

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

**CIV-2016-404-2269**

UNDER The Judicature Amendment Act 1972 and  
Part 30 of the High Court Rules

IN THE MATTER OF An application for judicial review

BETWEEN Phillip John Smith  
Plaintiff

AND The Attorney-General  
on behalf of the Department of  
Corrections  
Defendant

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**AFFIDAVIT OF PHILLIP JOHN SMITH IN OPPOSITION TO  
DEFENDANT'S APPLICATION FOR STRIKEOUT**

Sworn November 2016

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Judicial Officer: Justice Peters  
Next event: Interlocutory application for strikeout 03 March 2016

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Phillip John Smith  
Auckland Prison

Private Bag 50124, Albany, Auckland 0752

1. I, Phillip John Smith, of Auckland Prison, take oath and swear -
2. I am the respondent to a strikeout application made by the Attorney-General on behalf of the Chief Executive of the Department of Corrections (the Chief Executive) in relation to my application for a judicial review into the decisions of the Chief Executive or his delegates concerning the suspension of and the restrictions imposed upon the temporary release and release to work (RTW) of prisoners following my November 2014 escape to South America.
3. I have alleged that the decisions of the Chief Executive or his delegates in relation to the temporary release and RTW decisions were ultra vires / an unlawful fetter of discretion / and or an act of dictation.

### **Background**

4. On the 16<sup>th</sup> of August 1996 I was sentenced to life imprisonment with a minimum non-parole period of 13 years.
5. I became eligible for parole in 2009. In 2013 the New Zealand Parole Board recommended that I be allowed to participate in temporary removals and temporary releases into the community to inform future assessments about my suitability for release on parole.
6. On 06 November 2014 I was granted a 74 hour temporary release from Spring Hill Corrections Facility. On the same day, I boarded a LAN Chile flight and flew to Santiago, Chile. I caught connecting flights to São Paulo and then to Rio de Janeiro, Brazil.
7. I failed to return from my temporary release by the due date of 09 November 2016. The circumstances of my background and the fact that I had fled overseas led to significant adverse media attention for the New Zealand government and the Department of Corrections.<sup>1</sup>

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<sup>1</sup> It is noted that on 12 November 2014 I was located in Rio de Janeiro. I was deported back to New Zealand on 29 November 2014.

8. On 11 November 2014, the Chief Executive suspended the temporary release of all prisoners. A copy of the suspension notice is annexed to the affidavit marked 'A'.
9. On 12 and 14 November 2014, the Chief Executive or his delegate issued new temporary release procedures that restricted the class and purpose for which a prisoner could apply for temporary release. The 12 and 14 November 2014 decisions are contained in circulars 2014/02 and 2014/02A. A copy of the 2014/02 and 2014/02A circulars are annexed to the affidavit marked 'B'.
10. On 21 November and 01 December 2014, the Chief Executive issued new RTW procedures which indicated that RTW should not be approved for child sex offenders subject to an indeterminate sentence, potential extended supervision offenders, other (unspecified) sexual offenders, violent offenders subject to an indeterminate sentence, and violent or sexual offenders sentenced to more than two years imprisonment if they had not completed a rehabilitative programme. The 21 November and 01 December 2014 decisions are contained in circulars 2014/03 and 2014/03A. A copy of circulars 2014/03 and 2014/03A are annexed to the affidavit marked 'C'.
11. On 03 February, the Chief Executive or his delegate issued further temporary release procedures. These also restricted the class and purpose for which a prisoner could apply for temporary release. The 03 February 2015 decision is contained in circular 2014/03B. A copy of circular 2014/03B is annexed to the affidavit marked 'D'.
12. Following the 11 December 2014 decision to suspend the temporary releases of all prisoners, the Government Enquiry into matters concerning my escape reported that the number of temporary releases decreased from 214 offenders in the six months before my escape, to zero subsequently. It further reported that the number of prisoners on RTW decreased from 443 prior to my escape, to 264 following it. A copy of the relevant pages from the Government Enquiry into matters concerning the escape of Phillip John Smith/Traynor are annexed to this affidavit marked 'E'.

13. It is my believe that the RTW numbers dropped so dramatically because all prisoners that were child sex offenders subject to an indeterminate sentence, potential extended supervision offenders, other (unspecified) sexual offenders, violent offenders subject to an indeterminate sentence, and violent or sexual offenders sentenced to more than two years imprisonment if they had not completed a rehabilitative programme, were removed from RTW following the 21 November and 01 December 2014 decisions to issue circulars 2014/03 and 2014/03A. This is notwithstanding that they had successfully been participating in RTW without being directly involved in an incident. The only incident had been my escape.
14. I believe that the 21 November and 01 December 2014 circulars were acts of dictation because the relevant prison directors rubberstamped the circulars without specifically turning their minds to consider the particular circumstances of the individual offenders already participating in RTW programme; including their legitimate expectations that their participation in the programme would continue in the absence of any direct involvement in an incident that would have put their particular placement in the programme in jeopardy.

#### **Standing – personal interest**

15. For the period 29 November 2016 until 03 December 2014, until I was classified from minimum to maximum security, I was subject to the 12 and 14 November 2014 circulars. Until 03 December 2014 I could have made an application for a temporary release on the eligibility criteria set out under the Corrections Act 2004 and Corrections Regulations 2005; however, the effect of the 12 and 14 November 2014 circulars meant that I was not eligible, except under the exceptional circumstances criteria. I could similarly have applied for RTW up until 03 December 2014; but in application of the 21 November and 01 December 2014 circulars my application would have been declined because I was a violent offender subject to an indeterminate sentence. A copy of my 08 March 2013 minimum security classification and my 03 December 2014 maximum security classification are annexed to this affidavit marked 'F'.

16. Following the withdrawal of hundreds of prisoners from release to work and RTW, the Department of Corrections has publically stated that I am to blame. For example, in a media release made by the Department of Corrections on or about 04 December 2014, which is captured in an email to the Prison Director of Auckland Prison, Tom Sherlock, the Regional Commissioner, Jeanette Burns, was quoted as having said:

The killer's escapade had ended all temporary releases for prisoners, and Smith was not popular she said.

"There are some prisoners who are not happy that the actions of Mr Smith interrupted their rehabilitation progress," Ms Burns said.

17. A copy of the email containing the Regional Commissioner's comments is annexed to this affidavit marked 'G'.
18. Similarly, in a Radio New Zealand item aired on several occasions over the period 12 October 2016 to 17 October 2016, the Minister of Corrections, Judith Collins, said something to the effect of "well you can blame Phillip John Smith or whatever name he is going by now for that ..." The Minister's comments were made in response to criticisms of the restrictions that remain in place with respect to the RTW programme. The Radio New Zealand programme noted that no prisoners at Auckland Prison are currently on RTW.
19. It is my belief that I am responsible for escaping. It is further my believe that it is the Department of Corrections that is responsible for the decisions that lead to the suspension of and the restrictions imposed upon the temporary release and RTW programmes. Those decisions were not within my control. It is my belief that those decisions were unlawful for the reasons set out in my statement of claim.
20. It is further my belief that against this background I have standing in this case. If the declarations that I have sought are made, I will be personally vindicated, it will be a matter of public record that it was the Department of Corrections' unlawful actions that lead to the suspension of and the restrictions imposed upon the temporary release and RTW programmes.

### **Standing – prisoner interest**

21. I believe that as a prisoner I have a legitimate interest in decisions which affect prisoners' rights. I further believe that there is authority to support the proposition that as a prisoner I have standing to advance prisoner rights in the interest of the homogenous group that I have belonged to for 20, nearly 21 years.

### **Standing – public interest**

22. I believe that I also have standing to bring this case in the broader public interest, for two reasons.
23. Firstly, there is a public interest in the successful rehabilitation and reintegration of prisoners, of which the temporary release and RTW programmes are an important part. I am aware that the Corrections Act and Regulations reflect this sentiment. In my view, the primary objective of community safety is best achieved through the effective rehabilitation and reintegration of offenders. I believe that there is a public interest in ensuring that the Department of Corrections decision-making is consistent with society's interest in the rehabilitation and reintegration of offenders. I am aware of authority that supports standing in the public interest.
24. Secondly, I believe that there is a public interest in ensuring that the executive of the New Zealand government acts within the law. I am aware of authorities that strongly support the proposition that standing is given a broad interpretation within this context.

### **Merits of the case**

25. It is my belief that the causes of action that I have brought are well supported by the evidence. Put simply, I have alleged that the circulars that the Chief Executive or his delegate issued pursuant to sections 196 of the Corrections Act 2004 were ultra vires section 62 and 63 of the same Act and regulations 27 and 76 of the Corrections Regulations 2005. The RTW decisions turn whether the relevant

prison directors simply rubber stamped the circulars issued on 21 November and 01 December 2014. I am aware of authority that is strongly against the Defendant on both issues. I will discuss these in detail in my submissions.

26. In addition, I am aware that the Government Enquiry into matters concerning my escape had its own concerns about the legality the restrictions that the Department of Corrections imposed upon the temporary release programme. It said:

To exclude certain categories of prisoner as being unsuitable per se rather than assessing the risks and benefits of temporary release for individual prisoners could be seen as a retrograde step and inconsistent with current government policy.

...

... we are unconvinced that all aspects of the restructuring of the temporary release programme that has occurred and the restrictions that have been placed on the type of prisoner eligible for reintegrative release are entirely justified.

...

Arguably, the current restrictions fetter the chief executive's discretion to grant a temporary release.

27. A copy of the relevant pages from the Government Enquiry into matters concerning the escape of Phillip John Smith/Traynor are annexed to this affidavit marked 'E'.

### **Relief sought will use a useful purpose**

28. I believe that if this case is successful, the declarations that I have requested will serve to deter the defendant from acting against the rule of law in the future.
29. I further believe that if this case is successful, those prisoners that were removed from RTW may be able to sue the defendant for lost wages. Furthermore, prisoners that were removed from the temporary release programme may have a case that their temporary releases should be reinstated.
30. Declarations would also serve to vindicate me. It will be pronounced to the world that it was the defendant's unlawful actions that led to

suspension of and the restrictions imposed upon the temporary release and RTW programmes.

31. I understand that the defendant has denied that any of the circulars referred to in this affidavit are in effect; resulting in a claim that the issues raised in my statement of claim are moot.<sup>2</sup> My belief is that Schedule 4: Offender Management Prisons, Rehabilitation and Employment – 30 August 2016, indicates that Circular 2014/02 is still in effect. It sets forth:

Temporary release

...

To approve, under s62 (2) of the Corrections Act 2004, the temporary release of a prisoner from a class specified in regulation 26 of the Corrections Regulations 2005 for any of the purposes set out in regulation 27 of the Corrections Regulations.

...

**The exercise of this delegation is to be done in accordance with the POM Temporary Release, Temporary Removal and Release to Work section, and Circular 2014 /02 [emphasis added].** If the prisoner is a service prisoner, the person exercising this delegation must have regard to regulation 192 of the Corrections Regulations 2005.

32. I am aware that the 30 August 2016 schedule was released to me under the Official Information Act 1982 in mid-November 2016, indicating that it was still in effect then. A copy of Schedule 4: Offender Management Prisons, Rehabilitation and Employment (2016) is annexed to this affidavit marked 'H'.
33. I am also aware that Schedule 4: Offender Management Prisons, Rehabilitation and Employment (2016) is identical to the 13 November and 09 December 2014 versions of the same document. I believe that this casts doubt on the issue of mootness. The defendant has not disclosed when circular 2014/02, or for that matter, the rest of the circulars became ineffective; if they are ineffective at all. A copy of the 2014 versions of Schedule 4:

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<sup>2</sup> Statement of defence at 26



Offender Management Prisons, Rehabilitation and Employment (2014) are annexed to this affidavit marked 'I'.

34. Nevertheless, even if the circulars have been withdrawn, I am aware of authorities that strongly support the proposition that the rule of law will trump futility or mootness.

### **The Government Inquiry into matters concerning my escape**

35. It is my belief that some of the findings of the Government Enquiry into my escape contextualise this case. I recite the following excerpts:

A focus on apportioning blame when things go wrong or shifting blame to others are understandable human reactions but can sometimes be counterproductive.

...

Some witnesses have conveyed to us, directly or indirectly, an understandable fear on the part of officials of the reputational risk seen as inherent in having convicted murders on release to work programmes or reintegrative releases generally ... The long-term focus needs to be on risk management, not risk aversion.

