EASTMAN v CHIEF EXECUTIVE OF THE DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY [2011] ACTSC 33 (4 March 2011)

HUMAN RIGHTS — Applicant serving term of imprisonment — whether certain conduct by public authorities was in contravention of *Human Rights Act 2004* (ACT) ss 18, 19 and *Corrections Management Act 2007* (ACT) ss 78, 53 — whether case management plans were in compliance — whether there was a failure to offer specific work — whether prisoner exposed to passive smoking in prohibited areas of prison — whether any loss or damage followed.

Corrections Management Act 2007 (ACT) s 53(1)(c)
Human Rights Act 2004 (ACT) ss 18(2) and 19(1)

Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs (2004) 219 CLR 486 cited
Eastman v Chief Executive Officer of the Department of Justice and Community Services (2010) 172 ACTR 32 referred to
Eastman v Besanko and The Attorney-General for the Australian Capital Territory [2009] ACTCA 23 referred to
Eastman v Chief Executive Officer of the Department of Justice and Community Safety [2010] ACTSC 4 referred to

No. SC 68 of 2010

Judge: Mansfield J
Supreme Court of the ACT
Date: 4 March 2011

IN THE SUPREME COURT OF THE)
) No. SC 68 of 2010
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN: DAVID HAROLD EASTMAN

Plaintiff

AND: CHIEF EXECUTIVE OF THE DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY

Defendant

O R D E R

Judge: Mansfield J

Date: 4 March 2011

Place: Adelaide (via video link with Canberra)

THE COURT ORDERS THAT:

1. The proceeding be dismissed.

2. The plaintiff pay the defendant's costs of the action to be taxed.

INTRODUCTION

1. This matter is a proceeding which consolidates the claim in Supreme Court Action No 1034 of 2009 with this action. The claims are expressed in the consolidated application dated 5 February 2010 and particularised in the plaintiff's particulars dated 4 March 2010. There were originally eight orders sought, but because of events which have occurred since the application was filed, the plaintiff no longer seeks two of them. That is not to indicate that those claims otherwise may or may not have had merit. It is simply unnecessary to address them.
2. The plaintiff is presently serving a sentence of life imprisonment for murder committed in the Australian Capital Territory. On 29 May 2009, following the opening of the Alexander Maconochie Centre (the AMC), he was transferred to the AMC to serve his sentence. The issues in the proceeding concern his treatment whilst he has been at the AMC.
3. The *Corrections Management Act 2007* (ACT) (the CM Act) is the enactment which principally governs the management and operations of the AMC, including the management of, and dealings with, those serving terms of imprisonment.
4. As the plaintiff said in his closing submissions, although he is seeking six final orders, they arise from three general matters:
    (1) the dealings he has had with two officers at the AMC, Mr Starkey and Mr Frame, and whether an order should be made preventing them from having any further dealings with him whilst he is imprisoned at the AMC (order 1 and ground 1 of the consolidated application) (the First Claim);
    (2) what action has been taken to provide the plaintiff with an appropriate case management plan (a CM plan) under the CM Act, in particular in relation to providing him with appropriate work, and for orders directing that he be

given such a CM plan and appropriate full-time work, and that he be awarded damages for the failure of the defendant to have done so to date (orders 2, 3 and 4 and grounds 2, 3 and 4 of the consolidated application) (the Second Claim); and

(3) whether the plaintiff has been exposed to cigarette smoking in the internal areas of the AMC where he has been placed, in part through the conduct of officers of the defendant either facilitating or permitting other prisoners to smoke in areas where it is not permitted, and for orders prohibiting such officers from allowing prisoners to smoke in any AMC buildings, including cells and cottages, and for damages for "passive smoking inflicted on him" in the past by such conduct of officers of the defendant (orders 7 and 8 and grounds 7 and 8 of the consolidated application) (the Third Claim).

5. At the commencement of the hearing, an issue arose as to the extent to which the plaintiff should be permitted to give evidence about his exposure to passive smoking at the AMC, having regard to the particulars he had provided of that exposure. He also sought discovery and inspection of extensive documentary evidence, including surveillance film of a number of areas of the AMC, to support his claim. He had, in response to a request from the defendant for particulars of this claim, confined his claim to the assertions in paragraph 19 of his affidavit of 31 January 2010. It was clear he wished to give evidence beyond those assertions.

6. The plaintiff therefore applied for leave to significantly amend, and expand, the particulars of grounds 7 and 8 of the consolidated application. That also involved, or potentially involved, the adequacy of discovery given by the defendant relating to the potential broadening of the plaintiff's case. In turn, that also potentially involved the

need to inspect surveillance camera recordings of certain sections of the AMC Centre over quite a lengthy period of time. Certain of those matters had previously been raised by the plaintiff but had not earlier been resolved. It is not necessary to explore why, because they were to be addressed in the matter set out below. Much of the first hearing day was taken up with submissions on those matters.

7. The present particulars of those allegations are contained, in essence, in the plaintiff's affidavit of 31 January 2010. His particulars of 4 March 2010 identified that affidavit as providing the particulars of his claim. In his opening of his case, the plaintiff indicated that he proposed to give evidence relating to those allegations on a much wider scale of time and circumstance, relating to the extent to which the defendant by its officers either facilitated or permitted smoking by other prisoners in the AMC, in areas where smoking was otherwise prohibited. I ruled that that evidence could not be adduced, without amendment of the particulars, because it would be unfair to the defendant to do so. The defendant had prepared his case on the basis of confronting the claim as then particularised.

