**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2020-404-001704**
**[2022] NZHC 3015**

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| BETWEEN | THOMAS CHENG<br>First Applicant |
| | JAMES ALLAN HEMANA<br>Second Applicant |
| AND | PRISON MANAGER, AUCKLAND SOUTH CORRECTIONS FACILITY (SERCO)<br>First Respondent |
| | SECUREFUTURE WIRI LIMITED<br>Second Respondent |
| | SERCO NEW ZEALAND LIMITED<br>Third Respondent |
| | MINISTER OF CORRECTIONS<br>Fourth Respondent |

| | |
|---|---|
| Hearing: | 3 October 2022 |
| Counsel: | TC Stephens and MRG van Alphen Fyfe for Applicants<br>JK Scragg and EM Greig for First and Third Respondents<br>EM Watt and SK Shaw for Fourth Respondent |
| Judgment: | 18 November 2022 |

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## JUDGMENT OF DOWNS J

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*This judgment was delivered by me on Friday, 18 November 2022 at 11 am pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors/Counsel:
Ord Legal, Wellington.
Duncan Cotterill, Wellington.
Meredith Connell, Auckland.
TC Stephens, Wellington.
MRG van Alphen Fyfe, Wellington.

## The case

[1] Thomas Cheng and James Hemana[1] seek judicial review of three matters in relation to their incarceration: rates of earnings for prison work; the cost of telephone calls at Auckland South Corrections Facility,[2] which is managed by Serco New Zealand Ltd;[3] and the process followed by Serco in setting canteen prices at the facility. Mr Cheng is serving a long prison sentence for importing and supplying methamphetamine. He was recently convicted of like offending committed within and from prison.[4] Mr Hemana is serving a life sentence for murdering his stepson. Both applicants served time at the facility but are now incarcerated elsewhere.

[2] For those short of time, a précis of what this judgment holds is at [76]–[78].

## Rates of earnings paid to prisoners

*Background*

[3] Prisoners are offered employment to promote their rehabilitation. A variety of work is available, including, for example, within kitchens, laundries, and other parts of prison facilities. Some prisons facilitate farming, forestry, and horticultural work. In each case, the aim is the same: establishment of a work ethic; acquisition of a skillset; and the fostering of a pro-social mindset.[5]

[4] Prisoners are paid for their work. However, as may be expected, their rates of remuneration bear little resemblance to those offered by the market. The applicable rates are in this table:

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1 The applicants.
2 The facility.
3 Serco.
4 *R v Cheng* [2022] NZDC 11309.
5 The applicants have had various prison jobs. Mr Cheng worked in the kitchen at Rimutaka prison. At Tongariro prison, he cleaned, and maintained the computer room. Mr Hemana worked in the kitchen at Paremoremo prison. In other prisons, he has been a cleaner.

| Class | Category | Rates of earnings per hour | Earnings for 30-hour week | Earnings for 40-hour week |
|---|---|---|---|---|
| Zero | Refused / removed from work | $0.00 | $0.00 | $0.00 |
| 1 | Sick or unemployed | $0.09 | $2.70 max | $2.70 max |
| 2 | Initial | $0.20 | $6.00 | $8.00 |
| 3 | Average | $0.30 | $9.00 | $12.00 |
| 4 | Senior | $0.40 | $12.00 | $16.00 |
| 5 | Advanced | $0.60 | $18.00 | $24.00 |
| 6 | Programme / study allowance | Per employment status, or class 2, 3 or 4 if no employment status[6] | | |

[5] These rates were approved by the Minister of Corrections[7] 10 July 2004 and the Minister of Finance 21 July 2004. I call the rates the 2004 rates for this reason. Both approvals were given under s 20(3) of the Penal Institutions Act 1954.

[6] Earlier rates, adopted in 2002, allowed slightly higher sums for prisoners with a lower security classification. This aspect sought to encourage prisoners to reduce their security classification. The Ombudsman questioned its fairness as a security classification can lie beyond a prisoner's control. The 2004 rates abolished this feature.

[7] In 2005, class 6 was expanded so prisoners on a programme could potentially earn a class 2, 3, or 4 rate.

[8] Since then, the Department of Corrections[8] has considered revising the 2004 rates:

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6 In 2004, class 6 originally referred only to class 2. Reference to classes 3 and 4 was added in 2005.

7 The Minister.

8 The Department.

(a) In 2007, officials prepared a paper entitled *Activity Allowances for Prisoners (National System)*. The paper envisaged a system with annual adjustment for inflation using the Consumer Price Index.

(b) In 2009, a National Qualifications Framework was considered. Rates were to be "simplified". Higher rates were proposed "on the achievement of credits".

(c) In 2016, a "pay engagement framework" was proposed. The associated paper recognised the "current framework is now outdated".[9] The proposal reached what counsel for the Minister describes as the "senior leadership" of the Department but was "overtaken by other policy priorities".[10]

(d) In 2018, the Department recognised "the … value of [prisoners'] wages has eroded since 2002".[11] Rates in other jurisdictions were considered. Those here were reported as "lower than all other jurisdictions examined, except the United Kingdom".[12]

(e) In 2019, the Department accepted a recommendation to review the 2004 rates. Work stalled in early 2020 due to the pandemic.

(f) On 9 August 2022, the "Executive Leadership Team" agreed to "a comprehensive review" of the 2004 rates. Terms of reference are "expected to be considered by the end of October and/or confirmed by the end of 2022".

[9] However, the 2004 rates endure, unchanged since 2005.

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9 Department of Corrections *Internal Memorandum: Offender Employment and Reintegration* (4 February 2016) at [3].

10 Submissions on behalf of the Minister at para 3.29(c).

11 Department of Corrections *International Scan: Payments and Incentives for People in Prison* (September 2018) at 4.

12 At 2.

[10] To this timeline must be added an important date: on 1 June 2005 the Corrections Act 2004 came into force.[13]

*A précis of the applicants' case*

[11] The 2004 rates predate the Corrections Act and as observed, were made under its predecessor, the Penal Institutions Act. The applicants contend the Corrections Act requires the Minister to approve rates under that Act, and the Minister has failed to do so. The applicants also contend that Act required the Minister to approve rates from its outset and keep them "under review". They argue the Minister has failed to do both.

*Analysis*

[12] The starting point is the Act. The power to approve rates is governed by s 7(1)(b), which in context reads:

> **7 Powers and functions of Minister**
>
> (1) The Minister has the following powers and functions:
>
> (a) declaring land or buildings to be a community work centre or prison in accordance with section 30 or section 32:
>
> (b) approving rates of earnings for prisoners in accordance with section 66:
>
> (c) fixing the weekly rate of the cost of detaining prisoners for the purposes of enabling deductions to be made under section 68:
>
> (d) placing notifications in the *Gazette* in accordance with section 170:
>
> (e) presenting a copy of the terms of any prison management contract, and of the terms of any variation to a prison management contract, to the House of Representatives in accordance with section 199I:
>
> (f) any other powers and functions conferred under this Act or regulations made under this Act.

[13] The Act or occasionally, that Act or Corrections Act.

[13] Section 66(3) reads:

> **66 Work and earnings**
>
> …
>
> (3) Earnings at a rate or rates approved by the Minister may be—
>
> (a) credited to each prisoner employed under this section; or
>
> (b) applied or paid in accordance with regulations made under this Act; or
>
> (c) dealt with under both paragraphs (a) and (b).

[14] On its face, s 7(1)(b) does not require the Minister to approve rates. The provision presents as a power, not more. Sometimes, however, a power may entail a duty that power be exercised. The classic statement of the law is that of Lord Cairns in *Julius v Lord Bishop of Oxford*:[14]

> … there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so.

[15] In the same case, Lord Blackburn said if the object of a power is to enable the decisionmaker to give effect to a right, it is the duty of the decisionmaker to exercise the power when called on to do so.[15]

[16] Both Law Lords gave examples of powers to set rates as entailing a duty to do so. These included *R v Barlow*, in which the statute provided churchwardens "may make a rate" for the payment of constables.[16] As constables were entitled to be paid, the churchwardens could not refuse to exercise the power for that purpose.

[17] On behalf of the Minister, Ms Shaw resists this line of authority. Ms Shaw contends it is available only when Courts impose a duty "to effectuate the rights of an individual". No prisoner has a right to employment, let alone a right to a particular

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14 *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214 (HL), [1874-80] All ER Rep 43 at 46.
15 At 59.
16 *R v Barlow* (1693) 2 Salk 609, 91 ER 516, 42 Digest 717 at 1363.

rate of remuneration for prison work.[17] So, the power to approve rates for prison work is "not tethered to any enforceable right".

[18] This submission reads the case law too narrowly. While a duty to exercise a power may be inferred when the power is tethered to a right, this is not the only situation in which a duty may be inferred.[18] It may also be inferred as a matter of statutory construction. In *B v Waitemata District Health Board*,[19] the Supreme Court held there was no obligation on the District Health Board under the Smoke-free Environments Act 1990 to provide dedicated smoking rooms in mental health institutions.[20] Importantly, the Court reached this conclusion because of the text and purpose of the Smoke-free Environments Act; not for any other reason. Similarly, in *Tyler v Attorney-General*, the Court of Appeal held the power to grant a community wage, having regard to hardship as a consideration, was merely discretionary.[21] That Court also approached the question as one of statutory construction rather than underlying rights.

[19] Next, Ms Shaw contends the nature of the power in s 7(1)(b) is incommensurate with the attraction of a duty. She emphasises its policy content, fiscal implications, and the undesirability of Courts entering this area:[22]

> Any decision around incentive rates in prisons will be polycentric and policy laden. It is the kind of decision that courts are institutionally ill-quipped to assess in the context of judicial review proceedings. As outlined in [the affidavit] evidence, consideration of the rates, whether they are raised or lowered, brings into play wider fiscal factors that will likely require the involvement of Treasury and associated expertise. Assessment of the rates sits within a wider work programme underway with the Department.

[20] This submission misapprehends the inquiry. The Court is not asked to assume responsibility for approving rates of earnings, an admittedly "polycentric", and presumably difficult, statutory task. On any view of the Act, this task is entrusted to

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17 *Smith v Attorney-General* [2017] NZHC 136, [2017] NZAR 331 at [128], citing *Taylor v Chief Executive of the Department of Corrections* [2010] NZCA 371, [2011] 1 NZLR 112 at [32] and [35].

18 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at p 950–952.

19 *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823.

20 The case turned on whether "may" meant "must" but the overarching principle was that engaged here: did a legislative power entail a duty?

21 *Tyler v Attorney-General* [2000] 1 NZLR 211 (CA).

22 Submissions on behalf of the Minister at para 3.22 (footnotes omitted).

the Minister, not Court. Rather, the Court is asked to determine whether the Act obliges the Minister to approve rates of earnings, and if so, whether the Minister has discharged this obligation.

[21] Ms Shaw also contends no objective methodology exists by which these issues can be determined, hence the Court should defer to the Minister's views of his responsibilities:

> Given these complexities, as a question of timing, by what yardstick is the Court to decide whether the power to approve rates of earnings ought to be exercised by the Minister? How would the Court know when the right time is to make a decision on the rates? And with reference to what legal indicia or requirements would the Court's decision be pinned? It is axiomatic that in cases without a satisfactory legal yardstick by which the issue can be resolved, an omission to exercise a power will not be readily reviewable.

[22] The answer to this contention is the time-honoured one given whenever the effect of a statute is in doubt: meaning turns on text, purpose, and context,[23] and Courts are well placed to make such a determination. That being so, I emphasise four points made by Mr Stephens on behalf of the applicants.

[23] First, New Zealand's system of corrections underwent complete legislative overhaul by virtue of the Act. Section 5 creates a specific, identifiable purpose: the corrections system is to improve public safety and contribute to the maintenance of a just society by:

(a) Ensuring custodial sentences are administered in a safe, secure, humane, and effective manner.[24]

(b) Providing for corrections facilities to be operated in accordance with rules set out in (and under) the Act and based, among other things, on the United Nations Standard Minimum Rules for the Treatment of Prisoners.[25]

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23 Legislation Act 2019, s 10(1).
24 Corrections Act 2004, s 5(1)(a).
25 Section 5(1)(b).

(c) Assisting in the rehabilitation of offenders and their reintegration into the community through the provision of programmes and other interventions (so far as is reasonable and practicable within the resources available).[26]

[24] Section 6(1) of the Act creates a suite of principles to "guide the operation of the corrections system". This suite includes the principles:

(a) Prisoners must be treated fairly by ensuring decisions about them are taken in a fair and reasonable way.

(b) Prisoners must be given access to activities that may contribute to their rehabilitation and reintegration into the community.

(c) To reduce risk of re-offending, the cultural background, ethnic identity, and language of offenders must be taken into account in:

(i) Developing and providing rehabilitative programmes and other interventions to assist rehabilitation and reintegration of prisoners into the community; and

(ii) Planning and managing sentences.

(e) Sentences must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and safety.

[25] Section 6(2) provides those "who exercise powers and duties under this Act … must take into account" these principles so far as they are applicable (as practicable in the circumstances).

[26] The obvious bears stating: none of this was a feature of the previous regime. Parliament recognised corrections law needed to be "updated" for a variety of reasons, including the need for "modern policies and practices"; to ensure compatibility with

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26 Corrections Act, s 5(1)(c).

the Sentencing Act 2002 and Parole Act 2002; and to "effectively target rehabilitative and reintegrative programmes and services".[27]

[27] Second, the Act recognises the importance of human rights in this context. Among other things, it affirms the United Nations Standard Minimum Rules for the Treatment of Prisoners, or as these are more commonly known, the Mandela Rules. Rule 103 of the Mandela Rules provides:

> *Rule 103*
>
> 1. There shall be a system of equitable remuneration of the work of prisoners.
>
> 2. Under the system, prisoners shall be allowed to spend at least a part of their earnings on approved articles for their own use and to send a part of their earnings to their family.
>
> 3. The system should also provide that a part of the earnings should be set aside by the prison administration so as to constitute a savings fund to be handed over to the prisoner on his or her release.

[28] Third, the Act identifies rehabilitation of prisoners as an important aspect of the corrections system, and prison work comprises one means by which this objective may be advanced. I have already mentioned ss 5 and 6 of the Act. To these should be added ss 50–52 of the Act, which between them, require the chief executive of the Department[28] to ensure, so far as is practicable, each prisoner is provided with: (a) an opportunity "to make constructive use of their time"; (b) an individual management plan, outlining, among other things how the prisoner can make constructive use of their time; and (c) rehabilitative programmes for those, who in the opinion of the chief executive, will benefit from them. Remuneration of prisoners' work according to rates made under the Act is, therefore, a material aspect of the regime created by it.

[29] Fourth, under the Act, only the Minister—not chief executive—may approve rates of earnings.[29] This is consistent with fiscal implications; payment of earnings is, obviously, public money. Need for ministerial approval reflects another reason too: the importance of the function in the scheme of the Act. Approached another way, the

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27 Corrections Bill 2003, (34-1) (explanatory note) at 1 and 2.
28 The chief executive.
29 Corrections Act, s 7(1)(b).

Minister's functions under the Act are confined.[30] Approving rates of earnings is one such function.

[30] Taken together, the mix implies s 7(1)(b) obliges the Minister to approve rates of earnings under the Act, in accordance with it. Otherwise, an approval under the Penal Institutions Act could continue indefinitely even though that enactment has been supplanted, in turn frustrating the legislative objective of modernisation of the law of corrections. Parliament cannot have intended this. It follows this case is an exceptional instance in which a statutory power contains an implicit duty that power be exercised.

[31] Ms Shaw argues this conclusion, or any like it, contravenes s 35 of the Legislation Act 2019, which reads:

> **35 Powers exercised under repealed or amended legislation have continuing effect**
>
> Anything done in the exercise of a power under repealed or amended legislation, and that is in effect immediately before that repeal or amendment, continues to have effect as if it had been exercised under any other legislation—
>
> (a) that, with or without modification, replaces, or that corresponds to, the legislation repealed or amended; and
>
> (b) under which the power could be exercised.

[32] This argument assumes the conclusion at [30] somehow invalidates the 2004 rates. The assumption is misplaced. The applicants do not argue the 2004 rates are unlawful, or invalid. Realistically, they could not. The 2004 rates were approved under the Penal Institutions Act (s 20(3)), as required, by the Minister and Minister of Finance. Section 35 of the Legislation Act means the 2004 rates endure, despite the Penal Institutions Act's repeal. So, the conclusion that the Minister is required, by s 7(1)(b) of the Corrections Act, to approve rates under that Act does not operate to invalidate the 2004 rates. Again, the applicants do not, and could not, argue otherwise.

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30 Corrections Act, s 7(1).

[33] This leaves related questions of timing and review. Mr Stephens contends the Minister was obliged to exercise the duty to approve rates of earnings at the commencement of the Act, and thereafter, to consider doing so periodically. In relation to the latter, Mr Stephens notes in *R v Secretary of State for the Home Department, ex parte Fire Brigades Union*,[31] Lord Browne-Wilkinson held the statutory power in question came with a "clear duty to keep [it] under consideration from time to time".[32] In the same case, Lord Nicholls held there was a "legal duty to consider whether or not to exercise the power and appoint a day".[33]

[34] Mr Stephens also invites attention to *Borrowdale v Director-General of Health*[34] and *Idea Services v Attorney-General*,[35] in which emergency health powers were held to attract a duty of periodic review.

[35] These cases do no more than identify situations in which Courts have discerned otherwise implicit duties in connection with seemingly open-ended legislative powers. Unsurprisingly, they reveal context is everything.

[36] I do not accept the Minister was obliged to exercise the duty to approve rates at the commencement of the Act. Nor do I accept the Minister was obliged, thereafter, to consider doing so periodically. A single reason unites these conclusions: nothing in the Act supports either contention.[36] Perhaps anticipating this response, Mr Stephens contends a duty of review is needed to ensure rates of earnings do not become "disconnected" given the effluxion of time and erosion, by inflation, of their purchasing power. I acknowledge the risk. But again, nothing in the Act supports a duty of review (or one to approve rates at the commencement of the Act).

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31 *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL).

32 At 550-551.

33 At 575.

34 *Borrowdale v Director-General of Health* [2020] NZHC 2090, [2020] 2 NZLR 864.

35 *Idea Services v Attorney-General* [2022] NZHC 308 and *Idea Services v Attorney-General* [2022] NZCA 470.

36 During argument, Mr Stephens responsibly acknowledged he could not point to any *particular* provision to ground these contentions.

[37] I recapitulate, then continue. For the reasons identified at [23]–[30], s 7(1)(b) obliges the Minister to approve rates of earnings under the Act, in accordance with that Act. The obligation is that, not more.

[38] Ms Shaw contends the Minister has not breached this obligation because the policy work summarised at [8] is, in law, that of the Minister, and he may approve rates in the not-too-distant future. Ms Shaw emphasises there is more policy work to be done, and this will take time.

[39] Even if one assumes the policy work is that of the Minister, the argument is unpersuasive.[37] The Minister has not approved rates under the Act, and 17 years have passed since it came into force. Parliament could not have contemplated a delay of this magnitude. It is not necessary to specify when, exactly, such inactivity became unlawful. It is sufficient to conclude that 17 years on, the Minister has not discharged his duty under s 7(1)(b) of the Act to approve rates of earnings under that enactment.

*Remedy*

[40] The applicants' statement of claim seeks a declaration that the decision to pay prisoners in accordance with the 2004 rates is unlawful. It also seeks an order directing the Minister "to reconsider and redetermine the rates at which prisoners are paid".

[41] Mr Stephens accepted in argument that the latter form of relief is "muscular". I decline to make it for this reason. It goes much too far given our constitutional arrangements. A declaration is sufficient.

[42] However, the declaration sought in the statement of claim is not that which should issue. Again, the applicants have not argued the 2004 rates are unlawful. Rather, they have argued the Minister acted unlawfully by not approving rates under the Corrections Act. I have accepted *that* argument, and the declaration should respect the distinction. It is subtle but important.

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[37] The evidence reveals none of the policy work has actually reached the Minister.

**The cost of telephone calls at the facility**

[43] Prisoners may be required to meet the cost of outgoing telephone calls or pay an associated fee. The applicants contend the cost or fee imposed by Serco in relation to outgoing calls at the facility is unlawful. This part of the case can be addressed reasonably swiftly because of a concession on behalf of Serco. I return to it after outlining the law and evidence.

[44] By s 69(1)(i) of the Corrections Act, every prisoner has the minimum entitlement to make outgoing calls as provided for in s 77(3). In context, s 77(3) reads:

> **77 Outgoing telephone calls**
>
> (1) The chief executive must ensure that every corrections prison has telephone facilities for prisoners to make outgoing telephone calls.
>
> (2) The Commissioner of Police must ensure that every Police jail has telephone facilities for prisoners to make outgoing telephone calls.
>
> (3) Every prisoner is entitled to make at least 1 outgoing telephone call of up to 5 minutes' duration per week.
>
> (4) The entitlement in subsection (3) is in addition to any telephone call made to—
>
> (a) an official agency; or
>
> (b) the prisoner's legal adviser.
>
> (4A) The entitlement in subsection (3) is overridden by directions given under section 168A (no-contact conditions if family violence offence defendant remanded in custody) of the Criminal Procedure Act 2011.
>
> (5) The chief executive (in the case of a corrections prison) or the Commissioner of Police (in the case of a Police jail) may impose conditions on, and maintain records of, the use of telephone facilities by prisoners.
>
> (6) Every prisoner who makes an outgoing telephone call may be required to—
>
> (a) meet the cost of the call; or
>
> (b) pay a fee set by the chief executive.
>
> (7) Despite subsection (6), a prisoner is not required to meet the cost of an outgoing telephone call or to pay a fee if this Act, or any regulations made under this Act, provides otherwise.

[45] As will be apparent, s 77(6) permits a requirement that a prisoner meet the cost of the call or pay a fee set by the chief executive. Section 77(6) was amended from 29 October 2019 by the Corrections Amendment Act 2019. The provision used to read:[38]

> Every prisoner who makes an outgoing telephone call *must* meet the cost of that call, except where this Act, or any regulations made under this Act, provide otherwise.

[46] So, whereas s 77(6) once required prisoners to meet the costs of outgoing calls, the provision now affords a discretionary power to require that, and a like power to pay a fee set by the chief executive.

[47] The explanatory note to the associated Bill commented on this change:

> **Prisoner communication**
>
> Every prisoner is entitled to make at least 1 outgoing telephone call of up to 5 minutes' duration per week, but they must meet the cost of all calls they make. Charging for phone calls can be administratively complex and costly, and can affect a prisoner's ability to maintain family and social relationships.
>
> The Bill gives the department flexibility about whether, and how, it charges for calls. It enables prisoners who make calls to be required to pay a flat fee instead of being charged for each call.

[48] Before April 2020, prisoners at the facility paid for outgoing calls at these rates:[39]

(a) $1 for up to 15 minutes for local calls.

(b) 40 cents per minute for national calls.

(c) 49 cents per minute for calls to mobile phones.

(d) $1 per minute for international calls.

(e) Calls to approved 0800 numbers were free.

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38 Emphasis added.
39 The pre-April 2020 rates.

[49] In April 2020, Serco amended the rates. The amended rates are:

(a) $1 for up to 15 minutes for local calls.

(b) 30 cents per minute for national calls (being a 10-cent, or 25 percent, reduction from the previous rates).

(c) 40 cents per minute for calls to mobile phones (being a 9-cent, or roughly 25 percent, reduction from the previous rates).

(d) $1 per minute for international calls.

(e) Calls to approved 0800 numbers remained free.

[50] The amended rates are similar to those charged by the Department throughout all other prisons:

(a) $1 for up to 15 minutes for local calls.

(b) 25 cents per minute for national calls.

(c) 35 cents per minute for calls to mobile phones.

(d) 90 cents per minute for international calls.

[51] The applicants contend the pre-April 2020 rates are unlawful because Serco made them without regard to mandatory considerations, or in reliance on the chief executive's power under s 77(6)(b) without the delegation of the chief executive.[40]

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[40] The (second amended) statement of claim (varied by joint memorandum 28 September 2022) cites only the pre-April 2020 rates, not the amended rates. Ms van Alphen Fyfe acknowledged at the hearing there was "no express pleading" in relation to the amended rates. I did not understand Ms van Alphen Fyfe to seek permission to amend the claim to encompass the amended rates. The point is unlikely to be important given [52].

[52] This brings me to the concession. At the hearing, Mr Scragg on behalf of Serco accepted that it made the pre-April 2020 rates in reliance on the power under s 77(6)(b) without "a valid delegation" from the chief executive. Mr Scragg observed while the applicants had not challenged the legality of the amended rates, these too appeared to have been made without the required delegation. Mr Scragg said because Serco would need to make new rates for this reason, this Court's observations about what considerations are mandatory in this context would be helpful. Ms van Alphen Fyfe, who argued this part of the case for the applicants, agreed.

[53] What follows is, therefore, observation only, and more akin to a sketch. I confine my remarks to s 77(6)(b) as most of the submissions were directed at it. Furthermore, as s 77(6)(a) empowers recovery of "the cost of the call", it is not obvious much could be said about it, beyond perhaps addressing whether the inclusion of capital cost is permissible; for example, to meet the cost of damaged telephones, a prison phenomenon. That is for another day.

[54] The applicants argue the chief executive must consider nine mandatory factors when setting a fee in relation to outgoing calls:

(a) The principle that the "cultural background, ethnic identity, and language of offenders" be taken into account in developing and providing rehabilitative programmes and other interventions intended to effectively assist the rehabilitation and reintegration of offenders into the community.[41]

(b) The principle that the corrections system must ensure the "fair treatment" of prisoners by ensuring that decisions about them are taken "in a fair and reasonable way".[42]

(c) The principle that sentences "must not be administered more restrictively than is reasonably necessary to ensure the maintenance of

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41 Corrections Act, s 6(1)(c)(i).
42 Section 6(1)(f)(ii).

the law and the safety of the public, corrections staff, and persons under control".[43]

(d) The principle that "offenders must, so far as is reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community".[44]

(e) The principle that "contact between prisoners and their families must be encouraged and supported, so far as is reasonable and practicable and within the resources available, and to the extent that this contact is consistent with the maintenance of safety and security requirements".[45]

(f) Rates of earnings and the "consequent inability of prisoners to earn enough money to meet the cost of the outgoing telephone charges".[46]

(g) The "relative level of poverty of prisoners' families and the economic impact of imprisonment on them in terms of their ability to fund telephone calls from prisoners".[47]

(h) The "marginal cost" of an outgoing telephone call made by a prisoner.

(i) Section 23(5) of the New Zealand Bill of Rights Act 1990:[48] everyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the person.

[55] Considerations (a) to (e) lie in s 6(1) of the Corrections Act and therefore constitute "principles that guide the operations of the corrections system" in terms of that provision. By s 6(2), those "who exercise powers and duties under this Act … must take into account those principles in subsection (1) that are applicable (if any),

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43 Corrections Act, s 6(1)(g).
44 Section 6(1)(h).
45 Section 6(1)(i).
46 Second amended statement of claim, para 50.6.
47 At para 50.7.
48 The Bill of Rights Act.

so far as is practicable in the circumstances". The applicants contend these are mandatory for this reason.

[56] Considerations (f) to (i) lie beyond the Corrections Act. The applicants contend these too are mandatory because, as Ms van Alphen Fyfe observes, the facility's prison management contract requires Serco to comply with all laws, the United Nations Basic Principles for the Treatment of Prisoners 1990, and the Mandela Rules.

[57] No "ready template" exists by which to distinguish a mandatory consideration from one a decisionmaker may, rather than must, take into account.[49] In *CREEDNZ Inc v Governor-General*, Cooke J said:[50]

> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision. …
>
> Questions of degree can arise here and it would be dangerous to dogmatise. But it is safe to say that the more general and the more obviously important the consideration, the readier the Court must be to hold that Parliament must have meant it to be taken into account.

[58] Principle (e) is clearly mandatory because outgoing calls will often be to family, and "contact between prisoners and their families must be encouraged and supported".[51] Furthermore, r 58(1) of the Mandela Rules provides that prisoners shall be allowed to communicate with their family and friends at regular intervals by using telecommunications, electronic, digital, and other means.

[59] The same is true of principle (d). Outgoing calls comprise a form of activity "that may contribute to … rehabilitation and reintegration into the community", and the fee affects access to the activity.

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49 *Joseph on Constitutional and Administrative Law*, above n 18, at p 1012.
50 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 at 183.
51 Serco does not argue otherwise.

[60] Principle (b)—that the corrections system must ensure the fair treatment of prisoners by ensuring that decisions about them are taken in a fair and reasonable way—is likely mandatory, as the statutory language is sufficiently broad to encompass a decision by the chief executive in relation to a fee for outgoing calls. Whether the principle adds much practically is open to doubt though.

[61] Principle (a) is not a mandatory consideration because it is directed at the content of "rehabilitative programmes and other interventions". Outgoing calls cannot be considered these (at least without harm to the statutory language). Moreover, it is not obvious how the "cultural background, ethnic identity, and language of offenders"—matters that must be considered in developing and providing rehabilitative programmes and other interventions—could bear on the fee payable for outgoing calls. In terms of s 6(2) of the Act, this principle is not applicable to the power to set a fee under s 77(6).

[62] Serco contends principle (c) is not a mandatory consideration as the fee in relation to outgoing calls "does not involve the application of a 'restriction' of the type contemplated by s 6(1)(g)". I disagree. If the chief executive imposed a fee that was needlessly burdensome in relation to outgoing calls, that would involve the unnecessarily restrictive administration of a sentence given the minimum entitlement to make at least one outgoing call of up to five minutes' duration per week. Principle (c) is, therefore, mandatory, albeit its relevance is likely to be confined to establishing a boundary of legitimate decision making.

[63] This leaves (f) to (i) which, contrary to the applicants' submissions, are not mandatory considerations. The Act draws no linkage between rates of earnings by prisoners (f) and the fee for outgoing calls; and is silent on both poverty (g) and marginal cost (h). Furthermore, s 77(6)'s amendment in 2019 was directed at the chief executive's convenience rather than other concerns. No particular aspect of the United Nations Basic Principles for the Treatment of Prisoners or Mandela Rules is cited in support of (f) to (i) constituting mandatory considerations. It is also important to remember that is what we are here concerned with, not considerations the chief executive may take into account.

[64] The last proposition also extends to (i), s 23(5) of the Bill of Rights Act. In *Taunoa v Attorney-General*, the Supreme Court held the provision is directed at protecting a prisoner "from conduct which lacks humanity, but falls short of being cruel; which demeans the person, but not to an extent which is degrading; or which is clearly excessive in the circumstances, but not grossly so".[52] Section 23(5) does not, therefore, inform the power to set a fee in relation to outgoing calls.

[65] Again, these remarks are observations, not more.

*Remedy*

[66] Given Serco's concession, I did not understand it to resist a declaration that it acted unlawfully in setting the pre-April 2020 rates. An order quashing the decision is unnecessary as those rates have already been superseded by the amended rates.[53]

**Canteen prices at the facility**

[67] This aspect of the case is awkward for reasons that will become apparent.

[68] The facility has a canteen at which prisoners may buy food, batteries, hygiene products and other goods. The statement of claim alleges canteen pricing is unlawful because Serco, when setting prices, failed to take into account mandatory considerations, including the "relative level of poverty of prisoners' families and the economic impact of imprisonment on them". On its face then, the claim seeks orthodox judicial review.

[69] The substance of the claim is, however, different. Mr Cheng and Mr Hemana say they and other prisoners were not given adequate food at the facility. Mr Cheng and Mr Hemana also say prisoners at the facility were not given adequate hygiene products. The applicants say prisoners had to spend significant amounts of money at the canteen on food and hygiene products to make up for the shortfall. In other words, the applicants' *real* complaint is that Serco failed to meet its statutory obligations to

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52 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [177].

53 As observed, the claim does not extend to the amended rates, but these will need to be revisited given [52].

provide prisoners "a sufficient quantity of wholesome food and drink",[54] and the means to ensure prisoners keep their person, cell, furniture, clothing, and property clean and tidy.[55]

[70] The applicants' written submissions make it clear that this is their complaint:[56]

> 108. The Act provides for minimum entitlements for every prisoner. These include that every prisoner must be provided with a sufficient quantity of wholesome food and drink. In addition, the prison manager is required by cl 69 of the Corrections Regulations 2005 to ensure that prisoners have available to them the means to keep their person, cell, furniture, clothing, and property clean and tidy.
>
> 109. ASCF operates a canteen that allows prisoners to purchase approved items within the prison. Despite prisoners' minimum entitlements, the applicants' evidence is that prisoners frequently need to purchase items from the canteen to meet their basic needs. The applicants depose that the food they receive at ASCF was never enough. Their evidence of the meals prisoners were given at ASCF does not accord with what ASCF says it provides, and what was assessed in the menu reviews dated 2015 and 2017. In particular:
>
> (a) portion sizes based on an average healthy adult would be too little, taking into account the average size of prisoners and the encouragement of activities such as working out and sports training in prison;
>
> (b) prisoners are provided between four and eight slices of bread a day, never 11 as is claimed by ASCF in the menu review;
>
> (c) prisoners are provided only two sandwiches at lunch, not three; and
>
> (d) prisoners are not provided two pieces of fruit per day, in fact they rarely receive even one.
>
> 110. Importantly, the applicants depose that prisoners frequently buy other's food or buy from the canteen, just to satiate themselves.
>
> 111. Similar observations can be made of hygiene products—to keep both prisoners themselves clean, and their cells. ASCF has provided an "essential items" list of the items typically given to prisoners on a weekly basis. However, the applicants' evidence is that ASCF does not provide sufficient cleaning products, and prisoners do not receive cleaning products if they asked for them. For example, prisoners receive:
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> (a) one bar of soap per week, typically hotel-sized;

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54 Corrections Act, ss 69(1)(c) and 72(1).
55 Corrections Regulations 2005, reg 69.
56 Submissions on behalf of the applicants at paras 108–113 (footnotes omitted).

(b) two toilet paper rolls per week; and

(c) one blue paper towel per week for cleaning (scrubbing pads and cleaning fluid would have to be requested, and this is often refused).

112. Mr Hemana observes that ASCF, despite being one of the newer prisons, is unclean and unhygienic. By contrast, prisoners have ready access to cleaning products at Waikeria—a much cleaner prison despite being rundown.

113. As a result of this under-provision, prisoners frequently need to buy items from the canteen just to keep themselves and their cells clean, and to keep themselves fed. The applicants' evidence is that prisoners need to spend a minimum of between $22–$32 per week to maintain basic hygiene and to make sure they do not go hungry—to buy soap and bodywash to stay clean, and carbohydrates and protein to stay satiated. On top of that would be the cost of renting a television ($2 per week, plus the one-off cost of an aerial and remote at $5 each). Realistically, only once those costs have been met would a prisoner be able to spend money on "extras" at the canteen.

[71] The statement of claim does not ventilate these allegations, at least clearly; it refers only to the insufficient provision of hygiene products.[57] The allegations are serious. They would typically entail a pleading that ss 69(1)(c) and 72(1) of the Corrections Act had been breached, and another that s 23(5) of the Bill of Rights Act had been violated. Neither pleading exists.

[72] The pleaded claim rests on an assumption that Serco is failing to provide adequate food and hygiene products. That assumption could have been tested if Serco sought and obtained permission to cross-examine Mr Cheng and Mr Hemana.[58] However, Serco did not apply to do so. Instead, it defended this aspect of the claim on the basis that canteen pricing involves a commercial decision not amenable to judicial review.

[73] The combination is awkward; indeed, unfortunate. The pleaded claim rests on an assumption that Serco is in breach of important statutory obligations to provide adequate food and hygiene products. That assumption has not been tested; the pleaded claim is not the applicants' real claim; and the real claim is not pleaded, at least

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57 The statement of claim does refer to a prisoner spending money at the canteen "to meet their basic needs", including in relation to food. However, it does not expressly allege that Serco is providing inadequate food at the facility, in breach of its statutory obligations.

58 Cross-examination is permissible only by permission on judicial review.

adequately. *If* Serco has failed to meet its statutory obligations in relation to the provision of adequate food and hygiene products at the facility, that should be reflected in a suitably pleaded claim, not collaterally alleged in a claim ostensibly seeking judicial review of canteen pricing.

[74] This aspect of the applicants' claim must, therefore, be dismissed.

**An observation**

[75] The applicants filed evidence asserting these claims are brought to benefit all prisoners, and Mr Hemana asserted his rehabilitation.[59] I cannot know whether either is true. I make clear the judgment does not turn on either. Rather, it turns on the application of principle to the circumstances.

**A précis of what this judgment holds**

[76] The Corrections Act 2004 came into force 1 June 2005. That Act empowers the Minister to fix rates of earnings for prisoners' work. This judgment holds the Corrections Act required the Minister to fix rates under that Act. The Minister has not done so. The judgment concludes the Minister acted unlawfully in not doing so.

[77] By the same Act, every prisoner who makes an outgoing telephone call may be required to meet the cost of the call or pay a fee set by the chief executive of the Department of Corrections. Serco, which manages Auckland South Corrections Facility, set a fee for outgoing calls without the required delegation of the chief executive. The judgment concludes Serco therefore acted unlawfully in relation to the fee governing pre-April 2020 calls.

[78] The judgment dismisses a claim that Serco also acted unlawfully in relation to canteen pricing at Auckland South Corrections Facility.

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[59] Mr Cheng did not, presumably because of his recent offending within and from prison.

**Result and declarations**

[79] The applicants' claim in relation to rates of earnings is upheld:

(a) The Minister of Corrections acted unlawfully by not approving rates of earnings under the Corrections Act 2004.

[80] The applicants' claim in relation to the fee set by Serco for pre-April 2020 outgoing telephone calls is upheld:

(a) Serco acted unlawfully in not having the required delegation of the chief executive of the Department of Corrections.

[81] The applicants' claim in relation to canteen pricing is dismissed.

**Costs**

[82] My preliminary view is that the applicants should have 2B scale costs, reduced by 25 percent because of the dismissal of the canteen pricing claim. If agreement is not reached, counsel may file memoranda not longer than five pages each:

(a) The applicants on or before **13 January 2023**.

(b) The respondents on or before **20 January 2023**.

**……..**

**Downs J**