The incident occurred at piggery 1. On Friday, 27 May 2005, Mr Field drove from piggery 2 to piggery 1 intending to talk with Warren Chilton (an employee) about an inmate (DF) and collect some materials. As Mr Field pulled up at piggery 1 he saw DF and several other inmates standing outside the office. Mr Field got out of his vehicle. He says he moved towards DF and told DF to come with him to the office. Mr Field says that DF responded by coming up to him very quickly, talking in an agitated way. He thought that DF was going to attack him so he pushed DF away. DF came back at him so he pushed him away again. This time, DF stumbled to the ground. As he was getting up, Mr Field decided to restrain DF by holding him down. Next, Mr Chilton called out for Mr Field to let go of DF. There was then a verbal exchange between Mr Field and DF. Mr Field asked DF *what was his problem* and said he wanted to sort it out. Mr Field's evidence is that this was a reference to DF's attitude and verbal abuse towards Mr Field on earlier occasions, including earlier the same morning. Mr Field is critical of Mr Chilton for not immediately removing DF back to his prison unit, allowing the verbal altercation between Mr Field and DF to continue for a short duration. Mr Field then went into the office to collect the materials and left to return to piggery 2.

[6] When Mr Field returned to piggery 2, he told another instructor (Mr Murfitt) that there had been an incident and he went to Kotuku and wrote an incident information report. This report is timed about 20 minutes after the incident. It reads:

On 27-05-2005 I was rostered Piggery Instructor, Christchurch Prison. At 0730 hours I collected Piggery-two workers from Kotuku unit and as we were leaving inmate [DF] attempted to verbally abuse me. He was ignored. At 0800 I went to Piggery-one to collect provisions and saw [DF] outside the office with several other inmates. I said to [DF] to come with me, indicating the office, and he verbally yelled something and approached me quickly in a threatening manner. I thought that he was going to assault me and I pushed him on the ground and held him there until Mr Chilton and Mr Murphy – both Piggery Instructors, arrived. Again I told inmate [DF] that I wished to discuss his abusive manner as this was not the first time this had happened. Some weeks ago he was spoken to by Mr Chilton and Mr Daly about such behaviour and this seemed to have abated until today. When asked what the problem was he stated he did not have a problem and it was just the way he was. I asked if we were over this issue and he replied 'YES'. Several inmates were present as were instructors Chilton and Murphy. [DF] was returned to Kotuku by Mr Daly.

[7] A *Use of Force Register Report* was also completed. It describes the reason for use of force as:

Inmate approached instructor in a threatening manner. Instructor felt he was going to be assaulted.

There is also a section to report intervention strategies used prior to the use of force. It reads:

Inmate pushed and put to ground until assistance arrived.

The method of force used is indicated as *controlled removal*. The register shows that [DF] was placed in Kotuku separates at 8.40am, having been interviewed at 8.15am. At that time, DF is reported as having *no issues*. The medical section of the report shows that DF was examined

at 11.30am. That section reads *slight swelling evident above rt eye. No other injuries noted or reported.*

[8] A handwritten note by or on behalf of DF differs from Mr Field's account. It was written several days after the incident on a copy of the incident information report. It states:

27/5/05

I was outside the smoko room when 'John Field' Arrived. He came up to me and grabbed me with strong force, I tried to free myself from his hold, then he punched me with a closed fist in the face, and as I fell he then punched me in the back of the head, and then offered we go round the back to have a decent fight.

[signed]

[9] Within a day or two of the incident, DF contacted the Ombudsman and by 2 June 2005 he indicated his intention to lay a complaint with the Police of assault by Mr Field. By 3 June, terms of reference had been developed for an investigation by Debbie Smith, Site Operations Manager. The Department of Corrections' human resource procedures for managing misconduct say that *allegations of serious misconduct are investigated before disciplinary action is considered.* Corrections first conducts a preliminary investigation to determine whether there is sufficient evidence to proceed with a full employment investigation. That was the purpose of Ms Smith's investigation.

The preliminary investigation

[10] Ms Smith commenced by written advice dated 7 June 2005 to Mr Field informing him of her investigation, the possibility of an employment investigation with disciplinary consequences, his right to support or representation and her wish to meet with him on 9 June. Ms Smith interviewed DF, Mr Murphy (piggery instructor), Mr Chilton, Mr Daly (piggery instructor) and the following inmates: AL, AC, NH, RM, MH, MT and GO. She also interviewed Roger Leslie (Farm Manager), Robert Scott (Senior Corrections Officer) and Mr Field (twice).

