WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2019 WAIRC 00302
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	MONDAY, 4 FEBRUARY 2019, TUESDAY, 5 FEBRUARY 2019, WEDNESDAY, 6 FEBRUARY 2019, THURSDAY, 7 FEBRUARY 2019, FRIDAY, 8 FEBRUARY 2019, THURSDAY, 28 FEBRUARY 2019, WEDNESDAY, 6 MARCH 2019
DELIVERED	**:**	20 JUNE 2019
FILE NO.	**:**	U 97 OF 2018
BETWEEN	**:**	MR GARY HAWTHORN Applicant AND THE MINISTER FOR CORRECTIVE SERVICES Respondent

---

Catchwords	**:**	*Industrial law (WA) - Termination of employment of Senior Prison Officer - Harsh, oppressive or unfair dismissal - Whether use of force by deployment of OC spray in two incidents contravened the Prisons Act 1981 (WA) - Whether use of force constitued a breach of discipline under the Public Sector Management Act 1994 (WA) - Use of force in first incident justified - Use of force in first deployment of OC spray in second incident justified - Second deployment of OC spray in second incident not justified - Dismissal harsh, opressive and unfair - applicant to be reinstated without loss.*
Legislation	**:**	*Industrial Relations Act 1979* (WA), s 23A

		Corruption, Crime and Misconduct Act 2003 (WA), ss 4, 43
		Occupational Safety and Health Act 1984 (WA) s 19(1)(b)
		Prisons Act 1981 (WA) ss 13, 14
		Public Sector Management Act 1994 (WA) ss 8, 76(1)(b), 76(4), 81(1)(a)
Result	**:**	Order issued

Representation:

Counsel:		
Applicant	**:**	Mr D Stojanoski of counsel and with him Mr C Fordham of counsel
Respondent	**:**	Mr J Carroll of counsel and with him Mr D Akerman
Solicitors:		
Applicant	**:**	Slater and Gordon
Respondent	**:**	State Solicitor of Western Australia

Case(s) referred to in reasons:

Briginshaw v Briginshaw (1938) 60 CLR 336

George v Rockett (1990) 93 ALR 483

Miles v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous WA Branch (1985) 65 WAIG 385

Public Transport Authority v ARTBIU [2016] WAIRC 00236; (2016) 96 WAIG 408

State School Teachers' Union of WA (Incorporated) v Director-General Department of Education [2019] WAIRC 00175; (2019) 99 WAIG 336

SSTU v The Director General, Department of Education [2015] WAIRC 00517; (2015) 95 WAIG 1461

The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v Public Transport Authority [2017] WASCA 86; (2017) 97 WAIG 431

Case(s) also cited:

Bogunovich v Bayside Western Australia Pty Ltd (1998) 78 WAIG 3635

Danijel Pantovic v Public Transport Authority of WA (2011) 91 WAIG 2094

Frank Scott v Consolidated Paper Industries (WA) Pty Ltd (1998) 78 WAIG 4940

Garbett v Midland Brick Company Pty Ltd [2003] WASCA 36; (2003) 83 WAIG 893

Mr Patrick Guretti v The Director General Department of Education (2013) WAIRC 00779

Ms RT v The School [2015] FWC 2927

Public Employment Industrial Relations Authority v Scorzelli [1993] NSWIRC 48

Saybolt Australia Pty Ltd v Milan Hall (2006) 87 WAIG 87

The State School Teachers' Union of W.A. v The Director General, Department of Education (2018) WAIRC 00379

William Walker v P & O Automotive and General Stevedoring [2009] WAIRC 00250

Zainal Omar Mattar v The Minister for Corrective Services (2017) WAIRC 00794

Reasons for Decision

Claim and brief background

1 The applicant had a career as a prison officer for some 22 years. For 11 of those years, up to the events leading to these proceedings, the applicant had been a prison officer appointed by the respondent under the *Prisons Act 1981* (WA) (*Prisons Act*). At the time of the events leading to these proceedings, the applicant was at the rank of Senior Prison Officer. Prior to his appointment as a prison officer in Western Australia, the applicant was a prison officer in the Scottish Prison Service for some 11 years also. As at the time of the relevant events, it was common ground that the applicant had an unblemished record of service and had also received a number of commendations for actions taken in the line of duty. The applicant had been engaged at various prisons including Bandyup and Hakea. He took a secondment to the Eastern Goldfields Regional Prison in September 2016. It was whilst on secondment to this prison that the applicant was involved in two incidents that ultimately led to the termination of his employment.

2 These incidents involve the alleged use of unreasonable force on two prisoners, Mr Wharerau and Mr Bellin. The force option involved was Oleoresin Capsicum spray (OC spray). Allegations were made, and an investigation was conducted in accordance with the *Public Sector Management Act 1994* (WA) (*PSM Act*). The allegations against the applicant were largely sustained and as a consequence, the respondent maintained that there had been a loss of confidence in the applicant as a prison officer and his employment was terminated. The applicant now contends that his dismissal as a senior prison officer was harsh, oppressive and unfair. He seeks both reinstatement and compensation for loss.

3 The respondent maintained that the applicant's use of OC spray on the two prisoners concerned was not justified and constituted an unreasonable and excessive use of force in all the circumstances, in contravention of s 14 of the *Prisons Act* and the relevant policy in relation to use of force options. Additionally, the respondent contended that when the applicant deployed the OC spray on the two occasions concerned, he was not permitted to do so as his training in relation to the use of this force option was not at the time current. Accordingly, the respondent's position was that the decision to terminate the applicant's employment as a senior prison officer was justified and was not unfair.

The allegations and findings

4 On 28 July 2017 the respondent contended that the applicant had committed a breach of discipline in relation to the Bellin incident, under s 81(1)(a) of the *PSM Act*. It was contended that the applicant had used excessive force which constituted misconduct. Two allegations were made against the applicant and they were set out in a letter of the same date in the following terms:

> **Suspected Breach of Discipline**
>
> I have become aware that you may have committed a breach of discipline and I have decided to deal with it as a discipline matter pursuant to the *Public Sector Management Act 1994* **(Act) s** 81(1)(a) and the Public Sector Commissioner's Instruction entitled, *'Discipline - General. '*
>
> I enclose a copy of the Commissioner's Instruction.
>
> Specifically, the allegations against you are:
>
> **Allegation 1**
>
> It is alleged that on 20 May 2017, at Eastern Goldfields Regional Prison, you committed a breach of discipline when you deployed chemical agent at prisoner Jessie Bellin. The deployment of the chemical agent was an excessive use of force which constitutes an act of misconduct.
>
> **Particulars**
>
> a) On 20 May 2017, you were the rostered Unit Manager of Unit 4;
>
> b) Mr Bellin was a remand prisoner who became agitated at not being able to contact a surety for his release;
>
> c) In response to Mr Bellin's behaviour, you drew a chemical agent and pushed him into his cell;
>
> d) Whilst standing outside the cell, with Mr Bellin inside, you deployed the chemical agent at Mr Bellin for approximately two seconds;
>
> e) You then deployed the chemical agent at Mr Bellin a second time for approximately two seconds while he attempted to cover his face with a bed sheet; and
>
> f) The deployment of the chemical agent was excessive and disproportionate in the circumstances to manage Mr Bellin's behaviour.

Allegation 2

It is alleged that on 20 May 2017, at Eastern Goldfields Regional Prison, you committed a breach of discipline when you did not administer aftercare and / or decontamination after deploying chemical agent at prisoner Jessie Bellin.

Particulars

a) On 20 May 2017, you were the rostered Unit Manager of Unit 4;

b) Whilst standing outside Mr Bellin's cell, with Mr Bellin inside, you deployed the chemical agent at Mr Bellin for approximately two seconds;

c) You deployed the chemical agent at Mr Bellin a second time for approximately two seconds; and

d) You did not take reasonable steps to administer aftercare and / or decontamination of Mr Bellin in a timely manner.

…..

5 Sometime later, on 7 December 2017, it was further alleged against the applicant that he had committed a breach of discipline in relation to the Wharerau incident. The allegations were set out in a letter of the same date as follows:

Suspected Breach of Discipline

I have become aware that you may have committed a breach of discipline and I have decided to deal with it as a discipline matter pursuant to the *Public Sector Management Act 1994* **(Act) s** 81(1)(a) and the Public Sector Commissioner's Instruction entitled, *'Discipline - General.'* This letter sets out those allegations and the particulars that support it.

I enclose a copy of the Commissioner's Instruction.

Allegation 1

It is alleged that on 4 May 2017, you committed a breach of discipline when you used force, which was unreasonable in all the circumstances, on a prisoner, when you used OC Spray prior to utilising de-escalation techniques.

Particulars

On 4 May 2017, at approximately 3:15pm, while performing Senior Officer duties at Eastern Goldfields Regional Prison, you deployed Olea-resin Capsicum Aerosol (OC Spray) into the face of prisoner Ralph Joseph Wharerau.

Clause 3 of Policy Directive 5 provides in the relevant part:

> 3.1 In all instances, ***force shall only be used when all other avenues have been exhausted*** or are considered impractical. ***Force must only be used as a last resort.***
>
> 3.4 ***The amount*** **of** ***force used, shall be the minimum required*** **to** ***control the situation*** or behaviour and maintain security and good order and shall cease when the level of perceived
> threat can be managed without applying force.

If proven, this would constitute a breach of discipline in accordance with s 80 of the Act.

Allegation 2

It is alleged that on 4 May 2017, you committed a breach of discipline when you used OC Spray when you were not permitted to do so.

Particulars

On 4 May 2017, at approximately 3:15pm, while performing Senior Officer duties at Eastern Goldfields Regional Prison, you deployed OC Spray into the face of prisoner Ralph Wharerau. At the time of the deployment you were not up to date with the current training of the use of OC Spray.

Clause 4.1 of Policy Directive 5 provides in the relevant part:

> 4.1.6 ***Use of force must not be applied*** by a prison officer ***unless that officer has successfully undergone a DCS approved training programme.***
>
> 4.1.7 It shall be a shared responsibility between the designated Superintendent of each adult custodial facility ***and the individual staff member, to ensure they remain up to date and competent with the current use of force training packages when available.***
>
> 4.1.8 All prison officer staff shall be refreshed as minimum once annually in the following training:
>
> - Use of force overview
> - Restraints (including batons)
> - Escorts
> - Self Defence
> - ***Chemical Agent***

If proven, this would constitute a breach of discipline in accordance with the Act s 80.

Background

On 4 May 2017, at approximately 3:15pm, you were present in Unit 2 CD Wing, where Mr Wharerau was involved in a conversation with Principal Officer Stephen Parker.

