

Attention is drawn to the order prohibiting publication of certain information referred to in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 232  
3097933

BETWEEN

**BIGSON GUMBEZE**  
Applicant

AND

**THE CHIEF EXECUTIVE OF  
ORANGA TAMARIKI – MINISTRY  
FOR CHILDREN**  
Respondent

Member of Authority: Philip Cheyne

Representatives: Maxwell Rusero, counsel for the Applicant  
Greg Cain and Katie Alexander, counsel for the Respondent

Investigation Meeting: 14, 15 & 16 February 2022 at Auckland

Further Submissions Received: 22 February, 21 & 29 March 2022 from the Applicant  
21 March 2022 from the Respondent

Date of Determination: 2 June 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Bigson Gumbeze was employed as a social worker by the Chief Executive of Oranga Tamariki – Ministry for Children (OT) and its predecessors but was dismissed in December

2017. Mr Gumbeze says that he was unjustifiably dismissed. OT says it justifiably dismissed Mr Gumbeze following an investigation that caused its manager (Nicolette Dickson) to conclude that Mr Gumbeze’s “actions and social work practice ... amounts to serious and persistent misconduct” making continued trust and confidence in Mr Gumbeze “untenable”.

[2] The proceeding lodged in April 2020 was in the form of an application for leave to raise a personal grievance out of time. In October 2020 Mr Gumbeze lodged an intended statement of problem for his personal grievance claim. I later determined as a preliminary point that Mr Gumbeze had raised his personal grievance claim regarding the dismissal within time.<sup>1</sup> Leave was not required. I treat the intended statement of problem lodged on 15 October 2020, as Mr Gumbeze’s application to the Authority to investigate and determine his personal grievance claim concerning his dismissal. Despite mediation following the earlier determination, the matter was not resolved. This determination resolves Mr Gumbeze’s employment relationship problem.

[3] Mr Gumbeze was dismissed following a letter dated 19 June 2017 raising performance concerns and a disciplinary investigation. Other concerns were raised on 2 August and 31 August 2017. There is a substantial file of material canvassing the concerns, the investigation and other matters related to Mr Gumbeze’s employment. I refer to that material and the evidence and submissions I heard only to the extent necessary to make relevant findings of fact, state and explain legal findings and express conclusions on issues required to determine the matter.

[4] OT must show that its 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. OT’s actions, how it acted and Mr Gumbeze’s explanations following OT’s 19 June 2017 letter regarding its concerns are mostly documented.

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<sup>1</sup> *Bigson Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children* [2021] NZERA 84.

**Non-publication**

[5] By consent, I prohibited from publication the names and identifying details of Oranga Tamariki's clients and their whānau who are referred to in documents and evidence produced during this proceeding.<sup>2</sup> That order continues in force.

[6] During the investigation meeting, it was put to one of the respondent's witnesses in cross-examination that the witness had discriminated against Mr Gumbeze on the basis of race. On 21 March 2022 counsel sought an order prohibiting publication of the name of the witness. Grounds are: the absence of evidence to support the allegation; the allegation had not been directed at the witness earlier; the mere allegation (despite it being unsupported by evidence) might be professionally damaging for the witness; the witness was not OT's decision maker and is not a party to the proceedings; and that there would be little public interest in naming the witness.

[7] Mr Gumbeze through counsel opposed a non-publication order. Grounds are: the witness was "pivotal" in the dismissal process and the decision; the witness was voluntarily involved and ought to have known that the involvement would be subject to open justice processes; and OT can only act through human agents so the witness is not just a "mere witness".

[8] I made an interim order prohibiting the publication of the name and identifying details of the witness as the grounds relied on by both parties turned to some extent on the findings then reserved for this determination.<sup>3</sup>

[9] I consider it appropriate to continue that order and permanently prohibit the publication of the name and identifying details of this witness. There is no public interest in naming the witness and exposing them to the risk of being identified with Mr Gumbeze's allegation of racism. Although the allegation was unfounded, that finding is insufficient to protect the witness from professional harm that might arise. The person as just a witness had no influence over the proceedings and is entitled to some protection against that risk, despite the general principle of open justice.

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<sup>2</sup> Notice of Direction 15 September 2021.

<sup>3</sup> Directions of the Authority 1 April 2022.

**Some performance issues prior to the 19 June 2017 letter.**

[10] It is helpful to first set out some prior issues, before summarising the June 2017 concerns and the investigation.

[11] Mr Gumbeze as an employee of the Child Youth and Family Service (CYF) was offered employment with the Ministry for Vulnerable Children, Oranga Tamariki (MVCOT) from its establishment on 1 April 2017. Mr Gumbeze was offered employment on his existing terms, conditional on safety checking required under the Vulnerable Children Act 2014. There is documentation about the safety checking process. It was followed by confirmation that Mr Gumbeze had satisfied that condition. His employment commenced with MVCOT (now OT) on 1 April 2017 but on his pre-existing terms and conditions.

[12] On 17 July 2015 Mr Gumbeze had received a letter from Ms Dickson, who at the time was operations manager for Waitemata CYF. Ms Dickson “cautioned” Mr Gumbeze, despite her “serious concerns” about whether he was able to abide by reasonable directions and instructions given by senior staff. This issue arose from steps taken by Mr Gumbeze regarding a student placement, without authorisation and contrary to instructions (including from Jaimee Barwood, the site manager). Ms Dickson also accepted Ms Barwood’s concern that Mr Gumbeze appeared to be “angry and heightened” when Ms Barwood met with him. Contemporaneous emails supported other parts of Ms Dickson’s concerns.

[13] If Mr Gumbeze properly raised a personal grievance regarding the 17 July 2015 matter, it was not pursued further at the time. The passage of time means that Mr Gumbeze cannot now commence an action in the Authority in relation to a grievance.<sup>4</sup> In any event, the contemporaneous documents confirm that Mr Gumbeze acted contrary to instructions. Mr Gumbeze’s account now about his interaction with Ms Barwood is unconvincing. There is no sufficient evidential basis to make findings that depart from the views about Mr Gumbeze’s actions and conduct Ms Dickson set out in the 17 July 2015 letter.

[14] The 2015 caution was followed by a formal warning in 2016. In May 2016 Ms Barwood was acting operations manager for CYF Waitemata. The acting site manager

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<sup>4</sup> Employment Relations Act 2000 s 114(6).

was Judith Stinson. By letter dated 23 May 2016, Ms Barwood initiated a disciplinary process in response to an allegation that Mr Gumbeze had failed to follow the site manager's direction regarding a client reallocation. The outcome was a written warning dated 22 July 2016 to expire on 22 July 2017. Ms Barwood also referenced the 17 July 2015 caution letter.

[15] To summarise the July 2016 issue, Mr Gumbeze had disputed the changed client allocation and engaged further with the client, despite the reallocation. Ms Barwood did not accept Mr Gumbeze's explanation at the time, especially in light of the documented exchanges. Also, various other OT staff characterised Mr Gumbeze's exchanges as unprofessional, disrespectful, defensive, and agitated. This added to Ms Barwood's concerns.

[16] If Mr Gumbeze properly raised a personal grievance regarding the 22 July 2016 warning, it was not pursued. Again, the passage of time means that Mr Gumbeze cannot now commence an action in the Authority in relation to such a grievance. In any event, there is no sufficient evidential basis now to make findings that depart from the conclusions about Mr Gumbeze's actions and conduct Ms Barwood set out in her 22 July 2016 warning letter. Mr Gumbeze's point about the timing of a txt message does not assist him. The documents establish that Mr Gumbeze was aware of the reallocation several days before the txt message. Unsurprisingly, Ms Barwood concluded that Mr Gumbeze had refused to accept the reallocation.

[17] A letter to Mr Gumbeze on 5 April 2017 conveyed a written warning about breach of OT's IT policy. Ms Stinson as site manager had raised concerns in January 2017. It is not necessary to canvass the process or the substance. The 5 April 2017 warning was not referenced in the later process that resulted in Mr Gumbeze's dismissal.

[18] At the time of the concerns set out in the 19 June 2017, 2 August and 31 August 2017 letters, Mr Gumbeze was subject to the 22 July 2016 CYF written warning, because he was employed by MVCOT (later OT) under his existing terms and conditions. The safety check did not undermine those performance concerns.

**The 19 June 2017 concerns**

[19] I need only summarise Ms Dickson's letter. It is headed "Invitation to Discuss Concerns". Ms Dickson expressed concern about Mr Gumbeze's ability to engage in supervision and other exchanges that support safe and accountable social work practice. The letter refers to a concern that Mr Gumbeze might not be fulfilling his employment obligations and social worker registration practice requirements. A statement by Mr Gumbeze's supervisor (Marie-Rose Joseph) and a joint statement by a supervisor (Caroline Jones) and a duty supervisor (Lisa Burnett) were included. Other material was also attached. The letter referred to Ms Dickson's 17 July 2015 caution letter and Ms Barwood's 22 July 2016 written warning as context for Ms Dickson's decision to initiate a formal disciplinary process seeking Mr Gumbeze's response to the concerns based on the two statements. The letter cautioned Mr Gumbeze that disciplinary action such as dismissal might result.

[20] I will outline Ms Joseph's signed statement. She and Mr Gumbeze entered a supervision contract in March 2017. However, Ms Joseph considered that many barriers prevented her fulfilling her role. Barriers included several specific refusals by Mr Gumbeze. Ms Joseph did not have a clear understanding of some of Mr Gumbeze's cases as Mr Gumbeze was unwilling to complete formal case consults. Mr Gumbeze had not followed Ms Joseph's direction on a specific point. Ms Joseph had witnessed and experienced Mr Gumbeze being aggressive, intimidating, and disrespectful. Mr Gumbeze's conduct affected other team members. Ms Joseph was also concerned with Mr Gumbeze's conduct towards clients and mentioned a specific instance.

[21] I will also outline the joint statement signed by Ms Jones and Ms Burnett. They considered that Mr Gumbeze presented as dismissive of colleagues' decisions and reluctant to utilise their knowledge. A social worker's experience of Mr Gumbeze had affected their subsequent approach to handovers. Ms Jones and Ms Burnett considered that Mr Gumbeze was dismissive of OT policy and his reluctance to share decision making was a potential risk to client safety. They considered Mr Gumbeze had been argumentative with, dismissive of and avoidant towards his supervisor. At times Mr Gumbeze's behaviour had escalated to cause his supervisor to become distressed. They regarded Mr Gumbeze's practice and behaviour as a leadership issue, not just an issue for his supervisor to manage.

[22] Ms Dickson met Mr Gumbeze on 19 June 2017 to give him the letter and attachments. A further meeting was arranged for 26 June 2017.

[23] By consent, the 26 June meeting was recorded. I need only paraphrase some points. Mr Gumbeze queried why the matter had been elevated to Ms Dickson (regional management). Ms Dickson explained that there was about to be a site manager change and OT wished to avoid starting the process with one site manager, then having to change part way through the process. Ms Dickson noted her involvement also signalled how seriously OT viewed the concerns. Mr Gumbeze responded to his supervisor's bullet-points set out in her statement. Mr Gumbeze also responded to the joint statement. Ms Dickson sought clarification and confirmation of her understanding as Mr Gumbeze responded. During the meeting, an interim arrangement for supervision was proposed. The meeting ended with Ms Dickson to consider further steps to investigate the concerns, reflect on Mr Gumbeze's responses, talk to some other staff and have her senior advisor review Mr Gumbeze's caseload.

[24] At the meeting, Ms Dickson was accompanied by an HR advisor and Mr Gumbeze by a colleague support person. The exchange was principally between Ms Dickson and Mr Gumbeze. The HR manager's role was mostly about process and some points of clarification. The colleague added some points of substance to Mr Gumbeze's explanations. The colleague support person gave evidence but was not critical of the conduct of the 26 June 2017 meeting.

[25] The interim supervision arrangement involved both Ms Joseph and Mr Gumbeze being accompanied when they met for the purpose of professional supervision. Ms Joseph would be accompanied by a practice leader (Toni Luxton) and Mr Gumbeze by his colleague support person. I accept Ms Dickson's evidence that Mr Gumbeze agreed to the interim arrangement. Her evidence is supported by the transcript.

#### **Additional concerns – 2 August 2017 letter**

[26] After the 26 June meeting, Ms Dickson became aware of two additional concerns. These additional concerns are described in Ms Dickson's letter of 2 August 2017. It says there were concerns about Mr Gumbeze's ability to engage appropriately and respectfully

with clients and engage in safe and accountable social work practice. Relevant material was enclosed, including a case summary (“M”) and Mr Gumbeze’s letter to another client (“K”).

[27] In the 2 August 2017 letter, Ms Dickson expressed as a “preliminary view” placing Mr Gumbeze on special paid leave pending the conclusion of an investigation into the further concerns, given the serious nature of the further concerns. Ms Dickson said she was in the process of appointing an investigator who would arrange to meet with Mr Gumbeze. Mr Gumbeze was asked to contact Ms Dickson if he objected to the proposed special leave.

[28] IN the letter Ms Dickson explained her expectation, if special leave was confirmed, that Ms Gumbeze should remain away from the workplace, refrain from undertaking his role as a social worker, not access any records but remain available during normal hours to attend meetings as required. Ms Dickson advised that she would provide Mr Gumbeze with the investigation report and relevant documents and arrange a meeting with him to discuss that and for Mr Gumbeze to respond. The process may lead to disciplinary action including dismissal. Mr Gumbeze was urged to be represented and/or supported and was reminded that EAP assistance was available.

[29] Ms Dickson met with Mr Gumbeze on 3 August to talk about the proposed special leave. Ms Dickson’s evidence is that she and Mr Gumbeze talked through the reasons for the proposal. Ms Dickson invited Mr Gumbeze to take the remainder of 3 April as a day off to consider the proposal and then to contact her to raise any concerns about being placed on paid special leave. There is no reason to doubt Ms Dickson’s evidence about this exchange.

[30] Ms Dickson sent Mr Gumbeze an email after the meeting. It says that they agreed that Mr Gumbeze would take the rest of the day as paid leave away from the office to consider the paid special leave proposal and would reply to Ms Dickson by email the following morning.

[31] On 4 August 2017 Mr Gumbeze confirmed by email that he had no further information regarding Ms Dickson’s preliminary decision and he awaited further contact as outlined. Later that day Ms Dickson confirmed that Mr Gumbeze was on paid special leave until the disciplinary process was concluded.

**Additional concern – 31 August 2017 letter**

[32] An additional concern (regarding “S”) about Mr Gumbeze came to Ms Dickson’s attention. OT had received a client complaint about Mr Gumbeze. Ms Dickson wrote to Mr Gumbeze on 31 August enclosing a copy and raising a concern about Mr Gumbeze’s ability to engage appropriately and respectfully with clients in line with the social work competency framework.

**Investigator appointed**

[33] In the 31 August letter Ms Dickson confirmed that she had appointed an investigator (Justine O’Connell) who would contact Mr Gumbeze shortly to arrange to meet with him. Ms Dickson also stated:

These concerns must be seen in context of my previous letters ... where I raised concerns of the same nature with you ...

It is important for me to raise these further concerns with you. Given the serious nature of these further alleged concerns, we mutually agreed that it was safe for all parties, that you be on special paid leave.

[34] Ms Dickson sent her 31 August letter to Mr Gumbeze by email on 1 September 2017. Mr Gumbeze responded by email on 4 September, attaching his letter of 2 September 2017. He asked for a copy of the 26 June meeting minutes, a brief on tasks completed until 2 August and the names of the sources of the alleged concerns in the 2 August and 31 August letters. Mr Gumbeze also quoted the sentence (above) from the 31 August letter about him being placed on mutually agreed special leave. He asked Ms Dickson to clarify what she meant.

[35] Ms Dickson responded on 5 September 2017. She attached the meeting transcript and stated that interviews with identified staff and a review of Mr Gumbeze’s caseload as agreed at the meeting had been commenced. Ms Dickson described having met with Mr Gumbeze and his support person on 3 August, giving him the 2 August letter, discussing the proposed special leave and asking him to respond to that proposal by Friday 4 August. Ms Dickson stated that as Mr Gumbeze had emailed on 4 August that he had no further information, she concluded that he had agreed with the special leave proposal. She had then sent him an email confirming her decision on paid special leave. Ms Dickson stated that concerns were raised

with her by the site manager and from correspondence recorded in OT's records (the 2 August concerns) and from a client contact with the site manager (the 31 August concerns).

### **The investigation report**

[36] Ms Dickson had spoken to Ms O'Connell on 21 August 2017 about her engagement as the investigator. In an email of that date, Ms Dickson provided Ms O'Connell with some material including a briefing paper of matters to be investigated. Ms O'Connell also met with the HR manager at an OT office. Terms of reference were drafted. The briefing paper comprehensively set out the context and basis for the different concerns, steps taken to date by OT, an outline of the tasks for the investigator, the support available to her and the concerns in respect of which the investigator was requested to make findings of fact.

[37] Mr Gumbeze was advised of Ms O'Connell's appointment by the 31 August letter.

[38] At some point, OT provided Ms O'Connell with a USB drive with material related to the matters to be investigated. I accept Ms O'Connell's evidence that she met briefly with the HR manager to receive the USB drive. Nothing substantive was discussed at the time. I also accept Ms O'Connell's evidence that she subsequently deleted the information on the USB drive so cannot be sure what documents had been copied to it.

[39] There is an email from Ms O'Connell to Ms Dickson dated 1 September 2017. Ms O'Connell described calling Mr Gumbeze to introduce herself and to discuss the investigation process. Mr Gumbeze raised concerns about her not having knowledge of dealing with OT clients. Ms O'Connell explained that the investigation was about how Mr Gumbeze had engaged with his supervisor and undertaken his role, not individual case details. Ms O'Connell confirmed that she had not mentioned the terms of reference to Mr Gumbeze but referred him to the three letters, when he asked about the parameters of the investigation. Ms O'Connell suggested that someone from OT needed to ensure Mr Gumbeze understood the investigation process, Ms O'Connell's role in it and go over whether it was a code of conduct investigation or an investigation into his case management issues. I accept that Ms O'Connell's email is an accurate account of her conversation with Ms Gumbeze.

[40] Ms O'Connell's email resulted in Ms Dickson sending an email on 12 September to Mr Gumbeze. Ms Dickson cut and pasted excerpts from her 19 June, 2 August and 31 August correspondence. Ms Dickson stated that Ms O'Connell's investigation was to make findings of fact on specific issues referred to in the three letters. Ms Dickson did not expressly answer whether it was a code of conduct investigation, but repeated that it was part of the disciplinary investigation which might result in dismissal.

[41] Mr Gumbeze responded on 16 September 2017. He disputed that his "suspension" had been by agreement and questioned its necessity and its lawfulness. He said that the response about the sources was ambiguous, so that there was a "real danger and risk" of redirecting the prior issues of concern. Mr Gumbeze stated that Ms O'Connell had been appointed without clear terms of reference. He considered her investigation was "deeply flawed". He referred to concerns he had raised about "extreme bullying, systematic discrimination, abuse of children in state care etc", ignored by Ms Dickson but were the real issues that required proper investigation by the Children's Commissioner or the Ombudsman. He listed specific issues that he considered had been the catalyst for the 19 June 2017 concerns raised as "retaliation" by the leadership team. Mr Gumbeze said:

Surely, a refusal by those in position of authority to address these issues, failure to observe fundamental human rights or an attempt to cover-up and a complete departure from guiding principles that addresses employment issues is an insult to the former South African apartheid laws.

I therefore wish to inform you that I do not accept bullying tactics neither do I accept unethical and illegal process that is purported to be done in good faith at the cost of vulnerable children in state care.

[42] In her reply email of 20 September Ms Dickson confirmed receipt of this letter but did not specifically respond to the assertions other than by referring Mr Gumbeze to her earlier communications. Ms Dickson repeated that Ms O'Connell was appointed to investigate the concerns and it was an opportunity for him to raise concerns and provide his response.

[43] Ms O'Connell interviewed OT staff identified in the terms of reference provided to her and decided that she did not need to interview other people.

[44] Ms O'Connell sent an email to Mr Gumbeze on 3 October 2017. Ms O'Connell said that she had met with some relevant employees and would provide transcripts shortly.

Ms Dickson had also spoken to some staff following the 26 June meeting and initiated a review of Mr Gumbeze's caseload. Ms O'Connell said she would provide those notes and the review and asked Mr Gumbeze to confirm his email address. Ms O'Connell indicated her intention to send information "this week" and she proposed a meeting with Mr Gumbeze on 12 October.

[45] On 5 October, Mr Gumbeze confirmed his email address. Ms O'Connell responded that day with notes from Ms Dickson's meetings, case reviews and her own interview notes and requested confirmation of the proposed meeting. Ms O'Connell asked if there were others Mr Gumbeze wished her to interview. On 6 October, Mr Gumbeze asked Ms O'Connell for a copy of "your terms of engagement and the parameters of your investigation".

[46] By email on 9 October, Ms O'Connell said that the terms of her engagement were not relevant so she did not think it was something she should provide. Ms O'Connell directed Mr Gumbeze to Ms Dickson regarding the parameters of her investigation, given her understanding that Ms Dickson had discussed that with Mr Gumbeze as well as setting it out in the letters. Ms O'Connell attached a transcript of her interview with the previous site manager. Ms O'Connell again requested confirmation of the proposed meeting.

[47] By email on 10 October, Mr Gumbeze said he could not agree to meet "under these circumstances" but that he hoped to meet in the near future "when the time is right". Mr Gumbeze referred to his 16 September email to Ms Dickson. In reply, Ms O'Connell said she was not aware of the 16 September email and would forward Mr Gumbeze's reply to Ms Dickson. Ms O'Connell did that and told Ms Dickson that she would wait to hear back regarding her next steps.

[48] There were next exchanges between Ms O'Connell, Ms Dickson and the HR manager. The HR manager confirmed that the terms of reference were sent to Mr Gumbeze on 10 October. Following a discussion between Ms O'Connell, Ms Dickson and the HR manager on 13 October, Ms O'Connell confirmed that Ms Dickson had sent an email to Mr Gumbeze advising him to contact Ms O'Connell to arrange to meet and if Mr Gumbeze did not, Ms O'Connell should draft an investigation report.

[49] Ms Dickson and Mr Gumbeze exchanged emails between 10 and 13 October. Ms Dickson sent Mr Gumbeze the terms of reference. Mr Gumbeze referred to his earlier communications about “child abuse in state care, concerns ... [about] vulnerable children and ... reports of text-book bullying”, prior to the employment concerns being raised with him. He said he did not wish to submit information about those matters to a “fraudulent process”. In response, Ms Dickson authorised Mr Gumbeze to disclose information to Ms O’Connell that he considered was relevant to Ms O’Connell’s investigation and she assured him that Ms O’Connell respected client confidentiality. Mr Gumbeze repeated that he could not comment or submit information “under these circumstances”, for reasons already expressed. Ms Dickson next confirmed her understanding that Ms O’Connell had offered Mr Gumbeze meeting dates. If Mr Gumbeze did not make himself available, Ms O’Connell would be instructed to complete a report and provide it to him in draft with a further opportunity to respond at that point. Once the report had been received by Ms Dickson, Mr Gumbeze would have an opportunity to raise additional matters directly with her.

[50] On 24 October, Ms O’Connell advised Ms Dickson that she had not heard from Mr Gumbeze and Ms Dickson confirmed that she should complete the report.

[51] Ms O’Connell’s evidence is that she sent Mr Gumbeze a copy of her draft report by email on 3 November, invited his comments but received none. I accept Ms O’Connell’s evidence on that point. Next, Ms O’Connell sent her report to Ms Dickson.

[52] I will paraphrase the last section “SUMMARY OF FINDINGS”. The first subsection covered the supervisor’s concerns. Ms O’Connell concluded that Mr Gumbeze had unreasonably refused to discuss a work plan to address concerns. Mr Gumbeze had not refused to engage in a PDA<sup>5</sup> process, but his attitude and approach caused frustration for the supervisor who saw it as a barrier to building the supervisory relationship. Mr Gumbeze had unreasonably refused to provide details of reasons for his sick leave absences, contrary to obligations under the employment agreement. Mr Gumbeze had demonstrated by his practice that he was unwilling to participate in formal case consults unless directed. This was inconsistent with a social worker’s obligations of safe and accountable practice. Mr Gumbeze had not followed case direction given to him. Mr Gumbeze communicated in a manner that

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<sup>5</sup> Pay and Development Agreement.

others reasonably perceived as aggressive and intimidating. Mr Gumbeze used CRYAS<sup>6</sup> to record his challenge to what he thought were management decisions. In raising a specific instance in a team meeting, Mr Gumbeze mistakenly thought a decision had been made. On the specific instance, Mr Gumbeze's conduct was not an inappropriate challenge to a management decision, but he should not have continued to try and raise the matter when asked not to.

[53] The second subsection covered a client. Mr Gumbeze had not met the client's mother before 21 July 2017. He had formed a view about the mother's motivation. Mr Gumbeze had not referred the case to a family group conference in a timely manner. Mr Gumbeze's management of the case had wrongly caused the client's whānau to think that Mr Gumbeze had statutory authority to determine where the client would reside.

[54] The next subsection covered a second client. Mr Gumbeze's letter to the client's mother was likely to have been perceived as a threat of legal action such as removal of the client from the mother's care. The mother thought that Mr Gumbeze had authority to make that decision.

[55] The next subsection covered a third client. Mr Gumbeze had failed to arrange access by the father. Mr Gumbeze's communication with the family was seen by them as intimidating.

[56] Overall, Ms O'Connell considered that Mr Gumbeze was not engaging in safe and accountable practice, with gaps in his case management. Mr Gumbeze's practice was inconsistent with his job description, competency standards and OT's policy and principles.

### **The decision to dismiss Mr Gumbeze**

[57] In her 15 November 2017 email to Mr Gumbeze, Ms Dickson confirmed she had received the final report and understood that Mr Gumbeze had not commented on the draft Ms O'Connell had sent to him. Ms Dickson said she would consider the report, take advice and contact Mr Gumbeze the following week about the next steps in the process.

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<sup>6</sup> An electronic client record keeping system.

[58] Mr Gumbeze wrote to Ms Dickson on 16 November 2017. Mr Gumbeze said he had been waiting to engage in an investigation by a person appointed from the Children Commissioner's office or the Ombudsman's office rather than Ms O'Connell. He stated that issues of bullying and abuse of children in state care were not private matters and were more than employment issues. Mr Gumbeze said he refused to participate in bullying tactics meant to suppress wrong-doing and corruption.

[59] On 24 November 2017, Ms Dickson invited Mr Gumbeze to a meeting where she would provide her "preliminary thinking and views, and the supporting rationale and justification for this". Mr Gumbeze sent his response on 28 November. He referred Ms Dickson to his previous correspondence, said when the "time comes" he would speak and act. He did not wish to participate in a cover-up. He awaited Ms Dickson's decision and the end of "all the restraining orders you imposed against me". That was a reference to his earlier correspondence where Mr Gumbeze had described the special paid leave and directions not to attend the office, not to access OT clients and information and to maintain confidentiality during the disciplinary investigation as "Restraining Order", "Trespass Order" and "Total Ban".

[60] Ms Dickson emailed Mr Gumbeze again to check whether he would attend the proposed meeting. Mr Gumbeze confirmed that he did not wish to participate.

[61] Ms Dickson set out her "Preliminary View" in her letter dated 8 December 2017 to Mr Gumbeze. Ms Dickson offered Mr Gumbeze an opportunity to respond or provide further information by 11 December 2017.

[62] I will summarise Ms Dickson's "Preliminary View". Ms Dickson described steps taken following the 19 June 2017 letter of concerns to date. Ms Dickson considered that Mr Gumbeze had been given significant assistance to address longstanding performance concerns. Mr Gumbeze had been encouraged to use appropriate pathways to address concerns previous, as covered by the 17 April 2015 and 22 July 2016 letters, but had not followed directions. OT's efforts to address concerns constructively had not resulted in a demonstrated or constructive change in Mr Gumbeze's actions, behaviours and social work practice. Mr Gumbeze's written communications during the investigation caused Ms Dickson

concern about whether he would work within OT's established mechanisms. Ms O'Connell's investigation found an unwillingness to engage in reflective supervision and initiate case consults, inappropriate case recording and communication perceived as intimidating and aggressive on Mr Gumbeze's part.

[63] Ms Dickson attached Ms O'Connell's "SUMMARY OF FINDINGS" but separately identified those that she considered were "most serious" and explained the reasons for her concern on those findings. Ms Dickson referred to Mr Gumbeze's exchanges during the investigation in order to identify "key factors" raised by him in mitigation. Ms Dickson considered most points had been adequately addressed in Ms O'Connell's investigation report.

[64] Other "key factors" arose from Mr Gumbeze's correspondence. Ms Dickson responded to the labels Mr Gumbeze had given to her directions accompanying the paid special leave. Ms Dickson regarded the 2017 investigation issues as a continuation and escalation of the issues covered by the 22 July 2016 warning. Ms Dickson referred to her earlier explanations about the appointment of Ms O'Connell as an investigator. Ms Dickson responded to Mr Gumbeze's claims of having been bullied by a practice leader, as raised by him at the 26 June 2017 meeting and shortly after. Her review of the material provided led Ms Dickson to conclude that no examples supported Mr Gumbeze's allegation of having been bullied and harassed. Rather, Ms Dickson noted that the practice leader and others in the management team had on occasion been "direct and firm" in their communication. Ms Dickson also responded to the other key factors she had identified.

[65] In conclusion, Ms Dickson accepted Ms O'Connell's findings set out in the report. The findings evidenced a continuation of performance and conduct concerns that had been raised with Mr Gumbeze since April 2015. Ms Dickson regarded the issues in the report amounted to serious and persistent misconduct, so that OT had no confidence in Mr Gumbeze's ability to undertake his role as a senior social worker, given his position description, the competency framework and principles and policies of OT and its Act. Ms Dickson noted that Mr Gumbeze's engagement during the investigation had not been constructive. Ms Dickson considered that the employment relationship was "now untenable".

[66] Mr Gumbeze was asked to respond to the preliminary views by Monday 11 December 2017, following which Ms Dickson would inform him of her final decision. I accept Ms Dickson's evidence that she paid considerable attention to setting out in detail her rationale for her preliminary view, because Mr Gumbeze had not met with her.

[67] Mr Gumbeze did not respond to Ms Dickson's "Preliminary View". On 14 December 2017, Ms Dickson sent her dismissal letter to Mr Gumbeze. It says that Ms Dickson considered that Ms Gumbeze's conduct amounted to serious and persistent misconduct and had eroded OT's trust and confidence in him. Ms Dickson considered that Mr Gumbeze's conduct was incongruent with his obligations. She regarded the employment relationship as untenable. Ms Dickson decided to terminate Mr Gumbeze's employment with effect from 15 December 2017. Ms Dickson referred to OT's obligation to notify the Social Workers Registration Board and to arrangements regarding OT's property.

#### **Justification – sufficiency of OT's investigation**

[68] OT is a large, state employer with resources to support the highest standard of disciplinary investigation when considering alleged serious misconduct by an employee.

[69] Before Ms Dickson dismissed Mr Gumbeze, OT conducted a thorough investigation of the allegations against Mr Gumbeze.

#### **OT raised its concerns with Mr Gumbeze**

[70] OT's specific concerns were raised with Mr Gumbeze in the letters dated 19 June 2017, 2 August 2017, and 31 August 2017.

[71] The concerns were investigated by Ms O'Connell and her findings with respect to those concerns were raised with Mr Gumbeze in her report and through Ms Dickson's correspondence to Mr Gumbeze.

[72] I find that OT raised its concerns with Mr Gumbeze before it dismissed him.

**OT gave Mr Gumbeze a reasonable opportunity to respond**

[73] It is not necessary to repeat or enlarge on OT's efforts to afford Mr Gumbeze an opportunity to respond to its concerns. Mr Gumbeze's view about the appropriateness of Ms O'Connell being appointed does not detract from him being afforded a reasonable opportunity. OT was entitled to engage an independent investigator to report into the employment concerns it had with Mr Gumbeze.

[74] Following Ms O'Connell's report, OT persisted with attempts to obtain Mr Gumbeze's specific response to its concerns, without success.

[75] Mr Gumbeze considered that other agencies should have been engaged, but that does not detract from the reasonable opportunity he was given by OT to respond on its concerns about his employment issues.

[76] I find that OT gave Mr Gumbeze a reasonable opportunity to respond to its concerns before it dismissed him.

**OT genuinely considered Mr Gumbeze's explanation**

[77] Mr Gumbeze says that the "copy and paste" nature of OT's correspondence to him indicates that Ms Dickson predetermined the outcome of the disciplinary process. I disagree. OT was entitled to be consistent when raising issues with Mr Gumbeze, especially as he did not answer any of the specific concerns to cause OT to amend its views.

[78] Ms Dickson was asked and explained why the concerns had been escalated to her level. Mr Gumbeze thanked Ms Dickson for the explanation she gave. OT's action in vesting responsibility in its regional manager to manage the disciplinary process over the 2017 concerns was what a fair and reasonable employer could have done in the circumstances.

[79] Mr Gumbeze responded to the 19 June 2017 concerns when he met with Ms Dickson on 26 June 2017. The transcript meant Mr Gumbeze's response then was available to Ms O'Connell to incorporate in her investigation process. Ms O'Connell's report demonstrates that she genuinely considered the explanations Mr Gumbeze gave at the early stage of the disciplinary process. Similarly, Ms Dickson's "Preliminary View" letter

demonstrates that OT genuinely considered Mr Gumbeze's early responses and what Ms Dickson discerned Mr Gumbeze's explanation to be from his other communications.

[80] Mr Gumbeze did not proffer further specific explanation in relation to the allegations, despite being provided with transcripts of Ms O'Connell's interviews, case review information and the information gathered by Ms Dickson before Ms O'Connell's appointment.

[81] I find that OT genuinely considered Mr Gumbeze's explanation, to the extent he gave it, before it dismissed him.

### **Other appropriate factors**

[82] It is convenient here to deal with elements of the submissions and material presented for Mr Gumbeze.

[83] Some recordings and transcripts of meetings and some correspondence on issues prior to the June 2017 disciplinary process are in evidence. This material demonstrates that Mr Gumbeze's then supervisor and managers communicated with him in a respectful manner, seeking to understand his point of view on matters in issue at the time. Mr Gumbeze says that he was victimised and discriminated against because he had been a workplace PSA delegate. There is no evidence to support that assertion.

[84] The evidence of the HR manager and Ms O'Connell is that the HR manager did not work for Teesdale Associates (Ms O'Connell's firm). The HR manager met Ms O'Connell for the first time when Ms O'Connell was appointed to this investigation. About 5 or 6 years before 2017, the HR manager's former employer engaged Teesdale Associates on some work and the HR manager supplied information to Teesdale Associates for that purpose. That is what "worked with" in the HR managers statement of evidence meant. I accept all this evidence as there is no reason to doubt it. That historical indirect connection is irrelevant to whether Mr Gumbeze's dismissal is shown to be justified. There is no basis for doubting the HR manager's credibility as a witness.

[85] Ms Dickson accepted that she had not advised Mr Gumbeze of his right to pursue a personal grievance. OT's disciplinary principles requires that where an employee feels

aggrieved. The omission is not relevant to establishing justification for the dismissal. Mr Gumbeze raised his personal grievance claim in relation to the dismissal, despite not being told of that right by Ms Dickson.

[86] The disciplinary principles provide that the outcome is to be recorded in writing and signed by the employee. The 2015 and 2016 letters were not signed by Mr Gumbeze. Mr Gumbeze did not commence action in the Authority within time claiming personal grievances with respect to the 2015 and 2016 letters. The evidence produced during this investigation supports the facts asserted in the two letters. At its strongest, the point now can only be that having regard to these letters amounted to a defect in the process followed by OT in dismissing Mr Gumbeze. However, I find that the defect is minor and did not result in Mr Gumbeze being treated unfairly. A dismissal could have been justified based on the 2017 concerns alone.

[87] Several other points are made about the 2015 and 2016 letters and OT's prior process. They too would be minor defects which did not result in Mr Gumbeze being treated unfairly in 2017.

[88] There is some uncertainty about what material OT provided to Ms O'Connell for the purpose of her investigation and report. Source documentation is referenced in the letters, emails and the investigation report. That material must have been provided to Ms O'Connell. However, the uncertainty arises from Ms O'Connell deleting the files on the USB drive she was given and the absence of a duplicate USB drive or an index of the information it contained. Ms Dickson's evidence is that the "Investigator's Bundle of Documents", assembled during these proceedings, is a print of the material that was provided to Ms O'Connell. Ms O'Connell did not recollect having seen all that material. Given the passage of time since events in 2017 to when these proceedings were initiated in 2020 and the later investigation meeting, Ms O'Connell's evidence is unsurprising. However, where the information was relevant to the decision to dismiss Mr Gumbeze, it was referred to in Ms O'Connell's report and in Ms Dickson's letters of concerns and her preliminary view. Mr Gumbeze had opportunity to comment as a result. The uncertainty at this point about all the content of the USB drive does not affect whether OT justifiably dismissed Mr Gumbeze.

[89] There is a submission that the HR manager was “more of the decision maker than the advisor”. The submission is unsupported by the evidence. Ms Dickson’s evidence is that she was the decision maker. There is no reason to doubt that evidence. Ms Dickson is an experienced line manager. It is not probable that a person in her position would hand-over responsibility for such an important decision to an HR manager. The contemporaneous material is consistent with Ms Dickson holding that responsibility, with the HR manager’s role being focussed on process advice. Ms Dickson gave detailed evidence about the substantive considerations that led to the decision to dismiss and answered questions in a reflective manner, as one would expect of the person holding responsibility for an important decision. For these reasons I do not accept the submission.

**Dismissal – what a fair and reasonable employer could have done in all the circumstances**

[90] By December 2017, OT had taken all the steps that a fair and reasonable could have taken to obtain specific responses from Mr Gumbeze on the matters that concerned it about his conduct.

[91] Ms Dickson concluded that Mr Gumbeze had continued to practice social work in isolation, without engagement in supervision or participation in formal case consults. Such practice was commonly recognised as unsafe social work practice and inconsistent with Mr Gumbeze’s job description, OT’s policy and the policy of the professional registration body. Ms Dickson’s view was that Mr Gumbeze had not ensured the safety and wellbeing of children and families he had had worked with.

[92] Ms Dickson concluded that Mr Gumbeze had communicated in a manner that others reasonably perceived as aggressive and intimidating. Ms Dickson concluded that Mr Gumbeze had used OT’s electronic records system to record his challenges to what he considered were management decisions. He also recorded inappropriate and unprofessional statements and his opinions of clients. Ms Dickson concluded that Mr Gumbeze had not met his obligations to clients “M”, “K” and “S”. It is not necessary to set out the specific issues here. Additionally, Ms Dickson concluded that similar themes emerged from a review of Mr Gumbeze’s practice by OT’s senior advisor.

[93] The foregoing conclusions match what a fair and reasonable employer could have concluded from the investigation by Ms O'Connell coupled with Mr Gumbeze's lack of response. Those conclusions led Ms Dickson to decide that Mr Gumbeze's "behaviour, actions and social work practice" amounted to serious and persistent misconduct such as to amount to serious misconduct. That too is what a fair and reasonable employer could have concluded.

### **Conclusion**

[94] I find that 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.

[95] It follows that Mr Gumbeze's personal grievance claim is dismissed.

[96] Costs are reserved. If the parties are not able to resolve costs between themselves, the party claiming costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party may then lodge and serve a memorandum in reply, within a further 14 days.

Philip Cheyne  
Member of the Employment Relations Authority