8. The plaintiff then sought leave to amend the particulars of his exposure to passive smoking in the following way:

> In the period from about 1 December 2009 to about June 2009[sic], in the Management Unit and in the Crisis Support Unit of the Centre, certain prison officers including, in particular, Prison Officers Martin, Fior, Manning and Feldman and Symons, (a) assisted in lighting cigarettes for prisoners in areas where smoking is forbidden; and (b) failed to take any steps to prevent prisoners from smoking cigarettes in areas where smoking is forbidden on many occasions, the details of which the plaintiff is presently unable accurately to specify.
>
> The forbidden areas in the Management Unit are prisoner's cells, the internal common area (hall) and the computer room. And in the Crisis Appeal[sic] Unit, prisoner's cells, the kitchen, the internal common area (hall), the shower room and the laundry.

9. After hearing argument on that application, I delivered ex tempore reasons in which I indicated that I would allow the plaintiff to amend his claim to include those particulars. It is not necessary to repeat them; they are at T65-69 on 21 July 2010. The consequence

would have been that the hearing would have been adjourned to a later date so that the defendant had a proper opportunity to investigate those allegations and, if he proposed to, assemble any evidence to be adduced to resist them. An additional consequence would have been that the plaintiff would have had the opportunity which he sought, to pursue orders for further discovery and inspection along the lines referred to above.

10. However, having indicated my proposed ruling, the plaintiff then withdrew his application to amend his claim to extend the allegations of exposure to passive smoking. He said he had reconsidered his application in the light of an indication from counsel for the defendant, given during the course of argument before the ruling, that the defendant did not propose to call any evidence to contradict what the plaintiff asserted in paragraph 19 of his affidavit of 31 January 2010. The defendant did not in fact call any such evidence.

11. The matter then proceeded to trial.

12. There is one further procedural matter to refer to before addressing the evidence.

13. Between the hearing of the evidence after each party had closed his case, and the final submissions, the plaintiff gave notice of his intention to apply to adduce further evidence. I ruled at the time that the proposed further evidence would not be admitted. Appended to these reasons for judgment are my reasons for so ruling. In any event, in the course of closing submissions, the plaintiff contended that the further document sought to be advanced as fresh evidence was a matter of public record, not requiring proof, as they were "notifiable instruments". He referred to it (and to other like documents) without objection from the defendant. I therefore considered that additional material, without formally considering whether it was appropriate to do so. It has not been necessary specifically to refer to it in the course of my factual findings, or more generally in these reasons for judgment.

14. The plaintiff gave oral evidence, as well as adopting the material in his four affidavits of 10 December 2009, 20 December 2009, 11 January 2010 and 31 January 2010 together with the documents annexed to them. That material was received, subject to certain rulings on objections taken by the defendant (which are recorded at T17-26 of 21 July 2010). During his oral evidence, the plaintiff also introduced further documentary materials (Exhibits P1 to P6).

15. I accept that the plaintiff gave evidence truthfully. Indeed, there was no submission from the defendant that I should take an opposite view. However, as is not uncommon, the plaintiff's evidence showed me that his focus is a personal one. He sees things very much from his personal viewpoint, and at times he was unable to recognise that there were wider considerations which might need to be taken into account in determining the appropriateness of steps taken by the defendant, through his officers, in addressing matters of concern to the plaintiff.

16. Consequently, whilst in certain instances, the plaintiff regarded conduct of which he complains, or the failure to act in the way in which he thinks action should have been taken, as delictual on the part of the defendant or his officers, I have not routinely accepted the plaintiff's evidence in an uncritical way. In some matters of detail, I do not consider his perspective truly represents the reliable picture, either in full or in part. It has been necessary to make a judgment about those matters in the light of the evidence as a whole. It should be pointed out that such judgments generally relate to the quality of certain conduct, or of certain omissions to act, asserted by the plaintiff, and not to the underlying events upon which he has built his concerns. The underlying events reported by him are generally reliably and, in fact, were generally not contentious. There are some instances, however, where his description omits significant elements of the underlying

events. As I noted above, his focus may not have led him to recognise or accept those additional facts.

17. The defendant called evidence from four of his officers who were, in various ways, directly concerned with the dealings with the plaintiff about which he was concerned. They were Manager of Prison Employment Services, Mr Bartlett, Area Manager Correctional Officer Grade 3, Mr Frame, Area Manager Correctional Officer Grade 3, Mr Starkey, and Deputy Superintendent, Mr Johnston. Only Mr Bartlett and Mr Johnston were required for cross-examination.

18. Again, I accept each of the witnesses for the defendant as truthful witnesses. The plaintiff did not ask me to disbelieve them but to assess the significance of their evidence in the context of all the evidence. I found both Mr Johnston and Mr Bartlett to be impressive witnesses, and generally I am prepared to accept what they say. I have no reason to doubt that the actions they took in relation to the plaintiff were properly motivated by what they saw as their respective responsibilities on behalf of the defendant, and that each of them was genuinely trying to fulfil those responsibilities properly and conscientiously.

19. As my findings below indicate, in this matter I have concluded that the actions, or failures to act, alleged against the defendant through his officers are not shown to have been flawed in any way which entitles the plaintiff to the relief which he seeks.

20. I shall deal with the three categories of claims referred to above at [4] separately.

THE FIRST CLAIM

21. The plaintiff claims that Mr Starkey and Mr Frame treated him in such a manner as to breach ss 18(2) and 19(1) of the *Human Rights Act 2004* (ACT) (the HR Act).

22. Section 18(2) provides that no-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law. There is obviously a difference between unlawful detention (which is not here alleged) and unlawful treatment whilst in

detention (which is here alleged): cf *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486.

