

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2022] NZEmpC 233
EMPC 149/2022**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN STEPHEN BAILLIE
 Plaintiff

AND THE CHIEF EXECUTIVE OF ORANGA
 TAMARIKI – MINISTRY FOR
 CHILDREN
 Defendant

Hearing: 27–29 September 2022
 (Heard at Christchurch)

Appearances: A J McKenzie and H Nicoll, counsel for plaintiff
 P Chemis and L Robertson, counsel for defendant

Judgment: 16 December 2022

JUDGMENT OF JUDGE K G SMITH

[1] Stephen Baillie was employed by the Chief Executive of Oranga Tamariki – Ministry for Children as a residential youth worker. He worked at Te Puna Wai ō Tuhinapo in Christchurch until he was summarily dismissed on 1 September 2021 following an incident with a young person who was resident in the facility.

[2] During the incident Mr Baillie was kicked by the young person who was then placed in a secure unit. On 4 April 2021, the young person made a formal complaint about what happened.

[3] In responding to the complaint Oranga Tamariki decided to investigate six allegations about Mr Baillie's conduct because it was dissatisfied with what happened before he was kicked. At the conclusion of the investigation Oranga Tamariki was satisfied that his conduct was intimidating and aggressive. Four of the allegations were substantiated, one was partly substantiated and the last one was dismissed. Oranga Tamariki concluded that the substantiated allegations were serious misconduct and he was summarily dismissed.

[4] Mr Baillie raised a personal grievance for unjustified dismissal and successfully sought interim reinstatement.¹ Subsequently the Employment Relations Authority determined his dismissal was justified.²

[5] Mr Baillie challenged the determination and sought to be reinstated to his former position or to one no less advantageous, lost remuneration and compensation. Oranga Tamariki did not accept that it had unjustifiably dismissed Mr Baillie. As an alternative, if he succeeded, it resisted reinstatement as a remedy on the basis that it was not reasonable.

[6] This hearing involved evidence about a young person at Te Puna Wai. At the hearing an order was made prohibiting the publication of the young person's name or any information that might be capable of identifying him.³

The legal test

[7] Under s 103A of the Employment Relations Act 2000 (the Act) the test is whether Oranga Tamariki's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.⁴

[8] In applying the test the Court is not to substitute its decision for the employer's decision. The Court is, however, entitled to review the facts on which the decision

¹ *Baillie v Chief Executive of Oranga Tamariki – Ministry for Children* [2022] NZEmpC 21, [2022] ERNZ 105.

² *Baillie v Chief Executive of Oranga Tamariki – Ministry for Children* [2022] NZERA 187 (Member Cheyne).

³ Employment Relations Act 2000, sch 3 cl 12.

⁴ The Court must consider the factors in s 103A(3).

was made to decide whether the employer was entitled to say dismissal was justified.⁵ The requirement is for an assessment of the substantive fairness and reasonableness of the employer's decision, not minute and pedantic scrutiny to identify failings.⁶

What happened?

[9] There was little difference between the parties about what happened. They parted company in their analysis of responsibility for the incident and whether the conduct could be viewed as serious misconduct justifying dismissal.

[10] Te Puna Wai is a secure residence for children and young persons staffed in shifts by residential youth workers. Each shift has a team leader and a shift leader designated for each of five residential units.

[11] Mr Baillie started working at Te Puna Wai as a residential youth worker in May 2017 following a career with the Department of Corrections. In early April 2021, he returned to duty after a period of sick leave.

[12] The young person was placed in Te Puna Wai in late March 2021 while Mr Baillie was on sick leave, but they knew each other from his previous time in the facility.

[13] Mr Baillie and the shift leader, Andrew Rowe, were working together on 3 April 2021. During the afternoon the young person was allowed to phone his girlfriend. The call was from a room using a Bluetooth speaker connected to a phone in another room. As Mr Baillie and Mr Rowe walked past the room they could hear the young person talking. They thought the language he was using was abusive and aggressive towards his girlfriend.

⁵ See *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466; *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295, [2016] ERNZ 501.

⁶ Section 103A(5): a dismissal is not to be considered to be unjustified solely because of defects in the process followed if they were minor and did not result in the employee being treated unfairly.

[14] Mr Baillie was in the process of delivering trackpants to another resident. The young person opened the room door and when he saw Mr Baillie was carrying trackpants demanded some should be brought to him as well.

[15] Mr Baillie did not respond to the demand immediately and continued what he was doing. However, he overheard the young person say to his girlfriend that he would “smash” Mr Baillie.

[16] After delivering the trackpants Mr Baillie and Mr Rowe returned to the room where the young person was still on the phone call. Mr Baillie told the young person that his language and behaviour were unacceptable and needed to stop. While Mr Baillie was talking to the young person he stood very close to him.

[17] Mr Baillie and Mr Rowe left the room and almost immediately the young person threw the phone speaker. They heard what happened and went back to the room. By the time they returned the young person was sitting on squabs in the furthest corner of the room away from the door. The speaker was beside him on the squabs.

[18] Mr Baillie walked across the room and stood at the base of the squabs slightly to one side of the young person. He explained to the young person the consequences of continuing to use abusive language on the phone, making threats to “smash” staff, swearing at staff and throwing property. The consequences were ending the phone call that the young person was still engaged in and losing his behaviour management system points.⁷ The young person’s response was that he did not care about losing the points but if the call ended he would “smash” Mr Baillie.

[19] There was a predictable response. Mr Baillie asked Mr Rowe, who was standing at the room door looking on, to terminate the phone call. Mr Rowe left and was away briefly. While Mr Rowe was out of the room Mr Baillie asked the young person for the speaker and reached forward to attempt to pick it up. As he did so, the young person kicked him.

⁷ A system of rewards to encourage good behaviour.

[20] After being kicked Mr Baillie stepped back. He told Mr Rowe, who had returned to the room, what had happened. They immediately placed the young person in a restraint hold in anticipation of moving him to the secure unit. As the restraint was being effected another residential youth worker arrived and relieved Mr Baillie. The young person was taken to the secure unit.

[21] When Mr Baillie stepped back after being kicked he briefly closed his right hand and pulled his right arm back slightly. That action was treated extremely seriously by Oranga Tamariki. It eventually decided he had formed a fist and was preparing to punch the young person.

The complaint

[22] The next day the young person made a formal written complaint about Mr Baillie. The crux of the complaint was about how he responded after overhearing the young person's conversation. He was accused of entering the room and encouraging the young person to punch him by saying "come on then, do it", followed by calling the young person a typical drug addict.

[23] In the complaint the young person acknowledged throwing the speaker, and being told about the potential loss of phone call privileges and points. He admitted kicking Mr Baillie.

The suspension

[24] On 7 April 2021, Mr Baillie became aware of the complaint for the first time when he was directed to meet Mason Peteru, who is the Manager of Operations at Te Puna Wai. Mr Peteru gave him a letter informing him that his suspension from work was being considered. A meeting was scheduled for the next day.

[25] During the meeting Mr Baillie was supported by Mr Rowe who was a union delegate. During it footage of the incident from Te Puna Wai's CCTV was played, eventually being stopped at a still image of Mr Baillie with his hand closed and arm

slightly pulled back. The image remained on the screen throughout the rest of the meeting. At its conclusion he was suspended immediately.

[26] No personal grievance claim was before the Court arising from Mr Baillie's suspension. Its circumstances were referred to as part of the background to his claim for unjustified dismissal.

The disciplinary meeting

[27] By letter dated 3 May 2021 Oranga Tamariki invited Mr Baillie to a disciplinary meeting to investigate six allegations of potential serious misconduct. Relevantly the letter read:⁸

Based on the information I have at hand; I am concerned that you may have:

- [1.] Displayed aggressive and intimidating behaviour towards a rangatahi [the young person] by appearing to square up to him and your face [to] be within inches of his. It also appears close enough to be in the "red zone" as per the STAR training guidelines.
- [2.] You appear to also poke [the young person] a couple of times in the chest with your finger with your left hand.
- [3.] You also appear to get into a sideways stance, with your right hand clenched into a fist and you pull your arm back, which suggests you are preparing to punch or hit the rangatahi [the young person] in front of you.
- [4.] When [the young person] is sitting down, you appear to be standing over him before moving in on top of him before two other staff members escort him out of the room. This appears to be completely unprovoked.
- [5.] Inappropriately restrained and had inappropriate contact with [the young person] whilst he was sitting down which appears to be unjustified or unnecessary.
- [6.] As per the grievance written by [the young person], you appear to be taunting [the young person], urge him to punch you, threaten [the young person] that he would lose BMS (behaviour management system) points and also label and call him a "typical drug addict".

[28] The letter stated that if the allegations were substantiated Mr Baillie could be in breach of reg 22 of the Oranga Tamariki (Residential Care) Regulations 1996, and

⁸ The paragraphs were bullet pointed and only numbered when repeated in subsequent correspondence, they are numbered here for ease of reference.

Oranga Tamariki's Code of Conduct. He was made aware that dismissal was a possible consequence if the allegations were substantiated.

