Note: An order prohibiting publication of a person's name is made in this determination.

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2015] NZERA Auckland 401
5592738

	BETWEEN	MAAUGA TUILAEPA Applicant
	AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT Respondent

Member of Authority:	Robin Arthur
Representatives:	Grant Macdonald, Advocate for the Applicant Judith Manoa, Counsel for the Respondent
Investigation Meeting:	4 December 2015
Further information from the parties:	9 December 2015 and 16 December 2015
Determination:	22 December 2015

DETERMINATION OF THE AUTHORITY

A. The application of Maauga Tuilaepa for interim reinstatement is granted. Under s127 of the Employment Relations Act 2000, the Chief Executive of the Ministry of Social Development must reinstate Mr Tuilaepa, on an interim basis and on the further conditions stated at paragraph [58] of this determination, to his position as a social worker pending the Authority's investigation and determination of his personal grievance.

B. The order for interim reinstatement is made in reliance on an undertaking as to damages given by Mr Tuilaepa.

C. Costs are reserved.

Employment Relationship Problem

[1] Maauga Tuilaepa was dismissed on 20 October 2015 from his role as a residential youth worker at a Youth Justice residence of the Child Youth and Family Service (CYF) of the Ministry of Social Development (MSD).

[2] Nova Salomen, a CYF manager, made the decision to dismiss him. She considered Mr Tuilaepa used inappropriate and excessive use of force and tried to use an unauthorised means of restraint on a teenage male resident during an incident on 1 September 2015. She decided that amounted to a failure to provide the required standard of care to a young person in custody at a Youth Justice residence and dismissed Mr Tuilaepa for serious misconduct. He had 16 years' service and was said to have had no prior disciplinary issues.

[3] This determination has referred to the resident as YPA, initials unrelated to his actual name. Publication of the youth's name, in relation to this proceeding and this determination, are prohibited by order of the Authority under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[4] Mr Tuilaepa accepted he punched YPA and stood on YPA's hand during the incident. He said he did so in self-defence. The use of force occurred after YPA had attempted to punch Mr Tuilaepa, was pushed to the floor by Mr Tuilaepa and then held there by Mr Tuilaepa and another social worker, Angel Siau. Mr Tuilaepa said he punched YPA and stood on his hand because YPA was pulling the hood of Mr Tuilaepa's sweatshirt over his head, attempting to gouge Mr Tuilaepa's eye and was refusing to let go of the wire of a radio communications device worn by Mr Tuilaepa.

[5] According to her letter of 20 October 2015 advising Mr Tuilaepa he was to be dismissed, Ms Salomen decided that the punches delivered to YPA were not acceptable "under any circumstances" and that it was YPA who acted in self-defence while being held on the floor by Mr Tuilaepa.

[6] Mr Tuilaepa raised a personal grievance about his dismissal and sought an Authority investigation of his claim of unjustified dismissal. Mr Tuilaepa also sought interim reinstatement for the period from the date of this determination until the

Authority has fully investigated and determined his claim. The investigation meeting is scheduled for 10 and 11 March 2016.

[7] MSD denied the dismissal of Mr Tuilaepa was unjustified and opposed his reinstatement in the interim period until the Authority's determination of his grievance.

Investigation of Mr Tuilaepa's interim reinstatement application

[8] Determination of whether to order interim reinstatement is made by applying the law relating to interim injunctions having regard to the object of the Act.[1] The object refers to building productive employment relationships through the promotion of good faith behaviour.[2] The necessary analysis has three steps.

[9] Firstly, Mr Tuilaepa must have established both that he had an arguable case that his dismissal was unjustified and an arguable case that – if the Authority did find he was unjustifiably dismissed – he would then be reinstated on a permanent basis rather than receive only money remedies.

[10] Secondly, the Authority must have assessed how best to regulate the positions of the parties until that subsequent investigation and determination of the substantive issues was completed. That assessment is referred to as the balance of convenience. Factors for assessment included whether effective remedies were available to Mr Tuilaepa (other than interim reinstatement) and possible effects his interim reinstatement might have on third parties (in this case including residents and other staff at the Youth Justice residence).

[11] Thirdly, the Authority must take an overall or global view of the justice of the case and decide what should be done to attain that in the interim period.

[12] An order for interim reinstatement may be subject to any conditions the Authority thinks fit.[3]

[13] Mr Tuilaepa's request for an interim reinstatement order was determined after considering written and oral submissions delivered by the parties' representatives at

[1] Employment Relations Act 2000, s 127(4).
[2] Employment Relations Act 2000, s 3.
[3] Employment Relations Act 2000, s 127(5).

an investigation meeting called for the purpose. The submissions addressed relevant legal principles and the evidence given in affidavits from Ms Tuilaepa (sworn on 2 November 2015) and Ms Salomen (sworn on 23 November 2015).

[14] While the Authority's determination of an interim reinstatement application relies on untested affidavit evidence, some common sense assessment of unanswered or disputed assertions in those sworn statements may be made in considering the respective justices of the situation in the interim period.[4]

[15] After hearing the representatives' submissions I gave the parties an oral indication of my likely conclusions on whether Mr Tuilaepa had an arguable case, the balance of convenience and where the overall justice lay until his grievance was investigated and determined.[5] That assessment favoured interim reinstatement. In that light the parties sought further time for discussion and agreed to advise the Authority by 9 December on whether they had agreed on an outcome that would not require a determination. On 9 December the parties reported they had not resolved the matter between themselves and sought the Authority's determination of Mr Tuilaepa's interim reinstatement application. The parties also advised that Mr Tuilaepa was the subject of a Police investigation as a result of the 1 September incident with YPA. On 9 December he was charged with assault. On 16 December the District Court set bail conditions that required Mr Tuilaepa not to associate with or have contact with three other CYF employees (including Ms Siau) who were witnesses in relation to some or all of the 1 September incident with YPA. It was not clear why Mr Tuilaepa was not charged with assault until so long after he had raised a personal grievance (which he did on 22 October), after he applied to the Authority for interim reinstatement (which he did on 3 November) and after the Authority had heard submissions on that application and the parties were given an oral indication that interim reinstatement was a likely outcome (which occurred on 4 December).

[16] As permitted by 174E of the Act this written determination has expressed conclusions necessary to resolve the interim reinstatement application but has not recorded all evidence and submissions received.

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[4] *Wellington Free Ambulance Service v Adams* [2010] NZEmpC 59 at [17]-[18].
[5] Employment Relations Act 2000, s 174B.

Arguable case: unjustified dismissal

[17] For the purposes of an interim reinstatement application an arguable case must have some reasonable, but not necessarily certain, prospect of success. Because that legal threshold was relatively low MSD accepted Mr Tuilaepa had an arguable case about the justification for his dismissal but submitted that even if the Authority found he was unjustifiably dismissed, he then had only a weakly arguable case that he should then be reinstated on a permanent basis. However MSD submitted the factors of the balance of convenience and overall justice were what decisively favoured declining Mr Tuilaepa's application to be put back on its payroll and back to work until his personal grievance was fully investigated and determined.

[18] The elements of what was arguable in his case nevertheless needed to be assessed. The relative strengths and weaknesses of those elements, as best they could be assessed at an interim stage, was a factor for consideration as part of determining where overall justice lay during the interim period.

[19] It was arguable (and as assessed later in this determination, strongly so) that Ms Salomen's decision (made on MSD's behalf), and how it was reached, was not one a fair and reasonable employer could have come to in all the circumstances at the time because of:[6]

(i) A flawed reliance on a so-called "zero tolerance" policy that referred to dismissal "in every case" of staff members who "in any way abuse[d] a … young person"; and

(ii) Insufficient consideration of regulations for CYF residences that allowed for use of physical force where reasonably necessary and, consequently, of Mr Tuilaepa's argument that he acted in self-defence; and

(iii) Her reliance on a report of the investigation of the incident by the residence manager Parani Wiki and human resources advisor Barbara Lautogo that included flawed information and a flawed description of the options open to her in making her decision; and

(iv) Difficulties with reliance on the evidence of Ms Siau as some of what she wrote in a report and told the investigators did not appear to match what could be seen on CCTV footage of the incident and her own involvement

[6] Employment Relations Act 2000, s 103A.

in the physical interaction with YPA did not appear to have been the subject of any review to the same degree as applied to Mr Tuilaepa.

Flawed reliance on a 'zero tolerance' policy?

[20] Mr Tuilaepa had an arguable case that Ms Salomen's investigation and decision was flawed from the outset due to its reliance on a "zero tolerance" policy in an MSD code of conduct. The policy stated that a staff member involved "in any way" with the abuse of a young person would be dismissed. The initial report provided to Ms Salomen by Ms Wiki and Ms Lautogo declared that Mr Tuilaepa had breached that policy. While there might be a technical question about what the word abuse meant precisely in the policy, the more general difficulty arose from the Employment Court's advice to employers about applying such so-called "zero tolerance" policies without careful consideration of the particular circumstances. The principle was explained this way in *Housham v Juken New Zealand Limited* (emphasis added):[7]

> There is a line of cases decided by this Court dealing with the difficult area of physical conflict between employees, especially in safety sensitive workplaces. Although an employer may properly regard assault, other physical aggression and fighting as serious misconduct upon appropriate proof of which employees involved might be dismissed, that cannot reasonably extend to every participant in such a confrontation under any circumstances.
>
> An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer no resistance at all, run away (especially if operating dangerous machinery), or meekly submit to the assault. Such an employee is entitled to take reasonable steps in all the circumstances to avoid actual or imminent assault. Such steps may include what would amount to a technical assault upon the aggressor, pushing the aggressor away, tackling the aggressor to prevent further blows, or the like. No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer.
>
> While a "zero tolerance" policy towards workplace violence is admirable in principle, the devil is, as always, in the detail of what is meant by a policy that has been sloganised. **It cannot be a reasonable policy if it purports to be applied to any involvement in any physical altercation whatsoever. Nor can it be a reasonable policy or practice for an employer to dismiss summarily all the employees in any way involved in any physical altercation.** While an employer is entitled to have a "zero tolerance" policy in the sense that employees engaged culpably in violence in a safety sensitive workplace should be liable to dismissal, that does not absolve that employer from the critical assessment of all of the relevant circumstances in which that employee may have been involved in the altercation. Such an analysis is especially important where there is a so-called "zero tolerance" approach that will see offenders dismissed.

[7] [2007] ERNZ 183 at [23]-[25].

[21] While that particular case concerned a situation where the conflict had occurred between employees, the Court has applied a similarly careful approach in cases involving the use of physical force on a patient or client by an employee. In *Timu v Waitemata District Health Board* a nurse in a forensic psychiatric unit for special patients held under the criminal justice system, accused of having pushed a patient against a wall and verbally abused him, was found to have been unjustifiably dismissed although the Court also found the nurse had been "unnecessarily forceful" and behaved unacceptably when he thought he might be attacked by the patient.[8] In *De Bruin v Canterbury District Health Board* the Court found the employer inadequately investigated and then unjustifiably dismissed a nurse for breaching a code of conduct provision about assault of a patient.[9] The nurse was accused of slapping a mental health patient and placing a knee on the patient's chest during an attempted restraint.

Insufficient consideration of CYF regulations allowing use of physical force?

[22] Evidence available to the CYF managers investigating the 1 September incident included CCTV footage from the 'time out' room in which the incident occurred and interviews with Mr Tuilaepa, Ms Siau and four other employees who saw part of the incident. The footage showed the first physical contact between YPA and Mr Tuilaepa occurred as YPA attempted to push past him to leave the room. The evidence from Mr Tuilaepa and Ms Siau was that YPA said he intended to go and assault another resident. YPA had also assaulted another resident in previous days.

[23] After Mr Tuilaepa pushed YPA back into the room, the next physical contact observable was what appeared to be the fists of YPA attempting to hit Mr Tuilaepa who blocked the blows with the open palms of his hand. Mr Tuilaepa could next be seen stepping forward towards where YPA appeared to be standing, in a part of the room that was beyond the field of vision of the CCTV camera mounted high in a corner of the room. Ms Siau walked forward from the doorway where she was watching the encounter. Mr Tuilaepa is then seen on camera pulling YPA across the floor, with Ms Siau's assistance, and holding YPA down on the floor in a corner of the room. During the following minute Mr Tuilaepa used physical force on YPA, as he accepted throughout he had. However he denied an accusation, based on an

[8] [2007] ERNZ 419 at [120] and [122].
[9] [2012] NZEmpC 110.

account given by Ms Siau, that he had also punched YPA before he had pushed him to the floor.

[24] Mr Tuilaepa gave this account of what happened while he and Ms Siau held YPA down:

> [YPA] continued to fight and resist. At some point [YPA] kneed/kicked me in the groin. I took preventative action to try and prevent another assault on my genital area through trying to pin his leg with my leg. [YPA] then threw another punch to my head. [YPA] also managed to grab the back of my hoodie, pulling it over my head. He then pulled on the hoodie, dragging my head towards him. He had a grip of my hoodie, and used the leverage to gouge my right eye with his thumb. This necessitated that I break his hold quickly, or potentially lose my eye. I couldn't really use my right hand/arm, as this was tangled up. I therefore threw some punches into his body/head area. This action saved my eye, as he used the arm/hand to protect himself. [YPA] also at this point had hold of my radio wire, which, can potentially be turned into a weapon. In order to release his grip on the wire, I stamped on his arm once, while grabbing at the wire to dislodge it from his grip.

[25] Mr Tuilaepa had an arguable case that he was entitled to use force in self-defence in that situation. The following extract from the Children, Young Persons and Their Families (Residential Care) Regulations 1996 was relevant to that argument:

> **22 Use of force in dealing with child or young person**
>
> (1) No member of a 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; …
>
> (2) Any person who uses physical force for any of the purposes referred to in sub clause (1) shall –
>
> (a) use no more than the minimum amount of force that is reasonably necessary in the circumstances; …

[26] The relevant inquiry then became whether what Mr Tuilaepa did was the minimum amount of force reasonably necessary. He had an arguable case that Ms Salomen failed to carry out that assessment. She met with Mr Tuilaepa on 16 October to provide him with an opportunity to respond to the allegations before she made a decision. However notes of the meeting taken by Ms Lautogo suggest Ms Salomen declined to consider whether Mr Tuilaepa's actions were reasonable in the circumstances. Instead, according to those notes, she said she had seen the CCTV

footage, was "appalled about the punching" and it was "not acceptable". She then said:

> I am not sure if it was reasonable which is why it has been referred to the Police who will decide the level of proof regarding your argument that it was self-defence. My role today is to determine if you are safe to work with my kids.

[27] Her stance, arguably, considered only one factor (safety concerns) and failed to properly consider another factor relevant to whether she could fairly and reasonably conclude Mr Tuilaepa's actions were serious misconduct in all the circumstances at the time. It was a decision for her to make in exercising the power of the employer in relation to the future of Mr Tuilaepa's employment relationship with MSD. It was strongly arguable that such deliberation, in that particular context, could not be delegated to the Police or, even if it could, that Ms Salomen could not fairly have proceeded to make a decision without having that assessment completed.

[28] Instead her letter dismissing Mr Tuilaepa said "the punches delivered to [YPA] were not acceptable under any circumstances". It was strongly arguable such a conclusion was inconsistent with a proper consideration of the r 22 defence. There are circumstances where such conduct is deemed acceptable to the law and appropriate. A sound inquiry was needed into the reasonableness of Mr Tuilaepa's belief that the use of physical force was reasonably necessary and whether no more than the minimum amount of force reasonably necessary was applied to deal with the young person in the particular circumstances. It was strongly arguable MSD could have difficulty – when tested on the standard of the balance of probabilities in an Authority investigation and in light of Ms Salomen's own recorded comment on the point – establishing what she did was what a fair and reasonable employer could have done to properly make that necessary inquiry.[10]

Flawed investigation report

[29] Although the topic would need to be subject of detailed consideration of the evidence in the Authority's substantive investigation, there were some strongly arguable causes for concern about the 12 October investigation report, prepared by Ms Wiki and Ms Lautogo, on which Ms Salomen based her subsequent disciplinary meeting with Mr Tuilaepa and her subsequent decision to dismiss him.

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[10] *Whanganui College Board of Trustees v Lewis* [2000] 1 ERNZ 397 at [20].

[30] The report began with firm conclusions that Mr Tuilaepa had breached r 22 (about the use of force) and breached MSD's code of conduct by using inappropriate force rather than giving tentative conclusions for Ms Salomen's assessment and decision after hearing from Mr Tuilaepa. It also stated two "options", one being dismissal for "very serious breaches of the code … and residential regulations" with the other being issue of a final written warning. However the report then discounted the second supposed option on the basis that if it were chosen, MSD would be treating Mr Tuilaepa inconsistently with other staff dismissed for similar breaches. There was no information about how or in what way other instances were similar to the allegations about Mr Tuilaepa.

[31] The report, arguably, minimised the role of YPA in initiating, participating in and prolonging the physical encounter with Mr Tuilaepa and Ms Siau. It described Mr Tuilaepa as initially blocking YPA from leaving the time out room and said that the footage showed YPA "advancing to the door only once" but the CCTV images also showed YPA attempting to push past Mr Tuilaepa. The report referred to "a physical altercation" in which there were "punches thrown" before YPA was "taken to the floor" – apparently neutral in describing whether one or both parties were involved in throwing punches – but the CCTV footages showed only YPA attempting to hit Mr Tuilaepa at that point. It made no reference to evidence from Ms Siau that early in the incident YPA said he was going to "fuck up Mac" (meaning Mr Tuilaepa). A much later written statement, said to have been given by Ms Siau to MSD staff after Mr Tuilaepa's dismissal, also referred to YPA as laughing during the incident, both when YPA was standing and later lying on ground.

[32] The 12 October report prepared for Ms Salomen stated that "all the relevant documentation" was attached. It presumably included an earlier 21 September "Investigation Report" that summarised the inquiries and interviews conducted by Ms Wiki and Ms Lautogo. Ms Siau was interviewed once for the 21 September report but no further inquiry appeared to have then been made of her about differences in her account of events from what Mr Tuilaepa said in his interview on 7 October had happened. Ms Siau's body position during the incident on 1 September – standing over YPA while helping Mr Tuilaepa hold him down in the corner – meant she obscured the CCTV camera view of some of what happened as Mr Tuilaepa leaned over YPA. She was effectively the only witness as to whether YPA had acted as Mr

Tuilaepa said he had – particularly by attempting to gouge Mr Tuilaepa's eye. Before the report from Ms Wiki and Ms Lautogo went to Ms Salomen, no attempt appeared to have been made to question Ms Siau about differences between what her report and interview notes said, what could be seen in the CCTV footage, and the account given by Mr Tuilaepa. Those arguable inadequacies were relevant because Ms Lautogo was involved in preparation of the 12 October report, which effectively recommended the dismissal of Mr Tuilaepa, and she was then involved in assisting Ms Salomen in her disciplinary meeting with Mr Tuilaepa and her decision to dismiss him.

Concerns about evidence from and about Ms Siau and her role in the incident?

[33] There were arguably some differences in what Ms Siau said had happened and some of what appeared on the CCTV footage available to Ms Wiki, Ms Lautogo and Ms Salomen. For example, a written report of the 1 September incident, prepared that evening either by Ms Siau or with her input, described her as having "jumped in between [Mr Tuilaepa] and [YPA] and trying to pull [Mr Tuilaepa] away from [YPA]". It was a description hard to reconcile with what could be seen of her actions during the one-and-a-half minute-long CCTV clip that ran from before the incident began and to when Mr Tuilaepa was led from the room by another staff member. Ms Siau can be seen helping Mr Tuilaepa drag YPA into the corner and then standing over YPA's legs and helping Mr Tuilaepa keep YPA lying down, including while Mr Tuilaepa (as he admitted he did) punched YPA. Only in the last few seconds, after Mr Tuilaepa stood up, can Ms Siau then be seen holding out her hand, putting it onto Mr Tuilaepa's shoulder and pushing him away.

[34] The veracity and reliability of Ms Siau's evidence was important because it was relied on by Ms Salomen to conclude that Mr Tuilaepa had punched YPA on two separate occasions and locations in the room during the incident.

Arguable case: reinstatement practicable and reasonable

[35] Mr Tuilaepa also had to establish he had an arguable case that – if MSD were eventually found to have unjustifiably dismissed him – it would practicable and reasonable to reinstate him to his former position or one no less advantageous. In *Ashton v Shoreline Hotel* the Employment Court gave guidance about the exercise of

the discretion to award that remedy which was also useful in considering the arguable case question in the interim period:[11]

> The important criterion is that employees are entitled not to be deprived of their employment unjustifiably and when they have been they ought ordinarily to be put back, if that is their wish. That would be a proper exercise of a discretion conferred on the Tribunal for the benefit of employees unless there are features in the case or indications pointing in a contrary direction that outweigh the employee's right to have his or her job back. Factors that produce that result ought to be substantial reasons and not mere assertions by an employer that it does not want to be forced to employ the employee whom, it will be recalled, it should never have dismissed in the first place. Such an assertion, if anything, aggravates the injury and renders reinstatement an even more compelling imperative. That is so notwithstanding the alteration in emphasis on reinstatement in the current statute. While each case must be determined on its own facts, the statistics given above indicate that the Tribunal is not mindful to an adequate degree that it is called upon to be the impartial referee in a playing field dominated by the goal of job protection. That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.

[36] That guidance was given at a time when – as now – the applicable legislation did not accord the remedy of reinstatement any primacy over the money remedies available to settle a personal grievance of unjustified dismissal,.

[37] While reinstatement presently has no greater or less weight than other remedies, as the Court in *Angus v Ports of Auckland (No 2)* observed, it may still be "the most significant remedy claimed because of its particular importance to the grievant" in a particular case and whether an order for reinstatement should be made needed to be examined on a case-by-case basis.[12]

[38] Having regard to the Court's guidance and the statutory criteria, if Mr Tuilaepa were found to be unjustifiably dismissed, he should (having sought it) be awarded reinstatement unless it was found – on the balance of probabilities – to be not practicable and not reasonable to do so or because the remedy should be denied due to factors considered under the inquiry required by s 124 of the Act (about contributing behaviour by the employee). However even a substantial level of contributory conduct may not disqualify a grievant from reinstatement, rather it could mean

[11] [1994] 1 ERNZ 421 at 436.
[12] [2011] NZEmpC 160 at [61].

reinstatement was the only remedy eventually granted, with monetary compensation cut or eliminated to reflect the requirements of s 124 of the Act.[13]

[39] Assessing the reasonableness of reinstatement requires "*a broad inquiry into the equities of the parties' cases*" and into the prospective effects of an order for reinstatement not only on Mr Tuilaepa and MSD but also any relevant third parties such as, in this case, other staff and the young people in custody at the particular Youth Justice residence.[14]

[40] Practicability concerns the prospects for successfully re-establishing the employment relationship. It involves the question of whether Mr Tuilaepa could be a sufficiently harmonious and effective member of the residence staff if he were ultimately reinstated to his former position (or a similarly advantageous one) as a residential social worker.[15] Practicability, for this purpose, has been described in the following way:[16]

> [P]racticability is not the same as possibility. … Whether the [employer] has established on the balance of probabilities that it would not be practicable to reinstate [the dismissed employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[41] While a real risk of reversion to dysfunctional relationships is a factor to weigh in considering the practicability of reinstatement, there was nothing apparent in the evidence to suggest any such problem in Mr Tuilaepa's case.[17] His 16-year record of service was said to be without blemish.

[42] Investigations (and suspension of staff during them) were submitted, on Mr Tuilaepa's behalf, to be a familiar feature of working life in the Youth Justice

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13 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 125 at [63]. See also *X v Auckland District Health Board* [2007] ERNZ 66 (EmpC) at [189] and *De Bruin*, n 9 above, at [85].
14 *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [65] and [68].
15 *Northern Hotel IUOW v Rotorua RSA Inc* (1989) ERNZ Sel Cas 535, 540 (LC).
16 *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243 at 286; as confirmed by the Court of Appeal in [1994] 2 ERNZ 414 at 416.
17 *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [288].

residences with no real practical problems for employees returning on their completion. Ms Salomen's affidavit referred to the potential for Mr Tuilaepa to work in another unit within the Youth Residence so there appeared to be some possibility that he need not work with the same employees if eventually reinstated. Such practical options could avoid or minimise any residual tension with managers or other colleagues that might exist as a result of the disciplinary matter. Similar arrangements could avoid conflict or contact with YPA if he remained a resident at the time Mr Tuilaepa was eventually reinstated. YPA could reside in a unit at the Youth Residence other than the one in which Mr Tuilaepa worked. However the evidence did not indicate, at this early stage, any actual ongoing difficulty in any contact Mr Tuilaepa might have with YPA. He had visited YPA later in the evening of the 1 September incident (in the secure unit to which YPA was removed) and was said to have discussed with him what had happened, with no report of rancour.

[43] Mr Tuilaepa had also described himself, in a written statement on 7 October, as deeply regretting the incident and stating that he was open to any criticism or observations about how he could improve his practice in the future under similar circumstances. On the basis of Ms Salomen's affidavit evidence that there were regular training update sessions about the use of restraint methods, Mr Tuilaepa could expect to benefit from that guidance. Similarly a risk that there might be a similar incident was not, in itself, a factor necessarily making reinstatement impracticable.[18]

[44] Ms Salomen deposed to having lost trust and confidence in Mr Tuilaepa's ability to make good decisions based on sound judgement. I was not persuaded that was a sufficient reason to conclude there was not an arguable case that reinstatement might, ultimately, be reasonable. The Authority's investigation might eventually find that it was Ms Salomen who did not have a reasonably justified basis for her conclusion and it would only be in that circumstance that the Authority would be considering the prospect of reinstatement in any event.

Balance of convenience

[45] An assessment of the balance of convenience considers the respective injustices – or relative hardships – to the parties (and relevant third parties) for the period until the merits of the case can be fully investigated (where the evidence of

[18] See *De Bruin*, n 9 above, at [70].

witnesses can be properly tested through questioning) and then determined by the Authority.[19]

[46] I have considered and disagreed with MSD's submission that four factors indicated Mr Tuilaepa should bear the relative inconvenience until the substantive determination of his claim.

[47] Firstly, MSD submitted that, while Mr Tuilaepa had pointed to having a young family which relied on him to provide the necessities of life, he gave no specific evidence of financial hardship. It submitted that even if he were later found to have been unjustifiably dismissed, an order for lost earnings and compensation would be sufficient. It was self-evident that the relative financial hardship of being without wages for the several months before a likely Authority determination would fall harder on Mr Tuilaepa than it would on MSD if it had to pay his wages during that period.

[48] Secondly, MSD submitted that it was "not fair" to YPA, other residents and other staff if Mr Tuilaepa was put back to work where there was an alleged possibility that he "might lose the plot again and assault another young person or put other staff member's safety at risk". I was not persuaded (on a common sense assessment of a disputed assertion) that the relative risk was greater for Mr Tuilaepa than any other staff member, given that there was no evidence (at least yet) that the 1 September incident was anything but a single, isolated and otherwise uncharacteristic instance in his 16 years of service. The prospect of contact with YPA, if a real factor of concern, could be managed by having him reside in one of the other units at the particular Youth Justice residence. Similarly, contact with other staff who were involved in the incident (and who would be witnesses in a future Authority investigation and a District Court hearing) could be managed by having Mr Tuilaepa work in a different unit or on a different shift. Given the size of the residence and the number of permanent staff working there (around 130),[20] making those arrangements could not be said to be too inconvenient for CYF to accommodate during the interim period.

[49] Thirdly, MSD submitted Mr Tuilaepa's conduct on 1 September was a failure to meet MSD's expectations of its staff who were employed to work with troubled

[19] *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].
[20] Child, Youth and Family Residential Care Regulations Inspection Report: 2014.

teenagers and who were expected to show a positive alternative to those young people. While that was said to have resulted in MSD's losing confidence and trust in Mr Tuilaepa's ability to make good decisions, the rationale for that conclusion was subjective and in dispute. It was not an objective factor that could be weighed in the balance.

[50] Fourthly, MSD submitted that the "prudent course" was "to let the Police do their job" and exercise caution by not granting Mr Tuilaepa interim reinstatement. It was a submission I found surprising and misconceived. The Police do not make judicial decisions. In the criminal jurisdiction, in this case, that is the role of the District Court. In respect of the assault charge – to which Mr Tuilaepa's submissions indicated he would also seek to apply the self-defence argument available to him under s 48 of the Crimes Act 1961 – the Crown's case about the 1 September incident will be put to the test of being beyond reasonable doubt. Meanwhile he is entitled to a presumption that he may be found not guilty of the offence. In respect of his employment dispute, it is the reasonableness and fairness of the actions of MSD that are subject to review by the Authority, measured on the balance of probabilities and the statutory test of justification. The outcome is either forum could differ. Mr Tuilaepa might be found not guilty by the District Court but MSD might be found by the Authority to have justifiably dismissed him. Equally the District Court might find him guilty of the offence but the Authority might find that his employer acted unjustifiably in why and how it went about dismissing him. I was not persuaded that, until the Authority has heard and determined the matters within its jurisdiction, whatever view the Police might take of events for the purpose of the court case swung the balance of convenience against Mr Tuilaepa's argument for interim reinstatement.

[51] The one aspect that was relevant, in respect of the court proceedings, was the terms of Mr Tuilaepa's bail that required him not to associate or have contact with witnesses, who were three other employees at the Youth Justice residence. Possibilities for managing that aspect included having him work on a different shift or in a different unit to those employees. There was however insufficient information to draw a firm conclusion on whether that would enable strict compliance with the bail condition (and which is a valid concern for both Mr Tuilaepa and MSD). If it were not, the term could be met by having Mr Tuilaepa work elsewhere in CYF operations

or being reinstated on a garden leave basis until his claim in the Authority was determined.

[52] Weighing those various elements I concluded the loss of income meanwhile for Mr Tuilaepa meant the balance of convenience favoured his interim reinstatement.

Overall justice

[53] I have considered and disagreed with three factors that MSD submitted showed the overall justice of the matter, in the period until the substantive determination, favoured declining Mr Tuilaepa's interim reinstatement.

[54] Firstly, MSD submitted its case that his dismissal was justified was stronger. It said his admitted conduct went to the heart of the employment and its conclusion of its loss of confidence and trust in him was more likely to be found fair and reasonable. For reasons canvassed under the consideration of an arguable case, set out earlier in this determination, I considered Mr Tuilaepa's case was relatively stronger. Relying on his evidence that he was reacting to YPA trying to gouge his eye and kick him in the groin, his argument that Ms Salomen did not fairly consider his self-defence explanation had a strong prospect of success.

[55] Secondly, MSD submitted the prospect for Mr Tuilaepa's eventual permanent reinstatement was low. For reasons also canvassed in this determination, the overall justice of the situation would favour Mr Tuilaepa's permanent reinstatement if MSD was found to have unjustifiably dismissed him. On the limited and untested information presently available, the practicability and reasonableness of such reinstatement appeared more likely than not.

[56] Thirdly, MSD submitted Mr Tuilaepa's admitted conduct showed he contributed substantially to the circumstances giving rise to his dismissal. Under s 124 of the Act such contributory behaviour may result in reduction of remedies, including both monetary remedies and (because it is an 'all or nothing' remedy) a refusal to grant permanent reinstatement. However, as examples in the case law demonstrate, even substantial contribution (and reduction of other remedies) may not negate the practicability and reasonableness of the remedy of reinstatement.[21]

21 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 125 at [63].

[57] On the information available at the interim stage I concluded the overall justice of the case favoured the interim reinstatement of a long-serving residential social worker involved in a single, brief and apparently isolated incident until the justification of MSD's decision to dismiss him can be fully tested. I was satisfied that the order for interim reinstatement could be subject to conditions that would enable MSD to sufficiently manage or control any potential risks during that period.

Order for interim reinstatement (with conditions)

[58] Under s127 of the Act, and in reliance on the undertaking as to damages that he had lodged in the Authority, Mr Tuilaepa must be reinstated to his position as a residential youth worker. As permitted by s127(5) of the Act the order has a number of conditions I thought fit to more closely match the merits of the situation between now and final determination. The conditions are:

(i) Mr Tuilaepa is to be restored to the MSD payroll (at his usual rate of pay) from the date of this determination; and

(ii) MSD, at its discretion and after first consulting with Mr Tuilaepa about any such proposal (and particularly in relation to observance of his bail conditions), may opt to direct him to carry out his duties at a different unit or at a different facility or on a different shift than from where or when he would usually work; and

(iii) MSD may, at its discretion, choose to place Mr Tuilaepa on garden leave for some or all of the period of his interim reinstatement.

(iv) The parties must co-operate, on a good faith basis, in the operation of Mr Tuilaepa's interim reinstatement and its related conditions and must seek mediation assistance if they cannot (after making best endeavours) resolve necessary arrangements for his return to work and dealings with his managers and other colleagues.

(v) Leave is reserved for the parties to seek any necessary variations to these conditions but they should not seek such leave without first attempting to resolve any problem with mediation assistance.

Preparation for the substantive investigation

[59] One aspect of the evidence lodged for the interim reinstatement application gave rise to a concern I considered should be openly recorded in this determination.

[60] Ms Salomen's affidavit attached a supposed recent statement by Ms Siau that Ms Salomen deposed was made after approaches by MSD staff to have Ms Siau provide an affidavit in relation to the interim reinstatement matter. The statement was not signed. Hearsay evidence from unnamed MSD staff, relayed in Ms Salomen's affidavit, was that Ms Siau had found it "overwhelming" to be in the middle of this particular matter and was not comfortable signing an affidavit. Nevertheless Ms Salomen sought to introduce the document as a statement from Ms Siau and relay, again on a hearsay basis, that again unnamed MSD staff said Ms Siau told them that the statement was a true and correct account of what she saw on 1 September.

[61] Much of the supposed statement from Ms Siau added little to what was recorded earlier as information from her, while some of it may ultimately assist Mr Tuilaepa's argument about the unfairness of MSD's disciplinary investigation.

[62] What was of potential ongoing concern was the suggestion that Ms Siau felt under pressure from MSD staff to assist MSD's case in one way or the other. Just as Mr Tuilaepa has been enjoined from contacting witnesses in respect of his District Court case, it was not appropriate for Ms Siau to be working under any sense that she must help either MSD, or Mr Tuilaepa for that matter, prove their case in the Authority investigation. Her evidence will be important and required for the Authority investigation but only on the basis that she will be asked to be truthful, not that she is being asked to take the 'side' of one or other party.

[63] In respect of Ms Siau and other employees who are likely witnesses for the Authority investigation, it is important both parties' representatives ensure contact with them is carefully and professionally managed to minimise the risk of accusations of actual or apprehended pressure about what evidence they might give (both about what happened on 1 September and the practicability and reasonableness of Mr Tuilaepa's reinstatement).

Costs

[64] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority