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**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2022] NZERA 187
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: 20 and 21 April 2022 at Christchurch

Date of Determination: 6 May 2022

DETERMINATION OF THE AUTHORITY

- A. The claim is dismissed.**
- B. Costs are reserved, in accordance with the timetable set out below.**

Employment relationship problem

[1] Stephen Baillie worked as a Youth Worker for Oranga Tamariki at Te Puna Wai o Tuhinapo (OT) in Christchurch. Following an incident on 3 April 2021 and a disciplinary investigation, Mr Baillie was summarily dismissed on 1 September 2021.

[2] Mr Baillie says he was unjustifiably dismissed. He raised his personal grievance on 2 September 2021 and commenced this action soon after. Mr Baillie succeeded in the Employment Court with a claim for interim reinstatement.¹ This determination resolves Mr Baillie's personal grievance claim seeking permanent reinstatement, reimbursement of lost wages and benefits and compensation.

[3] Oranga Tamariki says it justifiably dismissed Mr Baillie following a disciplinary investigation and its conclusion that Mr Baillie's actions on 3 April amounted to serious misconduct. If OT is found to have unjustifiably dismissed Mr Baillie, it says that it is not reasonable for Mr Baillie to be reinstated.

The Authority's Investigation

[4] Much of what happened is not in dispute. The Authority's investigation was significantly assisted by the parties' cooperation, including the preparation of an agreed bundle of relevant material. The following outline is just for some context.

[5] Mason Peteru was acting residence manager. The 3 April incident came to his attention, he looked at CCTV footage, proposed suspension and then met with Mr Baillie before suspending him pending the outcome of the disciplinary investigation. Mr Peteru wrote to Mr Baillie setting out alleged serious misconduct and then met with him. The meeting was adjourned. There was a second meeting. Mr Baillie also provided additional written responses to the allegations. Mr Peteru interviewed the 3 April shift leader and sent notes of the interview to Mr Baillie. Mr Peteru then sent a preliminary decision letter to Mr Baillie. There was a further meeting. Mr Baillie also provided some written responses. Mr Peteru set out his conclusions about serious misconduct and Mr Baillie's summary dismissal in his 1 September 2021 letter.

¹ *Baillie v The Chief Executive of Oranga Tamariki – Ministry For Children* [2022] NZEmpC 21.

[6] In addition to the documents, letters, emails, notes, transcripts and CCTV footage collated by the parties, I heard evidence from most of those involved in the events. Counsel helpfully emphasised points in their submissions, drawing my attention to important parts of the information and evidence to assist with the application of the statutory test for justification for the dismissal. However, in what follows, I will not set out a record of all the evidence and submissions.

Test of justification

[7] I need to assess on an objective basis whether OT's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. In applying this test, I must consider specified issues but I may also consider other appropriate factors. A dismissal is not unjustified solely on the basis of defects in the process followed if those defects were minor and did not result in the employee being treated unfairly.

[8] I am referred to *Angel v Fonterra Co-Operative Group* for a discussion about the significance of a finding of serious misconduct.² The Court at [73] referred to 2004 statutory changes, confirming the need to evaluate an employer's views against an objective standard. The Court noted at [75] that serious misconduct is the most serious breach of the employment relationship, likely to result in the most serious outcome of dismissal because if the relationship is deeply impaired or destroyed it is untenable. However, *Angel* does limit serious misconduct only to "intentional, wrongful and deliberate behaviour" as submitted for Mr Baillie.

[9] I need to objectively assess whether the decision and conduct of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.³ That involves first determining:⁴

...as matters of fact, what the employer did leading to the employer's dismissal ... of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions, that led to the dismissal ... , if the facts about material events are disputed.

² *Angel v Fonterra Co-Operative Group* [2006] ERNZ 1080.

³ *De Bruin v Canterbury District Health Board* [2012] NZEmpC 110.

⁴ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160 at [57].

[10] The events of 3 April were disputed through the disciplinary process and in evidence. I turn to those first.

What happened on 3 April?

[11] A resident (who will be identified as YP) was in a room alone, using a portable speaker connected to OT's phone system to speak to his girlfriend. YP⁵ opened the door and had an exchange with Mr Baillie about wanting his trackpants. Mr Baillie's evidence is that as he walked past the open door YP demanded he get him "some fucking trackpants too", to which he told YP not to speak like that to him and that YP was not going to get any trackpants. As Mr Baillie walked on, he heard YP say to his girlfriend he going to smash his "fucking face in" or something to that effect. YP states that Mr Baillie heard him through the closed door saying to his girlfriend "I feel like punching him".

[12] There is no reason to doubt Mr Baillie's description of this initial exchange.

[13] The CCTV footage in evidence is from two cameras in the room, without sound. The available footage does not include the foregoing exchanges.

[14] The first footage shows Mr Baillie opened the door and came into the room. The shift leader (Andy Rowe) also entered the room but remained near the open door. Mr Baillie's evidence is that YP "stepped up towards me as I was speaking to him". However, the footage shows YP on the opposite side of the room facing away from the door. YP turned towards the door when it was opened, Mr Baillie walked directly towards YP while YP took several steps towards the approaching Mr Baillie.

[15] Mr Baillie is shown close to and facing YP, speaking to him for about fifteen seconds. Mr Baillie turned and left the room, followed by Mr Rowe. YP moved back and appears to sit down. Mr Rowe shut the door.

[16] Although there is no CCTV footage, it is common ground that after Mr Baillie and Mr Rowe had left the room, YP threw the portable speaker across the room and picked it up again. Mr Baillie and Mr Rowe re-entered the room. There is footage from the two camera angles. YP is furthest from the door, on a cushion on the floor against the wall. Mr Baillie is

⁵ YP did not give evidence. He wrote a complaint on 4 April 2021 and is seen on CCTV footage. This account draws on that information. An order made earlier prohibits the publication of YP's name.

standing next to the edge of the semi-circular large cushion. Mr Rowe is in the room but by the open door. Mr Baillie spoke to YP for less than 30 seconds and then turned to Mr Rowe. It is common ground that Mr Baillie asked Mr Rowe to cut off YP's phone call. Mr Rowe left the room. Mr Baillie reached down towards YP, putting one foot onto the cushion. YP kicked Mr Baillie. Mr Rowe re-entered the room. Mr Baillie and Mr Rowe physically restrained YP. A third staff member came into the room and took Mr Baillie's place in the restraint. Mr Rowe and the third staff member physically escorted YP from the room.

The employer's actions - suspension

[17] The event was logged as a security incident. YP wrote a complaint about Mr Baillie. Mr Peteru was notified of the complaint and viewed the CCTV footage. That led to the letter proposing suspension "while formal employment processes are undertaken" being given to Mr Baillie. There was a meeting on 8 April. Mr Rowe as union delegate attended the meeting with Mr Baillie. The full CCTV footage was shown as part of considering suspension. After hearing Mr Baillie's response, Mr Peteru decided to suspend him on pay.

[18] Some points are made about the decision to suspend Mr Baillie rather than allocating him alternative duties, about how Mr Baillie was given the proposal letter and about the conduct of the 8 April meeting. The points lack merit. OT has clear procedures governing when suspension can be proposed and how managers should deal with that process. The nature of the concerns allowed for suspension. Mr Peteru dealt with the matter in a fair and reasonable manner in accordance with those procedures. Mr Peteru sought advice appropriately. I mention two specific points.

[19] Mr Baillie says that the CCTV footage shown on 8 April was stopped on an image of him with his "hand closed". Mr Baillie says the image was viewable "by anyone walking past", causing him distress. He says displaying it indicated bias. However, I accept Mr Peteru's evidence about the layout of the room and screen. No-one was likely to have seen the image while "walking past". The image was part of the basis for Mr Peteru's concerns. Displaying it in the circumstances then did not demonstrate bias.

[20] Mr Baillie did not receive a letter confirming the suspension decision at the time. However, it is common ground that Mr Peteru told Mr Baillie the reasons for the suspension at the end of the 8 April meeting. Les Bryce was NUPE's organiser who represented

Mr Baillie during some of the disciplinary process. Mr Bryce later asked Mr Peteru to reconsider alternative duties in place of the suspension. Mr Peteru confirmed that the suspension would continue. I accept that Mr Peteru properly considered, reconsidered and explained whether suspension was appropriate.

The employer's actions – sufficiency of the investigation

[21] OT is a large, state employer with resources to support the highest standard of disciplinary investigation when considering alleged serious misconduct by an employee. OT needed to be mindful that its outcome might limit Mr Baillie's future employment opportunities. Although Mr Baillie was not a regulated professional who might also be at risk of professional disciplinary consequences,⁶ OT was obliged to fully investigate its concerns and allegations.

[22] Several points merit specific consideration.

[23] There was a malfunction in OT's CCTV system on about 27 April so the original CCTV footage shown to Mr Rowe and Mr Baillie as part of the suspension was no longer available. However, Mr Peteru had recorded excerpts on his work phone when seeking HR advice about proposing suspension. The phone recording was made available for Mr Bryce and Mr Baillie to view at several points. Mr Bryce raised a concern during the disciplinary process about different footage. Mr Baillie's evidence is that the CCTV footage now in evidence differs from the phone recording excerpts he first saw. However, I prefer Mr Peteru's evidence that he recorded all relevant footage on his phone, the footage now in evidence is his original phone recording and the same footage was made available to Mr Baillie during the disciplinary process. It is not suggested that the original CCTV footage would have provided better support for Mr Baillie's explanation. Despite the loss of the original CCTV footage, OT sufficiently investigated its concerns.

[24] Mr Peteru did not interview YP as part of the disciplinary investigation. As matters developed, Mr Peteru decided that he did not need to reach a view about what specifically Mr Baillie had said to YP during the exchanges. As a result, it was not necessary for OT to interview YP to properly investigate its concerns about Mr Baillie's conduct.

⁶ Such as a registered nurse for example – see *De Bruin* n 3.

[25] Mr Rowe was present for most of Mr Baillie's interaction with YP. Mr Rowe as NUPE delegate participated during the 8 April suspension meeting. He saw the full CCTV footage then. He was also present at the 31 May disciplinary meeting and the 10 June 2021 reconvened disciplinary meeting. In an email on 15 June NUPE's secretary (Janice Gemmell) asked Mr Peteru to interview Mr Rowe. Ms Gemmell had raised that point on 10 June and it was included in a written response provided by Mr Baillie after the meeting. Mr Peteru decided to interview Mr Rowe. The interview was on 8 July. Mr Rowe (with consent) recorded the interview and provided the recording to Mr Baillie but not OT. However, Mr Peteru had made bullet point notes of the interview. I accept Mr Peteru's evidence that Mr Rowe confirmed the accuracy of his bullet points. Mr Peteru copied them to Mr Baillie and Mr Bryce on 14 July.

[26] In evidence, Mr Baillie says that the bullet point notes did not include questions "so did not make much sense". I was not taken to any part of Mr Peteru's bullet points and the transcript of Mr Rowe's interview to support Mr Baillie's evidence on this point. A participant in the ongoing disciplinary process is likely to have understood the bullet points, without questions being noted. In any event, Mr Baillie had the recording of the interview, so only needed to listen to the recording if the bullet points did not make sense.

[27] Given Mr Rowe's participation in the disciplinary process including on 10 June 2021, there was no deficiency in OT's investigation by him not being separately interviewed until July 2021.

[28] OT's policy states "In complex or serious matters, the investigator and decision maker tend to be different people". NUPE asked OT to separate the roles. Ms Gemmell's evidence is that "OT appeared to have agreed to do so in the 10 June meeting but reneged on that". However, the transcript records OT several times during the meeting maintaining the position that Mr Peteru would perform both roles. It was open to OT under the applicable policy to proceed on that basis. Doing so did not undermine the sufficiency of OT's investigation.

OT raised its concerns with Mr Baillie

[29] On 3 May, Mr Peteru raised the following concerns. It was alleged that Mr Baillie displayed aggressive and intimidating behaviour to YP by squaring up to him and having his face within inches of YP's face. Mr Baillie appeared to be in the "red zone" as per STAR

guidelines. Mr Baillie appeared to poke YP in the chest a couple of times. Mr Baillie appeared to get into a sideways stance with his right hand clenched in a fist, suggestive of preparing to punch YP. Mr Baillie appeared to stand over YP who was sitting, before moving in on top of him. Two other staff escorted YP from the room. This appeared to be unprovoked. Mr Baillie inappropriately restrained and contacted YP while he was sitting, which appeared to be unjustified. Mr Baillie appeared to be taunting YP, urging YP to punch him, threatening loss of privileges and calling him a “typical drug addict”.

[30] The concerns arose from YP’s complaint and the CCTV footage. Mr Baillie’s actions were potentially in breach of statutory regulations, OT’s code of conduct, OT’s disciplinary policy and the employment agreement. Relevant material was provided or referenced.

[31] OT’s policy provides that the decision maker will “generally” reach a preliminary decision whether there has been a breach of obligations amounting to misconduct or serious misconduct and the appropriate sanction. OT must advise the employee of its preliminary decision and give them an opportunity to comment before a final decision is made. On 28 July 2021, Mr Peteru provided a “preliminary decision” setting out reasons and findings regarding the concerns.

[32] The allegation of aggressive and intimidating behaviour, squaring up, face within inches and being in the “Red Zone” was substantiated. The allegation of poking YP in the chest was unsubstantiated. The allegation of being in a sideways stance, clenched fist and position suggestive of preparing to punch YP was substantiated. The allegation of standing over YP before moving in on top of him, two other staff escorting him from the room with that being completely unprovoked was substantiated. The allegation of inappropriately restraining and contacting YP without need or justification was substantiated. The allegation of taunting YP, urging him to punch Mr Baillie, threatening loss of BMS and calling him a “typical drug addict” was partly substantiated. Mr Peteru considered that Mr Baillie’s action breached the regulations and amounted to serious misconduct under the code, policy and employment agreement, for which the appropriate sanction was summary dismissal.

[33] Further exchanges with and for Mr Baillie followed the preliminary decision. In the 1 September 2021 dismissal letter Mr Peteru restated reasons and findings.

[34] In summary, OT in its correspondence and in meetings raised its concerns, before it dismissed Mr Baillie.

[35] Counsel submitted that OT did not fully raise its concerns with Mr Baillie before the dismissal. The point is based on the emphasis in OT's evidence placed on Mr Baillie not taking "ownership" for his actions. The submission is that this should have been specifically included in the preliminary decision letter.

[36] The evidence of OT's concern about Mr Baillie not taking ownership of his actions is essentially a response to the reinstatement claim by Mr Baillie, rather than a separate allegation or concern advanced by OT as justification for the dismissal. In any event, the view that Mr Baillie had not taken ownership for his actions was implicit in the reasons given by Mr Peteru in his preliminary decision letter for not accepting Mr Baillie's explanations with respect to specific allegations. To the extent that Mr Baillie's explanations gave rise to the view that he had not taken "ownership" of his actions, it was put to Mr Baillie ahead of the decision to dismiss.

[37] I find that OT raised the concerns it had with Mr Baillie before dismissing him.

OT gave Mr Baillie a reasonable opportunity to respond

[38] Mr Peteru interviewed Mr Rowe on 8 July and sent the bullet point notes to Mr Bryce on 14 July. As part of that email, Mr Peteru said that Mr Baillie had "until 5pm on Monday the 19th July" to provide any feedback, prior to him forming a preliminary decision. Mr Peteru received no response.

[39] On 27 July, Mr Peteru again sent an email to Mr Baillie, Mr Bryce and Ms Gemmell. The email sought any feedback in response to Mr Rowe's interview notes by midday Friday 30 July, prior to him forming a preliminary decision. Sally Sim is OT's HR advisor. Her evidence is that Mr Peteru sent this email with the later date for a response on her advice. There is no reason to doubt that evidence.

[40] Mr Peteru confirmed in evidence that preparation of the preliminary decision letter started several days ahead of when it was released. The letter was actually sent to Mr Bryce later on 28 July 2021, before the expiry of the later deadline for further comment in Mr Peteru's second email.

[41] It is submitted that Mr Baillie was denied an important opportunity to comment prior to the preliminary decision being made, because of the timing of its preparation and its release before midday on Friday 30 July. It is convenient to deal with the point here.

[42] Responding to the allegation about his clenched fist and adopting a position suggestive of preparing to punch YP, Mr Baillie had attributed it to a natural human response to being kicked. In the preliminary decision letter, Mr Peteru responded to that explanation by saying that he could see no evidence of Mr Baillie being kicked. However, the CCTV footage shows the kick. The submission is that Mr Baillie lost an opportunity to correct that error because Mr Peteru released the preliminary decision before the time given for a response to Mr Rowe's interview.

[43] Mr Rowe was not present when YP kicked Mr Baillie, although he confirmed having seen on the CCTV footage that Mr Baillie clenched his fist briefly. Overall, Mr Rowe's notes added little support to Mr Baillie's contention that he had been kicked. What Mr Baillie lost because of the timing was the chance to repeat his contention that he had been kicked.

[44] In the exchanges that followed the preliminary decision, Mr Baillie repeated that YP had kicked him, referred to the CCTV footage and to the complaint in which YP said he had kicked Mr Baillie. Mr Peteru, in the 1 September dismissal letter, then accepted that the CCTV footage shows that YP "kicked out at you", which was followed by Mr Baillie adopting a sideways stance, right hand clenched in a fist and pulling back that arm. That became part of the factual basis for the final decision that Mr Peteru made on 1 September 2021.

[45] Overall, there is no demonstrable unfairness to Mr Baillie caused by Mr Peteru releasing his preliminary decision ahead of the date given in his second email.

[46] There is evidence and comment to the effect that Mr Peteru and OT initially allowed insufficient time for a response at various points. Mrs Baillie is critical about OT on this and a related point. There is evidence that time was extended in response to concerns raised by NUPE. Counsel did not press the issue in submissions and it is not necessary to canvass the matter in detail. No unfairness to Mr Baillie arose from the short timeframes initially proposed at various points.

[47] I find that OT gave Mr Baillie a reasonable opportunity to respond to its concerns before the dismissal.

OT genuinely considered Mr Baillie's explanations

[48] Mr Baillie's explanation was that he was not aggressive and did not intend to intimidate YP. He wanted to ensure that YP did not self-harm or harm staff. Mr Baillie said that training did not refer to a "Red Zone".

[49] Mr Peteru did not accept Mr Baillie's explanation. He considered that Mr Baillie displayed aggressive and intimidating behaviour towards YP. He accepted that "Red Zone" was not documented, but considered it was used and understood to describe being within a dangerous zone close to a resident. Mr Peteru did not accept Mr Baillie's explanation that he was so close to YP to prevent self-harm or staff harm. I am satisfied that Mr Peteru considered but did not accept Mr Baillie's explanation about this allegation.

[50] Mr Peteru genuinely considered and accepted Mr Baillie's explanation that he did not poke YP in the chest.

[51] Mr Baillie's explanation about his sideways stance, clenched fist and position suggestive of preparing to punch YP was that it was a natural reaction to being kicked and lasted less than a second. Mr Peteru accepted that it followed after being kicked at, but still regarded it as threatening and intimidating behaviour. He did not accept it was a reasonable response to being kicked but considered it indicated a significant lack of judgement and that OT could not trust Mr Baillie to react appropriately in similar circumstances. I am satisfied that Mr Peteru considered but did not accept Mr Baillie's explanation on this matter.

[52] Mr Baillie's explanation in response to the allegation of standing over YP before moving in on top of him ahead of two other staff escorting YP from the room completely unprovoked, was that he went to retrieve the speaker. Mr Baillie said it had a sharp piece of metal on it and could be used for self-harm or to injure someone else. Mr Peteru did not accept that explanation. He concluded that Mr Baillie stood over YP and then moved in on top of him without justification. The speaker had no sharp pieces and nothing suggested YP was attempting to self-harm. Mr Baillie concluded that standing over YP appeared intimidating. There were more appropriate methods to retrieve the speaker safely. Mr Baillie

moved into YP's space, knowing he was in a heightened state. Being kicked by YP was not a valid reason for Mr Baillie to move in on top of him. I am satisfied that Mr Peteru considered but did not accept Mr Baillie's explanation on this point.

[53] Mr Baillie's response to the allegation of restraining and contacting YP without justification was that he and Mr Rowe did the restraint together because Mr Baillie was being kicked. Mr Baillie said that YP had been making threats and his agitated demeanour was the rationale for restraining him. Mr Peteru did not accept the explanation. Mr Peteru did not accept that Mr Baillie had reasonable grounds for believing use of force was reasonably necessary for one of the specified reasons. I am satisfied that Mr Peteru considered but did not accept Mr Baillie's explanation on this allegation.

[54] Mr Baillie denied taunting YP, urging YP to punch him, threatening loss of BMS points⁷ and calling YP a "typical drug addict". Mr Baillie said that he was trying to reason with YP to give him a chance to improve his behaviour and mentioned but did not threaten BMS points. Mr Peteru did not accept Mr Baillie's explanation and concluded that Mr Baillie was taunting YP, but Mr Peteru was not able to determine what specifically Mr Baillie said to YP. I am satisfied that Mr Peteru considered but did not accept Mr Baillie's explanation.

[55] In summary, Mr Peteru concluded that Mr Baillie had displayed aggressive and intimidating behaviour towards YP by squaring up to him with his face within inches of YP's face, physically threatened to punch him, stood over him, inappropriately and unjustifiably restrained YP and taunted him. Mr Peteru concluded this conduct amounted to serious misconduct given applicable regulations and employment obligations. In forming this view, Mr Peteru considered the explanations given by Mr Baillie.

Was serious misconduct a conclusion that a fair and reasonable employer could have reached?

[56] There is a submission that there was insufficient evidence, so a fair and reasonable employer could not conclude that Mr Baillie had inappropriately restrained and had inappropriate contact with YP while sitting down that was unjustified and unnecessary. It is said that there is "confusion" about whether the restraint occurred after the kick or whether

⁷ Behaviour management system.

the kick occurred during the restraint. This is said to be significant as to whether there was a breach of Regulation 22.⁸

[57] Mr Peteru's conclusions rely on the CCTV footage. The 1 September letter in a passage headed "The Kick" stated "when [YP] is laying down on mats, and you start physically to restrain him, [YP] then does kick ..." (my emphasis). Later in the letter Mr Peteru describes the kick as appearing to be "a defensive response because you are moving in on top of him" (my emphasis). Mr Peteru also says "I do not accept that this is a valid reason to move in on top of him" (my emphasis). "This" refers to "you state that he kicked you". Mr Peteru goes on to conclude that the allegation of inappropriately restraining and inappropriate contact with YP while he was sitting down which appears to be unjustified or unnecessary was substantiated.

[58] CCTV footage supports Mr Peteru's view that the kick came after Mr Baillie first stepped in towards YP, who was sitting or lying on the cushion. Mr Baillie stepped back, adopting the stance that is subject to another allegation. Mr Baillie then moved towards YP and Mr Rowe returned to the room. Mr Baillie and Mr Rowe then moved in on YP who was still on the cushion, taking different sides. Mr Baillie was slightly ahead of Mr Rowe in this action. Mr Rowe had told Mr Peteru that Mr Baillie "was already in a restraint" with YP when he returned to the room.

[59] Regulation 22 prohibits use of physical force when dealing with a young person, unless the staff member has reasonable grounds for believing use of physical force is reasonably necessary for one of the specific purposes in the regulation. Mr Peteru's focus appropriately was on whether there were reasonable grounds for Mr Baillie believing that use of force was necessary. He did not accept that there were reasonable grounds for Mr Baillie to believe use of physical force was reasonably necessary to retrieve the speaker or following the kick. The CCTV footage provided Mr Peteru with sufficient evidence for his conclusion that Mr Baillie had inappropriately restrained and inappropriately contacted YP, without justification.

⁸ Oranga Tamariki (Residential Care) Regulations 1996.

[60] Counsel submits that the evidence was such that a fair and reasonable employer could not have concluded that Mr Baillie taunted YP or was aggressive and intimidatory in his behaviour towards YP.

[61] Mr Peteru relied on the CCTV footage to reach the view that Mr Baillie appeared to be taunting YP and that Mr Baillie's behaviour, actions and body language supported YP's written grievance. Mr Baillie had denied the specific details in the written grievance and Mr Rowe had supported Mr Baillie's denial. A fair and reasonable employer could have formed the view that Mr Peteru came to, despite Mr Baillie's denial backed by Mr Rowe. That view was reasonably open on the evidence available.

[62] Counsel submits that Mr Baillie's denial of aggressive or intimidatory behaviour (supported by Mr Rowe) had to fail for lack of evidence. YP had not raised this in his complaint. However, Mr Peteru relied on the CCTV footage for the conclusion that Mr Baillie displayed aggressive and intimidating behaviour towards YP, by "squaring up" to and having his face within "inches" of YP's face and being within the "red zone". A fair and reasonable employer could have formed these views, despite Mr Baillie's denial backed by Mr Rowe and the text of the complaint. It was reasonably open on the information available.

[63] Mr Peteru accepted as part of his decision that "red zone" was not documented in the STAR training manual, but maintained that it was discussed during training, used in practice in the workplace and understood as being in a dangerous area in proximity to a resident. These views were open to a fair and reasonable employer.

[64] Counsel submits that two allegations are not capable of constituting serious misconduct. These are the allegations about Mr Baillie adopting a stance and demeanour that presented as him preparing to hit YP following the kick and standing over YP giving an appearance of intimidating him without provocation while he was on the cushion. The stance is said to be "truly reactive" and standing while a resident lies or sits is not any form of misconduct. However, Mr Peteru concluded that it was never appropriate to simulate a punch and was not a reasonable response to being kicked. He also concluded that Mr Baillie standing over YP appeared intimidating and there were other more appropriate methods to retrieve the speaker. These matters contributed to the conclusion that Mr Baillie's conduct constituted serious misconduct. That view was one a fair and reasonable employer could have reached.

[65] Mr Peteru summarised Mr Baillie's actions as follows:

... you displayed aggressive and intimidating behaviour towards [YP] by squaring up to him with your face within inches of his, physically threaten to punch him, stand over him, inappropriately and unjustifiably restrain him and taunt him ...

[66] Whether a fair and reasonable employer could have concluded this conduct amounted to serious misconduct to justify a decision to summarily dismiss depends on the obligations owed by the employee to the employer.

[67] Oranga Tamariki (Residential Care) Regulations 1996 prohibit a member of staff from using physical force in dealing with a resident, except in limited circumstances. None of the circumstances applied. The statutory obligation was supported by OT's Code of Conduct and the Public Service Commission Standards of Integrity and Conduct. OT's disciplinary policy included as an example of serious misconduct any action that could amount to assault, threatening or intimidating behaviour in the course of carrying out duties. The employment agreement gave contractual effect to the Code and policies.

[68] I find that a fair and reasonable employer could have concluded that Mr Baillie committed serious misconduct. OT's actions and how it acted in dismissing Mr Baillie were what a fair and reasonable employer could have done in all the circumstances at the time.

Other factors

[69] There is a submission that Mr Peteru was a complainant, so should not have been the investigator and the decision maker. Reference is made to the allegation that Mr Baillie poked YP in the chest. YP had not included that allegation in his complaint.

[70] YP's complaint caused Mr Peteru to view the CCTV footage. The footage led Mr Peteru to include an allegation that Mr Baillie had appeared to poke YP in the chest. Mr Baillie denied the allegation and Mr Peteru accepted the denial. No further decision on this aspect was required. Mr Peteru could not properly be regarded as a complainant who decided whether his own complaint was upheld.

[71] After viewing the CCTV footage, Mr Peteru alleged that Mr Baillie's conduct was aggressive. The CCTV footage includes actions by Mr Baillie that can reasonably be characterised as aggressive. YP does not say that Mr Baillie was "aggressive", but the

specific complaints can fairly be characterised in a broad way as “aggressive”. Mr Peteru decided whether he accepted Mr Baillie’s explanation for what could be seen on CCTV and in response to YP’s complaint. In raising OT’s concerns about Mr Baillie’s conduct, Mr Peteru was not the originator of a complaint that needed to be independently investigated or independently determined.

[72] Counsel submits that Mr Peteru failed to consider alternatives to dismissal. As a response to the preliminary decision, Mr Baillie proposed that a letter of expectations and further training in STAR and in communication would be appropriate, if sanction was required.

[73] Mr Baillie had received a letter of expectations in late 2020 arising from his actions during an exchange with other staff. The circumstances were different, but the letter cautioned Mr Baillie that disciplinary action might result if there were further substantiated concerns about his conduct.

[74] It is clear from Mr Peteru’s dismissal letter that he considered lesser sanctions, but came to the view that dismissal was the appropriate outcome.

Summary

[75] Mr Baillie was justifiably dismissed, so his claim must be dismissed.

[76] Costs are reserved. If there is a claim for costs, the party should lodge and serve submissions setting out the grounds for the claim within 14 days. The other party may lodge and serve submissions in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority