**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2016] NZEmpC 175**
**EMPC 13/2016**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| BETWEEN | IONA WIKAIRA<br>Plaintiff |
| AND | THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS<br>Defendant |

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| Hearing: | 15 August 2016 (at Auckland), 23 and 24 August 2016 (at Whangarei), 3 and 4 November 2016 (at Auckland), and by written submissions filed on 11 and 18 November 2016 |
| Appearances: | MW Ryan, counsel for plaintiff<br>J Rooney and M Hoolihan, counsel for defendant |
| Judgment: | 20 December 2016 |

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**JUDGMENT OF CHIEF JUDGE G L COLGAN**

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## Introduction and issues

[1] On a summer's morning in February 2014 on an isolated rural property in the South Hokianga district, Iona Wikaira, an off-duty corrections officer, attempted to serve a trespass notice on her stepfather. She did so as executor in her late mother's estate and acting on advice of a lawyer. When her unco-operative and antagonistic stepfather brushed Ms Wikaira's leg as he attempted to reverse his car rapidly off the property to avoid service of the trespass notice, Ms Wikaira struck his vehicle's windscreen causing it to crack. Just how this event led, several months later, to Ms Wikaira's dismissal from her employment by the Department of Corrections is not a short or simple story. This judgment is its outcome.

[2] The issues in this challenge by hearing de novo to a determination of the Employment Relations Authority[1] that Iona Wikaira was dismissed justifiably include whether that was so and, if not, the remedies to which Ms Wikaira may be entitled. Following s 103A of the Employment Relations Act 2000 (the Act), what the Court has to determine, on an objective basis, is whether the defendant's actions, and how the defendant acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[3] As the entituling to this judgment indicates, this case has had a disconnected hearing for a variety of reasons. Shortly before its scheduled commencement, the defendant advised that one of its witnesses was about to depart for Pitcairn Island for

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1 *Wikaira v The Chief Executive of the Department of Corrections* [2015] NZERA Auckland 396.

long-term work purposes. The evidence of this witness was taken in Auckland before his departure and before the case opened.

[4] Next, literally on the eve of the hearing in Whangarei on 23 August 2016, the defendant's principal witness was taken ill and admitted to hospital. For reasons set out in a ruling given at the start of the hearing on 23 August 2016, I determined that all other evidence should be taken whilst the parties and counsel (the vast majority of whom were from outside Whangarei) were assembled in that city. The parties' evidence, with the exception of the indisposed manager's, was concluded by the late afternoon of 24 August 2016. Because of the Court's availability and that of counsel, the hearing could not be resumed until 3-4 November 2016 when, by consent, the venue was transferred to Auckland. A then recently released judgment of the full Court, affecting loss mitigation obligations and s 124 contribution conduct reductions, led to further time being allowed for submissions on the effect of that case.[2]

## The relevant evidence leading to the defendant's investigation of alleged misconduct

[5] The following is a summary of the largely uncontested relevant events which led to Ms Wikaira's dismissal.

[6] The plaintiff was a corrections officer, or what used to be called a prison officer, at the Northland Region Corrections Facility (the Northland prison) at Ngawha near Kaikohe. Unconnected with her employment but relevant to this case, Ms Wikaira was the executor of her late mother's estate. Her mother had remarried and the relationship between Ms Wikaira and her siblings on the one hand, and their stepfather (whom I will call Mr H) on the other, was not good. Ms Wikaira's late mother left her estate to her children but allowed Mr H a life (occupational) interest in her house for which he was required to pay the relevant outgoings. Mr H did not meet the payment of outgoings on the home as he was expected to. Not only did this increase the estate's debt, but Mr H's failure to insure the home against fire expanded the debt further and significantly when the home was damaged seriously by fire.

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2 *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136.

[7] In these circumstances, Ms Wikaira took legal advice and was told, among other things, that Mr H should be prevented from coming back onto the property by giving him notice not to re-enter under the Trespass Act 1980.

[8] Ms Wikaira went to the property on 3 February 2015. Mr H arrived by car shortly afterwards and a verbal confrontation ensued. Ms Wikaira attempted to serve the trespass notice on Mr H in his car. He refused to accept service of it and in the course of reversing to leave, his car collided with Ms Wikaira. She then struck the windscreen of Mr H's car, causing the laminated windscreen to crack, before Mr H decamped.

[9] The property where this had occurred in rural South Hokianga was out of cell phone range but when Ms Wikaira came back into coverage, she rang the Police to advise of the incident. In the meantime, however, Mr H had himself visited the Police and made a complaint that Ms Wikaira had wilfully damaged his car.

[10] Some days later Ms Wikaira was invited to go to the Kaikohe Police Station where, after being interviewed by a constable, she was charged with wilfully damaging Mr H's car. The cost of a replacement windscreen was approximately $480. It appears that Mr H was adamant that Ms Wikaira should be prosecuted. Ms Wikaira was given a summons to appear in the District Court at Kaikohe on a specified date. Contrary to the usual inter-departmental protocol in such cases, the Police failed to notify the Department of Corrections (the Department) that one of its employees had been charged with an offence and would be appearing in court.

[11] Ms Wikaira took legal advice from a local lawyer experienced in District Court prosecutions, Doug Blaikie. There was dialogue between Mr Blackie and the Police about the potential for diversion of Ms Wikaira from the court process. Although the plaintiff's initial legal advice was that she may have had a viable defence to the charge (self-defence or defence of property), she would have had to admit the charge for the purpose of being diverted from the prosecution process as a first offender on a minor charge. Mr H, however, was again adamant that nothing short of a conviction and sentence by the Court would satisfy him as victim, so that the prosecution continued.

[12] At that time, there was a delay of many months between first appearances and the hearing of judge-alone defended prosecutions in Kaikohe. Ms Wikaira's legal advice was that she stood a good chance of being discharged without conviction under s 106 of the Sentencing Act 2002 if she admitted the offence, as indeed transpired. This discharge without conviction amounted, in law, to an acquittal. This Court called for the sentencing notes of the District Court Judge as, remarkably these had not been sought or considered by anyone before the hearing before me. I will refer to their contents later.

[13] Ms Wikaira did not tell her employer immediately of the events that led to her being charged or that she was to appear, or had appeared, in court. She had several court appearances. On the first occasion when she had to appear in court (25 February 2015) she was scheduled to work and reported sick to the Prison. On one occasion, also, there was a mix-up between court staff and Ms Wikaira's lawyer which resulted in her missing a scheduled appearance in court because of her genuine belief (based on her lawyer's advice) that this would not occur until a later date. A warrant for her arrest was issued but soon withdrawn when the misunderstanding over dates was revealed. There was, however, no media publicity at any time about her case, despite her occupation which was on court documents.

[14] Although not having been involved as a corrections officer in escort duties in a court and not having any personal involvement with the court system and therefore being unfamiliar with the court process, it was theoretically possible that Ms Wikaira had been at court facing the wilful damage charge on the same occasion as were inmates from her prison. There is, however, no evidence of this.

[15] Finally, on 11 March 2015 when she had decided, on legal advice, to admit to the charge, she sought a letter from her employer which she would place before a Judge in support of her application for discharge without conviction. The defendant refused to provide any advice at all in writing (or otherwise) which might assist the sentencing Judge including, importantly, any information about the possible consequences of a conviction for Ms Wikaira's job.

[16] Those were the essential circumstances that led the defendant to commence a comprehensive investigation of what it said was Ms Wikaira's possible serious misconduct in breach of a number of the employer's policies and procedures arising out of these events, in particular its Code of Conduct for staff (what I will call "the Code" or "the Code of Conduct").

[17] This was the start of the defendant's involvement in these matters and that led to the plaintiff's dismissal. I will examine the following events in more detail than recorded until now. But before outlining events in the investigation, it is necessary to set out the various relevant rights and obligations of corrections officers in relation to their employment, and of the Department as employer. These are drawn principally from the collective agreement and the defendant's unilaterally promulgated Code of Conduct, breaches of which the defendant relied on in justification for his dismissal of Ms Wikaira.

## Rights and obligations affecting employee conduct

[18] Ms Wikaira's employment agreement incorporated the provisions of the Department of Corrections Frontline Staff (Prisons Based) Collective Agreement CANZ 2015 - 2017. At relevant times Ms Wikaira was a member of the union known as the Corrections Association of New Zealand (CANZ). Although a local delegate represented the plaintiff at one or two meetings with management, the union was surprisingly uninvolved (at least effectively) in assisting her in these matters and leading up to her dismissal. Ms Wikaira sought ultimately the assistance of a local employment lawyer (the now late Mr Bryce Quarrie).

[19] The first step in determining the obligations on the parties in Ms Wikaira's circumstances is the collective agreement. Clauses 1.5.1-1.5.2 provided:

> 1.5.1 In accordance with the State Sector Act 1988, the Department will act as a good employer in all aspects of its dealings with its employees and with CANZ as their union.
>
> 1.5.2 The Department is committed to fair treatment of employees …

[20] Clause 11 of the collective agreement ("PRINCIPLES FOR DISCIPLINARY MATTERS") provided materially as follows:

> 11.1 The following principles will be followed when dealing with disciplinary matters:
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> …
>
> 11.1.2 The employee must be advised of the specific matter(s) causing concern, and a reasonable opportunity provided to state reasons or explanation.
>
> 11.1.3 The employee must be advised of the corrective action required to amend their conduct and given a reasonable opportunity to do so.
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> …
>
> 11.1.5 Depending on the seriousness of the misconduct an oral warning should usually precede a written warning.
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> 11.1.6 The process and results of any disciplinary action is to be recorded in writing, sighted and signed by the employee and placed on their personal file.
>
> 11.1.7 If the offence is sufficiently serious the employee may be suspended pending an investigation.

[21] I move next to the parties' rights and obligations imposed not by contract but unilaterally by the defendant. By way of general preface to the rules or requirements of the Code of Conduct, the law is that compliance with them by employees is subject to the fundamental common law of employment that an employer's expectations of an employee's work performance or other conduct must be both lawful and reasonable, the latter being in all the relevant circumstances of the employment. Put another way, an employer may not seek to justify dismissal of, or disadvantage to, an employee by pointing to that employee's failure to meet a standard of conduct specified by the employer which the Authority or the Court considers to be either an unlawful or, even if not unlawful, an unreasonable requirement. The ultimate test of justification, in this case of a dismissal, requires the employer to persuade the Authority or the Court that the decision to dismiss is one that a fair and reasonable employer could have reached in all the circumstances at the time of the dismissal. Section 103A(1) requires the Authority or the Court to reach that decision "on an objective basis". Dismissals cannot be the outcome of non-compliance with either unlawful or, as argued for the plaintiff here, unreasonable directions or instructions about how an employee is to conduct herself in the performance of her duties, let alone in her private life

[22] This becomes an especially important consideration where such policies and procedures purport to prohibit certain conducts or behaviours absolutely. In

particular, it is engaged where the policy or procedure purports not to admit of any exceptions, whether generally or individually, and purports to impinge significantly on an employee's private life as the defendant's Code does.

[23] The other overriding relevant consideration is the statutory requirement in s 103A that a disadvantageous act or omission by an employer, or a dismissal of an employee must, if challenged, be able to be justified by the employer. That is to the standard of persuading the Authority or the Court objectively that a fair and reasonable employer could, in all the circumstances, have acted justifiably as the employer did.

[24] The defendant relied on what it said were Ms Wikaira's several breaches of its then applicable Code of Conduct in dismissing her. Although Ms Wikaira had received (and had acknowledged receipt of) the Department's predecessor Code of Conduct in January 2008, this was replaced, from about 2011, by a new and, in many respects, significantly different Code of Conduct for the Department's employees.

[25] I am not satisfied on the evidence that this second Code was brought to Ms Wikaira's attention as the first Code had been. The method of the second Code's dissemination to staff was meant to be like a cascade, from senior managers responsible for teams of staff, who were, in turn, expected to make their teams familiar with the new Code. There was no evidence about how or even whether this had been carried out in practice at the Northland Prison in respect of basic grade corrections officers, as Ms Wikaira was. Her evidence that she was not made familiar with the 2011 Code of Conduct was uncontradicted. There were, apparently, no records confirming the universal dissemination of the latest Code including, as is usual, personal confirmation of receipt. The best case for the defendant is that Ms Wikaira should have been made aware of the promulgation of the new Code. In large workplaces, there can often be, and perhaps was in this case, a significant difference between what was intended to happen by the employer, and what happened (or did not) in practice.

[26] Ms Wikaira was nevertheless aware that the Code of Conduct was accessible on the Department's intranet. On about 11 March 2015, she and a colleague

attempted to locate relevant rules in the Code of Conduct affecting the position in which she then found herself. However, they were unable to do so. That evidence was not challenged or contradicted by the defendant.

[27] Despite the evidence being that Ms Wikaira may well have been unaware of the specific rules in the Code of Conduct governing the circumstances in which she found herself after the incident on 3 February 2015 and which resulted in her dismissal, the Department relied very significantly on the contents of the Code and on their contended breach by the plaintiff. So, for the purposes of this case, I will assume that it was applicable to Ms Wikaira and enforceable by the Department (and by the plaintiff) in relation to relevant events in this case. That is to the extent as outlined earlier, that the provisions of the Code were generally lawful and reasonable.

[28] Parts of the Code of Conduct in effect at times relevant to this case, and relied on by the defendant, include the following. Under a heading "WE ARE ACCOUNTABLE", it says:

> …
> Being accountable means we have the confidence of the public and Government. We do what is expected of us and act with transparency and integrity. We exercise self management at work and in our private lives.
> …
> We advise our manager of any changes in our personal circumstances that could impact on the safe and efficient completion of our duties, or that may impact on the perception of our integrity and professionalism.

[29] Next, "TO BE ACCOUNTABLE, AT CORRECTIONS YOU MUST:"

> > comply with the law at all times
> …
> > advise your manager of any criminal charge laid against you under any law, statute or regulation.

[30] It is noteworthy here that the requirement of an employee to advise his or her manager of any criminal charge laid against that employee, differed from the previous Code of Conduct's equivalent provision. That earlier Code contained the following requirements in relation to what was called the "*THIRD PRINCIPLE*" in relation to "Personal behaviour":

You should avoid any activity (work-related or private) which could reflect badly on the Department or jeopardise its relationships with Ministers, stakeholders, or the general public.

Whether any such activity constitutes misconduct will depend on the circumstances of the case and may vary according to the position you hold.

Minor offences against the law outside of your work may be of no concern to the Department where they do not involve breaches of trust, or otherwise impair your ability to carry out your duties.

However, other cases may be of concern and may call into question fitness for continued employment.

If you work with offenders you will be held to particularly high standards of personal behaviour and compliance with the law as you should be a role model for offenders.

*You must inform your manager immediately:*

- of any criminal charge laid against you in a criminal court and any convictions you receive

…
Every situation will be judged on its own merits but, in general, if you are convicted of an offence and receive a custodial or community-based sentence your employment will be discontinued.

If you are convicted of an offence which is punishable by a custodial or community-based sentence your continued employment will be subject to the discretion of the General Manager of your service or group.

Some situations leading to a court appearance may constitute serious misconduct and thus render your continued employment inappropriate, even though you may be placed on diversion or discharged without conviction.

[31] It will be seen that the new Code dealt differently, more briefly, less prescriptively and less predictably with these issues.

[32] Returning to the Code of Conduct relevant to this case, it provided "EXAMPLES OF CONDUCT THAT FALLS BELOW OUR EXPECTATIONS" including:

…
> Dishonesty (including by omission). Lying, failing to declare or otherwise withholding information. *Examples include 'covering up' a failure by yourself or someone else; knowingly providing incomplete, inaccurate or misleading information; falsely claiming to have experience or to have completed qualifications or work; or submitting or approving an incorrect timesheet or expense claim.*

> Actions that are unlawful. Undertaking any form of unlawful behaviour or involvement (whether in the workplace or off duty), or breaching your or Corrections' responsibilities under the Corrections Act 2004 and other legislation. *Examples include admitting or being convicted of an offence; failing to follow procedures relating to the use of force; or concealing, enabling or allowing an offence to occur.*

…

> Reputational issues. Actions that bring Corrections into disrepute or negatively affect the public perception of Corrections or the Government. *Examples include publicly criticising Corrections or Government; making media comments without delegation; or statements made in any electronic form or forum, such as a social network or website that reflect poorly on Corrections or other employees.*

## The investigation into the plaintiff's alleged misconduct

[33] Returning to the narrative, after her court appearance on 11 March 2015, the plaintiff emailed the Northland Prison's Operation Support & Movement Manager, Michael Rongo, advising him and the Department of the prosecution against her. The subject line of her email was "Wilful damage (car windscreen)" and included the following advice:

> [I'm] informing you of an incident that happened a couple of weeks ago I did not inform you immediately as I didn't know. I asked a colleague about it and we looked on the code of conduct I couldn't find anything, hence I thought [I'd] let you know anyways.

[34] Following a brief explanation of the events of her confrontation with her stepfather, Ms Wikaira continued:

> I appeared on the 23rd Feb It was deferred back to the police as a minor incident I was told to pay for the windscreen and accept responsibility I did this. However my step father wants to pursue the matter further and wants me to go back to court so I had to appear back in court again today, hence why Im sharing this with you as Im not sure of the process.
>
> If this situation affects my employment and that if perhaps convicted would this jeopardise my job. Can I have a letter to this effect that I will lose my job.

[35] On the following day Mr Rongo replied to the plaintiff:

> In light of your email request the Department does not provide letters to the Court as we must not be seen to interfere with Court process/proceedings and I have an obligation to remain impartial. We also cannot issue a letter saying you would/could lose your job as that would signal that we have predetermined an outcome.

[36] Mr Rongo's email continued by advising Ms Wikaira that he was conducting some preliminary inquiries to assist the Department in determining "our next steps from an employment perspective". In closing, Mr Rongo requested Ms Wikaira to keep him "updated of any progress/activity relating to the … situation [of the prosecution against her]."

[37] Accordingly, on 30 March 2015 Mr Rongo and a more senior corrections officer at the Northland Prison (Edith Pattinson) met with Ms Wikaira who declined to have a support person at the meeting. The purpose of the meeting was to consider the status of Ms Wikaira's employment (including potential suspension) pending further investigations. The meeting opened with an acceptance of responsibility by, and apology from, Ms Pattinson about the earlier premature and wrongful disclosure of Ms Wikaira's suspension to other staff at the institution. Ms Wikaira accepted the Department's apology and expressed her decision not to take further the matter of another employee's (and the Department's) breach of her privacy. She expressed satisfaction that the matter had been able to be sorted out. Ms Pattinson then departed, having obtained what might be said to be a generous resolution by Ms Wikaira to this breach of her privacy in the circumstances. This incident confirms the good faith of Ms Wikaira towards her employer and her acceptance of the Department's equally responsible acknowledgement and apology to her.

[38] Mr Rongo then announced that Ms Wikaira was to be placed on special paid leave for the next 72 hours. Ms Wikaira told Mr Rongo that she believed that her next date in court was 22 April 2015 and the advice from her lawyer was that in the circumstances, there might be no conviction entered but that this could not be guaranteed. Ms Wikaira was invited by Mr Rongo to make any submissions that she wished over the 72-hour stand-down period as to why she should not be suspended until the end of the court proceedings. Mr Rongo arranged to meet Ms Wikaira at another departmental venue in Kaikohe on 2 April 2015 and invited her to provide written or verbal submissions about possible suspension. Mr Rongo is recorded as having said:

> I do not need to know what's going on in court but why I should keep you at work. Also why you did not advise us in the first place, add this to your letter.

[39] A letter from Mr Rongo dated the same day, 30 March 2015, said that the Department took the allegations by the Police against Ms Wikaira seriously and that he intended to have these allegations fully investigated. He warned that, if substantiated, they could be a breach of the Code of Conduct and amount to serious misconduct.

[40] The letter then set out various parts of the Code of Conduct, identifying those which may have been breached. Mr Rongo advised that he would need to initiate an investigation into the circumstances surrounding the allegation before making a decision about further action. The two-week period within which Ms Wikaira had to make submissions was extended to 9 April 2015 at her request. By his email sent to her on 2 April 2015, Mr Rongo reiterated that she should keep him "updated on any matters pertaining to your court proceedings going forward."

[41] Ms Wikaira did prepare written submissions which were presented to Mr Rongo on 9 April 2015. She set out the relevant factual background to the confrontation with her stepfather on 3 February 2015 and included a copy of her statement to the Police about these events. Ms Wikaira advised that she had appeared at the Kaikohe District Court on 23 February 2015 on a charge of wilful damage but that the matter was "deferred" to enable the Police to investigate whether, if she paid for the windscreen and accepted responsibility (as she said she would), the matter might go no further. She advised Mr Rongo that the complainant (her stepfather) wanted the matter to be dealt with as a charge in court. Ms Wikaira advised that she was being represented by a lawyer and that she would "vigorously defend" the charge because she said she had no malicious intent to cause damage or injury but, rather, reacted out of fear for her own safety. She asked to be reinstated in employment rather than being suspended. Her submissions continued:

> … I believe I'm not a risk to the Department of Corrections.
>
> I am accountable as I was forth coming I did advise police as soon as [practicable] of the incident. I am accountable as I also brought this to the attention of my employer and advised management through Michael Rongo.
>
> I have always maintained role model standards and pride myself on integrity. Out of fearing for my safety of being hit by a vehicle my standard has been brought to be questioned by the law. Still this is unproven and I continue to exemplify a high standard or professionalism during any proceedings.

> Being represented by my lawyer an action of fear is not unlawful nor do I see this as careless or unsafe behaviour.
>
> For the above reasons I feel that continued suspension from the Department of Corrections will be detrimental to court proceedings.
>
> I do not see myself as a threat to The Department of Corrections I therefore submit that based on submissions given I should be re-instated back to full duties.
> …

[42] The meeting on 9 April 2015 to consider suspension was attended by a delegate of the CANZ (her union) and Ms Wikaira's husband as support people. Mr Rongo emphasised again that the only purpose of the meeting was to consider suspension and that there was no need to go into the details of the incident because that was "for the court". After Ms Wikaira had read out her written submissions, the parties adjourned briefly before Mr Rongo returned to announce that Ms Wikaira would be suspended from her employment until the prosecution had concluded.

[43] In relation to the court process and the charge faced by the plaintiff, Mr Rongo is recorded as having speculated that after her next appearance on 22 April 2015, "… it might get thrown out and you have the potential to come back to work the next day, it all depends on the outcome." That indicated to Ms Wikaira that if the prosecution went no further, she could expect to return to work immediately, perhaps irrespective of the events leading to it. Mr Rongo reiterated the necessity for Ms Wikaira to remain in regular contact with him before her next court appearance. He scheduled a review meeting for 23 April 2015, the day after the then next scheduled court appearance.

[44] By letter dated 13 April 2015, Mr Rongo advised Ms Wikaira formally of the events which occurred at the meeting on 9 April 2015 and its outcome, her suspension. Mr Rongo's letter re-emphasised the need to ensure that he was kept informed about the progress of her court case and to provide him with any relevant court documentation. The letter also explained that there might be a Department investigation once the District Court prosecution was finalised, and what Ms Wikaira might expect if this were to occur.

[45] On 22 April 2015 Ms Wikaira advised Mr Rongo by email that:

> We entered a plea today and applied for a section 106 discharge without conviction. The matter has been adjourned for a judges hearing on the 12th May TBC.
> Soon as I hear more around a confirmed date I will contact you.

[46] I infer that the "plea" referred to was a plea of guilty and that the date to which the case had been adjourned for hearing before a judge of 12 May was to be confirmed. I also infer that although a plea of guilty was entered, no conviction would have been recorded pending the decision on the foreshadowed discharge under s 106 of the Sentencing Act.

[47] On 12 May 2015 Ms Wikaira sent another email to Mr Rongo advising him that the hearing before the Judge had been adjourned to 26 May 2015. That tended to confirm her belief that this was the date she was remanded to and was consistent with her explanation that her non-appearance had been the result of confusion by others and her lawyer's advice to her.

[48] On 21 May 2015 Mr Blaikie, Ms Wikaira's lawyer representing her on the criminal charge, sent on to the defendant, through CANZ, Ms Wikaira's bail notice given to her on 21 May 2015, confirming that she had been re-released on bail to attend the District Court at Kaikohe on 26 May 2015. Also sent on to the Department on 21 May 2015 was a brief letter from the lawyer confirming that, when Ms Wikaira called at his office on 11 May 2015, he advised her that she would not have to appear at the District Court until 26 May 2015. The purpose of these communications to the defendant was to explain her innocent role in a confusion about appearance dates as a result of which a warrant for her arrest had been issued but subsequently cancelled.

[49] Finally, in relation to the relevant events in the criminal process affecting her employment, Ms Wikaira emailed Mr Rongo on 26 May 2015, saying that she had had a "good outcome" at court that day, having been discharged without conviction. She advised that her lawyer would confirm this in writing to her CANZ representative on the following day and asked Mr Rongo to schedule a meeting as soon as possible to discuss the next steps. There was no response from Mr Rongo to Ms Wikaira's request, at least immediately.

[50] Rather, on 4 June 2015, Mr Rongo notified Ms Wikaira formally that he was commencing an employment investigation into the events that led to her court appearances and subsequent discharge without conviction. The "concerns for the Department" were said to be:

> i. That you may have undertaken any form of unlawful behaviour off duty which resulted in you being charged with a criminal offence ("Wilful Damage")
> ii. That you may have failed to declare the charges at the time that they were incurred. You appeared in Court on 23rd February but did not disclose your charges to the Department until 11th March 2015.
> iii. Your actions in being charged with a criminal offence and appearing in Court had the potential to bring the Department into disrepute.

[51] These were said to have been potential breaches of the defendant's Code amounting to serious misconduct and the letter then set out a number of extracts from the Code of Conduct relevant to the employment investigation including, in particular, "examples of behaviour which falls below our expectations".

[52] Ms Wikaira was advised that she would remain suspended on full pay for the period of the employment investigation and that she was expected to be "responsive and communicative". She was advised that a copy of the terms of reference for the investigation would be sent to her, as would be advice of the investigator appointed by the defendant.

[53] On 9 June 2015, and although the prosecution had concluded, Ms Wikaira's lawyer, Mr Blaikie, wrote at some length to Mr Rongo narrating what he described as setting some matters "straight because you seem to have a misconception of what has occurred." That letter set out, over 16 numbered paragraphs, the background to the prosecution, the criminal process Ms Wikaira had undergone and the outcome of that. This included Ms Wikaira's initial decision, following legal advice, to plead not guilty to the charge of wilful damage on the basis that her actions had been in self-defence. However, at para 5 of the numbered list of events, Mr Blaikie's letter continued:

> As a lawyer with 40 years experience I considered that Ms Wikaira had a reasonable chance of success in her defence although it was clear that Mr [H] would say anything to defeat that chance and as there were no independent witnesses there was always a degree of trial risk.

[54] The lawyer advised the Department that it was considered that if a plea of not guilty was entered, it would take "some considerable time possibly as much as four to five months for the matter to come before the Court by way of a defended hearing." Mr Blaikie related his discussions with the Police including a request that the charge be withdrawn although, after consulting with the complainant who was described as "extremely belligerent", the Police declined to withdraw the charge against Ms Wikaira. The lawyer's advice was that the Police did then, however, indicate that if the charge was admitted, the process known as "diversion" would be favourably considered.

[55] Mr Blaikie's recorded advice to Ms Wikaira was that in these circumstances, considering the length of time to a defended hearing and the fact that she was suspended from work, an admission of the offence would be put forward but with a request that no conviction be entered, with the matter then being considered by the Police for diversion.

[56] The lawyer's letter to the Department then advised that, again, the complainant's "very negative reaction" to the prospect of diversion meant that it would not be offered to Ms Wikaira but that the Police would not oppose a discharge without conviction under s 106 of the Sentencing Act if this was sought. The lawyer's advice was that "The position with a 106 discharge is that if it is unopposed it is likely to be granted."

[57] The lawyer advised the Department that he then requested that the matter be called in court as soon as possible, and was initially advised that 12 May 2015 would be the date. It then appeared that the prosecution would not be ready to proceed on that day, whereupon the lawyer was notified by email that the alternative date of 26 May 2015 would be when the matter was next called. The lawyer advised the Department that he had told Ms Wikaira that she would not be required to attend at court on 12 May in these circumstances. He then explained that there had been a mix-up in communications between the Court and the Police and that although the original hearing date of 12 May 2015 was still in place, an email sent by the Court to the lawyer to this effect did not reach him. The lawyer explained that although he was at the District Court on 12 May 2015, cases were somewhat rushed and although

court staff knew that he was acting for Ms Wikaira, they did not advise him that her case was to be called that day.

[58] Subsequently, Mr Blaikie was advised that a warrant for Ms Wikaira's arrest had been issued because of her non-appearance. He advised the Department in his letter that Ms Wikaira had made a voluntary appearance at court and the warrant was cancelled with her case being re-set for 26 May 2015. The lawyer explained that this confusion, and the issue of the warrant, was not Ms Wikaira's fault but, rather, that of the Court and its processes.

[59] The lawyer pointed out that when Ms Wikaira appeared in court on 26 May 2015 and pleaded guilty to the charge, she was discharged without a conviction being entered and that this amounted in law to an acquittal.

[60] Mr Blaikie's letter to the Department explained that the Judge described the incident as being at the "very lowest end of the scale". The lawyer said that it could have been defended on a self-defence basis and that it was "relatively insignificant". The lawyer submitted that Ms Wikaira should be reinstated immediately, irrespective of whether the Department continued to carry out its disciplinary investigation.

[61] Next, the defendant appointed a manager of a different division of the Department (Probation), and based in Whangarei, to be its employment investigator, and so advised Ms Wikaira. The terms of reference for Claire Jones's investigation, dated 4 June 2015 from Mr Rongo, outlined some background facts about the court process and then identified the allegations for investigation as follows:

- Identify and report on any information that can clarify, support or refute the allegation that Iona Wikaira may have undertaken any form of unlawful behaviour off duty which resulted in her being charged with a criminal offence ('Wilful Damage")

- Identify and report on any information that can clarify, support or refute the allegation that Iona Wikaira may have failed to declare the charges at the time they were incurred. Iona appeared in Court on 23rd February but did not disclose the charges to the Department until 11th March 2015.

- Identify and report on any information that can clarify, support or refute the allegation that Iona Wikaira's actions in being charged with a criminal offence and appearing in Court had the potential to bring the Department into disrepute.

[62] Included in the "Investigation Methodology" that Ms Jones was directed to adopt and following reference to interviewing relevant witnesses, she was asked to:

- Identify and interview any other sources of information that may assist to clarify, confirm or refute the allegations in relation to this allegation. This should include examination of the following, but not limited to, Court documentation,, policies, procedures, rosters, file notes, job sheets, emails, meeting minutes other documentation etc.

- Identify and report on any information that could identify, confirm or refute any breaches of any policies, procedures or standards in relation to this allegation.

- Identify any other matters and information relevant to the allegation.

[63] Ms Jones's attention was drawn to the relevant parts of the Department's "Responding to Employee Conduct and Behaviour Policy" and she was told that its Senior Human Resources Advisor, Sara Crabbe, would provide HR advice throughout the investigation.

[64] The first meeting with the investigator (Ms Jones) was held on 17 June 2015. In attendance were Ms Wikaira's lawyer (a specialist employment lawyer by this time, (the now late) Bryce Quarrie), Ms Wikaira's husband and a departmental "scribe" to record the meeting. Ms Jones explained her role as investigator including that she was to gather information, meet with relevant people including any witnesses, and to report to the decision-maker, Mr Rongo. The investigator emphasised that she would not be making any recommendations about the outcome of her investigation.

[65] Ms Wikaira wanted to present and speak to a prepared diagram of the location at relevant times of her, Mr H and his car during the 3 February 2015 incident. Whilst Ms Jones did not prevent absolutely that happening, she said that she did not want to become involved in the events that led to the police prosecution for wilful damage because that had been dealt with. Ms Wikaira was, thereby, unable to present her account of the 3 February 2015 incident using this diagrammatic material.

[66] Both Ms Wikaira and her lawyer denied that she had behaved unlawfully off duty which resulted in her being charged in court. When asked why, in these

circumstances, she had entered a guilty plea, Ms Jones was told that this had been on the advice of her lawyer. Ms Jones's response was:

> … it would still be your choice though wouldn't it so even though it was on advice, did you think it might jeopardise your job or that you were admitting, I need you to talk me through why you would admit to something [you're] not guilty of then.

[67] Ms Wikaira's lawyer, Mr Quarrie, responded that this happened regularly in criminal courts and that even though she considered that she was not guilty of the offence, she entered a guilty plea on the advice of her lawyer to become eligible for a s 106 discharge without conviction. Mr Quarrie explained that if a not guilty plea had been entered, "then a hugely long protracted process is entered into …". Ms Jones acknowledged her awareness of that from her role as a manager in Community Corrections (Probation). Mr Quarrie referred to Mr Blaikie's letter and asked Ms Jones to take account of its contents to answer her questions about why Ms Wikaira had entered a plea of guilty to a charge of which she considered she was not guilty.

[68] Ms Jones advised Ms Wikaira that she (Ms Jones) had contacted the police officer responsible for the prosecution, putting to him that Ms Wikaira acted out of fear. Ms Jones said that the officer's response was, in her words: "if you thought you had a credible defence you should have put it forward." Mr Quarrie then responded: "That would be a response from an arresting officer and would not be disclosed in the judgement to the decision maker." It is not clear to me at least what this meant. Ms Jones did not give evidence before me and Mr Quarrie, who was also present, passed away between the Authority's investigation and delivery of its determination.

[69] Next, Ms Jones put to Ms Wikaira that she failed to declare (to the Department) the charges at the time they were "incurred". Ms Wikaira responded that she did not originally understand the import of the charge and asked her husband to explain this to Ms Jones. He said:

> … I asked her why she was going to court again and she goes well I got another paper and that was when I fully read it, cause I've seen those before, prior to that she thought she was going to pay for a windscreen.

[70] Ms Wikaira's husband confirmed that she did not really read the initial charging documents given to her and did not fully understand them. Ms Wikaira confirmed that although she had damaged the windscreen, she would pay for this and she thought initially that in these circumstances she did not need to tell the Department.

[71] Ms Wikaira's lawyer then explained to the investigator that he had noticed that when Ms Wikaira was under pressure, she had difficulty in comprehending a written document. He gave the example of Ms Wikaira receiving from the Department a copy of the Code of Conduct, and she assumed this was an allegation that she had been dishonest. He explained that her belief, in receiving a Police charge, was that it was about getting her to pay for damage to the windscreen.

[72] Ms Wikaira, through her lawyer, confirmed that she only thought it was relevant to tell her employer both when the Police became involved and she went to court.

[73] Next, Ms Jones asked the plaintiff whether she considered that her appearance in court had the potential to bring the Department into disrepute. Ms Wikaira's lawyer, on her behalf, said that this was not a question of fact but, rather, one for the ultimate decision-maker after Ms Jones's factual report had been provided. Mr Quarrie advised that there were "no further facts that she can put on the table in relation to that." Ms Jones asserted that her task as investigating officer included to determine whether Ms Wikaira recognised that her court appearance (with her occupation specified as Prison Officer/Corrections Officer) had the potential to bring the Department into disrepute. No further progress was made because of Mr Quarrie's questioning of the propriety of this line of questioning.

[74] Ms Jones's draft investigation report was provided to Ms Wikaira and Mr Quarrie on 24 June 2015 with an invitation to make any submissions about it by 29 June 2015. The report incorporated information from a variety of sources, including an interview statement made by Ms Wikaira on 16 June 2015, the written statements of Ms Wikaira's lawyer dated 21 May and 9 June 2015, and the Police's summary of the facts leading to the prosecution.

[75] Among Ms Jones's summary of evidence was that the plaintiff had "engaged in an incident with [Mr H] over some paperwork". Ms Jones described the plaintiff as having become "angry" and that she struck the vehicle's windscreen, causing it to break.

[76] I pause here briefly to note that the preponderance, perhaps even the totality, of the information before Ms Jones at that point was that the striking of the windscreen was attributable principally to fear or, at worst, an immediate and unthinking reaction, rather than anger. The reference to a dispute about "paperwork" rather underplays the important background to the attempt to serve a trespass notice.

[77] Ms Jones's draft investigation report contained the following accounts of some of Ms Wikaira's interview with her on 16 June 2015.

> [After Ms Wikaira was asked to relate events on 3 February 2015] … Mr Quarrie responded and said that CO Wikaira did not wish to discuss the events from the incident with her step father which resulted in a criminal charge. CO Wikaira confirmed this.

[78] Again pausing to assess the accuracy of that advice, I note that the account in Ms Jones's draft investigation report of that part of the interview is inconsistent with the Department's own recorded notes of the interview, and with the plaintiff's account. These confirm that not only did Ms Wikaira and her lawyer not decline to co-operate with explanations about the events of that day, but in fact that they did co-operate actively, including by offering to present a diagram showing who did what to whom. Rather than the Department's own record confirming that Ms Wikaira did not co-operate, the notes indicate that it was Ms Jones who was reluctant to revisit the events of that day, at least in the way that Ms Wikaira wished, by pointing them out using a diagram. That is illustrated, for example, by Ms Jones's words directed at Ms Wikaira and her lawyer:

> You can if you feel that it, one thing I just want to, I don't want to go over, or perhaps get caught up in the Police umm, you know the matter that's up, the Wilful Damage, because that's been dealt with, the allegations you know. …

[79] Ms Wikaira did not get to demonstrate graphically what she said happened in the incident with Mr H although, as will be seen, this opportunity was subsequently offered by the Department and taken up by Ms Wikaira.

[80] In respect of that part of Ms Jones's preliminary report in which she said that Ms Wikaira was asked by her to comment on the allegation that her conduct had the potential to bring the Department into disrepute, Ms Jones said that Ms Wikaira declined to answer the question on Mr Quarrie's advice. Again, the Department's notes of the meeting are not reflected in this subsequent report of Ms Jones, at least accurately. The response to Ms Jones's statement of the allegation (not a question) was for Mr Quarrie to seek to clarify that her task was to identify and report on information. He said that the statement about her conduct having the potential to bring the Department into disrepute was not a matter on which she could add to the facts that she had already provided in response to earlier questions. Mr Quarrie said that this allegation was a matter for assessment by the decision-maker, Mr Rongo.

[81] Next, Ms Jones identified what was described as "Disparities of Evidence". These were that although Ms Wikaira, in her submissions made in writing to the Department on 8 April 2015, said she had brought the relevant events to the attention of her employer, she nevertheless did not do so until 11 March 2015 and after two court appearances.

[82] Again I interpolate to comment on the accuracy of Ms Jones's report in light of the meeting notes and transcripts. That was not a 'disparity' of Ms Wikaira's evidence in the sense of her having made two contradictory statements at various times. Ms Wikaira's statements were not inconsistent: rather, the second elaborated on the first by providing detail, not provided initially, of when the matter was brought to the employer's attention.

[83] Under a penultimate heading "Findings" Ms Jones's draft report simply set out again the allegations, but not any "Findings".

[84] Finally, under the heading "Other Relevant Information" Ms Jones reported to Mr Rongo that Mr Quarrie had advanced "considerable opposition" as to whether Ms Wikaira's wilful damage of her stepfather's car was an unlawful act. Ms Jones also reported that Ms Wikaira said that she "maintained" (presumably entered) her guilty plea on the advice of her lawyer "and out of fear for her safety." The investigator also reported as a significant fact that when this was put to what Ms

Jones described as "the arresting officer", his response was that if she had believed she had a credible defence, she should have continued with her not guilty plea.

[85] On 29 June 2015 Mr Quarrie emailed Ms Jones thanking her for her draft report but saying that he did not believe it reflected fairly the discussions they had had during their meeting. Mr Quarrie took issue with the draft report's statement that, in response to an invitation to relate the events of the incident of 3 February 2015, he (Mr Quarrie) had responded that his client did not wish to discuss those events and that she confirmed this. Mr Quarrie advised Ms Jones that "This suggests that there was a categorical refusal to discuss the incident." Mr Quarrie pointed out that "The recorded interview shows that an offer was made to draw a diagram showing you what happened on the day. This was declined by you." I have already found that Mr Quarrie's criticism of Ms Jones's draft report was valid, and that the Jones report misrepresented what had happened in this regard.

[86] Mr Quarrie next advised that the recorded interview notes confirmed that Ms Wikaira had indicated that she was content that the written statement already given to the Department was an accurate account of the incident. Mr Quarrie requested that the decision-maker be given a transcript of the recorded interview together with a copy of the recording. He advised that he had copied the recording to a memory stick and intended to have a transcript typed over the next few days unless Ms Jones was able to arrange that from her own recording of the interview.

[87] Ms Jones's response, also sent on 29 June 2015, was to say that she would include a copy of the transcript in her report as an appendix for the decision-maker. She indicated her preparedness to extend the deadline for the presentation of any further submissions by Ms Wikaira or her counsel to the close of business on 30 June 2015. Mr Quarrie responded, again by email, that he had no further comments or submissions to make.

[88] The finalised investigation report was sent to the plaintiff and her lawyer on 6 July 2015 with an invitation to comment on it by 13 July 2015. There were no material changes from the draft report in the respects identified above. In particular, Ms Jones did not move from her view that Ms Wikaira did not wish to discuss the

events of the incident with her stepfather. Nor were what she originally identified as "Disparities of Evidence" (referred to above) changed.

[89] Ms Jones's final report did, however, contain 'findings' relating to the three allegations. Materially, Ms Jones's final "Findings" in relation to each of the allegations she was asked to investigate were as follows:

> **Findings**
>
> - *Identify and report on any information that can clarify, support or refute the allegation that Iona Wikaira may have undertaken any form of unlawful behaviour off duty which resulted in her being charged with a criminal offence (Wilful Damage)*
>
>  This is upheld. Although the Court outcome was discharged without conviction, CO Wikaira pled guilty to the charges before the Court. Although she has since attempted to provide an explanation for her actions, she did not put this defence forward and her plea is noted to be Guilty of the offence for which she was charged and this was accepted by the Court. The Code of Conduct requires employees to "comply with the law at all times"
>
> - *Identify and report on any information that can clarify, support or refute the allegation that Iona Wikaira may have failed to declare the charges at the time they were incurred. Iona appeared in Court on 23rd February but did not disclose the charges to the Department until 11th March 2015*
>
>  This is upheld. CO Wikaira was charged with Wilful Damage some short time after the incident on 3rd February. She appeared in the Kaikohe District Court on 23rd February and 11th March before advising her Manager of this. In explanation, CO Wikaira said that she was unaware that the Wilful Damage charge was a police matter and that her expectation on the advice of her lawyer was that this would result in a fine or damages payable to the complainant. When questioned further, CO Wikaira did not believe a charge resulting in a fine was a matter of concern for the Department to be aware of. The Code of Conduct requires the employee [to] "advise your manager of any criminal charge laid against [you]"
>
> - *Identify and report on any information that can clarify, support or refute the allegation that Iona Wikaira's actions in being charged with a criminal offence and appearing in Court had the potential to bring the Department into disrepute.*
>
>  This is upheld. CO Wikaira appeared in the Kaikohe District Court on 23rd February, 11th March, 22nd April & 26th May. During these four appearances, CO Wikaira would have been exposed to prisoners attending Court, family of prisoners, Police & Dept of Corrections Court staff. It is highly likely that in a small town like Kaikohe , CO

> Wikaira would have been recognised as a Corrections Officer from NRCF.
> Furthermore, although it appears to have been on the advice [of] her Lawyer, [CO] Wikaira did not attend Court on 12th May and a Warrant to Arrest was issued by the Kaikohe District Court bringing her to further attention.

[90] Mr Rongo invited Ms Wikaira's comments on the investigator's final report. He advised that he would form a preliminary view after he had read and fully considered the final report and any further relevant information gathered during the investigation including Ms Wikaira's submissions already made and any that she might wish to make in response to the final report. Mr Rongo also advised Ms Wikaira that she would be provided with an opportunity to comment on his preliminary view before he came to a final decision, and sought any further comments in writing by 13 July 2015.

[91] On the deadline day, 13 July Mr Quarrie wrote to Mr Rongo, again pointing out that the report's references to the interview with Ms Wikaira on 16 June 2015 did "not reflect the true tenor of the interview [and] [in] particular, the responses by and on behalf of my client are not accurately reported."

[92] Mr Quarrie said that the transcript of the interview had not been included in the appendices to Ms Jones's report that he received, as she had indicated would be provided to Mr Rongo. Mr Quarrie therefore included his recording of the meeting. Mr Quarrie invited Mr Rongo to prepare a transcript of this recording or suggesting that he ask Mr Quarrie to do so. The lawyer asked that Mr Rongo hear or read the full discussion that took place at the meeting.

[93] Mr Quarrie's letter also commented on Ms Jones's third "finding", submitting that it was not one appropriate for her to make as an investigator of facts. He submitted that this was a conclusion of opinion rather than fact and was a matter for Mr Rongo to decide. Finally, Mr Quarrie sought an opportunity for Ms Wikaira, with him as her representative, to meet kanohi ki te kanohi (face-to-face) with Mr Rongo before he made the defendant's decisions, whether preliminary or final.

[94] After some correspondence, Mr Rongo confirmed to Mr Quarrie that the former had a full transcript of the recording of the meeting. Mr Quarrie requested a

copy of that. The transcript was sent to him by Mr Rongo on 24 July 2015, together with an inquiry whether Ms Wikaira still wished to meet Mr Rongo in these circumstances. Mr Quarrie sent a follow-up email to Mr Rongo on 27 July 2015, asking for clarification of the point which the Department had reached in the disciplinary process. Mr Rongo replied later that same morning, reiterating his wish to know whether Ms Wikaira still wanted to meet with him, advising that he had, by then, reviewed all of the information including Ms Jones's report and interview transcripts, and proposing to write to Mr Quarrie with his preliminary view. Mr Rongo assured Mr Quarrie that he and his client would have an opportunity to meet with him as decision-maker and to provide any submissions on his preliminary view before a final decision was made.

[95] Mr Quarrie responded also on the same day, reiterating that Ms Wikaira wished to meet with Mr Rongo kanohi ki te kanohi and that she wished to have her lawyer present at that meeting, which should take place before Mr Rongo made a decision about the allegation against her.

[96] On 11 August 2015 the defendant (through Mr Rongo) wrote to Ms Wikaira, providing his "Preliminary View" about the allegations of misconduct against her. This letter reiterated the Department's view of the background and set out again both the aspirational and operative provisions of the Code of Conduct which the defendant contended had been breached.

