IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-54
[2023] NZHC 3807

BETWEEN	GRENVILLE FAHEY Applicant
AND	THE VISITING JUSTICE AT SERCO AUCKLAND SOUTH CORRECTIONS FACILITY First Respondent
	SERCO NEW ZEALAND LIMITED Second Respondent

Hearing:	28 November 2023
Counsel:	C G Tuck and A O Spense for Applicant D Jones and R E Gavey for Attorney-General as Contradictor
Judgment:	20 December 2023

JUDGMENT OF MUIR J

This judgment was delivered by me on 20 December 2023 at 11.00 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors: Crown Law, Wellington

Introduction

[1] Many prisoners seek to leave their mark on the walls of their prison cell, be it scratched initials, graffiti, or the like. On or about 10 November 2022, Mr Grenville Fahey, a prisoner at Auckland South Corrections Facility, apparently decided to leave an impression of his own — he is alleged to have smeared whole walls of his cell and parts of the ceiling in his own faeces.

[2] Mr Fahey was subject to disciplinary processes, with the matter eventually coming before a Visiting Justice. He now brings a wide-ranging application for judicial review of the Visiting Justice's decision. But ultimately his application turns on a relatively uncomplicated and narrow procedural point.

Background

[3] On the morning of 10 November 2022, an overpowering odour was reported as emanating from Mr Fahey's cell. The stench was such that other prisoners in his ward were vomiting. It is said that faeces were leaching from the cell door.

[4] On 17 November 2022, Mr Fahey was charged with an internal disciplinary offence: deliberately disfiguring or damaging a prison cell,[1] by painting or spraying faecal matter over it.

[5] The matter came before a hearing adjudicator on 21 November 2022. Mr Fahey pleaded not guilty. The adjudicator found the charge proven and sentenced Mr Fahey to seven days' solitary confinement; 28 days' loss of privileges; and $100 reparation payable to the prison operator, the second respondent, SERCO New Zealand Ltd (SERCO). On the same day, Mr Fahey appealed the decision (both conviction and sentence) to a Visiting Justice.

[6] On 24 November 2022, a rehearing was held before Visiting Justice Singh. The Visiting Justice considered and declined his application for legal representation by reference to the criteria in s 135 of the Corrections Act 2004. She then proceeded to find the charge proven and to impose the same sentence as that imposed by the

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[1] Corrections Act 2004, s 128(1)(h).

hearing adjudicator. In so doing, she rejected Mr Fahey's self-described defence of "provocation" based, he said, on SERCO's failure to address multiple issues in its management of him as a prisoner.

Housekeeping

[7] The proceeding has to this point named the Visiting Justice at SERCO Auckland South Corrections Facility as first respondent, the Attorney-General on behalf of the Department of Corrections as second respondent and SERCO as third respondent.

[8] The proceeding itself involves a challenge to the decisions made by the Visiting Justice in respect of proceedings which were prosecuted by SERCO which, for that reason, is also correctly named as a party.[2] The Visiting Justice abides the decision in the usual way. SERCO does likewise.

[9] As the Visiting Justice and SERCO abide, the Attorney-General has undertaken to act as contradictor on the Visiting Justice's behalf. However, the Attorney-General does not appear on behalf of the Department of Corrections.

[10] To that end, all parties agree that the intituling is appropriately amended by deletion of reference to the previously named second respondent, "The Attorney-General on behalf of the Department of Corrections".

Mr Fahey's challenges

[11] For Mr Fahey, Mr Tuck and Ms Spense submit that the decision to decline legal representation was unlawful on the grounds that the Visiting Justice erred in law, failed to observe natural justice and breached Mr Fahey's New Zealand Bill of Rights Act 1990 (NZBORA) rights.

[12] First, they submit that Visiting Justice failed to consider properly relevant mandatory considerations, namely the complexity of the issues that were likely to arise

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2 Judicial Review Procedure Act 2016, s 9.

at the hearing (s 135(2)(b) of the Corrections Act) and the need to ensure that the hearing was conducted fairly (s 135(2)(f)(ii)).

[13] Secondly, they submit that natural justice was not observed because Mr Fahey was not notified of the rehearing time and did not receive adequate details of the charge or proper disclosure of evidence prior to that hearing. They say that the Visiting Justice based her decision on undisclosed evidence.

[14] Thirdly (and relatedly), they say that Mr Fahey was given insufficient time to prepare his case before the Visiting Justice and that this constituted a breach of s 24(d) of the NZBORA, which affirms a person's right to such opportunity. Additionally, they say that the Visiting Justice breached Mr Fahey's rights to natural justice as well as cls 9 and 41 of sch 7 to the Corrections Regulations 2005 (the Regulations) by not agreeing to adjourn the proceeding for sufficient time to allow adequate preparation.

