

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 410
3141141

BETWEEN IOANA HILL
Applicant

AND THE CHIEF EXECUTIVE,
ORANGA TAMARIKI -
MINISTRY FOR CHILDREN
Respondent

Member of Authority: Nicola Craig

Representatives: Grant Macdonald, counsel for the applicant
June Hardacre and Kate Allan, counsel for the
respondent

Investigation Meeting: 27 August 2021 by Zoom

Submissions and further
information received: At the investigation meeting and 3 September 2021 for
the applicant
At the investigation meeting and 3 September 2021 for
the respondent

Date of determination: 22 September 2021

DETERMINATION OF THE AUTHORITY

- A. Ioana Hill's application for interim reinstatement is declined.**
- B. Costs are reserved.**

What is the employment relationship problem?

[1] Ioana Hill was a youth worker at Korowai Manaaki, a youth justice residence operated by Oranga Tamariki - Ministry for Children (Oranga Tamariki or the organisation).

[2] Youth justice facilities care for young people, usually between 14 and 18 years old. The young people have backgrounds of criminal offending and sometimes addiction and mental health issues, as well as physical, sexual and emotional trauma. The residences can be challenging environments to work in.

[3] Ms Hill was dismissed for her part in an interaction with a young person at Korowai Manaaki on 5 March 2021.

[4] Ms Hill claims that Oranga Tamariki unjustifiably dismissed her. She seeks reinstatement to her role on an interim basis until her grievance claims can be fully considered. Oranga Tamariki asserts that its dismissal of Ms Hill was justified and is strongly opposed to interim reinstatement.

[5] Affidavits were provided from Ms Hill (first and reply) and Alfa Kepu (Korowai Manaaki Manager Residence Operations).

[6] An investigation meeting was held by Zoom on 27 August 2021 to hear submissions with both parties later providing additional comment on video evidence. The parties disagree on whether the CCTV footage provided by Oranga Tamariki was sufficient and the circumstances surrounding the viewing and request for footage by Ms Hill's representative. I do not need to decide these questions for the purposes of the interim reinstatement claim.

[7] As is usual I have dealt with this application on the basis of untested evidence and submissions. This determination, as permitted by s 174E of the Employment Relations Act 2000 (the Act), has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[8] The issues for determination in this interim reinstatement matter are:

- (a) Is there a serious question to be tried, particularly does Ms Hill have an arguable case for unjustified dismissal and for permanent reinstatement?
- (b) Where does the balance of convenience lie?

- (c) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?¹

[9] Where a factor is relevant under more than one head, my discussion is focused in one part of the determination.

What was Ms Hill's history?

[10] Ms Hill completed an arts degree in criminology and psychology. She was also a youth leader at her church and a Pacific leader at a Christian college.

[11] In 2017 Ms Hill took up work, initially as a casual, then permanent, youth worker at Korowai Manaaki. The residence provides care for predominantly Pasifika and Māori young people sentenced in the Youth Court to a period of detention for serious offending.

[12] As part of her training with Oranga Tamariki, Ms Hill undertook STAR (Safe Tactical Approach and Response) training. She also did further training in her own time and at her own expense including about suicide and alcohol and drug awareness. She and other youth workers started a charity to implement a community based outreach project for young people. The focus later changed to mentoring Pasifika and Māori female youth offenders. Ms Hill personally mentored a young wahine, helping her to complete the programme and her supervision orders.

[13] Korowai Manaaki promoted Ms Hill to team leader.

What earlier difficulties arose for Ms Hill?

[14] In 2019 Ms Hill emailed Mr Kepu as she believed she was being targeted and doubted, particularly by two staff members. At one point she described herself as being bullied although Mr Kepu says she did not make a formal bullying complaint.

[15] Later in 2019 Ms Hill pursued concerns with Korowai Manaaki's external supervision facilitator and the then residence manager. Ms Hill describes the 2019 complaint as incorporating her concern that Mr Kepu had not taken her complaint seriously and had disclosed it with the people whom the complaint was about.

¹ For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863, *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 and *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59.

[16] Ms Hill asked to be moved to another unit. She was concerned that Mr Kepu may have indicated that people should keep an eye out for her. A Public Service Association (PSA) delegate became involved. There is some evidence of the delegate's involvement continuing in 2020. Ms Hill expresses that her complaint/s were not dealt with.

[17] From Mr Kepu's perspective, Ms Hill did not raise any concerns or complaints with him about her employment or any alleged bullying.

What are the parameters around the use of force?

[18] I summarise briefly the main parameters operating. Under the Oranga Tamariki (Residential Care) Regulations 1995, regulation 22 sets out the legal requirements in respect of the use of physical force. In summary, these are the defence of self or others, prevention of property damage or absconding, secure containment in a secure area and for an authorised search. Under Oranga Tamariki's Working with Tamariki and Rangatahi in Residences Policy, the use of physical intervention should be avoided unless non-physical approaches have failed and must be kept to an absolute minimum.

[19] Under STAR any use of physical force must be lawful, proportionate, necessary and reasonable. Mr Kepu was one of the developers of STAR.

[20] I note previous decisions of the Authority and the Employment Court in the *Tuilaepa* case regarding a claim for reinstatement by a residential social worker at Korowai Maanaki, also concerning the use of force.² These decisions occurred during a previous organisational form of Oranga Tamariki and when different policies were in place regarding the use of force.

What happened on 5 March 2021?

[21] Ms Hill refers to the young person's file describing him as extremely violent, having been involved in assaults on other young people and staff. He also has a history of taking stationary items and concealing them.

[22] I summarise Ms Hill's description of events in a Korowai Manaaki lounge as:

² *Tuilaepa v Chief Executive of the Ministry of Social Development* [2015] NZERA Auckland 410 and *The Chief Executive of the Ministry of Social Development v Tuilaepa* [2017] NZEmpC 84.

- Ms Hill gave the young person a pen. When she asked for it back he said he did not know where it was. She asked him to find it as it was his responsibility.
- The young person continued to deny knowledge of where the pen was. Ms Hill started asking other young people. The young person began acting defiantly and laughed when she asked the others about the pen.
- Having failed to obtain the pen, Ms Hill indicated that she was seeking approval for a pat search to find it. As she made her way to the office hub the young person took the pen from his pocket and handed it to another staff member.
- Seeing that, Ms Hill turned and directed him to the NPT (Non Participation Table) in the corner where those with challenging, non-compliant or disruptive behaviour are sent.
- When she directed the young person to the table he started to challenge her, asking why. She replied that she had given multiple chances to and over the pen and he refused, so sit there for your non-compliance.
- As he walked to the table, she thought she heard him calling her a “fucking slut”, leading to other boys going “ohhhh shit”. Ms Hill felt embarrassed and humiliated in a room full of boys at what she describes as slut shaming. She made her way to the table and asked the young person what he said. He stood inches from her face and started repeating “you fucking slut, you’re a slut, you’re a slut”.
- She used a STAR approved restraint technique, called a train stop, using both hands to push the young person away from her as she feared for her safety due to him getting in her face. He fell back on to the seat.
- The young person repeated his previous comments, getting louder and louder. He leaned forward to get up. Ms Hill feared for her safety and intended to push him by the shoulders but as she pushed him onto the chair her hands slipped and moved higher towards his collarbone. At that point other staff members intervened.

- Ms Hill left the unit and informed the team leader of operations (TLO) about the incident. She admitted that she had “fucked up”.

[23] Ms Hill’s view was that if she had not intervened it would have caused greater problems down the road, with the STAR system recommending that issues arising be dealt with and not ignored. Ideally another staff member would have intervened for a change of face, but that did not happen.

[24] According to Ms Hill, shortly afterwards the young person expressed remorse and regret at his choice of words and sought to apologise to her personally.

[25] Mr Kepu was informed by the TLO that Ms Hill had choked a young person. The TLO demonstrated hands held in a choking shape. I note that the TLO was not present during the incident. The source of the comment and displayed action is not evident.

[26] Ms Hill met with Mr Kepu and another staff member. She expressed that she could have dealt with the situation better and been not so quick to react. She informed Mr Kepu that she had a good rapport with the young person, having worked with him for about six months without issue. She indicated the incident was out of character for both of them and she would like to mediate.

[27] About an hour after the incident Mr Kepu viewed CCTV footage of it.³ Mr Kepu describes seeing footage of Ms Hill walking towards a door while the young person was at the opposite corner of the lounge. His description continues:

- Ms Hill then turns and walks back, pushing the young person. He falls into a chair.
- She steps in and puts her hand on what Mr Kepu describes as the neck area.
- Ms Hill holds on, pulling in a back and forth strangling/choking motion.

[28] Having seen the footage, with relatively poor quality in the crucial area, I would say there is room for debate about the descriptions of Ms Hill putting her hand in the neck area and a strangling or choking.

³ Visual images, no sound.

[29] Mr Kepu was alarmed at what he saw. He says the young person did not seem to have been acting in an aggressive way or displaying aggressive body language and therefore described the use of force as unprovoked. Having watched the CCTV footage Mr Kepu and a senior HR advisor both saw the incident as serious.

What process did Oranga Tamariki adopt?

[30] On 10 March 2021 Mr Kepu and the HR advisor met with Ms Hill, a PSA organiser and a PSA delegate. The following day Ms Hill received a letter identifying concern that she may have used unnecessary force on a young person and suspending her.

[31] By 15 March 2021 letter Ms Hill was invited to a disciplinary meeting, with Mr Kepu identified as the decision-maker. Oranga Tamariki set out the following as unnecessary use of force by Ms Hill:

- Marching from one side of the lounge to the young person, pushing forcefully with two hands;
- As he falls back into the chair, stepping into his space and placing her hands around the neck area; and
- With her hands in the neck area, applying excessive force to pull the neck area in a back-and-forth strangling/choking motion.

[32] Oranga Tamariki identified obligations in various documents including its code of conduct, values and policies along with the Regulations.

[33] Ms Hill was offered and took up, the opportunity to watch CCTV footage of the incident. No interviews seem to have been held with other staff on duty on 5 March.

[34] On 30 March 2021 Mr Kepu, the HR advisor, Ms Hill and the PSA delegate met again. The meeting notes include Miss Hill:

- Discussing her use of the train stop technique from the STAR training and acknowledged walking into the young person's personal space;
- Acknowledging her hands may have been nearer the throat than first thought;

- Recognising she had been quite reactive, should have known better and could have stepped back, taking a breather. She had never experienced behaviour like this at any time in her life, personally or professionally; and
- Accepting that she had “fucked up”.

[35] Mr Kepu says that he did not regard Ms Hill’s description as being consistent with the CCTV footage, including as regards no sign of body language by the rangitahi demonstrating a risk to her safety but rather her walking over, stepping in his space and pushing him.

[36] On 30 April 2021, Mr Kepu wrote to Ms Hill setting out his factual findings and his preliminary view that she should be dismissed. This included a view that Ms Hill’s actions amounted to serious misconduct because they were in breach of the Regulations, Oranga Tamariki’s policy and code of conduct and the Public Service Commission’s Standards for Integrity and Conduct. It is not altogether clear when Ms Hill received that letter but it may not have been until shortly before the next arranged meeting.

[37] By letter of 30 April Ms Hill informed a senior manager that she was resigning, having been offered a job elsewhere. That job has not eventuated, as once she informed the other organisation what was happening at Oranga Tamariki it wished to wait for an outcome. Ms Hill indicated to Oranga Tamariki that she was withdrawing her resignation and assumes the withdrawal was accepted as she heard nothing further about it and the disciplinary process continued.

[38] Ms Hill was surprised by Mr Kepu’s recommendation of dismissal, including because of her knowledge of allegations of male staff members assaulting young people which she understood to be far more serious and yet were not pursued.

[39] Oranga Tamariki offered a 5 May 2021 meeting time. The PSA delegate and organiser attended, explaining that Ms Hill had only just received the 30 April letter. Mr Kepu offered to adjourn the meeting.

[40] However, about 20 minutes later Ms Hill indicated she was willing to meet so the meeting went ahead. Ms Hill apologised for the incident and expressed her disappointment at the preliminary outcome. This was the first incident she had been involved in and she sought a second chance. Her representative indicated she was

remorseful. Ms Hill talked about how she would deal with such a situation if it arose again. She was informed by the HR advisor that the process should take a further two to four weeks.

[41] On 9 May 2021 Oranga Tamariki were informed that Ms Hill had a legal representative. It then took a few days to establish the nature of the issues.

[42] On 14 May 2021 Mr Kepu wrote to Ms Hill, telling her she was summarily dismissed. He concluded that the allegations were substantiated, amounted to serious misconduct and summary dismissal was the appropriate outcome.

What happened with the Police?

[43] Korowai Manaaki referred the matter to the Police but did not await the outcome of the Police investigation before progressing its own and disciplinary action.

[44] The Police investigated, including interviewing Ms Hill and other workers and viewing the CCTV footage. They decided not to prosecute her. No police warning was issued, which Ms Hill indicates did occur with some other Oranga Tamariki incidents.

Is there an arguable case regarding unjustified dismissal?

[45] This is a relatively low threshold.⁴ That is acknowledged for Oranga Tamariki but the organisation does not accept the test is met here. I note that the organisation recognises that the language used to Ms Hill by the young person was unacceptable. The question is whether it is arguable that Oranga Tamariki did not act as a fair and reasonable employer could have done in dismissing Ms Hill.

[46] The grievance claim emphasises that Ms Hill used a technique approved by the organisation (train stop) and that the police concluded that she should not be prosecuted. It is also argued that the procedural deficits make it impossible for the employer to substantively justify the dismissal.

[47] Should Mr Kepu have been the decision maker? Ms Hill does not believe that he should as he was closely involved in her earlier complaint, which reportedly included criticism of his mismanagement of her situation. Her affidavit refers to her, during the 2021 process, reporting her concern to the PSA, who passed it on to the senior manager,

⁴ *Humphrey* at n 1.

with Ms Hill receiving reassurance that the senior manager indicated Mr Kepu should be able to work professionally. I have no documentary evidence of those steps and Ms Hill acknowledges she did not mention her concern when Mr Kepu asked broadly about conflicts of interest at an early meeting.

[48] Ms Hill is also critical of any investigation process being undertaken internally and in a less thorough form than the extensive, external investigations she is aware of in other situations. These included lengthy documentation of interviews carried out with other staff members present during an incident as well as with the young person involved. Ms Hill's impression is that male colleagues who have been investigated have been provided with more thorough investigations undertaken by an external investigator.

[49] Oranga Tamariki's supporting guidelines to its disciplinary policy refer to the investigator and the decision maker tending to be different people in "complex or serious matters". The prospect of an external investigator is also raised.

[50] There may be an arguable point about Mr Kepu's role as decision-maker. The Authority has only moderate evidence about Mr Kepu's role with Ms Hill's previous "complaints". The organisation had a responsibility to consider whether Mr Kepu was a suitable person to investigate and decide this matter. There was presumably no shortage of others within the organisation who could have been brought in as an alternative.

[51] Questions can also be raised about the extent of Oranga Tamariki's investigation. Mr Kepu believes he had enough with the CCTV footage and Ms Hill's responses. The investigation here certainly does not seem to have had many components.

[52] Particularly given the low quality of the footage in the area where Ms Hill pushed the young person, there is an arguable inadequacy in the failure to speak to any other staff who were present during the incident. The difficulty with the footage quality, particularly as regards where Ms Hill's hands were on the young person, is referred to by the HR advisor at the 31 March meeting.

[53] Oranga Tamariki's earlier letters refer to choking/strangling. At the 31 March meeting Mr Kepu and the HR advisor refer to the TLO and the young person mentioning strangling and "choked, strangled" respectively. The TLO was not present

during the incident. It is not evident whether the young person was spoken to about the incident, if so, who by and what else he said. Later Oranga Tamariki correspondence refers to Ms Hill's admission that her hands were closer to the young person's collarbone than they should have been, without an explicit withdrawal of the choking/strangling allegation.

[54] Oranga Tamariki's correspondence also refers to the young person's body language which is somewhat difficult to reliably make out in the CCTV footage. Interviews of staff present may have assisted.

[55] I cannot at this interim stage rule out the prospect of further relevant evidence having been available from other staff. Having spoken to one of her colleagues, Ms Hill believes he has useful (unspecified) exculpatory material relating to the incident. There is an email between PSA representatives referring to other staff present (actually or potentially) having indicated that Ms Hill had not gone for the throat as was suggested.

[56] Although specifics were not offered, there also remains a question about disparity of treatment with Ms Hill's affidavit evidence referring to other incidents with young people where action was not taken. This includes after a police warning.

[57] At this stage I cannot conclude that the arguable procedural defects were minor and did not result in Ms Hill being dealt with unfairly. I am satisfied that there is an arguable case that Ms Hill was unjustifiably dismissed.

Is there an arguable case for permanent reinstatement?

[58] I move to look at whether it is arguably practicable and reasonable to reinstate Ms Hill. Reinstatement is back as a primary remedy and that influences the approach.⁵ In the recent *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* decision, the re-introduction "reflected a Parliamentary intention to raise the bar that employers would have to negotiate in order to provide that reinstatement was neither reasonable nor practicable".⁶

⁵ Section 125 of the Act.

⁶ *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59, at [42].

[59] Is it feasible or practically workable to re-impose this employment relationship? Ms Hill has indicated some remorse for her actions. However, she also expresses some distrust in management as a result of her dismissal although on the limited evidence it is not sufficiently certain that this would prevent the re-imposition of the employment relationship.

[60] Mr Kepu concluded that he had lost trust and confidence in Ms Hill. She did not report directly to him so any tension between them is not seemingly an immediate day to day problem. There is no evidence of Ms Hill's role not being available nor concern from Korowai Manaaki staff other than Mr Kepu to Ms Hill's return.

[61] The young person is still at Korowai Manaaki and it might be pragmatic to avoid Ms Hill caring directly for him at least for a time, although he was said to be apologetic and she was prepared to mediate with him. The facility has five units.

[62] It is arguable that reinstatement is practicable. The harder question is whether it is reasonable. The police decision not to prosecute could be seen as providing support for Ms Hill's return but does not entirely answer the reasonableness question. The standard of proof and other considerations are somewhat different in criminal and employment settings. Korowai Manaaki is trying to rebuild its foundations after some serious incidents, to ensure a safe environment for young people.

[63] I have considered the *De Bruin v Canterbury District Health Board* decision.⁷ There reinstatement was found to be reasonable for a nurse who slapped a patient in the face as a reflex action during a difficult restraint. The nurse's long and good working history and the existence of major stressors which had since significantly passed were sufficient for the Employment Court to conclude that reinstatement was reasonable.

[64] There is more room for doubt about whether it is reasonable to require Oranga Tamariki to have an employee back in the current circumstances. Without having heard witness evidence directly in sync with the CCTV footage, the footage suggests Ms Hill moving promptly to take action about the language, going up to the rangitahi and pushing him so that he fell backwards into the chair. Whilst the young person's statements were shocking and embarrassing for Ms Hill, in the absence of further

⁷ *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110

explanation and reassurance that stressors or triggers had been recognised and dealt with, I cannot conclude that reinstatement is reasonable.

[65] On the limited evidence available at this time, Ms Hill does not have an arguable case for reinstatement.

What is the balance of convenience?

[66] In the event that I am wrong about the reinstatement assessment, I move to weigh the interests of Ms Hill against those of Oranga Tamariki, including a consideration of the adequacy of damages.

[67] On the basis of her affidavit evidence Ms Hill was a committed youth worker who went the extra mile to help improve the lives and futures of those in her care and other young people in the community, particularly young women.

[68] Ms Hill's work was important to her and she believes her dismissal will impact her future ability to gain employment in this field. However, Ms Hill expresses a lack of trust in management which has diminished the passion she felt working with tamariki. Ms Hill talks about her mana being severely damaged by Oranga Tamariki although there is no particular link made to reinstatement resolving this. Her evidence is more focused on why she considers the process and her resulting dismissal unjustified.

[69] Ms Hill had applied for and obtained other work, suggesting that she did not wish to remain at Korowai Manaaki. It was complications with that other work which led to her withdrawing her resignation from Oranga Tamariki. In her affidavit in reply she concludes that she would have been far better off to resign and use the police outcome to clear her name and assist with her other work.

[70] The difficulties with the other work lead to Ms Hill having to "desperately" apply for other work over two months. She has had to apply for a WINZ benefit, to her embarrassment.

[71] The time to get the substantive claim heard weighs in favour of reinstating Ms Hill until that time. It is likely that this matter may not be heard until some way into 2022.

[72] Ms Hill's losses could largely be recompensed by damages.

Oranga Tamariki

[73] I turn to weigh any detriment which Oranga Tamariki would or could suffer if Ms Hill is reinstated.

[74] Mr Kepu expresses having lost trust and confidence in Ms Hill. This includes because in his view her responses during the disciplinary process focused on blaming the young person, suggesting he was a bad person and she was fearful of her safety when footage did not support that. She would have to work closely with young people if returning to her youth worker role. Perhaps surprisingly there is little evidence of the steps Oranga Tamariki would wish or need to take if Ms Hill is returned.

[75] The young person concerned is still at Korowai Manaaki and Mr Kepu does not regard it as appropriate for Ms Hill to work with him.

[76] Ms Hill's return would be a dangerous precedent for other staff according to Mr Kepu. Verbal abuse is an everyday part of the job which Mr Kepu indicates staff are trained to deal with. Reinstating Ms Hill could be seen as validating her actions and potentially exposing young people to other risks.

[77] Damages are unlikely to be able to remedy damage to Oranga Tamariki or its clients if difficulties arise on Ms Hill's reinstatement, either with her own conduct or that of others.

Concluding comments on the balance of convenience

[78] When looking at the modest level of evidence from Ms Hill as to why she wants to return, the balance narrowly favours Oranga Tamariki.

Where does the overall justice lie?

[79] In terms of the merits, I am not able to say that Ms Hill's case is a very strong one. There are certainly questions which will need to be explored with the advantage of witnesses and more documentation. However, Ms Hill faces the difficulty of having undertaken conduct which, to some extent, she accepts was ill considered. Oranga Tamariki must clearly be responsible in the approach it takes to the application of physical force to the young people in its care. There was comprehensive correspondence with Ms Hill setting out the organisation's views and opportunities provided for her and her representatives to put her side of the story to Mr Kepu.

[80] Another factor to consider is that Oranga Tamariki is a large governmental organisation which has significant resources although seeking to be responsible with public money.

[81] Oranga Tamariki is responsible for the care of many young people who have been exposed to violence and other traumatic actions before coming into the organisation's care and protection. Mr Kepu's view is that the organisation must take a strict approach to unlawful and unreasonable use of force by staff.

[82] It is hard to avoid a conclusion that Ms Hill does not really want to be working for Oranga Tamariki and distrusts management. Looking at the overall justice, I conclude that Ms Hill should not be reinstated on an interim basis.

[83] The Authority will be in contact regarding the next steps in this proceeding.

Costs

[84] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority