

Note: An order prohibiting publication of some evidence applies to this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 176
5592738

BETWEEN

MA'AUGA 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
Samantha Turner and Judith Manoa, Counsel for the Respondent

Investigation Meeting: 21, 22 and 23 March 2016

Further information: 8 April 2016

Determination: 7 June 2016

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Ma'auga Tuilaepa was not justified in all the circumstances at the time of the dismissal.**

- B. In settlement of his personal grievance for unjustified dismissal, the Ministry of Social Development must reinstate Mr Tuilaepa to his former position or place him in a position no less advantageous to him.**

- C. Due to actions by Mr Tuilaepa that contributed to the situation giving rise to his personal grievance, an award of lost wages of \$5000 and of distress compensation of \$6000 that would otherwise**

also have been awarded to him has been reduced by 100 per cent.

D. Costs are reserved, with a timetable for memoranda to be lodged if an Authority determination of that issue is required.

Employment Relationship Problem

[1] The Ministry of Social Development (MSD) dismissed Ma'auga (Mac) Tuilaepa on 20 October 2015. He worked as a residential social worker at a Youth Justice residence operated by MSD's Child Youth and Family Service (CYF).

[2] Nova Salomen, general manager of CYF's residential and high needs service, made the decision to dismiss him. Ms Salomen considered Mr Tuilaepa used inappropriate and excessive force and tried to use an unauthorised means of restraint on a 15-year-old male resident during an incident on 1 September 2015. She decided Mr Tuilaepa failed to provide the required standard of care to a young person in custody at a Youth Justice residence and dismissed him for serious misconduct.

[3] Under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) the Authority has prohibited publication of the names of any residents referred to in the evidence. The resident involved in the 1 September incident is referred to in this determination as YPA, initials unrelated to his actual name.

[4] Mr Tuilaepa accepted he punched YPA and stood on YPA's hand during the incident. He said he did so in self-defence. His use of force occurred after YPA had attempted to punch Mr Tuilaepa, was pushed to the floor by Mr Tuilaepa and then held on the floor by Mr Tuilaepa. Another social worker, Angel Siau, stood over YPA as Mr Tuilaepa held him down. Mr Tuilaepa said he punched YPA because YPA had pulled the hood of Mr Tuilaepa's sweatshirt over his head and was attempting to gouge Mr Tuilaepa's eye. He said he stood on YPA's hand, in the course of the same struggle, because YPA refused 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 of his dismissal, Ms Salomen decided the punches delivered to YPA were not acceptable

“under any circumstances” and 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. He sought reinstatement to his previous position, both on an interim and permanent basis. An order of the Authority made on 22 December 2015 granted him interim reinstatement until the Authority has fully investigated and determined his claim.¹ One condition of the interim reinstatement order allowed for MSD to place Mr Tuilaepa on ‘garden leave’ for that period. MSD exercised its discretion to do so.

[7] MSD denied the dismissal of Mr Tuilaepa was unjustified. It opposed his reinstatement on a permanent basis if the Authority found that its dismissal was not justified.

The Authority’s investigation

[8] For the purposes of the Authority’s investigation of Mr Tuilaepa’s application written witness statements were lodged by:

- Mr Tuilaepa; and
- Ms Salomen; and
- Parani Wiki, residence manager of Korowai Manaaki, the Youth Justice residence in Auckland at which Mr Tuilaepa worked; and
- Barbara Lautogo, the MSD human resources consultant who assisted Ms Wiki and then Ms Salomen in their disciplinary inquiry into Mr Tuilaepa’s conduct during the 1 September 2015 incident; and
- the following residential social workers who were involved or present at some stage of the incident:
 - Ms Siau; and
 - Rene Antonio; and
 - Tiola Tausisi; and
 - Kaota Puna; and
 - Sean Wallbank; and
- David Moala, a unit shift leader who was the acting team leader on duty on the evening of 1 September; and

¹ *Tuilaepa v Chief Executive of the Ministry of Social Development* [2015] NZERA Auckland 401.

- Alfa Kepu, an acting team leader at Korowai Manaaki and a certified instructor in the non-violent crisis intervention (NVC) techniques approved for use by residence staff.

[9] Each witness attended the investigation meeting and, under oath or affirmation, confirmed their written statement and answered questions asked by me and the parties' representatives. The representatives also gave oral closing submissions, speaking to a written synopsis on the issues of fact and law for determination.

[10] More than 800 pages of relevant background documents were also part of the evidence in the Authority investigation. The documents included notes of interviews conducted with staff during MSD's inquiry into the 1 September incident, notes of meetings with Mr Tuilaepa by MSD managers, and various MSD policies. Following a request made by me at the investigation meeting MSD also later provided a copy of an internal CYF assessment, referred to by Ms Salomen in answering a question. The assessment was completed on 10 September 2015 and before the decision was made to dismiss Mr Tuilaepa. CYF's internal assessor, not identified in the case note, concluded YPA was "physically abused" by Mr Tuilaepa and noted the assessment outcome as: "No further action". The finding of abuse was said by MSD to be relevant to its mandatory "safety checks" of all current employees, including Mr Tuilaepa if he were permanently reinstated, under s 26 and s 31 of the Vulnerable Children Act 2014 (the VCA) and the Vulnerable Children (Requirements for Safety Checks of Children's Workers) Regulations 2015.

[11] MSD also reported the incident to the Police under a Child Protection Protocol between CYF and the Police. The protocol applies, along with a wide range of other circumstances, to any allegations against CYF employees involved in what is described as "serious child abuse". The protocol defines a child as including a young person under the age of 17 years and serious physical abuse as including a blow to the head or hitting that occurs in a care facility. Although the protocol required reporting and agreement on a joint investigation plan within two working days of a concern being reported, the Police had not assigned an investigator until after Mr Tuilaepa was dismissed and then applied to the Authority for interim reinstatement, more than two months after the incident. On 5 November 2015 an MSD manager prompted Police to

take further steps as “there may be further employment issues which could require the Police investigation outcome”. A further message to Police from that manager on 16 November said “the HR is revving up a bit” and asked about progress on the investigation. After interviewing staff at the residence the Police then charged Mr Tuilaepa in early December 2015 with common assault under s 196 of the Crimes Act 1961. At the time of the Authority investigation meeting Mr Tuilaepa was on bail and awaiting a trial on the criminal charge.

[12] As permitted by 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

The issues

[13] The issues for investigation and determination, broadly, were:

- (i) Had Ms Wiki and Ms Salomen, with Ms Lautogo’s assistance, conducted a full and fair inquiry into Mr Tuilaepa’s involvement in the 1 September 2015 incident with YPA?
- (ii) In light of whatever findings are made in respect of issue (i), was the decision of Ms Salomen that Mr Tuilaepa’s conduct on 1 September 2015 constituted serious misconduct warranting dismissal, what a fair and reasonable employer could have decided in all the circumstances at the time?
- (iii) If MSD’s actions were not justified, what remedies should be awarded, considering:
 - (a) whether reinstatement of Mr Tuilaepa to his position or a no less advantageous position was practicable and reasonable; and
 - (b) lost wages; and
 - (c) compensation under s123(1)(c)(i) of the Act?
- (iv) If any remedies were awarded, should they be reduced (under s124 of the Act) for blameworthy conduct by Mr Tuilaepa that contributed to the situation giving rise to his grievance?
- (v) Should either party contribute to the costs of representation of the other party?

Overview

[14] For reasons set out in this determination Ms Salomen's decision of 16 October 2015 that Mr Tuilaepa's conduct on 1 September comprised "two separate instance[s] of serious misconduct", and how her decision was reached, was not within the reasonable range of conclusions that a fair and reasonable employer could have reached in all the circumstances at the time.² She lacked a sufficiently reliable evidential base for her conclusion about the first instance, said to comprise Mr Tuilaepa punching YPA before pushing him to the floor. Her conclusion on the second instance, the six punches and stomping on YPA's hand that Mr Tuilaepa acknowledged throughout he had done, was reached without fairly considering his self-defence argument. Regulations specifically allow for youth justice residence staff to use self-defence in some circumstances. A proper assessment was required of the explanation he offered.

[15] The shortcomings regarding the two alleged instances of excessive force resulted from a flawed disciplinary inquiry carried out by Ms Wiki and Ms Lautogo on which Ms Salomen had in turn relied on in reaching her conclusions. While she interviewed Mr Tuilaepa before reaching a decision, her efforts failed to remedy inadequacies in the earlier inquiry and analysis on which she relied.

[16] Accordingly MSD's dismissal of Mr Tuilaepa failed to meet the requirements of the statutory test of justification.³ Given the resources available to it to do so, MSD failed to sufficiently investigate the allegations against Mr Tuilaepa before dismissing him. This resulted in MSD not genuinely considering his explanation, particularly in relation to self-defence. The defects in what MSD did, and how it did it, were not minor and resulted in Mr Tuilaepa being treated unfairly. As a result his dismissal was unjustified and he was entitled to an assessment of remedies.

[17] More detailed examination of the evidence about the circumstances at the time of the incident and the dismissal was required to consider whether it was reasonable and practicable to order the reinstatement of Mr Tuilaepa and whether that remedy and other remedies should be denied or modified to account for the extent to which Mr Tuilaepa had contributed to the situation giving rise to his grievance.

² *Angus v Ports of Auckland Limited (No 2)* [2011] NZEmpC 160, at [35] – [41].

³ Employment Relations Act 2000, s 103A.

Failures in the employer's inquiry

[18] Failures in the inquiry undertaken by Ms Wiki, Ms Lautogo and Ms Salomen included:

- (i) insufficient weight being given to YPA's behaviour; and
- (ii) insufficient analysis of the evidence of Ms Siau; and
- (iii) failure to fairly investigate and assess the self-defence explanation; and
- (iv) an unfair narrowing of the options for a disciplinary outcome.

[19] Those failures needed to be examined in light of the following legal and factual background, concerning:

- (i) the legal standards applicable to the employer's inquiry and the Authority investigation; and
- (ii) information about YPA relevant to his role in the incident and Mr Tuilaepa's actions; and
- (iii) the events of 1 September, before, during and after the incident; and
- (iv) the employer's inquiry.

The legal standards

[20] In justifying its decision to dismiss Mr Tuilaepa MSD had to establish on the balance of probabilities that, as a result of a complete and fairly conducted inquiry, it was justified in believing serious misconduct had occurred. Ms Salomen's decision had to be made out not only on the evidence known to the employer at the time but on what would have been available after proper inquiry. Her decision to dismiss Mr Tuilaepa had to be based on a reasonably founded belief, honestly held, that serious misconduct had occurred. Consequently, while there was no real doubt Ms Salomen honestly believed Mr Tuilaepa had committed serious misconduct and his dismissal was the appropriate outcome, deficiencies in the investigative and decision-making processes could result in a finding that her belief was not reasonably founded.⁴

[21] In conducting its own inquiry and making such a decision MSD only had to meet a standard of reasonableness, not a legal standard of proof. However on being required to justify its actions in proceedings in the Authority MSD had to provide reliable evidence to establish it had reasonably concluded Mr Tuilaepa committed serious misconduct. The nature and quality of that evidence had to be assessed on the

⁴ *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198 at [78].

balance of probabilities, flexibly applied according to the gravity of the alleged conduct that led to the dismissal.⁵

[22] Under s 103A of the Act the Authority's investigation focuses primarily on whether what the employer did, and how it did that, was what a fair and reasonable employer could have done in all the circumstances at the time. The evidence about the employer's actions and decision is assessed on the civil standard of a balance of probabilities. If the employer is found on that basis to have acted unjustifiably, conduct by the worker that contributed to the situation giving rise to her or his personal grievance is assessed under s 124 of the Act to the same evidentiary standard. Remedies that would otherwise have been awarded may be reduced due to blameworthy conduct by the worker.

[23] The separate question of whether Mr Tuilaepa might have committed a criminal offence of assault on YPA was to be decided in a different jurisdiction, the District Court, to its evidential standard in criminal matters, that of being beyond reasonable doubt. The court's focus would be on his actions rather than, as in the Authority, on the actions of his employer in inquiring into the circumstances where he admitted he had struck YPA. The different focus and evidential standard between the two jurisdictions, in some circumstances, could legitimately result in apparently different conclusions from evidence about the same events.

[24] Mr Tuilaepa's self-defence explanation for his actions was also subject to a different evidential standard between the two jurisdictions. In the Authority investigation the focus was on whether, having raised the defence, his employer took reasonable steps to properly consider the necessary elements of that explanation before making a decision about an appropriate disciplinary consequence to impose for his conduct. For the Authority's purposes the question of whether Mr Tuilaepa had a legitimate self defence argument also had to be weighed on the civil standard of the balance of probabilities, not the criminal standard.

[25] The Children, Young Persons and Their Families (Residential Care) Regulations 1996 expressly prohibit the use of force against a young person in a youth justice residence except in certain specified circumstances, one of which is in self-

⁵ See [Whanganui College Board of Trustees v Lewis \[2000\] 1 ERNZ 397](#) (CA) at [19] and [20] and [Ritchies Transport Holdings Ltd v Merennage \[2015\] NZEmpC 198](#) at [108].

defence. Force used for a permitted purpose must be the minimum amount reasonably necessary:

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] There appear to be no previous Employment Court decisions or Authority determinations that directly consider the application of those particular regulations in the context of a Youth Justice residence. Relevant principles and approaches could be drawn from previous cases involving prison officers and mental health nurses accused of hitting prisoners or patients and the question of whether those actions were excusable on the account of being done in defence of themselves or another. Prison officers, mental health nurses and MSD social workers all work within a framework of legislation and policy with broadly similar concerns about appropriate treatment of people subject to control by the state and who may be particularly vulnerable to any misuse of power by such employees in those situations.

[27] In some cases, where the explanation of self-defence was a relevant factor, the use of force by a prison officer or a nurse has been held not to amount to serious misconduct justifying dismissal.

[28] The Employment Court decision in *Timu v Waitemata District Health Board* considered the dismissal of a nurse in a forensic psychiatric unit for special patients held under the criminal justice system. The nurse was accused of having pushed a patient against a wall and verbally abused him. The Court found he was unjustifiably dismissed although he had been “unnecessarily forceful” and behaved unacceptably when he thought he might be attacked by the patient.⁶ 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

⁶ [2007] ERNZ 419 at [120] and [122].

assault of a patient.⁷ The nurse was accused of slapping a mental health patient and placing a knee on the patient's chest during an attempted restraint.

[29] In *Chief Executive of the Department of Corrections v Tawhiwhirangi* the Court considered the application of section 83 of the Corrections Act 2004 which allowed for use of force by prison officers in defined circumstances.⁸ Section 83 had the same wording as r 22 of the residential care regulations relevant in Mr Tuilaepa's case. The Court found the Department of Corrections failed, in its investigation and preliminary findings, to consider Mr Tawhiwhirangi's reasons for acting as he did. He was accused of pushing and then slapping a prisoner. The Department's decision maker was found to have adopted "a mindset" that precluded the necessary steps being taken to properly consider the self-defence explanation. Its investigation report mentioned the relevant section of the legislation but did not show the investigator had properly considered Mr Tawhiwhirangi's "subjective views at the time of the application of force". A proper inquiry was required into "the state of mind" of the employee for acting as he had done at the time.⁹ In that case "an instinctive reaction" by a prison officer in the face of a threatening, abusive prisoner was considered by the Court to be grounds for the employer to have reasonably concluded there were breaches of the code of conduct but not serious misconduct.¹⁰ The employer's evidence in support of a serious allegation of assault by a senior officer on a vulnerable prisoner was required to be as convincing as the charge was grave.¹¹ In that case the Court found the employer's evidence inadequate.

[30] Some guidance on how an employer could have properly assessed a self-defence explanation may be drawn from a Health Practitioners Disciplinary Tribunal decision about a psychiatric nurse charged with inappropriate use of force on a mental health patient.¹² The nurse hit the patient in the face, causing the patient's lip to bleed, after the patient kneed the nurse in the stomach. The patient was holding and twisting one arm of the nurse when he hit the patient with his other hand. The nurse said he had "lashed out" at the patient to make him let go. The Authority also

⁷ [2012] NZEmpC 110 at [62] and [63].

⁸ [2007] ERNZ 610.

⁹ *Tawhiwhirangi*, above n 8, at [145], [149] and [150].

¹⁰ *Tawhiwhirangi*, above n 8, at [159] and [160].

¹¹ *Tawhiwhirangi*, above n 8, at [19] and [161].

¹² NZHPDT decision 299/Nur09/137P (Bruce Corkill QC, Chairperson).

investigated the same case, found the nurse was unjustifiably dismissed for the incident, and reinstated him.¹³

[31] In that case the Health Practitioners Disciplinary Tribunal adopted a three step approach developed in the case law about self-defence in the criminal jurisdiction but then adapted for the context of professional practice and civil disciplinary proceedings. A proper assessment of a self-defence explanation in a professional context involved considering the following questions:¹⁴

- (a) What were the circumstances as the practitioner believed them to be?
- (b) Was the practitioner acting self-defence or the defence of another?
- (c) If the practitioner did act in defence of himself or another, was his reaction a reasonable and appropriate one for a professional practitioner in the circumstances as he believed them to be?

[32] Those questions could as reasonably apply to the conduct of a CYF residential social worker as to that of a district health board nurse. They were a suitable means of measuring whether MSD fairly considered Mr Tuilaepa's self-defence argument made under the regulations that applied to the Youth Justice residence. The first question required MSD to consider Mr Tuilaepa's perception of events, even if he was mistaken or overestimated their seriousness. The second question required an assessment of whether he did strike YPA to defend himself or someone else or had merely done so to express anger or frustration. The third question required an overall assessment of whether his reaction was appropriate for a residential social worker in the circumstances as he believed them to be. Specifically: was the kind of force he used and the degree of force that he used the minimum necessary to reasonably respond to the threat as he saw it?¹⁵

Information about YPA

[33] Background information about YPA's presence and history at the Youth Justice residence was relevant for the following three reasons. Mr Tuilaepa knew YPA had been involved in previous incidents of violence at the residence. The evidence suggested Ms Wiki and Ms Salomen minimised or ignored YPA's role in the incident but it was part of the circumstances that had to be considered. His possible

¹³ *Shepherd v Whanganui District Health Board* (NZERA, WA 101/09, 4 August 2009, Member Stapp).

¹⁴ Above n 12, at 41.

¹⁵ See analysis in NZHPDT 288/Nur09/136P, at [62] and [63].

presence at the residence was also a relevant factor in the assessment of Mr Tuilaepa's claim for reinstatement.

[34] YPA had been admitted to the Korowai Manaaki Youth Justice residence on 19 August 2015. He was placed in a unit called Kowhai with six other residents. He was in CYF custody while awaiting a Youth Court appearance scheduled for 3 September on charges of burglary and being unlawfully on a property.¹⁶ It was his fourth admission to a youth justice residence. His previous offending included arson, burglary, wilful damage and assault. His family history was one of extensive neglect and violence. Records of an earlier period of being in CYF care described him as reacting:

negatively continuously by setting off alarms, threatening staff, damaging property, attempting to continuously abscond and causing other residents to heighten from his extreme behaviours.

[35] Those records noted violent behaviour by YPA in "several incidents" with other young persons and CYF staff.

[36] One such incident occurred on 6 November 2014. During a basketball game YPA attempted to hit another young person and swore at him and a social worker who intervened. When directed to time out for swearing and being aggressive YPA also tried to attack a team leader. The social worker walked YPA backwards into the time out room where YPA kicked the social worker once in the genital area before the social worker was able to block the kicks. When YPA continued kicking and punching, the social worker and another staff member used a NVCi restraint to forcefully remove YPA from the time out room to the secure care unit. The incident report noted that the intervention technique of using calm tones in talking to YPA made him verbally abusive and the "change of face" technique of involving another social worker "made him aggressive to that person".

[37] An "operational plan" prepared by a case worker on 19 August 2015 noted that a "heightened risk" of YPA harming himself or others was likely after an altercation or argument with staff, after family contact through phone calls or visits,

¹⁶ Children, Young Persons, and Their Families Act 1989, s 238(1)(d).

and instances where he received “bad news”. The plan included “action steps” for situations where YPA became “unsettled or aggressive”:

... Care team are to use NVCi verbal intervention and if necessary as a last resort use NVCi physical restraint to control the young person.

If necessary direct the young person to time-out.

Following time out, staff to approach him to see if he is ready to return to the group/activity. ... If you believe he is still not calm enough or if he does not want to return then staff will advise young person to continue to take timeout.

If young person is still being aggressive or threatening to staff or other young people, consider a Secure Admission if it meets the legal requirements. If necessary call for the Response Team and the relevant [Team Leader Operations] for direction.

[38] The Response Team comprised social workers in each of the residential units who were assigned on each shift to respond urgently to any call for assistance from staff in any unit. They were authorised to restrain and remove a young person in a situation where the young person was behaving in a manner likely to harm themselves or others. The residence had a secure care unit to which a young person could be removed in such circumstances.

[39] On 27 August 2015 YPA was restrained, removed from Kowhai unit and admitted to the secure care unit. He had earlier received a phone call that upset him. He was asked to go to the time out room but refused. Soon after he made an unprovoked attack another young person, attempting to punch that youth’s head. Ms Siau, who wrote the incident report about this event, said she then “jumped in between” YPA and another young person who had tried to defend the young person hit by YPA. Ms Siau reported that she “had managed to restrain [YPA] up against the corner of the wall” shortly before the response team arrived. YPA was returned to the residence unit the following day. The manager who reviewed the report wrote a note describing the staff as having done “a great job in handling the incident”.

Events of 1 September 2015

[40] At the staff shift changeover in the early afternoon of 1 September 2015 YPA was reported to have been unsettled during the day. He had earlier attended a family group conference that had not gone as he hoped. Mr Tuilaepa was YPA’s assigned ‘key worker’ and spent around 15 minutes in a one-on-one discussion with him. According to Mr Tuilaepa’s oral evidence to the Authority YPA told him that he did

not want to be in the Kowhai unit and wanted to return to the secure care unit. YPA did not want to talk about his assault on the young person in the previous week or how he felt about the family group conference that day.

[41] Shortly after that discussion Mr Moala, who was acting team leader operations that day, also came and spoke to YPA about his behaviour. Around an hour later Mr Puna, who was working at a neighbouring unit, went to the Kowhai unit because he could see two young people in that unit kicking a window. He identified YPA as one of the two. By the time he reached the unit YPA was in the time out room where Mr Puna spoke to him. Mr Puna's witness statement gave this account of their conversation:

I asked him why he kicked the window. Kicking a window is considered serious as it can lead to young people absconding. From memory I believe [YPA] said something along the lines of "fuck everything and I don't care". I warned him that if he continued his behaviour of kicking the window I would have him sent to the secure unit. [YPA] responded "I don't care, fuck secure and fuck staff".

[42] Shift report notes show YPA spent a further period in the time out room in the early evening due to disruptive behaviour.

[43] At 7.00pm residents were allowed to receive phone calls, connected by a staff member and taken in turns one at a time. That evening the calls were to be made from a phone in an office area in the centre of the unit, referred to as the hub. YPA was the first resident to have his call which was from his girlfriend. At the end of the call he was upset and refused to move from the chair placed outside the hub door for residents to use while making their call. In order to make way for the next young person waiting to take his turn for a telephone call Ms Siau asked YPA several times to move to the time out room to calm down.

[44] When YPA did not respond to Ms Siau's requests she dragged the chair, with him sitting on it, from the hub door through an adjacent room and into the time out room.

[45] CCTV footage of the events in the time out room, from 7.12 pm to 7.15 pm, was available to Ms Wiki, Ms Lautogo and Ms Salomen in their subsequent disciplinary inquiry. The footage was part of the evidence in the Authority investigation. It comprised video images from a camera inside the time out room and

a camera in the next room directed to the door of the time out room. The camera inside the time out room was mounted high on its back wall. It did not capture some events that occurred inside the room close to the back wall. The recording was visual only, without sound.

[46] The following account is drawn from several sources: the CCTV footage, a written statement Mr Tuilaepa presented at his first disciplinary meeting, notes of interviews conducted by Ms Wiki with residence staff, and witness statements prepared for the Authority investigation. Later sections of this determination have noted some important differences or conflicts in some of this evidence.

[47] Mr Tuilaepa had followed Ms Siau as she dragged YPA in the chair to the time out room. At 7:12:33 Mr Tuilaepa stood in the doorway of the timeout room as Ms Siau tipped the chair forward and YPA stood up. YPA then stepped forward and tried to push past Mr Tuilaepa to leave the time out room. At 7:12:39 Mr Tuilaepa pushed YPA back from the door as Ms Siau stepped behind him and took the chair out of the time out room (the first push).

[48] YPA told Ms Siau to “fuck off” as he stood up. Mr Tuilaepa recalled that YPA had said he intended to assault a young person. Ms Siau’s evidence was that she thought YPA “said something like ‘he wanted to fuck up someone’”. Their evidence differed on whether that was said as YPA tried to push past Mr Tuilaepa at the door of the time out room or after Mr Tuilaepa made the first push.

[49] Ms Siau also heard Mr Tuilaepa tell YPA: “Calm down and stay in timeout. You should’ve moved when Angel asked you the first time.”

[50] At 7:12:42 Mr Tuilaepa stepped forward and pushed YPA a second time (the second push). YPA then said he was going to “fuck up” Mr Tuilaepa. He stepped forward and aimed several punches at Mr Tuilaepa. The CCTV footage showed Mr Tuilaepa raised his hands with open palms and blocked YPA’s fists. Mr Tuilaepa said one of YPA’s punches connected. He described it as a minor glance to his jaw.

[51] At this point Ms Siau stepped back into the room from the doorway in which she standing. In an interview with Ms Wiki the next day Ms Siau said she had seen

Mr Tuilaepa punch YPA at that point of the incident. Throughout the subsequent disciplinary inquiry Mr Tuilaepa denied he had punched YPA then.

[52] At 7:12:47, as Ms Siau approached from behind him, Mr Tuilaepa can be seen stepping forward and leaning down. At this stage YPA was standing near the back wall of the time out room and was not visible on the CCTV footage. Mr Tuilaepa's evidence was that he pushed YPA to floor.

[53] Mr Tuilaepa then slid YPA along the floor into the corner of the room closest to the door. Ms Siau had stepped around Mr Tuilaepa and YPA. Her hands could be seen on YPA's back as Mr Tuilaepa slid him along the floor.

[54] At 7:12:55 Mr Tuilaepa was leaning over YPA holding him in the corner while Ms Siau stood, legs astride, over YPA's legs with her hand resting on the wall.

[55] At 7:13:00 Ms Tausisi, the unit shift leader, looked into the room and walked away. She later told Ms Wiki, in an interview on 11 September, that other residents had started walking towards the time out room and she turned to guide them away.

[56] For around 20 seconds between 7:12:55 and 7:13:15 YPA, Mr Tuilaepa and Ms Siau remained still. In her interview with Ms Wiki the next day Ms Siau said Mr Tuilaepa and YPA were talking to one another. She remembered YPA laughing and saying "I don't care". She said she could not remember exactly what Mr Tuilaepa was saying but recalled him saying "let go" meaning the way to his earpiece and his radio.

[57] At 7:13:15 YPA began struggling on the floor again. Five seconds later his left lower leg and foot can be seen on the CCTV footage kicking up between the legs of Mr Tuilaepa who was still leaning over YPA. This was the instance at which Mr Tuilaepa later said he was kneed or kicked in the groin. Mr Tuilaepa could then be seen lifting his right leg and blocking YPA's left leg and knee.

[58] At 7:13:22 Mr Antonio looked in the room from the doorway and moved away.

[59] Between 7:13:23 and 7:13:28 Mr Tuilaepa's left elbow and lower arm can be seen pumping backwards and forwards. This was the action he acknowledged as being the six punches he aimed at YPA. Mr Tuilaepa said he did this when the hood

of his sweatshirt was pulled over his head by YPA and YPA was using his thumb to try and gouge Mr Tuilaepa's eye. Mr Tuilaepa's right arm was either held by or holding down YPA. The upper bodies and heads of YPA and Mr Tuilaepa could not be seen on the CCTV footage because Ms Siau's body blocked the camera view. She remained standing with her legs astride YPA and leaning against the wall.

[60] At 7:13:25 Mr Antonio again appeared at the doorway and could be seen reaching out his hand towards Mr Tuilaepa's elbow as it pumped backwards and forwards in a punching motion. Both Mr Antonio and Ms Siau were both standing above, and looking down on, Mr Tuilaepa as he leant over YPA. They were both within a metre or so of Mr Tuilaepa and the upper body of YPA.

[61] At 7:13:33 Mr Tuilaepa stood up and appeared to stamp his left foot down towards YPA. This was the action he admitted was standing on YPA's hand. He said YPA was holding the wire of radio telephone earpiece.

[62] As Mr Tuilaepa stood up the hood of his sweatshirt was up over his head. The hood was down before he had moved YPA into the corner and leaned over him. The wire of his earpiece can be seen dangling and held in Mr Tuilaepa's right hand.

[63] At 7:13:36 Mr Puna and Mr Wallbank, who were the response team members, entered the room. Mr Tuilaepa then leaned down over YPA again but was pulled up by Mr Puna who pushed him out the doorway into the next room. Mr Puna said he heard Mr Tuilaepa saying to YPA: "Why are you trying to fight me". He said he had to put his arm around Mr Tuilaepa's body and push him out of the room.

[64] For several seconds Ms Siau then stayed standing over YPA, legs astride, and then stepped over him and left the room. Mr Wallbank remained in the room as YPA sat up and talked to him and Mr Puna who also stepped back into the room. Mr Puna and Mr Wallbank then left the room. As each man left, YPA gave them a 'thumbs up' sign. They said they had asked if he was ok and he had replied that he was "all good".

[65] Mr Wallbank shut the door of the time out room as he left. YPA immediately stood up, pushed open the door (which had no latch or lock) and leaned against the doorframe. At 7:14:45 could be seen talking to someone outside the room.

[66] Mr Moala arrived in the unit soon after. He spoke to Ms Siau and Ms Tausisi, and authorised removal of YPA to the secure unit. Mr Moala also telephoned Ms Wiki to advise her of the incident. In an email Ms Wiki then sent Ms Lautogo at 8.24 pm she said Mr Moala had told her YPA had a cut on the inside of his mouth, a bump on his head and a scratch on his face. She said Mr Moala had told her Mr Tuilaepa had “calmed down enough” and was “ok to continue working the PM shift”. She also noted she had asked Mr Moala to ensure Ms Siau completed a security incident report.

[67] Mr Moala’s evidence was that when he asked YPA what had happened YPA replied: “I was just being a dick” and “I’m all good”.

[68] Later during the evening of 1 September Mr Tuilaepa had gone to the secure unit and spoke to YPA. Mr Moala, Mr Wallbank and one other staff member were nearby. Neither Mr Moala nor Mr Wallbank could recall details of what words were exchanged between Mr Tuilaepa and YPA but both observed them exchange a clasped handshake, which they described in their oral evidence as a “bro shake”. Mr Tuilaepa said he told YPA that he was “sorry for what turned out” and asked if YPA had any other concerns. He said YPA had replied: “nah, I’m all good”.

[69] This evidence from Mr Moala and Mr Tuilaepa about YPA’s attitude immediately after the incident also appeared consistent with his later approach. On 10 September YPA declined to take part in an evidential interview. And after being re-arrested in late November and returning to Korowai Manaaki, he again refused to speak to Police in relation to the criminal charge that was laid against Mr Tuilaepa.

[70] Later in the evening of 1 September Mr Tuilaepa told Ms Siau he had visited YPA in the secure unit and apologised to him. She referred to that information in the security incident report she wrote before finishing her shift that evening. Her report included this account of events in the time out room:

... Staff Angel then pulled the chair with [YPA] sitting on it to the time out room. Staff Mac supervised as this happened. In the time room, Staff Angel then asked [YPA] to move of the chair so she could take it out. Staff Angel lifted up the chair and [YPA] stood up. [YPA] then went to push past staff Mac who was standing at the time out door and said he was going to assault a YP. Staff Mac told him “no” and guided him back into the time out room. [YPA] was still trying to get out of the time out room, but Staff Mac pushed him back to the wall and [YPA] then pushed Mac back. [YPA] then said that he was going to “fuck up Mac”. Mac then tried to use the NVCi technique to restrain him but [YPA] was still trying to fight Mac off. Mac then got frustrated and then lost the

plot by throwing punches to his face. Then Mac realised what he had done and grabbed [YPA] and put him quickly to the ground. Staff Angel jumped in between Mac and [YPA] trying to pull Mac away from [YPA]. Response team then came in by that time [YPA] wouldn't let go of Mac's hands. Mac then used his foot and started stomping to release [YPA] grip. Finally response team came (Kaota and Troy) removed Mac and change of face at present. ...

[71] The shift debrief notes included this note Ms Tausisi said was written by Ms Siau:

[YPA] has been up and down when we walked on shift due to the outcome of his FGC. He had an upset phone call which escalated to him being in secure for threatening/attempting to assault a staff member and young person when was advised to stay in time out due to him being heightened.

[72] Mr Moala said that as he left the site around 9.40pm that evening Mr Tuilaepa asked to talk privately. He said Mr Tuilaepa then said that "the restraint tonight went down really bad". Mr Moala said Mr Tuilaepa told him he had "just lost it and started throwing punches".

[73] Mr Moala reminded Mr Tuilaepa that Ms Wiki wanted an incident report and he recalled that Mr Tuilaepa said Ms Siau would do that. Ms Siau evidence was that she had talked with Mr Tuilaepa before she wrote her report but he did not read it before she submitted it. The report, on an electronic form, was timed as sent at 11.09pm on 1 September.

The employer's inquiry

[74] The following day Ms Wiki interviewed YPA and Ms Siau. She then suspended Mr Tuilaepa while she conducted an investigation. He was advised that the allegations were that he had attempted to place YPA in an unauthorised restraint, had punched him in the face at least twice, had taken him to the floor, and had stomped on him.

[75] Ms Wiki subsequently interviewed Mr Puna (on 8 September); Ms Tausisi and Mr Antonio (on 11 September) and Mr Wallbank (on 14 September) about the 1 September event. She did not interview Mr Moala who was the most senior employee on duty that night. Within minutes of the incident he had spoken to Ms Siau and YPA and, later that evening, with Mr Tuilaepa.

[76] On 21 September Ms Wiki sent an investigation report that she and Ms Lautogo had prepared to Mr Tuilaepa. It referred to the Ministry's code of conduct

obligations, a summary of the regulations referring to the use of force, the use of NVC techniques when force was necessary and the Ministry's "zero tolerance" policy. Its summary of evidence referred to video footage showing Mr Tuilaepa initiating physical contact by walking up to YPA and pushing him which "results in a scuffle between [YPA] and [Mr Tuilaepa] which is partially obscured from the camera". The summary stated Mr Tuilaepa was "then seen to appear to throw a punch, at which time, [Ms Siau] comes into the room and grabs [Mr Tuilaepa]." The summary also referred to Mr Tuilaepa appearing to punch YPA six times while he was on the ground and later being "dragged out of the room" by Mr Puna. The report said the investigation substantiated the allegations that Mr Tuilaepa had "used inappropriate and/or excessive force while restraining [YPA]".

[77] Mr Tuilaepa was called to a disciplinary meeting to respond to the allegations and the report. He was advised he could also provide written submissions, could bring a representative and could face disciplinary sanctions up to and including dismissal.

[78] He attended the meeting on 7 October with Grant Macdonald, a co-worker at the residence, as his representative. In a four page written submission Mr Tuilaepa set out his account of events, some background about YPA, and his explanation that he had acted in self-defence. Mr Tuilaepa wrote that he had to prevent YPA leaving the time out room because YPA's comment that he was going to assault another young person, as YPA had done previously, meant YPA "posed a confirmed threat to other YPs". He wrote that he had restrained YPA on the floor because YPA threw the first punch at him and that YPA had then also kned or kicked him in the groin. He wrote that YPA had thrown another punch at his head, used his hoodie to drag his head towards him and "used the leverage to gouge my right eye with his thumb". Mr Tuilaepa wrote that his right hand was tangled up and he needed to break YPA's hold quickly or he could potentially lose his eye. To do so he "threw some punches into his body/head area".

[79] In the disciplinary meeting Mr Tuilaepa denied he punched YPA while he was standing, after the second push, but confirmed that he had punched YPA six times while he was on the ground. His explanation about the allegation regarding the first punches was that he had put up his hands to block those blows and Ms Siau may have misunderstood that as looking like a punch.

[80] Ms Wiki and Ms Lautogo then prepared a memorandum for Ms Salomen, with copies of their earlier investigation report, Mr Tuilaepa's submission, their interview notes and other background documents. In a section head "Considerations" their memorandum said Mr Tuilaepa's description was "at odds in part with the evidence of the video footage". They said it was:

... quite likely that Mr Tuilaepa did need to defend himself once the physical altercation had escalated and that [YPA] was fighting back; a lot of what happened while [YPA] was on the ground is obscured by [Ms Siau]; however, the initial contact was made by Mr Tuilaepa and it is our view that this initial contact was preventable and avoidable.

[81] They then stated that there was a risk for the Ministry in continuing to employ Mr Tuilaepa because he had chosen not to try to de-escalate the situation and if the "alleged threats" to the safety of other young people were made by YPA, Mr Tuilaepa could have been expected to call for assistance while standing at the doorway of the time out room.

[82] They concluded that the first option was to dismiss Mr Tuilaepa for "very serious breaches of the Code of Conduct and Residential regulations". They stated that if a second option, of a final written warning, was chosen "the Ministry would be treating Mr Tuilaepa inconsistently with other staff who had been dismissed for similar breaches of the Code of Conduct".

[83] Ms Salomen met with Mr Tuilaepa, and his representative Mr Macdonald, on 16 October. In addition to the memorandum from Ms Wiki, she also had Ms Wiki's earlier investigation report, copies of interviews and the CCTV footage. Mr Macdonald provided an 11-page submission which covered the application of the regulations on use of force and the code of conduct and what he described as procedural failures in the disciplinary investigation. Five pages of the submission addressed Mr Tuilaepa's account of the facts of what happened and its application to his explanation of self-defence. It said that YPA's attempt to gouge Mr Tuilaepa's eye was "a moment of crisis" and "throwing punches to save the sight in his right eye was reasonable, therefore proportionate". It also said the force Mr Tuilaepa used in stamping on YPA's hand, to release his hold on the radio wire, was reasonable because YPA could have used the wire as a weapon.

[84] Ms Salomen said she had asked questions of Mr Tuilaepa to understand his self-defence explanation, his belief about what had happened and his personal values. Those questions are not reflected in notes Ms Lautogo kept of the meeting. What Ms Lautogo did write down were these comments said to have been made by Ms Salomen:

I am a social worker too as well as a GM. I have an obligation to keep my staff and young people safe. I have seen the footage and I am very concerned; in fact, I am appalled about the punching. I am struggling to understand why – it is not acceptable. 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.

[85] Ms Salomen ended the meeting by advising that her preliminary decision was to dismiss Mr Tuilaepa. She made arrangements allowing for any further submissions to be put to her in writing before she made her final decision. No further submissions were made and Ms Salomen issued her final disciplinary decision by letter on 20 October.

Analysis of failings in the employer's inquiry

(i) Insufficient weight given to YPA's behaviour

[86] Ms Wiki's investigation report and her memorandum to Ms Salomen, both drafted with Ms Lautogo's assistance, minimised or ignored YPA's violent behaviour before and during the 1 September incident in a way that was clearly inaccurate when checked against the CCTV footage (which was silent) and what Ms Siau and Mr Tuilaepa reported he was both doing and saying. The investigation report, for example, does not refer to YPA trying to push past Mr Tuilaepa to leave the time out room, punching at him after the first push, or, once on the ground, trying to kick him in the groin – all of which was clearly visible in the CCTV images. The selective interpretation was reflected in Ms Wiki's witness statement where she said she "could not see [YPA] acting aggressively" in the camera footage.¹⁷

[87] As another example, both Ms Lautogo and Ms Salomen were reluctant to accept the footage showed YPA's leg kicking up into Mr Tuilaepa's groin area. It was not a view that a fair and reasonable employer could have taken of the

¹⁷ *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [117].

information available to it, but was motivated by their view that Mr Tuilaepa should not have been in that situation in the first place. The effect of minimising or ignoring YPA own use of force, however, was that they also effectively discounted any prospect Mr Tuilaepa might have legitimately reacted in self-defence or the defence of another.

(ii) Insufficient analysis of the evidence of Ms Siau

[88] Ms Siau's evidence was relied on for the conclusion that, after the second push, Mr Tuilaepa punched YPA while he was standing near the back wall out of view of the camera. The reliability of her recall of events, and particularly the order in which things happened, could be assessed by comparison with what could be seen happening in the CCTV footage. There were clearly inaccuracies between what she wrote in her incident report and then said in an interview with Ms Wiki the next day.

[89] She described herself as having "jumped in" between YPA and Mr Tuilaepa and trying to pull him away from YPA after she came back into the room as Mr Tuilaepa put YPA on the floor. The CCTV footage showed her walking in and briefly clutching the back of Mr Tuilaepa's sweatshirt as she moved around them. Rather than getting between them, her hands were on YPA as Mr Tuilaepa slid him into the corner. For the next 40 seconds (from 7:12:55 to 7:13:36) Ms Siau stood legs astride over YPA as Mr Tuilaepa was leaning down and holding him in the corner. The footage showed no physical movement by her that could be interpreted as attempting to pull Mr Tuilaepa up or away, including during the five second period where he could be seen making six punches. Only when Mr Tuilaepa then stood up did Ms Siau put her hand on his shoulder in a gesture that could be taken as holding him back or pushing him away.

[90] Ms Siau's incident report made no mention of the six punches delivered as she stood above and looked down on Mr Tuilaepa. It was not clear whether Ms Wiki asked her about those punches during their interview the next day. The interview notes refer to watching the footage and Ms Wiki asking what Mr Tuilaepa was "doing with his left hand". Ms Siau is recorded as replying that she could not see it but thought he was trying to pull the wire off YPA.

[91] Despite the obvious doubt about the reliability of her recall created by the inaccuracy and omission described above, Ms Wiki preferred Ms Siau's account that,

in part of the incident not captured on camera after the second push, she had seen Mr Tuilaepa punch YPA “about three times” before he put him on the floor.

[92] The other source in support of the allegation that Mr Tuilaepa punched YPA was an interview with YPA also conducted the next day and also inconsistent with what the CCTV footage showed. Asked how many times Mr Tuilaepa hit him when he was lying on the ground, YPA said once. The camera showed six punches. Despite that obvious inaccuracy, Ms Wiki also preferred YPA’s account that Mr Tuilaepa hit him twice when he was standing near the back wall out of the camera shot.

[93] Ms Siau’s evidence to the Authority was significantly different to her report and interview at the time of the disciplinary inquiry. She said she “did not see any fist connect”. She also accepted that the open-palm blocking motion used by Mr Tuilaepa when YPA tried to hit him, as seen on the CCTV footage, may have looked like punches being made by Mr Tuilaepa as she approached him from behind. She could see his arms raised and going forward but, from the angle of her approach, not Mr Tuilaepa’s open palms.

(iii) Failure to fairly investigate and assess the self-defence explanation

[94] After Mr Tuilaepa raised his self-defence explanation at his first disciplinary interview, no further interviews were conducted with Ms Siau or Mr Antonio. As was clear from what the CCTV footage showed of their positions in the room, both were very close to what happened during the five seconds in which Mr Tuilaepa delivered the admitted six punches. They were the two people most likely to be able to corroborate or discount the eye-gouging allegation. The failure to re-interview them was the clearest indication that Ms Wiki, Ms Lautogo and Ms Salomen throughout their inquiry effectively closed their minds to any prospect that the self-defence explanation was relevant to the possible disciplinary conclusion.

[95] While it was correct, as matter of policy and regulation that use of force on young persons in those centres was not *acceptable*, the law allows for the prospect that it is *excusable* in certain circumstances. It was not within the range of reasonable responses by a fair and reasonable employer to not thoroughly assess whether the circumstances supported the explanation. As a matter of the evidential standard required for a dismissal on the grave charge of serious misconduct, MSD had to be

able to show that it was more likely than not that it had made such a thorough assessment.

[96] Ms Salomen did not have sufficiently persuasive evidence that she had done so before making her decision to dismiss Mr Tuilaepa. Her evidence in her witness statement to the Authority investigation was that she had discussed that issue during the 12 October disciplinary meeting. It was not reflected in MSD's own notes taken at the time. What was recorded was a statement by her that the punching was not acceptable and that it was up to the Police (referring to the criminal charge) and not her (referring to the employment disciplinary investigation) to consider the question of whether there was a reasonable self-defence explanation.

[97] Applying the three step approach suggested by case law on professional practice described earlier in this determination, Mr Tuilaepa's account of the circumstances as he believed them to be at the time identified YPA's actions as a real threat to others at the unit that evening, given what YPA said he would do if he could get out of the time out room. It was a subjective view but rationally drawn from Mr Tuilaepa's knowledge of YPA's previous and recent history.

[98] Mr Tuilaepa had a similarly subjective view on the risk posed to him by YPA said to have been attempting to gouge his eye. He described his six punches, made while his right hand was tangled or held by YPA and his hoodie pulled over his head, as "instinctive".

[99] In answer to the second question, his actions in making the second push, pulling YPA to the ground after blocking YPA's punches, blocking the kick to his groin and making the punches could readily be said to be in self-defence or defence of another.

[100] Determinative, for a fair and reasonable employer making the assessment, would be the answer to the third question as to whether the six punches were reasonable and appropriate in the circumstances that Mr Tuilaepa believed them to be. His evidence was that the action started with the eye gouging and stopped when YPA withdrew his thumb. The pumping elbow action shown on the CCTV footage started and stopped in a five second period. It appeared deliberate and precise. Mr Tuilaepa stood up immediately on stopping, suggesting that he was free to do so at that point.

He then stamped downwards and can be seen pulling away his radio wire. His hoodie was up over his head as he stood, consistent with his account that YPA had pulled it up. As the two-man response team then entered the room Mr Tuilaepa could be seen leaning down again over YPA, without touching him. The evidence of the other three people in the room confirmed that he spoke angrily to YPA as he was pushed out of the room by Mr Puna. It was not sufficient to establish that his earlier use of physical force, which was a series of controlled and deliberate movements rather than a frenzied attack, was merely an expression of frustration.

[101] It was open to an employer's representative, properly assessing the question, to have concluded Mr Tuilaepa's punches were the minimum amount necessary to free himself from a dangerous situation as he saw it and therefore legitimately made in self-defence. Whether Ms Salomen would have reached that conclusion if the exercise were properly conducted cannot be determined, in part because she was relying on incomplete investigation undertaken with a mind-set that no physical force was acceptable in any circumstance.

[102] She did take the view that the particular force used – the punches – was not acceptable because it was not a technique among those approved in MSD's policy on the physical force, particularly the various NVCi holds and moves developed to break contact with or restrain an attacker. However, while those techniques are one measure of what could have been reasonable, they were not exclusively so. The regulations do not state that the means of force used must be an approved one. Rather they require whatever is actually used, be the minimum reasonably necessary in the circumstances. On the test that those circumstances are as the social worker had reasonable grounds for believing, the six punches may have been what were reasonably necessary to get YPA to stop what he was doing. In those circumstances, however unacceptable it was generally for a social worker to hit a young person in custody at the residence, a fair and reasonable employer who conducted a full and fair inquiry could have concluded that the action was excusable as self-defence and therefore not serious misconduct.

[103] Such a conclusion, in appropriate circumstances, must be open to MSD managers despite its "zero tolerance" policy about what might otherwise be unacceptable violence. References in its code of conduct and other policies are subject to the regulations and do not 'trump' the permission for use of force in the circumstances allowed by r 22.

(iv) An unfair narrowing of the options for a disciplinary outcome

[104] The unfairly closed approach of their inquiry was also reflected in what the 12 October memorandum from Ms Wiki and Ms Lautogo told Ms Salomen were the disciplinary options open to her. The option of an alternative to dismissal, said to be a final written warning, was worded in a manner that signalled it could not really, in their view, be considered at all. Ms Salomen, who had been in her general manager's role for around two years and said she had decided the outcome in about 20 disciplinary processes, must be taken to have known options other than dismissal were theoretically open to her. However no information was provided to her that substantiated the basis for the statement that a final written warning "would be treating Mr Tuilaepa inconsistently with other staff who had been dismissed for similar breaches of the Code of Conduct". It reflected Ms Lautogo's view based on her experience as an MSD human resources consultant over the previous five years. Her view referred to some incidents before Ms Salomen became the general manager. No evidence established that the comparisons were genuinely 'apples for apples' in relation to the events or actions that were said to have led to other dismissals. The effective recommendation from Ms Wiki and Ms Lautogo was plainly a factor relevant to Ms Salomen's decision but Mr Tuilaepa and his representative did not have access to the information on which it was based or a real opportunity to comment meaningfully on it. It was no answer to the lack of fairness in the wording of that option, or the lack of supporting information, that Mr Tuilaepa and Mr Macdonald did not ask for that information.

Remedies

[105] Mr Tuilaepa sought an order for his permanent reinstatement to his position, lost wages for the period from his dismissal on 20 October to 22 December 2015 (which he calculated to amount to \$10,350 after tax) and an award of compensation for humiliation and loss of dignity.

[106] MSD opposed reinstatement, submitting that remedy was neither practicable nor reasonable. It submitted no lost wages should be awarded because Mr Tuilaepa had not shown he had done enough to mitigate his losses by looking for alternative work. It also said Mr Tuilaepa had not provided any real evidence of suffering emotional or mental consequences from his dismissal that would warrant

compensation. Even if any remedies were awarded, MSD submitted they should then be reduced by 100 per cent because Mr Tuilaepa's conduct had contributed so significantly to the situation. It submitted he had failed to act with regard to training and the Ministry's expectations on 1 September and, because there were other options open to him, punching a young person was completely unacceptable.

[107] For reasons that follow, this determination has provided for Mr Tuilaepa's permanent reinstatement, on particular terms, but under s 124 of the Act has denied him the other remedies of lost wages and compensation because blameworthy conduct by him had contributed significantly to the situation that gave rise to his grievance.¹⁸

[108] The question of whether there was blameworthy conduct, and the extent of that conduct, was also relevant to the issue of the practicability and reasonableness of permanent reinstatement. Given the interrelated nature of that point, this determination has set out that aspect first.

Blameworthy conduct and contribution

[109] MSD submitted that Mr Tuilaepa's blameworthiness or level of fault in that situation needed to be considered on the basis that he was completely responsible for his predicament and that he should have exercised other options to get out of the room or call for help on 1 September 2015.

[110] MSD's highly-individualised attribution of blame to Mr Tuilaepa did not fairly acknowledge the reality of the team approach that was an essential feature of how the residential social workers carried out their roles. The incident with YPA arose because Ms Siau had decided to drag YPA on a chair from the hub office to the time out room. The evidence of Mr Kepu, the certified NVCi instructor, was that dragging YPA in the chair "should never have happened" and was not something he had ever seen before. It was a physical rather than verbal method of managing YPA's behaviour that likely contributed to the nature of the incident that followed. Mr Tuilaepa was only present at the door of the time out room because he had followed Ms Siau to maintain 'line of sight', a safety procedure whereby a staff member should always be able to see and be seen by another staff member during any interactions with residents.

¹⁸ *de Bruin*, above n 7, at [85].

[111] Neither was Mr Tuilaepa solely responsible for not calling the response team earlier during the incident in the time out room. Based on the timing stamp on the CCTV footage and Mr Antonio's account that he called the response team after looking into the room, it took Mr Puna and Mr Wallbank less than 15 seconds to arrive from a neighbouring unit once the urgent assistance call was made (by 7:13:22 at the earliest with them arriving at 7:13:36). Ms Tausisi and Ms Siau both had earlier opportunities to make that call, which would have resulted in help arriving before the situation had developed to the point where Mr Tuilaepa believed it was necessary to punch YPA on the floor in the corner of the room. Ms Siau had stepped out of the room after the first push and could have made a call using her radio telephone, clipped to a belt on her hip, before stepping back into the room at the time of the second push (at 7:12:42). She did not. Ms Tausisi, the unit shift leader, who looked into the room at 7:13:00 and then walked away to guide other residents into another part of the unit, could have made a call to the response team, or called out for Mr Antonio or another staff member to do it, at that time. She did not. And in the period of around 20 seconds between 7:12:58 and 7:13:15, when YPA lay relatively still in the corner and before he began struggling again and kicked Mr Tuilaepa in the groin, Ms Siau could have reached down to the radio telephone on her hip and made call for the response team. She did not. Another 10 or so seconds went by before Mr Antonio made the call. By then Mr Tuilaepa had punched YPA because of what he said was the eye-gouging.

[112] The reality was that two other staff, not just Mr Tuilaepa, did not take earlier available opportunities to call the response team. Any blame for that failure had to be shared among those four staff and not sheeted home solely to him.

[113] However there were also at least three opportunities for Mr Tuilaepa to have disengaged from the physical interactions that occurred during the minute from 7:12:38 (when YPA tried to push past him and leave the time out room) to 7:13:40 (when Mr Tuilaepa stood up after breaking free from the struggle in the corner). He stepped forward after the first push rather than stepping back out of the room. After pushing YPA to the floor, in what he said was a failed attempt at an NVC restraint, he attempted to hold YPA down on the floor rather than stepping back and out of the room. After moving YPA to the corner, he continued to hold him down. Neither Mr Tuilaepa nor Ms Siau stepped away from the physical contact at that stage. For Ms

Siau it was a partial repetition of a situation she had been in the week before with YPA. Her incident report for 27 August recorded that she had restrained YPA “up against the corner of a wall” in the fracas that followed his assault on another your person. However on that occasion she and other staff were praised for their “great team work”.

[114] Although the situation on 1 September escalated very quickly, Mr Tuilaepa’s failure to disengage, in the fleeting moments that he had opportunities to, was blameworthy conduct given his training and 16 years’ experience on the job. Applying the approach adopted by the Court in *Tawhiwhirangi* a fair-minded employer could have reasonably concluded his failure was a breach of its procedures but not, in light of the finding made in this determination about his self-defence explanation, serious misconduct.¹⁹ Mr Tuilaepa’s failure to disengage did, however, contribute to a large extent to the situation giving rise to his grievance.

Reinstatement

[115] As found by the Court in *de Bruin* the nature and extent of an employee’s contribution to the situation giving rise to his dismissal may be substantial but not so great as to make reinstatement inappropriate.²⁰

[116] Having determined Mr Tuilaepa had a personal grievance for unjustified dismissal, the Authority could order reinstatement if it was practicable and reasonable to so do.²¹

[117] Practicability considers more than what is possible. It concerns whether the employment relationship can be successfully re-established. The interests of the parties are balanced with regard not only to the past but also the future.²²

[118] Reasonableness considers the prospective effects of an order, not only on MSD and Mr Tuilaepa, but other employees and, in the case of a Youth Justice residence, the young people likely to be there.²³

¹⁹ *Tawhiwhirangi*, above n 8, at [160].

²⁰ *de Bruin*, above n 7, at [85].

²¹ Employment Relations Act 2000, s 123(1)(a) and s 125.

²² *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 at 416.

²³ *Angus*, above n 2, at [161].

[119] MSD submitted four factors weighed against Mr Tuilaepa's claim for reinstatement:

- (i) potential implications of a risk assessment required under the VCA; and
- (ii) a supposed lack of acceptance by Mr Tuilaepa of any wrongdoing so that trust and confidence in him could not be restored; and
- (iii) impracticability of supervision; and
- (iv) other 'blemishes' on his employment record – concerning use of sick leave and a previous allegation of a similar use of force.

(i) VCA concerns

[120] MSD submitted the practicability of reinstatement was affected by "implications" of the VCA, particularly the safety check that Mr Tuilaepa, and all other employees in roles of his type, must undergo under s 31 of that Act. It said a conviction on a common assault charge would be a relevant consideration in the risk assessment made during that check.

[121] Under s 28 of the VCA MSD could not continue to employ Mr Tuilaepa as a residential social worker if he was convicted of any of the serious offences listed in a schedule of "specified offences". The charge of common assault Mr Tuilaepa faced was not one of those specified offences. However the s 31 provision for safety checks and risk assessments of current employees, and the regulations on how that is carried out, allow MSD to collect information about previous criminal convictions of any employee. If Mr Tuilaepa was convicted on the assault charge, information about that would be one factor among many in any fairly-conducted risk assessment. The VCA, and the relevant regulations, do not provide for the automatic ending of the employment of anyone with a criminal conviction (apart from the serious specified offences). It was not a factor that made Mr Tuilaepa's reinstatement impracticable or unreasonable.

(ii) No acceptance of wrong doing, no trust and confidence

[122] MSD submitted Mr Tuilaepa had not accepted any wrong doing at the time of his dismissal and, on that basis, it could not have any confidence in his ability to make good decisions or not to use unreasonable force against a young person in the future.

[123] It was incorrect Mr Tuilaepa had not accepted any wrong doing in his conduct on 1 September. He apologised to YPA that evening. He spoke to Mr Moala acknowledging that what happened that evening was “really bad”. In the first opportunity that he had to formally respond to the allegations, on 7 October, he told Ms Wiki that he should have called the response team. He also gave her a written statement that ended with the following words:

I deeply regret my part in the incident. I am also open to any criticism or observations as to how I could improve my practice in the future under similar circumstances.

[124] Continued expressions of lack of trust and confidence by Ms Wiki and Ms Salomen, as made in their witness statements to the Authority investigation, cannot be sustained on the basis of the finding in this determination that their conclusions about Mr Tuilaepa’s conduct were not made reasonably.

[125] Of more significance was the oral evidence of each of the witnesses who had worked as frontline staff with Mr Tuilaepa. Mr Wallbank, Mr Puna, Ms Tausisi, Mr Moala, Mr Kepu and Ms Siau each said they were able and willing to work with Mr Tuilaepa if he was reinstated.

(iii) Impracticability of supervision

[126] In his written statement Mr Moala commented that, if reinstated, Mr Tuilaepa should not have any contact with YPA and should not be in the response team. Mr Wallbank, in his written statement, suggested Mr Tuilaepa should be kept away from residents who regularly “smart mouth” others. MSD submitted those comments supported its view that it was neither practicable nor reasonable to separate Mr Tuilaepa from difficult young people or to carefully supervise him.

[127] Both Mr Moala and Mr Kepu, who are in the centre’s supervisory hierarchy, said they wanted to be involved in supervision of Mr Tuilaepa if he was reinstated. Their commitment was a factor positively favouring the practicability of his reinstatement, contrary to MSD’s submission. It was clear Mr Tuilaepa could expect support from his peers and supervisors for developing and maintaining high standards of practice in his work as a residential social worker if reinstated.

[128] By the time of the Authority investigation meeting YPA was no longer a resident of Korowai Manaaki. Ms Wiki said he had been moved to another CYF facility that might be more amenable to his needs. Korowai Manaaki has more than 130 full-time staff working across four residential units.²⁴ If YPA returned there and it were necessary for Mr Tuilaepa to have not contact with him, the operation and staffing is of sufficient size for Mr Tuilaepa to work in a unit other than the one housing YPA.

[129] Similarly a limit on Mr Tuilaepa's involvement in response team work, which Mr Moala suggested might be appropriate, was not established as disproportionately difficult, given the total number of staff. The workplace must already have the flexibility not to deploy some staff for that purpose from time to time – such as those who recovering from an injury or who are otherwise not physically capable of undertaking that assignment. Whether such a limitation was actually necessary for Mr Tuilaepa could be assessed during the regular development assessment process used in the workplace, and in light of feedback from him, Mr Kepu, Mr Moala, or other coach or mentor appointed to assist or supervise his practice.

[130] The 1 September incident was not caused by what Mr Wallbank called 'smart mouth' behaviour by YPA but by the physical interactions – Ms Siau dragging YPA in a chair, YPA trying to push past Mr Tuilaepa to get out of the time out room, Mr Tuilaepa pushing YPA, YPA hitting and kicking Mr Tuilaepa, and Mr Tuilaepa responding with punches to what he said was eye gouging by YPA. The evidence as a whole did not support a conclusion that Mr Tuilaepa could not or would not cope, as he presumably had done over 16 years of service, with swearing or other negative verbal comments from the sometimes difficult and challenging young people in the Youth Justice residence.

(iv) Other 'blemishes'

[131] **Sick leave:** MSD submitted Mr Tuilaepa's continued employment was not certain in any event due to "significant use of sick leave". It said this had occurred in circumstances where there was no medical reason preventing him from working. Employment records submitted by MSD showed his use of sick leave was raised as an issue with him several times between 2011 and 2014. In February 2015 CYF

²⁴ Child Youth and Family Residential Care Regulations Inspection Report: 2014.

withdrew further paid sick leave to him for the remainder of his anniversary year, to April, as he had already used 26 days paid sick leave. In late August 2015 he was called to a further review meeting because he had used 16 days paid sick leave – seven days for domestic-related reasons (for care of his children or wife) and nine personal sick days.

[132] On 27 August 2015 a team leader had recommended Ms Wiki again remove paid sick leave from Mr Tuilaepa and consider placing him on a performance improvement plan if unplanned absences continued. Those measures were matters of management of his ongoing performance that would have occurred if he was not dismissed. On reinstatement CYF remained entitled to take appropriate measures to monitor and manage his attendance. If his performance in that respect remained unsatisfactory it could then initiate disciplinary proceedings that could potentially result in his dismissal on those grounds. However, for the present purpose of considering remedies for his unjustified dismissal, the performance issue regarding use of sick leave was not of sufficient weight to require denial of reinstatement.

[133] **Previous incident:** In July 2014 Ms Wiki arranged an investigation over allegations Mr Tuilaepa had not followed CYF ‘line of sight’ standards and correct NVCi procedures when he entered the bedroom of a young person at the residence. A young person complained Mr Tuilaepa had pushed and hit him. The investigator interviewed four other young people and a staff member, who had each witnessed aspects of the incident, as well as interviewing the complainant. The investigator found the allegation was not substantiated. He reported the accounts of the five witnesses that the complainant had pushed Mr Tuilaepa “before starting an unprovoked assault of punches and kicks” on him. The complainant had pulled Mr Tuilaepa’s sweatshirt up over his head and he was not able to defend himself. The attack on Mr Tuilaepa was only stopped by the intervention of the other staff member and another young person.

[134] Ms Wiki ended her July 2014 investigation by advising Mr Tuilaepa that the allegation was not substantiated, telling him he needed to keep himself safe by maintaining line of sight, and thanking him for his co-operation. There was no evidence Ms Wiki and her investigator had not properly considered the facts of the July 2014 incident or had reached conclusions there were incorrect at that time. In answering questions at the Authority investigation Ms Salomen commented she

would be surprised if Mr Tuilaepa had not been previously assaulted during his 16 years of service. In that light there was no reasonable basis for taking the July 2014 incident, as MSD sought to have inferred, as a similar fact situation that then validly cast doubt on Mr Tuilaepa's conduct in September 2015 or made his reinstatement on a permanent basis from June 2016 unreasonable.

Reinstatement order

[135] Contrary to MSD's submission reinstatement was practicable and reasonable for the following reasons:

- (i) Mr Tuilaepa had strong support from other staff who were aware of the circumstances and requirements of the role and his capabilities in performing it; and
- (ii) as a result of what had happened in and after the 1 September 2015 incident Mr Tuilaepa was likely to be more attentive and careful to follow procedures for disengaging from conflict with residents and seeking assistance from other staff; and
- (iii) Mr Kepu and Mr Moala were committed to assisting Mr Tuilaepa maintain high practice standards; and
- (iv) any potential risk to residents or other staff that he might not follow proper procedures was lessened by that context; and
- (v) The size of the workplace and staff allowed for sufficient flexibility on when and where Mr Tuilaepa worked within it to minimise his contact with YPA, if YPA returned and contact with him was deemed inappropriate.

[136] Despite Mr Tuilaepa's contribution to the situation giving rise to his grievance, particularly his failure to take opportunities to disengage from YPA during the incident on 1 September, the extent of that failure was not so great as to require Mr Tuilaepa be denied the remedy of reinstatement.

[137] Accordingly, under s 123(1)(a) and s 125 of the Act, MSD must reinstate Mr Tuilaepa to his former position as a residential social worker or place him in a position no less advantageous to him. The order for reinstatement is made on the following terms:

- (i) As Mr Tuilaepa has already been restored to the MSD payroll under the interim reinstatement order made on 22 December 2015, he is to continue

- to be paid his usual pay until CYF has made arrangements for him to be included in the staff roster and to return to work; and
- (ii) Within 14 days of this determination CYF must make and implement those arrangements in consultation with Mr Tuilaepa; and
 - (iii) Mr Tuilaepa must, either before he returns to work or after doing so and at the direction of his managers, attend any retraining or re-integration programmes deemed appropriate by his managers; and
 - (iv) CYF may, at its discretion but in consultation with Mr Tuilaepa and other residence staff, also develop and implement any development or performance assessment programme considered appropriate to refresh and monitor Mr Tuilaepa's compliance with its policies and procedures and provide him with any on-going coaching or mentoring in performance of the residential social worker role; and
 - (v) CYF may, at its discretion and if the circumstances warrant it, proceed with its proposal for a performance programme monitoring Mr Tuilaepa's use of sick leave and attendance at work; and
 - (vi) Leave is reserved for the parties to seek any necessary variations to these terms but before seeking such leave they are expected to have first sought mediation assistance to resolve any problem.

Lost wages

[138] Mr Tuilaepa faced two hurdles in establishing he should be awarded \$10,300 in reimbursement of wages he lost in the period from his dismissal to his interim reinstatement.

[139] The first hurdle concerned whether he had made reasonable endeavours to mitigate his loss by seeking work and earning other income during that period. His efforts in that two month period were limited. He earned \$400 from casual work, had approached two people to enquire about work, and had applied to WINZ for jobseeker assistance. He said he felt unable to work, partly because of time taken up meeting with his lawyer and attending police interviews over the criminal charge. In light of that limited evidence his loss of wages could not be assessed as being greater than \$5000, for around half of the period of loss claimed.

[140] However the award of that amount faced a second hurdle, reduction of remedies for contributory behaviour. From the basket of remedies Mr Tuilaepa has been awarded reinstatement, a remedy not amendable to partial deduction for contribution as it is granted in its entirety or not at all. The extent of Mr Tuilaepa's contribution to the situation giving rise to his personal grievance needed to be marked by some reduction of his other remedies. It was appropriate, in the balance of remedies awarded overall, to do so by applying a 100 per cent reduction to the lost wages remedy.

Compensation for hurt and humiliation

[141] Mr Tuilaepa also gave very limited evidence in support of his claim for an award of compensation for humiliation, loss of dignity and injury to his feelings as a result of his dismissal and how it was decided. He referred to being distressed by the resulting financial pressure and seeing how upset his wife was by what happened. However some of his evidence of his distress was about the effect on him of having to face the criminal charge, including the sense of shame it caused him. His distress about the criminal charge was not something for which his employer could be required to compensate him. CYF was directly responsible only for the distress caused to him for how it had decided to dismiss him without properly taking account of his self-defence argument and the humiliation he suffered, inherently, among former colleagues and in his wider family by being dismissed. On his evidence a modest award of \$6000 was an appropriate amount of compensation on that account.

[142] However it was also appropriate to apply a 100 per cent reduction of the compensation remedy, in assessment of the overall basket of remedies, due to his conduct that had contributed to the situation giving rise to his grievance. He was embarrassed among his colleagues because of how he had acted in the situation on 1 September. The reduction of his distress compensation marked the extent of his contribution to that situation.

Costs

[143] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[144] If they are not able to do so and an Authority determination on costs is needed Mr Tuilaepa may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of this determination. From the date of service of that memorandum MSD would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[145] The Authority has a discretionary power to award such costs and expenses as the Authority thinks reasonable.²⁵ Typically, if asked to determine costs, the Authority applies a notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.²⁶ In the circumstances as here, where it appears a party was represented by a co-worker rather than a lawyer or other professional advocate on a fee basis, Mr Tuilaepa would have to establish he paid for his representation and, if claimed, also itemise expenses incurred in preparing for the Authority investigation.

Robin Arthur
Member of the Employment Relations Authority

²⁵ Employment Relations Act 2000, Schedule 2 clause 15.

²⁶ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].