> During the conversation you have intervened, restraining Mr Wharerau against the unit wall with the assistance of Mr Solomon ldowu.
>
> Whilst restraining Mr Wharerau, you have requested OC Spray, it was handed to you by a fellow officer. You deployed the spray in Mr Wharerau's direction, contaminating yourself as well as Mr Wharerau and Mr ldowu.
>
> Due to the contamination, attending officers have taken over Mr Wharerau's restraint and escorted him out of the unit.
>
> It appears, from the CCTV footage, that you did not utilise de-escalation techniques prior to choosing to use OC Spray.
>
> In accordance with the Commissioner's Instruction *Discipline - General* and s 81(1) of the Act, I now provide you with the opportunity to provide a response to the allegations.
>
> ….

6 The applicant denied the allegations against him. In doing so, the applicant had been shown the CCTV footage of both incidents. The CCTV footage was subsequently tendered in evidence in these proceedings as a part of the agreed tender bundle. In summary, the applicant contended that Mr Bellin became increasingly aggressive when told his surety had been arranged and he would not get access to his telephone account. The applicant maintained that Mr Bellin repeatedly threatened both himself and Prison Officer Bruynzeel who was then present. This included adopting a fighting stance, picking up a chair and taking off and placing his t-shirt over his face. Whilst the applicant had obtained OC spray and gave Mr Bellin a warning that if he continued to fail to comply with directions to return to his cell, spray would be used, it was not in fact used at that point.

7 The applicant then used “open hand” techniques and pushed and directed Mr Bellin back towards his cell. He was accompanied by Officers Bruynzeel and Mulvaney. The applicant maintained that Mr Bellin was still behaving in an aggressive manner and was non-compliant. Once he reached the cell, the applicant noted that Mr Bellin by his words and conduct, was still threatening assault against either himself or the other two officers. Accordingly, the applicant deployed the OC spray towards Mr Bellin. When Mr Bellin was inside the cell, the applicant said that he attempted to cover his face with bedding to avoid the effects of OC spray and the applicant deployed the spray for a second time. The door to the cell was then shut.

8 At all times, the applicant maintained that he was acting in accordance with relevant policies and training materials.

9 In relation to the Wharerau incident, the applicant wrote to the investigators and referred to Mr Wharerau displaying agitated and aggressive behaviour towards Principal Officer Parker. The applicant said he was aware of at least 20 other prisoners who were becoming interested in the events. The applicant said that he ushered Mr Wharerau towards the corner of the room in order to deescalate the situation. He had declared a "code green" by this point. Mr Wharerau grabbed hold of the door handle and despite orders to desist, he remained non-compliant.

10 Given Mr Wharerau's continued non-compliance, the applicant said that he requested OC spray from another officer who was with him. A warning was given to Mr Wharerau that if he continued to fail to comply with his orders then spray would be used. The applicant said he deployed OC spray so that Mr Wharerau would be compliant. He was then restrained and removed from the area.

11 As to the training allegation, the applicant noted that despite the respondent's training records, that he thought he had completed the Chemical Restraints Training Course several times since his appointment as a prison officer. Despite this, the applicant noted that it had been previously highlighted to officers that there had been a significant training deficit for prison officers and he did not consider that it was fair that he had been singled out on this occasion.

12 In relation to both incidents, the applicant referred to a direction that he received from the Principal Officer at Hakea Prison, in relation to the use of chemical agents. This communication, which became known as the "Cooper Email" in the course of the hearing, was dated 11 February 2015. It referred to a high number of assaults by prisoners on prison officers and Principal Officer Cooper's advice to Hakea prison officers, that "if in doubt get the spray out". The applicant informed the respondent in his response, that he took this as an indication of a change in philosophy in relation to situations where the safety of prison officers could be put at risk.

13 At all times the applicant responded that he did not use excessive or unreasonable force on these two occasions, and that he acted in accordance with the *Prisons Act* and the respondent's relevant policies and procedures.

14 Having considered the issues and the applicant's responses, the respondent formed the view, by letter of 25 May 2018, that apart from allegation 2 in connection with the Bellin incident, that the allegations were made out. Importantly, for reasons which will be considered later, given the proximity of the incidents to one another, they were regarded by the respondent together as a single course of conduct, in terms of the applicant's management of prisoners. The letter relevantly provided, without reproducing the allegations, as follows:

Suspected breach of discipline - Finding and Proposed Discipline Action l

On 17 August 2017, Mr Nick Wells a Principal Investigator in the Investigations Branch wrote to you and advised you that as a result of information received, he was commencing a discipline process pursuant to the Public Sector Management Act 1994 (**Act**) s 81(1)(a) and put to allegations to you as follows:
…..

He invited you to respond to the allegations and on 24 May 2017, you made a written submission through you WA Prison Officer's Union representative.

On 7 December 2017, Principal Investigator Mr Mark Riddle wrote you setting out a further two allegations as follows:
…..

As your matters are only sixteen days apart, I have decided to view them together as they relate to conduct of a similar nature in respect of your method and judgment in dealing with prisoners and deployment of OC Spray.

Accordingly, I have reviewed all the available evidence in relation to all four allegations and find that on the balance of probabilities **you did commit** a breach of discipline and an act of misconduct as follows:

Allegation 1 (Mr Bellin)

Your actions breached:

a. *Prisons Act 1981, s* 14 in relation to the lawful use of force; and

b. Policy Directive 5, *'Use of Force.'*

And is therefore a breach of discipline under the Acts 80(b). I am also of the view that your actions constitute an act of misconduct under the Acts 80(c).

Allegation 2 (Mr Bellin)

This allegation is withdrawn.

Allegation 1 (Mr Wharerau)

Your actions breached:

a. *Prisons Act 1981, s* 14 in relation to the lawful use of force; and

b. Policy Directive 5, *'Use of Force.'*

And is therefore a breach of discipline under the Acts 80(b). I am also of the view that your actions constitute an act of misconduct under the Acts 80(c).

Allegation 2 (Mr Wharerau)

Your actions were contrary to Policy Directive 5 'Use of Force' and is therefore a breach of discipline under the Acts 80(b)(i). I am also of the view that your inaction constitutes an act of misconduct under the Acts 80(c).

Reasons for Decision

In considering both OC spray discharges, I need to be satisfied that on the balance of probabilities your actions in deploying Oleoresin Capsicum spray **(spray / OC spray)** were 'excessive and disproportionate in the circumstances' having regard to the legislation and Policy Directive against which you are bound.

As a Senior Prison Officer, you are authorised to use force (including using OC spray) in certain circumstances set out under the *Prisons Act 1981*. You are also bound by Police Directive Five *'Use of Force'* with the *Prisons Act 1981* prevailing in circumstance where there is any ambiguity between the Act and Policy.

On both occasions, the issue is whether you had objectively sound reasons to deploy the spray against Mr Wharerau and Mr Bellin, in light of the prevailing circumstances at the time. A review of the closed circuit television **(CCTV)** of these incidents, which I understand you have viewed, speak for themselves and in my view your actions in deploying the chemical agent were 'excessive and disproportionate' in the circumstances.

In relation to the incident involving Mr Wharerau, the CCTV footage shows that three to six seconds elapse from the time the OC Spray was requested by you and ultimately deployed. Your Total Offender Management Solutions (TOMS) Incident Report provides in the relevant part:

> The writer requested Chemical Agent from IDOWU, Solomon (ID: D273466) the writer then gave WHARERAU a formal warning that if he continued to be non-compliant Chemical Agent would be used. He continued to resist and the writer deployed the Chemical Agent giving him a warning.

Given the elapsed time, this statement is implausible and even if it was the case that a verbal warning was issued, you did not give Mr Wharerau reasonable time to comply with your order or warning. Moreover, the manner in which you deployed the spray placed Mr Wharerau, and your colleague in an unacceptable risk of hydraulic eye damage.

In relation to Mr Bellin, while there is some argument that deploying the spray in the first instance was necessary when taken as a whole, you could not have had a belief based on reasonable grounds that you needed to deploy the chemical agent twice in order to protect yourself, your colleagues and any other prisoner.

As with 4 May 2018 incident, your characterisation in your TOMS report of what occurred does not align with the CCTV footage:

> It was when he reached his cell did he turn and made a gesture that he was going to continue to fight, I gave him a push into his cell it was then he went to come back at me so I deployed the Chemical Agent.
>
> Due to his aggression the cell door was secured, and the writer informed him to decontaminate himself ...

This is inconsistent with the CCTV footage which shows:

00:09	You shove Mr Bellin along the corridor towards his cell. You and your colleagues arrive at the door with Mr Bellin
00:16	You commence to shove Mr Bellin into the cell door opening.
00:17	Mr Bellin places his right hand against the door and momentarily resists your shove
00:18	You step back and deploy the OC Spray towards Mr Bellin and Mr Bellin runs away from you into the cell.

The footage inside the cell shows the shadows of the above motions just outside the door followed at 00: 16-17 by Mr Bellin running to the rear of the cell, turning towards you, taking cover on the bed, under the blankets with his feet towards the cell door. You are seen continuing to deploy the spray towards Mr Bellin.

Proposed Discipline Action

Having regard to all the circumstances, I am considering dismissal as the most appropriate discipline action.

When I reviewed the footage with your response, I initially considered a range of alternatives including reduction in rank combined with a reprimand and retraining.

However, given the similarities in these two incidents, the apparent disregard for the safety of your colleagues and prisoners in your care, together with the way in which you obviated your actions in your various reports, I believe dismissal is the most appropriate action.

Prior to imposing the proposed discipline action, I now provide you with an opportunity of making a submission to me setting out any mitigating factors you would like me to consider.

…

15 The fact that the respondent treated the two incidents together was confirmed in an internal memorandum to the Director General from the investigators dated 15 May 2018 (p 85 exhibit A1).