[11] Following the interviews, Ms Smith wrote a draft report and sent it to Brent Maughan. Mr Maughan, at the time, was National Operations Manager of the division of Corrections in which Mr Field worked. He had approved the terms of reference for Ms Smith. The draft report recommended that there was insufficient evidence to support the matter being escalated into an employment investigation, given the absence of *another reliable witness* to the event. The implication is that neither of the two prisoners who told Ms Smith that Mr Field had punched DF were considered by her to be *reliable*.

[12] Mr Maughan's evidence is that he thought the draft report was unsatisfactory. His complaint is about the structure and logic rather than the outcome. He contacted Charles Williams, an auditor in Corrections' internal audit team, and sent him a copy of the draft report. He asked Mr Williams for comment on it. Mr Williams' evidence is that his overall impression is that Ms Smith's conclusions were not supported by the evidence that she had derived from the witnesses. He also says that there were pertinent questions not asked by Ms Smith. Mr Williams sent an email to Mr Maughan on 22 June highlighting *discrepancies with this investigation*.

[13] The criticisms by Mr Williams of the draft report strike me as a reasonable position for him to take. Viewed objectively, there is an absence of analysis and there are gaps in the available information in the draft report. In light of that, it must also be said that Mr Maughan's decision to involve Mr Williams was a reasonable response to the draft. I should note that neither Mr Maughan nor Mr Williams had any preconceived bias against Mr Field. They both reacted reasonably to what they saw as flaws in Ms Smith's draft report.

[14] Mr Williams met Ms Smith and helped her plot out questions to ask of the various witnesses. Following this, Ms Smith re-interviewed some of the original interviewees. She

then drafted further reports. They note that there were essentially two versions of the incident. Mr Field's version was that he wrestled DF to the ground and held him by the shoulders until assistance arrived. He did this in response to DF's aggressive and agitated behaviour. The second version has Mr Field approaching DF, placing his hand on his shoulders and directing him to the office. DF told Mr Field to *buzzer off*. Mr Field then punched DF twice. The final report concluded that no witnesses supported Mr Field's version while several witnesses supported version two. The report concluded by recommending that there was sufficient evidence to undertake an employment investigation.

The employment investigation

[15] Richard Gretton is the Primary Sector Manager for Corrections' inmate employment. Mr Maughan forwarded Ms Smith's report to Mr Gretton who initiated the employment investigation by writing to Mr Field. Another manager, Reg Christiansen, was appointed to conduct the employment investigation. Mr Christiansen had previously worked for Corrections up to the level of Prison Manager but from mid-2003 he had been re-employed in the role of Site Operations Manager of Corrections' inmate employment at Tongariro/Rangipo Prison. There is no criticism of his selection to conduct the employment investigation; nor could there be any valid criticism. He is an experienced manager practised in such investigations and with the appropriate background to understand the context of events.

[16] Mr Christiansen wrote to Mr Field on 2 August 2005. That letter explained that Mr Christiansen would investigate and compile a report making a recommendation as to whether DF's allegation of assault is substantiated. Mr Gretton would then consider whether there had been a breach of Corrections' Code of Conduct. Mr Field was cautioned that if the allegation was substantiated, it was likely to constitute an example of serious misconduct under the Code of Conduct, specifically *violence or threats of violence against clients or others in the workplace* and *threatening or insulting behaviour to any person in the workplace*. The letter also refers to other related parts of the Code, cautions that serious misconduct is likely to result in dismissal and reminds Mr Field of his right to support and representation.

[17] Mr Christiansen received documents from Ms Smith's investigation but, I accept, did not receive her first draft report. Mr Christiansen interviewed the three officers and most of the inmates who were present or nearby. He then met with Mr Field on 22 August 2005. On 15 August 2005, Mr Christiansen sent by courier to Mr Field's representative all the interview notes and transcripts generated by Ms Smith and by himself as well as the relevant contemporaneous reports referred to above. It did not include Ms Smith's draft report or the exchanges with Mr Williams. At that point, Mr Christiansen was unaware of Mr Williams' assistance to Ms Smith and had not seen the draft report. Whilst I accept that Mr Field may not have seen this disclosed material before the meeting on 22 August 2005, it is clear that the material was properly disclosed to Mr Field's representative in good time before that meeting.

[18] By agreement, Mr Christiansen's interview with Mr Field and his representative was tape recorded. The transcript was later sent to Mr Field's representative who took the opportunity to highlight a number of points made during or arising from the interview before Mr Christiansen completed his report.

[19] During the interview, Mr Field told Mr Christiansen that he had received some abuse from DF earlier on the morning of the incident; drove over to piggery 1 a bit later on to collect some materials and to speak to Mr Chilton about DF and the abuse; when he arrived he saw DF with a group of other inmates and told him to come to the office with him; that DF rushed up to him; that he initially pushed DF away; that DF came back; they struggled briefly and he put DF on the ground face down holding on to the tops of his shoulders and his clothing. Mr Field denied telling DF to go around the side of the office to sort it out physically.

[20] Mr Christiansen wrote a report dated 5 September 2005. Mr Christiansen concludes that the investigation was faced with determining which of two versions, if any, of the reported incident was to be believed. He reviews the evidence from other inmates and from

Corrections' staff that supported DF's allegation and does the same with Mr Field's account. Mr Christiansen concludes that Mr Field travelled to piggery 1 to confront DF and in the process of doing that assaulted him.

[21] Mr Gretton received Mr Christiansen's report and then made arrangements to meet Mr Field and his representative on 22 September 2005. The representative was late and when he arrived said that he had not seen Mr Christiansen's report. Mr Gretton gave him a copy of the report and time to read it. In evidence, Mr Field is critical of having to wait in a lobby at the meeting venue for over an hour. He said that Mr Gretton and the representative were in the meeting room during that time as far as he knew although that room was out of his sight. Any delay in the meeting was not caused by Mr Gretton. Mr Field had an opportunity to speak to Mr Gretton directly and through his representative. I accept Mr Gretton's evidence that he agreed to meet with Mr Field and the representative in a further two weeks because the representative said he was under-prepared for the meeting.

[22] There was a further meeting. Prior to the meeting, the representative sent Mr Gretton a copy of Mr Christiansen's report with editorial comments and submissions included throughout. Mr Gretton's evidence, which I accept, is that he carefully considered the comments from the first meeting and the written submissions. Following the second meeting, Mr Gretton wrote to Mr Field confirming his decision to dismiss Mr Field for serious misconduct. Mr Field was paid a month's pay in lieu of notice and received his final pay.

Justification for dismissal

[23] Section 103A of the Employment Relations Act 2000 provides that the question of whether a dismissal is justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[24] Mr Field's representative referred to *Honda NZ Ltd v NZ Shipwrights etc IUOW* [1991] 1 NZLR 392; [1990] 3 NZLR 23 regarding the appropriate standard of proof. I accept that the allegation against Mr Field was of a serious nature and evidence of sufficient cogency was required to uphold the allegation. It is also helpful to refer to *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZLR 584. In that case, the Court of Appeal held that an employer must have more than mere suspicion but need not have proof beyond reasonable doubt of an offence by an employee. At the time of a dismissal an employer must have carried out reasonable inquiries which left it on the balance of probabilities with reasonable grounds for believing (and did actually believe) that the employee was at fault.

[25] Mr Field attacks the intervention of Mr Maughan following Ms Smith's first draft report, Mr William's involvement and Ms Smith's eventual recommendations following several further drafts. The purpose of the attack is to support Ms Smith's recommendation in the first draft of the report that there was insufficient evidence to warrant an employment investigation. However, on any view of the matter, the incident warranted a full investigation into the allegation of assault. There was an allegation made by DF. Medical information was consistent with his allegation that he had been punched by Mr Field. There were surrounding circumstances to support the view that Mr Field might have provoked an incident. DF had verbally taunted Mr Field earlier that morning and there was a background of similar comments. It was unusual for Mr Field to go over to piggery 1 at that time. Information from the other employees tended to suggest that Mr Field was the aggressor at the time of their observations suggesting by inference that he had been the aggressor from the outset. There was also support for the allegation from two other inmates, one who reported one punch and the other who reported two. I have not listed Mr Field's denial and other factors such as inconsistencies in DF's accounts and the possibility of collusion between DF and the other inmates. However they are precisely the factors to be weighed up by the employment investigation in due course. The allegation could not just be rejected because it had come from a possibly unreliable inmate against a reliable employee's denial. A fair and reasonable

employer would have initiated an employment investigation in the circumstances disclosed by Ms Smith's first round of interviews.

[26] There is a submission that Ms Smith's initial recommendation is supported by comments in the *Use of Force Register* that the incident was managed appropriately and actions were justified and necessary. If these comments had been critical of Mr Field's actions, he would no doubt say that the officers did not conduct anything like a full or adequate investigation before reaching those conclusions. That is a true statement in respect of the investigations undertaken by the officers before recording those comments. It follows that their conclusions add little or nothing to the overall picture.

[27] Even if it is assumed that Mr Field was unfairly treated by the intervention of Mr Maughan and Mr Williams leading to an unfair report by Ms Smith, it does not follow that Mr Field was unjustifiably dismissed. I have accepted the evidence of Mr Christiansen that he was not aware of that involvement from Mr Maughan and Mr Williams although he had access to the source material from Ms Smith's interviews and her final report. Neither Mr Maughan nor Mr Williams affected Mr Christiansen's investigation or conclusions which formed the basis of Mr Gretton's decision to dismiss Mr Field. That decision rests or falls on whether the actions of Mr Christiansen and Mr Gretton were what a fair and reasonable employer would have done in the circumstances. The principle expressed by the Employment Court in *Rankin v Attorney-General in Respect of the State Services Commissioner* [2001] 1 ERNZ 476 would prevent any unfairness arising during Ms Smith's investigation from affecting the investigation by Mr Christiansen and Mr Gretton's decision.

[28] At the heart of this problem is Mr Field's continued assertion that his account of the 27 May 2005 incident is correct. He says that he did not punch DF and that his actions in pushing DF, putting him on the ground and holding him down were justified because he acted to defend himself. If that is correct, there could be no action on his part amounting to serious misconduct so as to justify the dismissal. On the other hand, if the allegation that he punched DF is upheld, that would clearly be a breach of the applicable code of conduct entitling the employer to conclude that Mr Field seriously misconducted himself. An assault by an employee on another person within an ordinary work context has often enough been regarded as behaviour amounting to serious misconduct for which an employer both could and would dismiss. This work context makes such conduct by an employee against a "client" even more serious.

[29] What was required here of a fair and reasonable employer? No doubt they would conduct a full and fair investigation without any predetermination giving the employee a proper opportunity to understand the allegation and explain in light of the potential consequences: see *NZ (with exceptions) Food Processing etc IUOW v Unilever NZ Ltd* [1990] 1 NZILR 35. The employment investigation was essentially in two parts. First, there are some complaints raised about Mr Christiansen's investigation. It is said that he was influenced by Ms Smith's notes and transcripts rather than conducting his own process. I do not accept that the criticism is accurate. Mr Christiansen asked open questions about what happened and also referred interviewees to their previous statements or the statements of others. The tone overall of his inquiry, as is apparent from the detailed notes, is of an open process, seeking information rather than a closed process seeking confirmation. It is also submitted that Ms Smith failed to inform Mr Field of the detail of the allegations and the identity of most of the interviewees. Her views reached unfairly in this way then influenced Mr Christiansen's conclusions. However, Mr Field had Ms Smith's notes by the time of Mr Christiansen's investigation so he had a proper opportunity to give any reason why witnesses might be lying or mistaken. Indeed, Mr Christiansen specifically addressed that point with Mr Field, who did not make much of the possibility of ill feeling towards him as motivation for the inmates' statements. There is a complaint that Mr Christiansen did not tell Mr Field that he disbelieved him before producing the written report of his investigation. This demonstrates the difficult balance required of an employer in such situations. It is said that Mr Gretton's later comment that he believed that Mr Field had *thumped* the inmate indicated predetermination on his part. No doubt if Mr Christiansen had said he disbelieved Mr Field there would be a similar complaint of predetermination. I do not accept that Mr Christiansen was obliged as a matter of fairness to

tell Mr Field he disbelieved his denial of an assault before expressing that conclusion in his report. The obligation is to give an opportunity for any explanation and consider what is said without predetermination. That is what Mr Christiansen did.

