

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2014] NZEmpC 174
WRC 17/13**

IN THE MATTER OF a challenge to the determination of the
Employment Relations Authority

BETWEEN WORKFORCE DEVELOPMENT
LIMITED
Plaintiff

AND LYNDA JEAN HILL
Defendant

WRC 19/13

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN LYNDA JEAN HILL
Plaintiff

AND WORKFORCE DEVELOPMENT
LIMITED
Defendant

Hearing: 3-6 March 2014, 23 June 2014 and by submissions filed on 30
June 2014 and 3 July 2014
(Heard at Wellington)

Appearances: S Webster, counsel and D McLeod, advocate for Workforce
Development Limited
P O'Sullivan, advocate for Lynda Hill

Judgment: 19 September 2014

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] Workforce Development Ltd (WDL) is a company specialising in adult literacy training. It is party to a contract with the Department of Corrections (Corrections). Under the contract WDL provides literacy and numeracy tuition to

serving prisoners. This is done by tutors, employed by WDL, one of whom was the defendant – Mrs Hill.

[2] Not surprisingly Corrections takes a cautious approach to security issues. This extends to the way in which prison staff and others working within the prison environment engage with prisoners. Prison Managers are vested with wide discretionary powers to authorise – and decline – access to the prison. Tight controls are in place for restricting what can come into and go out of prisons, for obvious reasons. Under the contract with WDL, Corrections in its sole discretion could withdraw access for tutors, on either an interim or permanent basis.

[3] Around September 2011 prison management became aware that Mrs Hill had sent a postcard to a serving prisoner while she had been away overseas on holiday. It also appeared that this was not an isolated event and that Mrs Hill had sent correspondence to the same prisoner while she had been a tutor at Whanganui prison. While Mrs Hill considered this to be an entirely innocent gesture, designed to encourage the prisoner's learning, prison management did not take such a benign approach.

[4] Ms Bernard, Manager Contracts and Services at Hawkes Bay prison at the time, considered that the communications raised serious safety concerns, including in relation to boundary issues between Mrs Hill and the prisoner. Ms Bernard advised the manager of WDL, Ms Greenhalgh, of her concerns and told her that consideration was being given to suspending Mrs Hill from the prison site on an interim basis pending further investigation. This is what subsequently occurred.

[5] Suspended access meant that Mrs Hill was unable to undertake her tutoring tasks. WDL placed Mrs Hill on suspension and advised her that, depending on the results of Correction's investigation and decision-making, her employment might be in peril. This advice was founded on a term of her employment agreement, which provided that:

It is further agreed that at any time, should the Department of Corrections consider you to be in breach of any of their rules or policies, and as a consequence deem this breach by you to be serious, they may withdraw your access to one or all their sites.

In this instance, and should the Department of Corrections decision become final, and there are no other positions for you to fulfil, [WDL] may terminate this Employment Agreement through the notice provisions.

[6] I pause to note that Mrs Hill gave evidence in chief that she had not read the employment agreement, but conceded in cross-examination that she would have read it prior to initialling each of its pages. The agreement made it plain that:

No Employee shall have any communication with an inmate unless in relation to the programme ... Employees must retain professional distance from inmates and not form friendships with inmates...

[7] The agreement included a job description which set out a number of responsibilities and acknowledgements, including that Mrs Hill:

Read, understand and implement all relevant [Prison Service] and Company Handbooks, Health & Safety policy requirements for working in and how to behave in prisons.

[8] The employment agreement also stated that:

The responsibility to complete the induction and orientation process, along with attendance at relevant courses and completion [of] required documents is exclusively yours.

[9] Despite acknowledging these obligations Mrs Hill did not seek out, or read, the handbooks and other documentation referred to.

[10] Clause 2 of the contract between WDL and Corrections set out the process that would be followed by Corrections in deciding whether to withdraw access to a WDL staff member. The contract provided that Corrections could “at its sole discretion” and “for any justifiable reason” withdraw prison access for any of WDL’s staff members. Within five business days of initial notification of withdrawal of access, Corrections was obliged to provide WDL with written notification as to the circumstances of the decision. Within a further ten business days, Corrections was to convene a meeting with representatives of WDL and the affected staff member to enable all parties concerned to explain the reasons for the situation. Corrections was required to consider any explanations put forward, and within ten working days of the meeting advise the parties of its final decision in writing.

[11] Mrs Hill was not privy to the contract between WDL and Corrections. However, she was aware from the terms of her employment agreement that Corrections had the power to remove her access to the prison and if that occurred, and there was no other position for her within WDL, she was liable to have her employment terminated.

[12] Mr Dack, Acting Security Manager for Corrections, undertook an investigation (the Dack investigation). He met with Mrs Hill as part of his inquiries. His conclusions were set out in an email dated 15 September 2011, including that:

At the end of August 2011 a postcard was intercepted at Hawkes Bay Prison. The postcard was addressed to [the prisoner] and was sent by a tutor currently employed by Work Force and contracted to deliver educational courses at Wanganui Prison.

The contents of the post card indicate this is not the first card sent as it mentions a previous one sent the year before. [Mrs Hill] also requests that [the prisoner] write back but send the letter through the programmes facility at Wanganui Prison. The request just asks to tell everyone how [the prisoner] is doing. The rest of the postcard is general tourist chatter and of no significance.

Ms Hill was genuinely apologetic and understands she has crossed an ethical boundary.

She stated that the first postcard was sent whilst she was not employed or contracted by the department to deliver courses.

She admits that the second postcard was sent whilst employed/contracted by the department and now realises it was wrong.

...

Ms Hill has only received an Induction at Manawatu Prison, although I think she has had specific induction through programmes she has not had a specific site induction here and that should be rectified immediately. She has not received any "Staying Safe" or "Getting Got" training and this should be remedied as soon as possible.

I find that this has been an innocent mistake and that Ms Hill has been honest and open about what has happened. There is little to substantiate any wrong doing.

Ms Hill has been advised of her professional boundaries and has been left with no doubt that if a further occurrence comes to light or is discovered it will be a direct breach of her contract.

I also suggest that she attends the next "Getting Got" presentation and that all other tutors and programme providers also attend.

[13] Mrs Hill was copied into the email but says she never received it. That may be because it was sent to her via the Corrections intranet. As at the date of the email Mrs Hill had been suspended from the site. Mrs Greenhalgh did not receive a copy of Mr Dack's email at the time either.

[14] While it is apparent that Mr Dack considered the incident to be an innocent mistake that could adequately be addressed by further training, he was not the Prison Manager and did not have the power to make decisions as to what, if any, action might be taken in relation to the postcard incident. Ms Bernard, who had sought the investigation, was copied into Mr Dack's report. Notwithstanding the views that Mr Dack had expressed she regarded the incident as a very serious one.

[15] Mrs Greenhalgh was also concerned about the incident, including the potential safety issues it might give rise to for Mrs Hill. She discussed this with Mrs Hill. Mrs Greenhalgh was keen to ensure that the process set out in the contract between WDL and Corrections was followed. She immediately wrote to Corrections on 16 September 2011, noting that the Dack investigation had been conducted without her prior knowledge. She made it clear that suspension from the prison site gave rise to employment issues for WDL and that there was a need to follow a careful process. She also raised concerns about difficulties she had been encountering in securing training (the "Getting Got" programme) for tutors.

[16] Mr Kaiwai, the then Prison Manager, responded to Mrs Greenhalgh's letter advising that Mrs Hill's access had been suspended until further notice, to:

...allow a thorough investigation into the situation ... and to provide assurance that she, your organisation and the Department of Corrections are being protected in the appropriate manner.

[17] Mrs Greenhalgh took steps to keep Mrs Hill advised of the process going forward, as set out in the WDL/Corrections contract. Mrs Greenhalgh also took steps to hurry Corrections along with its investigation, reminding the Department of the contractual timeframes for completing various stages of the process.

[18] On 29 September 2011, Mr Kaiwai wrote to Mrs Greenhalgh again and set out a “summary of information” which had been taken from an internal email from Ms Bernard. This included a number of listed concerns:

I have serious concerns around the safety of this Tutor and believe that she may be compromised. My concerns are as follows;

- We have a nothing in, nothing out policy. This includes letters and the Tutors are well versed in this.
- [Mrs Hill] first wrote to [the prisoner] when he was at Whanganui Prison, he has since transferred to Hawkes Bay Prison and she has actively followed him [via correspondence only as far as I can ascertain]. This is clearly demonstrated by her sending the card directly to HB prison.
- There is no way to know who else [Mrs Hill] is corresponding with in the prisons, the content or nature of information being passed, the volume of communication that has been passed...and the method. Is she passing messages through her classes to prisoners?
- [Mrs Hill] states in her post card that if [the prisoner] wants to correspond back to her, he may do so through ‘Programmes’. This puts my staff at risk by implying that this is acceptable when it could lead to our staff losing their job. It definitely compromises their safety.
- From what I understand, [Mrs Hill] has worked at the prison for quite a length of time – She was delivering programmes for another provider prior to her employment with Workforce. She is not new to our environment and should be aware of dangerous situation she has put herself and our staff in. If she is not, then I am even more concerned for her safety.

[19] Mrs Greenhalgh noted that the letter from Mr Kaiwai contained an invitation to respond directly to the Prison Manager. However, she was aware that this was not consistent with the agreed approach under the contract. Mrs Greenhalgh wrote to Mrs Hill the same day formally advising her of what Mrs Hill already knew, namely that there was a serious problem with the delivery of services and that her access had been withdrawn by the Prison Manager. A copy of the suspension notice was enclosed, together with an extract from WDL’s contract with Corrections (setting out the entitlement to suspend and the process to be followed by the Department). Mrs Greenhalgh advised Mrs Hill that she had the right to meet with Corrections to make submissions on her own behalf, and that the Department would then decide if access would be withdrawn “requiring us to replace you.” The latter point was made by

reference to the terms of Mrs Hill's employment agreement, referred to above. The letter stated that:

As you will appreciate, this means that should the Corrections decision become permanent, and should we be unable to redeploy you into some other work, then we may be forced to terminate your employment.

Given that you are now prevented from discharging your duties under your Employment Agreement, and if we are unable to identify something useful for you to undertake *we may need to invoke the suspension provision of your Employment Agreement.*

...

Prior to making this decision however, I will speak with you to seek your input into this.

With that in mind, I plan to call you at a time to be advised by you by email as soon as possible to:

1. Discuss and overview this situation
2. See if you require any further information
3. Understand if you wish to meet with Corrections
4. See if there are any duties you can undertake in the meantime.
5. Talk about any other matters of concern.

In the meantime, please feel free to contact me to raise any other issues.

(emphasis added)

[20] Mrs Greenhalgh did not provide Mrs Hill with a copy of Mr Kaiwai's letter, considering that it was not necessary to do so as the basis for the investigation had been made clear to Mrs Hill. The fact that Ms Bernard's concerns had not been provided to Mrs Hill became a key focus of the defendant's case. It was submitted that this prejudiced her ability to provide a considered response. I do not accept this, for reasons which will become apparent.

[21] Mrs Hill gave evidence that she read Mrs Greenhalgh's letter at the time but believed that the issues that had been identified within it would be resolved and that it would all "blow over". She also said that she continued to draw comfort from what Mr Dack had had to say during the course of his previous interview, although she had not seen his subsequent email to prison management and she knew that Corrections was undertaking further inquiries into the incident.

[22] I do not accept that Mrs Hill was labouring under a false sense of security following receipt of Mrs Greenhalgh's letter of 29 September 2011. She accepted in cross-examination that she fully understood that her employment was in jeopardy and that ultimately it was a decision for Corrections to make, following a closely prescribed procedure and having regard to the statutory framework that the Prison Manager was required to operate under. A sense of complacency could not reasonably have been drawn from the correspondence. It was clearly crafted and drew Mrs Hill's attention specifically to the fact that if Corrections decided to withdraw her access on a permanent basis it may well have serious ramifications for her employment, including termination.

[23] A meeting took place on 20 October 2011, between Mrs Hill, her husband, Mrs Greenhalgh, another WDL representative (who took notes) and Mr Mason, a Relationship Manager with Corrections tasked with carrying out the investigation. It is clear that Mrs Hill engaged in the meeting, including expressing the view that her relationship with the prisoner was professional, why she had been motivated to send the postcard (to encourage and motivate learning), her understanding that sending the postcard had been wrong, that she understood what "grooming" was, and that it was important that additional training be undertaken as soon as possible. Mrs Greenhalgh also participated in the meeting, primarily raising concerns about the paucity of induction training that was being provided by Corrections.

[24] On 16 November 2011 the Manager, Intervention Programmes with Corrections, Ms Hopa, wrote to Mrs Greenhalgh advising her of the outcome of the Department's investigation and the decisions that had been made. She advised that it was no longer considered appropriate for Mrs Hill to access the prison. Withdrawal of access was confirmed.

[25] Mrs Greenhalgh wrote to Mrs Hill enclosing a copy of Ms Hopa's letter, stating that:

As has been explained to you previously, your role with us involves a requirement to attend at the Department of Corrections facility. With no prospect of the Department lifting their directive and with no other roles available to redeploy you to, then we now need to consider if we can continue to employ you in the circumstances.

Our next step is to discuss this with you, and to consider any matters you wish to raise, or any submissions you seek to make prior to us making any final decision.

[26] Mrs Hill advised by email that she was unwell and the first arranged meeting time was deferred at her request. She sought a further deferral, advising that she was still unwell but reiterating that she wished to take up the opportunity to make submissions identified in Mrs Greenhalgh's earlier correspondence and asking "could you please bear with me on this for a few more days?" This was greeted with the following response:

I am sorry to hear that you are unwell and I do understand you asking for a deferral of our discussion planned for today. However, please see the attached letter which advises my position. We will of course need to have a discussion about any alternative outcome as soon as you are well enough but I do need to start this process from today. A hard copy of this letter will be forwarded by mail tomorrow.

Please call me as soon as you are well enough or send your written submissions to me for consideration.

[27] The letter attached to Mrs Greenhalgh's email was what can be described as a provisional notice of termination of employment. It advised that:

I had established a phone meeting with you this morning, but you did not make that meeting moving it to this afternoon. I then received an email from you declaring yourself unavailable for a week.

Notwithstanding that I am still to hear from you regarding any options or opportunities to keep your employment ongoing, I have conducted an assessment of the options from your perspective and I am unable to see any possibility of maintaining your ongoing employment.

Accordingly, I have decided to issue you with four weeks' notice of your termination of employment with Workforce Development Limited from today's date.

This means that should an alternative not be identified between now and Friday 16th December 2011, then your employment will terminate on that date.

I will leave it to you to contact me once you feel well enough...

[28] Mrs Hill replied requesting clarification of the "alternative options" referred to in Mrs Greenhalgh's letter. Mrs Greenhalgh responded advising that she needed to consider whether there might be work for Mrs Hill under any of the other

contracts WDL currently had, but reiterating that she was now unable to deliver programmes for Whanganui prison because of the Prison Manager's decision.

[29] In the event Mrs Hill made written submissions to Mrs Greenhalgh on 25 November 2011. She outlined her work history with the company, made the point that she continued to accept that what she had done was wrong but submitted that the incident was not as serious as it had been treated, pointed out that there had been management changes within Corrections and that "surely it makes for a case of re-submitting the state my suspension for the future?" She also raised concerns about the conduct of the October meeting with Mr Mason, advising that:

Workforce requires me to build a rapport with my students, and I did attempt to elaborate on this at the meeting with Mr Mason in October, but was effectively shut down. Workforce was not interested and nor was he. Mr Mason made it clear that he was primarily concerned with the policies and procedures of the Corrections Dept and not with what I had done personally.

This was a little confusing since I thought the investigation was meant to be about my behaviour. ...

I felt confused also in that I did not consider I felt or heard any support from Workforce, other than your presence at the meeting. You were, however, intent on pointing out failures to abide by the contract on the DOC side.

I left the meeting feeling relieved that at least you had made some headway concerning the induction process other tutors had been involved with ...

Yet my own induction – or rather, lack of – did not seem to be an issue for you.

[30] The concerns identified in Mrs Hill's correspondence were reiterated during the course of the hearing and in support of her submission that she had been unjustifiably disadvantaged and dismissed. Aspects of them are also echoed in the Employment Relations Authority's determination.

[31] Section 103A of the Employment Relations Act 2000 (the Act) provides that:

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), ... the court must consider –

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the

employee before dismissing or taking action against the employee;
and

- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[32] The full Court identified a number of difficulties with the application of the s 103A(3) factors in situations involving no-fault dismissals in *Angus v Ports of Auckland Ltd*.¹ Such difficulties are compounded having regard to the tripartite relationship at issue here. As Mr Webster observed, the factors set out in s 103A(3) sit uncomfortably with the context of the present case and are either inapplicable or apply with diluted force. It was Correction's, not WDL's, investigation into concerns about Mrs Hill's actions. The outcome of the investigation was that the Prison Manager withdrew Mrs Hill's access to the prison. It was this step that triggered the termination clause in Mrs Hill's employment agreement with her employer.

[33] Ultimately, consideration must be given to what a fair and reasonable employer could have done in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. As was observed in *Angus*:²

These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.

[34] A number of arguments were advanced on behalf of the defendant, all of which I have considered. As I have said, a key focus of the argument advanced on Mrs Hill's behalf was that WDL had breached its obligations as employer by failing to advise Mrs Hill of what were characterised as Ms Bernard's "speculations", as

¹ *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [51] – [52].

² At [58].

outlined in Mr Kaiwai's letter of 29 September 2011.³ As I understood the submission, this alleged failure undermined Mrs Hill's ability to substantively engage in the meeting with Mr Mason (on behalf of Corrections) on 20 October 2011 because she was in the dark as to the nature of Correction's concerns. I do not accept this.

[35] I am not satisfied that Mrs Knowles (the Prison Manager who ultimately decided to terminate Mrs Hill's access to the prison) had been appraised of Ms Bernard's concerns and, accordingly, that they fed into the decision-making process. And it was far from clear from the evidence as to whether Mr Mason had been aware of Ms Bernard's concerns prior to his meeting with Mrs Hill. In any event, Mrs Hill was squarely on notice that her actions in sending the postcard, including against the backdrop of a previous incident of a similar nature involving the same prisoner, were at issue. She candidly accepted during the course of the meeting with Mr Mason that the postcard incident was not an isolated event, that she had communicated with the same prisoner at a different prison location on a previous occasion, that she appreciated that it reflected an error of judgment and that it gave rise to legitimate safety concerns for Corrections.

[36] Mrs Hill was under a positive obligation to familiarise herself with the Corrections' Code of Conduct and other documentation that impacted on her role in the prison. I do not accept that WDL deliberately withheld or suppressed this information from Mrs Hill. As Mrs Greenhalgh explained in evidence, the process was for Corrections to provide a copy of the Code of Conduct as part of the induction process which it was required to deliver. In any event, the individual employment agreement itself made it very clear that there were to be no personal communications with prisoners, and Mrs Hill could not reasonably have been under a misapprehension about this.

[37] I do not accept Mrs Hill's criticisms of the plaintiff in relation to how the meeting with Mr Mason unfolded. It is clear that she felt able to contribute to the discussions and that she had an opportunity to put forward any points that she felt

³ Citing *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4, [2010] ERNZ 1 in support.

appropriate, including in relation to the circumstances surrounding the sending of the postcard and the nature of her relationship with the prisoner.

[38] Nor do I accept that it was part of WDL's obligations as a good employer to strongly advocate for Mrs Hill's renewed access to the prison. The reality was that Mrs Greenhalgh was concerned about the incident and Mrs Hill's actions, making it clear to Mrs Hill after the meeting that even if Corrections did not advance matters in relation to the access issue there may still be disciplinary consequences for her. In these circumstances strongly advocating for Mrs Hill, while possible, would likely have placed Mrs Greenhalgh in a difficult position.

[39] Mr O'Sullivan referred to *G & H Trade Training Ltd v Crewther*.⁴ There the employer had failed to adequately investigate allegations made against the employee, effectively bowing to pressure from a third party to dismiss. The present case is not directly analogous. Corrections had sole control over the workplace. The decision to grant, or withdraw, access to the prison was for the Prison Manager to make, in her sole discretion and having regard to considerations relating to prison safety. The decision to withdraw access followed an investigation by Corrections, not WDL. WDL's role was necessarily constrained. Contrary to Mr O'Sullivan's submission, I do not accept that *Crewther*, properly interpreted, is authority for the proposition that an employer is under a duty to persuade a third party in circumstances such as this.

[40] Nor was WDL obliged to persuade Corrections to treat Mrs Hill as one of its own employees for the purposes of its investigation or decision-making. While the Service Agreement between Corrections and WDL refers to the Department's Code of Conduct (in terms of a requirement to align behaviour) it does not follow that all aspects of the Code directly applied to those in Mrs Hill's position, including the detailed provisions relating to what constitutes unacceptable behaviour and the disciplinary provisions, which are plainly aimed at Corrections' employees. While s 3(2) of the Corrections Act 2004 (which Mr O'Sullivan described in closing submissions as pivotal) may be relevant to the way in which Corrections assessed access issues, it is not more broadly relevant to WDL's actions as employer and the justifiability or otherwise of them.

⁴ *G & H Trade Training Ltd v Crewther* [2002] 1 ERNZ 513 (EmpC).

[41] Mrs Hill says that she did not feel adequately supported by WDL at the meeting with Mr Mason. However this was not raised by her at the time and the reality was that she had arranged her own support, through her husband's presence. Mrs Hill's complaints must also be viewed in the context of Mrs Greenhalgh's earlier advice that she was entitled to meet with Corrections to make submissions on her own behalf. Mrs Hill had clearly been advised of the seriousness of the events at issue and she was also advised that she had the right to support at the meeting, as Mrs Greenhalgh confirmed in evidence. She took up this option.

[42] Mrs Hill said that she had been expecting Mrs Greenhalgh to advise Mr Mason of her work record and her good character, but that she had not. Mrs Hill was perfectly able to make these points herself if she felt it important to do so. She did not take this step and nor did she raise any concerns at the time as to what Mrs Greenhalgh was saying, or not saying, or seek an adjournment or break in the meeting to discuss matters with her.

[43] Mrs Hill gave evidence that it did not occur to her to seek legal representation for the meeting with Corrections, although she accepted in cross-examination that she understood her job was in jeopardy and that the decision to be made by Corrections was central to what would occur. The Authority found that the company failed in its employment obligations to Mrs Hill, including by omitting to advise her to obtain legal advice and representation.⁵ I do not accept that the company failed in this regard. It made it clear that the situation was serious and what the potential outcome might be, and specifically drew her attention to her ability to be supported. While it would certainly have been open to the company to make specific mention of legal representation and the potential benefits of that, the fact that it did not was something that a fair and reasonable employer could have done in the circumstances.

[44] As I have said, Mrs Hill was supported by her husband. Mr Hill was more than competent to raise any issues or concerns on his wife's behalf, including having had experience in business and some involvement in employment matters. I pause to note that Mrs Hill suggested, during the course of evidence, that with the benefit of

⁵ *Hill v Workforce Development Ltd* [2013] NZERA Wellington 65 at [30].

hindsight she believed that Mrs Greenhalgh may have been attempting to deflect her from obtaining legal advice. I do not accept that. It is plain that Mrs Greenhalgh actively encouraged her to get support, and this arose in the context of making it very clear to Mrs Hill that the matter was serious and that her future employment may be in jeopardy.

[45] Mr O’Sullivan submitted that Mrs Greenhalgh had a predetermined view of matters and that this effectively stifled inquiries at the meeting. While Mrs Greenhalgh was concerned about the incident I do not accept that this was reflected in inappropriate conduct at the meeting or, as Mr O’Sullivan suggested, a suppression of key material by her.

[46] It is evident that the meeting was conducted in a relatively relaxed manner by Mr Mason. I do not accept that Mrs Hill was effectively ‘shut down’ during the course of it. This contention was not established in evidence and is not reflected in the minutes of the meeting. Nor is it clear why, if the meeting progressed in the way that Mrs Hill suggests, neither she nor her husband intervened to raise a concern. Mrs Hill had the opportunity to discuss matters on her own behalf and did so, including towards the conclusion of the meeting.

[47] It was submitted that the discussions were derailed by broader concerns Mrs Greenhalgh raised about the induction process. However, it is clear that issues relating to what Mrs Hill had done and why were also traversed. The meeting notes (which I accept accurately encapsulate the substance of the meeting) reflect that Mrs Hill’s responses were sought and given. As I have already observed, Mrs Hill drew particular attention to the nature of her relationship with her students, that she accepted that sending the postcard was wrong, that she understood the dangers of “grooming,” and that it was important that she complete the “Getting Got” course. She said that she wanted to clarify that the purpose of sending the postcard had been educational, which was why she had made some additional points at the conclusion of the meeting. And while Mrs Hill says that she found the focus of the meeting confusing, this was not raised at the time.

[48] Mrs Hill says that she was concerned that Mrs Greenhalgh focussed less on inadequacies in her induction than the induction process more generally. Again, if this were so it was not a point that Mrs Hill made during the course of the meeting. Further, Mr Mason gave evidence, which I accept, that Mrs Hill made it clear at the meeting that she did not consider that the training she had received was adequate. It is also clear that Mrs Greenhalgh had reasonably assumed that Mrs Hill had received a proper induction, because she had been allowed on site.

[49] In the event it was Ms Knowles who made the final decision as to Mrs Hill's access to the prison. While evidence was focussed on the extent to which Mrs Hill's actions may have been beneficial to the prisoner's education, that is not relevant to a determination of the issues before the Court. Mrs Hill had an opportunity to advance these sorts of factors in the meetings with various Corrections' officers and, ultimately, it was the Prison Manager (who has statutory responsibility for ensuring the safety of prisons, including prisoner safety) who was tasked with reaching a concluded view as to whether access should be permitted. In any event, Ms Knowles made it clear that her focus was on safety and security, and not on educational outcomes. WDL was the employer, with employment obligations, not Corrections. While it may be possible to challenge perceived deficiencies in the way in which Corrections exercised its discretionary powers in another forum, it is WDL's actions and omissions as employer that are relevant to the present proceedings. In the final analysis WDL provided information and support to Mrs Hill during the course of the Department's investigation and took steps to ensure that it followed the process set out in the contract.

[50] It was submitted that WDL ought to have done more following the meeting to advocate for Mrs Hill's position or, following advice of the final decision, taken steps to 'appeal' it on her behalf. The meeting concluded on the basis that Corrections had ten days to reach its decision. Mrs Hill had been given an opportunity to comment at the meeting and took no steps following the meeting to raise further matters on her own behalf. I do not consider that the plaintiff can reasonably be criticised for awaiting the outcome, just as Mrs Hill was doing, and as the process provided. Moreover, both felt the meeting had gone well and that it was

likely that Mrs Hill's access would be reinstated, a point subsequently highlighted by Mr Mason's recommendation (which was not followed) that this occur.

[51] I do not accept that WDL was obliged to seek a review or, as the Authority found, pursue some sort of appeal against the Prison Manager's decision. There was no contractual mechanism for doing so and Mrs Hill was well aware (from the terms of her employment agreement) that the Prison Manager's decision was final. Nor was there anything new that had come to light which might otherwise have prompted some further steps. Mrs Hill extended a vague request to WDL to ask Corrections to reconsider but this request was oblique, at best, and not pursued. Nor did she seek a review from Corrections herself.

[52] Mrs Hill complained that she had not been provided with a copy of Mr Mason's report, saying that she assumed that it must have changed things from Correction's perspective. She asked Mrs Greenhalgh for a copy, but Mrs Greenhalgh confirmed (truthfully) that she did not have it. She did however offer to make a request for the report on Mrs Hill's behalf, and subsequently did so.

[53] I accept that Mrs Greenhalgh turned her mind to whether there might be redeployment opportunities and took active steps to pursue various possibilities. It became clear that no alternative options existed, and Mrs Hill was advised of this. Mrs Hill remained on full pay, without being required to do any work, during the period from 20 September to 16 December 2011. I agree with the Authority member's conclusion that, in the circumstances, the approach adopted by WDL was not disadvantageous to Mrs Hill.⁶

[54] Mr O'Sullivan advanced a submission that there was a failure to explain why access had been withdrawn and the reasons for termination of Mrs Hill's employment. Mrs Hill requested reasons for her dismissal on 9 December 2011 and these were supplied, with adequate particularity, four days later. It was not for WDL to clarify the reasoning underlying the Prison Manager's decision to withdraw access and nor was it in a position to do so.

⁶ At [34].

[55] WDL terminated Mrs Hill's employment after her access to the prison had been permanently denied by the Prison Manager and after it had genuinely turned its mind to whether there were other positions available for her but had concluded, following reasonable enquiries, that there were not. The employment agreement, the terms of which Mrs Hill had agreed to be bound by, provided that her employment could be terminated in such circumstances. While WDL could have done more at various points of the process it did not breach any of its obligations as an employer in the way in which it dealt with Correction's investigation and subsequent events. WDL's decision to terminate was one that was open to it in the circumstances, and was justifiable. Nor do I consider that Mrs Hill suffered an unjustifiable disadvantage in her employment. Any deficiencies in the process were minor and did not affect the outcome.

[56] The challenge to the Authority's substantive determination accordingly succeeds. The Authority's determination is set aside. This judgment stands in its place.

[57] Because of the findings I have reached I do not need to deal with WDL's additional argument that because the employment agreement was effectively frustrated, there was no dismissal and, accordingly, no personal grievance. On this analysis, the statutory requirements set out in s 103A have no application. I would, however, have had difficulty accepting these propositions. Parties to an employment relationship are not permitted to contract out of their statutory obligations, including the procedural requirements relating to fair process and their mutual obligations.⁷

[58] Mrs Hill challenged the Authority's costs determination and advanced submissions in this regard. The Authority's costs determination followed its finding that Mrs Hill had been unjustifiably dismissed. That has obvious consequences for Mrs Hill's challenge. Mr Webster submits that, in the circumstances, the Authority's costs award should be set aside and costs awarded to WDL in respect of the Authority's investigation in the sum of \$7,000 (being the applicable daily rate). Mr O'Sullivan is invited to file submissions on this issue, and has 15 working days from today's date to do so.

⁷ Employment Relations Act 2000, s 238.

[59] Costs on the substantive challenge are reserved. If the parties cannot otherwise agree costs they may be the subject of an exchange of memoranda, with WDL filing and serving within 30 days from the date of this judgment and Mrs Hill filing and serving within a further 20 days. Any reply must be made within a further 5 working days.

Christina Inglis
Judge

Judgment signed at 12.30pm on 19 September 2014