

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2026] NZERA 340
3331980

BETWEEN **WIREMU CALDWELL**
Applicant

AND **THE CHIEF EXECUTIVE, ORANGA
TAMARIKI – MINISTRY FOR
CHILDREN**
Respondent

Member of Authority: **Antoinette Baker**

Representatives: **Andrew McKenzie, counsel for the applicant**
Hamish Kynaston, Raukura Doyle counsel for the respondent

Investigation Meeting: **16 September 2025, 1 October 2026**

Submissions: **1 October 2025**
Last information **11 February 2026**
received:

Date: **2 June 2026**

DETERMINATION OF THE AUTHORITY

Nonpublication order

[1] **There are non-publication orders in relation to these proceedings that are not disputed.**

[2] The Authority has the discretion to prohibit publication of matters before it.¹ The exercise of that discretion is based on a starting point of open justice.² Having considered the positions of the parties, I find no impediment to the starting point of open justice to make the following orders:

- a. I prohibit from publication any reference in all evidence and documentation in these proceedings that references identification of and or information about any identified young person (YP) in the custodial care of or formerly in the custodial care of OT.

Employment Relationship Problem

[3] Mr Caldwell was employed under a collective employment agreement as a Residential Youth Worker (RYW) for the respondent Oranga Tamariki, Ministry for Children (OT). He worked for OT at Te Puna Wai (TPW), a secure youth justice residence.

[4] TPW houses up to 40 YP of different ages and gender in secured custodial living units within a wider complex that includes an onsite state-run school, recreational facilities, social workers, administration and medical personnel (nurses). The YP may be placed in the facility by the Youth Court or have been sentenced to imprisonment, part which is to be served at TPW.³

[5] On 5 August 2024, Mr Caldwell was summarily dismissed for serious misconduct by OT. This was after an investigation carried out by an externally engaged investigator after which an OT decision maker led a disciplinary process. The dismissal was related to likely breaches of protocols including breach of 'line of sight' and having a cell phone in the YP units without reason. Mr Caldwell was found to have likely screened inappropriate adult content material for YP to watch and found to have likely communicated with and in front of YP including the use of 'sexist and derogatory' comments about women that impacted how YP behaved towards female staff. Mr Caldwell was further found likely to have been dismissive towards those challenging his behaviours in the workplace by saying that he could not be disciplined in part due to a familial connection in the management of OT.

¹ Employment Relations Act 2000, schedule 2, clause 10 (1).

² *Erceg v Erceg* [2016] NZSC 135; *Courage v The Attorney-General* [2022] NZEmpC 27.

³ Accepted evidence from the Witness Statement of Virginia Anne Lavender, residence manager dated 15 August 2025.

[6] Mr Caldwell brings a grievance that the decision to dismiss him was unjustified. Before the dismissal he also raised disadvantage grievances about justified employer actions during the investigation that led to his dismissal. He says that he was suddenly 'stood down'⁴ without being consulted or told why, that OT reinvestigated matters already dealt with in a prior letter of expectations that had proposed he would receive training and coaching which did not happen, and that OT unilaterally added to allegations after the Terms of Reference (TOR) were finalised.

[7] OT accepted most but not all of the investigation outcomes and decided that cumulatively Mr Caldwell's actions amounted to serious misconduct. OT decided it had lost its trust and confidence in Mr Caldwell to continue to be employed by OT in his RYW role and decided to summarily dismiss him. The investigation and disciplinary process took over one year. Parallel to this was a separate criminal process triggered by the Office for Commissioner for Children (OCC) raising concerns after an unannounced visit to the TWP as part of its wider role. The police child protection process that was triggered by this did not result in police taking any action rather referring back that after its investigation the matters were likely employment related.

[8] For Mr Caldwell the challenge to the justification of the dismissal includes that the external investigator made multiple findings about him in the workplace that were not based on specifics and that the interviewer allowed multiple interviewees to expand into generalised comment about him when some in the workplace were wanting to get rid of him. He says the investigator was 'building a case' especially when a main and serious allegation that arguably had attracted the attention of the OCC, proved to be unfounded because of a story that built through 'talk' in the workplace. Overall Mr Caldwell says the matters he was asked to respond to in the investigation became too wide and therefore unreasonable for him to be able to provide meaningful feedback.

[9] For Mr Caldwell there is also a challenge that the decision maker simply accepted the investigation outcome and did not take into account mitigating factors that Mr Caldwell has a

⁴ The respondent accepts this was raised in relation to the immediate 'stand down' that occurred and with sufficient specificity to have been in time but opposes any raising of the whole suspension as an unjust unfair disadvantage.

condition which means people may misunderstand him; that his humour and banter is misunderstood; that he had past concussions affecting his memory; that he had never worked with women before; that he was not trained properly for the role; that others don't follow protocols and have not been disciplined; and that the overall context of working long hours in a short staffed environment affected everyone's ability to do their jobs including him.

[10] Mr Caldwell seeks permanent reinstatement, compensation for the grievances, lost wages and a contribution to his costs. He did not bring an application for interim reinstatement.

[11] OT says its investigation, findings and decision were justified and opposes the claims and remedies sought including reinstatement.

Authority's investigation

[12] This matter has taken some time to determine. A significant amount of documentation has been put before the Authority including transcripts of 23 investigation interviews and a further two with Mr Caldwell. The first interview with Mr Caldwell transcribes to over one hundred pages. The bundles of documentation provided from OT's investigation, the responses for Mr Caldwell, multiple communications between NUPE (acting throughout for Mr Caldwell) and OT, as well as internal communications in the OT investigation and disciplinary process, run to more than 2,500 pages.

[13] This matter was lodged with the Authority on 16 October 2024. It was allocated to me in January 2025. I held a phone conference call with counsel on 31 January 2025. At that stage the parties had not attended mediation. I directed the parties to mediation but also discussed and directed a timetable beyond this for an investigation meeting with dates in late July 2025 with a timetable for written briefs of evidence to be provided before this. The investigation timetable was to occur in the event that matters did not resolve.

[14] The parties attended mediation in April 2025 and did not resolve the employment relationship problem. The matter continued in the Authority. Dates already set down for the scheduled investigation had by then been enlarged due to unavailability counsel.

[15] I held an in-person investigation meeting on 16 September 2025 during which I asked questions of witnesses who had previously provided briefs. I asked questions on oath and affirmation of Mr Caldwell and Ms Gemmel from NUPE who represented Mr Caldwell during the investigation and disciplinary process and a process occurring just prior in March 2023; for OT, from Ms Virginia Lavender who is the TPW residence manager, Ms Jansen who is a RYW who put her name to a joint complaint about Mr Caldwell's behaviour, Ms Fairie who was the OT decision maker in the investigation and dismissal, and Mr Isaako, an OT team leader and Mr Caldwell's team leader from about a month prior to him being stood down from his role in June 2023.

[16] After the 16 September 2025 investigation meeting concluded with hearing from all of the above witnesses, I heard submissions from counsel at a continued meeting on 1 October 2025 based on their respective written submissions provided just prior.

[17] It was agreed that I would be reviewing the substantial written interview documentation beyond the meeting process and should questions arise further I would communicate this.

[18] I asked for further information to be provided in January 2026 about how interviewees were communicated with prior to being interviewed. I received this material from the respondent. Part of that material included a summary that the respondent asked the investigator to provide with some detailed spreadsheet references to assist. I considered this material relevant to ask for because by this time having read the interviewee scripts I wanted to understand better Mr Caldwell's claims that there may have been gossip and collusion in the workplace about what was said to the investigator. I gave an opportunity for the applicant to reply to this material and a response was received on 11 February 2023 after an extension of time was granted. I then reserved my determination after this last response which was taken as the last information received.

[19] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings and expresses conclusions on issues necessary to dispose of the matter and specifies the outcome. It has not recorded all evidence and submissions received.

[20] This determination has been issued outside the statutory period of three months from the last information received. When I advised the Chief of the Authority this would occur, he decided, as he is permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

Framework to determine this matter

[21] The test for justification under s 103A of the Act is an objective one that asks whether an employer was justified in its actions or in a decision to dismiss based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. This includes a consideration of factors which include but are not limited under s 103A(3) and (4) of the Act to:

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with then employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.'

[22] A dismissal will not be unjustified if there are defects in the employer's process leading to the dismissal, but where the defects were minor and if they were more than minor they did not result in the employee being treated unfairly⁵.

[23] In applying the above test of justification it is not the Authority's role to replace its decision for the employer's decision but to test whether the employer's process and outcome

⁵ Employment Relations Act 2000, s103A(5).

were within scope of what a fair and reasonable employer could have done and could have decided in all the circumstances at the time.

Issues

[24] The issues for me to determine are:

- a. Did OT in its actions disadvantage Mr Caldwell in his employment resulting in unfairness to him by:
 - i. Standing him down from his employment without consultation and without fully providing reasons to do so?
 - ii. Unilaterally changing the Terms of Reference (TOR) to the investigation process?
 - iii. Reinvestigating matters already investigated and already dealt with by a letter of expectations that Mr Caldwell had not yet had the opportunity to meet?
- b. Was the decision to summarily dismiss for serious misconduct one that OT as a fair and reasonable employer could have made in all the circumstances at the time?
- c. Depending on the above what if any remedies are to be ordered including:
 - i. Permanent reinstatement
 - ii. Compensation
 - iii. Lost wages as a result of the dismissal?
- d. Are any remedies awarded to be reduced under s 124 of the Act due to Mr Caldwell's contribution to the circumstances of the grievance?
- e. What if any costs are to be awarded?

Further Background to the employment relationship problem

[25] In March 2023 OT raised a number of issues with Mr Caldwell. This was before the investigation that led to his dismissal that commenced in June 2023. The background to this prior process is important in relation to a consideration of the claims about how that process may have impacted the justification of Mr Caldwell's dismissal.

[26] Ms Lavender commenced as residence manager at TPW from 19 December 2022 initially on a six-month secondment from another government department becoming permanent in the role in July 2023. Her role includes amongst other things dealing with employment matters.

[27] Ms Lavender's written evidence includes that when she started in the residence manager role 'it didn't take long for various different staff members to start mentioning [Mr Caldwell's] name to me in connection with poor conduct'. Ms Lavender's evidence is that 'initially' she considered she needed to 'focus...on understanding what these complaints and concerns were and what had been done to address them. Over time though, more and more things were brought to my attention.' I have nothing before me that that shows any record of how these 'more and more' things were documented or recorded between December 2022 and March 2023 except for the list of 'complaints' about Mr Caldwell that Ms Lavender did address in March 2023 as set out below.

[28] Ms Lavender was on annual leave from early February 2023. The OT operational manager acted up in her role with another OT manager acting in his. Ms Lavender says she understands that the manager had intended to have a 'catch up' with Mr Caldwell about matters occurring from 10 to 12 February 2023 but Mr Caldwell went on sick leave emailing his team leader that it was stress due to employment issues. A medical certificate was later provided. Mr Caldwell returned to the workplace on 5 March 2023.

[29] Ms Lavender returned from her annual leave and wrote to Mr Caldwell on 8 March 2023 inviting him to meet about his wellness and also seven complaints (she attached them) about Mr Caldwell's behaviour in the workplace. I accept Ms Lavender's evidence that the complaints came to her 'separately from a number of different staff.' There was a mix of those in roles like Mr Caldwell's and also those in more senior roles. A review of those complaints supports this.

[30] Ms Lavender's letter included that 'the complaints provided are of significant concern to me and appear to mostly contain sexual connotations or reference to the use of derogatory language, and they appear to refer to or be directed against the female rangitahi [female YP] and kaimahi [staff] at the residence. The complaints raised cite apparently inappropriate behaviour and language displayed by you. I am also highly concerned given there are several complaints of behaviours that appear similar in nature.'

[31] Ms Lavender included in the letter that the 'alleged actions and behaviours do not appear to be in line with the Values and Code of Conduct that we would expect from a staff member, in particular:

- We hold ourselves to high standards to ensure we deserve the trust of the people and the Government of New Zealand
- We work in a supportive, positive, respectful and inclusive environment
- We build positive relationships with those we work with, embracing diversity and accepting each other's differences
- Contribute to a healthy and safe working environment for ourselves and others
- Collaborating with our colleagues, partners, and stakeholders to build strong partnerships and work as one team with colleagues and the public
- Carrying out our duties competently and efficiently, using our skills and resources to the best of our ability. This includes giving our full commitment to the performance of our duties and complying with all lawful and reasonable instructions relating to our employment
- Ensuring the safety and wellbeing of the Tamariki and rangitahi is our primary focus in everything we do.

[32] The letter to Mr Caldwell included that he could bring a support person to the meeting and referred to employee assistance services. It was described as not being a disciplinary process. From this point Ms Gemmel from NUPE⁶ represented Mr Caldwell.

15 March 2023 meeting

⁶ 'National Union of Public Employees', a party to the collective employment agreement that covered Mr Caldwell in his employment.

[33] A meeting occurred on 15 March 2023. It was attended by Ms Lavender with an OT human resource employee taking handwritten brief notes, Mr Caldwell, Ms Gemmel, and an OT team leader as support person for Mr Caldwell. The notes include that Mr Caldwell responded to Ms Lavender's question about his wellbeing that he was feeling well 'now.' Both Ms Lavender and Ms Gemmel in their evidence refer to a discussion about the long hours Mr Caldwell was working and Ms Lavender gives evidence she took this into account. I understand this was in the context of Mr Caldwell having been on the period of sick leave referred to above. There is little recorded about this part of the discussion.

[34] There is reference in the notes to a discussion about Mr Caldwell's upcoming planned annual leave. Mr Caldwell was scheduled for planned annual leave to go customary mutton birding a few weeks after this meeting which he did from 11 April 2023 until 28 May 2023. The notes include that each of the seven complaints, which Mr Caldwell confirmed in the notes he had seen sent and had already seen, were then discussed giving Mr Caldwell and his support and representation an opportunity to respond.

[35] Four of the complaints were from different female RYWs, one was from a 'Team Leader Operations', one was from Mr Isaako who at the time was Mr Caldwell's team leader. As noted above, Mr Isaako gave evidence in this investigation.

[36] As already explained above, Mr Caldwell's challenge is in part that the subsequent investigation 'relitigated' matters dealt with here when these seven complaints were before Ms Lavender. To that end I will set out in summary below the seven complaints that Ms Lavender sent to Mr Caldwell and then discussed with him at the meeting. For ease of reading I have matched the responses Mr Caldwell gave in the meeting (doing my best to read the handwritten notes taken) and have also added the more detailed record of his responses in Ms Lavender's 'letter of expectations' that I accept was written soon after. I find this gives a closer in time reflection of what was discussed or addressed in this process than much later recollections or interpretations. The written complaints from this time are able to speak for themselves and have not been challenged as to their validity as actual documents.

Complaint one

[37] 1 December 2022, a Team Leader reports that a RYW reported to them about alleged inappropriate 'sexualised' comment to young girls in a unit Mr Caldwell was working in. This

related to saying sausages were chopped up for the girls so they could not be used sexually, and that toothbrush handles were removed so the handles could not be used sexually.

Response at meeting to complaint one

[38] Mr Caldwell could not recall this and says, 'who would say that' 'they would have to be mental'. His supporters ask about when it was and refer to the reporting of female YPs speaking highly of Mr Caldwell in a prior external survey process. Mr Caldwell included that conduct was different in the female unit rather than the male unit and you would never be alone with a female using 'good spotting.' Ms Lavender later checked and confirmed Mr Caldwell was working this day in answer to his query as to whether he was even working that day.

Complaint two

[39] An undated complaint from a RYW about hearing about a phone call to another staff member when Mr Caldwell had used expletives to criticise new staff coming in and trying to change things when 'we' had been there for years.

Response at meeting to complaint two

[40] Mr Caldwell acknowledges this was a phone call he had. Ms Lavender recorded later that Mr Caldwell had said that he did speak out about certain staff being inexperienced, could not recall the conversation because he had had a couple of alcoholic drinks, and that the criticism wasn't about all of the staff.

Complaint three

[41] 4 February 2023 (handwritten notes) by a RYW saying Mr Caldwell was treating female staff differently by saying they should do domestic chores, that the YP picked up on this and became disrespectful to the female staff.

Response at meeting to complaint three

[42] Mr Caldwell's response included that he was likely joking and people think it's funny, that he had no memory of this, that others do not like the complainant, that when she first started she used 'academic language', that some YPs are quite rude to her and that he told her 'you need to do something yourself', that she had told him she felt unsafe on a shift but that the shift was settled and that he did not tell team leaders because 'they're busy'. The notes include Mr Caldwell asking Ms Lavender 'what do you want me to do?' The notes further record Ms Lavender saying, 'pass on to TLO – observed.' Ms Lavender's outcome letter recorded that Mr Caldwell had said he assigned new staff kitchen duties to give them a break from the floor, it was not based on gender, and that he did not recall admitting to being 'sexist' but may have said it in jest.

Complaint four

[43] 7 February 2023, a 'Formal Complaint' from a different RYW to the other six complaints in this sequence about the comments to staff made by Mr Caldwell on 4 February 2023 about women. This included that Mr Caldwell referred to female staff as 'bitches', made inappropriate comments to YP about slave ownership and gave an inappropriate response to a YP who had asked him about whether Mr Caldwell used protection during sexual intercourse to which it was reported Mr Caldwell said, "Fuck no, I raw dog that shit and leave those bitches." As to calling women staff 'bitches' the complainant said this behaviour continued despite a team leader asking it to stop on a previous shift. This complaint voiced concerns about the YP mimicking Mr Caldwell's behaviour and that they are 'noticeably more disrespectful to female staff.'

Response at meeting to complaint four

[44] The meeting notes include that Mr Caldwell engaged with Ms Lavender in a discussion about slavery and where the reference he used came from. When asked by Ms Lavender about whether he made a comment about women as (what is recorded) 'a piece of meat' he said he didn't think he would say that. He denied having a belief that men were above women. Ms Lavender's outcome letter includes reference to the discussions about slavery and that Mr Caldwell accepted this was not an appropriate conversation to have with the YP. Ms Lavender's outcome letter does not address the specifically alleged words of the comment in this complaint about an inappropriate response to a YP by saying, "Fuck no, I raw dog that shit and leave those

bitches” but if it is the reference to ‘raw meat’ she includes Mr Caldwell’s response being that he didn’t think he would say that.

Complaint five

[45] 7 February 2023⁷, an email forwarded to Ms Lavender from a fellow OT senior manager, who had acted in Mr Lavender’s role at this time in February 2023. The complaint forwarded from an OT ‘Team Leader Logistics’. It describes a situation they saw and heard when walking near a courtyard and seeing and hearing YP from two different groups yelling at each other. A radio message was sent by senior staff to Mr Caldwell to shut the matter down. The YP group from one of the units were seen and heard by this complainant to have been called back inside by Mr Caldwell with him saying “Come on get inside cos of these f*cking c*nts.” The reference was to the requesters (I understand to have been female senior staff) asking that the YP situation be shut down. The complainant included that they were shocked to hear this said.

Response at meeting to complaint five

[46] The meeting notes show Mr Caldwell says that he had no memory of this. Ms Gemmel is recorded as then interjecting and speaking to it. Ms Gemmel prompted Mr Caldwell that the matter occurred before Mr Caldwell took some time off and that Mr Caldwell had previously accepted that he said it and that two people heard it. Ms Lavender is recorded as saying it was not acceptable, and Mr Caldwell agreed. I note here that the ‘time off’ had commenced at the time Mr Caldwell had been challenged by a team leader about playing an inappropriate screening for YP and he was verbally abusive to her when this was raised, something I return to below next under complaint six.

Complaint six

[47] A 12 February 2023 email to Ms Lavender from another manager, headed ‘abuse to [B]⁸ team leader Sunday 12.03.23’. This email was copied to other OT management. It included that during a shift leader changeover meeting that day Mr Caldwell became abusive to B. I pause to

⁷ Ms Lavender’s evidence lists this as 12 February 2023. The date referenced by the email writer in the email is the 7 February as in ‘today’.

⁸ I have not included this person’s name and the letter is randomly selected. They were not a witness and took no part in these proceedings.

note here that B is a long-term staffer and mother of the then acting manager in Ms Lavender's leave absence, Mr Camp. The email reported that B had told shift leaders including Mr Caldwell at handover that 'it had come to the attention of the [team leaders] that the young people in [name of the unit where older YP are resident] (where [Mr Caldwell] was shift leading last night⁹) were watching some female twerk videos on 'TikTok' and masturbating as they watched while female staff were present in the unit.' The email continued that [Mr Caldwell] 'became immediately defensive and verbally abusive towards B and stated, "Fuck up [B] and fuck off". Then B said to [Mr Caldwell] "Don't talk to me like that".' The email included that B came and told the writer of this email about this, that Mr Caldwell returned and talked to the writer and, with another team leader present, there was a meeting to 'clear the air' at which Mr Caldwell apologised to B. It was further included in the email that at this meeting Mr Caldwell was 'asked/challenged around the reasons why he allowed the content to be watched in the unit [and] he replied, "He was trying to keep them settled due to a code orange in secure care." He then went on to state that he would do it all again if the same thing happened and when challenged about breaking the rules he stated he didn't care about that.' The email finished with, 'The meeting was called short as [B] felt that it wasn't going anywhere due to the attitude and energy coming from [Mr Caldwell.]'

Response at the meeting to complaint six

[48] Mr Caldwell accepted he showed the screening of a 'Tik-Tok twerking video' in the context of a code orange occurring, that he intended to distract the YP because if the code escalated then the remaining staff would have been 'overpowered' because he would have had to help. The notes record that Mr Caldwell said, 'I did what I thought would work - thought would get in trouble - trying to keep the 4 out of secure as much as I could - keep separate.' I note here, and will return to this later, that nothing was asked, according to the notes, by Ms Lavender about a YP masturbating in front of female staff while the screening was played which was clearly included in the emailed record to her. The notes show Ms Lavender telling Mr Caldwell it was not for him to make risk assessment calls which I take reasonably to relate to his response that he screened the content based on his assessment that he needed to distract the YP in the 'code' situation. The notes show that Mr Caldwell uses descriptors of his

⁹ The email is dated 12 February 2023. 'Last night' would have been 11 February 2023, a Saturday night, something not reconciled in what is before me but it appears this incident occurred on 10 February 2023 and not as sometimes referred to on 12 February 2023 which was the date of this email.

behaviour as 'unorthodox' 'thinks out of the box' and Ms Gemmel also uses the words 'unorthodox' at the end of the meeting. In relation to being asked why he reacted to B raising issue with the incident and why he said later he would do it again, Mr Caldwell, with Ms Gemmel's support to this recorded said that the intent was about safety concerns. In his oral evidence to me Mr Caldwell maintained he only ever put a Tik Tok video on this one time which he admitted to. He also provided answers in his oral evidence that he didn't think there was anything wrong with this screening.

[49] Ms Lavender's later report of Mr Caldwell's responses to this complaint in her outcome 'letter of expectations' is that Mr Caldwell said simply that the 'allegation was correct' and that he said (as noted above) there were mitigating circumstances being the safety concerns about things potentially escalating on site. She also records Mr Caldwell said what he did was 'unorthodox' and that 'you thought you might get into trouble for it.' The notes and Ms Lavender's summary did not include anything about the masturbation occurring or the female staff being present which were both clearly contained in the complaint letter that had been emailed to her from a senior staff member. It is not disputed that the female staff member was not interviewed until the later investigation process and by the police.

[50] Ms Lavender's evidence before the Authority includes that at the time she had understood the 'masturbation' incident was a one off and that she did not understand Mr Caldwell had encouraged it but that he had admitted putting the inappropriate screening on for the reason of distracting the YP for the safety concerns he perceived.

[51] I pause here to note that back in February 2023 when this situation unfolded the acting residence manager and another manager watched footage of the incident but there is no written record of their observations at the time and surprisingly no footage was ever retained. Both managers were interviewed in the investigation that followed later about what they saw in the footage and both were consistent that Mr Caldwell was there, that one said he could see it was 'U-Tube being shown because of the drop down on the screen, that the female staff member that had later been interviewed was present, and that one YP was clearly masturbating, one manager saying 'openly.'

[52] For the sake of completion here I also note that both of the above managers said to the investigator later that things ended up back with Ms Lavender when she returned from leave

and that until they were asked months later to be interviewed they had nothing more to do with the situation.

Complaint seven

[53] On 7 March 2023, team leader Mr Isaako emailed Ms Lavender. This email relays that Mr Caldwell was in the staff room telling Mr Isaako and another Team Leader that “None of this would’ve happened if they say anything. Julie is probably the only one that was legit but the other ones are all sh*t.” ... “It’s probably that bitch Jess¹⁰.” Mr Isaako reports he told Mr Caldwell, “Come on man, we shouldn’t be talking like that about any staff, especially our wahine staff, so please stop.” Mr Isaako then reported that Mr Caldwell said, ‘ “Nah F*ck them” ... carried on with his rant and using [sic] of derogatory terms calling female staff “B*tches” ’. Mr Isaako then reported he had to repeat the admonition and Mr Caldwell then ‘stopped immediately’.

Response at the meeting to complaint seven

[54] The notes include that Mr Caldwell said he rated female staff but that he did ‘have problems with new staff, arrogance, have issue with that’. Ms Lavender’s outcome letter of this feedback is that the interaction occurred after Mr Caldwell had taken leave and that he said he was agitated and angry after receiving the letter of complaints about him. He said he reverted to unacceptable language when under pressure and he realised the need to modify this.

[55] I take the timeline and context of the above to likely be in relation to by then Ms Lavender verbally letting Mr Caldwell know something of these complaints before the written letter dated 8 March 2023. I take this from her explanation to me in her oral evidence and it is consistent with the above recorded response from Mr Caldwell to this complaint.

Letter of expectations as outcome to the seven complaints

[56] The letter of outcome was communicated on 17 March 2023. Ms Lavender sent it to Mr Caldwell and Ms Gemmel. It was headed ‘outcome from Meeting and Expectations’.

[57] I set some detail from Ms Lavender’s ‘letter of expectations’ below now because Mr Caldwell challenges that he did not receive the training and coaching proposed in this letter,

¹⁰ I take this reasonably to be referring to Ms Jansen.

something he says supports a reason why he may have continued not to improve after this mitigating factor for the decision to dismiss.

[58] Ms Lavender listed in her letter of expectations that ‘from now on’ Mr Caldwell was expected to (in part summarised by me):

- Raise work place issues with your team leader when appropriate to avoid dealing with issues in isolation, that she wanted Mr Caldwell to debrief with one of his team leaders at the end of each block of shifts about ‘how you are tracking’ and they [the team leaders] ‘will record this in writing so we can be agile in our support for you.’
- *‘moderate your language¹¹ in all interactions on site, including in front of YPs, in front of [team leaders, supervisors, managers] and amongst your peers. You are a role model to YP and new or fellow staff and are expected to model the behaviours we expect to see from others.’*
- ‘undertake mentoring of newer staff so they can become leaders in their own right. Share your knowledge and experience with all new staff, build them up and provide them with appropriate training, guidance and mentoring. I will be speaking with your [team leaders] about how we can support you to do this. You have great skills to pass on, as evidenced by the YP enjoying your company during your working duties.’

[59] Under the above text in the letter Ms Lavender proposed *‘In addition¹²*, I propose to provide training opportunities for you to assist with your communication style. Giving and receiving feedback, and any other skills that we both agree would be appropriate and suitable for you. We will work together to ensure that this happens.’ At the end of the letter Ms Lavender closed with ‘I look forward to working with you and your [team leaders] to talk about further training opportunities and ways in which we can support you to *mentor newer staff.*’

¹¹ My italicised emphasis added.

¹² My italicised emphasis added.

[60] Ms Gemmel's evidence is that Ms Lavender was 'pleased for the honesty from Mr Caldwell in this meeting.'

[61] I find that Ms Lavender's letter can reasonably be described as focusing on Mr Caldwell needing to improve how he communicated and includes Ms Lavender's expectations going forward about this after which she says 'in addition' she would be considering training on his communication style. The training is not described in any more detail than including 'giving and receiving feedback' and that Ms Lavender looked forward to discussing with team leaders so Mr Caldwell could continue to be supported.

[62] Ms Lavender's evidence in relation to her management of this process and the outcome of this process is that Mr Caldwell to her could appear to be 'glib or off hand or not taking things seriously' and that she 'was aware of this so took the time to explain the consequences of his language and behaviour'. There is nothing reflecting this specifically in the notes taken at the meeting, but I found Ms Lavender a straight forward witness who appeared to still consider Mr Caldwell someone she would deal with by not taking him too seriously. Her comment in oral evidence to me is consistent with this. She said she considered it 'stupid behaviour and not too serious' that Mr Caldwell made an aggressive finger gesture from his car to a witness in these proceedings (a complainant about Mr Caldwell's behaviour) when on the road leading away from the WTP carpark at a time during his suspension. This was at a time after these matters had escalated to what they have now become. Ms Lavender had to write to Mr Caldwell about this reminding he was not to be at TWP during his suspension.

[63] Ms Lavender's written evidence further includes the following retrospective view of her approach:

At the time [during the above process about the seven complaints] I appreciated [Mr Caldwell] acknowledging some of what he had done and the inappropriateness of it, which is why I took a supportive approach of issuing a letter of expectation with ongoing coaching. [Mr Caldwell] accepted this outcome. Knowing what I know now, and with the benefit of hindsight and experience, I believe I should have taken a firmer stance. It was a busy and stressful time for everyone, including me and the HR people

supporting me. There was allot to do, and our priority was resetting the culture at [TPW] and ensuring the safety of young people and staff.¹³

[64] Ms Lavender's evidence includes that WPT was 'in a bad way' when she started in December 2022, 'staffing was critically short and there was significant unsafe practice occurring as a result. There was a very poor culture on-site. I started to address these matters from the outset by resetting expectations with staff and prioritising key operational matters, such as ensuring there were correct staffing levels on the floor and that proper supports and processes were in place.' I note that these comments are potentially consistent with concerns raised in a report in August 2023 from the Office of the Children's Commissioner (OCC)¹⁴ after that agency visited unexpectedly in June 2023 as I have referred to above, something that becomes relevant again below. However, Ms Lavender's evidence also includes that she does not consider this environment excused Mr Caldwell's behaviour as addressed in this March 2023.

After the letter of expectations: a 'tracking review' by a team leader after a three day 'shift block' and further complaints reference

[65] As anticipated by Ms Lavender's 'letter of expectations' the team leader who had supported Mr Caldwell in the 15 March 2023 meeting who I take had also at the time been Mr Caldwell's team leader, provided Ms Lavender with a first review of how Mr Caldwell was 'tracking' (tracking report). The tracking report was dated 20 March 2023 - 23 March 2023 which I take to represent Mr Caldwell working the likely first three shifts 'back on the floor' after the above letter of expectations. I understand that Mr Caldwell was designated as 'shift leader' on these shifts. Mr Caldwell went on his planned extended annual leave only weeks after this.

[66] The above tracking report included positive bullet points about Mr Caldwell. It also recorded that Mr Caldwell reported in their 'catch up' that his two female colleagues [his friend outside work and Ms Jansen, a later complainant about Mr Caldwell's behaviour) 'pull him back and keep him accountable when he at times said inappropriate things'; that the team leader

¹³ Brief of evidence, Virginia Anne Lavender dated 15 August 2025 at [42].

¹⁴ *OPCAT Monitoring Follow Up Report*, August 2023 on TWP. Visit June 2023. I note that the report explains that 'OPCAT' is an acronym for 'Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment'.

put to Mr Caldwell that another RYW complained he had made an inappropriate comment about a female YP to which Mr Caldwell explained it was not intended to objectify the YP concerned but to defend the YP; that he was challenged about his view about 'secure [unit] should be used as punishment'; and that two RYWs had by then made a joint written complaint.

[67] The tracking sheet supports that the anticipated 'catch ups' had started, and it also supports there continued to be issues despite Mr Caldwell's letter of expectations including that he was to 'moderate your language'. The tracking sheet also shows Mr Caldwell considered he was being helped by his female colleagues to pull him up on things when he said something inappropriate. I find that while Mr Caldwell complains he had no opportunity for ongoing coaching, it is difficult to see what coaching he needed meet to expectation to 'moderate your language'.

[68] The above is further borne out in the above tracking report, where the Team Leader recorded receipt by then of a joint complaint and that 'the comments made are alarming and I have only addressed some ... but realise there is more that is included in the email from what they shared with me in person.' The tracking report also includes that the writer and another team leader are pleased that Mr Caldwell 'has displayed attributes in the way he is working alongside two women colleagues.' That comment seems at odds with one of those women being a co-complainant in the joint complaint. The cover email dated 23 March 2023 to this tracking sheet to Ms Lavender refers to attaching the review and that 'you will see that I have prefaced some positives, however this complaint [reasonably taken to be the joint complaint received] could be the tipping point.' I note here that this team leader then unfortunately became unavailable due to being seriously injured in the workplace. He was replaced by Mr Isaako from late May 2023 when Mr Caldwell returned from his approximately six weeks of annual leave.

[69] I pause again here to cover one of the many challenges Mr Caldwell brings to OT's process which is that Mr Caldwell considers that when 'people' (and I understand he includes Ms Jansen in this) realised that he had come back from annual leave and hadn't been dismissed as he perceives that they thought he had been because of his absence, they complained again about him to have another go at getting rid of him. I do not accept that the dates here in relation to the joint complaint that Ms Jansen made fits this narrative. It is clearly mentioned by the team leader in the tracking sheet *before* Mr Caldwell went on leave and as I set out below there

was a delay from when the complaint was received and when the two complainants decided they would put their names on the complaint.

Ms Lavender receives the joint complaint and one other about what Mr Caldwell told a nurse he wanted to do to the feral cats that she was feeding

[70] Ms Lavender's evidence includes that after the letter of expectations she received the above referred joint complaint in writing before Mr Caldwell went on his leave. She also says she received a complaint from a nurse contracted to provide services on the TPW site. The latter was brief and included that Mr Caldwell had told the nurse that the feral cats around the TWP property should be shot or given antifreeze and then made a general statement that this was settling comment to the other nurses. Ms Lavender in her written evidence refers to dealing with this matter 'in passing' with Ms Caldwell. She says she told him not to say these things and that his response was that he was just winding people up.

Joint complaint meeting 28 March 2023 and decision to take it no further if no names to it

[71] Ms Lavender, another senior manager and the same team leader that wrote the above first tracking report (and had also supported Mr Caldwell in the 15 March 2023 meeting) attended a meeting on 28 March 2023 with the joint complainants. Ms Lavender's evidence is that neither complainant wanted their names to be known to Mr Caldwell. Ms Lavender's evidence and Ms Jansen's evidence includes that the co-complainants expressed they were concerned about repercussions because they had heard that Mr Caldwell may get YP to turn on staff that complain about him. To be clear I have no evidence before me to show OT investigated this to any substantiated finding (nor the complaints about what Mr Caldwell wanted to do to the cats). I note this here because it would seem a serious matter to be heard by managers in the environment of OT raise. When I asked Ms Jansen about this she could not be clear how she knew for sure about this concern when I asked her in her oral evidence.

[72] At the above meeting, as evidenced by Ms Lavender, the complainants were told that unless they put their names on the complaint it could not be taken any further. The acting up manager during the 10-12 February weekend also stated this to the investigator in this matter. The co-complainants decided they would not put their names on the complaint at that stage. Ms Lavender in her evidence refers to the upcoming long leave that Mr Caldwell was to take and that she 'ensured' the co-complainants of the joint complaint were not rostered on with Mr

Caldwell before that occurred. As noted above this would have been across about three weeks before Mr Caldwell went on leave. The joint complaint was eventually progressed with the complainants names but as I understand it not until after the Office of the Children's Commissioner (OCC) visited and raised concerns in mid-June 2023 which I refer to below.

Office of the Children's Commissioner (OCC) visits TPW June 2023

[73] Mr Caldwell returned to work after the approximately six weeks of planned annual leave on 28 May 2023. He was working during the time the OCC made an unannounced visit to TPW in mid-June 2023 as I am satisfied was part of that agency's remit to do. Part of that visit reported observations of Mr Caldwell with a single YP that was later investigated in relation to 'line of sight' protocols, and the rest included reports of Mr Caldwell's behaviour in the workplace from others in that workplace. These concerns were then bullet pointed into a Record of Concern (ROC) recommunicated and sent to the senior leadership of OT. I return to this ROC below.

[74] OCC at the time was an independent Crown entity with the task of monitoring services provided by youth justice residences such as TPW in terms of care and protection of children. The following is an excerpt from the OCC's description of its monitoring role:

Where we monitor

Our power to monitor places of detention comes from the Crimes of Torture Act 1989. Under that law, Mana Mokopuna – Children's Commissioner is a National Preventative Mechanism, which means that it is our job to check whether places where children are detained are treating children with dignity and respect.

Our monitoring checks this against the United Nations Optional Protocol against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, known as OPCAT.

...

Secure locations we monitor

We have a legal mandate to examine the quality of treatment for mokopuna who are detained. This includes:

OCC communicates to OT its concerns about Mr Caldwell

[75] Ms Lavender's evidence includes she understood a phone call was made from the OCC to the Deputy Chief Executive of OT on 15 June 2023 about Mr Caldwell and following this, the OCC on 15 June 2023 emailed a Report of Concern (ROC) to OT about Mr Caldwell which was forwarded to Ms Lavender by her direct manager on 16 June 2023.

[76] The ROC was marked 'URGENT' and of 'high importance' and stated that in OCC's visit 'the following concerns were raised by several kaimahi [staff] within the facility in regard to a particular Kaimahi [Mr Caldwell]. The ROC was penned by someone with the OCC title of 'Manager Monitoring'. The concerns listed were:

- Screening music, YouTube videos and movies with adult sexualised content for mokopuna to watch in units.
- Making regular sexualised comments and engaging in sexualised conversations with mokopuna in the units.
- Organising a game with mokopuna called 'first to cum gets a chocolate bar'. An inappropriate movie was screened, mokopuna were fetched towels and were all masturbating. This incident was alleged to have occurred 2 to 3 months ago.
- Female kamahi across all operations in the residences do not feel safe around this particular kamahi based on his person comments, sexual references and a sense of intimidation. Some refuse to work with him.
- When inappropriate practice is challenged Mr Caldwell is open about staff not having the power or ability to formally address it.
- Bringing a personal cell phone into the unit for unstated purposes.

[77] The ROC then included, 'The OCC have been clear with TPW management that the allegations regarding [Mr Caldwell] and his interactions with [YP]¹⁶ require immediate investigation' and that a phone call had been made already to the Deputy Chief Executive of

¹⁵ <https://www.manamokopuna.org.nz/monitoring/where-we-monitor/>.

¹⁶ The ROC also recorded observations of Mr Caldwell in relation to a single YP in relation to standing near or the YP following him out of the room. This was not an allegation commenced or progressed in the OT investigation. There is reference to a team leader explaining that the particular YP tended to follow RYW's including referencing another RYW being followed as an example.

OT. The ROC set out our 'expectations' that the OCC had asked for video CCTV footage for the approximate time of the 'masturbation game' and 'were advised it was likely it had been erased.' Under a heading of 'the following actions must be taken' was:

1. Mr Caldwell is removed from the roster and does not work directly with mokopuna.
2. [OT] initiate specialist police interviews with Child Abuse/Sexual Abuse Teams.
3. A full investigation is launched into Mr Caldwell's professional conduct which includes the incident outlined in this report of concern.

[78] For Mr Caldwell, Ms Gemmel put forward¹⁷ a challenge that OCC had no authority to demand an employee be removed from the workplace and be investigated. OT has put forward that it undertook its own steps and investigation and the outcome was justified in relation to Mr Caldwell's employment following receipt of the ROC and the later summary of concerns (that I return to below). For the purposes of my determination, what powers the OCC may or may not have in relation to 'requiring' steps to be taken by OT as is reflected in the apparent directive nature of the language in the ROC is a matter for OT and the OCC.

[79] My understanding from what is before me is that OCC has/had at the time recommendatory powers only.¹⁸ As will become evident, I find that OT did undertake its own lengthy and extensive investigation and disciplinary process and did not, as suggested for Mr Caldwell just become a conduit for untested allegations for the OCC. Accordingly, I do not take this any further and focus on the justification of OT's process and outcome as is the framework under s 103A of the Act.

Mr Caldwell is 'stood down' and later confirmed as suspended

[80] Mr Caldwell was 'stood down' upon his arrival to start a shift on 15 June 2023. I deal with the details of this further below under the first issue as to disadvantage.

16 June 2023: An investigation commences, and suspension is proposed

¹⁷ For example, in her 26 June 2024 47 page response to the draft investigation report at page 14.

¹⁸ Oranga Tamariki Act 1989, Optional protocol to the Convention Against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment (OPCAT).

[81] Ms Lavender's evidence is that after Mr Caldwell was stood down she considered the ROC (received by her the next day) and decided to conduct a 'formal employment process.' She wrote to Mr Caldwell on 16 June 2023 and included the following bullet point summary of the concerns that she explained had been raised by the OCC. She did not attach the ROC with this letter but did attach the OT Disciplinary Policy and Guidelines (that included reference to matters regarding suspension that I return to below). The following is the quoted bullet points from Ms Lavender's letter using different words from the ROC:

- Behaviour described as 'sexually harassing' towards female members of staff;
- Making regular sexualised comments and engaging in sexualised conversations with mokopuna in the units;
- Reference to showing young people videos with inappropriate sexual content, encouraging them to masturbate and offering chocolate to the young person who 'cums first'.

[82] Ms Lavender continued that 'The Ministry is taking this matter very seriously and is going to investigate the concerns and your alleged involvement. However, at this time your alleged conduct raises very serious concerns about our ability to have on-going trust and confidence in you to exercise your role of [RYW] because based on the information we have available so far, your actions appear to be in breach of our Code of Conduct.' Mr Caldwell's views were sought regarding suspension while an investigation was carried out and as noted already, I detail this below.

Summary of Concerns from OCC dated 21 June 2023 emailed to OT 26 June 2023

[83] On 26 June 2023 OCC provided OT with a 'Summary of Concerns' further to the ROC which included some more details but largely not in relation to the above listed concerns but included the names of YP spoken with in the visit, observations made and a list of staff (just initials were used in part but have been later identified) who had relayed to the OCC about things such as the 'masturbation game incident' and others on the staff who had 'heard' about it.

Roles changed for OT's investigation and decision making

[84] Matters changed in terms of who was to be involved in the investigation and decision making. The eventual decision maker for OT was Ms Sonia Fairie, a senior manager working away from Christchurch. I accept her evidence that at the time of undertaking this task she had just returned from leave and was employed at an OT facility away from Christchurch. Her evidence includes that she cannot recall why she was appointed instead of Ms Lavender but thinks upon her return she was asked to step in because she was not involved in the prior process in March 2023 which by then had been raised as a challenge to the scope of the investigation by Ms Gemmel.

Investigation allegations and Terms of Reference

[85] The allegations that became part of OT's employment investigation and disciplinary process included those reflected in the ROC. The investigator carried out 23 interviews of TWP personnel including RYWs, RYW team leaders, managers and nurse and social work personnel.

[86] Ms Fairie confirmed Terms of Reference (TOR) for the investigation by mid-July 2023 and by this time OT had instructed external senior legal counsel to be the investigator and not the person originally put forward by Ms Lavender. Opportunity was given before this for Mr Caldwell to feed back on the draft TOR which he did through Ms Gemmel. The overall heading on the TOR was 'Investigation into allegations regarding a "masturbation programme" and inappropriate use of language and behaviour towards rangitahi [YP] involving [Mr Caldwell].' The allegations were then set out as specific allegations to be investigated but included that if the investigator considered their 'investigation raises other issues that you think should be investigated' that they had to bring these to the decision maker's attention and this may result in a widening of the investigation upon which Mr Caldwell 'will be advised of any amendments to the investigation.' A further allegation relating to derogatory and sexist comments about women in front of YP was added in this way as emerging from interviews. I return to that below under the disadvantage issue about this.

[87] The investigator was given a list of people to interview including some put forward by Mr Caldwell. There was a dispute about two further people Mr Caldwell wanted interviewed. OT considered neither were relevant to the investigation one being a character witness and the other not present over the February times when the 'masturbation game' matter was being investigated as having occurred. To cover this point here, I find that decision was within

reasonable scope for OT to make. It was clearly not accepted and asked for again by Ms Gemmel at later stages.

[88] The TOR tasked the investigator to provide a draft report with the allegations, an outline of the investigation process, a summary of evidence and information gathered, findings of fact including reasons or differing accounts as to the allegations, findings based on the 'balance of probabilities (i.e. more probable than not) whether each allegation is substantiated or not based on the analysis of the findings of fact, findings on whether the above breached various policies protocols and procedures and that all documents were to be appended to the draft report.

[89] The TOR included that the investigation was expected to commence mid July 2023 and be completed in approximately four weeks. Delays were alerted as potentially prejudicial, and the investigator was asked to record these and reasons for them. Mr Caldwell was not interviewed until November 2023. There are communications to show that Ms Gemmel sought to postpone Mr Caldwell's interview until the police matter was concluded, and there was a brief pause when Mr Caldwell was on sick leave and paid as such. As referred to above the conclusion of the police investigation was that there would be no criminal action taken against Mr Caldwell. This was notified in March 2025 by which time Mr Caldwell was interviewed substantively for the first time in November 2023 and a second time more briefly to hear his feedback in relation to the draft investigation report.

[90] The investigator as part of the TOR was only initially provided with the ROC and the further 'Summary of Concerns' dated 21 June 2023 as referenced above. Much later Ms Gemmel provided the documentation of the March 2023 process as a point to show that matters had been already investigated supporting the overall challenge that matters were being dealt with again.

[91] A list of people to interview was included in the TOR including some but not all people that Mr Caldwell had proposed be talked to as referenced above.

[92] The TOR included that the external investigator was required to report regularly to the decision maker and as above, that there was scope to come back to the decision maker in the event that they considered issues arose that could widen the investigation and if this happened Mr Caldwell was to be informed.

[93] As noted above Mr Caldwell was interviewed with Ms Gemmel and his close relatives in attendance in November 2023.

[94] By the time of this November 2023 interview Mr Caldwell had been given previous opportunity to consider the material obtained by the investigator including the 23 interview transcripts that had been conducted to that point, mostly all completed throughout July and August 2023 with some further ones approved in September including Mr Caldwell's friend outside of work.

[95] The transcript of Mr Caldwell's November 2023 interview shows Questions throughout the transcript from the investigator of Mr Caldwell who appeared to answer less for himself and much was answered by Ms Gemmel with comments made throughout by Mr Caldwell's close relatives in support.

[96] The meeting did not complete hearing all responses to all allegations from Mr Caldwell. It was later put forward by Ms Gemmel and accepted by the investigator that further responses would be in writing based on material already provided to Ms Caldwell. The material was detailed and set out clearly the allegations and matters the investigator sought responses to in summary form. The 23 source transcripts and associated materials were also made available. Further written feedback was provided through Ms Geemel and responded to.

[97] The investigation report was drafted, and Mr Caldwell was provided with a further opportunity to provide feedback to this which was forwarded by Ms Gemmel. It included interspersed feedback to draft findings in the draft report. This written feedback is in close print across 48 pages with attachments to this in the summary form. The investigator received this material the day before a scheduled meeting to hear Mr Caldwell's feedback to the draft investigation report. The investigator, in my view not unreasonably, indicated at that meeting that they had yet to have the opportunity to review the extensive feedback received the day before and would do so and would reply which they did. This resulted in the investigator considering the feedback beyond the meeting and providing comments throughout. The comments included one change which was to change an adjectival word from 'bare.'

[98] The investigation report was finalised. It is 103 pages with 74 attached documents which included the above-mentioned interview transcripts and documents summarising evidence against allegations for Mr Caldwell to provide feedback as well as the feedback supplied and responded to.

[99] I heard from Ms Gemmel who summarised this process as 'overwhelming'. I heard from Ms Fairie who also confirmed that she took several weeks away from her employed full-time role to consider all the material before her before providing a proposed outcome.

[100] Ms Faire provided to Mr Caldwell via Ms Gemmel a proposed outcome which included her reference to the investigation report findings and some changes she proposed. She proposed that overall matters substantiated and partly substantiated supported an overall finding of serious misconduct. She proposed summary dismissal.

[101] Ms Faire asked for feedback to the above and received this in writing from Ms Gemmel who did not then accept an invitation to further meet to discuss this feedback. That feedback was corresponded to by Ms Faurie in her final decision for OT which was to confirm serious misconduct and summary dismissal.

The final decision to summarily dismiss for serious misconduct

[102] In the final decision to dismiss Mr Caldwell the decision maker considered that only two of the five sub allegations relating to Mr Caldwell screening inappropriate material for YP would be taken into account changing one from the investigator's finding being the 10 February 2023 incident as being one already dealt with in March 2023. The remaining two were that the decision maker accepted the finding that Mr Caldwell had screened an R18 movie called 'Polar' that included graphic sex scenes and violence (covered off in detail in the investigation report against the policy of only showing 'P' or 'PG' with approval) and also that Ms Caldwell had screened content that he described to a colleague as having 'great tits and arse'. The latter was found in the investigation report to be corroborated by others after weighing Mr Caldwell's responses against this. Of the other two allegations under this head that were not substantiated in the investigation report and accepted as such by the decision maker these were the alleged

screening of UFC compilations which in part the investigator found may have had approval from a Team leader for their sport value, and another where that there was insufficient in interviews to support on the balance of probabilities that Mr Caldwell had screened further TikTok type screenings of 'half naked' dancing girl compilations to the YP.

[103] The decision maker further accepted the investigation report findings on the allegation that Mr Caldwell had engaged in sexualised conversations with YP in units, something Mr Caldwell denied, could not recall, or said it may have been banter. This allegation was extensive with a list of matters investigated and weighed in favour of the number of different interviewees who corroborated similar or same words or phrases said in front of YP or in response to their talk as against Mr Caldwell's responses. The decision maker removed one sub allegation that was upheld by the investigator in this manner from consideration in relation to considering it was dealt with by Mr Isaako just prior to the stand down in a 'catch up'. This relates to what I find was a likely 'performance management' approach Mr Isaako gave evidence about. In his oral evidence to me Mr Isaako clearly had little understanding that there had been a March 2023 process that included the need for 'catch ups.' His evidence which I found straight forward was that he had just started as team leader for Mr Caldwell after his leave and after the previous team leader had been injured. He understood he had to record things if he was going to have to put in place a performance plan and the 'tracking sheet' evidencing in this sub allegation that was removed by the decision maker as previously dealt with showed an entry of a 'catch up' including it on the 15 June 2023, the day Mr Caldwell was stood down. It related to an inappropriate 'eating pussy' comment that Mr Caldwell made to a YP.

[104] The decision maker accepted the report findings otherwise on the allegation regarding sexualised conversation with YP. I do not intend to traverse all of this material here. Mr Caldwell was found to have used this sexualised talk which referenced at times telling YP of his own activity outside of the TWP using terms such as "Smashed a bitch on the weekend" [taken as a reference to sex] and "Oh yeah, yeah, I used to f*ck so many bitches". The investigation that was accepted included weighing in favour of the number of different OT staff interviewed who heard Mr Caldwell using some specific terms in front of or to YP against Mr Caldwell denying he said these things, that this was conversation led by the YP, that he would not have said these

things, that he may have been joking or the overall challenge on his behalf that because there were no specifics to when these things occurred so he could not reasonably respond.

[105] A further allegation that was partly substantiated by the investigator but not taken further by the decision maker was about making 'regular sexualised comments at TPW' focused more on conversations with staff. The decision maker's final view was that this had been addressed previously and did not continue to consider it as part of the decision-making process. The investigator had found that the allegation was partly substantiated because there was only one incident found likely, and it could not be said to be 'regular'. I note with this matter it related to an OT employee saying Mr Caldwell had made inappropriate sexualised comment about their daughter when seeing the same on the complainant's phone. There is narrative that would have been in front of the decision maker to show there had been an apology provided sometime after this.

[106] A further allegation was that Mr Caldwell had told others (including in front of YP at times) that he could not be challenged due to his connections in the hierarchy of OT or more generally because he had so much 'dirt' on OT. The allegation included that this was 'intimidatory' which the investigator found little evidence of, but that Mr Caldwell likely said things of this nature given the similarity of what many interviewees referred to. Again, a corroboration of the number and different staff was weighed including those who were interviewees proposed by Mr Caldwell.

[107] The type of talk in this allegation that was found to have likely occurred to the YP included: "I've had four grievance against me by staff. I didn't know that they could do that. I was stood down and basically had a paid holiday. Boys, this just show I'm untouchable." Mr Caldwell's recorded feedback to this specific comment was that if he did say it, "It would be venting out of frustration and in context." The investigation considered this feedback as 'problematic' and concluded it was difficult to see how any context would see this as appropriate talk to the YP. By similarity and again as an example of the investigator's approach to this allegation, the investigator considered that Ms Jansen's complaint (separate to the above) included that Mr Caldwell had used words to her in the staff room to the effect that "I've had grievance against me from staff and pretty much I could whip my dick out and I would not get

fired.” I have not included all the matters found as substantiated by the investigator in this allegation but illustrate what I consider was reflective of the investigator’s approach in weighing matters to conclude Mr Caldwell had likely said them. The decision accepted the investigation finding and maker upheld this allegation as partly substantiated due to the lack of finding on the ‘intimidatory aspect.’

[108] The further allegations about not following protocols and having a cell phone in the units were substantiated. The investigators findings on these matters were accepted by the decision maker. They were weighed against Mr Caldwell’s main challenge that the specifics of details were not provided with again the number of different interviewees who referenced how they observed Mr Caldwell in the workplace. The cell phone allegation was separated and considered by a weighing of Mr Caldwell’s feedback that he acknowledged he had his cell phone on his for a period of time in the units but that this was because he had issues with getting a swipe token. The also feedback that Ms Lavender knew about his problems with getting a swipe token and therefore took this as permission to have the phone in the units. The investigator weighed evidence from interviewees that included Mr Caldwell telling others not to get caught but overall concluded that having spoken to managers including Ms Lavender, no permission had been given for the cell phone to be brought in.

[109] The decision maker upheld the investigation report’s findings on the protocol breach allegations.

Unsubstantiated – that Mr Caldwell had run a masturbation ‘programme’

[110] For Mr Caldwell it is put forward that the main serious incident investigated was not substantiated and this forms a key part of submissions for him to say the dismissal was unjustified. As already referred to above, Mr Caldwell was alleged to have run a ‘masturbation programme’ for the YP, handing out towels and telling them that ‘the first to cum gets a chocolate fish.’ The allegation was originally recorded by the Office for Commissioner for Children in the ROC after its unannounced visit to WTP in June 2023. It was included in the heading for the TOR for OT’s investigation.

[111] The investigator found this allegation unsubstantiated on the basis that after interviewing 23 employees at TWP including those who were reported to have told the Office for Commissioner for Children (OCC) about this 'programme,' all said they had only heard about it. The investigator concluded the allegation likely stemmed from workplace gossip based on the incident that did likely occur on 10 February 2023 when Mr Caldwell played an inappropriate TikTok screening to YP (something he had previously admitted doing in March 2023) during which a YP likely openly masturbated. This incident is the one above referred to above where managers had watched footage, footage had not been kept and then Ms Lavender took over on her return from leave and dealt predominantly with the aftermath of Mr Caldwell's inappropriate reaction to a team leader.

[112] The decision maker after considering the investigation report did not change this allegation as being unsubstantiated. They did however, as I note above remove the 10 February 2023 incident from further consideration under the separate allegation of other screenings of inappropriate material where the decision maker had investigated the matter in depth.

[113] With reference to the above I will consider the issues.

Did OT in its actions disadvantage Mr Caldwell in his employment resulting in unfairness to him by standing him down from his employment without consultation and without fully providing reasons to do so?

[114] An employer has a duty to act in good faith under s 4 of the Act and to follow principles of natural justice before deciding on something that adversely affects an employee. Being sent home suddenly from the workplace without reasons given could be said to adversely affect an employee.

[115] The Employment Court has said that the sudden expulsion from a workplace even on pay (as I accept occurred here with Mr Caldwell's stand down on the evening of 15 June 2023 and then beyond into the longer suspension) can without consultation be something unfair to

an employee.¹⁹ There are also situations where a high level of concern for immediate safety have been regarded as a reason for immediate and without consultation suspension from the workplace.²⁰ I note also that OT's Disciplinary Policy which includes its adjunct 'Supporting Guidelines' includes that suspension without consultation may happen in 'extremely rare cases' where 'there may be real or immediate concerns regarding health, safety or investigation integrity which require resolution.'²¹

[116] Mr Caldwell was immediately 'stood down' upon his arrival to start a shift on 15 June 2023. Ms Lavender's evidence which is supported by her handwritten file note includes that she was instructed by phone to 'stand down' Mr Caldwell immediately. The call was from a senior official in OT who had briefed her at a high level about the ROC received that day. It appears not in dispute that two team leaders assisted Ms Lavender one being Mr Isaako who in evidence confirmed he went with Mr Caldwell to the toilet when he asked to go before leaving the premises. This was because Ms Lavender wanted him not to find his way back to the floor of the unit. I find that this is consistent with Mr Lavender's evidence that she had never stood down anyone immediately from their shift before and felt it needed to be done discreetly. This intention to be careful about the approach with Mr Caldwell in mind is also consistent with what I find overall was Ms Lavender's apparent supportive approach towards Mr Caldwell albeit not supporting the behaviours that he was eventually dismissed for.

[117] While it is not in dispute that Mr Caldwell was not given details of reasons when he was 'stood down' further supported by Ms Lavender and Mr Isaako's evidence that when he was asked to come off the floor to talk away from the unit he responded with "What the fuck have I done now?" While I can understand when Mr Caldwell says it was a shock and that he felt humiliated because he had in fact started work and then to others would have disappeared suddenly, I am not satisfied he was 'marched' off the workplace in front of everybody. I found Mr Isaako's evidence about how he walked Mr Caldwell to his car and that they passed by very few people to be plausible and straight forward in recall.

[118] On 16 June 2023 Ms Lavender communicated to Mr Caldwell about ongoing paid suspension and as above included her paraphrasing of the concerns. While Ms Gemmel

¹⁹ *Booth v Big Kahuna Holdings Limited* [2014] NZEmpC 134 at [60].

²⁰ *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587.

²¹ 'Disciplinary-Supporting Guidelines' Common Bundle, Tab 3, page 87.

challenged this as Mr Caldwell already being suspended without consultation the response was on 19 June 2023 for Mr Caldwell was a proposal that he was able to work 'at all times' in the 'Key Room/Press' but that he was concerned for his safety in that allegations could be made about him during this time. To that end he asked that he work alongside another staff member 'at all times'.

[119] On 21 June 2023 Ms Lavender replied and indicated that she had considered Mr Caldwell's feedback on the proposal to suspend but communicated that he would be on paid suspension while the investigation continued. She did not appear to respond to the raising of what OT accepts was now enough specificity for a grievance here about the 'stand down'. Rather the focus was on consulting on the suspension. Her explanation to Mr Caldwell's proposal was that to have Mr Caldwell work in the Key Room with another staff member 'at all times' was not viable explaining the Key Room is a small working environment and does not require additional workers to operate. Ms Lavender considered it was not healthy or safe for Mr Caldwell to operate only in that room without access to the kitchen and restroom. Accordingly, Mr Caldwell was suspended on full pay and continued to be so until the termination of his employment apart from a brief time that he was on sick leave and paid leave for that status accordingly.

[120] While for Mr Caldwell I am asked to consider the humiliation of this 'stand down' before matters were consulted or explained, I accept the submission for OT that this was one of those situations that required a high level of risk management in the context of the seriousness of the concerns *at the time*. Those concerns referenced concerns from an agency with recommendatory powers where on the face of it the type of concerns carry significant risk before a proper investigation can be carried out. This was in the context of what I reasonably accept is the role of OT regarding the YP's emotional, developmental as well as physical safety and their understandable categorisation as vulnerable youth.

[121] On balance I accept here that the decision to initially 'stand down' immediately was one made by OT that was within scope to have been considered a situation where there was immediate risk. I also find Ms Lavender likely tried to mitigate the situation and not add to the shock and humiliation that can be inevitable by trying to have the matter dealt with discreetly. Further the matter was then rectified with consultation about the ongoing paid suspension.

[122] Within this claim I have been asked to consider that Mr Caldwell was asked to leave the workplace without reasons and the humiliation and stress for Mr Caldwell was exacerbated by a televised press conference²² held by the then Chief Executive (CE) of OT sitting next to the Commissioner of Police where the CE referenced that two employees²³ (Mr Caldwell was not named) were stood down due to an investigation commencing into sexual behaviour towards YP in OT's care. At the end as the conference wound up I agree the CE used words that included in clear reference to the two employees that they were 'no longer part of OT'. OT accepts these words were 'mis-spoken' but that Mr Caldwell was not named, the rest of the media release made it clear there were investigations commenced, and that it must have been evident to the represented Mr Caldwell by the time of that press release that the paid suspension and commencement of the investigation meant that he had not been dismissed.

[123] Based on the above I find that this grievance claim is not successful.

Did OT in its actions disadvantage Mr Caldwell in his employment resulting in unfairness to him by unilaterally changing the Terms of Reference (TOR) to the investigation process

[124] I have referred above to the additional allegation that was added during the investigation process. This related to an allegation that was eventually substantiated in the investigation and accepted as such by the decision maker. While Mr Caldwell says he was disadvantaged because this was unilaterally added during the investigation there is communication to show that OT's position was that the TOR's allowed for this to happen. I agree.

[125] I am also not satisfied that Mr Caldwell was disadvantaged by an allegation that was not put to him. It is clear that this was put to him in detail and referencing this to the interviewee transcripts and what they said about this behaviour. He had the opportunity to respond which he did through his representative.

[126] Based on the above I find that this grievance claim is not successful.

²² The audio-visual news release was viewed by all participating in the investigation meeting including myself.

²³ Relating to a separate issue relating to an OT employee in a different OT facility.

Did OT in its actions disadvantage Mr Caldwell in his employment resulting in unfairness to him by reinvestigating matters already investigated and dealt with by a letter of expectations?

[127] I have considered in detail above what the earlier March 2023 process led by Ms Lavender entailed. There were specifically seven complaints. There are three I mention here as the only ones I need to consider in relation to this claim. The rest I find dealt with specific incidences that were not repeated later in OT's investigation.

Complaint six 12 February 2023 email from a team leader witnessing Mr Caldwell's reaction to another team leader and his later responses about playing the 'TikTok' video

[128] To the extent that Mr Caldwell had admitted to Ms Lavender in March 2023 that he had put on an inappropriate video (the only one he has told me he ever screened) on what eventually has turned out to be 10 February 2023, nothing in that process appeared to cover the wider concern covered in the later investigation about Mr Caldwell's attitude to the female staff member present and the RYW openly masturbating to the screening. Nor did it include any consideration of the footage in relation to the concerns raised by the RYW present even if she initially did not put her concern in writing.

[129] I also note that the investigator took the approach that it was unclear if there was a potentially second date that weekend when Mr Caldwell screened something. This I am satisfied was consistent with the mess of the way the managers at the time either did not communicate about the footage or that there was a lack of exploration of the seriousness of the matter which only seemed to focus on how Mr Caldwell had reacted to a long-standing team leader inappropriately. It was reasonable that the allegation of the 'masturbation programme' needed to be properly investigated due to the apparent reference to multiple YP and concerns on the face of it from the ROC. This was also to Mr Caldwell's benefit. He was entitled to have a proper investigation undertaken by his employer about the concerns raised.

[130] What I find from my observation of all interview transcripts is that the investigator engaged carefully and asked about how people formed their view about the 'programme' and

checked with the above mentioned two 'acting up' managers who watched the footage and expanded carefully into comparing the two statements of the RYW present to the police and to OT.

[131] The investigator found that nothing supported the masturbation programme and that this incident was likely what that 'talk' stemmed from. Before the investigator was the acting manager's explanation of hearing from his mother about a 'programme.'

[132] I then have considered the extent to which the investigator then found the 10 February 2023 incident was substantiated under the more general allegation of screening inappropriate material to YP. The investigator did go to some lengths to ask Mr Caldwell what he typed in for the video which he responded to and then replicated the search to include for the decision maker about what the likely video was. Mr Caldwell's views about the video have also been noted in that either he has in these proceedings included there was nothing wrong with the video and it was ok to have played, TikTok being designed for children. The extent to which then the ongoing investigation of this matter due to the lack of clarity about when it initially occurred is outweighed in my view by Mr Caldwell's own inconsistent later responses here.

[133] Even then, the decision maker concluded despite the above that they would not take this matter into account as a substantiated allegation because they concluded it had been dealt with in March 2023.

Complaint Four in March 2023 that included reference to specific words about "Fuck no. I raw dog that shit ... etc."

[134] I find that this complaint contained very specific wording and was likely 'reinvestigated' and dealt with in the March 2023 process with the notes showing it was likely directly discussed. Mr Caldwell did not accept then he said it his responses in the later investigation include not recalling or that it could have been quoting lyrics. However, I find that even without this one aspect in what has been a much longer list of findings under this allegation could not reasonably have impacted the overall finding of serious misconduct which I return to below. I

do not accept this matter takes the procedural fault into something more than minor as is submitted for OT and if wrong about that I do not find it overall impacted unfairly.

[135] Based on the above I find that this grievance claim is not successful.

Was the decision to summarily dismiss for serious misconduct one that OT as a fair and reasonable employer could have made in all the circumstances at the time?

[136] I have set out above from [21] the test for justification under s 103A of the Act and guided by these factors I consider this issue.

Sufficiency of the investigation - 'whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee'

[137] OT is a large government organisation with internal human legal resource support, and I find the investigation of the allegations it engaged to be carried out has the hallmarks of a thorough and detailed investigation. It is submitted that I should not be duped by the length and breadth of the documentation produced by the investigation process. I have concluded the above after taking time to consider all of that material and in particular the investigator's report and how they weighed findings with responses from or for Mr Caldwell something that has been a focus of criticism in this matter for Mr Caldwell.

[138] It is submitted for Mr Caldwell that the allegations to be investigated were set too wide for meaningful feedback. For Mr Caldwell I am asked to consider a situation that had parallels to the present in that the investigation parameters were considered too wide to allow the employee to reasonably respond.²⁴ That matter also had a genesis in what began as an external agency raising concerns about the behaviour of a principal at a school where those concerns became allegations stated widely. However, it was found that the wide berth was too wide in that allegations related to generalised concerns about the environment at the school

²⁴ *Campbell v Commissioner of Salford School* [2015] NZEmpC 122.

rather than specific conduct and in particular the principal's responsibility for this environment. These generalised allegations spanned many years and there were issues found with bias on the part of the investigator as well as a fundamental flaw in that some of those interviewed by the investigator who were one that were highly critical of the principal remained confidential as to their identity. These are not the hallmarks of this investigation. There were specified allegations that by their nature came from serious concerns raised in relation to YP that focused on conduct. All material was shared with Mr Caldwell for his responses and no interviewee or person spoken with was kept confidential to him.

[139] For Mr Caldwell criticism has been levelled at the manner in which the investigator asked questions of interviewees by finishing sentences for them or leading them and that this caused matters to be expanded unfairly. My observation of those 23 transcript interviews is that while there are elements of an informal questioning style that has aspects of this it also could be described as showing paraphrasing back to the interviewee as to what they have explained and having them speak in their own words to the various questions put to them.

[140] To the extent there may have been any 'leading' into topics in interviews, the investigation report itself includes extensive weighing of what people said and goes to the additional extent of summarising the consistencies of what interviewees said to make findings about types of language or phrases used.

[141] OT submits that the investigator is an experienced investigator and legal counsel. I did not hear from this person but on face value this would seem correct. Unlike in the case above²⁵, there is no evidence before me of bias on the part of the investigator and I do not accept the submission that a case was being built against Mr Caldwell. The documentation supports a careful gathering of topics under headings that show links to the allegations and then a weighing in detail of what was said and responded to. Extra documents were provided to assist his responses.

[142] I do find OT sufficiently investigated.

²⁵ See note above.

Concerns raised before dismissing; the employee given a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee

[143] For the sake of completion here I note these factors under s103A are also not lacking in OT's process. If anything, the process as illustrated by the investigation communications and documentation provided could be described as the opposite of one where an employee was not provided with concerns and was not given a reasonable opportunity to respond before the final decision to dismiss. I note also here that Mr Caldwell remained represented throughout to support him with his participation in the process.

Genuine consideration given to the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[144] This factor relates to the decision making of OT when faced with the investigation outcome. I have already considered above something of the decision making by Ms Fairie in relation to changes she made to the investigator's findings in the final investigation report. To the extent it is suggested she just accepted everything the investigator found is consistent with this.

[145] In addition to the matter of not including the TikTok incident when it had been investigated, Ms Fairie also took out the matter she considered that Mr Isaako had included in the tracking sheet on June 2023. Again, this supports genuine consideration of the investigation findings.

[146] While I have not been assisted by the apparent lack of explanation by Ms Fairie in her final decision as to which allegations she considered serious misconduct and while this seems for OT as a large well resource employer surprising, I found Ms Fairie to be a straight forward witness who explained how she spent weeks considering all the material before proposing what she considered as an outcome.

[147] Even if I were to consider that her lack of specificity about which allegations formed serious misconduct I find it was within reasonable scope for a fair and reasonable employer to consider at the very least the substantiated allegations regarding inappropriate screening, and the sexualised language to and in front of the YP and the 'sexist and derogatory'

nature of language in front of YP to be within scope for a reasonable employer to conclude serious misconduct. At the very least OT's code of conduct could be considered breached particularly where it includes: 'Ensuring the safety and wellbeing of the tamariki and rangitahi is our primary focus in everything we do.' I accept that the role of the RYW is to be a role model for the YP which in turn can reasonably be understood to be vulnerable and in this context findings on these matters of serious misconduct could be justified.

[148] For Mr Caldwell it is submitted that Ms Fairie did not properly consider that he had a diagnosable condition that affected the way he communicates, and this can be misinterpreted including that he was potentially being humorous. I asked Mr Caldwell to explain this condition and in his oral evidence to me he responded that the first he had heard about it was during the November 2023 investigation meeting when it was put forward by a close relative to the investigator but that he thinks it now 'makes sense'. He confirmed he has not attended any professional person since discovering it to assess or treat him for this condition. I have nothing before me to show that Mr Caldwell was not able to provide his own evidence to me. I have no medical evidence supporting any diagnosis such as has been briefly described in submissions for Mr Caldwell. I further note that Ms Fairie did address this matter which the investigator had reported was put to them as a mitigating factor. Mr Fairie's response was to say in her final decision that there was nothing to show OT was aware of this condition and if there was how this could affect Mr Caldwell in his role as a RYW which she expressed would have to be a serious concern to have been explored in the role as RYW. Standing back from the above I do not find this was a mitigating factor that OT as a fair and reasonable employer could have reasonably considered.

[149] For Mr Caldwell there have been other mitigating factors also put forward. Firstly, that it ought to have been considered that he suffered from concussions that affected his memory. I take this to suggest this may have impaired Mr Caldwell's responses in the investigation where there may have been inconsistencies or lack of recall. Counter to that Mr Caldwell remained represented throughout and the decision maker did not have medical evidence supporting this type of mitigation. I do not accept this was something that impacted the decision of OT.

[150] On the challenge for Mr Caldwell that he had not been trained either generally or as proposed in Ms Lavender's letter of expectations I have evidence before me supporting

the training modules Mr Caldwell participate in and he acknowledged the same in cross examination. He has also acknowledged that the way to behave with YP is simply common sense in any event. I find also that issues with Mr Caldwell's communication that were to be improved on in Mr Lavender's now acknowledged soft approach were initially addressed in 'catchups' that included that in fact issues were likely continuing and then matters were overtaken by further complaints, his own leave and then the OCC raising concerns. I do not accept this supports that OT could have reasonably considered this a mitigating factor here.

Other issues

[151] For Mr Caldwell it is submitted that there was a cohort of women working at WTP who were bent on getting rid of him and or did not like him. This is reflected in the views expressed to the investigator in Mr Caldwell's November 2023 meeting. This challenge also includes the suggestion that when Mr Caldwell went on his annual leave and then returned people then had another go to complain about him because he had not yet been dismissed. I find the above submission is largely conjecture with little to support it. I have already found this narrative is inconsistent with the timing of the further complaint made about Mr Caldwell after the letter of expectations.

[152] I find that the additional material provided to me for my concern as to how the interviewees were communicated with prior to their interviews does not support evidence of collusion by the interviewees with each other, nor bias by the investigator.

[153] While Ms Gemmel has put forward that the process was overwhelming, by nature this type of investigation would have this element. I have considered the reverse situation here as submitted for OT. Had OT not thoroughly investigated the matters in the ROC and then made conclusions Mr Caldwell could certainly have said he was not treated fairly.

[154] To the extent that it is claimed that nonspecific incidents were put forward for response I find the weighing up in the investigator's report shows me that it was reasonable to

conclude that the different interviewees and the number of them had similar reports to the extent that findings of Mr Caldwell's comments were made out. I accept further that Ms Fairie took time to consider all of this material including Mr Caldwell's responses and did make some changes as a result.

[155] In relation to Mr Caldwell saying that others likely breached protocols and rules about what was screened for YP and have not been disciplined like he has, I have no evidence to support a claim of disparity of treatment claim here. Even if I observe that some of those interviewed touched upon not being fully aware of some rules or the reason for rules (including OT team leaders) this related mainly to the wearing of hats and sunglasses inside which on its own could not reasonably be within scope to be something warranting dismissal. As to rules about what to screen and that some interviewees seemed also at odds about these rules I find this was sufficiently covered off in the investigation process with detailed investigation into the existing rules that Mr Caldwell likely ought to have known.

Summary on whether OT was justified to dismiss Mr Caldwell for serious misconduct

[156] Ms Fairie's final decision for OT was based on a finding of global serious misconduct. I have found the investigation was not procedurally flawed except to the matter repeated regarding a specific phrase used but that this overall is unlikely to have impacted the final decision. I have found this because I have considered Ms Fairie likely spent the time considering all the material from the investigation, that she appeared to genuinely consider this supported particularly by the changes she made to the investigator's findings.

[157] Overall while the final decision could have better explained in the decision maker's documentation as to serious misconduct against allegations, I accept that she referenced the investigation report sufficiently and that overall at the very least the findings of inappropriate screening and the allegations regarding Mr Caldwell's manner of using sexualised comment and derogatory language including about women in front of the YP could have led a fair and reasonable employer in the position of OT to have considered serious misconduct. Again, for the same reasons including OT's role and duties to the YP in its care, I find a fair and reasonable employer could have arrived at a conclusion that it had lost its trust and confidence in Mr Caldwell to continue in his role as a RYW.

[158] Based on the above, the claims by Mr Caldwell are unsuccessful and I have not considered the remedies claimed.

Costs

[159] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[160] If the parties are unable to resolve costs, and an Authority determination on costs is needed, OT may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Mr Caldwell will then have 14 days to lodge any reply to memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[161] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual 'daily tariff' basis unless circumstances or factors, require an adjustment upwards or downwards.²⁶

Antoinette Baker

Member of the Employment Relations Authority

²⁶ www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1