23. It is not obvious how s 18(2) might be relevant to the First Claim. Section 19(1) of the HR Act provides that anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. Refshauge J in *Eastman v Chief Executive Officer of the Department of Justice and Community Services* (2010) 172 ACTR 32 at [86] and [91] discussed that provision. The contravention of those provisions is said by the plaintiff to be actionable under Part 5A of the HR Act dealing with obligations of public authorities, s 40A describing functions of public authorities, s 40B(1)(a) which makes it unlawful for a public authority to act in a way inconsistent with a human right, and s 40C which enables the plaintiff by these proceedings to complain of conduct inconsistent with a human right, including the right under s 40C(4) to seek such relief as the Court considers appropriate, except damages (unless they are recoverable independently of the contravention of the HR Act). There are some restrictions on the operation of those provisions, but it is not necessary to refer to them.

24. The plaintiff also links the application and operation of those provisions to more specific provisions in the CM Act, which he says are variously relevant to each of the three general claims. In the case of the First Claim, he refers in particular to s 7(c) and (d) specifying certain general objects of the CM Act, and to s 9 dealing with the treatment of detainees. Generally, s 9 directs that functions under the CM Act in relation to a detainee must be exercised, inter alia, to respect and protect the detainee's human rights (subclause(a)) and to ensure the detainee's decent, humane and just treatment (subclause (b)) and to preclude torture and cruel, inhuman or degrading treatment (subclause (c)).

25. I do not need to determine, as a matter of law, whether those provisions either collectively or individually give rise to the right to relief which the plaintiff asserts in relation to the

First Claim. That is simply because I do not accept that the conduct complained of, in context, amounted to conduct which fell within any of those provisions.

26. I shall deal separately with each of the four occasions particularised by the plaintiff as falling within the First Claim. They are that about mid-January 2010, the plaintiff was called a "murderer" in an abusive tone by Mr Starkey; that about a week later he was called an "idiot" by Mr Starkey; that again about mid-January 2010, he was called a "convicted murderer" in an abusive tone by Mr Frame; and that on about 25 January 2010, Mr Frame said to him sarcastically "The good news is that in the long run nature will solve all of your problems". Each of Mr Starkey and Mr Frame gave evidence about those events, and in addition, Mr Johnston gave some evidence about them. That is because the first and third of those matters were the subject of complaints by the plaintiff. They were investigated and reported to Mr Johnston.

27. As to the first, the unchallenged evidence of Mr Starkey is that in late December 2009 he was responsible for investigating some complaints made by the plaintiff. Apparently, about that time (the plaintiff's particulars suggest about mid-January 2010, but nothing turns on the difference in dates), he had a conversation with the plaintiff at the plaintiff's open cell door in the company of another officer. He discussed the written reports of the plaintiff and read out his responses. The plaintiff appeared to be dissatisfied with those responses and became verbally aggressive. The plaintiff said "Go away. Go back to being a milkman. You're just a bankrupt milkman". Mr Starkey said "Where did you hear that?" The plaintiff replied "From staff where do you think?" Mr Starkey said in response, words to the following effect: "Your information is wrong, and in any case I'd rather be a failed milkman than a murderer".

28. As I have indicated, I accept that evidence. The plaintiff's oral evidence on this issue apart from referring to the use of the word "murderer" was quite general in nature and he

agreed that he could not "recall anything about the context" in which the word "murderer" was used.

29. Whilst there may be circumstances, as Mr Johnston acknowledged, in which it is unprofessional to refer to the nature of a detainee's conviction or the circumstances in which the offending conduct occurred, I am not satisfied that in the circumstances as I have found them to be, the use of the word "murderer" was conduct which contravened either ss 18(2) or 19(1) of the HR Act as the plaintiff alleges, even assuming their contravention would be actionable. It was a comment which was not judgmental, was accurate, and was made in the context of a response to a remark by the plaintiff about Mr Starkey's personal background which was either capable of being understood as, or intended to be, offensive.

30. The second matter is the claim that Mr Starkey called the plaintiff an "idiot". Mr Starkey said he had no recollection of the conversation alleged by the plaintiff, including whether he called him an "idiot" at any time. He also gave unchallenged evidence that, because the plaintiff "twists words", he ensures that wherever possible when dealing with the plaintiff that he has a witness present. In this instance, the plaintiff did not apparently make a written complaint about this conduct, although he is obviously familiar with the process of doing so as he made complaints in relation to the first and third matters.

31. The plaintiff's affidavit evidence is very short. It is simply that, in late January 2010 Mr Starkey, in the absence of any witnesses, called him "an idiot". The oral evidence in chief did not expand upon that laconic statement, but in cross-examination he described the occasion and its location in more detail. He had said the comment was made after Mr Starkey and another officer had been addressing him in the management unit at the AMC, and after that other officer had left. He said that Mr Starkey was "uncharacteristically courteous" in the earlier conversation. He did not say that the

comment was other than a passing, but offensive comment. No other conversation was described.

32. In respect of this matter, I am not satisfied that Mr Starkey made the comment alleged. It appears to have no context. It may well be that Mr Starkey and the plaintiff do not communicate in a very personable way. That seems to be the effect of both of their evidence. Mr Starkey is, I accept, careful about what he says to the plaintiff and how he says it. There is no apparent reason why Mr Starkey would have used in passing such a mildly pejorative term in the circumstances. Although I have generally accepted the plaintiff as a truthful witness, as I indicated above I am a little cautious about accepting that his memory of detailed events is necessarily fully reliable. In relation to this matter, having regard to the matters to which I have referred, I am not satisfied that Mr Starkey called the plaintiff "an idiot" on the occasion described.

33. The third matter alleged is that Mr Frame also called the plaintiff a murderer or a convicted murderer. The plaintiff made a written complaint about the conduct on 2 January 2010. The events surrounding this claim are well documented.

34. On 26 December 2009, (again, the particulars of the plaintiff suggest a different date but the precise date is unimportant) Mr Frame was present at the plaintiff's cell door following a disciplinary investigation by a Deputy Superintendent relating to the allegations against the plaintiff relating to an incident on 20 December 2009. Mr Starkey was also present. The plaintiff said "You are corrupt liars from Howard Jones [the Superintendent of the AMC] down". Mr Frame replied "That's an allegation. The difference is that we are not convicted. We're not convicted, that's the difference". Mr Frame denied that he said those words in an "abusive tone" as alleged by the plaintiff. He denied calling the plaintiff a murderer.

35. The unchallenged evidence of Mr Frame is consistent with an audio record of the conversation. In addition, Mr Starkey reported abusive conduct by the plaintiff arising out of the same incident. It was made by document of 30 December 2009. Mr Starkey's complaint asserts that the plaintiff also engaged in foul language and abuse of a Deputy Superintendent immediately prior to the remarks referred to above, including the following:

> You are a corrupt fucking piece of shit. You're all corrupt. You're all lying about the psychiatrist. You're setting me up claiming there are no jobs in the gaol. You are all corrupt you're all liars from Howard Jones down.

36. The plaintiff's complaint about this incident did not contain that context. It is incomplete in its detail. That is an indication of what I referred to above as the plaintiff seeing things only from his own perspective. When cross-examined, he had no real recollection at all of that.

37. On the whole of the evidence, I am satisfied that the interaction between Mr Frame and the plaintiff occurred in the manner described by Mr Frame. I do not accept that he called the plaintiff a murderer in so many words. In addition, I do not accept that the words he used to the plaintiff contravened ss 18(2) and 19(1) of the HR Act, even assuming that the contravention of those provisions would be actionable.

38. The fourth matter alleged is that Mr Frame said to the plaintiff "The good news is that in the long run nature will solve all of your problems". The plaintiff says the comment was made after Mr Frame and Mr Sharkey had come to see him on their own initiative on about 25 January 2010, for reasons which are not clear. The plaintiff was reluctant to talk to them. As they left, the alleged comment was made. The plaintiff says he took the comment to suggest he would never be released and would die in prison.

39. Mr Frame recalled the conversation. Both he and Mr Starkey discussed a number of written complaints with the plaintiff. He gave evidence that he did not say to the plaintiff

the words alleged. He was not cross-examined, so that evidence was unchallenged. Mr Starkey did not recall the occasion and had no recollection of Mr Frame saying to the plaintiff words to the effect of that alleged. He too was not cross-examined.

40. In those circumstances, in particular where the evidence of Mr Frame was not tested, I am not satisfied that the conduct alleged by the plaintiff occurred. Consequently, this claim must also fail.

41. It is therefore unnecessary to consider the further contention on behalf of the defendant that none of the facts alleged, even if made out, would be sufficient to warrant the granting of any relief under s 40C of the HR Act. It would be a significant matter to consider whether to make an order in the terms sought by the plaintiff. He seeks orders that Mr Starkey and Mr Frame be prohibited from having any contact with, or role in, his management except in an emergency. Such an order would involve, in effect, ongoing interference in the day to day management of a correctional facility. I agree with the submission that the Court should be reluctant to make such an order unless positively satisfied that such an order is necessary in order to protect the human rights of the alleged victim. In *Eastman v Besanko and The Attorney-General for the Australian Capital Territory* [2009] ACTCA 23 at [5]-[6], the Court of Appeal said:

> 5. It is a serious step for a court to intervene in the way in which prisoners under sentence are dealt with in a prison. Serious security and safety issues may arise. It is not an area in which courts have any real expertise or experience.
> 6. Further, there are likely to be considerable difficulties in anticipating and dealing with the conduct of other prisoners. We have no doubt that the existing orders have caused difficulties for the prison system.

42. In any event, for the reasons given, the question of relief does not arise, whether in the terms sought by the plaintiff or on some other basis.

THE SECOND CLAIM

43. The plaintiff claims an order that his CM plan be immediately amended to comply with s 78(2)(d) of the CM Act.

44. The ground for this claim is that:

> The Defendant has failed to comply with section 78(2)(d) of the Corrections Management Act 2007 and this creates a breach of sections 18(2) and 19(1) of the Human Rights Act 2004. The Court has jurisdiction under section 40(c)(4) of the latter Act to grant the order sought.

45. Section 78 of the CM Act provides:

> 78 Case management plans – scope etc
>
> (1) The chief executive -
> (a) must maintain an individual management plan for each detainee, other than a remandee; and
> (b) may maintain an individual management plan for a detainee who is a remandee.
>
> (2) A case management plan for a detainee must –
> (a) outline work and activities for the detainee; and
> (b) be based on an assessment of the needs, capacities and disposition of the detainee; and
> (c) be consistent with the resources available to the chief executive to manage the detainee; and
> (d) if the detainee is an offender – outline how the detainee is to be prepared for lawful release and reintegration into society at the earliest possible time.
>
> (3) A case management plan may deal with any matter relating to a detainee, including the following:
> (a) provision for the safe, secure and humane treatment of the detainee;
> (b) for a detainee at risk of self-harm – an outline of the risk and strategies for managing the risk;
> (c) the welfare of the detainee, including the detainee's participation in work or activities, and other constructive use of time in detention;
> (d) details of any academic, vocational or cultural education or training for the detainee approved under section 52 (News and educational services);
> (e) the detainee's health condition and risks, and any associated treatment regime;
> (f) for a detainee with a physical, mental or educational disability – strategies for extra assistance to minimise any disadvantage suffered by the detainee because of the disability, particularly in relation to suitability for work and release from detention;
> (g) for a detainee serving a sentence of imprisonment by full-time detention – requirements for the detainee to be –
> (i) told the detainee's release date under the sentence; and
> (ii) given necessary assistance in applying for parole;
> (h) anything else prescribed by regulation or directed by the chief executive.

46. By the conclusion of the submissions, it was common ground that there have been two CM plans adopted in relation to the plaintiff since his arrival at the AMC on 29 May 2009. The initial CM plan is headed "Rehabilitation Plan". It is undated but was made on about 16 September 2009. The second, and current CM plan is finally dated 13 May

2010 (the second CM plan). There is a third instrument apparently adopted and approved on 15 July 2010 headed Initial Case Management Plan, but it is agreed that that document addressed the plaintiff's classification and placement within the AMC and was not a CM plan for the purposes of s 78 of the CM Act.

47. Before turning to those documents, and the evidence generally, I refer the plaintiff's claims. In essence, he gave evidence that both the first CM plan and the second CM plan are inadequate; that until 3 November 2009 he was offered no work other than building bird traps; that thereafter he completed an education trainer's certificate but has been given only one student (another detainee) to tutor in English; that he has asked for, but been refused, clerical work; and that there has been no genuine effort to develop and implement a case management plan including appropriate work for him which might facilitate his rehabilitation and his eligibility for parole. He described events in the course of his working program which, he said, were themselves inappropriate obstacles to such a program being usefully implemented. His principal focus was on the obligation under s 78(2)(a) for the CM plans to outline work and activities for him.

48. The first CM plan comprises 5 pages. The terms of the first CM plan were finalised by the Sentence Planning Group. It addresses the plaintiff's mental health issues, his physical health issues, the offender intervention programs available to the plaintiff, vocational education and training programs that have been requested by the plaintiff and how they might be achieved, his employment capacity and activities and desires of the plaintiff, and the intervention steps to be undertaken.

49. The first CM plan includes a section headed "Employment". It is in the following terms:

> Mr Eastman has an extensive history of employment in the public service at both state and commonwealth levels. He appears to be well educated and apart form with operational or management issues arising, it appears he would adapt to most of the employment options available in the AMC. Given his work history and his level of education, he may be more

> suited to employment where he could utilise his education levels rather than his physical attributes.
>
> Mr Eastman is currently employed in a variety of industries employment where is currently building bird traps. Although he claims this job can sometimes be boring, he is appreciative of the opportunity to participate in employment. It is anticipated that should the opportunities arise, Mr Eastman would apply for any clerical position that may become available.

50. The "Intervention Steps" include his employment.

51. The second CM plan is a more detailed document, requiring input from several persons. It is one which was completed over a period of weeks by a series of officers. It specifically addresses progress in offender intervention programs, progress in education, progress in employment, goals for offender intervention programs, including goals in education programs, goals in employment programs, and goals in relation to parole/release on licence, as well as the assessment of the plaintiff for involvement in a violent offenders program, how ongoing employment of the plaintiff as a tutor should be managed and how much intervention there should be from the plaintiff's case manager.

52. The second CM plan noted that the plaintiff had completed a TAA (an educational qualification) on 3 May 2010. The Employment Services section records the following:

> Mr Eastman was employed as a general services cleaner in the Management Unit from 4/6/09. On 2/9/09 he began work in Industries, was promoted on 17/9/10, and later resigned.
> Possible work for Mr Eastman is in general services. Mr Eastman advises he is not interested in general services.

53. "General services" involves various work as a cleaner. There is also a Case Management Plan section, which includes the Education goal of completing the TAA, noting that has been effected. Under "Employment Goals", it records that generals services positions are currently available to the plaintiff, that attainment of the TAA may increase employment options, and that the plaintiff's goals are to obtain a clerical or tutoring position. It also noted that the plaintiff had commenced teaching within the AMC, and was interested in further clerical work. It adds:

> The steps already identified may assist Mr Eastman with preparation for release.

54. The second CM plan concludes with the Sentence Planning Group Recommendations, the "Prisoner's management agreement" (which the plaintiff refused to sign), and the approvals of the Offender Services Manager, the Deputy Superintendent and the Superintendent.

55. They are each detailed documents, apparently carefully prepared with input from a range of officers at the AMC. On their face, in my view, they appear substantially to address the requirements of s 78 of the CM Act. In particular, they address an assessment of the plaintiff's needs and capacities (s 78(2)(b)), and consider his behaviour and his capacities necessary for reintegration with society (s 78(2)(d)). In my view, each of the first and second CM plans consider the fundamental requirements for rehabilitating the plaintiff for lawful release and reintegration, namely offender intervention programs, employment and vocation education and training. The second CM plan makes express reference to the link between his training and teaching program and his possible release.

56. To the extent that the plaintiff's claim is based upon non-compliance with s 78 of the CM Act, I consider that each of the first CM plan and the second CM plan complies with the obligations of the CM Act. I reject the claim that there has been a breach of s 78 of the CM Act.

57. It is necessary to consider in addition that aspect of the plaintiff's claims that, even if the CM plans do comply with s 78 of the CM Act in their terms, in fact what has occurred in relation to him does not do so. He seeks an order that he be immediately given full-time work of a kind that complies with s 78(2)(b) and (d) of the CM Act 2007.

58. That order is sought on the ground that:

> The Defendant has breached sections 53(1)(c), 53(2)(b), 78(2)(b) and (d) of the Corrections Management Act 2007 in failing to give the Plaintiff work which complies therewith, and this also constitutes breaches of sections 18(2) and 19(1) of the Human Rights Act 2004. The Court has jurisdiction under section 40(c)(4) of the latter Act to grant the order sought.

59. In addition, the plaintiff claims an order that he be paid damages for the defendant's alleged failure to give him full time work of the kind which he says s 78(2)(b) and (d) of the CM Act require.

60. Before turning to the evidence and findings on this aspect of this claim by the plaintiff, one matter can readily be disposed of. The plaintiff also invokes s 18(7) of the HR Act 2004, and under the common law, to grant the order sought. Section 18(7) provides that anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention. Clearly, s 18(7) does not give the plaintiff a cause of action, even if the plaintiff's factual assertions were made out.

61. His detention is not thereby rendered unlawful, so the precondition to any right of compensation under s 18(7) or for wrongful imprisonment is not made out.

62. Section 53 relevantly provides:

> 53 Health care
>
> (1) The chief executive must ensure that –
>
> (a) detainees have a standard of health care equivalent to that available to other people in the ACT; and
> (b) arrangements are made to ensure the provision of appropriate health services for detainees; and
> (c) conditions in detention promote the health and wellbeing of detainees; and
> (d) as far as practicable, detainees are not exposed to risks of infection.
>
> (2) In particular, the chief executive must ensure that detainees have access to –
>
> …
> (b) timely treatment where necessary, particularly in urgent circumstances; and
> …

63. Despite those references in the consolidated application to s 53, the plaintiff's focus remained on his employment opportunities. There is a wide range of employment available at the AMC for detainees who are prepared to undertake it. That evidence was not contentious. Mr Bartlett confirmed it.

64. Its availability depends on a prisoner's security classification, accommodation area, and association considerations. Its availability is also assessed having regard to a prisoner's criminogenic programs addressing offender behaviour issues, and to a prisoner's educational programs including living skills. It may be undertaken up to 30 hours per week. The range of employment activities available, at a general level, includes kitchen duties, laundry duties, visits area services and maintenance, grounds maintenance, education area services (cleaners, tutors and administration), admissions area maintenance, programs area maintenance, medical area maintenance, accommodation area maintenance and services, and the industries area including maintenance and services and general fabrication activities (including the making of Myna bird traps).

65. Despite that uncontested evidence, the plaintiff did not do much in the period he was at the AMC until November 2009. He spent some time, as he described it, building bird traps. It was work in the industries area. Because of a transfer to the Management Unit area the plaintiff later in September 2009 was asked to do general services cleaning for a time. He expressed dissatisfaction about that on about 3 November 2009. There is medical evidence which indicates that the plaintiff about that time was becoming depressed because he did not consider he was being properly stimulated by being given meaningful work. The plaintiff resigned from his work in the industries area on about 12 November 2009. By a minute of 16 November 2009, he offered to teach basic literacy to other prisoners at the AMC. He had earlier, informally, expressed a desire to do that type of work and clerical work. He was told that his name had been added to the waiting list for clerical work. As noted above, the plaintiff was given the opportunity to undertake the appropriate formal qualification to provide such teaching, and he accepted it and obtained that qualification in May 2010. He has, however, only had one student since that time, and then only intermittently. I shall refer below to the circumstances in

which that has occurred. His proposal suggested up to 10 students, each receiving two hours individual tuition per week.

66. After being transferred to the Crisis Support Unit on 17 November 2009, the plaintiff (as with other prisoners in that area) was offered general cleaning work in that area. He did not agree to undertake that work. I note that the events relating to the plaintiff's employment to December 2009 are also set out in *Eastman v Chief Executive Officer of the Department of Justice and Community Safety* [2010] ACTSC 4, addressing his application for interim relief in this proceeding. Much of the evidence on this hearing was also given on that interlocutory application.

67. Mr Bartlett is the Manager of Prisoner Employment Services at the AMC. His evidence, in my view, satisfactorily explains why employment options for prisoners at the AMC vary, depending upon the area where they are located and their behaviour (affecting the degree of supervision or observation required), and the way they associate with other prisoners. He explained that, in late 2009 and early 2010, the relationship between the plaintiff and certain other prisoners made it difficult for the plaintiff to work near them doing clerical work.

68. Following the plaintiff obtaining his TAA qualification, Mr Bartlett added to the plaintiff's employment options the role as Teachers Assistant – Tutor. The plaintiff was offered, and accepted, that work. It has lead only to one reasonably regular commitment. It is not clear why. There is no evidence indicating that there are other prisoners in the AMC who are desirous of undertaking literary training with the plaintiff.

69. The plaintiff contends that the defendant, through his officers, either has impeded his opportunity for work, or not genuinely supported his desire to work, both generally and in relation to securing more students, and thus more work, as a tutor. I do not accept that, notwithstanding that one document of the defendant in late 2009 refers to building

"matchstick palaces" in the context of considering appropriate employment for the plaintiff. That reference is in an email of 5 November 2009 from the Offender Services Manager asking for ideas for employment or a research project for the plaintiff. It includes the following: "Are there books to be covered, files to be organised, matchstick palaces to be built?" I do not read that document as supporting the proposition that there was no genuine attempt to find suitable work for the plaintiff. To the contrary, I think it is an endeavour to do so, and (as I read it) is asking the recipients to be open-minded about identifying possible clerical tasks. On the whole of the evidence in this matter, I am not persuaded that the defendant through his officers has not made a genuine and realistic effort to secure for the plaintiff substantive and satisfactory work. On the evidence, the plaintiff's movements between various units in the AMC unrelated to his work, and his behaviour or perceived behaviour and relationships with some other prisoners, has played a role in what he regards as an unsatisfactory situation. For a time he was not able to attend to deliver his tutoring class as he was not allowed to attend that area. I accept that he considers that penalty for that particular behaviour was unfair, but I do not accept that the penalty was imposed for any reason related to his ongoing work opportunities. His focus on undertaking either clerical or tutoring work has self-limited his work options, because he has generally declined to do general duties of cleaning or of a like nature, impairing the extent of the work he has done. There is no evidence which supports the conclusion that any actions on the part of the defendant's officers have limited the number of prisoners who are happy to undertake literacy training with the plaintiff.

70. For those reasons, I conclude that the defendant has not failed to give the plaintiff work to the extent required by the CM Act. He has had certain forms of work available to him at all times since his arrival at the AMC. He has participated in a range of employment

activities (to the extent to which he could be, given his location in the management unit and the crisis support unit). He resigned from certain employment as he did not wish to perform it. He has not been given clerical work (other than the tutoring work) but he has no entitlement to full-time clerical work, nor indeed to clerical work generally. The tutoring position which he currently fills was established at his request, and I am not persuaded that its extent is limited by any conduct of the defendant's officers. I am satisfied that the relevant officers have endeavoured to accommodate the desires of the plaintiff, and have done so notwithstanding the behaviour of the plaintiff which has sometimes been inappropriate (perhaps because of his strong self-focus referred to above or his frustration with the extent of the work he has been given) and the competing demands inevitably involved in running the AMC.

71. In that regard, I observe that the plaintiff's claim at time veered towards an assertion that the statutory provisions referred to, in conjunction with s 19(1) of the HR Act, means that the defendant was obliged to provide the plaintiff with meaningful employment of a character of which the plaintiff himself approved or nominated. Plainly s 19(1) does not go that far, and in fairness to the plaintiff his submissions did not expressly assert that. Short of that position, the fulfilment of the statutory obligations of the defendant towards the plaintiff and others in the AMC is a question of fact and degree to be assessed in all the circumstances. It is in making that judgment that I have decided the Second Claim adversely to the plaintiff. The third aspect, namely the claim for damages for failing to comply with those statutory obligations, does not arise.

72. As the plaintiff has also referred to ss 53(1)(c) and 53(2)(b) more generally (although the plaintiff makes no specific point about them in his final submissions), I accept Mr Bartlett's evidence that in addition to the employment programs at AMC, there are criminogenic programs designed to assist offenders to address the causes of their

offending behaviour and education programs including remedial language, literacy and numeracy, and a range of vocational education and training programs. The plaintiff has been considered for, and had the benefit of, such programs. There was no final submission which requires the consideration of the quality of those programs. There are also health services available to the plaintiff as described by Mr Johnston, including general medical services, dental services, optometrist clinics, nurses clinics, access to specialist doctors and mental health services. There is no evidence of any difficulty accessing any of these services or of any alleged inadequacy with any of the services.

73. Accordingly, to the extent that the plaintiff's allegations, by his statutory references, enliven an allegation of a failure to treat him with humanity and with respect for the inherent dignity of the human person, I reject his claim. There is no basis for such a conclusion. I am not persuaded that the defendant has failed to give the plaintiff the opportunity to undertake a range of employment or has failed to make available other programs, apart from employment, specifically targeted at the rehabilitation of detainees, or has not made available comprehensive health services. He has an independent source of income; there is no foundation for concluding that he has financial shortcomings caused by the defendant.

74. I am not persuaded that there has been any breach of s 53(1)(c) or (2)(b) of the CM Act, nor any breach of s 78(2)(b) or (d), so the Second Claim fails. As I have decided that claim on the factual material, it is not necessary to decide whether – if the facts asserted by the plaintiff had been made out – s 40 of the HR Act would have provided a vehicle for the forms of relief sought.

THE THIRD CLAIM

75. The order sought by the plaintiff is an order prohibiting officers of the defendant from allowing prisoners at the AMC to smoke in areas where smoking is prohibited.

76. The ground upon which this order is sought is expressed as follows:

> The Defendant has breached section 53(1)(c) of the Corrections Management Act 2007, and this also constitutes breaches of sections 18(2) and 19(1) of the Human Rights Act 2004. The Court has jurisdiction under section 40(c)(4) of the latter Act to grant the order sought.

77. As noted earlier in these reasons, the particulars of the claim (paragraph 19 of the plaintiff's affidavit of 31 January 2010) are confined. It is in the following terms:

> In recent weeks I have witnessed CO1s MARTIN, FIOR, MANNING, and FELDMANN lighting the cigarettes of prisoners in the Management Unit at night and during the lunch hour, when the prisoner's rear doors are locked. Smoking in cells is forbidden. These officers are breaking A.C.T. law, fire and health regulations. I have sent another complaint to Supt JOHNSON, but have received no answer – the practice continues – I am asthmatic.

78. In addition, the plaintiff seeks an order that he be paid damages for passive smoking inflicted on him by the Defendant in the past, due to officers allowing prisoners to smoke in areas where smoking is prohibited.

79. He asserts that the Court has jurisdiction under s 18(7) of the HR Act, and under common law, to grant the orders sought.

80. There was little factual dispute on the evidence.

81. Apart from the affidavit evidence of the plaintiff set out above, he did not add to that in his oral evidence other than to describe the physical locations in more detail. He said he complained about that to Mr Johnston but received no response.

82. Mr Johnston's evidence dealt with both the policy and the plaintiff's alleged complaint. There is a Smoking Policy in force at the AMC. It identifies areas where smoking is prohibited, including all internal areas. The areas to which the plaintiff referred were internal areas. He said prisoners in the Management Unit are only permitted to smoke in the external individual exercise yards adjacent to their cells.

83. In the relevant period the defendant was in the Management Unit, namely 23 December 2009 to 26 January 2010, he was the Acting Superintendent. He does not recall the plaintiff complaining to him about prisoners being permitted to, or being assisted to,

smoke in the internal areas of the Management Unit. He has searched the files and has found no such complaint relating to that period.

84. In cross-examination, he disputed that he or the AMC management generally turned a "blind eye" to officers permitting or facilitating prisoners in the Management Unit smoking in breach of the policy. He agreed that, if that were reported, action should have been taken against the officers concerned. He was asked whether he had seen written complaints, lodged with Correctional Officer Collins on 15 January 2010 and 15 February 2010 about officers permitting smoking by prisoners in the internal areas of the Management Unit. He thought he recalled one such complaint. He was not asked what had been done in relation to it. He had previously said that a proper complaint would be investigated, and to comment upon any particular complaint he would need to know what the complaint was and have the details of the investigation.

85. I accept the evidence of the plaintiff about seeing officers do what he described. However, I am not satisfied that any complaint made by the plaintiff to Mr Johnston about officers breaching the relevant policy by allowing or facilitating prisoners to smoke. As to that, no documents were produced. Apart from Mr Johnston's vague recollection, it is not possible to know how specific any written complaint was or how, if at all, it was investigated. I find that Mr Johnston did not receive a complaint with a detailed investigation report which in practical terms called upon him to decide whether to take any disciplinary action against any officer. In my judgment, he would have recalled such a document and produced it as I regard him as a reliable and conscientious witness.

86. In the light of those findings, it is necessary to consider whether the plaintiff should receive the benefit of either of the orders he seeks against the respondent.

87. On the evidence, I do not consider that the plaintiff should be awarded damages for being exposed to the smoke from other prisoners' smoking, with the tolerance or support of certain officers of the defendant. I assume for the purposes of this step that, in the circumstances, the defendant is vicariously liable for their conduct and that, in all the circumstances, their conduct might render them also personally liable for any loss or damage suffered by the plaintiff. I do not need to make findings specifically on those two assumptions for present purposes. That is because it is not proved that their conduct has caused the plaintiff any loss or damage. He gave no real evidence of suffering from the consequences of passive smoking, other than to say that he is asthmatic. He gave no evidence about the extent of his exposure to passive smoking in the past, or indeed since he has been at the AMC. There was no medical evidence to indicate that he presently suffers from the consequences of passive smoking, or did so even temporarily in late 2009. I decline to find that, even if he was exposed to passive smoking whilst he was in the Management Unit in late 2009 and early 2010, he suffered any detriment as a result. I am not satisfied that he did so.

88. The plaintiff also seeks an order, which I convert into an order specifically against the defendant, that the defendant prohibit his officers from allowing prisoners at the AMC to smoke in areas where smoking is prohibited. It is necessary to convert the order proposed in that way, as any relief in this proceeding can only be awarded against the respondent. The ground for the relief recognises that contravention of s 53(1)(c) of the CM Act, or of ss 18(2) or 19(1) of the HR Act, by the defendant must be established.

89. In my view, on the findings made, the defendant has not contravened s 53(1)(c). He is obliged to ensure that conditions in the AMC promote the health and wellbeing of detainees. He has appreciated the dangers of passive smoking and issued a direction in relation to it. The plaintiff has not criticised its content. The evidence does not show that

the defendant, or Mr Johnston as the Acting Superintendent, failed to give effect to the direction. It is not suggested that detainees or corrections officers were unaware of the direction, or its application in the Management Area. The fact of an occasion or occasions when there is passive smoking in contravention of the direction will not demonstrate that the defendant has failed to satisfy s 53(1)(c). That is so even if, on such an occasion or occasions an officer either condoned or facilitated that conduct. It may be a different matter if the direction was shown to be a nominal policy, not expected to be complied with. There may be questions of degree to be considered. The evidence does not lead me to the conclusion that the direction was not enforced, or that the defendant or Mr Johnston routinely or commonly chose not to enforce it. I have previously indicated that s 18(2) of the HR Act does not apply to the present claims, as there is no issue about the legality of the plaintiff's detention. Section 19(1) of the HR Act provides that anyone in detention must be treated with humanity and with respect for the inherent dignity of the human person. It may be doubted whether such a provision, expressed in general terms, gives rise to a particular statutory obligation on the defendant capable of being enforced in circumstances such as the present. It is not necessary to decide that. I do not consider that s 19(1) is contravened in any event by the respondent or by Mr Johnston by the particular and limited conduct I have found to have been established.

90. Accordingly, it is not necessary to formerly decide whether, if a contravention of s 53(1)(c) of the CM Act by the defendant were established, the plaintiff would have the standing to maintain this proceeding and to relief through the portal of s 40(c)(4) of the HR Act.

CONCLUSION

91. For those reasons, the proceeding should be dismissed. I so order.

92. The parties made submissions as to costs, in the event of the proceeding being either successful or unsuccessful. I see no reason why costs would not follow the event. I do not think that it involved matters of such public interest that there should be no order as to costs. I order that the plaintiff pay the defendant's costs of the action to be taxed.

I certify that the preceding ninety-two (92) numbered paragraphs are a true copy of the Reasons for Judgment herein of his Honour, Justice Mansfield.

Associate:

Date: 4 March 2011

Counsel for the plaintiff:	The plaintiff appeared in person
Counsel for the defendant:	DJC Mossop
Solicitor for the defendant:	ACT Government Solicitor
Date of hearing:	21 and 22 July and 13 December 2010
Date of judgment:	4 March 2011