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PROHIBITING PUBLICATION OF CERTAIN
INFORMATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 478
3150463

BETWEEN

STEPHEN BAILLIE
Applicant

AND

CHIEF EXECUTIVE OF ORANGA
TAMARIKI – MINISTRY FOR
CHILDREN
Respondent

Member of Authority: Philip Cheyne

Representatives: Andrew McKenzie, counsel for the Applicant
Peter Chemis and Louise Robertson, counsel for the
Respondent

Investigation Meeting: 26 October 2021 at Christchurch

Date of Determination: 29 October 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. The claim for interim reinstatement is dismissed.**
- B. Costs are reserved.**

Employment relationship problem

[1] Stephen Baillie worked as a Youth Worker for Oranga Tamariki at Te Puna Wai o Tuhinapo in Christchurch. Following an incident on 3 April 2021, Mr Baillie was dismissed for serious misconduct, effective 1 September 2021.

[2] Mr Baillie's personal grievance (unjustified dismissal) was raised on 2 September. The present action was commenced in the Authority soon after. Mr Baillie seeks permanent reinstatement, reimbursement of lost wages and benefits and compensation as remedies. Mr Baillie also seeks interim reinstatement. In support of interim reinstatement, Mr Baillie lodged an affidavit, documents relating to the disciplinary process that preceded the dismissal and an undertaking for damages.

[3] Oranga Tamariki (OT) in reply says that Mr Baillie was not unjustifiably dismissed. It opposes the permanent remedies sought. It also opposes interim reinstatement. With its statement in reply (and documents), OT lodged an affidavit of Mason Peteru. Mr Peteru is the acting Residence Manager, who was involved in the disciplinary process.

[4] Matters were not resolved, despite mediation. This determination resolves the application for interim reinstatement. Findings are only for that purpose, based on the documents produced, the untested affidavit evidence and the submissions made by counsel.

[5] The approach to interim reinstatement claims is well established. An applicant must first show that there is a serious question to be tried. There must be a serious question as to justification for the dismissal and in relation to the remedy of reinstatement. Next, I must consider where the balance of convenience lies by assessing the impact on the parties of granting or refusing the order. The impact, if any, on third parties is relevant. I should then consider the overall interest of justice.¹

[6] Much of what happened is documented. I will outline events to give context.

[7] By consent, I prohibit the publication of the name of the resident involved in the exchange with Mr Baillie. I refer to the resident as YP.

¹ *Alastair Humphrey v Canterbury District Health Board* [2021] NZEmpC 59 at [6] and [7].

An outline of events

[8] Mr Baillie was a member of NUPE and covered by the collective employment agreement negotiated between NUPE and OT. The agreement permits OT to dismiss an employee without notice in the case of serious misconduct. OT has a comprehensive disciplinary policy. Conduct that undermines, damages or destroys the trust and confidence OT must have in an employee to enable the employment relationship to continue is defined as serious misconduct. Examples include serious breach of policy or procedure.

[9] OT and its staff are subject to Tamariki (Residential Care) Regulations 1996. Regulation 22 proscribes staff of a residence from threatening or using physical force in dealing with a resident, unless the staff member has reasonable grounds for believing the use of force is reasonably necessary for one of the specified purposes. OT has developed a de-escalation and response programme specific to the New Zealand context, called STAR. OT has a system to report any "Security Incident". CCTV cameras (without audio) operate in various locations at Te Puna Wai.

[10] There was an incident involving Mr Baillie on 3 April, following which YP was admitted to a secure unit. A staff member reported the "Security Incident". YP made a written complaint, dated 4 April. These matters came to the attention of Mr Peteru, who viewed the CCTV footage of the incident. Mr Peteru wrote a letter dated 7 April to Mr Baillie. It referred to the complaint and CCTV footage, the "apparent conduct" raising "very serious issues" about trust and confidence and a "proposal" to suspend Mr Baillie under the employment agreement and OT's policy "while formal employment processes are undertaken". A meeting was set for 8 April.

[11] When Mr Baillie reported for work on 7 April, he was escorted to meet Mr Peteru, who gave him the letter. He was then escorted from the premises. Mr Baillie's evidence is that these circumstances caused him considerable embarrassment and humiliation.

[12] Mr Baillie attended the meeting next day, supported by Andy Rowe, a work colleague and NUPE delegate. Full footage of the 3 April incident was played. Mr Baillie says that after the footage was viewed, a still image of him with his "hand closed" was left on screen. His evidence is that this could have been seen by anyone walking past the meeting room. He found this extremely confronting, stressful and humiliating. He says it showed a clear bias.

The meeting resulted in Mr Baillie's suspension. The suspension was confirmed in a letter dated 8 April.

[13] Mr Baillie says he received no communication until 3 May. Mr Peteru by email advised Mr Baillie that he was couriering some documents to him. Mr Baillie's evidence is that he received the documents by email several days later. There is a letter dated 3 May setting out the allegations, ahead of a disciplinary meeting scheduled for 6 May. Mr Baillie's evidence is that he (and NUPE) requested various documents and a copy of the CCTV footage. An offer to provide a copy of the footage was rescinded, with arrangements made for it to be viewed by Mr Baillie and NUPE officials at OT premises. That was done on 20 May. The footage available was extracts recorded on Mr Peteru's mobile phone. It was incomplete. Mr Baillie was told that was all that there was.

[14] The disciplinary meeting convened on 31 May. More extensive CCTV footage was available. Mr Baillie's evidence is that this unfairly disadvantaged him. The meeting was rescheduled for 10 June. Meantime, OT provided a copy of the CCTV footage that it had. It consists of a Powerpoint presentation, with three video segments and a still image of Mr Baillie. This has been produced in evidence.

[15] Mr Baillie's response to the allegations was given on 10 June. NUPE requested that Mr Rowe be interviewed. Mr Baillie's evidence is that OT was resistant to that. Mr Baillie is critical of OT's human resources manager trying to continue with the meeting, despite his representative and support person having to leave. His evidence is that there was then a delay until 14 July, when he received a copy of the answers given by Mr Rowe at an interview with Mr Peteru. Mr Baillie was asked to respond by 19 July. Mr Baillie requested the questions. The request might not have been received by Mr Peteru.

[16] Next, Mr Baillie was advised that he had until midday on Friday 30 July to respond further, prior to OT forming a preliminary decision. However, by email on 29 July, Mr Baillie received Mr Peteru's letter of 28 July setting out his preliminary decision. In that letter, Mr Peteru set 2 August to meet or for any further response. A meeting date of 12 August was then agreed. NUPE on Mr Baillie's behalf provided a detailed response. Mr Baillie says that Mr Peteru told him a final decision would be made the following week.

[17] On 1 September, Mr Peteru sent a letter of that date, setting out a final decision to summarily dismiss Mr Baillie. Mr Peteru concluded that Mr Baillie had displayed aggressive and intimidating behaviour towards YP by squaring up to and having his face within inches of YP; that Mr Baillie adopted a stance suggestive of preparation to hit YP; that Mr Baillie stood over YP, giving an intimidating appearance; that Mr Baillie inappropriately restrained YP, without reasonable grounds set out in Regulations; and that Mr Baillie taunted YP during the incident. On the basis of these conclusions, Mr Peteru decided that Mr Baillie's behaviour amounted to serious misconduct.

Arguable case

[18] OT concedes that Mr Baillie has an arguable case for a personal grievance. Reinstatement, where sought, is the primary remedy for a personal grievance, wherever practicable and reasonable.² In light of that, OT concedes that there is an arguable case for permanent reinstatement, but says it is a weakly arguable case.

[19] Mr McKenzie summarised Mr Baillie's case. There are elements of predetermination, in that the preliminary decision was released the day before the deadline set by OT for a response and that Mr Rowe was not sufficiently interviewed. A counter is that Mr Baillie had further opportunity to respond to OT's concerns and that Mr Rowe was involved at several points. I find that predetermination is at least arguable, but not strongly.

[20] Mr Baillie was dismissed as a result of responding to the team leader's (Mr Rowe) decision to institute a physical restraint on YP. However, Mr Rowe was not subject to any disciplinary process or challenged by OT. This raises a disparity argument. Mr Baillie's evidence is that Mr Rowe said "Right, secure", once he told Mr Baillie that YP had kicked him. At this point, there is no evidence from Mr Rowe. However, Mr Rowe is noted as saying when interviewed by OT that Mr Baillie was restraining YP "as I [Mr Rowe] walked in the room". I find it at least arguable, but not strongly, that Mr Baillie was singled out for disciplinary action.

[21] A point is made about Mr Peteru being both the investigator and the decision maker, when the Disciplinary Policy states that in complex or serious matters, the investigator and the decision maker "tend to be different people". NUPE had raised this during the

² Employment Relations Act 2000, s 125.

investigation. I find it at least arguable, but not strongly, that OT has not complied with its policy, so as to create unfairness for Mr Baillie.

[22] It is said that, if Mr Baillie's use of force was unjustified, it was an error of judgement, not amounting to serious misconduct. An error of judgement might not be sufficiently serious for a reasonable employer to justify a decision to summarily dismiss an employee. A difficulty with this argument will be that the principal response by Mr Baillie throughout the disciplinary investigation was that his use of force was reasonable and justified under the applicable Regulation. However, I accept that it is at least weakly arguable that circumstances at the time were not such that an employer could have summarily dismissed Mr Baillie.

[23] It is argued that the decision to dismiss was based primarily on a split-second frame on the CCTV footage of a "clenched fist which was never acted on". OT's allegations included reference to a "red zone", not taught as part of the STAR guidelines. These points were raised during the disciplinary process and responded to in Mr Peteru's 1 September letter. I find it is arguable, but not strongly, that OT did not genuinely consider Mr Baillie's explanation.

[24] It is argued that the closeness of Mr Baillie to YP does not indicate that Mr Baillie was intimidating or aggressive. The point is supported by YP not backing away. The point is made that the allegation that Mr Baillie stood over YP was when YP was sitting. I find that it is arguable, but not strongly, that OT did not properly account for these factors.

[25] Overall, I find that there is an arguable case that OT unjustifiably dismissed Mr Baillie.

[26] I further find that Mr Baillie has an arguable case for permanent reinstatement. The difficulty for OT is, if it unjustifiably dismissed Mr Baillie, he must be reinstated wherever practicable and reasonable. In *Humphrey*, the Employment Court observed that it was distinctly arguable that Parliament had raised the bar for employers to prove that reinstatement was neither reasonable nor practicable.³ I see no sufficient reason at this point to say that the arguable case for Mr Baillie's personal grievance does not also result in an arguable case for permanent reinstatement.

³ Note [1], at [42].

Balance of Convenience

[27] Mr Baillie acted promptly with this claim. A direction to mediation was made. I was unable to schedule an early date for a substantive investigation meeting. The meeting to investigate the claim for interim reinstatement was scheduled to accommodate the Authority's and counsels' availability.

[28] There is no suggestion of conflict between Mr Baillie and colleagues that would cause a difficulty for OT and colleagues if Mr Baillie was reinstated pending resolution of his personal grievance. However, YP remains a resident. OT would need to work rosters and assignments to limit contact with YP if Mr Baillie was reinstated in the meantime. However, I accept that OT could not guarantee that their paths would not cross. The risk appears low, but the potential consequences of contact might be serious. The factor counts against interim reinstatement.

[29] Counsel makes the point that the Authority can make an interim reinstatement order subject to conditions.⁴ No specific conditions were proposed, although counsel observed that OT had not agreed to place Mr Baillie on garden leave in the meantime. Reinstating Mr Baillie, subject to garden leave, would offset the immediate impact on him of loss of remuneration, but it creates a risk that OT might eventually be in a position to enforce his undertaking. A condition about rosters and assignments for Mr Baillie would not remove the risk that his path might cross that of YP.

[30] There is a submission that the presence of CCTV footage is a considerable safeguard for any concerns about Mr Baillie's conduct, should he be reinstated in the meantime. However, the presence of CCTV footage did not stop Mr Baillie's interaction with YP. Mr Baillie has maintained the view that his actions were appropriate. That view may be vindicated, in due course. Even if Mr Baillie is not reinstated now, he does not lose the benefit of that decision. However, OT's view may be upheld. In that case, OT would have been required to continue the employment of a person whose conduct had not complied with the law or its expectations. I place little emphasis on the CCTV footage as a safeguard against the risk of a further incident.

⁴ *Cliff v Air New Zealand* [2005] ERNZ 1 and s 127(5) of the Employment Relations Act 2000.

[31] OT as a crown entity will be able to meet any future order for compensation and reimbursement. I accept that there are benefits to work, in addition to pay. However, the prospect of Mr Baillie being successfully reinstated following a substantive investigation meeting is not diminished in any material or measureable way, just by the passage of time between now and then. To the extent that Mr Baillie would need training and support if reinstated, OT would be required to provide it. There is no reason to think that Mr Baillie would be less open to that following a substantive determination, than he is now. This would extend to “review and reconfiguration” processes, mentioned by Mr Peteru in his affidavit.

[32] Mr Baillie’s New Zealand work history has been in the public sector. Counsel points to the impediment for Mr Baillie in securing other public sector employment, having been dismissed. Mr Baillie suffers a similar impediment obtaining employment elsewhere in his chosen field. I accept this limits Mr Baillie’s ability to obtain replacement public sector employment, pending determination of the substantive claim. The financial information provided by Mr Baillie shows a shortfall between family income and outgoings, in the absence of his income. However, the information indicates that he has funds secured for another purpose that could be used to offset his lost income in the meantime. Compensation and reimbursement if Mr Baillie succeeds could restore him to his pre-dismissal financial position. Only a final determination in Mr Baillie’s favour could overcome the impediment to his future employment prospects.

[33] To summarise, Mr Baillie acted promptly. The financial consequences suffered by Mr Baillie can be remedied if his personal grievance claim is upheld. The prospects of Mr Baillie being compensated are not diminished, even if he is not reinstated in the meantime. The prospect of Mr Baillie being successfully reinstated permanently is not diminished, even if he is not reinstated in the meantime. The contrary position includes a risk for Mr Baillie under his undertaking, or the risk for OT of Mr Baillie performing work. Overall, I conclude that the balance of convenience favours OT, not Mr Baillie.

Overall Justice

[34] In support of a submission about the purpose of an interim injunction as a status quo holding remedy, I am referred to *Savage v Wai Shing Limited*.⁵ In that case, the employee had

⁵ *Savage v Wai Shing Limited* [2019] NZEmpC 141.

been dismissed as redundant but his interim reinstatement was ordered by the Employment Relations Authority. There followed a compliance order. The employee then sought enforcement of the compliance order by application to the Employment Court. The employer initiated a disciplinary process on an unrelated matter, raising alleged misconduct and the possibility of dismissal. The employee's application to the Authority for orders to prevent dismissal through the disciplinary process was declined. The declinature was challenged by application to the Employment Court.

[35] In that context, there were submissions before the Court that the existing interim reinstatement order did not prevent the employer exercising a right to dismiss the employee on other grounds. The employee's position was that an employer would need to apply to vary or rescind the existing interim order. The employer's position was that s 127(6) of the Employment Relations Act 2000 only applied with respect to the circumstances which led to the interim order, not the separate disciplinary matter. In considering the submissions and the statutory provision, the Court noted the distinction between interim and permanent injunctions, describing the former as a "holding remedy" by maintaining the status quo, being the last settled position between the parties.⁶ The Court then referred to the legal principles to be applied in deciding whether an interim injunction should be granted. These are the principles paraphrased at paragraph [5] above.

[36] The concept of maintaining the status quo considered in *George v Carter Holt Harvey Woodproducts Nelson*.⁷ The status quo there was that the employee was employed but not performing any of the duties of his position. This formed part of the Court's assessment of the overall justice.

[37] In *George*, the Court's impression was that the employee had a stronger case and was more likely to succeed on liability. However, it considered that reinstatement was more problematic, with the parties' cases more evenly balanced. Here, my impression is that the case is more balanced on the question of liability. OT had a basis on which to raise concerns. It embarked on a substantial disciplinary process. OT did not accept Mr Baillie's responses as sufficient (for the most part) to answer its concerns. Mr Baillie has an arguable case, but I cannot say at this point that he is more likely than OT to succeed on liability. If he does

⁶ At [32].

⁷ *George v Carter Holt Harvey Woodproducts Nelson* (unreported, CC6/08, 10 April 2008).

succeed on liability, Mr Baillie is entitled to reinstatement if it is practicable and reasonable. That assessment will depend, at least to an extent, on the reasons for a finding in Mr Baillie's favour on liability. At this point, that question too appears to be fairly balanced.

[38] As to status quo, Mr Baillie's case differs from *Savage* and *George*. In *Savage*, status quo was that the employee had the benefit of a binding order. The employer was restrained from potentially breaching that status quo. In *George*, the employee had a strong case for a personal grievance, so interim reinstatement on a garden leave basis with the option of an ACC graduated return to work programme (similar to the pre-dismissal situation) was considered appropriate. Here, Mr Baillie was dismissed following an incident with YP and a disciplinary investigation. Mr Baillie has an arguable case, but has not established circumstances to support interim reinstatement, ahead of a final determination of his claim.

[39] Dates for a substantive investigation meeting in December (subject to another unrelated matter), January or April were canvassed. I am now told that OT is only available for the April dates. If the balance of convenience had favoured Mr Baillie, the passage of time to accommodate availability of OT's key witness, would have been a strong overall justice factor favouring interim reinstatement. However, this likely time from the proceedings being lodged to a final determination does not materially move the balance of convenience in Mr Baillie's favour. The consequences suffered by Mr Baillie as a result of the passage of time are for the most part capable of remedy. This can extend to any lost benefits. As part of setting the April dates for an investigation meeting, I will also schedule time in the following week so I can complete a final determination if it is reserved.

[40] Overall justice does not lead me to conclude that it would be just and appropriate to order OT to reinstate Mr Baillie, pending final determination of his claim.

Summary

[41] Mr Baillie's claim for interim reinstatement is dismissed.

[42] Cost should be dealt with following a final determination.

[43] Parties are to keep 20 to 23 April 2022 as dates for an investigation meeting. The Authority will convene a case management conference shortly to confirm arrangements. We can also discuss whether further mediation would assist.

Philip Cheyne
Member of the Employment Relations Authority