[29] The allegations were based on the CCTV footage and the young person's complaint, a copy of which was provided.

[30] Mr Baillie took up an opportunity to view the CCTV footage and did so on 20 May 2021. Subsequently, for reasons beyond Oranga Tamariki's control, there was a storage problem which prevented the footage from being retrieved. What was retained, and relied on throughout the hearing, was a video of the footage taken by Mr Peteru on his phone. The parties accepted that the video was sufficient to inform the Court.

Preliminary decision

[31] Mr Baillie met with Mr Peteru, and Oranga Tamariki's Human Resources Adviser, on 31 May and 10 June 2021 to respond to the allegations. Mr Peteru's preliminary decision was communicated to him by letter dated 28 July 2021. The conclusion was that the first, third, fourth and fifth allegations were substantiated. The sixth allegation was partly substantiated, and the second one, that Mr Baillie had poked the young person in the chest, was not substantiated. The proposed sanction was summary dismissal.

[32] Alongside Mr Peteru's findings about the substantiated allegations he proposed to take into account a letter of expectation Mr Baillie received in November 2020, following an incident with another staff member.

[33] Mr Baillie responded and protested about evidence against him being derived from the CCTV footage. Mr Peteru's involvement was criticised as lacking impartiality, and concern was expressed about statements of fact in the letter inconsistent with other evidence; specifically a comment in the letter that Mr Peteru had not seen from the footage Mr Baillie being kicked when that was both obvious and admitted in the complaint.

[34] The claim of a lack of impartiality arose because Mr Peteru developed the allegations he investigated.

[35] Despite Mr Baillie's response Mr Peteru did not change his mind.

Dismissal

[36] Mr Baillie was dismissed summarily by letter dated 1 September 2021. Oranga Tamariki again addressed each of the allegations it considered were substantiated, provided an explanation for reaching the conclusions that resulted in those findings, and dealt with Mr Baillie's responses.

[37] In summary, the first allegation was considered substantiated because, from Mr Peteru's assessment of the CCTV footage, Mr Baillie was engaged in aggressive and intimidating behaviour towards the young person. The third allegation was substantiated because Mr Peteru considered Mr Baillie had formed a fist and pulled back his arm preparing to punch the young person, which was unacceptable threatening behaviour.

[38] The fourth allegation was substantiated because Mr Baillie was not justified in moving towards, or over, the young person immediately before attempting to pick up the speaker. The fifth allegation, about an inappropriate restraint and contact with the young person, was substantiated because it was an unnecessary action given that the young person was not an imminent threat to himself or Mr Baillie.

[39] The last allegation, about taunting, was only partly substantiated. The letter explained that Mr Peteru remained of the view that Mr Baillie appeared to be taunting the young person, which he deduced from the body language he saw in the CCTV footage. No other conclusion was drawn about the taunting, presumably meaning there was no finding about the words Mr Baillie was said to have used.

[40] Oranga Tamariki decided that Mr Baillie's behaviour breached the regulations, and Code of Conduct. He was informed that it no longer had trust and confidence in him as residential youth worker and, accordingly, he was summarily dismissed.

[41] Mr Baillie raised a personal grievance immediately, on 2 September 2021.

The issues

[42] The issues are:

- (a) Viewed objectively was Oranga Tamariki entitled to conclude that Mr Baillie had breached the regulations or its Code of Conduct?
- (b) If Oranga Tamariki was not entitled to reach the conclusions in (a), was Mr Baillie unjustifiably dismissed? If he was, should he be reinstated?
- (c) If Mr Baillie was unjustifiably dismissed should any other remedies be awarded?
- (d) If Oranga Tamariki unjustifiably dismissed Mr Baillie did he contribute to that decision in such a way that any remedies awarded to him ought to be reduced?

Was Mr Baillie in Breach?

[43] A comment is required about what constitutes serious misconduct warranting summary dismissal.

[44] Mr McKenzie, for Mr Baillie, submitted that serious misconduct is restricted to intentional, wrongful and deliberate behaviour.⁹ If accepted that would mean errors of judgment cannot constitute serious conduct.

[45] I do not accept that proposition. As Mr Chemis submitted, the correct approach was described in *Hines v Eastern Port Ltd*, adopting the comments in *Minhinnick v New Zealand Steel Ltd* and *The Chief Executive of the Department of Inland Revenue v Buchanan*.¹⁰ That is, it is not possible to define serious misconduct because it is

⁹ Reliance was placed on the analysis in *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 (EmpC).

¹⁰ *Minhinnick v New Zealand Steel Ltd* [2010] NZEmpC 30, [2010] ERNZ 73 at [25]; *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] ERNZ 767 (CA) at

always a matter of degree, but what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is essential to the employment relationship.¹¹

[46] Building on those cases Mr Chemis submitted that even a one-off act of inadvertence, oversight or negligence can, depending on the circumstances, amount to serious misconduct justifying dismissal.¹² The Court was invited to consider Oranga Tamariki's factual findings and evaluate whether a fair and reasonable employer would characterise the conduct as deeply impairing, or destructive of, the basic confidence and trust essential to the employment relationship, thus justifying dismissal.¹³

[47] Mr Chemis submitted that, in this environment, involving the care of vulnerable young people, Mr Baillie's conduct was very serious and made more so by his failure to accept his part in what happened. Oranga Tamariki decided Mr Baillie was responsible for creating the situation that developed and escalated it by his conduct. Mr Chemis summed up its decision-making as concluding that the restraint did not comply with reg 22 because it was the product of his behaviour; standing too close to the young person, standing over him, using forceful language and, generally, behaving in a way that was not good practice or necessary.

[48] For the reasons that follow I do not accept that the decision to summarily dismiss Mr Baillie was one that, viewed objectively, was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.¹⁴

[49] While Oranga Tamariki's concerns were divided into six allegations Mr Peteru's decision was made by reflecting on all of them together so that one allegation did not stand out as determinative against any of the others.

[36]; *Hines v Eastern Port Ltd* [2018] NZEmpC 79, [2018] ERNZ 224 at [78].

¹¹ *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA), at 487. See also *BP Oil New Zealand Ltd v Northern Distribution Workers Union* [1989] 3 NZLR 580 (CA).

¹² *Hines*, above n 9, at [78].

¹³ At [78].

¹⁴ The decision to dismiss did not raise for consideration any of the matters in s 103A(3)(a), (c) and (d). There is an issue over s 103A(3)(b) relating to one aspect of the inquiry discussed later in this judgment.

[50] Oranga Tamariki's allegations relied heavily on its CCTV footage. The footage available to the Court was in three parts, none of which had accompanying audio recording. The first part was Mr Baillie's first interaction with the young person. The scene was a slightly elevated view down towards the young person, who is standing with his back to the camera. It shows Mr Baillie and Mr Rowe entering the room. Mr Baillie is shown walking towards the young person and they stand more or less in the middle of the room very close to each other. Mr Baillie can be seen talking. The young person's face is not seen at any time.

[51] The other segments of footage are two views of the same scene when Mr Baillie and Mr Rowe returned to the room after the speaker was thrown. The first segment is again a slightly elevated view looking down towards Mr Baillie and Mr Rowe, but the young person is not visible.

[52] The next image is more or less from the reverse angle. Mr Baillie can be seen standing with his back to the camera at the edge of the squabs, near the wall of the room. Mr Rowe can be seen in the room and near the door until leaving briefly. The angle and where Mr Baillie is standing obscures a view of the young person and all that is visible of him is his legs. It is in the second and third segments that Mr Baillie can be seen closing his right hand and slightly drawing back his right arm.

[53] The difficulty Oranga Tamariki cannot overcome is that it chose to place heavy, almost exclusive, reliance on the CCTV footage and inferences drawn from it without adequately taking into account their potentially limited value in the absence of accompanying audio, the possibility that the images might support different conclusions, and uncontested evidence that contradicted the impressions from the footage that generated the allegations.

[54] As to the first allegation, Mr Baillie denied acting aggressively and intimidatingly towards the young person or departing from his STAR training.¹⁵ He offered two explanations for what could be seen in the first CCTV segment, both of which were rejected. The first explanation was that standing close to the young person

¹⁵ STAR stands for Safe Tactical Approach and Response.

was appropriate because he was known to self-harm. The proximity was said to provide an opportunity to respond if required (at the time the young person had stitches from an injury). The second explanation was that the young person was known to kick and standing close to him shut down the striking distance to reduce the potential threat.

[55] Far more important was what Mr Rowe said. He told Mr Peteru that he had no concerns about Mr Baillie's conduct "at all". He went so far as to say that Mr Baillie was talking to the young person about the abuse they heard and he would have done the same thing. Mr Rowe was certain Mr Baillie did not call the young person a drug addict going so far as to say if he had heard such a thing said he would have intervened and informed his team leader.

[56] Mr Rowe conceded that he would not have stood as close to the young person as Mr Baillie did, but considered the right decision was made at the time.

[57] Mr Peteru did not interview the young person at any stage of the investigation, which meant that, in reaching his conclusion that Mr Baillie acted aggressively and inappropriately, he preferred his interpretation of the CCTV footage over what was said by Mr Baillie and Mr Rowe. In the first encounter that conclusion could only have been drawn from the proximity of Mr Baillie to the young person and to Mr Baillie's head moving as he spoke.

[58] Mr Peteru has given no weight to the balance of images that can be seen. For example, the seemingly calm demeanour exhibited by Mr Baillie, the young person and Mr Rowe throughout. Mr Peteru rejected Mr Baillie's explanation as untruthful when nothing he said was implausible. Even if it was open to Mr Peteru to reject Mr Baillie's explanation there was no basis to put aside what Mr Rowe said.

[59] Too much weight was placed on the CCTV footage that was not conclusive. The same deficiencies are evident in the remainder of the allegations which either expressly or by implication criticise Mr Baillie's behaviour as aggressive or intimidating.

[60] There is also a problem confronting Oranga Tamariki over its finding that Mr Baillie departed from his training by being in the “red zone”. What was being referred to was a recommendation in his training for a separation distance to be kept between a residential youth worker and a young person to avoid being struck.

[61] The problem Oranga Tamariki has with this allegation is that the training contains a recommended position, not an absolute instruction as to where the residential youth worker must stand. That much was evident in the dismissal letter itself which referred to a recommended position. Mr Peteru acknowledged that there were some circumstances where it could be appropriate to stand closer to the young person than the training recommended. What he was concerned about, however, was that Mr Baillie should not have been standing where he was on this occasion.

[62] Mr Peteru was not the only person to refer to situations where standing close to a young person might be an appropriate response. Luke Jenner is a residential youth worker at Te Puna Wai. Mr Jenner knew the young person involved in the incident with Mr Baillie, because he was a reasonably regular resident in the secure unit for his violent behaviour involving threats of assault and self-harm. The young person’s willingness to self-harm was known to staff, was noted on his file, and often led to increased observation for his safety.

[63] Mr Jenner said that before Mr Baillie’s dismissal the STAR training he received did not refer to the “red zone”, as mentioned in the allegations, although the term is now used to describe the area within “punching distance of the young person”.

[64] Mr Jenner said that part of the role of a residential youth worker was to be familiar with the young person’s history and risks for everyone’s safety. He said that there were occasions when a youth worker needed to be close enough to a young person so that if he tried to “take a swing” there was no momentum behind the punch “so then that way you don’t get smacked”.

[65] It is apparent that the STAR training is a useful tool for residential youth workers but that there are circumstances in which a departure from that training is accepted. If it is open for a youth worker to make a judgment call that the

circumstances justify standing close to a young person, it is difficult to see how that decision can be criticised as a departure from the training, or support the allegation of displaying aggressive or intimidating behaviour.

[66] The third allegation resulted in a finding that was, essentially, that Mr Baillie was preparing to punch the young person. When interviewed Mr Baillie said that he did not know, before looking at the CCTV footage, that he had closed his hand. He said he did not intentionally form a fist and that he had no intention of punching the young person. Mr Baillie's explanation was that his hand closed as a reflex reaction and then only very briefly. His union timed the image of his closed hand at less than one second which information was used to support the explanation. Mr Peteru rejected Mr Baillie's explanation and his conduct was said to indicate a significant lack of judgment.

[67] Mr Peteru did not explain why he rejected Mr Baillie's explanation, but it can only have been because of the conclusions he drew from the CCTV footage. No one else who was present at the time saw Mr Baillie's hand close or attributed to him an intention to punch the young person. Mr Rowe did not see Mr Baillie's hand close, although that may have been because he was concentrating on the young person. The young person's complaint did not mention Mr Baillie forming a fist or any concern about being punched.

[68] Mr Peteru seems to have given little or no weight to the sequence of events that supported what Mr Baillie said. There was room to accept that Mr Baillie's action was entirely a reflex and I am not satisfied that Mr Peteru fairly assessed the explanation when he reached the conclusion, probably as early as the suspension meeting, that a fist was formed and he was preparing to punch the young person. At that meeting an image of Mr Baillie's closed hand, taken from the CCTV footage, was on display for some time. It is apparent that Mr Peteru concentrated on that image rather than whether Mr Baillie's explanation was consistent with what could be seen.

[69] The fourth allegation relates to Mr Baillie "standing over" the young person, but that expression is capable of conveying a misleading impression. He denied "standing over" the young person if that suggests a position of inappropriate

dominance or control. Mr Baillie's explanation was that he was not in an overbearing position: it was just that the young person was sitting and he was standing. The rest of the allegation was about what happened when an attempt was made to retrieve the speaker and the subsequent restraint. Viewed this way the allegation is effectively a restatement of concern about where Mr Baillie was standing and suffers from the same shortcomings.

[70] Mr Baillie made a decision to stand near the young person at the base of the squabs. That decision, it transpired, was the wrong one to make. The result, however, does not lessen the fact that it was open to Mr Baillie to conclude that the circumstances justified where he was standing.

[71] The fifth allegation has some overlap with the fourth allegation and was about inappropriately restraining the young person while he was sitting down. Mr Peteru's concern was that Mr Baillie's action was unprovoked and led to inappropriate contact that did not satisfy reg 22 to effect a lawful physical restraint. He considered the young person was not a threat to himself or Mr Baillie by the time the restraint was applied and, therefore, it should not have been applied. Removal of the young person to the secure unit was said not to justify the restraint because the purpose of detention in that unit is not to punish for past events that are unlikely to be repeated.

[72] Mr Chemis submitted that support for the conclusion that the restraint was unnecessary came from Mr Baillie and Mr Rowe because the explanations given by them had shifted. He was referring to uncertainty over which one of them decided the young person should be sent to the secure unit, before Mr Baillie said it was intuitive and that they just knew what to do without any other communication between them.

[73] I doubt it is necessary to resolve the conflict in that evidence or conclude who made the decision to place the young person in the secure unit. Mr Baillie, Mr Rowe and Mr Jenner all said that placing a young person in the secure unit was a common if not inevitable response if a residential youth worker is struck.

[74] Relevantly, reg 22 reads:

22 Use of force in dealing with child or young person

- (1) No member of staff of a residence shall use physical force in dealing with a child or young person in the residence unless that member of staff has reasonable grounds for believing that the use of physical force is reasonably necessary—
 - (a) in self defence, or in the defence of another person, or to protect that child or young person from injury; or
 - (b) to prevent that child or young person from damaging any property; or
 - (c) to prevent that child or young person from leaving the residence if not authorised to do so; or
 - (d) to secure the containment of that child or young person in secure care; or
 - (e) subject to section 384H of the Act, for the purpose of carrying out any search authorised by section 384C or section 384E of the Act.

...

[75] The restraint could have been justified under reg 22(1)(a). The young person lashed out and it was open then to say that reasonable grounds existed for believing the physical use of force was reasonably necessary in Mr Baillie's own defence. The CCTV footage alone was not enough for Mr Peteru to conclude that the young person presented no threat either to himself or Mr Baillie. The restraint might have also fallen within reg 22(1)(d). It is also noteworthy that while the allegation fell on Mr Baillie's shoulders Mr Rowe participated in the restraint as well without criticism.

[76] The last allegation was one of taunting. Mr Peteru's conclusion was that this allegation was partly substantiated:

I remain of the view that you do appear to be taunting [the young person] throughout the video, your behaviour, actions and body language displayed throughout the video supports [the young person's] documents of grievance concerned. The allegation remains partly substantiated due to the lack of sound from the video, and therefore I cannot [ascertain] what you said [to the young person].

[77] The difficulty facing Oranga Tamariki is that Mr Baillie flatly denied the allegation, Mr Rowe corroborated what he said and the young person was not interviewed. In the absence of audio on the CCTV footage all Mr Peteru could do was draw adverse inferences from what he saw, but that was not adequate.

[78] There was nothing inherently implausible about Mr Baillie's denial and, when combined with Mr Rowe's statement that nothing untoward occurred, there was no adequate basis on which Mr Peteru could prefer his interpretation of what he saw on the CCTV footage over the explanations.

[79] There is another relevant aspect to the decision making. A factor that played a part in the decision was that Mr Baillie would not accept responsibility for his behaviour and accept that it was wrong. He was never told that his acceptance of responsibility for what happened was something Oranga Tamariki intended to take into account. Not to raise the subject with him while considering it was a significant shortcoming. Raising it with him was required by s 103A(3)(b) of the Act. Had he been aware of it that may have prompted a different response from him, but he did not get that opportunity.

[80] Finally, Mr McKenzie made submissions about other deficiencies in Oranga Tamariki's procedure. There was a delay in supplying information to Mr Baillie following Mr Rowe's interview. A further problem was that Mr Baillie was informed he would have until 30 July 2021 to comment before the preliminary decision was made, but Mr Peteru's letter conveying that decision was dated 28 July 2021 and sent on 29 July 2021. The implication was that Mr Baillie would not have been able to influence the preliminary decision no matter what he said.

[81] Unlike Oranga Tamariki's failure to tell Mr Baillie that accepting responsibility would be taken into account, these other deficiencies are not fatal. He knew what Mr Rowe said at the interview because it was recorded by consent, and the recording was sent to him by Mr Rowe and transcribed. While truncating Mr Baillie's time to comment was problematic, and in other circumstances might have been significant, his responses were considered before the final decision was made. That led to the final decision correcting obvious errors in the preliminary decision, such as the comment that Mr Baillie was not kicked.

[82] For the reasons I have just described Oranga Tamariki has not satisfied the test in s 103A of the Act. Mr Baillie was unjustifiably dismissed.

Should Mr Baillie be reinstated?

[83] Mr Baillie sought reinstatement to his position or one no less advantageous to him, recovery of lost remuneration from the date of his dismissal, \$30,000 for humiliation, loss of dignity and injury to his feelings and costs.

[84] Where a personal grievance for unjustified dismissal succeeds reinstatement is the primary remedy. It must be provided wherever practicable and reasonable no matter what other remedies are awarded.¹⁶

[85] Oranga Tamariki did not welcome reinstatement, but Mr Peteru and Russell Caldwell, the Residence Manager of Te Puna Wai, agreed that it was practicable. The resistance to reinstatement took the form of concerns that, given the seriousness of the incident, the letter of expectation, and Mr Baillie's "lack of insight or acceptable of wrongdoing," it was not reasonable to reinstate him.

[86] Mr Caldwell agreed that Mr Baillie's interim reinstatement was uneventful but noted that the work he performed was not "on the floor" with young people. It was said, therefore, that no weight should be placed on the apparent success of the interim reinstatement.

[87] From Mr Peteru's perspective reinstatement was not reasonable because Mr Baillie had refused to realistically address what was said to be clear from the CCTV footage and to take any responsibility for his part in the incident escalating. Mr Peteru expressed a lack of trust and confidence in him to interact with children and young persons safely without similar errors of judgment.

[88] Mr Chemis' submissions drew on the relatively small size of Te Puna Wai and concerns as to the message Mr Baillie's reinstatement might convey to children, young persons and staff by downplaying and sanctioning the inappropriate use of force and abuse of power. He criticised Mr Baillie's reflection on what happened by not

¹⁶ Employment Relations Act 2000, ss 123(1)(a) and 125; and see *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [42].

accepting responsibility for his behaviour, or its impacts, or the part he played in the escalation that occurred.

[89] The difficulty with those submissions is that they rely on Oranga Tamariki's conclusions that Mr Baillie fell below the standard required of him. I do not agree that he did. Further, there was no evidence his reinstatement might risk conveying an inappropriate message to residents in Te Puna Wai or to staff there. It would not convey any message to the young person because he is no longer at Te Puna Wai. I do not accept that professional residential youth workers will in some way be compromised in discharging their duties if Mr Baillie is reinstated or that the work they do will be undermined.

[90] The letter of explanation does not assist Oranga Tamariki. It is what it says it is; a statement of Oranga Tamariki's expectations of Mr Baillie after an incident between him and another staff member, but it also contained an apology to him for its lack of attention to his leave and overall wellbeing. The letter falls short of being disciplinary in nature and should not now be treated as if it was.

[91] I am satisfied that reinstatement is practicable and reasonable.

[92] Mr Baillie is entitled to financial remedies. He sought lost wages from the date of his dismissal until judgment. Ms Nicoll, who presented this part of Mr Baillie's case, advised me that by agreement the parties had resolved that they could determine the value of lost wages if an order was to be made.

[93] So far as this decision is concerned what is required is to decide the period of time over which any award of lost wages should be made payable. Under s 123(1)(b) of the Act the Court may order reimbursement of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. Where reimbursement is ordered, s 128(2) provides for an order to be the lesser of a sum equal to the lost remuneration or three months ordinary time remuneration, but with discretion to award a greater amount.

[94] Oranga Tamariki's case was that the most Mr Baillie might be awarded should be three-months remuneration. I am not persuaded that it would be just to limit the recovery of lost wages in that way. Apart from the time he was reinstated on an interim basis Mr Baillie remained unemployed from the date of his dismissal until now. Significant attempts to find employment were unsuccessful, and where the jobs he applied for were in the public service his dismissal from Oranga Tamariki was an effective bar to his application being considered.

[95] The financial loss was significant and flows entirely from the decision to dismiss. I exercise the discretion in s 128(2) to extend the assessment period of lost wages so that it runs from the date of his dismissal until the date of this judgment.

Compensation for humiliation and injury to feelings?

[96] The next issue is whether there should be an order to pay compensation for humiliation, loss of dignity and injury to feelings under s 123(1)(c) of the Act. Mr McKenzie submitted that the circumstances of this case fall into the mid-range of the bands as discussed by the Court in *Waikato District Health Board v Archibald*, that is band 2.¹⁷

[97] A helpful starting point is the approach of the Court in *Richora Group Ltd v Cheng*.¹⁸ In *Richora* the Court considered the harm suffered, the extent of the employee's loss, where on the spectrum of cases the decision sits in terms of harm suffered, where it sat in terms of quantum and what would be fair and just to award in the present case.¹⁹

[98] There is no doubt Mr Baillie suffered harm. He was deeply affected by the damage to his reputation exacerbated by the protracted disciplinary process. He described having his confidence eroded, suffering a loss of identity and a feeling of being of little value to his family or society in general. The sense that his integrity and reputation were damaged contributed to the impact on him. He does not have a sense

¹⁷ *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791 at [62].

¹⁸ *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

¹⁹ *Richora*, above n 18, at [41]-[55].

of purpose when not working and described feelings of extreme embarrassment about being dismissed. He has spent about 15 months avoiding family gatherings so as not to discuss what happened or to avoid feeling he was being judged by his family. One example of the impact on him was not participating in celebrating his mother-in-law's eightieth birthday, which was hosted at his home with his family. He could not face his family and hid in a bedroom instead.

[99] I am satisfied that Mr Baillie has experienced harm under s 123(1)(c) of the Act. In *Richora* the Court said that "it is a truism that what may be devastating to one employee may be 'water off a duck's back' to another".²⁰ Mr Baillie is not the sort of employee who is able to shrug off the consequences of being summarily dismissed.

[100] Where on the spectrum of cases does this case fit in terms of the harm suffered? Mr McKenzie drew comparisons with *Richora* itself where the plaintiff was awarded \$20,000 and *Marx v Southern Cross Campus Board of Trustees* where \$25,000 was awarded where the harm included the plaintiff also being unable to face others.²¹ Those cases set the lower paramount of the range he identified.

[101] Mr McKenzie also relied on *Rayner v Director-General of Health* to set the upper parameter for his comparative cases. In that case the plaintiff suffered humiliation and a sense of letting down his family, with an aggravating feature being a loss of reputation.²² The Court awarded \$42,500.

[102] That selection of cases is small but gives a range from \$20,000 to \$42,500.

[103] Mr Chemis agreed that a disciplinary process and dismissal will have had an impact on Mr Baillie's wellbeing and his family more generally. However, he criticised the evidence about the impact on Mr Baillie as relatively broad. Where it touched on his health it was criticised as not being supported with medical evidence. This analysis was said to support an award of the lower end of the spectrum but comparator cases were not mentioned.

²⁰ At [42].

²¹ *Marx v Southern Cross Campus Board of Trustees* [2018] NZEmpC 76, (2018) 16 NZELR 24.

²² *Rayner v Director-General of Health* [2019] NZEmpC 65, [2019] ERNZ 142.

[104] Mr Baillie's description of the impact on him was compelling. Undoubtedly he has suffered significantly from having been dismissed, and that has found expression in a withdrawal from family life and a deep sense of embarrassment.

[105] I agree with Mr McKenzie that the circumstances Mr Baillie described place him within Band 2. This case has more in common with *Rayner* than those cases towards the bottom of the range Mr McKenzie mentioned. I agree that an award of \$30,000 would be appropriate.

Contribution?

[106] Mr Chemis submitted that any financial remedy might be reduced to 50 per cent of the award that would otherwise be made.²³ The reason for that submission lies in Oranga Tamariki attributing to Mr Baillie a poor-quality attitude and conduct.

[107] The circumstances in which Mr Baillie was subjected to a disciplinary process and dismissal do not involve a departure by him of expected standards or his training. There is no basis to reduce the available remedies under this section.

Conclusion

[108] Mr Baillie's challenge is successful and the Authority's determination is set aside.

[109] I order that:

- (a) Mr Baillie is to be reinstated to his former position or one no less advantageous to him with immediate effect from the date of this judgment.
- (b) Oranga Tamariki is to pay to Mr Baillie lost remuneration from the date of his dismissal until the date of this judgment. Leave is reserved to

²³ Employment Relations Act 2000, s 124. See *Xtreme Dining Ltd (T/A Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628.

apply for further orders if the parties are unable to reach agreement as to the quantum of the remuneration.

- (c) Oranga Tamariki is to pay Mr Baillie compensation under s 123(1)(c)(i) of the Act of \$30,000.

[110] Costs are reserved. The parties are encouraged to reach agreement about them but if that is not possible memoranda may be filed.

K G Smith
Judge

Judgment signed at 10.30 am on 16 December 2022