The applicant is dismissed

16 By letter of 11 July 2018, having considered the applicant's response to the findings and proposed penalty, the applicant's appointment was terminated by the payment of five weeks' salary in lieu of notice. Formal parts omitted, the letter of dismissal said:

> **Suspected breach of discipline - Imposition of disciplinary penalty**
>
> I refer to my correspondence to you dated 25 May 2018 in which I found that you committed a breach of discipline in relation to the allegations particularised in that correspondence and proposed a discipline action of dismissal.
>
> On 19 May 2018 the Department of Justice received correspondence from Slater and Gordon Lawyers acting on your behalf providing a written submission in response to the proposal to dismiss you. On 21 June 2018 Slater and Gordon Lawyers provided the Department with an updated response.
>
> I note from this correspondence that you continue to rely on your responses to the allegations provided in letters to me on 1 September 2017 and 21 May 2018.
>
> Having considered all of the material, I remain of the view that your actions are inconsistent with the Department's Policy Directive 5 (PD5). Your reference to a briefing which purportedly provided 'lawful directives' by then Acting Assistant Commissioner Schilo in February 2015 and an email provided to staff at Hakea by Principal Officer Jacqueline Cooper on 11 February 2015 referenced in your response does not alter my view.
>
> *As I indicated to you in my previous correspondence when I reviewed the CCTV footage with your response, I initially considered a range of alternatives to dismissal. This included reduction in rank, combined with a reprimand and retraining. However your actions and subsequent responses demonstrate that you are unable to reflect on your conduct or accept responsibility for your actions which were disproportionate and excessive in both circumstances.* (My emphasis)
>
> Despite your rank and experience you have disregarded the safety of your colleagues and prisoners in your care. In addition you have obfuscated your actions in your various reports and have shown no contrition.
>
> I take your misconduct extremely seriously and as the Director General I am required to ensure this type of behaviour is not tolerated within the Department of Justice. The community of Western Australia expects high standards of professional conduct and accountability by public officers. The use of excessive force by Prison Officers on prisoners had the capacity to bring the administration of justice by the Department of Justice into disrepute.
>
> In light of the gravity of your conduct, your lack of insight into the excessive nature of your uses of force, and the high standards of professional conduct expected of Prison Officers

> both by myself, and the Western Australia community at large, I have lost trust and confidence in your ability to conduct yourself in a manner that accords with such standards.
>
> Having considered all the circumstances in relation to both these matters I find that you did commit a breach of discipline as set out in the Act and accordingly dismiss you from your employment with effect from the date of this letter.
>
> You will be paid five weeks in lieu of notice and your dismissal will be effective from the date of this letter. Your Superintendent will arrange the return of all of your uniforms, identification cards, equipment and any other departmental property.
>
> *I also wish to advise you that had you continued in the employment of the Department the Investigations Branch were in the process of serving further allegations on you. Given my decision these allegations will be stayed*. (My emphasis)

Contentions of the parties

17 For the applicant a number of submissions were made. First, he submitted that in relation to both the Bellin and Wharerau incidents, his actions in deploying OC Spray were in accordance with Policy Directive 5 Use of Force (PD5) (pp 92-98 exhibit A1). The applicant contended that he acted consistently with the principles set out in PD5 in that on both occasions when force was used, it was as a last resort and the minimum amount of force was used to control the situation at hand.

18 Furthermore, in so far as s 14 of the *Prisons Act* is concerned, the applicant submitted that at all times he had reasonable grounds to deploy the OC spray to ensure that his lawful orders were complied with. As to the question of training, the applicant noted that the terms of PD5 are to the effect that a prison officer is not to use a force option unless the prison officer has been trained under an approved training course. To the extent that the respondent relied on this as an allegation of misconduct, the applicant contended that the allegation was misplaced. This was because, as the submission went, the responsibility at law was on the respondent to provide appropriate instruction and training and therefore the respondent could not rely on his own failure to train to impose a disciplinary sanction.

19 I should note at this point, that the respondent maintained in his case, that although the training issue formed part of the disciplinary allegation against the applicant, it did constitute a ground of the respondent's decision to dismiss him. It was not mentioned in the letter of dismissal. I will return to this issue later in these reasons.

20 Furthermore, in relation to the deployment of the OC spray, the applicant maintained that he acted in accordance with the Defensive Equipment and Techniques: Chemical Agent Manual (pp153-180 exhibit A1). To the extent that the applicant deployed OC spray a second time on Prisoner Bellin, he did so in accordance with this manual which states that if a subject has not received a full exposure of chemical agent because of defensive behaviour, a further application may be necessary. In this regard, a further submission of the applicant was that even if a second spray in the circumstances was found not to be necessary, this would fall far short of grounds for dismissal. Rather, this would be a training issue.

21 As to the Cooper email, the subject of what the applicant regarded as a lawful direction to prison officers at Hakea Prison, the applicant maintained that he was only acting consistent with his understanding that if there was some doubt in the mind of a prison officer as to the possibility of a physical assault by a prisoner, the officer should use OC Spray in those circumstances.

22 On the key question of whether the applicant's actions were "disproportionate or excessive", as set out in the respondent's letter of dismissal, the applicant contended that this cannot be assessed in a vacuum. Rather, one must have regard to the volatile environment of a prison.

23 As to the contentions by the respondent that the applicant had brought the administration of justice into disrepute, he submitted that there was no basis for this conclusion. Furthermore, objectively considered, there was also no foundation for the respondent's assertion that the Western Australian community at large had lost confidence in the applicant's ability to conduct himself in accordance with the high standard expected of a prison officer. In any event, given that after the incidents concerned, the applicant was placed in higher acting roles in prisons, including a period as the Principal Officer at Hakea Prison, this undermined the respondent's contention in this regard. Objectively viewed, the applicant submitted that a loss of trust and confidence was not a finding that was reasonably open.

24 A number of other submissions were made. First, to the extent that the respondent in his letter of dismissal referred to the service of further allegations on the applicant, had he remained employed, this was said to be inappropriate. It raised the issue as to whether the respondent may have had regard to these unspecified further allegations in his decision to dismiss the applicant.

25 Second, it was contended that the applicant's dismissal was procedurally unfair on a number of bases. This included that at no time did the respondent inform him of what in the circumstances, was the correct manner of dealing with the two prisoners, in order for him to respond. Furthermore, the applicant also contended

that at no time were allegations that the applicant's conduct brought the administration of justice into disrepute, or that the respondent had lost trust and confidence in him, ever put to the applicant prior to his dismissal.

26 Finally, it was submitted that given the applicant's length of service, his unblemished record as a prison officer and his promotion into higher acting positions, the respondent's decision to dismiss him was disproportionate to the gravity of his conduct in all of the circumstances. It would be appropriate having regard to all of these matters, on the applicant's submissions, that if his dismissal was found to be harsh, oppressive or unfair, that he be reinstated without loss.

27 The respondent contended that the incidents which took place at Eastern Goldfields Regional Prison involving the applicant and prisoners Wharerau and Bellin spoke for themselves. In particular, the respondent submitted that the second OC spray directed towards Mr Bellin was not justified. Also, based on the letter of dismissal, the respondent submitted that it relied on three issues. First, was the gravity of the conduct itself. Second, was the applicant's lack of insight into his actions and his position that if confronted by the same events he would respond in the same way. This was said by the respondent to be a basis for the respondent's loss of confidence in the applicant as a prison officer, given the level of trust placed in an officer appointed under the *Prisons Act*.

28 Third, the respondent contended that the applicant's obfuscation of his actions in relation to the incidents, his reporting of them and his response to the disciplinary process, contributed to the decision to dismiss. In all of the circumstances, the respondent contended that the applicant's dismissal was justified.

Use of force principles

29 Use of force by a prison officer in the course of his or her duties must be strictly controlled and is, at all times, subject to legal restraint. The appointment, powers and duties of a prison officer in this State are governed by the *Prisons Act*. Section 13 empowers the respondent to appoint prison officers. Under s 13(2), on engagement, a prison officer takes an oath to well and truly serve the State as a prison officer and to maintain the safety and security of a prison, the prisoners and officers employed at a prison. The oath also obliges a prison officer to uphold the *Prisons Act* and all orders, rules and regulations made under it, to deal fairly with prisoners and to obey lawful orders of superiors.

30 Section 14(1) is most relevant for present purposes. It deals with the powers and duties of prison officers. It provides as follows:

14. Powers and duties of prison officers

(1) Every prison officer —

(a) has a responsibility to maintain the security of the prison where he is ordered to serve; and

(b) is liable to answer for the escape of a prisoner placed in his charge or for whom when on duty he has a responsibility; and

(c) shall obey all lawful orders given to him by the superintendent or other officer under whose control or supervision he is placed and the orders and directions of the chief executive officer; and

(d) may issue to a prisoner such orders as are necessary for the purposes of this Act, including the security, good order, or management of a prison, and may use such force as he believes on reasonable grounds to be necessary to ensure that his or other lawful orders are complied with.

31 For the purposes of these proceedings, s 14(1)(d) is most relevant. That empowers a prison officer to use such force as he considers necessary, based on reasonable grounds, to ensure that either his or other lawful orders are complied with. In terms of the meaning of "reasonable grounds" for these purposes, as was stated by the High Court in *George v Rockett* (1990) 93 ALR 483 at 488:

> When a statute prescribes that there must be "reasonable grounds" for a state of mind — including suspicion and belief — it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. That was the point of Lord Atkin's famous, and now orthodox, dissent in *Liversidge v Anderson* [1942] AC 206 : see *Nakkuda Ali v MF De s Jayaratne* [1951] AC 66 at 76–7 ; *R v IRC; Ex parte Rossminster Ltd* [1980] AC 952 at 1000, 1011, 1017–18 ; *Bradley v Commonwealth* (1973) 128 CLR 557 at 574–5 ; 1 ALR 241 ; *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 169 at 180– 1 ; 30 ALR 559 at 566–7 . That requirement opens many administrative decisions to judicial review and precludes the arbitrary exercise of many statutory powers: see, for example, *Attorney-General v Reynolds* [1980] AC 637 . Therefore it must appear to the issuing justice, not merely to the person seeking the search warrant, that reasonable grounds for the relevant suspicion and belief exist.

32 The respondent also has policies in place dealing with the use of force by prison officers. The relevant policy in this case is PD5. By par 1 titled 'Scope' it is provided that "all staff that are involved or could reasonably be expected to be involved in an incident requiring the use of force shall comply with this document". Paragraph 3 entitled 'Principles' is important, and it provides:

> 3.1 In all instances, force shall only be used when all other avenues have been exhausted or are considered impractical. Force must only be used as a last resort.
>
> 3.2 In the instance that force is used, staff should seek to de-escalate the situation and reduce the level of force used as soon as possible.
>
> 3.3. Force shall never be used as a form of punishment.
>
> 3.4 The amount of force used, shall be the minimum required to control the situation or behaviour and maintain security and good order and shall cease when the level of perceived threat can be managed without applying force.
>
> 3.5 Prisoners should not be held in instruments of restraint for any longer than is necessary to control their behaviour.

33 PD5 also deals with training and at par 4 it is provided as follows:

> 4.1.6 Use of force must not be applied by a prison officer unless that officer has successfully undergone a DCS approved training programme.
>
> 4.1.7 It shall be a shared responsibility between the designated Superintendent of each adult custodial facility and the individual staff member, to ensure they remain up to date and competent with the current use of force training packages by accessing training when available.
>
> 4.1.8 All prison officer staff shall be refreshed as minimum once annually in the following training:
>
> - Use of Force overview
> - Restraints (including batons)
> - Escorts
> - Self Defence
> - Chemical agents.
>
> All DCS staff shall be refreshed, as frequently as mandated by Adult Custodial.

34 All use of force in a prison is required to be preceded by a warning as mentioned in par 4.4 of PD5, that if the prisoner's actions do not cease, force may be used against them and an allowance of adequate time is made for the prisoner to comply. Annexed to PD5 is a further document providing guidance for the use of chemical agents (including OC spray) and distraction devices. It provides that chemical agents may only be used by officers trained in their use; emphasises the importance of initial responses being negotiation and conflict resolution techniques; and reiterates that "where practicable in the circumstances to do so"

to issue appropriate orders to restore good order and security of a prison and to tell a prisoner that if they do not comply with the order then chemical agents will be used.

35 The Training Academy is where prison officers undergo their initial and subsequent training. Mr Kentish is a team leader at the Academy. In this position he is responsible for managing training teams and arranging training for officers. He also sometimes undertakes training directly. In relation to the use of OC spray, Mr Kentish referred to the Academy Defensive Equipment and Techniques: Chemical Agent manual at p 168 of exhibit A1. He referred to the "hydraulic needle effect" which is where a high velocity spray may penetrate layers of soft tissue. Specifically, as prison officers are trained to use OC spray by spraying towards a person's eyes, nose and mouth, consideration needs to be given to safe operating distances. In the case of the OC spray used by the applicant, the minimum recommended engagement distance is 1 metre. Mr Kentish accepted however, that OC spray may be used at a closer distance and each case will be dynamic and depend on its circumstances.

36 As part of its training of prison officers, the Academy has a document called "Defensive Equipment and Techniques Use of Force (Adult Custodial)", a copy of which was exhibit R8. Mr Kentish was taken to this in his evidence. The introductory part of this document is relevant. On p 1 it is stated that:

> **Introduction**
>
> Prison officers are involved on a daily basis in numerous and varied encounters with prisoners and when warranted, may use force in carrying out their duties.
>
> Officers must have an understanding of, and true appreciation for, the limitations of their authority. This is especially true with respect to officers overcoming resistance whilst engaged in the performance of their duties.
>
> Even at its lowest level, the use of force is a serious responsibility. The purpose of this Manual is to provide officers of this Department with guidelines on the reasonable use of force. While there is no way to specify the exact amount or type of reasonable force to be applied in any situation, each officer is expected to use these guidelines to make such decisions in a professional, impartial, and safe manner.
>
> 'Reasonableness' of the force used must be judged from the perspective of a reasonable officer on the scene at the time of the incident. Any interpretation of reasonableness must allow for the fact that prison officers are often forced to make split-second decisions, in circumstances that are tense, uncertain and rapidly evolving, about the amount of force that is necessary in a particular situation.
>
> There are many factors that can influence use of force in a prison environment and these factors need to be fully understood in order to allow officers the latitude to properly

> understand, apply and defend their force decisions in order to keep themselves, prisoners in their care and custody as safe as possible.
>
> Using force can put officers as well as prisoners at risk of physical harm and as such, it is essential officers have the skills and knowledge to de-escalate situations (so force is used only as a last resort) and are trained in how to use force safely when there are no other alternatives.

37 In his evidence Mr Kentish was taken to p 6 of the document which is headed "The Use of Force Model". This is a theoretical model used as a tool to assist prison officers in the assessment of a situation with a prisoner that may involve the use of force. The model includes what factors an individual officer brings to a situation and Mr Kentish agreed with the proposition that the model refers to the perception of the officer (p 11) in terms of their own person characteristics, such as prior personal experience, size, strength and fitness etc. These are relevant as to how an officer may react in any given situation. The training manual recognises that two officers may react differently to a situation, depending on their own perception of events.

The incidents

The Wharerau incident

38 On 4 May 2017 in Unit 2, known at the prison as the "Reception Unit" prisoners were being addressed by Principal Officer Parker. The issue raised was prisoners hoarding bedding in their cells and general housekeeping within the unit. One prisoner, Mr Wharerau, complained that a number of his personal items, including soap, which he had purchased from the canteen, were missing from his cell. Mr Wharerau was told that his personal items were at the officers' post. Mr Wharerau became upset. An exchange took place between Mr Wharerau and Principal Officer Parker and Mr Wharerau became aggressive and adopted a fighting stance. Mr Wharerau had some history of fighting with other prisoners at the prison. A considerable number of other prisoners were present in an open area close to where Mr Wharerau was located.

39 Mr Wharerau was ushered by the applicant into a corner of the unit and attempts were made to restrain him. Mr Wharerau refused to comply with directions to cease resisting and took a firm hold of a door handle close to where he was located and refused to let go. He was described as having a "vice like grip" on the handle. the applicant called a "code green" in order to get assistance from other officers. He also called for OC spray and Mr Wharerau was warned that if he failed to cooperate and comply with orders from the officers then OC spray

may be used. Mr Wharerau continued to refuse lawful orders to cease his resistance, so the applicant deployed the OC spray. Mr Wharerau was then restrained in handcuffs and escorted from the area.

40 The applicant's evidence was that at the time Mr Wharerau became aware that his personal items had been removed from his cell he started to become very agitated. Mr Wharerau had some history and was known to get into fights with other prisoners. According to the applicant, Mr Wharerau called Principal Officer Parker a "fat c***" and that Principal Officer Parker responded. At the same time, the applicant testified that he observed that a large number of other prisoners in the open area close to Mr Wharerau were milling around. He became concerned that there might be some disturbance created. In cross-examination the applicant said there were some 15 prisoners behind him and he was conscious of a possible escalation.

41 It was at about this point, that the applicant called a "code green". Other officers attended including Officer Idowu. The applicant testified that given the situation developing, he tried to move Mr Wharerau into the corner of the room immediately next to the office window and an entry door. As he was doing so, the applicant said that Mr Wharerau grabbed the door handle and refused to let go. He had a vice like grip according to the applicant. It was at this point, that the applicant asked Officer Idowu to give him OC spray. The applicant's evidence was that he then gave Mr Wharerau two warnings to remove his hands from the door handle or he would be sprayed. I should observe at this point that whilst the respondent, in its initial allegations, contended based on the timing of events, presumably revealed in the CCTV footage, that the applicant failed to warn Mr Wharerau of the use of OC spray, that was not sustained on the evidence and the CCTV footage timing of the events. Counsel for the respondent, in my view properly so, accepted this was the case.

42 By this time, Officer Hinchcliffe was also behind the applicant. As Mr Wharerau was, according to the applicant, remaining non-compliant and was not going to move, and given his concerns as to the number of prisoners milling about behind them and taking an interest in what was occurring, the applicant deployed his OC spray at Mr Wharerau. Unfortunately, the spray hit the window and some spray also got on the applicant and the other officers. Immediately following the spray deployment, Officer Hinchcliffe provided the applicant with handcuffs and the officers secured Mr Wharerau. He was taken out of the room to the containment unit to calm him down.

43 It was put to the applicant in his evidence that in terms of the respondent's training materials, that there may be some risk of injury if the OC spray cannister used, a mark 4 type, was deployed at less than one metre. The applicant also accepted that in terms of his reporting of the incident, that an officer should

record the nature of the lawful order given prior to deploying a force option such as OC spray. The Incident Description Reports or "TOMS" reports of the Wharerau incident appear at pp 32-26 of exhibit A1.

44 Principal Officer Parker is the Principal Officer at the Eastern Goldfields Prison. He testified that an incident occurred in May 2017. He was at the particular prison unit to investigate the use of blankets by prisoners and found soap in a cell that he thought belonged to the prison. Principal Officer Parker accordingly took this item to the office. He then addressed the group of prisoners. It was Principal Officer Parker's evidence that Mr Wharerau became vocal at this time and asked for his soap. He came down the stairs from the upper level. Principal Officer Parker referred to the applicant and Officer Idowu being present at this time. Additionally, there were, on Principal Officer Parker's estimate, about 28 to 40 other prisoners present in the immediate area.

45 It was Principal Officer Parker's evidence that the applicant started moving Mr Wharerau away from him. However, Mr Wharerau continued to come back towards him. Principal Officer Parker said that he foresaw some problems in removing Mr Wharerau at that point. His evidence was that he then tasted OC spray and he went outside.

46 As a part of his responsibilities as the Principal Officer, it was Mr Parker's job to review CCTV footage in relation to such incidents. Principal Officer Parker's evidence was that in the circumstances that occurred on that day, he had no concern with the use of OC spray by the applicant. The prisoner was clearly not complying with his direction. Principal Officer Parker also added that he could see that the applicant was initially trying to de-escalate the situation and to calm Mr Wharerau down.

47 Officer Idowu was a probationary officer at the time of this incident. His evidence was that Principal Officer Parker had undertaken a cell inspection and all laundry in the cells was removed. Mr Wharerau's soap was removed and put in the office. Mr Wharerau became upset by this and he became abusive towards the Principal Officer and also Officer Idowu. Officer Marshall was also present at the time. According to Officer Idowu, the applicant called a "code green". Officer Idowu also mentioned that there were a significant number of other prisoners present and the situation was unpredictable. He testified that the other prisoners present may have been incited to act. He saw the applicant direct Mr Wharerau towards the corner of the room where Mr Wharerau grabbed hold of the door handle and would not let go. Officer Idowu's evidence was that because of this, handcuffs could not be used. He heard the applicant give two warnings to Mr Wharerau that if he did not let go then OC spray would be used.

48 As mentioned above, this is quite at odds with the inference drawn by the investigators that from the CCTV footage, the applicant did not likely have sufficient time to warn. The applicant then deployed the spray and it bounced off the windows and struck the officers also. In his evidence, Officer Idowu agreed that it was important to act quickly in the circumstances that developed on that day. There was a significant chance of an incident occurring as Mr Wharerau was a large prisoner and there was a significant chance of an assault on officers. Evidence was given on behalf of the applicant by Ms Reynolds, presently the Assistant Superintendent of Operations at Bandyup Women's Prison. Ms Reynolds is an officer of some 20 years' experience, including as a senior officer at Hakea Prison. She testified that she worked with the applicant for over five years at Hakea and found him to be a very professional officer well acquainted with prison rules and procedures. Other staff would go to him for advice and guidance.

49 Assistant Superintendent Reynolds was asked about the Cooper Email and she said she remembered it well. She took this as a directive to officers. It came about because of assaults on officers by prisoners and meant that chemical agent should be used rather than having physical contact with prisoners, due to the risk of assaults. It was Assistant Superintendent Reynold's evidence that OC spray was used regularly at Hakea in more volatile areas of the prison in relation to prisoners who were non-compliant, when not following a direction. She accepted that the email directive must be understood and applied in accordance with the PD5 policy on use of force and s 14 of the *Prisons Act*.