[15] Finally, Mr Fahey seeks a declaration that insofar as s 135 of the Corrections Act may potentially restrict access to legal representation in respect of prison disciplinary charges, it is inconsistent with s 24(c) of the NZBORA which gives a right to consult and instruct a lawyer to anyone who is "charged with an offence".

Mr Fahey's evidence

[16] In his affidavit in support of his application for judicial review, Mr Fahey deposes:

> 27. I was charged on 17 November 2022.
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> 28. I was summonsed on 24 November 2022 before the Visiting Justice, and the hearing commenced.
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> 29. I was not expecting to appear in Court for a defended hearing on 24 November, and I voiced this surprise to the Visiting Justice.
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> 30. I did not receive any disclosure in advance of the disciplinary hearing.
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> 31. I did not have the opportunity to prepare my defence.
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> 32. I was not told of the hearing date.
>
> 33. I was denied my right to present a defence.

[17] His primary allegation — that he was given no advance notice of the hearing before the Visiting Justice — is borne out by the transcript of the hearing where the following exchange occurred:

> **VISITING JUSTICE TO PRISONER:**
>
> Q. So, from your perspective, Mr Fahey, do you have anything to tell me about what you consider to be the seriousness of the allegations or the penalty that would mean that you would need a lawyer?
>
> A. Well, there needs to be legal points, reason, s 84 of the Corrections Act. That's what I rely on, and there was something else. I didn't know I was coming to court today. I thought it was in two weeks' time 'cos I — the — from my paper work before me, see, otherwise I would of brought them in but I didn't know I was coming.

[18] Subsequently, Mr Fahey says to the Visiting Justice, "you're blindsiding me with all this information that I should have had prior to coming to this hearing … I haven't seen any of it".

[19] No affidavit has been filed in opposition by SERCO (or, obviously, the Visiting Justice). I must therefore proceed on the basis that Mr Fahey was given no prior notice of the rehearing before the Visiting Justice and that what occurred on 24 November 2022 was that a Corrections Officer simultaneously gave notice of the hearing and escorted Mr Fahey to the hearing itself. Mr Jones, on behalf of the Attorney-General, acknowledges this as unsatisfactory.

Discussion

[20] As I have indicated, Mr Fahey brings a wide-ranging challenge to the decision of the Visiting Justice. The written submissions filed on his behalf emphasise his vulnerability not only by virtue of his status as a prisoner but on account of his mental health problems also. His counsel submit that with proper representation, a defence based on absence of mens rea (reflected in the requirement that the alleged disfiguring or damaging occurred "deliberately") may have been developed. That is possible although I note that the stated defence of "provocation" is more suggestive of a deliberate action in the nature of a protest against his perceived treatment. There are also the other challenges I have identified, including absence of proper notice of hearing and non-disclosure.

[21] Having regard to the conclusions I reach in respect of absence of proper notification of the rehearing, I am not required to address these other challenges. The position is, in my view, sufficiently clear in respect of the notification point, that it can be regarded as decisive. I record also the position of counsel for Mr Fahey that, were I to grant his application on the basis of inadequate notification, then there is no requirement on my part to engage with his other grounds for review and, in particular, with the proposed declaration of inconsistency regarding s 135 of the Corrections Act and s 24(c) of the NZBORA.

[22] No hearing can, in my view, be considered fairly conducted unless it has been adequately notified. I accept that within a prison environment there is a premium on timely disposition of any disciplinary charge, including imposition of any penalty. However, as Brewer J observed in *Obiaga v Visiting Justice at Auckland Prison*:[3]

> [21] Efficiency of process must be weighed as part of the matrix of natural justice considerations. It is true that a prisoner going through a disciplinary hearing may not be entitled to all the protections of a defendant in a criminal proceeding. But it is important to recognise that many prisoners are in a position of particular vulnerability when taking part in quasi-judicial processes. This may be due to a combination of factors, such as poor education, lack of financial resources and various substance abuse and mental health problems. The basic standards of natural justice must be met.

[23] Relatively brief notification may, depending on the nature of the charge, be appropriate. This is consistent with the requirement in cl 9 of sch 7 to the Regulations providing that, "[e]very charge in respect of a disciplinary offence must be heard reasonably promptly …".

[24] But significant natural justice concerns are engaged when, without any prior notification that a hearing is to take place, a prisoner is collected from their cell and conveyed to a room where the adjudication is to take place. Such a course is also inconsistent with the further legal requirement in cl 9 of sch 7 to the Regulations that a prisoner "must be given sufficient time to enable the prisoner to prepare his or her defence". Clearly, preparation entails assembling all the materials which might be the

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3 *Obiaga v Visiting Justice at Auckland Prison* [2018] NZHC 3095, [2019] NZAR 148 at [21] (footnote omitted).

basis for submission or cross-examination, but also collecting and ordering thoughts, writing notes and preparing psychologically for the hearing.

[25] In this case, Mr Fahey was effectively blindsided. Indeed, he was conveyed to the hearing with so little forewarning such that he neither took with him his reading spectacles nor any of the papers he was holding relevant to the case. In the result, the hearing had to adjourn while he obtained these.

[26] Clause 41 of sch 7 is prescriptive:

> 41 A person who is holding a disciplinary hearing must adjourn the disciplinary hearing if—
>
> (a) he or she is satisfied that the prisoner who is charged with the disciplinary offence has not had a proper opportunity to prepare his or her defence; or
>
> …

[27] Although responsibility for the absence of notification is likely to lie with SERCO and not with the Visiting Justice, I consider there was a duty on her part to adjourn the hearing on advice from Mr Fahey that he "didn't know [he] was coming to court today", at least in the absence of evidence that Mr Fahey's advice was incorrect. She should, in my view, have appreciated that he was never likely to be able to prepare for his case properly without adequate notification of the hearing.

[28] Mr Jones points to the fact that the Visiting Justice was alive to potential prejudice and dealt with it appropriately. He refers to the following observations, made in the context of a discussion about non-disclosure of documents but which he says informed the Visiting Justice's whole approach:

> Okay. All right. This is the way I will deal with it, is that if there is any matter that we receive here that you are put to any prejudice to, I will note that and deal with that as it arises.

[29] Mr Jones says that because the Visiting Justice was alive to the issue of prejudice, sufficient "patches" (my word in the course of the oral argument) were put on the process that, although deficient at the outset, it did not ultimately result in any prejudice to Mr Fahey.

[30] I am unable to accept that submission. Mr Fahey was never in a position to put his best foot forward in the circumstances that arose. Nor did he know what he didn't know — in the sense of how his defence might be appropriately developed if he had had the opportunity to properly reflect and prepare. There was also the possibility that he might wish to seek legal advice (as has subsequently occurred) and that this would have resulted in him better framing his defence to engage with the mens rea component on which his counsel now relies. Assuming proper notification, he may even have persuaded counsel to appear and make a submission about the importance of legal representation under s 135 of the Corrections Act. If successful in that respect, he may have had the benefit of their assistance in the hearing. None of this was possible having regard to the way in which the case developed.

[31] In the result, I have formed the clear view that there was a breach of the basic standards of natural justice applicable to the hearing and of the specific provisions in cls 9 and 41 of sch 7 to the Regulations. It is not, in that context, necessary for me to decide whether the matter for which he was charged is appropriately considered an "offence" for the purposes of s 24(c) or (d) of the NZBORA.

Remedy

[32] In terms of relief, counsel for Mr Fahey proposes and the Attorney-General agrees, that if a breach of natural justice and/or illegality is made out, the appropriate course is simply to quash the decision of the Visiting Justice. I note that this is the relief sought in para 17C of the statement of claim and that neither Mr Fahey nor the Attorney-General seek orders remitting for the purposes of redetermination before a Visiting Justice. However, Mr Fahey may not have fully considered the consequences of that position. If the decision of the Visiting Justice is merely quashed, and no redetermination ordered or sought, then Mr Fahey would appear to be left in the position that the original decision of the hearing adjudicator remains extant (that decision not being the subject of this review). As Mr Fahey's intention is clearly to challenge his conviction, he would need to bring a fresh appeal against that decision, but any right of appeal has since expired.[4]

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4 Corrections Act, s 136(1).

[33] I propose therefore that relief be by way of an order quashing the decision of the Visiting Justice but reserving leave to apply (by memorandum) for any further relief which may be necessary. I note that the penalties of solitary confinement and loss of privileges imposed on Mr Fahey have been served. I have not been updated in respect of the position with respect to reparation.

Result

[34] I quash the decision of the Visiting Justice dated 24 November 2022 (conviction and sentence) with the reservation of leave previously identified.

Costs

[35] Mr Fahey is legally aided and serving a life sentence. His counsel's written submissions indicate that updated instructions in respect of costs are required. If costs are sought and cannot be agreed, then submissions (maximum five pages plus any schedules) may be filed on the following timetable:

(a) Mr Fahey by **2 February 2024**;

(b) the Attorney-General (as contradictor) by **16 February 2024**; and

(c) Mr Fahey in reply by **23 February 2024**.

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Muir J