

**This determination includes
an order prohibiting publication
of certain information.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 104
3073733

BETWEEN

NATHAN VICTOR CHURCH
Applicant

AND

THE CHIEF EXECUTIVE,
ORANGA TAMARIKI – MINISTRY
FOR CHILDREN
Respondent

Member of Authority: Philip Cheyne

Representatives: Andrew McKenzie, counsel for the Applicant
Kate Allan and June Hardacre, counsel for the Respondent

Investigation Meeting: 11 & 12 November 2020

Submissions Received: 17 and 23 December 2020 from the Applicant
17 December 2020 from the Respondent

Determination: 18 March 2021

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The claims are dismissed.

B. I reserve costs, subject to the timetable set for submissions if required.

Employment relationship problem

[1] Nathan Church was employed by the Chief Executive, Oranga Tamariki – Ministry for Children (OT) from July 2017 until he was dismissed on 29 August 2019. The dismissal followed an incident on 29 June 2019, a disciplinary investigation into that incident and Mr Church's suspension on pay on 2 August 2019.

[2] Mr Church says that he was unjustifiably dismissed. He also says that the suspension was an unjustified action by OT which affected his employment to his disadvantage. Mr Church seeks reinstatement, reimbursement of lost remuneration and lost benefits and compensation for humiliation, lost dignity and injured feelings.

[3] OT says that its decision to suspend Mr Church was procedurally fair and substantively justified. It also says that it conducted a full and fair disciplinary investigation into allegations arising from the 29 June incident, found Mr Church's actions constituted serious misconduct and summarily dismissed him for that reason.

[4] Mr Church initially included a claim for interim reinstatement but he discontinued that part of his application.

[5] Despite mediation, the problems were not resolved.

[6] Much of the disciplinary investigation process was documented. In general, there is no reason to doubt the outline of the process that emerges from that. I will summarise the incident, outline the investigation process and then consider whether the suspension gives rise to a personal grievance and whether the dismissal was justified by applying the statutory test.

[7] With consent, I made an order prohibiting publication of the names of any OT residents who feature in this matter.

The 29 June incident

[8] The use of force in dealing with a young person under OT care is subject to statutory regulation by Oranga Tamariki (Residential Care) Regulations 1996. Regulation 22 is the relevant part. Part of OT managing compliance with this includes incident reporting. The

reports are referred to as SOSHI reports. A SOSHI report was generated at 5.29 pm by Bill Teata, part of which states:

While moving across the courtyard young people R and I started squirting each other with their water bottles. Young person R has apparently squirted water on the back of young person I's trackie and wet it. Once in the unit young person I has squirted young person R again. Staff Nathan then asked young person I to hand his water bottle to him. He has asked a couple of times but young person I still refused to hand the bottle in to staff Nathan. At this stage young person I was walking around the unit. Young person R2 jumped over the table tennis table to take the bottle off young person I, but missed in the attempt. Young person I at this stage was outside the classroom door. Staff Nathan reached over the top of young person I to get the bottle. Verbal abuse towards staff Nathan from young person I happened, then staff Randell intervened to help take the bottle. A low level restraint was required, but however young person I then started to head butt staff Nathan, This required a medium to high level restraint,. At this stage young person I was trying to kick staff Nathan. The restraint went to ground and staff Nathan was tapped out by staff Stephen as per TLO Wayne. Young person I was then moved to Secure Care where he walked across.

[9] Later, I refer to other accounts of the incident.

[10] Wayne Keats was an acting team leader. Before he saw the SOSHI report that evening, but having viewed the CCTV footage, Mr Keats sent an email to various people, indicating some concern about the incident. Angela Williams was acting residence manager. She received the email. Fred Williams, who Mr Church reported to on a day to day basis, was another recipient. Mrs and Mr Williams are married.

The investigation

[11] STAR is the acronym for OT's current model in assessing the requirement for and using restraints on young persons. When Mrs Williams and Mr Williams later discussed the incident, they agreed to ask a STAR instructor (Ross Murphy) to give his analysis of the restraint, from the CCTV footage. Mr Murphy's review is set out in an email to Mr Williams on 5 July. Mrs Williams next asked Kenny O'Brien to review the footage. Mr O'Brien had developed the STAR model for OT. Mr O'Brien's review is set out in an email on 12 July.

[12] In light of the concerns expressed, Mrs Williams decided to initiate a disciplinary process with Mr Church over the incident. A letter in her name dated 16 July 2019 was drafted and sent, setting out a description of the incident, concerns and potential breaches of the employment agreement and code of conduct and disciplinary policy, being matters which

could if substantiated amount to serious misconduct. It included the two reviews, the code, the policy and Regulation 22. A date was proposed for a meeting.

