

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN James Steadman (Applicant)
AND Department of Corrections (Respondent)
REPRESENTATIVES Simon Mitchell, for Applicant
Raewyn Tretheway, for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 16 September 2004
SUBMISSIONS RECEIVED From Applicant – 6 October 2003
From Respondent – 13 October 2003
DATE OF DETERMINATION 28 October 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] In his statement of problem filed in the Authority on 31 May 2004 Mr Steadman claims he was disadvantaged in his employment on more than one occasion when he was unjustifiably suspended, given a final written warning without proper justification or process, was subject to unlawful searches of his vehicle, and claims his rights under the New Zealand Bill of Rights Act 1990 have been breached.
- [2] The Department of Corrections (“Corrections”) denies all the claims made by Mr Steadman.

Background

- [3] Mr Steadman has been an employee of Corrections for 26 years. He is currently based at Mt Eden Prison.
- [4] Corrections activities are governed by the Penal Institution Act 1954. Section 21M of the Act provides a statutory right for Corrections to undertake searches of “...*any*...” vehicle being brought into an institution to be undertaken by “...*any officer who is in uniform or is wearing any badge or other article that identifies him or her as an officer.*”

- [5] On 19 November 2002 a letter was sent to all corrections staff advising of a new search policy to be introduced to all prisons from 9 December 2002. Staff were reminded that Corrections were introducing a number of strategies aimed at reducing drug abuse in prisons. At that point in time vehicle checkpoints had been introduced for visitors and inmates. The purpose of the memo was to advise staff that the vehicle checkpoint would be extended from 9 December 2002 to include all entrants, including Managers, staff and statutory visitors. The memo states “...while all visitors and staff could have been searched we have concentrated our efforts on inmate visitors...”.
- [6] The 19 November 2002 letter also advises staff that from 9 December 2002 staff could be required to stop for a vehicle search, pass through a metal detector on the way into the facility, have bags, locker or locker room searched, or be subject to a rubdown search if reasonable grounds are established.
- [7] Staff were informed that the consequences of refusing a search would be an internal investigation and possible disciplinary action. Staff were invited to ask questions about the new policy.
- [8] As events transpired the implementation of the search policy did not occur until October 2003.
- [9] On 11 March 2003 a special meeting was held, primarily for CANZ members, regarding the new search policy. The meeting had been arranged by the Union for its members as part of the consultation process about the policy and its implementation.
- [10] Mr Steadman, who is not a member of CANZ asked to attend the meeting as he was aware that it was for something important. Unfortunately Mr Steadman was unable to attend as he was required to provide cover in the unit in which he was employed.
- [11] Mr Steadman told me he was advised that a further opportunity would be made available for him to attend a session on the new search policy. It was common ground at the investigation meeting that this further opportunity never occurred.
- [12] Mr Steadman went on a period of extended Long Service Leave and Annual Leave from 12 May 2003 until 15 August 2003.
- [13] On 28 May 2003 a letter was distributed to all staff advising that the new search policy would be implemented on 16 June 2003. This letter states:
- National meetings with staff during March were an opportunity for staff to raise any concerns and issues they had about this policy. Public Prison Service Management have also undertaken extensive consultation with employee representatives. The draft policy ... has been available to all prison staff, through the Bulletin Board, since early March.*
- [14] The letter goes on to say:
- If you refuse to be searched, or refuse to search another staff member and/or their vehicle or possessions, you will be warned of the possible consequences of your continued refusal/failure to comply with a direction or requirement. You will also be warned that continued refusal will result in an Employment Investigation in accordance with the Department's HR Procedures, and could also result in you being convicted and fined up to \$2000...*
- [15] Mr Steadman did not receive a copy of this letter as he was away on leave, although it was emailed to his email address.

- [16] On 10 June 2003 Public Prisons Circular 2003/21 was distributed to all Prison Staff. This circular reiterated the new policy requirements and advised staff where they could find copies of the new policy.
- [17] Mr Steadman did not see this Circular as he was away on leave.
- [18] In August and on his return to work following his extended leave Mr Steadman logged onto the computer and deleted all his emails without reading them. Mr Steadman told me there were too many emails to read. As there is only one computer for all staff to access in the Special Needs Unit he did not want to take up too much time reading everything so he simply deleted them all.
- [19] On 15 September 2003 Mr Steadman received a copy of a new offer of employment. The offer sets out the main terms and conditions of employment and advises Mr Steadman that the offer is in conjunction with a new Individual Employment Agreement, which would be emailed to him. Mr Steadman signed the offer on 22 September 2003.
- [20] The Individual Employment Agreement provides as its first clause:

Scope

Management has the right to plan, manage, organise and finally decide on the operations and policies of the Public Prisons Service (PPS) of the Department of Corrections (the Department), subject to the provisions of this Agreement. However, PPS is committed to effective consultation with staff and accepts its responsibility to deal with them in good faith in accordance with the Employment Relations Act 2000.[my emphasis]

- [21] On 8 September 2003 Raewyn Abbott, the Acting Site Manager sent an email to all staff at Mt Eden Prison. In her email Ms Abbott reiterates to staff that the new policy is commencing and should not come as a surprise. The email attached a copy of a notice to staff regarding the new Search Policy. The attachment stated:

NOTICE TO ALL STAFF

**SEARCHING OF ALL VISITORS
(Including Staff) TO INSTITUTIONS**

As you will all be aware searching of all visitors to and from New Zealand Institutions and Departmental land has been introduced. This includes every person (and vehicle) that comes onto land owned by the Department. Section B.12 Prison Entry Searching contains the full policy details.

Lawful searching will commence in the Auckland Region effective immediately and will include staff searching as laid down in the policy mentioned above.

Should a staff member refuse to participate in a "lawful search", a Manager will be contacted and asked to attend and explain the ramifications regarding refusal (Section B.12.02.R3 refers).

Searching of staff (by other Corrections employees) will take place under strict supervision of a Prison Check-Point (PCP) Supervisor who has been fully trained in searching operations and has an understanding of all legislation and policies relating to searches. Staff conducting searches will be fully briefed before and debriefed after all operations. They will conduct themselves in a professional manner and treat all contacts with respect and sensitivity.

It is expected that all staff will comply with all lawful requests regarding Prison Entry Searching. This in turn will reap rewards regarding our public profile indicating that our staff are professionals and have nothing to hide.

You should ensure that you make yourselves familiar with the policy to reduce any possibility of misunderstanding. The Policy and Procedures Manual can be accessed via Internet Explorer. [my emphasis]

- [22] Mr Steadman told me he didn't know about the policy, he was not consulted over it, and that he never heard other staff discussing it.
- [23] Corrections say that extensive consultation was undertaken with the unions between November 2002 and the final implementation of the new policy in October 2003. I was also told that the implementation of the new policy was a big issue for all staff and it was talked about extensively in the workplace.
- [24] Given the enormity of change in policy for Corrections staff it is unlikely staff did not discuss the changes in some detail. The change had been mooted for almost 12 months. It was Mr Steadman's evidence that news of his final written warning spread very quickly indeed. The change in search policy was of high importance and it is more likely than not, that news of that policy also spread very quickly within the workplace.

Events leading to suspension and final written warning

- [25] On Wednesday, 1 October 2003 and in accordance with the memo emailed to all staff on 8 September 2003 searches were undertaken of staff vehicles as they entered the prison site.
- [26] As Mr Steadman approached Mt Eden Prison in his vehicle to commence work he was stopped by Officer Taylor, who was wearing Corrections overalls with an identifying badge on one sleeve of the overalls. Officer Taylor advised Mr Steadman of the requirement to have his vehicle searched. Before Officer Taylor could explain more than the fact of the search, Mr Steadman refused. Mr Steadman told the Authority he provided no reasons for his refusal at the time.
- [27] It was common ground that when Mr Steadman refused to be searched Ms Deborah Bradley, Superintendent of Mt Eden Prison was contacted. Ms Bradley, Ms Abbott and Mr Clive Kilgour, Human Resources, made their way to the search area where Mr Steadman remained seated in his vehicle.
- [28] Mr Steadman told me he was told to accompany the three management staff to a nearby woodshed.
- [29] Ms Bradley told me she approached Mr Steadman on her own while the other two Managers stood away from the vehicle. Ms Bradley says she explained to Mr Steadman why they were there. Ms Bradley told me she invited Mr Steadman to go somewhere more private to discuss the matter and that it was agreed to move to the carpenters workshop which was nearby. Ms Abbot confirmed that Ms Bradley offered to go somewhere more privately and that it was agreed to use the carpenters workshop.
- [30] Having reviewed all of the evidence I am satisfied that it is more likely than not, that Mr Steadman was invited to discuss his refusal to have his vehicle searched in a more private area and that it was agreed that the discussion could take place in the workshop.

- [31] Once the parties had arrived in the workshop Ms Bradley proceeded to explain the new Search Policy to Mr Steadman. Mr Steadman says he did not really understand. Ms Abbot told me Mr Steadman nodded at the end of each paragraph, when Ms Bradley checked with Mr Steadman that he understood what she had explained to him.
- [32] During the course of the meeting in the workshop Mr Steadman left the workshop to move his vehicle to where he could keep an eye on it. After moving his vehicle Mr Steadman returned to the workshop.
- [33] After going through the policy documents both Ms Bradley and Ms Abbot tried to convince Mr Steadman to allow his vehicle to be searched. He continued to refuse. Ms Bradley offered to search the vehicle herself with Mr Steadman present. Still Mr Steadman refused.
- [34] Ms Abbot contacted Mr Brendon Moynihan, Regional Manager, to discuss next steps given the continued refusal. Mr Steadman was offered an opportunity to discuss the matter with Mr Moynihan but refused this offer.
- [35] Ms Abbot then suspended Mr Steadman.
- [36] The Department wrote to Mr Steadman later that day. The letter sets out the allegation that Mr Steadman had refused to have his vehicle and belongings searched. Mr Steadman was advised that the matter, if proven, would be deemed to be serious misconduct that could lead to dismissal. The letter purports to place Mr Steadman “...*on special leave on full pay until 8.00am, Friday 3 October 2003, to give you an opportunity to prepare submissions on why suspension should not occur.*” [my emphasis]
- [37] Mr Steadman was reminded of his opportunity to have representation and was invited to attend a meeting on 3 October 2003 to discuss the issue of suspension.
- [38] On 3 October 2003 the respondent considered submissions made on behalf of Mr Steadman regarding his suspension. Mr Steadman’s suspension was confirmed by Corrections and advised it would continue until an investigation had been completed.
- [39] On 7 October 2003 Mr Steadman’s representative provided written submissions to Corrections for consideration relating to the refusal to have his vehicle searched.
- [40] Mr Neville Mark, Quality Assurance Manager for Corrections, completed an investigation into Mr Steadman’s refusal to allow his vehicle to be searched. His report was completed on 23 October 2003. A copy of the report was made available to Mr Steadman and his representative. Included in the report are summaries of interviews held with various employees. None of the summaries have been signed by the interviewees, and neither have they been confirmed as an accurate summary of the discussions.
- [41] On 5 November 2003 a meeting was convened to discuss the report and its recommendations. From the notes provided to the Authority the meeting appeared to focus on the legality of the searches. There were also questions raised during this meeting as to the reliability of the notes from the interview with Mr Steadman which formed part of the Investigation Report.

- [42] Also during this meeting Mr Steadman raised with Corrections that he had not attended the meeting in March where the policy was discussed and debated and had not been consulted with over the implementation of this Policy.
- [43] Mr Steadman was invited to make further written submissions which would be taken into account before Corrections made any decisions concerning his future employment.
- [44] On 10 November 2003 Mr Steadman through his representative made extensive submissions to Corrections for their consideration.
- [45] On 17 November 2003 Corrections responded to Mr Steadman setting out Corrections view of matters and invited a further response from Mr Steadman.
- [46] There was further correspondence between the parties until 15 December 2003 when Mr Moynihan drafted a letter to Mr Steadman advising him that Corrections were satisfied that the allegation of serious misconduct had been proven to his satisfaction and issued Mr Steadman with a final written warning. The final written warning was issued to Mr Steadman on 19 December 2003.

Discussion and Determination

Consultation over new policy

- [47] Mr Steadman's employment agreement provides for Management of the Public Prisons Service to finally decide on the operations and policies of the service. However, that is countered with the obligation on Corrections to "effective consultation".
- [48] The Court of Appeal stated in *Wellington International Airport Ltd v Air NZ Ltd* [1993] 1 NZLR 671, "consultation" is a quite different process from "negotiation":
- The word 'negotiation' implies a process which has as its object arriving at agreement. There is no such requirement in the present case. The airport company is given the power to fix charges. Before doing so it must consult, and for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses.*
- [49] Mr Steadman complains that he was never consulted with, regarding the development and/or implementation of the new search policy.
- [50] Corrections say it did consult. It consulted widely with the unions involved in the workplace and consulted with other staff by way of sending out information and inviting responses.
- [51] It was submitted on Mr Steadman's behalf that Corrections made no effort to ensure Mr Steadman was consulted with or advised that searches would commence. He did not attend the CANZ consultation meetings.
- [52] Corrections submitted that consultation with staff took many forms. Staff were informed about the policy by email, the intranet, memoranda, notices on noticeboards and notices attached to pay slips.

- [53] Corrections sent numerous emails and other documents to all staff outlining the new vehicle policy. The Authority accepts that some of this documentation was distributed while Mr Steadman was on extended leave. Mr Steadman was aware there was a new policy being discussed. He knew the policy was important before he went on his extended leave because he had wanted to attend the CANZ consultation meetings and had been unable to. In those circumstances Mr Steadman had some responsibility to check his mail correctly on his return. When an employee takes extended leave over a period of some three months duration, it is contingent upon that employee taking responsibility for finding out what had occurred in his absence.
- [54] I have reviewed all of the correspondence relating to the development and implementation of the new search policy which was provided for Mr Steadman. I am satisfied that there was sufficient information to enable Mr Steadman to be adequately informed to enable him to make intelligent and useful responses if he so desired.

The suspension

- [55] Corrections have published a Managing Misconduct and Poor Performance Manual. Under the heading Procedures for Managing Misconduct and in relation to suspension, the manual states:

Suspension

Employees should only be suspended, where there are sound reasons, such as:

There is an allegation of serious misconduct and an employment investigation is to be conducted...

Procedural fairness

It is usual to place the respondent employee on special leave with pay for 48 hours to give him or her the opportunity to prepare submissions on why suspension should not occur.

- [56] Mr Steadman says Corrections were in breach of their own policy when he was suspended on 1 October 2003.
- [57] Corrections say Ms Abbott did not suspend Mr Steadman on 1 October 2003, but rather he was placed on paid leave while Corrections considered whether or not he should be suspended.
- [58] I am satisfied that the words used by Ms Abbott to Mr Steadman on 1 October 2003 included the word “*suspended*”. The notes from Ms Abbott’s interview which form part of the Investigation Report state that Ms Abbott told Mr Steadman he had been suspended. Before coming to such a decision Mr Steadman had the right to be heard on whether suspension was appropriate in the circumstances and, in accordance with the manual, to have 48 hours during which he could prepare submissions on his suspension.
- [59] This failure in Corrections procedure was however rectified when Mr Steadman was invited in writing on 1 October 2003 to provide input into the decision regarding the appropriateness of suspension. Mr Steadman made extensive submissions on his suspension which were then taken into consideration by Corrections.
- [60] I find in relation to the suspension that Mr Steadman does not have a personal grievance.

The final written warning

- [61] Mr Steadman was issued with a final written warning on 19 December 2003. Mr Steadman was given this warning for:

Refusing to comply with a lawful order in that you did not allow a search of your vehicle and belongings on entry to the Mt Eden Prison site on 1 October 2003.

and

Your actions if proven are a breach of the Code of Conduct, second principle, Performance of duties, and PPS Policy and Procedure Manual PPM B.12 – Prison Entry Searching (National Policy).

- [62] The PPS Policy and Procedure Manual PPM B.12 provides for force to be used where a person refuses to allow a search to be undertaken. In this matter, no force was used against Mr Steadman. The consequences of continued refusal specified in the policy is that an employment investigation will be undertaken. The policy does not specify that continued refusal will be considered serious misconduct nor does it provide for any penalty.
- [63] Corrections viewed Mr Steadman's actions of refusing to allow his vehicle to be searched as amounting to serious misconduct. Examples of Misconduct and Serious Misconduct are set out in Corrections Code of Conduct.
- [64] The Corrections Code of Conduct under the heading Disciplinary Sanctions provides a discretion to place an employee on a first and final warning as an alternative to summary dismissal.
- [65] Mr Steadman says he has never been inducted into the Corrections Code of Conduct. Corrections have provided the Authority with a form which shows that Mr Steadman attended a presentation on the Department of Corrections Code of Conduct and Key Standards of Behaviour at Mt Eden Prison on 22 January 1998. The form states that Mr Steadman was provided with a copy of the Code and Key Standards at the presentation but refused to sign the Acknowledgement Forms.
- [66] I am satisfied that it is more likely than not that Mr Steadman was aware of the Code of Conduct and had an understanding of its contents.
- [67] The Code of Conduct under the heading "*Examples of Serious Misconduct*" includes:
- Refusal, without reasonable excuse, to perform work assigned, or to obey a lawful order.*"
- [68] The test as to whether an instruction is lawful is set out in *Wellington etc Clerical etc Workers IUOW v College Group Limited* [1984] ACJ 315, 324:
- *Is not illegal in the sense of requiring a servant to perform any act contrary to the law; and*
 - *Is within the scope of a servant's contractual obligations; and*
 - *Does not demand the performance of any impossible or dangerous task.*
- [69] During the investigation meeting, and in answer to questions it became obvious that at no stage did either Ms Bradley, Ms Abbott or Mr Kilgour ever give Mr Steadman a specific instruction to undergo a vehicle search. There were many requests that he do so, Ms Abbot openly admitted that she attempted to persuade Mr Steadman to undergo a search. I am satisfied on the balance of probability that at no time on 1 October 2003 was Mr Steadman given an instruction which he then refused.

Could Mr Steadman's refusal submit to a vehicle search serious misconduct?

- [70] To be serious misconduct the employer must show that the conduct in issue was such that a fair and reasonable employer could see it as deeply impairing basic confidence and trust essential to the employment relationship.
- [71] The types of behaviours provided as examples of serious misconduct in the Corrections Code of Conduct includes:
- Being convicted of an offence which would give reasonable doubt as to suitability for continued employment;
 - Illegal possession or consumption of drugs;
 - Violence or threats;
 - Abusive or insulting behaviour;
 - Negligence
 - Having a sexual or financial relationship with a person for whom you have custodial or counselling responsibilities;
 - Misuse of funds
- [72] Taking into account all of the evidence, Corrections response that Mr Steadman's refusal to the request to have his vehicle searched amounted to serious misconduct was not a response open to it as a fair and reasonable employer.
- [73] The warning is now less than two month's from expiring. This means that Mr Steadman has been exposed to a greater possibility of dismissal for almost the entire 12 month period.
- [74] Mr Steadman has suffered a disadvantage in his employment for which remedies are available.
- [75] The Authority accepts that Mr Steadman has suffered humiliation, loss of dignity and injury to his feelings. Word travelled quickly around the Prison that Mr Steadman had been given a final written warning.
- [76] Mr Steadman had, until 1 October 2003, an unblemished record of some 26 years standing. Both Ms Bradley and Ms Abbott acknowledged at the investigation meeting that they were pleased when they discovered that the person refusing the vehicle search was Mr Steadman as they had a very good relationship with him and they both felt sure they could reason with him and persuade him to have his vehicle searched. Having regard to Mr Steadman's evidence and the nature of the personal grievance and the circumstances overall, I would usually award \$10,000.00 under this head.

Contribution

- [77] The Authority is bound by section 124 of the Act to consider the extent to which the actions of Mr Steadman contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies.

- [78] On 8 September 2003 Mr Steadman was sent a copy of a notice to all staff that the searching of all visitors including staff had been introduced. Staff were told to ensure they made themselves familiar with the policy to reduce any possibility of misunderstandings. The memo specifically advised staff that staff were expected to comply with all lawful requests regarding Prison Entry Searching. This was not the first time this matter had been notified to staff. However, as found earlier in this determination, the only consequence of continued refusal was an employment investigation.
- [79] Mr Steadman was aware before his leave that the policy was under development. He was aware it was a big issue. He chose on his return from extended leave not to familiarise himself with documents contained in his emails but rather to simply delete them. Notwithstanding that, on 8 September 2003 he was clearly on notice that he was expected to comply with any requests for lawful searches on entry to Mt Eden Prison. On 1 October 2003 Mr Steadman refused to comply with several requests for his vehicle to be searched, in contravention of Corrections policy.
- [80] Mr Steadman's award is reduced by 35% to recognise his contribution.

The Department of Corrections is ordered to pay to Mr Steadman without deduction the sum of \$6,500 under section 123(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Breach of NZ Bill of Rights Act 1990

- [81] Mr Steadman says he was detained on 1 October 2003 and that that detention was unlawful and a breach of the New Zealand Bill of Rights Act 1990.
- [82] I have found earlier in this determination that when Mr Steadman attended the meeting in the Carpenters Workshop he did so as the result of an invitation to accord him privacy. I am not satisfied that Mr Steadman was detained by Corrections. He was free to leave at any time. Mr Steadman did leave the workshop on his own when he moved his vehicle and again when he stood outside the workshop when he and Ms Bradley smoked cigarettes.
- [83] Looking at the evidence overall, I find that Mr Steadman was neither detained nor arrested on 1 October 2003 and can assist him no further with his claim under this heading.

Compensation for ongoing searches

- [84] Mr Steadman claims monetary compensation for searches carried out on either his vehicle or person (by scanner).
- [85] In his own notes from a meeting conducted on 5 November 2003 and provided to the Authority during the investigation meeting Mr Steadman is recorded as being asked if he knew about the right for Corrections to search vehicles. His response is recorded as "*I do now*".
- [86] Mr Steadman told me he does not accept Corrections are entitled to search his person or his vehicle. He said that every time they do searches it causes him *irritation* and he finds them *offensive*.

- [87] Compensation is not used as a penalty to indicate disapproval of an employer's conduct. It is to compensate an employee for the effect of the grievance (*Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334.)
- [88] The Authority has no evidence of humiliation, injury to feelings or distress in relation to the ongoing searches for which a remedy should flow. The Authority is unable to assist Mr Steadman any further in this claim.

Summary of Orders

The Department of Corrections is ordered to pay to Mr Steadman without deduction the sum of \$6,500 under section 123(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

The parties addressed the question of costs in their submissions following the conclusion of the investigation meeting, which leaves me in a position to decide that issue as well in this determination.

Mr Steadman has been partially successful in his personal grievance. The Department of Corrections has also been partially successful in its defence.

The investigation meeting took 1 day with parties having to return for a further 1 hour on a second day.

Mr Steadman's full costs for the investigation meeting were a very reasonable \$1,712.50. The costs incurred by the respondent, who was represented by in-house counsel were \$3,151.00, \$2,626 of these costs were by way of disbursements for air travel to and from the investigation meeting, toll calls and photocopying etc.

Both parties incurred costs which were not unreasonable and both parties were successful in a limited way. This is a matter, where I think it is both reasonable and appropriate that there shall be no award for costs. Cost shall lie where they fall.

Vicki Campbell
Member of Employment Relations Authority