

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2026] NZERA 86  
3431164

BETWEEN                      LIONEL CAFFELL  
Applicant

AND                              HEALTH NEW ZEALAND – TE  
WHATU ORA  
Respondent

Member of Authority:      Antoinette Baker

Representatives:            Amy Keir, counsel for the Applicant  
Katherine McDonald, counsel for the Respondent

Investigation Meeting:     5 February 2026

Submissions received:     On the day

Determination:              19 February 2026

---

**DETERMINATION OF THE AUTHORITY**

---

[1] Mr Caffell was employed by the respondent, Health New Zealand (HNZ) as a hospital orderly for over 20 years. HNZ summarily dismissed him for serious misconduct after a complaint from another orderly about his conduct in the workplace towards them. He claims grievances including that he was unjustifiably dismissed. He seek remedies including compensation, lost wages and reinstatement on an interim and permanent basis. This determination only deals with his application for interim reinstatement. The respondent, HNZ, opposes all claims including the application for interim reinstatement.

**The Authority's investigation**

[2] Mr Caffell lodged an application for interim reinstatement with the requisite undertakings. The parties were directed to urgent mediation. Mediation was not successful. I

held a half day investigation meeting to hear submissions only from respective counsel. By the time of the investigation meeting, as directed after an earlier phone conference call with counsel, the parties had provided a statement in reply (the respondent) and further affidavits (both parties) including a reply affidavit from Mr Caffell.

[3] Mr Caffell was present at the investigation meeting with his counsel. I did not hear from him except to confirm a sworn oath from him on his affidavit in reply. Counsel for HNZ appeared by AVL.

[4] In determining this interim matter I have received and considered Mr Caffell's two affidavits, and in support of him, affidavits from three employees of HNZ who all work alongside him in the department he works in as an orderly. For HNZ I have affidavits from Evan Calder, Mr Caffell's manager at HNZ and the investigator and decision maker towards HNZ's dismissal; a HNZ orderly who includes what they heard and saw in relation to Mr Caffell's post dismissal conduct; and a further HNZ employee who was the complainant. I have also considered the initiating documents, all attached documents and the parties' submissions through respective counsel, both written and oral.

[5] In considering the above, evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested. To that extent not all material before me is traversed in this determination. In applying the relevant tests for interim reinstatement, the Authority is not required to resolve any disputes of evidence.

### **Background and material currently before the Authority**

[6] Mr Caffell was employed under a collective agreement<sup>1</sup> by the respondent (HNZ) as an orderly at Christchurch Hospital for over 20 years. During the last ten years Mr Caffell worked mostly in one department of Christchurch Hospital (IR). He transported patients from their wards to IR and back again for specialist radiology services which could include associated surgical procedures. IR is described as providing day patient and hospital patient specialist services, is very busy and is the largest of its type in the South Island of New Zealand.<sup>2</sup>

---

<sup>1</sup> Food and Services Collective Agreement, 1 June 2024 to 31 May 2026 between *Health New Zealand Te Whatu Ora* and *E tū Incorporated*.

<sup>2</sup> Affidavit of Sacha Elizabeth Milne, Medical Imaging Technologist (Team Leader), affirmed 8 December 2025.

[7] On 4 October 2025 HNZ summarily dismissed Mr Caffell for serious misconduct after investigating a written complaint from another younger male orderly (the complainant) who had been working on shifts with Mr Caffell in IR for a few weeks while another orderly was either on leave or because they were assigned to assist in that area. The complainant started work in his role in 2024 and carried out orderly duties across other parts of the hospital unlike Mr Caffell who was based in IR.

[8] The written complaint to HNZ that set off an investigation was that on 11 September 2025 in two separate incidents in the workplace the complainant suffered physical injury (bruising) from what Mr Caffell later told HNZ was just ‘banter’ ‘boy’s argy bargy’ and ‘playfighting’ but where the complainant said it did not end up that way. The written complaint included that this was ‘not an isolated incident’ but gives no specific day or time details about this and it remains unclear that this part of the complaint was fully investigated. The written complaint listed some allegedly adverse things in quotation marks that the complainant alleged Mr Caffell would say to them generally about their manager and or to the complainant in relation to them not doing their job properly. The complainant included in the written complaint that he was fearful of working with Mr Caffell and was concerned about him retaliating due to the complaint. The written complaint was emailed to HNZ by the complainant’s union.<sup>3</sup>

[9] The two ‘incidents’ detailed in the written complaint were that:

- a. after the complainant says they had made light hearted comment to a nearby HNZ employee about her hair, Mr Caffell ‘forcefully stabbed’ them in the chest with a pen while ‘leaning in close’ and saying ‘don’t you ever talk to my girls like that, only I can say things like that’ [the pen incident]; and
- b. later in the day and during ‘banter’ Mr Caffell ‘suddenly’ punched the complainant more than once and then pushed the complainant while saying ‘Don’t you ever fucking talk to me like that in front of people again.’ The complainant also stated that Mr Caffell told the complainant in this incident that he would take them outside and beat them up [the punching incident].

---

<sup>3</sup> E tū Incorporated.

[10] Several days later the complainant emailed to HNZ, upon its request, two digital photos of two separate bruises from the ‘pen’ the ‘punching’ incidents.

[11] Mr Evan Calder was Mr Caffell’s overall manager, and his affidavit evidence includes that he remains the manager of orderlies at Christchurch and Burwood Hospitals. He investigated the complaint for HNZ and was the decision maker as to the outcome of summary dismissal. Mr Caffell’s affidavit evidence includes that he does not believe Mr Calder likes him because he has ‘stood up to him’ about changes he made in the past to Mr Caffell’s role, a role he considers is unique among the orderlies because it is based as a specialist orderly in IR and not the wider hospital. Mr Calder’s affidavit evidence includes that he has no personal animosity to Mr Caffell and includes that he considers that while Mr Caffell can be ‘very confrontational’ he has had to make managerial decisions about how orderly work is performed.

[12] HNZ’s investigation process included suspending<sup>4</sup> Mr Caffell on pay (the date this occurred varies throughout the current materials before the Authority) and inviting him to meet which he did with a union representative. The invitation was couriered to Mr Caffell at home because Mr Caffell does not use email. The invitation attached the complainant’s complaint. It included that Mr Caffell could ask to view the camera footage of the incidents at the hospital before the meeting. The digital footage files were stated as too big to otherwise send to him.

[13] Attendees at the investigation meeting were Mr Caffell, his then union representative, Mr Calder and a HNZ human resources manager. There are brief bullet point handwritten notes before the Authority.

[14] Mr Caffell was shown the silent security camera footage of the incidents at the investigation meeting (the footage). It remains unclear the extent to which this was shown at the meeting compared to the footage that Mr Calder states he watched ‘multiple times’ and the two digital footage files provided to the Authority. Mr Caffell and the union representative gave feedback and comment. HNZ has later referred to Mr Caffell’s poor attitude in the meeting. Mr Caffell’s affidavit is that he found the meeting difficult. The extent to which HNZ was justified to take Mr Caffell’s approach in the meeting into account in finding serious misconduct, which

---

<sup>4</sup> There is a substantive grievance of disadvantage raised in relation to the suspension. This remains for the substantive investigation.

the termination letter appears to do, and which is submitted for Mr Caffell was not justified, is yet to be tested.

[15] It is not in dispute that the only time Mr Caffell viewed the footage was at the one investigation meeting. There is currently nothing before the Authority to show Mr Caffell asked to see footage before or after the investigation meeting either directly or through his then union representative. There is no evidence currently before the Authority to show HNZ invited Mr Caffell to further view the footage after the investigation meeting or after Mr Calder says he watched it 'multiple times' to decide that the level of force used 'crossed the line' from playfighting.

[16] Mr Calder's affidavit evidence is that he identified (on the footage) three HNZ employees in the IR department closely present during the above incidents at their open plan work stations. The footage before the Authority clearly shows the three sitting in close proximity to the incidents, working. Mr Calder spoke to all three.

[17] It is not in dispute that what the above three HNZ employees told Mr Calder was not disclosed to Mr Caffell before the dismissal. This includes two statements taken from two of the witnesses. Those statements are before the Authority as well as an affidavit from one of the statement givers and an affidavit from the third witness who says they considered Mr Calder was not interested in what they had to say because they had not seen anything. Mr Calder explains in his affidavit evidence that this person did not see anything, and he was not going to waste their time getting a statement. The latter person's affidavit and the material from the other two indicate untested positions that what was seen or heard (the footage is silent) was considered 'playfighting' or that nothing happened that required their intervention. All three witnesses were working at their desks at the time. One witness refers to things happening behind them which may have been the pen incident. One now says they had trouble hearing someone on the phone (while they worked also on their computer) due to the laughing going on with the complainant and Mr Caffell.

[18] After the investigation meeting's opportunity for verbal feedback, Mr Caffell through his union representative provided written feedback twice. The Authority only has the first written feedback document. Overall Mr Caffell's various feedback to HNZ from the investigation meeting and through written feedback included that he did not intend to hurt the

complainant, that it was all banter, that he doubted the bruising could have resulted from the pen, that the complainant had become a bit ‘lippy’ and that he was responding to this, that the job was very important to Mr Caffell and he gave reasons including the longevity of the position and its meaning to his life.

[19] There is nothing before the Authority to show Mr Caffell had been subject to any prior disciplinary process before by HNZ in his long tenure.

[20] Mr Caffell includes in his affidavit that any punches were ‘soft punches’, that he did not use force and withdrew before impact like he does with his nephews. It is not clear this was provided to HNZ in feedback during the investigation process. Footage before the Authority shows a side view moving out of total camera view across only a few seconds in what appears to be the punching incident followed by Mr Caffell returning to push the complainant.

[21] Affidavits from three IR HNZ employees in support of Mr Caffell include support for the good job they consider Mr Caffell does as an orderly in IR. One of those affidavits is from a team leader in IR who explains the difficult logistics involved in bringing patients to and from the department and how well Mr Caffell does this transporting, including his manner with patients and that the efficiency in this area in IR has reduced since he has been dismissed.

[22] The decision to terminate was proposed in writing and feedback was sought and received proposing a lesser sanction to dismissal. The final decision to summarily dismiss was dated 6 October 2025 (the termination letter). This stated that Mr Caffell was in ‘breach of your employment obligations,’ referenced at the beginning of the letter as a ‘breach of the Code of Conduct’. The following was the summary of the findings in the termination letter that this breach was based on:

- a. There are no circumstances that validate physical contact of any kind, that causes bruising and in this case on two parts of the body in the workplace.
- b. You crossed the line from banter to physical contact
- c. Mitigations provided appear to be on the basis that it is your responsibility to manage workflow of IR and that your actions and communications justify your actions because [the complainant] did not respond in a way to your liking. In this incident you are a co-worker and have no supervisory accountability

- d. In our meeting [investigation meeting] and the subsequent submissions provided, you have not once expressed that you are sorry.

[23] Mr Caffell's final pay included a significant amount for untaken holiday leave pay that in his affidavit evidence he says he has since been living off. Also included in his affidavit evidence is acknowledgement he has been visiting the hospital since his dismissal to visit a friend who has now passed away, that he would sometimes talk to those he had worked with in the orderly group and that he happened upon the complainant and considers there was an amicable interchange which included him telling the complainant he would 'see you soon.' Further, in response to an orderly's affidavit evidence, Mr Caffell has replied to acknowledge he entered the hospital and spoke to people in the orderly group while drunk after his 'leaving drinks' at a nearby bar; he says while he can't recall what he said because he was too drunk he may have said the things claimed in that affidavit. I note that the things said included expletives about Mr Calder personally and that Mr Caffell wanted to burn Mr Calder's house down. Mr Caffell's reply evidence is that he was very drunk and upset about what he considers was Mr Calder's unfair dismissal of him and he would not be saying these things sober.

### **The relevant law**

[24] Section 127 of the Employment Relations Act 2000 (the Act) gives the Authority the power to order interim reinstatement. In considering whether to do so I am required to consider:

- a. Does Mr Caffell have an arguable case for unjustified dismissal?
- b. Does Mr Caffell have an arguable case for permanent reinstatement?
- c. What detriment would either Mr Caffell or HNZ incur because of granting or not granting interim reinstatement (called the 'balance of convenience' test)?
- d. When standing back where does the overall justice of this matter lie until the substantive problem can be resolved?

[25] The Employment Court has observed that when determining interim reinstatement, the object of the Act should be considered. The object is to build productive employment relationships by promoting the concept of good faith. This includes that both parties should act

in a way towards each other that is responsive and communicative, and that issues ought to be dealt with promptly, constructively, and where feasible, by repairing them.<sup>5</sup>

[26] It is with the above in mind that I consider this application.

### **Does Mr Caffell have an arguable case for unjustified dismissal?**

[27] Whether a case is arguable is based on asking whether it has serious or arguable prospect of success but not necessarily certain as to that outcome. The threshold is not high. The case should not be one that is ‘frivolous or vexatious’ claim.<sup>6</sup>

[28] Section 103A of the Act provides factors to determine when considering whether a dismissal was justifiable, both in substance (the reasons) and procedurally. It will be for HNZ to prove this at the substantive stage.

[29] For Mr Caffell it is submitted that he has an arguable case that his dismissal was unjustified both procedurally and substantively. HNZ submits that while it accepts the threshold for an arguable case is not high the case is *weakly* arguable.

[30] Based on what is before me at this untested stage I find Mr Caffell has an arguable case that HNZ’s decision to end his employment was unjustified for reasons set out below.

#### *Non-disclosure of information provided to the investigator by three witnesses to the incidents.*

[31] It is arguable that by not providing the above information to Mr Caffell during the investigation and disciplinary process HNZ has breached its duty of good faith under s4(1A)(c) of the Act. This is a statutory obligation upon an employer proposing to make a decision that will or is likely to have an adverse effect on the continuation of the employee’s employment to provide the employee access to information relevant to the continuation of the employment and an opportunity to comment on the same before a decision is made. It is not disputed that non-disclosure occurred. Arguably an employer of this size and resource could have been expected to follow a process that ensured it thoroughly gathered a sufficient level of evidence to fit the serious allegations. I except for Mr Caffell that there is case law that includes that where there

---

<sup>5</sup> *Humphries v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59, [5].

<sup>6</sup> *XVY Limited v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

is a serious allegation the employer needs to match evidence that is ‘as convincing in its nature as the charge is grave.’<sup>7</sup>

[32] I do not have the ability at this interim stage to test evidence that examines whether HNZ sufficiently investigated what became a finding of fact that Mr Caffell had ‘crossed the line’ in terms of the physical contact that he has acknowledged he made with the complainant. However, the above information was not provided to him, and it included statements taken just after the time of the incidents. They were from those close at hand who arguably had a different if not fully complete perspective of what could be heard or seen as opposed to the silent camera footage.

[33] I note again the submission for Mr Caffell that the employer is a large public based employer. The extent to which the omission was an ‘administrative oversight’ or was driven by a form of unfair predetermination or ulterior motif as is suggested by Mr Caffell is yet to be tested. Arguably however Mr Caffell has a case that not having the opportunity to understand and respond to what three immediate witnesses saw *and heard*<sup>8</sup> who were close at hand could render his dismissal unjustified.

#### *Unbalanced opportunities to view camera footage*

[34] There are two digital camera footage files before the Authority. They are yet to be tested in evidence in terms of the challenge that they were not ‘clear’ enough to rely on as HNZ submits they were. However, at this stage I find I can see that the footage before the Authority does not appear ‘grainy’ as submitted orally for Mr Caffell. It is visually distinct and close enough to see expressions on faces albeit only when facing the camera. As noted above there is no sound to have considered what was said. The complainant says the two incidents were accompanied by aggressive allegedly threatening words by Mr Caffell albeit they have added more words allegedly said in an affidavit in these proceedings.

[35] It is unclear on the footage before the Authority what the exact physical interaction with the pen was. While this will be for later testing and clarification, Mr Caffell can arguably be seen to be physically close and physically against the complainant who is sitting behind a door

---

<sup>7</sup> *Honda v New Zealand Boilermakers Union* [1991] 1 NZLR 392.

<sup>8</sup> My emphasis added.

with the nearest witness sitting in front of them. As noted above the punching incident is not fully viewable on the digital footage file before the Authority but it is clear after the first punching actions by Mr Caffell that he walks back and then returns to push the complainant. Both actions are referenced in the written complaint from the complainant before Mr Calder. While I might be criticised for commenting on this evidence, I do so because the submissions focus on either the footage being too 'grainy' (for Mr Caffell) which it is not, or that the footage is 'clear' evidence of a level of force found by HNZ which, while apparently unclear for the pen incident, can arguably be shown on the punching incident with the additional return to push the complainant.

[36] I find it arguable that Mr Caffell could say that evidence before HNZ could not have sufficiently shown a level of force that 'crossed the line' from playfighting but in terms of the pen incident footage it is arguable and for the punching incident it is weakly arguable.

*Refusal by HNZ to allow Mr Caffell to talk to other employees about the incidents*

[37] It is further submitted for Mr Caffell that the refusal for Mr Caffell to talk with fellow employees to support him meant the process of investigation was unfair. I find this arguable. The request through the union representative's communication is focused on wanting character references although the same communication includes an observation that no witness statements had been provided when there were people present. I find this links to the above non-disclosure issue. In the absence of hearing from what those witnesses may say, Mr Caffell wanted to talk with them. It is arguable that the process was unfair to Mr Caffell and together with the above non-disclosure arguably forms more than a minor fault in HNZ's investigation process.

*That HNZ's omission to disclose is not easily explainable as an administrative oversight*

[38] Mr Calder's affidavit evidence includes that he did not disclose the above witness statements due to an 'administrative oversight'. Again, it is submitted for Mr Caffell that this is a large public employer. I agree. I also agree that it is arguably surprising for such an employer with internal human resource support to have made this omission. I further note that there is other material before me which needs to be tested against a claim that this was only an administrative oversight. Mr Calder communicated in an email to Mr Caffell's union

representative in response to the first written feedback. He was responding to why he did not agree to Mr Caffell talking with others in the work place to support him through, in particular, character references. He indicates there was no dispute that there was 'banter' but he was only focused on the conduct that 'crossed the line'. This arguably shows a decision that the three witnesses had nothing to say that was relevant. This arguably misses the point that the footage was silent, and they were in very close proximity during both incidents. Arguably Mr Caffell was denied an opportunity to consider what witnesses said they saw and heard. Arguably this was unfair to Mr Caffell. I have already noted above it is arguably a breach of good faith.

[39] I find it arguable that this 'oversight' was not inadvertently 'administrative' but further to this it is weakly arguable that it was as a result of a deliberate attempt to get rid of Mr Caffell from the workplace. An ulterior motif would require considering that HNZ ought not to have investigated at all and left Mr Caffell (as he proposes in his affidavit evidence) to have sorted things out with the complainant himself. The written complaint included serious claims for any workplace. The footage shows physical contact occurring involving punching actions (partly obscured) and pushing from Mr Caffell towards the complainant which are both things included in the written complaint. I do not then consider in this context that it is any more than weakly arguable that Mr Calder's omission to disclose witness material was part of a deliberate attempt to remove Mr Caffell from the workplace. I do find it arguable that it was a decision made based on what was arguably a surprisingly poor investigative procedure, a more than minor fault, which arguably forms a case for unjustified dismissal.

*Not providing access to Mr Caffell to further watch the camera footage to the same extent as the decision maker who states they watched it multiple times to arrive at a finding that playfighting crossed over into intentional physical harm*

[40] It is submitted that Mr Caffell was not only unfairly treated by not having access to the above but also that he only saw the camera footage once in the investigation meeting that he attended with his union representative. HNZ communicated to Mr Caffell prior to that investigation meeting that he could make a time to view the footage prior to the investigation meeting because the digital file could not be sent but could be viewed on site upon request. HNZ's position is that Mr Caffell did not request to view the footage, nor did he ask the same after the investigation meeting. I have already noted above that there is nothing to show Mr Caffell asked to view the footage prior to the investigation meeting. If he did not understand

the letter couriered to him he was at the time represented by his union and could have sought assistance and advice. I note that after the investigation meeting Mr Caffell's union representative communicated twice to HNZ with feedback and while I do not have the feedback closer to termination, there appears to be no request to view the footage again.

[41] It is submitted for HNZ that despite any procedural flaws the camera footage is very clear to support the finding that playfighting moved to something more serious and I have considered this above already. The footage before the Authority has some obscurities but has some clarity that includes punching and pushing actions from Mr Caffell towards the complainant.

[42] Standing back from the above I find it arguable that HNZ had a proactive obligation here to give an opportunity to Mr Caffell to view footage in more detail after the investigation meeting (he was only invited to do so before the meeting) but the effect of this procedural flaw may on its own be only weakly arguable against what I have considered above about the footage.

*That what HNZ found was serious misconduct could not be sustained from its factual findings*

[43] It is submitted for Mr Caffell that HNZ could not have found the level of force used by Mr Caffell (the 'crossing the line') due to an insufficient investigation, that this in turn could not support a finding of serious misconduct with subsequent dismissal and that this could not support a finding of a breakdown in trust and confidence in the employee to continue in their role. I note that HNZ's position includes that Mr Caffell through his then union representative accepted the finding of serious misconduct after the investigation meeting in the first written feedback. I will need to consider this dispute later. In the event that there has been an acceptance of serious misconduct the matter would then remain as to the level of sanction and whether that was within scope for a fair and reasonable employer to have arrived at in all the circumstances at the time. For Mr Caffell it is also submitted that a sanction less than dismissal could have been appropriate based on what I have traversed already above. Again, the matter at this interim stage remains to be tested later in evidence.

*Summary of whether there is an arguable case for unjustified dismissal.*

[44] I find that Mr Caffell has an arguable case to be tried in relation to unjustified dismissal focused on the procedural aspects of the investigation process and how this may have impacted upon fairness to Mr Caffell. I have found aspects of Mr Caffell's challenge weakly arguable where it relates to challenging camera footage of his actions in the two incidents that formed the core of HNZ's investigation and disciplinary process.

*Is there an arguable case for permanent reinstatement?*

[45] Section 125(2) of the Act says that the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy. Reinstatement is considered a primary remedy when a dismissal is found to be unjustified.

[46] Here I have to consider whether it is arguable that permanent reinstatement may be practicable or reasonable.

[47] I found above that it is arguable that Mr Caffell has a serious case that he was unjustifiably dismissed with a focus on the sufficiency of the investigation and in particular the non-disclosure of what witnesses said to the investigator. Reinstatement is a primary remedy under the Act.<sup>9</sup>

[48] Whether permanent reinstatement is practicable and reasonable does not mean the situation has to be easy to do. An employee who may require integration or training could still be permanently reinstated. An employee who may have been a 'difficult' employee to deal with could also be permanently reinstated. There can be conditions upon an employee's reinstatement in relation to further training or supervision. There is affidavit evidence before me stating that Mr Caffell has long experience in his role and that he has contributed positively to the running of the IR department and that his efforts are missed in that department which I accept is a busy logistically complex operation. I also have affidavit evidence that reminds me that those operating the IR department or work as Mr Caffell's colleagues are not his employer and a designated manager is tasked with running the orderly operations in what is a large hospital.

---

<sup>9</sup> Employment Relations Act 2000, s125.

[49] HNZ submits that there are problems with reintegrating Mr Caffell given his behaviour post dismissal that included him strongly disparaging his manager, to others in the orderly team when drunk. He was visiting the hospital after his leaving drinks at a nearby bar. I consider that it is arguable that given some distance from the dismissal and no recurrence of the same between now and when the substantive matter is resolved there is an arguable case for reinstatement on a permanent basis potentially under conditions that can be ordered.

[50] I find there is an arguable case for permanent reinstatement.

**What detriment would either Mr Caffell or HNZ incur because of granting or not granting interim reinstatement (called the ‘balance of convenience’ test)?**

[51] Mr Caffell’s position is that he has relied on a significant amount of annual leave paid to him at the time of his dismissal to live off since then. He says once that runs out he will suffer financial hardship. He includes a description of owning a house with a family member that incurs mortgage repayments. He includes supporting an adult child and grandchild living with him. I have no other affidavits nor documentation to support these statements albeit in his affirmed form. HNZ submits I have no documentary evidence to support the financial situation. I agree that this lack of evidence does not assist me. I am left with not knowing the extent of mortgage repayments in a shared asset situation, nor of the financial situation that could have been supported by some form of bank statements or record. To this extent I consider there is a lesser detriment to Mr Caffell in not being reinstated on an interim basis than if I had more financial evidence before me.

[52] Mr Caffell’s position is that due to circumstances that I accept may impact on his ability to obtain replacement employment he is left without a likelihood of employment ongoing. I accept he has lost a long standing job that he has felt a sense of satisfaction in. As noted above, affidavit evidence from the IR department supports his experience in the orderly role attached to that department. They include that his work is appreciated and missed. The sample of affidavits is small and does not represent the deponents’ employer, HNZ. However, Mr Caffell has set out a detriment that any person losing their long term role may feel. The additional long term effects that are particular to him are not well evidenced at this stage, but I accept they show a level of particular detriment to him in not returning in the interim.

[53] HNZ on the other hand points to it not being a practicable logistical matter to have Mr Caffell managed by the IR department as a separate working arrangement as I understand Mr Caffell puts forward could occur. I accept there is some detriment to HNZ in this regard and return to this below.

[54] What I find tips the balance to as a greater detriment to HNZ than what Mr Caffell has put forward is Mr Caffell's post dismissal behaviour that I have referenced above and how that has raised concerns for HNZ about a return in the interim.

[55] Mr Batterbury's affidavit includes that Mr Caffell came into the hospital one evening drunk after he was dismissed. He related verbally abusive terms about what he thought of Mr Calder's dismissal of him, what he thought of Mr Calder and included that he would 'burn his house down.' Mr Caffell's affidavit evidence includes that he doesn't 'have much recollection of this conversation' and that 'it's possible' he said the words but that he was drunk and was still very 'raw' about the way he considered Mr Calder had unfairly treated him. Mr Caffell's affidavit includes he would not have said these things in a sober state and would not say these things in a sober state when returning to the workplace.

[56] I note that the written complaint from the complainant which was written well before the investigation started included that the complainant alleged in speech quotes that Mr Caffell said of Mr Calder that he would 'burn his house down.' I remind myself then of Mr Caffell's affidavit evidence that he did not think Mr Calder liked him and 'had it in for him' and he considered they did not get on. I have found above a weakly arguable case in relation to ulterior motif to dismiss even with the arguable case that there have been more than minor procedural faults.

[57] In the above context, I find it is reasonable for HNZ to be concerned about the comments and behaviour from Mr Caffell in relation to his former manager who as I understand would practicably remain the manager of those in orderly roles across the two large hospitals in Christchurch. That is not a small group of employees. I accept that while a large employer working the logistics of a large operational workplace may be able to accommodate some changes on an interim basis to work streams I accept that returning Mr Caffell on an interim basis to work in this large group with a risk of his lack of inherent loyalty to a representative of the employer is a detriment to HNZ.

[58] I note further that Mr Caffell sets out that on his visits into the hospital after his dismissal (visiting a friend who was a patient) he came across the complainant who said hello to him, smiled and smiled again when Mr Caffell said, 'see you soon'. As I understand it, I am asked to consider that this as yet untested interchange supports that Mr Caffell can return on an interim basis and that he and the complainant can sort things out. I have considered this alongside the affidavit before me of the complainant who talks of being afraid of working with Mr Caffell again. The footage reasonably shows me a difference in ages between Mr Caffell and the younger complainant. By affidavits before me I can see that Mr Caffell has been around the hospital for a long time and is confident in his role of many years. The complainant has likely not. I am not persuaded that the above untested interchange shows me it indicates that everything will be alright when weighed with other matters I have traversed above.

[59] I then consider whether as submitted for Mr Caffell he could be reinstated on an interim basis but managed by Ms Milne, a deponent of an affidavit. She affirms her role as one of three managers in IR, a team leader. She has not been Mr Caffell's line manager, and I understand she is not part of a management team managing orderlies. It is submitted that in reality, because Mr Caffell has worked exclusively in the IR department for so long, Ms Milne could manage him, that this would create a distance from Mr Calder and the complainant until matters can be substantively resolved. It is clear by Ms Milne's affidavit that she supports this and considers Mr Caffell to be an asset in the way he conducts himself in the workplace and supports the IR department. HNZ says this line change structure is not as straight forward as having Mr Caffell managed as above. I accept this is likely in the running of a large hospital and do not find this management change supports interim reinstatement when considering this on balance. That balance in particular favours HNZ in relation to concerns about Mr Caffell's post dismissal conduct outlined above and the flow on concern of an ongoing breach of loyalty to his employer. I also note here that while I am asked to consider that Mr Caffell is somehow in a separate role from other orderlies, the inherent description of that role includes that he would be still moving patients across the hospital where I reasonably understand those in the larger team of orderlies, managed by Mr Calder, also work.

[60] I am not satisfied that the balance of convenience supports Mr Caffell being reinstated on an interim basis particularly on the post dismissal conduct and an apparent lack of loyalty to his employer. While Mr Caffell has outlined personal circumstances that I can understand may impact his ongoing opportunities, he has provided limited financial evidence to explain his

situation. I also do not consider all of the things that he says would support him returning on an interim basis (the loss of job satisfaction for example) are beyond what any employee has when losing a job.

### **Overall justice**

[61] Finally, I am to stand back and consider the overall justice of this matter before deciding whether to reinstate Mr Caffell on an interim basis.

[62] While I have found an arguable case for unjustified dismissal focused on more than minor procedural flaws, I have found a weaker arguable case relating the footage which shows punching and pushing (both apparently physically aggressive movements) by Mr Caffell against the complainant who is a younger less experienced orderly. While I have found an arguable case for permanent reinstatement, this would be after the currently untested evidence is properly heard, evidence that, by the nature of the challenge, is about factual findings in relation to Mr Caffell's actions towards the complainant. HNZ's position is that Mr Caffell was not remorseful. His position that his actions were play fighting is arguably consistent with this albeit this issue and needs to be tested more fully. On balance, I am persuaded that there is more detriment to HNZ in relation to its concerns about Mr Caffell's ongoing obligation of loyalty to his employer particularly based on his post dismissal conduct.

[63] I find that the overall justice does not support interim reinstatement.

### **Outcome**

[64] The application for interim reinstatement is unsuccessful. Substantive investigation meeting dates have been set, and a phone conference call is scheduled to discuss this.

### **Costs**

[65] Costs are reserved.

Antoinette Baker

Member of the Employment Relations Authority