The extended curtailment of the temporary release programme (for nine months thus far), particularly reintegrative release, has been unfair to scores of prisoners, has (in respect of release to work programmes) caused disruption in various communities (the Christchurch rebuild and various projects in Northland being but two), has denied to the Parole Board for the time being a useful testing tool, and has almost certainly retarded the rehabilitation and reintegration of some prisoners approaching parole.

As one submitter stated to us:

With the new threshold level set so high for temporary releases many prisoners previously considered suitable candidates ... are no longer considered suitable. The newly constituted Advisory Panel to consider temporary release put in place since Smith's escape is a system where prisoners submit a very detailed and lengthy application to the panel for consideration of temporary release. Few prisoners are reaching the threshold level for temporary releases, yet they would probably have been suitable

for temporary releaser prior to the Advisory Panel being established.

Large numbers of prisoners have been withdrawn from temporary release who were on release to work (despite already working anywhere from one-18 months or sometimes longer without incident), others have had 72 hour leaves and leave to go shopping at the supermarket if in self-care units stopped. These prisoners are now kept inside the prison wire and removed from all integrative activities. Many have been removed from productive useful employment working 5-6 days a week in paid [release to work] employment, to now being placed in a phase of enforced idleness. By withdrawing a large proportion of prisoners from temporary releases greater numbers of prisoners are unable to fulfil the requirements of the Parole Board.

We have had similar evidence to like effect from several Corrections staff. Our conclusion is that reintegrative releases should be resumed, but with a much improved and focused assessment of the risks posed by individual prisoners.

The evidence we have heard overwhelmingly satisfies us that temporary release (including reintegrative temporary releases) are a useful feature of penal policy.

36. A copy of the relevant pages from the Government Enquiry into matters concerning the escape of Phillip John Smith/Traynor are annexed to this affidavit marked 'E'.
37. The effects of the restrictions to the temporary release and RTW programmes have therefore been profound.
38. Against this background, it is my belief that there is a significant public interest in ensuring that the Department of Corrections decision-making in relation to the restrictions imposed upon the temporary release and RTW programmes was not unlawful.
39. For all of the reasons that I have outlined in this affidavit, I believe that I have standing to bring this proceeding.

Signature of deponent: )

Sworn at Auckland this      day of November 2016 )

Before me: )

(a solicitor of the High Court of New Zealand/Registrar/Deputy Registrar)

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Defendant

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**STATEMENT OF CLAIM**

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Phillip John Smith  
Auckland Prison  
Private Bag 50124, Albany, Auckland 0752

## **The Parties**

1. At all material times the plaintiff is a prisoner at Auckland Prison where he is serving a sentence of life imprisonment for murder.
2. The defendant is the Attorney-General sued pursuant to the provisions of the Crown Proceedings Act 1950 in relation to the acts and omissions of the Chief Executive of the Department of Corrections in respect of breaches of the Corrections Act 2004 (CA), the Corrections Regulations 2005 (CR), and the Common Law.

## **The temporary release decisions**

3. On 11 November 2014 the Chief Executive or his delegate directed the suspension of all temporary releases for all prisoners pending a comprehensive review of the temporary release procedures and policies. This followed the escape of the plaintiff to Brazil while on a 74 hour temporary release.
4. On 14 November 2014, the Chief Executive or his delegate approved additional temporary release procedures pursuant to section 196 of the CA, imposing restrictions on the class of prisoner that could be temporarily released under sections 62 and 63 of the CA to prisoners serving a sentence of 24 months or less unless the New Zealand Parole Board had specified a release date.
5. The 14 November 2014 decision further restricted the purpose for which prisoners could be released to compassionate grounds.
6. On 03 February 2015 the Chief Executive updated the temporary release procedures, with no discernible differences to the restrictions that he had imposed on 14 November 2014.
7. As a result of these policies, hundreds of prisoners were unable to apply for temporary release.

## **The release to work decisions**

8. The 14 November 2014 and 03 February 2015 decisions directed that prison directors (then referred to as prison managers) review the conditions of prisoners involved in release to work (RTW), particularly child sex offenders, potential extended supervision order offenders, and prisoners serving sentences of preventive detention or life imprisonment.
9. As a result of the 14 November 2014 and 03 February 2015 directions, hundreds of prisoners were withdrawn from RTW.

## **FIRST CAUSE OF ACTION – ULTRA VIRES AND UNLAWFUL FETTER OF DISCRETION**

10. The plaintiff relies on section 62 of the CA which provides that every prisoner that belongs to a class of prisoners specified in regulations may be temporarily released from custody for any of the purposes specified in those regulations.
11. Accordingly, the plaintiff also relies on regulation 76 of the CR. It states:

### **26 Classes of prisoners who may be released under section 62**

- (1) The following classes of prisoners may be temporarily released under section 62 of the Act:
  - (a) every prisoner (other than a service prisoner) sentenced to imprisonment for a term exceeding 24 months who has reached his or her parole eligibility date under section 20 of the Parole Act 2002; and
    - (i) who is assigned a security classification that reflects the lowest level of risk category; or
    - (ii) who is assigned a security classification that reflects the second or third lowest level of risk category and who has been directed by the Parole Board to be released on parole under section 28 of the Parole Act 2002;
  - (b) every prisoner (other than a service prisoner) sentenced to imprisonment for a terms of 24 months or less who is assigned a security classification that reflects the lowest level of risk category:

- (c) every prisoner (other than a service prisoner) who, before 1 July 2002, was sentenced to imprisonment for a serious violent offence who –
  - (i) is not eligible for parole but whose final release date is within the next 12 months; and
  - (ii) is assigned a security classification that reflects the lowest level of risk category:
- (d) every prisoner whose release is required for the purpose specified in regulation 27(u) and who consents to being released for that purpose:
- (e) every prisoner whose release is required for the purpose specified in regulation 27(v).

12. The plaintiff further relies on regulation 27 of the CR, which provides:

**27 Purposes for which eligible prisoners may be temporarily released under section 62**

A prisoner who is eligible to be temporarily released under section 62 may be temporarily released for any of the following purposes that chief executive considers will facilitate 1 or more of the objectives specified in section 62(2)(a) of the Act:

- (a) to visit the prisoner's family:
- (b) to undertake paid employment (including self-employment):
- (c) to seek employment (whether directly with a prospective employer or through an agency) or to receive vocational or other training:
- (d) to attend any agency for assessment or treatment of the prisoner's rehabilitative or reintegrative needs:
- (e) if the prisoner's release is imminent, to visit a department of State or other agency to make arrangements for the prisoner's release:
- (f) to visit a community facility for educational, cultural, or recreational purposes:
- (g) to visit a member of the prisoner's family, or a close friend who is –
  - (i) seriously ill; or
  - (ii) incapacitated:
- (ga) to accompany a seriously ill member of the prisoner's family to medical treatment, and support the family member at the treatment:
- (h) to attend the funeral, tangi, or subsequent ceremonial commemoration of the death (for example, the unveiling of a headstone) of a family member or close friend:



- (i) to attend a religious service or a religious activity
- (j) to attend a restorative justice conference:
- (k) to attend a family group conference:
- (l) to obtain, whether by appointment or otherwise, medical, surgical, or dental assessment or treatment that is not available in the prison:
- (m) to be admitted to hospital for treatment:
- (n) to have a tattoo removed (including any pre-procedure assessments and post-procedure checks):
- (o) to enable the prisoner to give birth to a child, or attend the birth of the prisoner's own child, or visit the prisoner's own newborn child:
- (p) if the prisoner's release is imminent, to obtain from family or friends personal property where this cannot be done by other means and the property is reasonably required before the prisoner's release:
- (q) if the prisoner's release is imminent, to purchase clothing which is reasonably required before the prisoner's release:
- (r) to be involved in a community project or other reintegrative activity in association with staff or members of service clubs, religious or cultural groups, or other community organisations:
- (s) to participate in an outdoor pursuit activity:
- (t) to participate in a sports team, or play as a member of a club or team participating in a local competition, or attend a sporting event as a spectator:
- (u) to assist the Police in relation to the prevention, investigation, and detection of offences:
- (v) to enable the Police to exercise powers under section 32 or 33 of the Policing Act 2008.

13. The plaintiff says that polices, rules or guidelines made by the chief executive pursuant to section 196 of the CA are inferior to statute law and regulations passed by Order in Council. They cannot be inconsistent with the CA or CR or they will be repugnant and ultra vires.
14. The plaintiff says that the 11 November 2014 decision to suspend the temporary release of all prisoners was repugnant and ultra vires sections 62 and 63 of the CA, and illegal.
15. The plaintiff says that the 14 November 2014 and 03 February 2015 decisions to restrict the **class** of prisoners permitted to apply for temporary release were repugnant and ultra vires section 62(1) of the CA and regulation 26 of the CR, and illegal.

16. The plaintiff says that the 14 November 2014 and 03 February 2015 decisions to restrict the **purpose** for which temporary release could be granted was repugnant and ultra vires section 62(2) of the CA and regulation 27 of the CR, and illegal.
17. The plaintiff says that the chief executive or his delegate held no powers to suspend the temporary release of all prisoners, or to impose the restrictions to temporary releases that he did in his 11 November 2014, 14 November 2014, and 03 February 2015 decisions.
18. The plaintiff says that the policy restrictions imposed by the chief executive or his delegate unlawfully fettered the discretion of decision-makers to grant temporary release to any class of person specified in regulation 26 of the CR with a sentence of more than 24 months.
19. The plaintiff says that the policy restrictions imposed by the chief executive or his delegate further unlawfully fettered the discretion of decision-makers to grant temporary release for any of the purposes specified in regulation 27 of the CR.

**The plaintiff seeks**

- A. A declaration that the 11 November 2014 decision to suspend the temporary release of all prisoners was repugnant and ultra vires sections 62 and 63 of the CA, of no effect, and illegal.
- B. A declaration that the 14 November 2014 and 03 February 2015 decision to restrict the category of prisoner and the purpose for which temporary releases could be granted was repugnant and ultra vires sections 62 and 63 of the CA, and regulations 26 and 27 of the CR, were of no effect, and illegal.
- C. A declaration that the 11 November 2014, 14 November 2014, and 03 February 2015 decisions unlawfully fettered the discretion of decision-makers to grant temporary release to classes of prisoners serving 24 months or more the purposes set out in regulation 27 of the CR.
- D. An order quashing the 11 November 2014, 14 November 2014, and 03 February 2015 temporary release decisions.

- E. Any other declarations or orders that the Court thinks fit.
- F. Costs, or where costs cannot be ordered, disbursements.

## **SECOND CAUSE OF ACTION – ACTING UNDER DICTATION**

- 20. The plaintiff relies on sections 62 and 63 of the CA which allows the chief executive to approve a temporary release to any class of person specified in the CR.
- 21. The plaintiff also relies on section 41(1) of the State Sector Act 1988 (SSA) which authorises the chief executive to delegate any functions and powers not listed in section 10 of the CA to departmental officials.
- 22. The plaintiff further relies on section 42(1) of the SSA which provides that chief executive retains his powers under the empowering legislation notwithstanding his delegation.
- 23. The plaintiff says that the chief executive's powers do not allow him to dictate how any discretion that attaches to his powers are to be exercised once they have been delegated.
- 24. The plaintiff says that the 14 November 2014 and 03 February 2015 decisions directing that prison directors review the RTW for child sex offenders, potential extended supervision order offenders, and prisoners serving a sentence of preventive detention or life imprisonment was an act of dictation, and unlawful.
- 25. The plaintiff says that the discretion to decide whether to review the RTW of any prisoner was vested in the prison director once the powers under sections 62 and 63 were delegated to him by the chief executive.

### **The plaintiff seeks**

- A. A declaration that the 14 November 2014 and 03 February 2015 decisions directing that prison directors review the RTW for child sex offenders, potential extended supervision offenders and prisoners

serving a sentence of preventive detention or life imprisonment was an act of dictation, and unlawful.

- B An order quashing the 14 November 2014, and 03 February 2015 RTW decisions.
- C. Any other declarations or orders that the Court thinks fit.
- D. Costs, or where costs cannot be ordered, disbursements.

08 September 2016

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Phillip John Smith  
Plaintiff

This document is filed by the plaintiff in person. The address for service of the plaintiff is Auckland Prison, 530 Paremoremo Road, Paremoremo, Auckland.

Documents for service on the filing party may be left at the address for service or may be-

- (a) posted to the party at Private Bag 50124, Albany 0752, Auckland; or
- (b) left for the party at a document exchange for direction to DX:EX11191