[13] Mr Church says he received the letter on 18 July. He sought representation from NUPE (union organiser - Les Bryce). The meeting was rescheduled to 26 July 2019. Arrangements were made so that Mr Church and Mr Bryce could see the CCTV footage prior to the meeting.

[14] Present on 26 July were Mrs Williams, Mr Williams, Karen Schulz (an OT HR advisor), Mr Church and Mr Bryce. Ms Schulz took notes during the meeting. The notes were later transcribed into typed format. Mr Bryce also made notes. The meeting lasted about an hour, including an adjournment. The meeting ended with Mrs Williams to consider the evidence and review what had been said, before providing a “tentative decision”.

[15] Mrs Williams’ evidence is that, during the 26 July meeting, either Mr Church or Mr Bryce claimed that Mr Keats had said soon after the incident that there were no issue with the restraint or Mr Church’s actions on 29 June. Mrs Williams asked Mr Keats to write a statement about the incident. There is a typed statement by Mr Keats.¹ Mr Keats described his recollection of the incident and his involvement, including:

When I went back to the unit Church had made a comment around I guess I will be in the shit for that restraint. I replied with why. And he stated because they are always looking for stuff to ping me on or words to that effect. He asked me prior to the debrief if I thought there was anything wrong with the restraint, my reply was I am here to debrief with the team around the whole incident and not to discuss the restraint in particular.

...

... Randell did say that he thought things didn’t go well and challenged Church’s practice. Some others were also not happy with what happened but said little, Church asked everyone present if anybody had an issue with the restraint itself and after a long period of silence a couple said no but others remained in silence.

Last week Church approached me and wanted to discuss the incident and particularly the restraint. I said I didn’t want to discuss it given that it is being looked at, he was persistent and asked if I thought the restraint was ok, I said you need to make up your own mind when you view the footage as I am not going to get into details. He said as an instructor did you think it was ok, I stated no I have concerns around part of the restraint but am not going to discuss it.

¹ The statement was written on 26 July and a revised statement was provided to Ms Schulz on 29 July. There is no reason to doubt Ms Schulz’s evidence about the changes. No substantive point arises.

He stated that I said the restraint was ok when asked on the night and he had written it down as such. I stated that actually my comments were, I am not here to discuss the physical part of the restraint but I am here to do a welfare check on all staff, and to debrief if we thought the incident could have been managed differently, I distinctively recall stating that I wasn't here to talk about the restraint itself.

[16] Mrs Williams sought advice from Ms Schulz about whether Mr Church should be suspended. A letter dated 30 July in Mrs Williams' name was drafted proposing that Mr Church be suspended pending the outcome of the disciplinary investigation and setting a meeting on the following day for Mr Church to respond. However, Mrs Williams was not part of the suspension meeting at 2pm on 1 August. Russ Caldwell, the residence manager, had returned to work after an absence. Mr Caldwell and Ms Schulz met with Mr Church, Mr Bryce and Davit Lavery (support person). Notes were made by Ms Schulz and Mr Bryce. After Mr Bryce had spoken, Mr Caldwell took an adjournment. Mr Caldwell then told Mr Church he was suspended. There were some exchanges about the disciplinary investigation process. The meeting ended on the basis that Mrs Williams was preparing OT's tentative decision on the disciplinary issue, with Mr Bryce expressing an intention to obtain an injunction to restrain OT's process.

[17] A letter dated 2 August under Mr Caldwell's signature summarised what had been said at the 1 August meeting and confirmed the decision to suspend Mr Church on pay until the completion of the disciplinary investigation process. The letter was delivered to Mr Church's address.

[18] A second letter dated 2 August was also sent to Mr Church. That letter under Mrs Williams' signature conveyed OT's preliminary decision with reasons that the disciplinary issues in relation to the 29 June incident were substantiated and that Mr Church's actions amounted to serious misconduct for which he would be summarily dismissed. The letter attached a copy of Ms Schulz's "meeting minutes 26 July 2019" and Mr Keats' statement. A meeting was proposed for Mr Church to respond.

[19] Mr Bryce's evidence is that before he was aware of the preliminary decision, he sent an email on 2 August to Mr Caldwell (copied to Ms Schulz). There is no reason to doubt Mr Bryce's evidence that he did not know of the preliminary decision at that point. Mr Bryce sought disclosure of all file information and notes, repeated a request that other staff present

at the time of the incident be interviewed and sought reasons why that had not already happened. Mr Bryce expressed concern that Mrs Williams was in the process of making a preliminary decision without that information and Mr Church having an opportunity to comment on the information. Mr Bryce also raised with OT's national HR manager that other staff present during the incident had not been interviewed and his unsuccessful attempts with OT to get other staff interviewed. Their exchanges are apparent in an 8 August email from Mr Bryce to Mr Kettley.

[20] OT decided to take statements from other staff. Ms Schulz arranged for another team leader (Angela Cameron) to take these statements, so that Mrs Williams was not involved in that. The resulting statements were copied to Mr Bryce. Included was a statement from Mr Lavery, the NUPE delegate who attended the 1 August suspension meeting as a support person for Mr Church.

[21] There followed a meeting on 22 August. Present were Mrs Williams, Mr Caldwell, Ms Schulz, Mr Church, Barty Doak (NUPE delegate) and Mr Bryce. The meeting was recorded (with consent). It ended with Mrs Williams to consider the substantive and procedural matters raised on Mr Church's behalf, before making a final decision.

[22] There was another meeting on 29 August. The meeting was recorded, by consent. Mrs Williams, Mr Caldwell, Ms Schulz, Mr Church, Mr Bryce, Mr Doak and Andy Rowe (for Mr Church) attended. Mrs Williams read out a letter dated 29 August.

[23] At the end of the meeting there were some exchanges between Mr Bryce, Mrs Williams and Ms Schulz about written reasons for the decision, including specific responses to submissions made on 22 August. Mr Bryce followed up on 30 August with an email confirming that Mr Church was raising a personal grievance and advising an intention to lodge proceedings in the Authority.

[24] I consider first the personal grievance claim arising from the suspension as it arose first in time.

Justification for the suspension?

[25] The employment agreement provides that where there is a “serious allegation” and there may be “a genuine on-going risk to the safety of staff, tamariki or the organisation”, OT may require an employee to remain away from work, on pay, while it conducts an investigation. OT must first consult the employee and their union representative.

[26] The supporting guidelines say that suspension itself is a serious step and should only be used in sufficiently serious cases. Examples include where a young person was harmed or potentially harmed or there is a risk of significant interference with the investigation. Suspension is a “last resort” if there are no suitable alternatives to mitigate the risk. The guidelines also say “If you wish to suspend an employee you will need to engage with your Senior HR Advisor and the DCE for approval before proposing suspension”.

[27] Ms Shultz sent an email to Mrs Williams and Mr Caldwell on 29 July with a draft of the 30 July suspension proposal letter and some advice about the process. Mrs Williams was advised not to direct Mr Church “not to be at work” when he arrived on Tuesday (30 July), but to release him so he could prepare for the proposed suspension meeting and to ensure he does not go to work but concentrates on that.

[28] Mr Church’s evidence is that he was shocked to arrive at work (on 30 July) and be told 15 minutes prior to changeover to hand in his swipe card and leave the premises due to a “proposal of suspension” by Mrs Williams. Mr Church says he was then escorted to the carpark. He says he was “blindsided” by the decision at such a late stage after the incident. Mr Church said in response to questions that he was suspended on 30 July by having his access card removed and being sent home. The statement of problem however alleges that suspension was proposed on 30 July, there was a meeting on 1 August and suspension was confirmed on 2 August.

[29] Mr Bryce on 1 August did not raise any concern about the 30 July interactions. Despite Mr Church’s evidence, it is likely that Mrs Williams’ interaction with Mr Church on 30 July took place in accordance with Ms Schulz’s advice. On 30 July Mr Church was released from duty so he could prepare for the meeting scheduled for 1 August. No disadvantage arose for Mr Church from that action.

[30] Mrs Williams' evidence is that she had become aware of Mr Church "trying to get support" from other staff, despite the request in the 16 July 2019 letter to limit discussion about the allegation to his representative and whanau. The 30 July suspension proposal letter alerts Mr Church to a concern of a risk arising from his decision making in volatile situations with young persons, in light of the explanation regarding the 29 June incident he gave at the 26 July meeting. Mrs Williams gave evidence of that concern first arising then. There is no reason to doubt that evidence. On 1 August Mr Caldwell referred to his primary concern about Mr Church interfering with the investigation. It follows that Mr Church had an opportunity to comment on these points, prior to Mr Caldwell's suspension decision, announced later in the 1 August meeting.

[31] Mr Caldwell summarised the exchanges and repeated his reasons for the suspension in the 2 August letter.

[32] I accept that Mr Church's employment was affected to his disadvantage by being "shocked" and feeling "blindsided", having continued working (without incident) for a month after the 29 June incident. However, I find that OT was justified in its decision to suspend Mr Church on pay, having regard to the test for justification.

[33] OT raised its concerns with Mr Church, he had a reasonable opportunity to respond to the concerns and Mr Caldwell genuinely considered the response given by and for Mr Church.

[34] The situation was within the circumstances where suspension is permissible in accordance with the agreement and guidelines.

[35] There was engagement with the senior HR Advisor before suspension was proposed. There is no evidence of engagement with the DCE prior to suspension. I find that there was not. The engagement guideline reinforces the "last resort" nature of suspension. There was some evidence that the process at the time involved notification, not approval. I am mindful that the step of engagement, notification or approval is part of the supporting guidelines for OT's disciplinary policy, rather than part of the employment agreement.

[36] I must not determine that the action of suspension was unjustifiable solely because of a defect in the process followed by the employer, if that defect was minor and did not result in unfair treatment of Mr Church. I find that not “engaging” with the DCE by notification or for approval before proposing the suspension was a minor defect in OT’s process and did not result in any unfair treatment of Mr Church.

[37] No personal grievance under s 103(1)(b) of the Employment Relations Act 2000 arises from the decision to suspend Mr Church.

Justification for the dismissal?

[38] Whether the dismissal was justified must be determined on an objective basis by assessing whether the employer’s actions and how the employer acted at the time were what a fair and reasonable employer could have done in all the circumstances at the time. In applying this test, I must consider the factors set out at s 103A(3) of the Employment Relations Act 2000 and may consider other factors that I consider are appropriate. I refer to these statutory factors, before determining justification.

With regard to its resources, did OT sufficiently investigate the allegations?

[39] OT was obliged to fully investigate the incident. It is a large, state sector employer. It was dealing with a serious matter with the potential of the most serious consequence for an employee. There is the potential for ramifications beyond Mr Church’s employment with OT.

[40] There is a submission that the investigation was limited to two expert opinions and the CCTV footage itself. It is said that there was “no genuine effort to interview staff” or the young persons present (at least young person I and young person R).

[41] While OT did not interview or involve any of the residents involved or present on 29 June, I do not accept that this caused its investigation to be insufficient. The disciplinary allegation did not arise from a complaint from young persons I, R, R2 or other young persons. It arose from Mr Keats’ email, the SOSHI report and the reviews of the CCTV footage. Appropriately, OT did not attempt to involve the young people. I note also that young person I was no longer in OT’s care when the disciplinary investigation was initiated. Young person I was only involved in the investigation through consideration of the notes made at the time of

I's admission to secure care immediately after the incident. That note was appropriately disclosed to Mr Church and he responded. No further investigation was required.

[42] Putting aside the point about staff interviews, which I consider later, OT did sufficiently investigate its concerns.

Did OT raise its concerns with Mr Church before dismissing him?

[43] Mr Church refers to expert opinions about the incident were sought before any concern was raised with him, and the passage of three weeks before her was made aware of concerns.

[44] The incident was on Saturday 29 June and the disciplinary process was initiated by the Tuesday 16 July letter, received Thursday 18 July, less than three weeks later. An employer, acting fairly and reasonably, could have taken that amount of time to come to the view that there were concerns about Mr Church's conduct that needed to be raised with him in a disciplinary process.

[45] Mrs Williams properly sought expert reviews on Mr Church's use of restraint on young person I, as shown in the CCTV footage. Mrs Williams properly sought HR advice and assistance over concerns arising from Mr Keats' email, the SOSHI report, the CCTV footage and the reviews. These steps took time to complete. No prejudice arose for Mr Church by reason of the time taken to complete these steps.

[46] The concerns are comprehensively set out in the 16 July letter. The concerns were fully raised on 26 July, and again in the preliminary decision letter. They were raised during the 22 August meeting. Documents relevant to the concerns were properly disclosed.

[47] I find that OT did raise its concerns with Mr Church before dismissing him.

Did OT give Mr Church a reasonable opportunity to respond to its concerns before dismissing him?

[48] There is a submission that the investigation was of a "rushed nature", taking two weeks from its commencement on 16 July until the preliminary decision conveyed in the 2

August letter. That mis-states the duration of the opportunity to respond to concerns. Under the supporting guidelines, the OT disciplinary process is not ended by the release of a preliminary decision. An employee must be given an opportunity to respond to it. Mr Church was given that opportunity and not dismissed until 29 August.

[49] There is a submission that the CCTV footage does not recreate the verbal interplay and increasing tension during the shift and that co-workers should have been involved in the investigation. The CCTV footage is video only.

[50] On 26 July Mr Bryce several times voiced disappointment that other staff who were present had left Mr Church to deal with the matter. Mr Church explained that it was young person R2 who threatened to “smash” young person I and young person R2 swearing at young person I that caused him to either control young person R2 or follow young person I. The young persons had become frustrated while walking back to the unit.

[51] Ms Schulz’s notes do not record Mr Bryce asking that other staff be interviewed, but Mr Bryce’s notes do record that. Mr Bryce’s notes also record Ms Williams’ response as “We will interview who we think is necessary”. Mr Bryce asked during the 1 August suspension meeting about the whereabouts of the interviews with all the staff. Mr Bryce in his 2 August email to Mr Caldwell said that NUPE had previously requested staff interviews, sought an explanation of why that had not happened and referred to the need for context. I take from the exchanges that it was clear to OT by 1 October at the latest that Mr Church wanted it to interview other staff who were present as part of its investigation. The purpose was to give context to Mr Church’s explanation for his actions on 29 June.

[52] I will summarise the statements from the other staff. Mr Teata signed a copy of the SOSHI report that he had drafted. There is also his statement that Mr Keats had said at the de-brief that there was nothing wrong with the incident and the restraint. Mr Teata considered no staff used excessive force and the restraint was executed mindful of the safety of all involved. Mr Greig responded to a call and when he arrived at the unit, two staff (including Mr Church) had young person I restrained in the dining room area. He became involved in the restraint when Mr Church “swapped out”. Mr Smith came into the unit several minutes after others, noticed that the young persons were quite “bubbly”. Mr Church was trying to get

the water bottle off young person I, who refused. Mr Church “has gone to grab the bottle”. Things became “heated”, Mr Smith came from the side of young person I to assist. The young person became very angry with Mr Church and attempted a head butt and (Mr Smith thought) had tried to spit at Mr Church. Mr Smith noticed the “low level hold” turn to a “medium hold”. This resulted in the young person being taken to the ground. Mr Gray’s recollection was that the young person was already on the ground when he arrived. Another staff member said he had no recollection of the incident. Mr Timpson considered that the residents were being “silly” with water bottles, while walking back to the unit. He was radioed by Mr Church, so got the bottle off young person R successfully. Mr Church was struggling to get the bottle of young person I. Young person R2 became frustrated and said “I’ll get the fucking bottle” and advanced towards young person I. Mr Timpson did not recognise the severity of the situation and did not engage to support. Mr Church initiated a restraint to remove the bottle to resolve the situation but the young person resisted. Because he saw other staff moving to support, he moved the other residents to another room. He did not see anything more of the restraint. While Mr Keats spoke at the de-brief and said he had viewed the CCTV footage, Mr Timpson did not recollect any issue in the restraint being raised then. Maria Prescott said that young person I had become “heightened” as he returned to the unit. Mr Church asked for the bottle and for others to move to the TV room. Ms Prescott and Mr Church followed young person I, to avoid heightening others. Young person R2 said he would take it if staff could not, jumped across the table and pursued young person I. Mr Church moved closer and the other young person told him to take the water bottle. “Hands were laid on the YP as Church proceeded to move the bottle”. As the young person fought back, a restraint hold was then put on the young person and a code was called.

[53] Mr Lavery recounted what he had seen on the CCTV footage at the time of the incident. He describes Mr Church as putting his hands on the young person in a “wrap around arm restraint – looks like a Bear Hug”. There was a struggle, with the young person attempting a head-butt. Mr Lavery considered that Mr Church had used the force necessary to restrain the young person and had not used an unsafe restraint. Mr Lavery considered there was a time delay before other staff assisted in the altercation. Mr Church was then assisted by two staff and the young person was “taken to the floor” by all three. Mr Lavery qualified his

account because he had no audio of the incident. He regarded it as of “a low to moderate” level. He noted no medical attention was required by the young person.

[54] These accounts were provided after Mrs Williams had reached her preliminary decision, based on the SOSHI, the two reviews, the CCTV footage and Mr Church’s responses. I will summarise the 2 August preliminary decision.

[55] Mrs Williams did not accept that Mr Keats had told Mr Church at the time that his holds were acceptable. Mrs Williams did not understand, given the stringent guidelines in regulation 22, how Mr Church was justified in placing hands on young person I when he was claiming to stop the actions of young person R2. Mrs Williams did not understand how that action would make young person I safe. She thought young person I’s safety was compromised by Mr Church’s action. Mrs Williams did not consider there was anything occurring that should have resulted in a physical restraint on young person I. Quite apart from that, Mrs Williams considered that the holds used were outside of permitted holds. A hold to the head or neck is not permitted. Mrs Williams considered that Mr Church had sufficient control, so that the young person should not have been taken to the ground. Nothing authorises twisting a person’s arm up their back and OT could not condone Mr Church’s hand on the side of the young person’s face holding the head to the ground.

[56] OT in investigating the allegations had not considered it necessary to interview or seek statements from other staff. Those staff were not the source the OT’s concerns. Releasing the preliminary decision reached by Mrs Williams on OT’s concerns gave Mr Church a reasonable opportunity to respond by asking it to interview other staff. OT agreed to do so. I place no significance on the timing of the request to interview other staff and when OT acted on it. Nothing was lost for Mr Church, just because Mrs Williams had disclosed her preliminary view by the time OT sought staff statements. Rather, Mr Church was put in the position where OT gave him a greater opportunity to respond to its concerns because he then had the opportunity to use the views of other staff to support his explanation.

[57] OT’s preparedness to defer a decision and to seek the views of other staff reinforces the finding earlier about the sufficiency of its investigation into the allegations.

[58] There was then a further disciplinary meeting on 22 August. I summarise the meeting. Mrs Williams explained its purpose. She asked Mr Bryce if there were any questions regarding the material provided (including the staff statements). Mr Bryce said “no”. Mr Bryce referred to several procedural concerns. He acknowledged that OT had responded to the earlier concern about Mr Williams being involved alongside Mrs Williams, but said that using the same person as the investigator and the decision maker is contrary to OT disciplinary policy. Mr Bryce mentioned several date errors.² Mr Bryce challenged Ms Schulz’s view that OT would not accept a statement from Mr Lavery because he had been Mr Church’s support person at the suspension meeting. Mr Bryce mentioned the steps he had taken to get other staff interviewed. Mr Bryce expressed doubt about an earlier statement from Mr Williams that there were no other issues.³ Mr Bryce offered to copy his list of procedural concerns. He apparently did not, but nothing turns on that.

[59] Mr Bryce then moved to substantive matters. He said that Mr Church had done more than 50 restraints without complaint during his employment and had been moved to units where there had been a risk of violence to stop it happening. He had received a wage increase on 15 July due to the quality of his work. Mr Bryce said that there was a lack of support from other staff during the restraint. He noted that Mr Keats arrived as the restraint was ending. Mr Bryce said that Mrs Williams was procedurally incorrect to prepare the preliminary decision without witness interviews having been done or provided to Mr Church. He said that it was the response team, not Mr Church, who had the young person’s arms twisted up the back. Mr Church came back in and had the young person’s arm in that position for only three seconds before holding it out sideways. Mr Bryce said it was customary practice on the site that restraints include holds outside STAR holds. He said that Mr Church had not used a wrist lock, but two others had. Mr Murphy’s review did not claim that Mr Church had used a wrist lock. Mr Church had not kneeled on the young person’s back. Mr Bryce referred to an unrelated, earlier situation where a judge had commented favourably on a restraint that was not STAR approved.⁴ Mr Bryce said that Mr Church had re-established a rapport with the

² The errors were typographical and their existence is immaterial. The dates of events were (and are) not disputed.

³ There is no reason to doubt Mrs Williams’ evidence that the other matter was not part of the reason for her decision to dismiss Mr Church.

⁴ Mr Caldwell interjected that it was before STAR was introduced. There is no evidence to suggest otherwise. There is no evidence to support tolerance or acceptance of non-STAR methods.

young person after the incident. Mr Church had maintained composure on site, just as he did during the incident. Mr Bryce said the restraint was not to remove the water bottle but in response to being assaulted. Mr Bryce repeated that Mr Church had not held the young person's arms up his back. Mrs Williams asked to hear directly from Mr Church but Mr Bryce said that they had given their response. He urged Ms Williams to look again at the CCTV footage. There was then an adjournment.

[60] The meeting resumed and Mrs Williams repeated that the other matter (raised by Mr Williams) was not part of the present process. She confirmed that Mr Church was responding only through Mr Bryce, but expressed a preference for a conversation with Mr Church so that they could interact and engage. Mrs Williams said that there had been no clear response to the preliminary decision. Mr Bryce repeated that Mr Church had not held the young person down with arms up the back, it was not Mr Church who held his knee in the young person's back, and that it was not Mr Church who used a wrist lock. That was Mr Church's response to the preliminary decision.

[61] I find that OT gave Mr Church a reasonable opportunity to respond to its concerns through the 22 August meeting and earlier.

Did OT genuinely consider Mr Church's explanations before dismissing him?

[62] The following submissions are made. OT had a duty to consider alternatives to dismissal. Reference is made to OT's guidelines and a general duty to be fair and respond proportionately. The key to misconduct here is the subjective view of Mr Church in using force against the young person. OT should have identified that and investigated any reason for him wrongly (if he was wrong) thinking that his use of force was justified.

[63] OT's consideration of Mr Church's explanation can be assessed from the 29 August dismissal letter. I will summarise relevant parts.

[64] OT summarised the procedural issues that Mr Bryce had raised. Mrs Williams stated that OT had no record (by reference to its meeting notes) of a request having been made for other staff to be interviewed until during the suspension meeting. The final disciplinary

meeting was deferred to allow for statements by other staff. Other procedural issues had been addressed during the 22 August meeting.

[65] Mrs Williams withdrew the part of the allegation in relation to use of the “hammer hold” and “wrist lock”. Mrs Williams observed that Mr Church had not addressed Mr O’Brien’s review or given a reasonable explanation of why he commenced a physical response. Mr Church’s explanation was that young person R2 was a threat. He had not said that young person I was a threat. If young person R2 was a threat, Mr Church should have dealt with that person, not young person I who was already subject to unacceptable attention from young person R2. Mrs Williams noted that physical contact should always be the last resort. She was concerned that Mr Church had not attempted to explain what alternatives to the use of physical force he had considered.

[66] Mrs Williams expressed conclusions. Mr Church was attempting to remove the water bottle from young person I, as that had been his focus from earlier. Mrs Williams considered there was no cause for Mr Church to initiate physical contact with the young person. The explanation that Mr Church did this to stop unsafe behaviour by another young person was not permissible under Regulation 22 and OT’s policies. Mr Church’s physical contact of young person I resulted in the safety and security of that young person being severely compromised and a physical restraint that should never have occurred. Although Mr Church said he did not consciously intend to use the young person’s head or neck in a restraint, the CCTV footage showed that he had, more than once. OT was not permitted to use holds involving the head or neck. Mrs Williams did not condone Mr Church placing his hand on the side of the young person’s face, holding the young person to the ground.

[67] Mrs Williams said that restraint of a young person in breach of guidelines amounted to serious misconduct. Mr Church had breached OT’s code of conduct, values and Regulation 22. Mrs Williams considered that summary dismissal was the appropriate disciplinary outcome.

[68] I return to the submission that Mrs Williams did not consider alternatives to dismissal. OT’s policy provides that disciplinary action will be in proportion to the disciplinary issue, taking into account circumstances and any mitigating factors. I was not referred to any

specific provision in the policy or supporting guidelines that mandates OT to consider alternatives to dismissal if serious misconduct is established. However, I accept that an employer committed to proportionate action, in acting fairly and reasonably, would consider alternatives. In her 2 August 2019 letter, Mrs Williams stated that she had considered the appropriate disciplinary outcome, including alternatives to dismissal, based on the context and the mitigating factor given in explanation, but concluded that summary dismissal was appropriate. Mrs Williams referenced this in her 29 August letter. In evidence, Mrs Williams said that as a final warning had not been proposed, she did not consider that as an outcome. The evidence given in November 2020 must be understood in the context of the letters written at the time. A form of warning had not been proposed on Mr Church's behalf, before or after the preliminary decision. Rather, the explanation was that his use of force was warranted, when understood in context. That explanation was maintained, in response to the preliminary decision. There was no reason for Mrs Williams to revisit her preliminary decision that an alternative to dismissal was not appropriate.

[69] I refer to the submission that the key to whether there was misconduct here was Mr Church's subjective view that his use of physical force was reasonably necessary. I deal with a different aspect of this elsewhere. However, for present purposes, Mr Church (and Mr Bryce) explained why he initiated physical contact with young person I. Mrs Williams formed the view that it was not permissible under the Regulations and OT's policies. Mr Church did not advance as an explanation that he might have been mistaken in his view of what was permissible under the Regulations and policies in the circumstances. To establish justification, OT does not need to show it "genuinely considered" that Mr Church made an error of judgment, as that explanation that was not advanced.

[70] Mrs Williams did not accept the assertion that Mr Keats had endorsed Mr Church's actions shortly after the incident. Shortly before the de-brief, Mr Keats viewed the CCTV footage and sent the email. His attitude at the time is apparent from his comment on the first part of the interaction: "Anyway an attempt was made to get the bottle leading to a tussle which wasn't good, the young man tried to assault staff. (all over a water bottle)". According to his statement, during the disciplinary process, Mr Keats did not endorse Mr Church's actions at the de-brief or later. It would have been inconsistent with his initial view, if Mr

Keats had endorsed Mr Church's actions. There is some support for Mr Church's contention in the statements by other staff. However, Mrs Williams' actions in preferring Mr Keats' account were what a fair and reasonable employer could have done in the circumstances.

[71] Mrs Williams was not persuaded that the views expressed by the other staff should have caused her to not accept the two reviews based on the CCTV footage. Mrs Williams preferred the independence of the reviews. That too was a decision that a fair and reasonable employer could have reached.

[72] Overall, there is no reason to doubt the picture that emerges from the 29 August letter. Ms Williams gave consideration to the explanation given by and on behalf of Mr Church during the disciplinary meetings. I find that OT genuinely considered Mr Church's explanation, prior to dismissing him.

Other appropriate factors

[73] It is not necessary to separately consider any other factors.

Were OT's actions and how it acted at the time what a fair and reasonable employer could have done in the circumstances?

[74] OT was permitted under the applicable employment agreement to terminate employment if serious misconduct was confirmed. The disciplinary policy included a definition. Serious misconduct is unacceptable conduct that undermines, damages or destroys the trust and confidence that Oranga Tamariki must have in an employee to enable the employment relationship to continue. Examples are given: an action that results in, or may have resulted in, harm to a young person in OT's care; serious breach of policy or procedure; and conduct or behaviour that results in, or may have resulted in, personal injury to others.

[75] Mrs Williams held delegated authority to deal with the investigation and to make the decision in the disciplinary matter. An issue about the involvement of Mr Williams was resolved by him not continuing to be involved. Mr Caldwell returned to work part-way through, but Mrs Williams remained the decision-maker. Considered objectively, these were actions which a fair and reasonable employer could have taken at the time.

[76] An issue is made about Mrs Williams being both investigator and the decision-maker. The supporting guidelines include the statement that in complex or serious matters, the investigator and decision maker tend to be different people. The guidelines indicate that an investigation report would then be prepared, expressing findings about what probably occurred, with reasons for those conclusions. A disciplinary process might then follow. However, under the guidelines, an investigation separate from a disciplinary process is not always required. Here, based on Mr Keats' email and the SOSHI report, Mrs Williams sought two reviews of the CCTV footage. Given those, Mrs Williams decided to initiate a disciplinary process. No separate investigation was required. These were actions which a fair and reasonable employer could have taken at the time.

[77] Mrs Williams was inexperienced in the role of decision maker in disciplinary processes. However, Mrs Williams had worked for OT for about 15 years at the time and understood the working environment. The incident occurred while she was manager. Mrs Williams had access to HR advice. Vesting Mrs Williams with responsibility as the decision maker was what a fair and reasonable employer could have done in the circumstances.

[78] Use of force in dealing with young persons is a last resort in any interaction at OT. That is consistent with the statutory provision that no member of staff shall use physical force in dealing with a young person, absent reasonable grounds for believing that use of physical force is reasonably necessary in specific situations. It is supported by OT's values and code of conduct. STAR is a de-escalation model of intervention that reinforces physical force as a last resort. Mr Church (and other staff) received instruction in STAR as well as training in the legal restrictions on the use of force when dealing with young persons.

[79] I return to the submission that the key to misconduct is the subjective view of Mr Church. I do not accept that submission. The Regulation requires belief based on reasonable grounds that use of physical force is reasonably necessary, for one of the purposes specified. That grounds for the belief need to be reasonable, necessarily imports an objective standard. I must assess OT's actions and how it acted objectively. OT formed the view that there were no reasonable grounds to initiate the use of physical force in defence of, or to protect from injury young person I, when the only source of harm might have been another young person. Absent objectively reasonable grounds, OT formed the view that Mr Church's actions

breached Regulation 22. OT's actions and how it acted were what a fair and reasonable employer could have done at the time.

[80] Mrs Williams' conclusion arose from the two reviews. She was entitled to rely on their expertise and independence and prefer the reviews to the views of staff. I accept that Mr Murphy had seen both camera angles, while Mr O'Brien had seen only one camera angle. Mr Murphy in his review concluded that grounds under Regulation 22(1)(a) only arose during the struggle at the kitchen door, not when Mr Church initiated the use of force. Similarly, Mr O'Brien in his review considered that there were no sufficient grounds for force to be initiated. I accept Mr O'Brien's evidence that the second angle would not have altered his conclusion. I have viewed the CCTV footage from both angles. Viewing from both angles does not significantly alter an understanding of the event. It reinforces Mrs Williams' conclusions expressed in the 29 August letter.

[81] Several additional matters should be mentioned. Mr Bryce said in evidence that he had received all relevant documents from OT by 22 August. Ms Schulz's typed notes of the 26 July meeting might not have been provided until later, although her hand-written notes made during the meeting were provided. No unfairness arises from this. Mr Church understood clearly what concerned OT and its response to his explanations as matters developed. Mr Church expressed concern about a letter being delivered to his home address. However, delivered letters were in sealed envelopes and there is nothing to suggest the staff member knew their content. Additionally, during the process, Mr Church through Mr Bryce directed that communication be sent to Mr Church, not to Mr Bryce. Mr Church did not have personal email access at the time, so OT was asked to deliver letters to his home address. Again, no unfairness arises from the method of communication.

[82] OT refers me to *The Chief Executive of the Ministry of Social Development v Ma'Auga Tuilaepa*.⁵ The employee's conduct in that case was more serious than Mr Church's conduct. However, the case acknowledges the use of CCTV footage as part of an employer assessing whether an employee has complied with the limits on use of force in dealing with young persons. It is an example of serious misconduct arising from the breach

⁵ *The Chief Executive of the Ministry of Social Development v Ma'Auga Tuilaepa* [2017] NZEmpC 84.

of regulation 22. Referring to the behaviour as also comprising a breach of the code of conduct does not overstate its seriousness.

[83] OT's actions in respect of these reviews and how it acted were what a fair and reasonable employer could have done at the time. I find that OT was justified in its decision to dismiss Mr Church. The unjustified dismissal personal grievance claim must be dismissed.

Costs

[84] I am asked to reserve costs. If not agreed and either party seeks a determination on costs, they may lodge and serve a submission within 14 days. The other party may lodge and serve a reply within a further 14 days. Costs will then be determined based on those submissions.

Philip Cheyne
Member of the Employment Relations Authority