[97] Mr Rongo then turned to the employment investigation and Ms Jones's report. Dealing with the investigator's interview of Ms Wikaira on 17 June 2015 with which she, through her lawyer, took issue, Mr Rongo confirmed that he had reviewed and considered the full transcript of that interview as requested by Mr Quarrie. Nevertheless, Mr Rongo's advice was that he agreed, in a preliminary way, that the allegations had been sustained and gave reasons for that conclusion for each of the three allegations.

**[98]** First, with regard to the claim that Ms Wikaira had "undertaken any form of unlawful behaviour off duty" which resulted in her being charged with the criminal offence of wilful damage, Mr Rongo agreed with the investigator's finding that she

had been charged with wilful damage and had pleaded guilty. He explained that as a correction officer she was held to "a high standard … at all times." Because she had pleaded guilty, she had "admitted to undertaking an unlawful action."

[99] Mr Rongo wrote that whilst he accepted the existence of difficult personal circumstances surrounding the events that led to Ms Wikaira's prosecution, he did not "accept your actions and the subsequent consequences."

[100] Finally, in relation to the first allegation, Mr Rongo concluded that although Ms Wikaira had entered a guilty plea to the charge of wilful damage on her lawyer's advice, this was not "a satisfactory mitigating factor" and the decision to enter the plea was Ms Wikaira's alone.

[101] Turning to the second allegation of misconduct, that the plaintiff "failed to declare the charges at the time they were incurred", this was likewise upheld by Mr Rongo. He noted that the incident occurred on 3 February 2015, that Ms Wikaira's first appearance in court was on 23 February, but that she failed to notify him of these events until 11 March 2015. Mr Rongo concluded that this was not acceptable, that she was expected to advise her manager of any criminal charges "as soon as possible", and that she would have known before that date that she had been charged.

[102] Noting that Ms Wikaira may have had some difficulty in comprehending those documents when she was under stress, Mr Rongo wrote nevertheless that if she had been unclear about the nature of the process, she should have sought advice from her lawyer in the first instance and "as soon as you received papers from the Court you should have contacted me to advise me of the situation."

[103] Finally, turning to the third allegation that Ms Wikaira's actions in being charged with a criminal offence and appearing in court had the potential to bring the Department into disrepute, Mr Rongo wrote that this allegation was likewise upheld by the investigation. He wrote that on the four occasions on which the plaintiff appeared in the Kaikohe District Court, Police and Corrections staff may have been present, together with families of prisoners, members of the public and prisoners "who we are trying to rehabilitate for similar and other criminal offences". He

concluded that in a small town like Kaikohe, there was a "strong likelihood" that the plaintiff may have been recognised as a corrections officer from the local prison. Mr Rongo added that the Department had a goal of reducing reoffending by 25 per cent by 2017 and that part of her role was to model behaviours that helped offenders become better members of society.

[104] Next, Mr Rongo set out his conclusions about whether Ms Wikaira had breached the Code of Conduct. He advised that he had reached a preliminary view that there had been a number of breaches of it by her. He concluded that she breached the required standard of being "accountable" which included requiring her to "comply with the law at all times", "address your behaviour or anyone else's if it falls below these standards" and "advise your manager of any criminal charge laid against you under any law statute or regulation." In this regard, Mr Rongo repeated his assertion that Ms Wikaira had delayed declaring the charge, that this was unacceptable and that the Department "expects their employees to be open, transparent and honest": her actions, he said, had not met those expectations.

[105] Mr Rongo concluded that the plaintiff had also failed to meet the Department's standard encapsulated in the phrase "We make a difference". He wrote that this required her to maintain and model high standards of integrity, presenting herself in a way that enhanced her credibility and supported the Department's success, and also to behave in a way that reflected well on her position with the Department both in and out of the workplace.

[106] Among the preliminary conclusions, Mr Rongo listed that the plaintiff did not let him know before the first court appearance that she had been charged; that she rang in sick; and that if she was unclear what the court papers meant or what her obligations under the Code of Conduct were, she should have sought clarification.

[107] Mr Rongo concluded that Ms Wikaira had failed to meet these standards, repeating that "It is wholly inappropriate for a Corrections Officer to have criminal charges laid against them and this certainly does not set a good example to prisoners and offenders".

[108] Next, Mr Rongo wrote that Ms Wikaira had breached the Code of Conduct's prohibition on *"undertaking any form of unlawful behaviour or involvement (whether in the workplace or off duty) [including] admitting to or being convicted of an offence …"*. He wrote:

> I acknowledge that you were discharged without conviction however, my concern remains that you placed yourself in a position where you were charged with wilful damage, and you admitted this offence by pleading guilty to that charge. The Code is explicit that "admitting to or being convicted of an offence" is an example of conduct which falls below our expectations. Due to the nature of our environment it is unacceptable to have a Corrections Officer in such circumstances and it fails to set an appropriate example to either your peers or prisoners.

[109] Elaborating on this tentative conclusion in relation to reputational issues, Mr Rongo wrote:

> … as an employee of Corrections you are expected to meet a high standard of professional and personal behaviour. Employees of Corrections and the Department as a whole [are] expected to act in a manner which will bear the closest public scrutiny and the integrity of public servants is central to the maintenance of public and Government confidence in the public service. The Department has always been very clear in its requirement that employees should avoid any activity (work related or otherwise) which could reflect badly on the Department or jeopardise its relationship with the Government or the public. Your actions in being charged with a criminal offence [are] not in keeping with those expectations particularly given that we have offenders in our care [who] have been convicted of the same, or similar offences.
>
> Additionally, the NZ Police Caption Sheet and the Notice of Bail to the Defendant have the potential to pose a reputational risk for the Department should they become public knowledge as your name and position are specified in these documents. As such, it is my view that you did engage in conduct and undertake actions which could affect our reputation and the response of other justice sector agencies and the public of the Department.

[110] In these circumstances, Mr Rongo expressed his "preliminary view" that Ms Wikaira had failed to act in accordance with the Code of Conduct and that her actions and behaviour constituted serious misconduct.

[111] Mr Rongo described it as an "important area of concern" that Ms Wikaira had failed to disclose to the Department the fact that she had been charged at the time it occurred but, instead, waited until immediately after her second appearance in court before doing so. He wrote:

> … The Code of Conduct requires you to inform your manager of any criminal charges laid against you. You were given a copy of the Code of Conduct when you commenced employment and there is also an updated copy online for all employees to view at any time and therefore it is my view that you should have been aware of your obligations in this regard. All employees are required to be honest, communicative and responsive and to act with integrity.
>
> … The Code of Conduct also states that employees must advise their manager of any changes in our personal circumstances that could impact on the safe and efficient completion of our duties, or that may impact on the perception of our integrity and professionalism. I do not accept that you misunderstood the fact that you had been charged initially as an impediment to you informing the Department of the charge or of your first appearance in Court.
>
> You are expected to refrain from conduct which may impact on the perception of your integrity and professionalism, including complying with the law at all times. Your actions in failing to comply with the law and being charged with Wilful damage, and failing to disclose the charge in February 2015 as well as appearing in Court, albeit you were eventually discharged without conviction, raise serious concerns about [your] ability to continue to perform your role as a Corrections Officer. I believe that your behaviour is incompatible with your role as a Corrections Officer, especially your responsibility to proactively role model appropriate actions, attitudes and behaviours, including giving effect to the Department's Code of Conduct.
>
> Your actions which have significantly undermined the Department's requirement to have trust and confidence in you to maintain an on-going employment relationship (sic). Therefore, it is my preliminary view that disciplinary action is appropriate in all of the circumstances. I have considered the range of disciplinary sanctions available and the seriousness of the substantiated allegations. I have also considered all of your submissions provided to date. Because your actions have caused serious damage to the relationship between you and the Department and I have lost trust and confidence in your ability to make sound decisions around setting an appropriate example and complying with the law as well as exercising good judgment both in your personal and professional life, both of which are requirements of employees of the Department, my preliminary view is that dismissal is the appropriate sanction in this instance.

[112] Mr Rongo's letter concluded by emphasising that this was his preliminary view only and it had "not been reached lightly". He advised that no final decision would be made until Ms Wikaira had had an opportunity to make further submissions as to why dismissal may not be an appropriate outcome, and asked to meet with her on 20 August 2015 for that purpose. Mr Rongo confirmed that he would also welcome written submissions before the meeting.

[113] At the meeting on 20 August 2015 Ms Wikaira was accompanied by her husband and her lawyer, Mr Quarrie. Mr Rongo confirmed that he would be the decision-maker although after consulting with employment advisers within the Department. Mr Quarrie, on Ms Wikaira's behalf, denied again that she had undertaken unlawful behaviour as she had said to the employment investigator, Ms Jones, and as had been set out in the lawyer's submissions of 8 April 2015. Mr Quarrie reiterated that he had offered to provide more detail about the incident to Ms Jones but that she had "made it clear she wasn't interested." He submitted that Mr Rongo's preliminary view had been coloured by the summary of facts provided by the Police which had, in turn, been based on Mr H's partisan complaint. Mr Quarrie went so far as to allege that the Department's preferred outcome had been predetermined and that the then current exercise was a "charade" and a "ticking boxes exercise".

[114] More safely and less rhetorically, Mr Quarrie submitted that the Code of Conduct could not be properly interpreted so that the fact that someone had been charged with an offence was a breach. He submitted that a fair and reasonable employer could not conclude that there were grounds for dismissal and re-emphasised the District Court's discharge of Ms Wikaira without conviction, which amounted to an acquittal. Mr Quarrie submitted that Mr Blaikie had outlined clearly the situation as to why, due to an error of others, Ms Wikaira had been misled about the date of a court appearance which led to the issue of a warrant to arrest. Mr Quarrie said he had been involved in another similar incident (of remand date mix-ups) recently, indicating that this was a not uncommon occurrence, at least in that area.

[115] The Department's employment adviser, Ms Crabbe then asked if Ms Wikaira wished to provide the diagram and to talk further about the incident and she did so, using her diagram to illustrate her account of events. The plaintiff said that she feared for her safety as a result of her stepfather's actions, that she did not have anything in her hand which contributed to the cracking of the windscreen, and that she had not expected events to have gone the way they did. Ms Wikaira said that to have taken things as far as the Police and the Department had, was unjust. In reply to Mr Rongo's inquiry about why Ms Wikaira pleaded guilty instead of "fighting it",

Mr Quarrie responded, on her behalf, that a defended hearing would probably have featured in the local newspaper and escalated potentially the reputational consequences for both parties. He said that a not guilty plea might have taken months to come to hearing and that there was always a risk, as in any litigation, of an unfavourable outcome. He emphasised that Ms Wikaira's lawyer had advised her and that she accepted that advice. Ms Wikaira concluded by saying that she honestly did not understand the majority of the prosecution process.

[116] Mr Quarrie then raised alternative outcomes to dismissal. He indicated that Ms Wikaira would be prepared to accept that she got things wrong in relation to allegation two (that she failed to declare the charges at the time they were incurred and that she appeared in court on 23 February 2015 but did not disclose those charges to the Department until 11 March 2015). He said that in these circumstances, dismissal was not warranted but, rather, a warning in relation to that allegation because she should have read and followed the Code of Conduct. It appears that Mr Quarrie may not have read the Code, as his concession assumed that there was a duty to report to the Department immediately, which there was not.

[117] Mr Rongo concluded the meeting by saying that he wished to consider matters further and would come back with a final decision at a further meeting.

[118] The final meeting between the parties was held on 11 September 2015. Although notice of it was given to both Ms Wikaira and her lawyer, and the latter did not take any issue with that, Mr Quarrie was nevertheless absent in Wellington on that day. Ms Wikaira's husband was with her and there was neither a request by her for a postponement of the meeting until her lawyer could attend, nor any mention of that by Mr Rongo and Ms Crabbe for the Department or other inquiry as to whether Ms Wikaira was content to proceed in her lawyer's absence. It may be that the writing was on the wall by that stage and Ms Wikaira considered that Mr Quarrie's presence could not have altered that.

[119] As was probably the case with earlier formal departmental correspondence, a letter had been prepared by the defendant before the meeting, with significant input from Ms Crabbe but over Mr Rongo's signature. Mr Rongo did not, however, read

from the letter during the meeting, or hand it to Ms Wikaira until its conclusion. Rather, he spoke to some of his own pre-prepared speaking notes. It is notable that, unlike previous meetings, there was apparently no sound recording made. Perhaps this was as a result of Mr Quarrie's absence because it appeared that at least on some previous occasions it was he who had arranged for a sound recording to be made. There are, however, Ms Crabbe's handwritten notes that summarise what was said, at times verbatim.

[120] Having seen and heard Mr Rongo give evidence, I consider that what he said from his speaking notes represented his own view of Ms Wikaira's conduct and its consequences, rather than, in several respects, the carefully prepared prose of the letter into which I conclude Ms Crabbe had extensive input. The task of announcing the Department's decision and its reasons for it, fell to Mr Rongo as manager. His expert employment adviser, Ms Crabbe, was present but remained silent and made notes of what was said.

[121] Mr Rongo made some initial responses to Mr Quarrie's input from the previous meeting. He said that the outcome of the investigation had not been predetermined and that he had previously expressed only a preliminary view for the purpose of considering Ms Wikaira's response to that. Mr Rongo denied that it had been a "tick box" exercise and said that he had maintained an open view throughout.

[122] With recourse to his speaking notes and from Ms Crabbe's notes provided to the Court, Mr Rongo told Ms Wikaira that:

> Charging someone is breach of [the Code of Conduct]. The [Code of Conduct] states that being charged [with] something is a breach. [It is important] to hold a high standard of behaviour. [It is] unacceptable to have [a Corrections Officer] charged [with] an offence.

[123] Next, Mr Rongo said that Ms Wikaira had failed to notify him "of your charges [and] court appearances." He said that she had only done so "after the fact" and that "You took sick leave, that is lying by omission". Mr Rongo disagreed with the submission that Mr Quarrie had made on Ms Wikaira's behalf that it was not a breach of the Code of Conduct that someone was charged with an offence. He said that the Code was very clear and included "Actions that are unlawful" as being a

breach. He said that corrections officers were expected to demonstrate a high standard of behaviour, given the nature of its business, both at and beyond work. Mr Rongo reiterated that it was unacceptable "to have an employee charged with an offence".

[124] Next, Mr Rongo moved to what he categorised as Ms Wikaira's "Omission (sic) of guilt". He told her that she had "accepted" and taken the advice of her lawyer to enter a plea of guilty.

[125] Mr Rongo then said that his preliminary view that Ms Wikaira should be dismissed, had not been changed. He said that he had lost trust and confidence in her as an employee and that she would be dismissed. He then referred to his letter confirming dismissal and that this would be on one month's notice.

[126] I observed Mr Rongo give evidence at length by reading from a prepared brief and including, especially, under cross-examination. I also observed Ms Crabbe as a witness. Having given careful consideration to the form and content of the letters sent by Mr Rongo to Ms Wikaira, I have reached some conclusions about the substantial authorship of those letters and about the extent to which Mr Rongo's own understanding and conclusions played a part in his decision to dismiss Ms Wikaira.

[127] Both when giving evidence and when he spoke at the final meeting from his own speaking notes, Mr Rongo expressed erroneous conclusions about several aspects of the Code of Conduct. He also took into account in his decision-making his conclusion that Ms Wikaira had 'lied by omission' as he expressed it, in relation to her calling in sick on the first occasion that she was in court. This had, however, at no stage been an allegation of misconduct against her although I am satisfied from the evidence that this conclusion played a part in Mr Rongo's decision to dismiss Ms Wikaira.

[128] It was conceded by the defendant's witnesses that expert human resources staff (and, in particular, Ms Crabbe) had input into the formal correspondence that Mr Rongo wrote to Ms Wikaira and which was detailed, careful and strategic in the sense that it followed the scheme of such investigations required by the Department.

I am, however, satisfied that in some critical respects, the correspondence does not accurately reflect Mr Rongo's views and conclusions as he expressed them in evidence and in unscripted moments in the meetings with Ms Wikaira. In short, the contents of the letters do not, in important respects, represent the views and conclusions of Mr Rongo but, rather, what he was carefully advised he should say and how. What Mr Rongo is recorded to have said, rather than what was in letters that he signed, where these conflicted, was more likely to have been Mr Rongo's reasoning for Ms Wikaira's dismissal.

[129] Following her dismissal, Ms Wikaira sought alternative employment but, at least at the date of hearing in Whangarei on which she gave evidence, she had been unsuccessful. Because the adequacy of her mitigatory attempts is challenged by the defendant, findings about those need to be made.

[130] The south Hokianga area or Waima in which Ms Wikaira resides is amongst the most economically depressed in New Zealand and paid work, especially secure and well-paid work, is scarce. The Court can also take judicial notice of the fact that stable and, in the circumstances, well-remunerated work at the Northland Prison, although some distance from Waima/Rawene and adjacent areas, provides the residents of surrounding districts with significantly consistent and better income-earning opportunities than generally. A prison job is a valued job in Northland.

[131] In connection with seeking alternative employment, Ms Wikaira disclosed the facts of her previous employment and the circumstances in which it ended. This would not have made it easy to obtain alternative employment in many positions, even if she had otherwise been a preferred candidate. That is the reality of the difficulties encountered by employees dismissed for serious misconduct in the circumstances that Ms Wikaira was.

[132] In late 2015 Ms Wikaira applied for a position with the Ministry of Social Development as a Youth Justice Coordinator at Kaikohe. Her application did not survive the first round in the selection process.

[133] In early 2016 she applied for a position as a Community Support Worker with Hokianga Health. Despite being told that she had "interviewed very well", her application was unsuccessful.

[134] In mid-2016 Ms Wikaira applied for a position as a shop assistant in a pharmacy at Rawene. This was described as a "Dispensary and retail assistant" combined with retail assistant and she was invited to an interview for that position. Because of the nature of that employment, Ms Wikaira was advised that her application would be subject to "reference checking" and "pre-employment police vetting …". The remuneration for that position was to be at the minimum rate under the Minimum Wage Act 1983 and a three-month trial would have to be undertaken. Ms Wikaira was unsuccessful although she was complimented on being "the honest upfront person that you are". I infer that this was as reference to her disclosure of the circumstances of her dismissal by the Department.

[135] In early 2016, also, Ms Wikaira applied for a position as a Rates Administration Support Officer for the Far North District Council. She was unsuccessful.

[136] In addition to these job searches, I accept that Ms Wikaira had made a number of other unsuccessful inquiries for which there is now no independent supporting documentary evidence. I accept that these were genuine attempts to find alternative employment but, consistent in my view with the level of opportunities in her area and the circumstances in which she lost her job with the Department, these have been unsuccessful.

## The Employment Relations Authority's determination

[137] Given that the outcome in this Court will be very different from that determined by the Authority, it is appropriate to make some comment. The Authority decided, on evidence not put before this Court, that there was no influential predetermination of the issue of dismissal; it was satisfied that there was no disparity of treatment with other employees. It also accepted the Department's view that there had been a breach of the Code of Conduct because "A criminal

charge is an unlawful action." This finding is a major plank of the plaintiff's case in this Court.

[138] Among the significant elements affecting the Authority's determination were that Ms Wikaira could not conceivably have been unaware that she was facing a criminal charge, given that she "dealt with the criminal justice system on a day-to-day basis"; that she sought to hide her predicament from the Department by calling in sick on the day of her initial court appearance; and that, despite telling her employer that she would be "vigorously defending the charges", she then pleaded guilty without telling her employer of her change of view or the reasons behind it.

[139] It is apparent that, in some respects, a different case has been developed and run by the plaintiff with the benefit of new legal representation. Different witnesses were heard by the Authority and the Court and, without doubt, a much more thorough and rigorous examination of many more important documents was able to be undertaken by the Court than by the Authority. The length and complexity of this judgment illustrate that different approach to decision of the case.

## The plaintiff's s 106 discharge and the reasons for it

[140] Had the Department obtained the District Court Judge's sentencing notes during its investigation, it would have found the following. After summarising the relevant facts of the incident and addressing the tests under s 107 of the Sentencing Act as to when a s 106 discharge without conviction might be appropriate, the sentencing Judge noted Ms Wikaira's grounds for a discharge. These included that she had not previously appeared before the Courts and that there was a "real risk that a conviction being entered against you will have an impact on your employment".

[141] Pertinently, the sentencing Judge said, among other things, that he understood that following preliminary investigations by the Department, "… your continued employment with the Northland Regional Corrections Facility remains very much up in the air pending the outcome of this Court case." The District Court Judge emphasised that he was not considering the merits of the Department's investigation

of the offence in what appeared to him to be a disciplinary process which awaited the District Court sentencing decision.

[142] At [12] of his sentencing notes the Judge said:

> Having assessed the gravity of the offending, which I placed to be at the very lowest end of the charges that are on the statute books, I am satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending.

[143] The Judge noted that payment for the damaged windscreen was about to be made to the victim and concluded at [13]:

> … I am told also that efforts to contact the victim directly to pay the reparation amounts have been unsuccessful. I am very clearly of the view that the balancing exercise falls heavily in your favour and I am satisfied that the Court should grant a discharge without conviction in this instance and accordingly you will be discharged without conviction.

## Bringing an employer into disrepute

[144] Justifying the dismissal of an employee because that employee has, or has potentially, brought her employer into disrepute, is now an oft-invoked justification for dismissal. In this case, the defendant's claim was that Ms Wikaira's conduct, and its consequences in court proceedings, risked bringing the Department into disrepute. I assume the reference to risk is because there is no evidence of either public disclosure of those events, or of any individuals or classes of people identified by the Department, having thought less of it as a result. Those classes of persons included police officers, District Court staff at Kaikohe, other corrections officers and inmates of the institution. It extended also to members of the general public.

[145] Considering whether a fair and reasonable employer could conclude, in the circumstances of a particular case, that an employee's acts or omissions either brought the employer into disrepute or risked this consequence, involves several different constituent considerations.

[146] First, the disrepute into which the employer may be brought is not the same as, or necessarily a consequence of, any personal disrepute that the employee may have invited by his or her conduct. That distinction is everyday commonsense:

simply because an employee does something that he or she should not have done, especially outside work, does not necessarily mean that that person's employer will be brought into the same disrepute as the employee, or indeed any. A pertinent example is of New Zealand Defence Force personnel who are prosecuted for offences in the District Court. These are often disorder offences associated with intoxication when on leave. I suggest that no reasonable-minded citizen would consider, in those circumstances alone, that the particular armed service of which such defendants are members, is thereby brought into disrepute. Indeed, as I discussed with counsel in submissions when using this analogy, the accompanying by their senior officers of armed services personnel facing criminal charges in the District Court, tends to illustrate not only that there may be internal disciplinary consequences within the armed service but, importantly, there may also be a degree of concern and support for the defendant which probably engenders the antithesis of disrepute into which the 'employer' is brought in the eyes of the public.

[147] It will be remembered that in this case, the Department refused to support or otherwise become involved with Ms Wikaira in her court appearances on the questionable ground alone that it had to remain entirely neutral and uninvolved in those proceedings. That was an unfortunate and ill-founded decision. Assisting or supporting an employee appropriately in her court appearances, could not have compromised the defendant's investigation of these same events, and would have allowed it to be better informed. It could not have brought the Department into disrepute, especially if all Corrections Department staff concerned had not been in uniform as I infer Ms Wikaira was not for her court appearances.

[148] Next, it cannot be correct that any appearance in a District Court on any charge of any severity, means that the employer is at risk of being brought into disrepute. So, for example, whilst criminal charges arising out of the execution by a corrections officer of his or her duties as such may well affect the Department's reputation, the same considerations will not necessarily apply to a minor infraction of the law unconnected with the defendant's occupational status. That is especially

where this is regarded by all others involved in the court case[3] as such a minor infraction that it does not warrant a conviction.

[149] How, then, to define the test to be applied to an employer such as the defendant affecting the fairness and reasonableness of that employer's conclusion that an employee's conduct has brought or may bring the employer into disrepute? Although some cases in this jurisdiction have touched on this question, it has, to my knowledge, never fallen for consideration in the way that it has in this case.

[150] In *Harris v The Warehouse Ltd* the Court concluded, in relation to the same question, that it was difficult to define but important to contextualise:[4]

> … bringing a commercial entity into disrepute to the extent that it amounts to serious misconduct for which dismissal could be justified, is not a simply defined and thereby concluded circumstance. Rather, it is a matter of degree in the particular circumstances of each case. Those circumstances include the nature of the business, its reputation, and an objective assessment of the culpability of what was said and/or done which may have brought the company into disrepute. …
>
> … It must be an objective assessment that takes into account the nature of both the conduct complained of, and the response of reasonable customers to it.

[151] *Harris* was a case of public conduct by an employee of a retail business towards a customer of that retail business in the shop where it was observable and observed by other staff and customers.

[152] Bringing an employer into disrepute was also an important issue in *Hallwright v Forsyth Barr Ltd*.[5] In that case there was no question that the employee's conduct had brought the employer into disrepute and the only consideration was whether this was sufficient to be a factor of justification in dismissal. The employer in that case was a merchant bank, the employee its senior and very public representative. In the circumstances, his out-of-work offending was very highly publicised in news media accounts which included detailed accounts of his criminal trial and sentencing. A number of customers had expressed to the

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3 Except perhaps the unreasonable complainant in this case.
4 *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [135]-[136].
5 *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 202, [2013] ERNZ 553.

employer their disquiet about what had happened and, at least strongly inferentially, what they would think of the business of Forsyth Barr if Mr Hallwright continued to be employed by it. In that case, also, Judge Inglis noted that "Reputational damage is difficult to prove", drawing an analogy to defamation cases in which "the Court considers what the hypothetical bystander would take from the statements that have been made.[6]

[153] There is, however, little else from employment law cases on this question that assists in defining a test for employers. As Judge Inglis suggested in *Hallwright*, an analogy may be drawn with the law of defamation. As long ago as 1936, the House of Lords in the United Kingdom framed the test for "disrepute" as resulting from "a statement" that would "tend to lower the plaintiff in the estimation of right-thinking members of society generally."[7] An employee's actions may be the analogous to a defamer's statement in this context.

[154] What characterises "right-thinking" members of society has evolved, both over time and geographically, from that prim but convenient description given in 1930s' Britain. Adjectives and nouns these days such as 'reasonable', 'ordinary', 'fair-minded', 'independent' and 'neutral observer', better capture the current mood of a more tolerant and less judgmental antipodean society, than the somewhat self-serving characterisation of "right-thinking members of society" which set the standard among those of 'establishment' 1930s' Britain.

[155] Closer in time and to home, *The Law of Torts in New Zealand* characterises the 'reasonable person' as:[8]

> … an ordinary person with ordinary general knowledge, not an unusually suspicious or unusually naive person. The "reasonable man" does not live in an ivory tower and is not inhibited by a knowledge of rules of construction. "So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs." The reasonable person may be guilty of a "certain amount of loose thinking". However, he or she is also someone who reads beyond a sensational headline to find out the substance of the article beneath it.

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6 At [64].

7 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240 per Atkin LJ.

8 Stephen Todd (gen ed) *The Law of Torts in New Zealand* (6th ed, Thomson Reuters, Wellington).

[156] In Australian defamation law, the test for an "ordinary" or "reasonable" person has been described in similar terms:[9]

> The test of defamatory matter is whether it has the tendency to lower the plaintiff's reputation in the estimation of the ordinary reasonable person. … The High Court [of Australia] endorsed previous descriptions of the 'ordinary, reasonable person' as being a person 'of ordinary intelligence, experience and education; who is not 'avid for scandal' and is 'fair minded'. The 'ordinary reasonable person' is a decent person; a person who abides by societal standards, value and rules; that is, a person who shares the standards of the general community and will apply them. The 'ordinary reasonable person' test is to be applied regardless of whether the matter involves the personal reputation or the business or professional reputation of the plaintiff.
>
> (footnotes omitted)

[157] There is also Australian authority for the proposition that this reasonable person test applies equally to an individual's personal reputation as it does to a business's reputation.[10] I would add that there is no reason in principle not to extend this to the reputation of a government department.

[158] From this, I conclude that a fair and reasonable employer, considering whether an employee's conduct brought, or risked bringing, the employer into disrepute, must consider objectively several factors. These are whether a neutral, objective, fair-minded and independent observer, apprised appropriately of the relevant circumstances, could have considered the relevant actions to have brought, or to be a reasonable risk of bringing, the employer into disrepute.

[159] In investigating and determining matters such as this, the obligation to apply this test fairly and objectively falls on the employer who or which may well be concerned subjectively about the employee's conduct. That is especially so if, as here, it appears to the employer that the employee has breached its instructions to, or expectations of, the employee. However, ss 103 and 103A of the Act require an independent objective review of those conclusions by the Authority or this Court. That is because, in a nutshell, the question is not what the employer thinks about its reputation and the effects of the employee's actions on it but, rather, how others perceive, or may perceive, the employer's reputation. Although it may not always be

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9 Danuta Mendelson *The New Law of Torts* (3rd ed, Oxford University Press, Victoria, 2014) at 850.

10 *Radio 2UE Sydney Pty Ltd v Chesterton* [2009] HCA 16 at [40].

easy for employers to identify and apply that difference, it is necessarily incumbent on them to do so as part of the broader test of justification for a dismissal. In *Hallwright*[11] the employer had evidence of the perception others had of the employer's reputation which was relevant and significant in Mr Hallwright's dismissal, rather than its own subjective assessment of its reputation and damage or potential damage to it.

[160] In this case, in contrast to *Hallwright*, there was no news media or similar publicity surrounding Ms Wikaira's appearances in the District Court, initially in a 9 am Registrar's list and, ultimately, for sentencing before a District Court Judge. Although there is no actual evidence of awareness among others of these matters, it is reasonable to infer that, the plaintiff's occupation having been disclosed by her from the outset and being on court documents, some others may have especially noted her appearances in court. These might include local police officers, local court staff and, potentially, a current or former Northland Prison inmate. There was, however, no evidence of such persons thinking less of the Department as a result of the plaintiff's court appearance. The defendant relied on no more than the facts of the charge of wilful damage and Ms Wikaira's plea of guilty to that charge, which was necessary to obtain a discharge without conviction, to establish sufficiently the potential for it to be brought into disrepute.

[161] For there to have been a real risk of being brought into disrepute as opposed to a mere and vague possibility of this being so, there should be consideration by the employer of what a fair-minded, neutral, objective and reasonably informed member of the class (police officers, corrections officers, inmates and the general public) could think and whether this might constitute grounds for the employer's justifiable concern about its reputation.

[162] Put in the terms of this case, the question for decision by the defendant should have been whether any of those members of the classes who might have known of Ms Wikaira's conduct that led to the charge of wilful damage, could reasonably have considered the Department to have been brought into disrepute thereby, or by its dealing with this issue short of dismissing the plaintiff.

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[11] *Hallwright*, above n 5.

[163] Simply observing or hearing that a corrections officer had appeared in court charged with wilful damage of property could not, in 21st century New Zealand and of itself, cause a fair-minded and objective person to conclude, on that information alone, that the Department was thereby brought into disrepute. Such a hypothetical person would, in my assessment, want and need to know more detail before reaching any conclusion about the employer's repute, either way.

[164] Next, if such an objective and fair-minded observer had been given relevant information about the charge, I do not consider that the defendant could reasonably have concluded that this notional person would consider that the Department was thereby disreputable, or that it was disreputable unless it rid itself of the corrections officer. Such an objective consideration of the question could not have caused the defendant as employer to reach that decision about the Department's reputation if that notional person had been informed:

- of the circumstances in which Ms Wikaira broke the windscreen of her stepfather's car;
- of the statutory necessity for her to plead guilty to wilful damage in order to be discharged without conviction;
- that a discharge without conviction is a deemed acquittal;
- of the views expressed by the sentencing Judge;
- of Ms Wikaira's contrition which she expressed among other ways in an affidavit put before the sentencing Judge; and
- of the role that she performed at the Northland Prison.

[165] Those are all elements that were, or ought to have been, taken into account by the Department's investigator and decision-maker in assessing whether Ms Wikaira's actions could have brought the Department into disrepute.

[166] The Department's role as a sometimes high-profile government department means that the perception of the community that it serves also needs to be assessed objectively when looking at actual or potential disrepute. Applying that test to the particular circumstances of this case, I consider that a reasonable employer could not have reached the conclusion, as the Department did, that Ms Wikaira's conduct risked putting the Department's reputation at risk of disrepute. That was whether, amongst police officers at Kaikohe, District Court staff at Kaikohe, other corrections officers, inmates of the institution or especially the community generally, if all the relevant circumstances of the conduct had been known to that notional person. This conclusion relates not only to reputation loss resulting from the plaintiff's actions, but also to its repute in the event it did other than dismiss her, for example by imposing a lesser sanction. The defendant's conclusion about this consequence of the plaintiff's actions could not have been reached reasonably under s 103A.

## Disparity of outcome?

[167] Ms Wikaira says that her dismissal was unjustified, among other grounds, because it was unfairly disparate with the consequences suffered by other corrections officers who had faced, and had admitted, or been convicted of, similar or more serious criminal charges. The question of consistent treatment was first raised before Ms Wikaira's dismissal in her lawyer's submissions to the Department about what should be the consequences for her. Mr Quarrie asked that she be dealt with equitably in comparison to the way other corrections officers had been treated in similar circumstances. The Department assured the plaintiff that this had been taken into consideration before deciding to dismiss her. In view of the evidence now adduced and the absence of explanation for several apparent disparities, there must now be at least doubt about the correctness of the defendant's assurances to the plaintiff on this parity question.

[168] Disparity was also argued by the plaintiff as an element of the absence of justification when the matter came to this Court. At the hearing in Whangarei Ms Crabbe produced, as Exhibits 45 and 46, correspondence affecting the employment of a member of staff at the Otago Region Corrections Facility in 2014. That followed a discharge without conviction for assault by that Corrections' employee. It

recorded that he had retained his job with a warning having been issued to him. Ms Crabbe confirmed the contents of these letters to that Corrections Officer but was not familiar with the case. Just how reference to that officer was not included on the spreadsheet subsequently produced by the Department covering these sorts of events from 2010 to 2015, could not be explained by anyone. Nevertheless, at least from then at the very latest if not from the first brief day of hearing in Auckland, counsel for the plaintiff, Mr Ryan, had put the Department clearly on notice that not only would disparity of treatment be an issue in the case, but that it should obtain more information for the purposes of the hearing about materially similar events involving other staff.

[169] There was a significant break between the hearing in Whangarei in August and its resumption in Auckland in November 2016. During that time Mr Ryan asked to be provided with information from departmental records about recent cases of other staff charged with criminal offences and the outcomes in their cases. This resulted in the plaintiff's counsel being given a list of such instances which had occurred over the past several years. Although anonymous as to the identities of the staff involved, this list stated the location by region of the employee; the date of the outcome of the disciplinary procedures; the general nature of the criminal charge faced; and the outcome of the criminal charge. Mr Ryan cross-examined Mr Rongo, who was the last and sole witness for the Department who gave evidence at the resumed hearing in Auckland on 3 November 2016. Although the witness attempted to interpret and explain some of the differences, he clearly did not have sufficient information to be able to do so to the extent to which he was pressed, justifiably, by Mr Ryan.

[170] The information provided about the previous cases of the Department's staff having criminal convictions over the period of 2010-2015 is not detailed. Nevertheless, some of that information is relevant and useful in assessing whether a sufficient case of apparent disparity has been made out, to move the onus to the defendant to justify this.

[171] For example, an employee holding a position called "Roster Coordinator" in the Department's Southern region was, in late 2012, charged with "domestic assault

and wilful damage". It was accepted that even the least serious possible charge of assault carries a maximum penalty (fine and/or imprisonment) of twice that for wilful damage. The outcome in court was a discharge without conviction and the employment outcome is noted as "No further action".

[172] In 2013 a corrections officer from the Department's Lower North region was charged with assault but discharged without conviction. Again, the least serious assault charge carries a maximum penalty twice that of wilful damage. The Department took "No further action".

[173] Although there are brief notations of "Failure to disclose" against some of those records of staff on this list, there is nothing to differentiate, for example, whether that was a failure to disclose immediately, or later, or at all. Ms Wikaira's alleged failure to disclose her predicament to the Department could, at worst, only have fallen into that middle category, even if the requirement had been for immediate disclosure as I have decided it could not.

[174] In the instance put forward by Mr Ryan in which there is some more detailed information, an Otago Corrections Facility corrections officer was arrested for assault, charged and subsequently discharged without conviction and had permanent name suppression. It appears that the corrections officer advised his manager promptly of these events and was subsequently placed on special leave and then suspended on pay, in total for a period of a little more than three months, until the conclusion of the court process. The Department then sought information from the District Court about the grounds for discharging him without conviction. The Department's preliminary conclusion was that despite the discharge without conviction, the corrections officer had breached the Code of Conduct and that what he had done amounted to serious misconduct. His actions were considered to be inconsistent with the Department's values of public safety with a zero tolerance for violence and there was assessed to be a clear connection between the out-of-work conduct and the Department's values and purposes.

[175] However, especially the investigator's review in the Otago case of the sentencing Judge's notes was said to have provided him with "sufficient context to

negate the requirement for further investigation or submissions related to this incident." The Prison Manager noted, however, that when the incident occurred, the corrections officer had failed to communicate with the institution concerning his whereabouts and status. It appears also that the corrections officer had been issued previously with a written warning "for this type of behaviour and the issues were evident in the weeks leading up to your offending and subsequent suspension."

[176] A final written warning was considered in that Otago case to be the appropriate consequence in employment, the District Court Judge's sentencing notes having been influential in that decision. The corrections officer was entitled to return to work immediately.

[177] Clearly, the Prison Manager in the Otago case (above) considered the District Court Judge's sentencing notes or remarks to be important in determining the outcome of the Department's employment investigation. In Ms Wikaira's case, however, and despite the Department arranging for information to be provided by the Police, the Kaikohe District Court Judge's sentencing notes were not sought or considered, whether at the relevant time or indeed until the Court called for these in the course of the hearing. Mr Rongo had been alerted to the content of the Judge's sentencing remarks in a letter from Ms Wikaira's then lawyer and it is surprising that the defendant did not consider this important information, especially when it had before it the prosecution's and Ms Wikaira's accounts.

[178] I conclude that the information put to the Department's Mr Pattinson and Ms Crabbe about the Otago employee and the most recent list of other employees subjected to disciplinary processes after criminal proceedings had been concluded, put the Department on notice sufficiently that Ms Wikaira challenged the equity and parity of her dismissal when compared with the outcomes in apparently similar cases. Further, I have concluded that the obtaining of this information by counsel for the plaintiff and its use in the hearing raised a sufficient case of apparent disparity of treatment that the onus moved to the Department to justify some apparent disparities by distinguishing those other cases from Ms Wikaira's or otherwise justifying the apparently different outcome of the plaintiff's. Surprisingly, no such attempt was made by the defendant to call evidence from a witness or witnesses with sufficient

knowledge about the circumstances of these cases and documentary records of them, to persuade the Court that although there was prima facie disparity, this was justifiably explicable.

[179] Do these conclusions meet the appropriate test in law for disparity of treatment to become an issue under the s 103A?

[180] The Court of Appeal's judgment in *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* is the most recent authoritative statement of the law.[12] In that judgment, delivered by O'Regan J, the Court reiterated, first, its previous statement of the law from *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd* as follows:[13]

> … if there is a prima facie case of disparity or enough to cause inquiry to be made by the Arbitration Court into the issue of disparity, the employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming.

[181] This test was said in *Buchanan*[14] to have been "refined" by the Court of Appeal in *Samu v Air NZ Ltd* where the *Airline Stewards* test was reproduced and the following added:[15]

> Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.

[182] In *Buchanan*, the Court of Appeal adopted, at least implicitly, a three-stage or three-issue test which had been applied in the United Kingdom in cases referred to. Those three steps were as follows:[16]

(a) Is there disparity of treatment?
(b) If so, is there an adequate explanation for the disparity?

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12 *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] ERNZ 767 (CA) at [40]-[54].
13 At [41], citing *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd* (1985) ERNZ Sel Cas 156, [1985] ACJ 952 (CA) at 158, 954.
14 At [42].
15 *Samu v Air NZ Ltd* [1995] 1 ERNZ 636 (CA) at 639.
16 *Buchanan*, above n 13, at [45].

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[183] The Court of Appeal in *Buchanan* was satisfied that the Employment Court had omitted the third element of the test described above, conflating the second and third elements by defining adequacy of explanation as meaning "adequate in the sense of satisfactory enough to warrant a conclusion that the dismissals were justifiable …".[17]

[184] The Court of Appeal then went on to deal with what it described as "subsequent disparity" cases. These are not in issue in this case in that there is no reliance upon cases similar to Ms Wikaira's but which were concluded by the Department after hers.

[185] Applying the elements of the three-stage test just described, I find that the plaintiff's case has identified an apparent disparity in the sense described by the Court of Appeal in the *Airline Stewards* case that is "a prima facie case of disparity or enough to cause inquiry to be made … into the issue of disparity …".[18] This arises from the particular evidence relating to the Otago officer, and from the summaries of other cases produced by the defendant for this purpose.

[186] Second, there is no real explanation, let alone an adequate explanation, of those apparent disparities despite the defendant having been on notice that this would be, and was, a live question from even before the dismissal.

[187] The third question is then engaged in these circumstances. Was the dismissal justified, notwithstanding the disparity for which there has been no adequate explanation? The first point to make is that this is not a case in which justification for dismissal turns solely on disparity of treatment. If there is unexplained disparity, that is a contributor to the Court's conclusion of an unjustified dismissal. But even if, contrary to my conclusions, there had been an adequate explanation for the apparent disparity, this would not have rendered justified an otherwise unjustified dismissal. The other grounds for finding Ms Wikaira's dismissal unjustified would

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17 At [48].
18 *Airline Stewards*, above n 14.

have continued to support that conclusion in any event. The finding of unexplained disparity in Ms Wikaira's case reinforces that conclusion and the third *Buchanan* test is satisfied.

## Decision – the s 103A 'what' test

[188] Although I conclude, as did the Authority, that the defendant's investigation and decision-making process was comprehensive and well satisfies what might be called the 'how' or procedural test under s 103A(2), that is not the end of the case.

[189] The Court must also conclude under s 103A that what the employer did, that is to dismiss Ms Wikaira summarily, was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred, the 'what' test. Those two separate and cumulative tests are, of course, inter-connected: as has sometimes been said, an employer who does it right is in a better position to get it right. As this case illustrates, however, that is not a universal truth or a necessary sequitur.

[190] The process that the defendant went through, and as a result of which he determined to dismiss the plaintiff, appears on its face to have been a generally fair and comprehensive process. It included, as required, meeting the minimum standards set out in s 103A(3) of the Act. The Department has thorough, even painstaking, processes in place for such situations.

[191] However, although adherence to fair process is expected to produce, at least in most cases, what is also a substantively fair and justified result, that does not always occur and the Authority and the Court cannot assume it will, however good the process appears to be. Put more colloquially, going through the motions of a fair and proper inquiry is not always guaranteed to produce the right outcome: that is that the decision to dismiss could have been made by a fair and reasonable employer.

[192] The tenor of the defendant's case, both in attempting to justify substantially Ms Wikaira's dismissal, and in opposing adamantly her reinstatement if she is found to have been dismissed unjustifiably, is one of unwavering adherence to very high

and invariable standards of conduct. So, for example, it is the defendant's case that a corrections officer's failure to report promptly and fully to his or her manager his or her involvement in a court proceeding, is a fundamental breach of the Code of Conduct and thereby of the trust and confidence expected by the Department in its staff. Similarly, the defendant's case is, equally rigidly, that "unlawful behaviour" (including by admitting to or being convicted of an offence) or bringing the Department into disrepute or negatively affecting the public's perception of it, or by lying or failing dishonestly or 'by omission' to declare or otherwise withhold information, is also serious misconduct leading to a loss of trust and confidence, the likely, if not invariable, consequence of which will be dismissal.

[193] The Department's case admits of very few shades of grey or accommodation of any of the inevitable particular circumstances applying to events which are covered by the Department's comprehensive and strict rules affecting staff conduct, not only at work but in their private or otherwise public lives. I conclude that the Department regards its rules affecting employees as 'black and white'. If nothing else, a Judge's experience of these matters is that it is very rare that there are only bichromatic palettes: grey comes in numerous shades, and not all issues admit justifiably of black or white outcomes.

[194] Behind the façade of a generally thorough investigation and decision-making process (for which the defendant deserves credit), and standing back to look at the circumstances overall, I am left in no doubt that the dismissal of Ms Wikaira was not what a fair and reasonable employer, in all the circumstances, could have done as a consequence of the relevant conduct of both of the parties. I have reached that conclusion by reconsidering in detail the factual background and the evidence of what Ms Wikaira did and did not do.

[195] That examination starts with the events of 3 February 2015. In her role as an executor of an estate, Ms Wikaira was, perhaps with others, liable for significant debts. That liability was brought about by her relation, Mr H, by his failure to properly protect the estate's only asset by fulfilling his obligation, as a life tenant of the house, to insure it against loss by fire. On legal advice, Ms Wikaira attempted to (what is commonly called) "trespass" Mr H from the property of which she was an

executor and trustee. Mr H became unco-operative and then enraged and, in the car he was driving, collided, albeit in a minor way, with a pedestrian, Ms Wikaira, in the course of leaving the property. In the circumstances at that time, and in Ms Wikaira's mind, there was at least a risk that Mr H might attempt to do further physical harm to her. She was vulnerable to this. Her reaction was to defend herself and her property, and I infer also to express her frustration, by hitting Mr H's car windscreen. Although, with the benefit of hindsight, this was not a good strategy as she conceded, Ms Wikaira was under significant pressure. In such circumstances, many otherwise rational, controlled and non-violent people do these things. How many other normally restrained and law-abiding people have sometimes done similar things, albeit without the consequences that ensued for the plaintiff?

[196] Next, Ms Wikaira attempted to advise the Police (as soon as she was able to return to mobile telephone coverage) of what had occurred with Mr H at the property. That was both an appropriate and responsible action by her to what had happened. Mr H appears also to have contacted the Police as a result of the incident. Following interviews of both parties, a police officer elected to charge Ms Wikaira with the summary offence of wilful damage by summonsing her to appear in the District Court at Kaikohe on a future date.

[197] The offence of wilful damage is one of long standing and now appears in the Summary Offences Act 1981.[19] It carries a maximum penalty of three months' imprisonment or a fine of up to $2,000. Its low level of seriousness in the scale of criminal offences may thus be gauged, although it can cover a range of conduct from the quite minor deliberate damaging of property at one end, to sustained, serious and expensive damage to property at the other. Ms Wikaira was at the lowest end of that scale, as the sentencing District Court Judge concluded. A fair and reasonable employer in possession of the relevant facts could have reached no other reasonable conclusion about this aspect of Ms Wikaira's conduct.

[198] Ms Wikaira sought and obtained legal advice about this charge against her and relied on the advice of her lawyer who was experienced in these matters, both as to plea and as to when she was required to appear in court. The issuing of a bench

[19] Summary Offences Act 1981, s 11.

warrant for her arrest when she did not appear in court on one occasion, was the result of a miscommunication between the Court and/or the Police on the one hand, and her lawyer on the other. Ms Wikaira was not responsible personally for failing to appear. She remedied that matter as soon as possible, appeared voluntarily and the warrant to arrest her was not executed and was set aside. She was thereafter re-released on bail, indicating the District Court's acceptance that this was a mix-up in communication. A fair and reasonable employer could have reached no other reasonable conclusion about this aspect of the case.

[199] The outcome of the charge of wilful damage was that Ms Wikaira was discharged without a conviction being entered. Although she had pleaded guilty to the offence on the advice of her lawyer and following her initial insistence on defending it, the discharge without conviction could not have been granted otherwise and amounts in law to an acquittal. Again, a fair and reasonable employer could not have reached any other reasonable conclusion about why a guilty plea was entered by her. It was artificial and unrealistic in these circumstances to have maintained simply that if she was blameless, she should have pleaded not guilty and gone to trial many months later. Knowledge and experience of the criminal justice system and human characteristics means that counterintuitive decisions are often made for practical reasons, especially on professional advice which weighs up risks and benefits to the individual defendant.

## Errors in dismissal decision-making

[200] Those errors in Mr Rongo's decision-making which I find he identified in his recorded advice to the plaintiff included, first, that it was a breach of the Code of Conduct that a corrections officer was charged with a criminal office. Next, Mr Rongo took into account in deciding to dismiss Ms Wikaira, that she had lied, although this was not ever an allegation put to her or investigated by the defendant. Third, Mr Rongo considered wrongly that Ms Wikaira was required by the Code to report her prosecution to the employer immediately. And finally, Mr Rongo concluded erroneously that her actions had put, or had the potential to put, the Department's reputation at risk.

*Charge of wilful damage*

[201] I have concluded that Mr Rongo acted erroneously in his interpretation and application of significant elements of the Department's Code of Conduct. He concluded that the fact of a corrections officer's appearance in a District Court, charged with a minor offence unconnected with her work, alone amounted to a breach of the Code and, thereby, to misconduct on the part of the employee. Despite the carefully written letters to Ms Wikaira setting out the defendant's position at various stages of its investigatory process, I have decided that Mr Rongo, himself as the defendant's decision-maker, applied this erroneous interpretation to his reasoning that led to Ms Wikaira's dismissal, as illustrated by the evidence he gave to this Court.

[202] In the letter, which again set out the allegations and the ways in which the Department's expectations had been breached, Mr Rongo's stated reasoning for rejecting the submission for Ms Wikaira, that being charged with an offence breached the Code of Conduct, did not address that correct and significant submission. Rather, it focused on the conduct that led to the outcome of the criminal charge but not, as Mr Quarrie had identified correctly, the fact of being charged as Mr Rongo said was significant. If one accepts the presumption of innocence until conviction, and that being charged does not presume or amount to guilt of a criminal offence, both the inadequacy of the defendant's response to that position, and its untenability, are exposed.[20]

[203] Nor, of course, does the Code of Conduct say that the act of being charged with a criminal offence amounts to a breach of it. The defendant proceeded on an erroneous assumption in this regard and persisted in it in deciding to dismiss Ms Wikaira for serious misconduct. It used this erroneous reasoning to support that dismissal. It was inconsistent with Mr Rongo's earlier statement to Ms Wikaira that if the charge was "thrown out", she could expect to be back on the job.

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[20] This is such a fundamental precept of New Zealand's constitutional fundamentals that it transcends criminal law and infuses other branches, including in applicable cases, employment law. See New Zealand Bill of Rights Act 1990, s 25(c); and the Universal Declaration of Human Rights GA Res 217A (III) (adopted 10 December 1948), art 11(1).

*Lying*

[204] Further, one of the elements that Mr Rongo used to support the decision to dismiss Ms Wikaira was not one of the allegations that were investigated and on which Ms Wikaira was given opportunities to make submissions, including as to the consequence of this alleged misconduct if it was admitted or proven. In his remarks to Ms Wikaira, Mr Rongo described this misconduct as "lying by omission". If anything, "lying" by Ms Wikaira was by commission rather than omission in that the defendant says that she lied to the Department when she claimed sick leave for an occasion on which she appeared in court when she was otherwise rostered for duty at the prison. Nothing turns, however, on Mr Rongo's misplaced terminology. That conclusion of lying, nevertheless, breaches the minimum requirements of procedural fairness set out in s 103A(3) of the Act because this was not ever made known to Ms Wikaira as one of the misconducts alleged against her. Although she was not given that advice or an opportunity to comment on it, I am satisfied that it nevertheless formed one of a number of grounds for her dismissal.

[205] On its own, this error may or may not have justified Ms Wikaira's dismissal, but it is not a matter of such minor moment that it can be ignored under s 103A(5). Rather, its significance lies in the fact that it was another unfair conclusion reached by the Department contributing to its decision to dismiss her.

*Not immediately reporting the charge*

[206] Turning to the next matter of Ms Wikaira's disclosure of the charges against her to the Department, Mr Rongo wrote that his view remained unchanged that it "would have been more appropriate" to advise him of her first court appearance and that disclosing to her manager any charge laid against her was required by the Code of Conduct.

[207] It is notable in the letter of 11 September 2015 that the defendant retreated from its previous position that the Code of Conduct required immediate notification of the Department in such circumstances. This is despite what I conclude was Mr Rongo's belief and personal conclusion that immediate advice was required. The

defendant's position then became that the spirit of the Code of Conduct required an immediate disclosure, even although the text of the Code of Conduct may not have done so. It is difficult for the defendant, however, to say both that Ms Wikaira was expected to be familiar with the Code of Conduct and to follow it and, at the same time, that she was expected to comply with an unwritten and, at best, inferential obligation to report her circumstances immediately in circumstances where the Code of Conduct did not say that.

[208] Mr Rongo in particular, and thereby the defendant, whose representative he was, again misinterpreted an important part of the Code of Conduct relating to the reporting of relevant events by Ms Wikaira to her manager. Purporting to rely on words or phrases that did not appear in the Code of Conduct, Mr Rongo dismissed Ms Wikaira in part because she did not immediately report to her manager the incident which led to, and the fact of, her court appearance. In the absence of such a temporal requirement, the defendant was compelled to argue, but unconvincingly, that this was an implicit expectation of the employer, breach of which contributed to serious misconduct and therefore in justification for dismissal. Unlike the previous iteration of the Code of Conduct but which had not operated for a number of years, the relevant Code affecting Ms Wikaira contained no requirement as to when such a report was to be made.

[209] I conclude that the finding that Ms Wikaira's failure to declare to the Department the charge against her at the time it was first brought before the Court, was not a breach of the Code of Conduct and could not reasonably have been one.

*Department's reputation*

[210] Next, the defendant reached the untenable conclusion that the events of 3 February 2015 and following, risked bringing the Department into disrepute, either with specific identified groups of people (local police, court staff, other corrections officers and inmates) or generally in the community. In failing to assess that risk by considering all relevant circumstances of Ms Wikaira's conduct, the defendant did not bring an objective, neutral and informed analysis to the assessment of that risk

and thereby could not have concluded reasonably that it existed or that its existence also justified Ms Wikaira's dismissal.

*Choice to plead guilty*

[211] Next, as to the 3 February 2015 incident which precipitated these events, Mr Rongo's letter recorded Ms Wikaira's account of the incident largely accurately. It then went on to say that, while he acknowledged that she had accepted responsibility for her actions, nothing in her explanation had allayed his concern that she had chosen to plead guilty. While he said that he understood her reasons for doing so, he repeated that admitting the offence was a breach of the Code of Conduct leading to his loss of trust and confidence in her ability to be a role model to prisoners and offenders.

[212] In this regard, I conclude that the defendant focused unduly on the single fact that Ms Wikaira entered a plea of guilty to the charge of wilful damage for the reasons that she did. That was a narrow and technical view of both the Code of Conduct and of the operation in practice of the way in which minor offences before District Courts are dealt with expeditiously and pragmatically, albeit sometimes counter-intuitively and even perhaps in an apparently and arguably unprincipled way.

[213] The failure to properly consider and put in context the reasons for a plea of guilty being entered, caused the Department's focus on the fact only of entering a guilty plea, to be erroneous.

*Disparity*

[214] Finally, in light of both Ms Wikaira's submission during the investigative process that she should not be treated disparately from other corrections officers in material circumstances and, before and during the hearing this issue having been identified by the plaintiff, the defendant did not justify the evidence of apparent disparity. This had been raised by the plaintiff's case and it could and should have been addressed by the Department, at least satisfactorily. I have concluded that this failure to differentiate demonstrably Ms Wikaira's case from others of her colleagues

for similar or more serious misconduct, is so significant that it fails to justify the fairness and reasonableness of her dismissal as the consequence of any misconduct.[21] Parity of treatment of corrections officers charged with minor criminal offences was an important element of fair treatment of them and Ms Wikaira in particular. Its absence without explanation risked a finding of arbitrariness by the employer which is inimical to its obligations generally as an employer. Its significance lies also in a flawed and unobjective focus of its investigations and conclusions.

*Could the dismissal have otherwise been justified?*

[215] I deal also with whether Mr Rongo's conclusion on the other grounds for dismissal (which I accept were not flawed in the same way as the foregoing) in my consideration of whether the decision to dismiss was what a fair and reasonable employer in all the circumstances could have made. In other words, excluding these several erroneous assessments, could Ms Wikaira's dismissal have nevertheless been justified? I have concluded it could not have been a justified dismissal even if these several flaws had not played a part in the decision to dismiss.

[216] In giving evidence, Ms Crabbe conceded that, as she sat listening to Mr Rongo deliver this dismissal decision to Ms Wikaira on 11 September 2015, she realised he had made mistakes in doing so. She felt, however, that it was not her place to intercede and correct these, or otherwise seek to rectify those errors by adjourning the meeting and speaking with Mr Rongo about them. Nor, significantly in my view, did Ms Crabbe even consider that it was appropriate, after the decision had been announced, to identify those errors she realised had been made by Mr Rongo and, even belatedly, to revisit the decision that had been made, to ensure that it had been done for the right reasons. It is concerning that a senior expert adviser to the Department in effect allowed, by her silence and adherence to the employer's philosophy that managers were to be responsible for these things, clear and significant errors to go uncorrected and lead to an employee's dismissal.

[217] As already noted, the letter confirming the dismissal dated 11 September 2015 (handed to Ms Wikaira at the conclusion of the meeting) had been prepared

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[21] See the third test in *Buchanan*, above n 13.

with significant assistance from Ms Crabbe and perhaps also other expert employment advisory staff at the Department, although it was over the name and hand of Mr Rongo as Operations and Movements Manager.

[218] It is for the foregoing reasons, therefore that I have concluded that a fair and reasonable employer could not have dismissed the plaintiff in all the relevant circumstances at the time that this occurred. Despite the application of a generally fair process to its investigation and dismissal of Ms Wikaira, the defendant got the result wrong in multiple and important ways. A fair and reasonable employer in the position of the defendant at the relevant times, could not have dismissed the plaintiff as Corrections did. Ms Wikaira was dismissed unjustifiably.

## Remedies

*Reinstatement*

[219] Reinstatement is sought but opposed adamantly by the defendant. The test to be applied by the Court is in s 125 of the Act. The Court must be satisfied that it is practicable and reasonable to reinstate the plaintiff to her former position as a corrections officer at the Northland Prison or to a position no less advantageous to the employee (s 123(1)(a)).

[220] First is the relevant evidence and assessment of it, in support of reinstatement. The plaintiff has struggled to find any, let alone equivalent, employment in the economically depressed area of South Hokianga where she lives, or in or around Kaikohe near to where the Northland Prison is located. The plaintiff is now 50 years of age and had, until her dismissal, a substantial and generally unblemished record of service as a corrections officer at the Northland Prison. Her dismissal and the reasons for it have, I infer, prevented her in several instances from obtaining employment in which the attributes that the Department found absent in her are desirable or necessary. She has had to be, and has been, frank about the circumstances of her previous employment when seeking alternative work. I conclude that, unsurprisingly, this is likely to have made her searches for jobs much more difficult and unproductive.

[221] Further, I have little doubt that the dismissal, and the subsequent proceedings before the Authority and this Court, will have emphasised to the plaintiff the Department's very rigorous expectations of staff, so that there is a significantly lessened likelihood that she may again fall into the traps that she did. Further, I am confident, as was the District Court Judge who discharged the plaintiff without conviction, that she is very unlikely to appear as a defendant in court proceedings, and especially in respect of trivial incidents which saw her charged with, but then acquitted statutorily of, wilful damage. Ms Wikaira wishes strongly to return to her chosen and valued career.

[222] Now to the defendant's opposition to reinstatement. This is based on its assertion that, irrespective of the outcome of the case, the Department has so lost trust and confidence in the plaintiff that she could not practically or reasonably again be a corrections officer. That assertion cannot, however, be divorced from, and maintained justifiably after, the Court's finding that Ms Wikaira was dismissed unjustifiably. The Department could not, as a fair and reasonable employer, have concluded as it did, that it had lost completely the essential elements of trust and confidence in the employment relationship. Any such loss could only, reasonably, have been both temporary and repairable in my assessment. When the Court's reasons for concluding that Ms Wikaira was unjustifiably dismissed are analysed, the Department's staunch and uncompromising opposition to reinstatement loses much, even most, of its force.

[223] Although it has been suggested that other staff might be uncomfortable working alongside Ms Wikaira, or even not trust her, the probable truth of that assertion has not been supported by any direct evidence. As Mr Rongo (who was at the time of the incident Operations Support Manager at the Northland Prison) conceded when asked, once the full circumstances leading to Ms Wikaira's dismissal are known to colleagues, they will be in a better position to assess for themselves their response to her reinstatement. I do not consider that any fair and reasonable corrections officer could, in that knowledge, object justifiably to working alongside the plaintiff as I accept the Department's staff must do in a mutually supportive and sometimes potentially dangerous environment.

[224] I consider the remedy of reinstatement to her former role, on conditions outlined below, to be both practicable and reasonable. There will be an order accordingly, albeit on conditions, made at the end of this judgment.

*Reimbursement of lost remuneration*

[225] I deal first with the law on mitigation of economic loss. Because an important judgment of the full Court had been issued only a few days before the last day of the hearing, counsel for the parties were given an opportunity after its conclusion to file submissions addressing the effect, if any in this case, of the judgment in *Xtreme Dining*.[22]

[226] The relevant part of this judgment makes reference to obligations at common law to mitigate loss arising from an actionable wrong.[23] The Court followed the summary of the position by the Court of Appeal in *Walop No 3 Ltd v Para Franchising Ltd* where it held that in an action for damages for breach of contract, the innocent party is under no obligation to prove that all reasonable steps to mitigate loss were taken by it.[24] As the full Court noted in *Xtreme Dining*, applying the relevant passages in *Walop*:[25]

> … Rather, the onus is on the defaulting party to satisfy the Court that damages should be reduced because a plaintiff has failed to take reasonable steps to mitigate loss consequent on a defendant's wrong and should not be permitted damages in respect of any part of the loss due to the plaintiff's neglect to take such steps.

[227] This is said to have followed the longstanding position at common law, illustrated, for example, by the judgment of the House of Lords in *Banco de Portugal v Waterlow and Sons Ltd*.[26]

[228] Subsequent United Kingdom authority re-established the foregoing principles and added:[27]

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22 *Xtreme Dining*, above n 2. This was a personal grievance case. The same principles as in a breach of contract case are applicable to personal grievances in employment law.

23 At [93].

24 *Walop No 3 Ltd v Para Franchising Ltd* CA20/03, 23 February 2004.

25 At [7].

26 *Xtreme* Dining, above n 2, at [94] citing *Banco de Portugal v Waterlow and Sons Ltd* [1932] AC 452 (HL) at 506.

(i) It was the duty of [the claimant] to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from ... his former employer;

(ii) The onus was on [his former employer] as the wrongdoer to show that [the claimant] had failed in his duty to mitigate his loss by unreasonably refusing the offer of re-employment;

(iii) The test of unreasonableness is an objective one based on the totality of the evidence;

(iv) In applying that test the circumstances in which the offer was made and refused, the attitude of [the former employer], the way in which [the claimant] had been treated and all the surrounding circumstances should be taken into account; and

(v) The court or tribunal deciding the issue must not be too stringent in its expectations of the injured party. The circumstances to be taken into account under (iv) included the state of mind of [the claimant].

[229] The judgment of Sedley LJ makes it clear that the wrongdoer must show that the innocent party was unreasonable in not taking steps proposed by the wrongdoer. He said:[28]

> … it is not enough for the wrongdoer to show that it would have been reasonable to take the steps he has proposed: he must show that it was unreasonable of the innocent party not to take them. This is a real distinction. It reflects the fact that if there is more than one reasonable response open to the wronged party, the wrongdoer has no right to determine his choice. It is where, and only where, the wrongdoer can show affirmatively that the other party has acted unreasonably in relation to his duty to mitigate that the defence will succeed.

[230] Although the defendant criticised the plaintiff's attempts at mitigation as inadequate and inadequately proved, I disagree. I have set out what Ms Wikaira did and she has established this in evidence sufficiently.

[231] Having established that she was dismissed unjustifiably, Ms Wikaira is entitled to a minimum of three months' remuneration which was lost as a consequence of her dismissal or, if her actual loss was more, the lesser of these two figures.[29] In addition, the Court has a discretion to award greater compensation for

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27 *Wilding v British Telecommunications PLC* [2002] EWCA Civ 349, [2002] ICR 1079 at [37].
28 At [55].
29 Employment Relations Act 2000, s 128(2).

remuneration loss than three months' equivalent.[30] In Ms Wikaira's case there is no doubt that her actual remuneration loss exceeded three months' loss.

[232] As part of assessing this remuneration loss, the Court must consider the realistic counterfactual. This means asking what would have been the position had Ms Wikaira not been dismissed as she was. I conclude, as a matter of probability, that her employment would have continued long-term, although she might have had a warning recorded on her file reflecting a fair, and measured consequence for any proven misconduct, for example, in failing to keep her employer advised of changes in her court status. I also find to a high level of probability that there would not have been a repeat either of any incident related to the contretemps with her stepfather on 3 February 2015, or any similar incident involving anyone else. That assessment is made as a result of a number of factors including the absence of any criminal convictions against her at her age of 50 years; her steady and generally unimpeachable record of service with the Department; and, not least, because of the sobering experiences engendered by the events of 3 February 2015 including her dealings with the Police, with the District Court and during what would have been an appropriate investigation by the Department, albeit one that did not reach the conclusions that the defendant did.

[233] In these circumstances, I am not persuaded that Ms Wikaira would not have continued to be a corrections officer at the Northland Prison up to and until the present time. Therefore, subject to any deduction for contributory fault under s 124 of the Act (with which I deal subsequently), she should have as compensation her remuneration lost between the date of her dismissal and the date of her reinstatement, less any earnings received by her from alternative employment in the meantime.

[234] Whether dealt with as an element of remuneration or otherwise under s 123(1)(c)(ii), Ms Wikaira should have, for the same period, compensation for any associated losses including KiwiSaver contributions and benefits (including her employer's) for that period. Any other service-related benefits to which she may be

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[30] Sections 123(1)(b) and 128.

entitled should be calculated assuming that she has had continuous service as a corrections officer since her dismissal.

[235] There was no, or at least insufficient, evidence about the amounts of these losses, although to deprive her of them now for that reason would not be equitable or in good conscience. Accordingly, having determined the nature of these monetary losses, the parties are invited to settle between them the amounts involved. If they are unable to do so within the period of three calendar months of the date of this judgment, leave is reserved for Ms Wikaira to apply further to the Court for those amounts to be fixed.[31]

*Compensation for non-economic losses*

[236] Whilst, because of the lengthy and thorough process undertaken by the defendant, her dismissal could not have come as a completely unexpected shock for Ms Wikaira, it nevertheless affected her significantly. In my assessment, she continued to be affected adversely even when she came to give evidence before the Court. I assess Ms Wikaira as being not only somewhat fatalistic in some respects but also stoic and undemonstrative, at least publicly in a court setting. Although not so describing it herself or through others, my assessment of the position is that Ms Wikaira was both distressed and ashamed as a result of her dismissal and of the inevitable knowledge of that to family and friends in the relatively close community in which she lived. This knowledge inevitably extended to other staff at the prison where both her brother and her husband are also employed, although it is of course her response to this extended situation that is compensable and not the feelings of relatives. Her non-economic losses as a result of her unjustified dismissal were, and are, long-lasting and, although borne deeply, are nevertheless real, enduring and painful.

[237] Again subject to s 124 considerations, I assess that a moderate amount of monetary compensation for s 123(1)(c)(i) consequences is warranted and I set this in the sum of $20,000. In doing so I have had regard to recent levels of awards made

[31] This takes into account the forthcoming holiday period.

by this Court and reflecting the desirability that these awards should be, although not over-generous, nevertheless fair, realistic and not miserly.

*Section 124 reduction?*

[238] Counsel for the defendant submitted that if the Court were to provide remedies for unjustified dismissal, these should be reduced by the "maximum amount possible" under s 124 of the Act which provides:

> **124 Remedy reduced if contributing behaviour by employee**
> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[239] The recent judgment of the full Court in *Xtreme Dining* has, however, determined that such a result is not a proper application of the s 124 power to "reduce", and also that the Court and the Authority should consider carefully the amount or other means of measuring any reduction which is required as a result of contributory fault.[32] Very substantial reductions are to be reserved for very significant cases of contributory fault. They are not to be either an automatic feature of awards of monetary compensation, or imposed other than where this and their amounts are justified by evidence of truly culpable misconduct which contributed to the situation giving rise to the grievance.[33]

[240] Ms Wikaira did contribute culpably to the situation that gave rise to her grievance. She misled the Department when telephoning her advice that she would not be attending work on the day of her first court appearance, saying that she was ill. Although Ms Wikaira may have felt sick about the prospect of having to do so, that was not the purpose of the sick leave which she took by misrepresenting to the Department the real reason for her absence.

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[32] *Xtreme Dining*, above n 2.
[33] At [126], [217]-[222].

[241] Next, Ms Wikaira asserted in her explanations to the defendant's investigation that she did not initially realise that her involvement with the Police and the District Court meant that she was charged with an offence, albeit a minor one. In my assessment, it is improbable that Ms Wikaira did not appreciate the nature of the Police and court process to which she was subjected, at least after attending at the Court for the first time. Very shortly after the incident with her stepfather, she telephoned the Police to advise of its occurrence. She was interviewed by a constable at the Kaikohe Police Station when asked to attend in relation to that matter. On that occasion she was handed copies of documents including a summons to defendant specifying the charge that she "wilfully damaged the car of [Mr H]" and requiring her to appear in the District Court at Kaikohe at 9 am on Wednesday 25 February 2015.

[242] Next, when Ms Wikaira appeared before the District Court (I assume in a Registrar's list) at 9 am on 25 February 2015, her case was adjourned (I assume, again, without a plea having been entered) and she was granted bail. The bail notice given to her required her to attend again at the District Court at Kaikohe at 9 am on 11 March 2015 with conditions that she reside at her home address and that she was not to contact the complainant. Ms Wikaira signed the bail notice, confirming that she had received a copy of it, and that she understood the conditions of her bail.

[243] I accept the plaintiff's evidence that she has never previously had any involvement with a criminal court, including in connection with her work as a corrections officer, and that she was not familiar with the processes undergone or the sorts of forms which she was given. However, I do not accept that, certainly after her first appearance in court on 25 February 2015, she could have been unaware of the fact that she was being prosecuted by the Police over this incident. Her denial of awareness, at least until a later stage of the prosecution, caused the defendant to reach the same conclusion and, thereby, to question her veracity on this point.

[244] Finally, s 124 is engaged by Ms Wikaira's failure to adhere to the defendant's repeated advice that she keep it informed of developments in her prosecution. She did not do so, at least as well as she should have. I do not accept as reasonable what appeared to be Mr Rongo's expectations of immediate and very detailed advice to

him of things like her lawyer's advice to her. Those were private and privileged matters. However, the essential aspects of this request by Mr Rongo of Ms Wikaira were reasonable, such as forewarning him of the dates of her court appearances; she failed to do this as she should have.

[245] These contributory actions warrant a reduction in monetary remedies to which Ms Wikaira would otherwise be entitled. For those elements of contributory conduct which I have identified, I consider a 15 per cent reduction in all monetary remedies is warranted and this should be reflected in the final figures either that the Court determines or the parties may settle. For clarity, the remedy of reinstatement and its consequences for service-related benefits are not affected by s 124, only monetary amounts to be paid out to her.

## Costs

[246] The plaintiff is entitled to a contribution towards her legal costs in both the Authority and in this Court.

[247] Applying the Court's current costs guideline pilot, the parties are encouraged to agree costs and disbursements, the former being a 2B award, with the latter (disbursements) to be settled by the Registrar if the parties cannot agree upon this. Similarly, if costs cannot be agreed, leave is reserved to apply to the Court for these to be fixed. In relation to Authority costs, the parties are recommended to have regard to the Authority's (then) standard rate of $3,500 per investigation meeting day.

## Summary of remedies

[248] First, Ms Wikaira is be reinstated forthwith as a corrections officer at Northland Region Corrections Facility. That reinstatement is to take the form, immediately, of paying her future salary and any other allowances as if she were working.

[249] Actual performance by Ms Wikaira of her duties as a corrections officer is, however, subject to a reasonable period of re-familiarisation with those duties and the institution, including any updating or retraining as may be appropriate for a former member of staff away from the prison for as long as Ms Wikaira has been.

[250] The parties' attention is drawn to the ability of the Mediation Service of the Ministry of Business, Innovation and Employment to assist in the reintegration of a reinstated employee in these circumstances if that may be necessary.

[251] Next, Ms Wikaira is to have a payment of compensation for lost remuneration as she would have earned between the date of her dismissal and the date of her reinstatement. This is, however, subject to deduction of any remuneration that she has earned elsewhere during this period and is also subject to a second reduction of 15 per cent pursuant to s 124 of the Act.

[252] In addition to compensation for lost remuneration, Ms Wikaira is entitled to compensation for any allowances or other benefits including, if appropriate, KiwiSaver contributions by the defendant as if she had not been dismissed. This is likewise subject to a 15 per cent reduction under s 124.

[253] Next, Ms Wikaira is entitled to compensation under s 123(1)(c)(i) of the Act in the sum of $20,000 but subject to a reduction of 15 per cent, bringing that final figure to $17,000.

[254] Ms Wikaira is entitled to costs as outlined in the body of this judgment.

[255] For the sake of clarity and although a formal warning for misconduct may have been warranted instead of her dismissal, the subsequent events have more than amply fulfilled the function of a warning so that Ms Wikaira's employment record should remain as it stood immediately before her dismissal.

## Observations

*Criminal sentencing and its effect on employee offenders*

[256] Questions of sentencing of employees in criminal courts and, in particular, of discharges without conviction (and non-publication orders), have been canvassed in another judgment which, although subject to ongoing appeals, is unaffected by them. In *Hayne v ASG*,[34] the full Court commented on the respective roles of sentencing Judges and employers of employees who appear in criminal courts charged with offences. The judgment emphasises the desirability of accurate information about employment implications of the criminal process being before a sentencing Judge, and the value to the employer of considering the observations of the sentencing Judge when a discharge without conviction is ordered.

[257] In the Court of Appeal in *ASG*, the Court made influential and novel observations about the obligations to their employers of employees charged in criminal courts.[35] In so doing, the Court identified the role that s 4 of the Act plays in such situations. It said, forthrightly:[36]

> We are in no doubt that the duty of good faith s 4 imposed on ASG required him to disclose the charges he faced to the University as his employer. Had he done so, the whole of this proceedings (the hearings before the Authority and the Employment Court, and this appeal) would have been unnecessary.

[258] The Court found the employee (ASG) to have been in breach of his s 4 duty of full disclosure of relevant material to the employer.

[259] Unfortunately, the opportunity to be involved in the criminal court and sentence processes did not happen in this case because of the defendant's unwavering stance on principle that the Department had to, and had to be seen to, maintain neutrality and, as it perceived it, could not be seen to be assisting an employee facing a criminal charge. The defendant, and others in similar situations in future, may care to reflect on the desirability of it doing otherwise than it did in this

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34 *Hayne (Vice-Chancellor of the University of Otago) v ASG* [2014] NZEmpC 208, [2014] ERNZ 562 at [30]-[32].
35 *ASG v Hayne* [2016] NZCA 203.
36 At [32].

case. As the *Hayne* case established, an appropriate degree of non-partisan participation in the court case, as Ms Wikaira invited the Department to do, or at least certainly a more comprehensive examination of the available documentation from the criminal court case, would have assisted the defendant as employer. Objectivity and neutrality are not lost necessarily as a result of doing so in a considered way that assists sentencing courts, employees and employers, as the defendant appeared to believe it could and should not do.

*Creation or retention of important documentary records*

[260] As I noted during the hearing, there was a remarkable absence of documentary records in evidence about important communications within the Department. The Court expects that these would have been created and kept. It may be that no formal disclosure and inspection of documents was sought under the Employment Court Regulations 2000. Witnesses for the Department deposed, however, that (in contrast with those meetings held with the plaintiff) they did not record or minute or otherwise keep any records of important meetings or other internal dealings with the matter of Ms Wikaira's employment that led to her dismissal. That included about the preparation of important correspondence that, although it emerged over Mr Rongo's signature, had significant input from human resources experts. There was no claim to legal professional privilege to any internal departmental documents. It is counter-intuitive and remarkable that no managerial records of the Department's careful and even painstaking processes were made where, for example, drafts of documents would have been expected to have been made and kept, or records of critical advice given to Mr Rongo.

[261] Accepting, as I do, the sworn evidence for the Department that such documentation did not and does not exist, that is a remarkable absence in relation to serious dealings with an employee of a major government department from which it was at least possible that litigation might arise. More particularly, it is an extraordinary practice within a government department in which detailed record-keeping about its operations is especially important. There was a suggestion from the defendant that although it keeps particular and thorough records about inmates, that does not mean that it adopts a similar standard in respect of its employees, even

those employees charged with custodial responsibility for those inmates. I was told that all internal communications within the Department about these events leading eventually to Ms Wikaira's dismissal, were conducted orally; that no notes or other records were maintained of them; and, I infer also, that none of these communications was by retrievable email or otherwise in reproducible hard copy.

[262] If that is so (and I am faced with the sworn evidence of senior departmental representatives that it was) that is arguably a major failing of employment relations management by a substantial and well-resourced government department in respect of important issues that have a track record of ending up not infrequently in litigation. Pursuant to s 123(1)(ca) of the Act, I recommend to the defendant to institute and maintain appropriate record-keeping practices in relation to employment matters that may, as this case has, end up in litigation. Such practices will benefit all concerned, not least the Chief Executive of the Department as employer.

GL Colgan
Chief Judge

Judgment signed at 5 pm on 20 December 2016