50 Assistant Superintendent Reynolds had been shown the CCTV footage of both incidents but had not been given any other information about the incidents or these proceedings by the applicant's solicitors. She had no contact with the applicant prior to giving her evidence. When reviewing the footage, she expressed the view in relation to the Wharerau incident, that there were a lot of other prisoners out of their cells and milling around the area. In her view, it looked like a situation that could escalate and get out of control. Assistant Superintendent Reynold's assessment was she would probably have acted in the same way as the applicant did given the circumstances. In particular, she emphasised the importance of officers getting situations like the Wharerau incident under control quickly, because of the risk of escalation.

51 Officer English is a senior prison officer who has about 27 years' experience. He is currently at Banksia Hill Detention Centre. Senior Officer English has previously acted as Principal Officer and Assistant Superintendent level at Hakea Prison over a number of years. At Hakea, Senior Officer English worked closely with the applicant and described him as a "great senior officer" who had been in charge of the prison as Principal Officer with him on a number of occasions when

the other senior management had either left for the day or were otherwise absent. This included occasions when the applicant handled critical incidents in the prison. He also gave evidence about the Cooper Email and that it arose out of an officers debrief meeting usually held on Mondays and Fridays, or possibly every day. However, he could not recall how frequently the meetings occurred at that time at Hakea.

52 Senior Officer English mentioned that the Superintendent Schilo had spoken about the high level of workers' compensation cases from officers being injured in prisoner assaults. The Cooper Email was in response to this and was to the effect that officers should not use physical force with non-compliant, violent prisoners, rather OC spray should be deployed instead. Senior Officer English took this as a directive and he passed it on to officers he supervised. As with Officer Reynolds, Senior Officer English understood the directive also had to be read along with PD5 and the *Prisons Act*.

53 In relation to the Wharerau incident, Senior Officer English had viewed the CCTV footage relatively recently. He said that he saw that there were about 18 other prisoners in the immediate area. In his experience, he said it is paramount to get the non-compliant prisoner out of the area and constrained as quickly as possible, as it doesn't take much for other prisoners to get involved in the incident. Senior Officer English's evidence said the best approach in that situation is to "cordon and contain" and he thought what was done in relation to Mr Wharerau was correct. He also observed that at the time there was an Assistant Superintendent and Principal Officer present and if they had any problems with the way the applicant was handling the situation, they could have done something about it. When it was put to him that there are recommended minimum distances over which OC spray should be deployed, Senior Officer English said having reviewed the footage, he would have acted in the same way as the applicant did.

54 Evidence was also given by Acting Deputy Commissioner Blenkinsopp on behalf of the respondent. Mr Blenkinsopp's substantive position at the time of the hearing was Superintendent at Hakea Prison for two and a half years and for a number of years prior to this had been the Superintendent at Greenough Regional Prison. Acting Deputy Commissioner Blenkinsopp has also held senior management positions with the respondent and is a very experienced and decorated officer. He had reviewed the CCTV footage on the morning of the hearing. In his view, as there were a number of officers present at the time, they could have assisted in getting Mr Wharerau to release his hands from the door handle without the need to use OC spray.

55 Superintendent Hedges is the prison superintendent at Eastern Goldfields Regional Prison. As the superintendent at the prison, Superintendent Hedges is

not only a very experienced officer, but is familiar with the staff at the prison and the prisoner cohort. As a part of his duties as Superintendent, he undertook a review of the use of force. Superintendent Hedges prepared a report as is required. A copy of the report appears at pp 37-42 of exhibit A1. The main body of Superintendent Hedges' report on p 37 reads as follows:

> **Designated Superintendent's Overview (including actions taken and any recommendation(s))**
>
> The Unit 2 prisoner group were being addressed by Principal Officer Parker regarding the hording of bedding items and general housekeeping. Following this, Ralph Wharerau requested to know the location of his canteen purchases, which had been removed from his cell. Mr Wharerau was informed it was within the officer post, he became verbally abusive towards PO Parker and allegedly adopting a fighting stance.
>
> Mr Wharerau was ushered against a wall in an attempt to restrain him and calm the situation. Mr Wharerau refused to present his hands for officers to mechanically restrain him, grabbing hold of the door handle and refusing to let go. Mr Wharerau refused several orders to stop resisting. Mr Wharerau was issued a warning by Senior Officer Hawthorn if he continued his non-compliance Chemical Agent may be used. Mr Wharerau ignored all negotiations and warning, continuing to refuse the lawful order. Chemical Agent was sourced from the Unit office and deployed by SO Hawthorn.
>
> Mr Wharerau was mechanically restrained and relocated to MPU Cell E05, where the restraints were removed, strip searched, decontaminated from Chemical Agent exposure and seen by EGRP medical. Nil injuries have been identified.

56 Superintendent Hedges concluded in the Report that the use of force in the circumstances was "adequate to control the situation and prevent it from escalating". His evidence was the circumstances which arose on that day constituted a volatile situation. Superintendent Hedges testified that this was his view when he made the Report, and this remained his view as at the time he gave evidence in these proceedings. I agree. There was plainly, as Superintendent Hedges and Officer Idowu identified, a risk of involvement of other prisoners. From a review of the CCTV footage, which I have studied carefully, especially from the full room angle, there were a considerable number of prisoners milling about and taking an interest in Mr Wharerau's interaction with the officers. They were edging closer. It was also clear from the CCTV footage, although the lack of audio is a limitation, that Mr Wharerau was becoming argumentative and non-compliant. Situation awareness, as all of the respondent's training material emphasises, is important. This was a factor which Superintendent Hedges considered. I agree with this also.

57 His assessment of the incident was consistent with the evidence of Principal Officer Parker, Officer Idowu and the applicant. I would add that the officers called on the applicant's behalf also supported this assessment, although it was,

as with Acting Deputy Commissioner Blenkinsopp's evidence, based on an after the event assessment with all of the limitations that involves. In saying this, I found the evidence of these witnesses to be credible. Superintendent Hedges' view was also consistent, as I have just observed, with the respondent's training materials in relation to use of force guides. As the most senior officer and the Superintendent, who is under the *Prisons Act* responsible for the good order and security of the prison, I found Superintendent Hedges' evidence very persuasive. Having regard to how the incident unfolded, it is difficult to see how else the applicant could have rendered Mr Wharerau compliant in the circumstances. In my view, the actions of the applicant on all of the evidence, were consistent with the respondent's training materials and the respondent's criticisms of his actions were unwarranted.

58 The evidence of Principal Officer Parker, not contradicted, was that the applicant attempted to de-escalate the situation by calming Mr Wharerau down. When this was not successful he then ushered him towards the corner of the room to move him away from the immediate area and particularly, further away from the large number of other prisoners who were taking an active interest in the situation. Those actions are entirely consistent with a prison officer's training, at least as presented on the evidence in these proceedings. Whilst the applicant was subject to some criticism in deploying the OC spray at a distance which was said to be too close, I note from the training materials that the one metre distance is a recommended distance and that Mr Kentish's evidence was that each case must be assessed in accordance with its circumstances.

59 On all of the evidence adduced in this matter, I conclude that the deployment of OC spray by the applicant in the Wharerau incident was justified. It did not, having regard to all of the circumstances, constitute the use of unreasonable force.

60 As to allegation 2, in relation to the applicant using OC spray when his refresher training was not up to date, the respondent submitted that despite this allegation being sustained, this could not be a basis, of itself, for the applicant's dismissal. Whilst the allegation was not abandoned, there was no reference to it in the respondent's dismissal letter. Nor did it seem to form part of the respondent's reasons for decision in its letter of 25 May 2018. In the absence of the Director-General or other senior executive directly involved in the decision making to dismiss the applicant being called to give evidence, this was the only evidence before the Commission as to the basis for the respondent's decision. No reason was advanced as to why the principal decision-makers were not called to give evidence in these proceedings. One would expect them to be. This course of action by an employer is not helpful and is not to be encouraged. Similar observations were made by the Full Bench recently in the context of an appeal

from a decision by the Education Department to dismiss a teacher: *State School Teachers' Union of WA (Incorporated) v Director-General Department of Education* [2019] WAIRC 00175; (2019) 99 WAIG 336 at par 86. This applies not just to the decision to dismiss but also to the questions of what remedy might flow, in the event that a claim is upheld.

61 As I have already noted the training allegation was not expressly abandoned by the respondent. As it was an allegation found to have been made out but did not feature in the letter of dismissal, its relevance to the decision to dismiss is, regrettably, somewhat ambiguous. This is made all the more so by the absence of evidence from Mr Tomison or other senior executives of the respondent, as to what extent, if any, it was relied on by the respondent. However, I simply note, as was raised during the course of the hearing of this matter, that under s 19(1)(b) of the *Occupational Safety and Health Act 1984* (WA), as a part of an employer's general duty of care, there is an obligation to provide "such information, instruction and training to, and supervision of, the employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards; …" This is an obligation that cannot be contracted out of. Whilst the respondent may also require an officer to undergo appropriate training, and failure to do so may constitute a disciplinary matter, the primary obligation, as a matter of law, rests with the employer.

The Bellin incident

62 On 20 May 2017 the applicant was managing the Crisis Care Unit at the prison. A prisoner, Mr Bellin, who was on remand, was enquiring about the status of his surety with prison staff. Mr Bellin was told that his surety had been arranged and it would be completed by the following morning. The prisoner was not responsive to this information and he continued to demand a telephone call to arrange his surety. Mr Bellin became increasingly argumentative and at some point, picked up a plastic chair and adopted a fighting stance. The applicant requested OC spray. Mr Bellin made threats to fight both the applicant and the officers present. Mr Bellin took off his t-shirt and eventually wrapped it around his face in an attempt to deflect any OC spray if it had been deployed at that point. The applicant, in the company of two other officers, Officers Bruynzeel and Mulvaney, both of whom were probationary officers at the time, pushed Mr Bellin back towards his cell. Mr Bellin remained non-compliant.

63 On reaching the cell door, Mr Bellin attempted to grab hold of the door frame, but the applicant pushed him into the cell. The applicant deployed OC spray once at Mr Bellin and then a second deployment was made shortly after. The cell door

was then shut. Because Mr Bellin remained in an agitated state, he was shortly thereafter extracted from his cell and placed in a safe cell.

64 The Bellin incident involved the allegation of excessive use of force. Given the terms of the relevant legislation, this is a serious allegation and one which in my view, without question, attracts the higher threshold of proof as set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336. Having regard to the context and surrounding circumstances, on a review of all of the evidence, including the CCTV footage, there could be no criticism of the applicant withdrawing the OC spray cannister from its pouch whilst he, the other officers and Mr Bellin were in the common room. He obtained the spray from Officer Mulvaney. A warning was given by the applicant to Mr Bellin that unless he obeyed the directions for him to return to his cell, then OC spray would be used. Officer Bruynzeel confirmed this was the case, although Officer Mulvaney could not recall this but assumed a warning had been given. As the applicant said in his evidence, the purpose in his actions in this regard, was to render Mr Bellin compliant by the fact of withdrawing the OC spray cannister itself, without the need to use it.

65 Plainly however, Mr Bellin became increasingly agitated and aggressive in relation to the dispute concerning his surety. This was the evidence of the officers who were present at the time. Mr Bellin adopted a fighting stance and picked up a chair, although I do not consider that this was done, from the CCTV footage, with the evident intention to use it to strike any of the officers. However, it is clear from the CCTV footage and the evidence of the applicant, Officer Mulvaney and Officer Bruynzeel, that Mr Bellin remained in a highly agitated state when he was escorted up the corridor towards his cell. At no stage could it be reasonably concluded that Mr Bellin had become compliant prior to reaching the cell door. It is what then occurred that is critical.

66 Mr Bellin was escorted by the applicant to the cell door and Officers Mulvaney and Bruynzeel were following just behind. Officer Bruynzeel testified that as a new officer he had never been in such a situation or faced such a highly agitated prisoner and he found it "fairly scary" and overall, "confronting". Officer Mulvaney also confirmed the state of agitation of Mr Bellin. She agreed that Mr Bellin's behaviour was abusive and threatening under the rules of the prison. With respect to Officer Bruynzeel, and I do not make any criticism of him, but he provided little assistance to the applicant during the incident. This was most likely because he was only a probationary officer at the time and the situation was as he said, very confronting. Indeed, Officer Mulvaney said in her evidence, that she had to move Officer Bruynzeel out of the way before they moved up the corridor. While I am commenting on this, I cannot accept the criticisms by the respondent of the applicant, when he said his colleagues on the day provided him little assistance, and the respondent's assertion that he was attempting to shift

blame for the incident to the other officers. Any reasonable assessment of the CCTV footage shows that the applicant did almost all of the work in containing Mr Bellin.

67 From the CCTV footage, immediately prior to arriving at the cell door, Mr Bellin looked to his right seemingly to observe where the applicant was, relative to his own position. The footage however shows that at the point the cell door was reached, Mr Bellin actively resisted entry to the cell and took hold of the cell door by its leading edge. At this point, Officer Mulvaney was still behind and to the left of the applicant and she was not on the other side of the door in order that it may have been quickly shut at that point. Officer Mulvaney said when they got to the door of the cell she made her way behind it and put the key in the lock. She said that she was ready to shut the door. The CCTV footage however shows there was some delay before this happened. On my reckoning there was a period of about four to five seconds between when they arrived at the cell door and when Officer Mulvaney moved to the right-hand side, to be in a position to shut the door.

68 What then occurred is in my view important. Mr Bellin, when holding the leading edge of the door is plainly resisting entry to the cell. The applicant said this in his evidence. The applicant also said that Mr Bellin was also still abusive and threatening towards the officers. Momentarily however, the CCTV footage shows that Mr Bellin moved back to his right and towards the applicant. He then moved quickly to the left through the door and at the same time, the applicant prepared to and deployed the first spray. His evidence was that he deployed the first spray as Mr Bellin was running into the cell and when he was about three quarters of the way inside it. At this point, and just prior to Mr Bellin entering the cell, Officer Mulvaney was still not in a position to shut the door. As I have noted above, a period of about four to five seconds elapsed from the time the officers and Mr Bellin reached the cell door and before Officer Mulvaney was on the other side of the door and seemed to be, from the footage, putting the key into the door lock. It was only after the second spray, that Officer Mulvaney seems to be in the position to close the cell door but cannot because the applicant remains in the entrance. It was Officer Mulvaney's evidence that she could have shut the cell door earlier had the applicant not been in the doorway.

69 The applicant testified that the first spray was deployed because when the prisoner had moved into the cell he gestured as if he was going to come back at the officers again. The first spray was also directed at the prisoner because the applicant said he told him to move to the back of the cell and was attempting to keep him there. I pause to note that as explored quite extensively in cross-examination, the reference to the further direction for Mr Bellin to move to the back of the cell in the applicant's evidence was the first occasion this explanation

had been given for the use of the OC spray. It was not referred to in the applicant's responses in the disciplinary investigation, in his private examination before the Corruption and Crime Commission (CCC), or in his various reports of the incident. Nor could Officers Bruynzeel or Mulvaney recall any other directions given to the prisoner in this respect.

70 It was the tenor of the applicant's evidence that once in the cell Mr Bellin remained non-compliant. He continued his abusive behaviour. Whilst the applicant accepted from the CCTV footage that just prior to the second spray the prisoner was on or just about on the bed covering himself with bedding, he added that Mr Bellin was inching down the bed. Also, the applicant justified his second deployment of OC spray because the first had not been effective and had not contacted the prisoner. This was said to be consistent with the respondent's training material on the use of chemical agent that if the first spray is not effective because the target is covering up for example, a second spray should be deployed. It was the applicant's evidence also that he sprayed the second time to keep the prisoner on the bed and he needed to be sure that he was affected by the spray.

71 Officer Mulvaney's evidence also was that at the cell door Mr Bellin remained very agitated and very aggressive. In her Incident Description Report completed shortly after the incident (see p 23 exhibit A1), which she accepted was the best reflection of her views at the time, Officer Mulvaney said "When he (Bellin) was almost at his cell BELLIN removed the t-shirt from his face, and I believe he would have struck Senior Officer HAWTHORN had he not used chemical agent." She further said in her evidence that she believed that the situation by the time the cell door was reached was escalating between Prisoner Bellin and the applicant. Officer Mulvaney said that it was more than likely in her view that the applicant would have been assaulted if the exchange between the two of them had continued. Whilst Officer Mulvaney was not entirely sure from where she was standing, she thought that Mr Bellin was only sprayed once whilst close to the door. However, when she saw the CCTV footage, she saw that there were two sprays.

72 Officer Mulvaney accepted that some two months or so after the incident, during the disciplinary investigation, she had some difficulties recollecting the detail of the incident and needed to refer to her IDR in order to respond to questions. Importantly, Officer Mulvaney made the point that whilst they formerly could, officers no longer, at the time of these incidents, had the benefit of reviewing CCTV footage prior to completing their IDR. She also said that on reflection, it would have been better if the cell door had been shut earlier, avoiding the need to use the OC spray.

73 Officer Bruynzeel also completed an IDR very shortly after the incident and it appears at p 28 of exhibit A1. In it, after narrating the build up to the cell door events, he said that "When he was almost at his cell, BELLIN removed the t-shirt from his face, and continued in a manner that was highly aggressive and leading towards physical action against Senior Officer HAWTHORN had he not used chemical agent". He said that at the time this was written, shortly after the incident, this was his belief. Officer Bruynzeel added that this was written with his lack of experience and he perceived Mr Bellin as a threat at the time. As with Officer Mulvaney, Officer Bruynzeel seemed to have had a change of heart over the intervening period, which included the disciplinary investigation into the applicant; the CCC investigation; and the benefit of a review of CCTV footage. His evidence was that with the benefit of hindsight, he now thought the door to the cell should have been shut, without the need to use OC spray. The applicant, in his IDR, described Mr Bellin in the common room as being belligerent and argumentative. He instructed staff to return him to his cell. The applicant continued that "I started to push him towards his cell which he started to go to, he stopped at least twice more resulting me in having to push him. It was when he reached his cell did he turn and made a gesture that he was going to continue to fight, I gave him a push into his cell it was then he went to come back at me so I deployed the Chemical Agent…" (exhibit A1 p 29). I note that this particular action of Mr Bellin, was consistent with the applicant's IDR. The applicant referred to Mr Bellin making a gesture that he was going to continue to fight. He then pushed him into the cell. Mr Bellin then hesitated, and the first spray took place.

74 Assistant Superintendent Reynolds said that when she reviewed the CCTV footage she saw Mr Bellin grab either the applicant or something on the door just before he went into the cell. She was of the view that one of the other officers could have pulled the applicant by his belt out of the way, so the door could have been shut earlier. She described this as a standard practice. Senior Officer English also said that, consistent with what is done at Hakea and at Banksia Hill, one of the other officers should have pulled the applicant back away from the door, so it could have been shut quickly. This is what he referred to as a "hot exit". He also put emphasis on the perceptions of an officer at the time of an incident, in accordance with their training. On his review of the CCTV footage he said he would have reacted in the same way. Acting Deputy Commissioner Blenkinsopp said that he didn't think that OC spray was necessary and that the prisoner could have been handcuffed and the cell door should have been shut to contain the prisoner. Whilst he had not heard of the phrase "hot exit", Acting Deputy Commissioner Blenkinsopp accepted that the other officers present in that situation, could help in moving an officer away from the cell door.

75 From all of the evidence, I draw a number of conclusions from this sequence of events. Firstly, Mr Bellin was a young and fit male prisoner in an aggressive state. From the respondent's training materials, the perception of a prison officer in relation to such matters is relevant. I accept also on the applicant's evidence, that his prior history, having been previously assaulted by prisoners, may have shaped his perception of the events up to this point. Secondly, at the point of reaching the cell door, Mr Bellin was actively resisting entry into the cell. His momentary action at moving back towards the applicant, in the context of Mr Bellin's actions and demeanour leading up to that point, would be on any reasonable view, sufficient to create an apprehension in the mind of a reasonable person, that Mr Bellin may have been intending to physically engage with the applicant or the other officers.

76 That conclusion was plainly open, having viewed the CCTV footage. From the CCTV footage, along with the situational factors and matters of perception that I have referred to, along with the fact that Mr Bellin was resisting at the cell door, and his momentary moving back towards the officers, would be sufficient to create reasonable grounds for a state of mind of a prison officer in the applicant's position, that Mr Bellin may engage physically with the applicant or the other prison officers. Additionally, there can be no doubt that there had been a previous direction for Mr Bellin to return to the cell. This direction did not mean that Mr Bellin was to remain standing outside of it. It was obvious that the lawful direction from the applicant was for Mr Bellin to return into his cell and to stay there.

77 Having regard to these factors, it is not without some oscillation, that I do not think that the first OC spray deployment, constituted an excessive use of force. It is easy with the benefit of hindsight, and not being present in the heat of the moment, to assess whether matters could have been handled differently up to that point. I note that in the Investigator's letter of 7 December 2017 to the applicant, the same concession seems to have been posited, that the first spray may have been justified. This was also mentioned, not insignificantly, in the letter of 25 May 2018, setting out the respondent's findings in relation to both incidents. In my view, having regard to all of the relevant circumstances, it was justified. However, for the following reasons, I have come to different conclusions in relation to the second OC spray delivered by the applicant.

78 A review of the CCTV footage from all of the camera angles shows that once Mr Bellin was inside the cell and prior to the second OC spray he was moving towards and was then on the cell bed, attempting to cover himself with blankets. I have no doubt from the footage that he did so to avoid the effect of any further OC spray. However, I consider that by this point, Mr Bellin was acting defensively. I do not consider that by this time, Mr Bellin constituted a threat to

either the applicant or the other two officers who were present at the cell door. Once the first spray had been deployed, I consider that the applicant should have stood clear and the cell door should have been shut by Officer Mulvaney. This is despite the fact that the first spray seemed to have either missed Mr Bellin completely or had little or no effect on him.

79 I do not consider that once Mr Bellin was on the cell bed attempting to cover himself with bedding, that this could create the apprehension in the mind of a reasonable person, that Mr Bellin may have posed a threat to the safety of the applicant or the other officers. It was contended by the applicant that the second spray was deployed because the first was ineffective, as Mr Bellin had not been exposed to the full effects of it, in accordance with the respondent's own policy PD5. However, even if this was so, once Mr Bellin was in the cell and on or close to the cell bed, the need for the deployment of spray for any reason fell away. The cell door should have been shut to contain the prisoner. Most aptly, I do not consider that the second spray was justified to ensure that Mr Bellin was complying with the lawful order to return to and remain in his cell. By that time the order had been complied with. Even if, as the applicant maintained, that a further direction was given by the applicant for Mr Bellin to move to the rear wall of the cell, the further use of OC spray was not necessary to ensure that such an order was complied with.

Consideration

The Cooper Email

80 As noted earlier, this issue seemed to assume some importance in the applicant's case. The contention advanced was that the email from Principal Officer Cooper at Hakea Prison of February 2015, constituted a direction to prison officers, at least at Hakea, to use OC spray if some doubt existed as to whether a prisoner may become violent towards a prison officer. Even though the applicant was on secondment to the Eastern Goldfields Prison, he contended that the Cooper Email formed part of the factual matrix and had some influence on his response in relation to the two incidents. This direction was said to have been issued at the time Superintendent Schilo was the Superintendent at Hakea Prison and was discussed at an officer "debrief" meeting, which Superintendent Schilo was said to have attended.

81 In order to clarify the uncertainty surrounding the status of this document, the Commission relisted the proceedings to take further evidence. Superintendent Schilo, who is now Superintendent at Casuarina Prison, gave evidence. He testified that he had been the superintendent at Hakea Prison on a number of

occasions. Superintendent Schilo was shown a human resources document (exhibit R9), that suggested that he was not at Hakea Prison until 16 February 2015, a few days after the date of the Cooper Email. Superintendent Schilo was not, understandably, able to independently recall the dates that he was at Hakea Prison and relied on exhibit R9 for these purposes.

82 According to Superintendent Schilo, "debrief" meetings at Hakea Prison are normally held on a Monday and Friday each week. These involve the Superintendent and senior officer group. Superintendent Schilo could not recall if he was at a debrief meeting when the content of the Cooper Email was discussed. When it was put to him however, Superintendent Schilo accepted that he probably would have been at the debrief meeting on Monday 16 February 2015 and the Cooper Email may well have been discussed but he had no independent recollection of this. He understood that the email arose because of the number of prison officer injuries at Hakea Prison, resulting from prisoner assaults.

83 In the final analysis, I am not persuaded that much weight can be placed on this communication. Firstly, it was issued by a principal officer at Hakea Prison and not the Eastern Goldfields Prison. It was directed to senior officers at Hakea to address specific circumstances that had arisen at that prison in relation to assaults on prison officers by prisoners and injuries sustained. Secondly, it is also clear that the suggestion in the Cooper Email that "if in doubt get the spray out" is, as it must be, qualified by the terms of the respondent's PD5, governing the use of chemical agents in a prison. It also, of course, must be read in the context of the law, in particular s 14 of the *Prisons Act*. Accordingly, I do not consider that it can be relied on by the applicant to provide any justification for in particular, the second OC spray deployment in the Bellin incident.

Joint basis for decision to dismiss

84 As noted earlier in these reasons, the respondent treated both the Wharerau and Bellin incidents together for the purposes of its decision to dismiss the applicant. This issue was the subject of submissions from the parties in the event that the Commission found that one of the incidents of the deployment of OC spray was not unreasonable or an excessive use of force.

85 For the applicant it was contended that the effect of this "fractured" the decision to dismiss and that it should fall away. The applicant contended that if the Commission found that the Wharerau incident did not constitute an unreasonable use of force, then apart from fracturing the decision to dismiss in the way contended, the incident in relation to Mr Bellin could not, taken alone, justify the

dismissal of a prison officer of 22 years' experience, 11 of which with the respondent and with an unblemished record of employment.

86 The respondent accepted that if, as I have in fact found, the Wharerau incident fell away and reliance is solely placed on the Bellin incident, then the "correctness" of the decision was open to question. Submissions where made by the respondent that this could, but would not necessarily, make the applicant's dismissal unfair.

87 Whether a dismissal is harsh, oppressive or unfair, involves an assessment of whether an employee has been given a fair go all around and whether the respondent's decision to dismiss, involves an abuse of the right to do so: *Miles v Federated Miscellaneous Workers Union of Australia, Hospital, Service and Miscellaneous WA Branch* (1985) 65 WAIG 385. It is for the Commission in the exercise of its discretion, to have regard to all of the circumstances of a case. In this matter, it is clear that both incidents were taken together by the respondent as the justification for its decision that dismissal was the appropriate outcome. This is set out in the respondent's letter of 25 May 2018, under the heading "Reasons for Decision" and also the heading "Proposed Disciplinary Action". The respondent also considered that the applicant had "obviated his actions" in his various reports. Although, in this respect, as I comment later, at no time did this issue form any part of the allegations against him. Also, in the final letter of 11 July 2018, reference was made to the applicant not being able to reflect on his actions.

88 Nowhere does the respondent say in either of these letters, that the applicant's conduct in respect of only one incident, could form the justification for its decision to dismiss him. This is particularly so when regard is had to the comments by the Director-General in his letter of 11 July 2018, that he considered other options to dismissal, such as reduction in rank along with a reprimand and retraining. However, it seems that the respondent's view that the applicant was not able to accept responsibility for his actions assumed some significance in the Director-General's decision and appears to have "tipped the scales" in terms of the respondent's ultimate decision. That this is so, only goes to further illustrate that if one of the incidents forming a foundation for the respondent's decision to dismiss is removed, then the rationale for the dismissal itself is undermined.

89 In this circumstance, it is difficult to see how the decision to dismiss could be other than unfair. Even if I am incorrect in this conclusion, the issue can be tested as to whether reliance on the one incident alone, in relation to the second OC spray of Mr Bellin, in all of the circumstances, not just some of them, would warrant the ultimate sanction of dismissal. I do not consider that it would. I have already found that the first OC spray in Mr Bellin's case was justified, but not the

second. This action must be seen in the context of the applicant's unblemished record of service over 11 years and his prior commendations. It must also be seen in the context of the whole incident with Mr Bellin, from the very beginning in the common room, and ending up with Mr Bellin being extracted from his cell because of his level of agitation and aggression.

90 The fact that the applicant has said in the past to investigators and in his evidence in these proceedings, that he considered his actions appropriate, and for which he was punished by the respondent, as forming part of its decision to dismiss him, is also undermined by the conclusion that in relation to the Wharerau incident, the applicant's actions were justified, and the use of force was not unreasonable. In that context, the applicant's subsequent statements that he would have acted in the same way if confronted by these circumstances again, cannot be the subject of criticism in relation to the Wharerau incident, as the view of his senior colleagues responsible for reviewing his actions at the time, was also that his conduct was reasonable.

91 I therefore do not consider that the Bellin incident alone, having regard to all of the circumstances, justified the dismissal of the applicant. It may warrant a reprimand and retraining, but not the loss of his job after 11 years of good service. Nor in my view, even though its significance in the mind of the employer at the time of its decision was unclear, could the addition of the training allegation "tip the scales" to make an unjustified dismissal, justified.

Obfuscation of actions

92 The contentions of the respondent in respect of this issue, from its letters of 25 May and 11 July 2018, were not entirely clear. The correspondence referred to the applicant obviating his actions in his various reports. No detail of these contentions was put to the applicant by the respondent at any time, either in the course of the disciplinary investigations or subsequently. The respondent in its notice of answer in these proceedings referred to other bases to support the fairness of the dismissal of the applicant, in the event that the allegations the subject of the disciplinary process were not, or not all, made out. This was to the effect that the applicant made inaccurate or false reports in relation to both the Wharerau and Bellin incidents. These allegations were the subject of an investigation by the CCC which resulted in a report, published on 27 June 2018. The CCC Report reached the opinion that the applicant engaged in serious misconduct in relation to his reporting obligations.

93 It was accepted by counsel for the respondent that none of the allegations against the applicant that were the subject of the CCC Report were put to him as disciplinary allegations in relation to either the Wharerau or Bellin incidents.

They appear to have emerged and been progressed subsequently. Thus, there was no compliance with s 81(1)(a) of the *PSM Act* and the Commissioner's Instruction No 3 Discipline – general, that obliges employing authorities whose employees are subject to Part 5 of the *PSM Act*, to comply with its terms. There can be no doubt that as a result of legislative changes made in 2014, prison officers are now prescribed for the purposes of s 76(1)(b) of the *PSM Act* and are subject to Part 5 of the *PSM Act*, in relation to disciplinary matters: s 8 *Prisons Act*.

94 Thus, the respondent, in undertaking disciplinary action against a prison officer, is subject to the rigours of the public service and public sector regime that applies. In particular, the Commissioner's Instruction requires, as a minimum obligation, that pars 1-1.10, in relation to procedural aspects of dealing with a disciplinary matter are complied with. In particular, no finding can be made against an employee in relation to an alleged breach of discipline, unless the detail of the alleged breach is put to the employee in writing; the possible consequences for the employee if a breach of discipline is established; and a reasonable opportunity to respond to the allegation is afforded to the employee. Furthermore, before any proposed action is taken by the employer, in relation to the allegation, the employee is to be given an opportunity to respond to the proposed action.

95 None of this occurred in this case, in relation to the assertions made against the applicant that he obviated his actions in relation to his reporting obligations. There has been no compliance with these mandatory statutory obligations in the case of any allegations concerning the applicant's reporting of the use of force in relation to either the Wharerau or Bellin incidents. Nor I might add, has the respondent sought to take disciplinary action against the applicant, as a former employee, as it may do so under s 76(4) of the *PSM Act*, in relation to any such allegation. It may well be that these matters are what the Director-General referred to in his letter of dismissal of 11 July 2018, in the final paragraph, where reference is made to "further allegations" that were to be served on the applicant, which given the decision to dismiss, were to be stayed. In the absence of any confirmation by the respondent that the reporting issues somewhat fleetingly adverted to in the correspondence, are what the Director-General was referring to, is at this point, merely speculative.

96 Whilst on this point, it is not appropriate to foreshadow "other allegations" of breaches of discipline in this manner, when communicating a decision to dismiss an employee. It raises the prospect that those other matters may have had some influence on the decision maker. This is particularly so where, as in this case, there has been an investigation and opinions reached by another body. A similar observation to this effect was made previously by the Commission in *SSTU v The*

Director General, Department of Education [2015] WAIRC 00517; (2015) 95 WAIG 1461 per Scott C at 1468.

97 The issue that arises from all of this is to what extent can the respondent rely on these matters now, in these proceedings, to either, as asserted in its notice of answer, justify the decision to dismiss the applicant or, alternatively, to resist reinstatement, in the event that the Commission makes a finding of unfairness. In my view, the answer to this question partly lies in the *Corruption Crime and Misconduct Act 2003* (WA) (*CCM Act*) and partly lies in established principle.

98 Under the *CCM Act*, the CCC is empowered to investigate allegations of serious misconduct by public officers as set out in s 4 of the *CCM Act*. Notably, for present purposes, it is subject to the qualification in s 4(d)(vi) that such conduct "constitutes or would constitute a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the Public Sector Management Act ..."

99 The CCC may assess, provide an opinion and investigate allegations of misconduct by a public officer under Part 3 Division 4 of the *CCM Act*. The CCC may make recommendations as to whether disciplinary action should be taken against a person in respect of whom an opinion of the commission of serious misconduct has occurred. Other recommendations may be made too: s 43(1) *CCM Act*. Importantly however, any recommendation as to disciplinary action is not and is not to be taken to be, a finding that a person has engaged in conduct that warrants, among other things, termination of employment.

100 Thus, with respect, the CCC Report is not, for the purposes of these proceedings, evidence of the commission of misconduct by the applicant that would warrant his dismissal. In accordance with the statutory scheme in the *PSM Act*, in relation to disciplinary matters, it is clear in my view, that the respondent would need to commence disciplinary action and make its findings as required by the statute and the Commissioner's Instruction.

101 Thus, for the respondent to now seek to rely on the CCC Report, the content of which has been the subject of very little evidence before me in these proceedings in relation to the reporting issue, without having complied with its obligations just mentioned, to justify its decision to dismiss the applicant, would be tantamount to circumventing its legal obligations under the *PSM Act*. As a large public service employer, subject to the statutory regime in relation to employment matters, a high standard of conduct is imposed on it as a model employer. Reliance upon the Report by the respondent, without compliance with its statutory obligations under the PSM Act and associated requirements, would in my view, render the dismissal at least partially unlawful. This could not support the dismissal on fairness grounds.

102 It also almost goes without saying, and to his credit counsel for the respondent conceded this, that for the respondent to now seek to rely upon the applicant's alleged obfuscation of his reporting obligations, without those issues being fairly and squarely put to him by way of disciplinary allegations, would be a denial of procedural fairness. I therefore consider that it would be quite unfair on the applicant in these circumstances, to enable the respondent to rely on the CCC Report as an alternative basis to support the fairness of its decision to dismiss the applicant.

Remedy

103 In a case where the Commission finds that a dismissal is harsh, oppressive and unfair, the primary remedy is reinstatement. It is only if reinstatement is impractical, that the Commission then considers the other remedies of re-employment or compensation: s 23A Act. Whether reinstatement is "impracticable" requires an assessment of all of the circumstances of the case and a "bespoke factual evaluation": *The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch v The Public Transport Authority* [2017] WASCA 86; (2017) 97 WAIG 431 per Kenneth Martin J at par 148. The onus is on an employer to establish that reinstatement is impracticable. In cases where trust and confidence is raised as a barrier to reinstatement, the employer is obliged to establish that the lack thereof is "genuine, credible and rationally based": *Public Transport Authority v ARTBIU* [2016] WAIRC 00236; (2016) 96 WAIG 408 at par 106. This must also take account of the position occupied by the employee.

104 A mainstay of the respondent's opposition to reinstatement was its contention that the applicant obfuscated his response in his various reports of his actions in the Wharerau and Bellin incidents. The respondent also said that the applicant's lack of insight into his actions should militate against reinstatement. Additionally, the respondent raised what it said were inconsistencies between his reporting of the incidents to the respondent, his evidence to the CCC in its investigation and his evidence in these proceedings, in relation to the Bellin incident in particular. So too, did the respondent seek to rely on the CCC Report to resist reinstatement, seemingly as an alternative to its first position, outlined above, to partly justify the dismissal itself, once the concession was made that it would be a contravention of procedural fairness to do so. I can deal with the latter point at once. In my view, for the same reasons as I have outlined above, the CCC Report cannot be relied on by the respondent to resist reinstatement. To do so would amount to prejudgement, with the effect of depriving the applicant of the opportunity of returning to his employment as a prison officer, without those

most serious allegations having been progressed in accordance with the statutory regime binding the respondent and also, as a further issue, without a solid evidentiary case having been put on these issues before this Commission.

105 It goes without saying in my view, that as with police officers, prison officers are in a position of trust. They are able to exercise substantial powers under the *Prisons Act*, including the use of force, in relation to prisoners under their supervision. They do so in an environment largely away from public scrutiny. Thus, the respondent, and the CEO under the *Prisons Act*, must be able to rely on the integrity and honesty of officers in the discharge of their duties. The respondent must be able to have a high level of trust and confidence in an officer.

106 In this respect, the respondent relied on the IDRs, otherwise known as "TOMS Reports", made by the applicant in the Bellin incident. There seems to be no issue with the reporting by officers in relation to the Wharerau incident. I should also note that as mentioned above, the issue of the incident reporting was not part of the disciplinary allegations formally put against the applicant. The evidence in these proceedings in relation to this issue was somewhat scant. The respondent in essence, sought to invite the Commission to infer from the absence of some information recorded by the applicant in his various reports, that this was a deliberate attempt to deceive the respondent to, effectively, "cover up" and minimise any wrong doing on the applicant's behalf. This in particular, extended to there being no reference to the second spraying of Mr Bellin and that there was no reference to him being on the cell bed covering himself with blankets. The respondent submitted that the applicant was, in effect, negligent in leaving out important information or at worst, deliberately dishonest in doing so. Thus, if so, this significantly impacted on the level of trust and confidence that the respondent could place on the applicant in the future.

107 As to the issue of insight into his actions, it is fair to say that the applicant has not wavered in his view, throughout the disciplinary process, seemingly the CCC process and in these proceedings, that in relation to both the Bellin and Wharerau incidents, he was acting correctly and more appositely for present purposes, would do the same again if facing the same circumstances. As to the Bellin incident, this seemed to be based on his assessment of the level of aggression and agitation of the prisoner; on his belief that the first spray in particular was not effective and thus in accordance with the chemical agent training a second would be justified; and that also, he was not assisted by the two other officers present during the incident. In particular, the contention that one of them could have pulled the applicant back from the doorway and shut the door in accordance with what a couple of witnesses said could have occurred.

108 Given that I have concluded on all of the evidence that the second spray was not justified, and in the circumstances of its deployment, the respondent's

contentions in this regard are to be acknowledged. I also note that save for this concern, the Director-General in his letter of dismissal set out above, seemed to rely on the applicant's lack of insight into his actions to a significant degree, when considering alternatives to dismissal in the first instance. However, in the context of the respondent's trust and confidence argument, it is important to appreciate that the decision of the respondent to dismiss the applicant was based on an assessment and findings that both incidents were a breach of discipline. To the extent that the failure of the applicant to have insight into his actions was a substantial consideration of the employer in its decision making, and it seems from what is before the Commission that it was, this now must, as a matter of logic and principle, be significantly diminished given my findings in relation to the Wharerau incident and the first OC spray deployment in relation to the Bellin incident.

109 I have no doubt on all of the evidence that the second OC spray in the Bellin case was plainly an error of judgement. There seemed however to have been no consequences arising from the spray, in that it did not seem on the evidence, that Mr Bellin suffered any significant adverse effects from its deployment, although I do not place much weight on this consideration. However, taken overall, I do not consider that this incident in and of itself, constitutes a sufficient basis for the respondent, given the applicant's eleven years of unblemished employment in the corrections service in Western Australia, and a twenty-two-year career overall, to lose trust and confidence in his capacity as a prison officer. Given all of what has transpired in these proceedings, I consider a reprimand and retraining would be an appropriate outcome, although of course in matters of the present kind, no order can be made by the Commission to this effect.

110 As to the contentions of the respondent that the applicant was dishonest in his reporting of events I am unable to reach that conclusion on the evidence in these proceedings. There is some substance however, in the argument that the IDR in relation to the Bellin incident, compiled by the applicant, was deficient in material respects. However, I do not draw an inference as sought by the respondent, that this was the result of any deliberate dishonesty by the applicant. There is simply insufficient evidence before the Commission in relation to those particular matters. I should observe that the IDRs from Officers Mulvaney and Bryunzeel were also deficient, in that they lacked the detail complained of by the respondent. However, despite this, it was put by the respondent that both of these officers were witnesses of truth and should be believed. In this regard too, the applicant also said in his evidence that often IDRs are lacking in some information. Whether this may be the result of a systemic lack of oversight in incident reporting that requires more attention by and training of officers by the respondent, is an open question in my view.

111 I am not persuaded that the applicant was dishonest in his various responses to, in particular the Bellin incident, as contended by the respondent. It is the case that the various responses of the applicant that were the focus of submissions by the respondent contained some discrepancies. However, it is to be borne in mind that these various processes took place over some two years and I would be more concerned if his responses to the innumerable questions put to him over this lengthy period of time were in perfect alignment, suggesting a rehearsal of his responses and testimony.

112 A matter of note in relation to the trust and confidence issue, was the fact that after the applicant completed his secondment to the Eastern Goldfields Regional Prison, and subsequent to the commencement of the disciplinary process, he acted in higher positions in prisons, including as the officer in charge on several occasions. It was not contested that the applicant performed higher duties. Whilst the respondent asserted that this was consistent with the "presumption of innocence" as such, given the nature of the work of a prison officer and the responsibilities of an officer at an in-charge level of acting appointment, it is somewhat incongruous to suggest there had been such a breakdown in the relationship whilst, at the same time, placing the applicant in a position of higher authority and trust. This was an employment relationship and the applicant was not a citizen charged with a criminal offence. If there had been genuine concern for the safety of prisoners under the applicant's care and supervision because of, in particular the Bellin incident, then placing him in any acting capacity in higher duties was quite inconsistent with it.

113 In all of the circumstances of this case, I will order that the applicant be reinstated in his position as a senior officer without loss. Any loss of income will, of course, need to take account of the applicant's earnings from other employment over the period since his dismissal.