[30] The second part of the investigation was controlled by Mr Gretton. I have already mentioned the complaint that he predetermined the outcome. I do not accept that as a valid complaint. Mr Gretton's role was to decide whether Mr Field should be dismissed. He was never going to repeat the investigation undertaken by Mr Christiansen. That is all clearly laid out in the department's procedures for managing misconduct. In light of that, it was reasonable for him to convey to Mr Field his view about the accuracy of Mr Christiansen's findings. Mr Field was able either to attempt to persuade Mr Gretton that the findings were wrong or to mitigate the conduct. Most of his (and his representative's) efforts were directed at the former approach. Mr Gretton gave Mr Field a reasonable opportunity to say all that he wanted before deciding to dismiss him for serious misconduct. That outcome was always likely given the circumstances found by Mr Christiansen and Mr Gretton clearly signalled that to Mr Field before they met. It would have been a sham for Mr Gretton to say anything else. By frankly recognising the difficult position Mr Field found himself in, Mr Gretton did not improperly predetermine the decision to dismiss.

[31] Having heard from the responsible managers, I am satisfied that they conducted a full and fair investigation before the decision to dismiss Mr Field was made. That leaves for consideration whether, on an objective basis, the decision to dismiss was what a fair and reasonable employer would have done in all the circumstances.

[32] In evidence Mr Field continued to deny any assault and asserted his actions were in self defence. Unfortunately I have to say that I found this evidence unconvincing. It is a matter that needs to be dealt with in response to the submission that Mr Field's evidence must be preferred in light of Corrections' decision to rely on the documents and records rather than bring direct evidence from any of the inmates or the relevant officers who were present on 27 May 2005.

[33] The first report by Mr Field is timed at 8.19 am within about 20 minutes of the incident. It says that Mr Field thought he was going to be assaulted when DF approached him quickly verbally yelling something so he pushed DF on the ground and held him there until Mr Chilton and Mr Murphy arrived. A little later the same day Mr Field wrote something similar in the *Use of Force Register*. By the time of Ms Smith's two interviews, Mr Field is saying that DF *rushed up, extremely close face to face, the look on his face was aggressive, very hyped up, very agitated. ...I pushed him away with two hands and pushed him to the ground. It was a matter of seconds before Chilton and Murphy came out.* In his second interview he said *I felt he was going to possibly assault me...I pushed him away I don't know how far he turned he came again we scuffled and I put him to the ground ...I held him down ...Mr Chilton came out I know he missed the scuffle ...I was standing over [DF] I had him down there by the shoulders* In his brief of evidence, Mr Field said *I pushed him away quite hard and he went backwards before approaching me again. He came back to me and I pushed him again He stumbled and was getting back up. At that point I considered that this was now a situation where I needed to defend myself and ...took the decision to restrain him. ...I stepped to the side of [DF], took hold of him and after a brief scuffle with arms waving about was able to turn him and put him face down on the ground. I was standing over him holding him down* When questioned by the Authority, Mr Field said *He came up very close to me. I put my hand out. I'm not sure if I touched him at that stage ...I thought I was about to be assaulted – I pushed firmly with both hands ... open palms ...He was propelled backwards ...I stepped forward as he started to get up, I pushed him again. I came round to the side of him – I pushed him down – he wasn't initially on the ground ...brief scuffle with me trying to stay behind him ...my hands on his shoulders pushing him into the shingle. I had my knee on his back holding him down ...Next thing I heard Mr Chilton.*

[34] Counsel for Corrections suggested to Mr Field that he was ramping up the description of the risk as time went on. In response, Mr Field said that on the day (ie; 27 May 2005) he was still very shocked and that by the time of Ms Smith's interviews he had had more time to clear

it in his head. I do not accept this evidence. On 27 May 2005, Mr Field was in control of the situation throughout whether on his, the other officers' or any of the inmates' accounts. That assessment is confirmed by him not calling out for any assistance during the incident. He had the presence of mind to write an exculpatory report almost straight away. The detail is added as time goes by to help explain, deflect or deny aspects of others' accounts. The added details do not necessarily represent conscious fabrication by Mr Field. However, it is a pattern that makes it difficult to accept as reliable his description of the incident. For that reason, I do not accept that his account must be preferred in the absence of direct evidence from those others who were present.

[35] One could examine the statements of the other officers and the inmates as I have Mr Field's statements. The only one who might be similarly influenced by a natural desire to exculpate himself is DF and there are variations and apparent inconsistencies in the several accounts. There is also evidence of his equivocation about laying a complaint. The key to resolving what occurred is the evidence of the several inmates who claimed to see Mr Field punch DF, the observations of the other employees who arrived on the scene just after the punches were allegedly thrown and the surrounding circumstances. With regard to that, I conclude that a reasonable employer would have found that Mr Field punched DF and would have dismissed him, just as did Corrections.

Summary

[36] It follows that Mr Field has no sustainable grievance.

[37] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority