

**ORDER PROHIBITING PUBLICATION NAMES OR IDENTIFYING
PARTICULARS OF NAMES AND IDENTIFYING DETAILS AS AT [10] OF
THIS JUDGMENT**

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 133
EMPC 256/2022
EMPC 425/2022**

IN THE MATTER OF challenges to two determinations of the
Employment Relations Authority

BETWEEN BIGSON GUMBEZE
Plaintiff

AND THE CHIEF EXECUTIVE OF ORANGA
TAMARIKI – MINISTRY FOR
CHILDREN
Defendant

Hearing: 30 October 2023 – 2 November 2023 and 16 November 2023
(Heard at Auckland)

Appearances: D Fleming, counsel for plaintiff
RM Butler and DT Smith, counsel for defendant

Judgment: 24 July 2024

JUDGMENT OF JUDGE K G SMITH

[1] Bigson Gumbeze began working as a care and protection social worker for Child, Youth and Family on 22 March 2010. By November 2011 he had become a senior social work practitioner.

[2] On 1 April 2017, Oranga Tamariki – Ministry for Children came into existence and Mr Gumbeze transferred to the new Ministry.¹

[3] On 14 December 2017, Oranga Tamariki dismissed Mr Gumbeze summarily for serious misconduct. The decision was made after an investigation by an external investigator into complaints about him by his supervisor, some other supervisors, and following a review of three cases where he was the assigned social worker. Oranga Tamariki concluded that his behaviour, actions and social work practice amounted to serious and persistent misconduct. He was also found to be in breach of Oranga Tamariki’s expectations and obligations.

[4] The decision to dismiss Mr Gumbeze was made by Nicolette Dickson who was at that time the Regional Manager — Services for Children and Families Central Auckland.

[5] Mr Gumbeze unsuccessfully pursued a personal grievance for unjustified dismissal in the Employment Relations Authority.² He challenged the determination and sought reinstatement to his former role, or an equivalent one, pursuant to s 123(1)(a) of the Employment Relations Act 2000 (the Act), compensation, reimbursement for lost earnings and costs.³

[6] Oranga Tamariki does not accept that Mr Gumbeze was unjustifiably dismissed. It is satisfied that the complaints it investigated, and how it investigated them, established that serious misconduct had occurred and that dismissal was an appropriate outcome.

The issues

[7] Counsel identified the issues in this case by joint memorandum. Those issues can be summarised as whether:

¹ I refer to the defendant as the Ministry or Oranga Tamariki.

² *Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children* [2022] NZERA 232 (Member Cheyne) [*First determination*].

³ Mr Gumbeze also challenges the Authority’s costs determination: *Gumbeze v the Chief Executive of Oranga Tamariki – Ministry for Children* [2022] NZERA 312 (Member Cheyne) [*Costs determination*].

- (a) the conduct Mr Gumbeze was dismissed for constituted serious misconduct;
- (b) Oranga Tamariki's decision to begin an investigation and to dismiss him was consistent with its internal policies and procedures and/or a statutory duty to be a good employer;
- (c) Oranga Tamariki followed a fair and reasonable process and, in particular, whether:
 - (i) the decision was influenced by improper or irrelevant considerations;
 - (ii) the investigation was appropriately arranged and conducted in accordance with the principles of natural justice;
 - (iii) the disciplinary process following the investigation was predetermined or biased;
 - (iv) the paid special leave affected the fairness of the overall process;
 - (v) a fair and reasonable employer would have taken further steps to address Mr Gumbeze's process concerns before dismissing; and
 - (vi) consideration was given to other outcomes aside from dismissal.

[8] Counsel identified further issues to consider if Mr Gumbeze's challenge succeeded. They included whether he contributed to the circumstances leading to his dismissal and the appropriateness of reinstatement as a remedy.

Non-publication

[9] This case involves the work of social workers employed by Oranga Tamariki, who are engaged with children, young people and their families under the Oranga Tamariki Act 1989. In reviewing the circumstances in which Mr Gumbeze was dismissed some of the cases assigned to him and families he dealt with were mentioned.

[10] The parties, correctly in my view, used agreed anonymisations for the children, young people and their families Mr Gumbeze dealt with. The parties also sought a permanent non-publication order. I am satisfied it is appropriate, pursuant to the powers in cl 12 of sch 3 to the Act, to order that there is to be no publication of the names or identifying information of any child, young person or family with whom Mr Gumbeze dealt in his capacity as a social work practitioner employed by Oranga Tamariki.⁴ That non-publication order essentially continues an order made by the Authority.⁵

[11] The Authority also granted an application by Oranga Tamariki and made a non-publication order applying to the name and identifying information of its Senior Human Resources Advisor who, during the investigation, was cross-examined about alleged racism.⁶ The Authority held that the allegation was unfounded and that a non-publication order was the only way to sufficiently protect that person from the risk of professional harm flowing from the allegation.

[12] The Senior Human Resources Advisor gave evidence in this proceeding. An application was made for the Court to mirror the non-publication order made by the Authority and for the same reasons. The grounds relied on to support the application are insufficient to warrant a departure from the principle of open justice.⁷ A non-publication order is, therefore, not made. However, as it happens, it has not been

⁴ Sections 11B–11D of the Family Court Act 1980 apply to proceedings concerning the care and protection of children and young persons, whereby publication of identifying information about a person under the age of 18 years or a vulnerable person is prohibited: Oranga Tamariki Act 1989, s 437A. Although these are not proceedings under the Oranga Tamariki Act, publication in these proceedings would undermine the protective nature of that legislation.

⁵ *First determination*, above n 2, at [5].

⁶ At [9].

⁷ See, for example, *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310.

necessary to refer to the evidence given by the Human Resources Advisor in this judgment.

The legal test

[13] In considering whether Mr Gumbeze's dismissal was justified the test to apply is in s 103A of the Act. It is whether Oranga Tamariki's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The test is objective and there may be range of responses open to a fair and reasonable employer.⁸

[14] The Court's task is not to substitute the employer's decision with its own, but it is entitled to review the facts on which the decision was made to decide whether the employer was entitled to say dismissal was justified. What is required is to assess the substantive fairness and reasonableness of the employer's decision, but not to engage in a minute and pedantic scrutiny to identify failings.⁹

[15] Section 103A(3) requires having regard to the resources available to the employer, whether concerns were raised with the employee before the dismissal occurred, whether there was a reasonable opportunity to respond before dismissal took place, and whether the employee's explanation (if any) was genuinely considered. The Court may also consider any other factors it thinks appropriate.¹⁰

[16] Ms Butler accepted that, in satisfying s 103A of the Act, an employer is required to take into account and comply with the employment agreement and its own policies. She also accepted that to justify a dismissal on the grounds of misconduct an employer must show that it had reasonable grounds to believe, and honestly did believe, that misconduct occurred.¹¹

[17] Mr Gumbeze was dismissed summarily for serious misconduct. What constitutes serious misconduct was analysed in *Northern Distribution Workers Union*

⁸ *Cowen v Idea Services Ltd* [2020] NZCA 239, [2020] ERNZ 252 at [39].

⁹ *A Ltd v H* [2016] NZCA 419, [2017] 2 NZLR 295, [2016] ERNZ 501 at [46]; applying *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466.

¹⁰ Employment Relations Act 2000, s 103A(4).

¹¹ Citing *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA) at 556.

v BP Oil New Zealand Ltd.¹² In that case, the Court of Appeal held it is not possible to define what justifies summary dismissal because it is always a matter of degree.¹³ The Court went on to hold that usually what is needed is conduct that deeply impairs or is destructive of the basic confidence or trust that is essential to the employment relationship. The Court held that, in the context of a personal grievance claim, questions of procedural and substantive fairness are relevant. It concluded that, in the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer could have taken in all of the circumstances.¹⁴

[18] It was common ground that to satisfy s 103A Oranga Tamariki needed to establish that the conduct it attributed to Mr Gumbeze was serious misconduct and that dismissal was justified; both elements needing to be present in order to satisfy the legal test.¹⁵

[19] Ms Butler submitted that the Oranga Tamariki Act 1989 is a relevant consideration, especially ss 5, 6 and 7. Section 5 contains that Act's principles. Section 6 provided, at the relevant time, for the welfare and interests of a child or young person to be the first and paramount consideration. Section 7 required the Chief Executive of Oranga Tamariki to take action to ensure that the objects of the legislation are attained in a manner consistent with ss 5 and 6.¹⁶

[20] Mr Fleming agreed with the discussion of the tests to apply put forward by Ms Butler, but cautioned that a conclusion that serious misconduct occurred is not an available response for an employer when performance or competency are in issue.¹⁷ I agree.

¹² *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA) [*BP Oil 1992*]. See too *BP Oil NZ Ltd v Northern Distribution Workers Union* [1989] 3 NZLR 580 (CA).

¹³ *BP Oil 1992*, above n 12, at 487.

¹⁴ The test as expressed by the Court of Appeal has been modified by amendments to the Employment Relations Act 2000 which substituted “could” for “would” in what is now s 103A but the section has not altered the approach to serious misconduct.

¹⁵ See *BP Oil 1992*, above n 12; *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA); *Air New Zealand Ltd v V* [2009] ERNZ 185 (EmpC); *Emmanuel v Waikato District Health Board* [2019] NZEmpC 81; and *Waitoa v Chief Executive of the Ministry of Social Development* [2021] NZEmpC 113, [2021] ERNZ 480.

¹⁶ Oranga Tamariki Act 1989 reprint as at 14 July 2017.

¹⁷ Citing *Edwards v The Board of Trustees of Bay of Island College* [2015] NZEmpC 6, [2015] ERNZ 437 at [273]–[276].

How the Oranga Tamariki inquiry began

[21] As staff transferred to the new Ministry in April 2017, they were screened in a “safety checking process”. Ms Dickson described that process as exercising due diligence under the Children’s Act 2014; to ascertain whether any employees presented a safety concern. Mr Gumbeze transferred to the new Ministry.

[22] The inquiry into the allegations that led to Mr Gumbeze’s dismissal began just a few months later in June 2017, when concerns were raised with Ms Dickson by the manager of the site where he worked. The concerns were about his participation in supervision and allegedly poor-quality behaviour. Subsequently, Ms Dickson met with senior employees from that site including Mr Gumbeze’s supervisor, Marie-Rose Joseph.

[23] The information relayed to Ms Dickson informally was then provided to her in written statements from Ms Joseph and two other supervisors: Caroline Jones and Lisa Barnett. Ms Joseph was concerned about Mr Gumbeze’s participation in supervised consultation with her (referred to by witnesses using the shorthand “case consult”), and an alleged refusal to discuss a work plan devised by his previous supervisor or to make any new development or wellbeing plans. Ms Joseph also expressed concerns about Mr Gumbeze’s behaviour alleging that he had on occasions moved quickly from being calm to aggressive and disrespectful.

[24] Ms Jones and Ms Barnett made a combined written statement in which they raised and described in general ways issues about Mr Gumbeze’s social work practice and behaviour. He was alleged to be frequently unable or unwilling to articulate what he intended to do to address “immediate safety”. This statement included a claim that he was dismissive of Ministry policy at times, including the need for a child in care to be visited at a minimum frequency, and of decisions made by colleagues. Ms Jones and Ms Barnett also said he was argumentative or dismissive of his supervisor. Aside from a reference to the visitation cycle the statement gave no specific examples of these alleged shortcomings.

[25] Ms Dickson considered these statements raised an issue of resistance to management direction. She was particularly concerned by Ms Joseph’s statement,

because the supervisory relationship was reasonably new having been created only after the transition to the new Ministry just a few months earlier.

[26] In analysing these statements Ms Dickson identified three broad problems. One was about Mr Gumbeze's wellbeing, because of the amount of sick leave he had taken and that he had declined to discuss the subject. The second was that she had a "completely distressed leadership team" at the site. The third was about whether Mr Gumbeze was practising safely as a social worker.

[27] Ms Dickson decided to arrange a meeting with Mr Gumbeze. On 19 June 2017, she sent him an invitation for that afternoon. The stated purpose of the meeting was to provide him with information about concerns that had come to her attention. Beyond that description nothing more was provided with the invitation.

[28] When the meeting took place it was used as a vehicle to deliver a letter to Mr Gumbeze. The letter began by saying concerns were brought to Ms Dickson's attention regarding his ability to engage constructively in supervision (described as meetings, "case consults" and discussions) in order to provide "for safe and accountable practice". The letter expressed her opinion that he may not have been fulfilling his obligations as a Ministry employee or as required of a registered social worker. The letter reminded Mr Gumbeze of his obligations to engage effectively in supervision and to be accountable. The concerns were listed in seven numbered paragraphs. Copies of the statements Ms Dickson received accompanied the letter.

[29] In summary, the seven listed concerns were that Mr Gumbeze:

- (a) had refused to discuss an existing work plan initiated by his previous supervisor in January 2017 and endorsed by the site manager;
- (b) had refused to engage with his supervisor regarding the "PDA" (Pay and Development) process and his development plan;
- (c) had refused to engage with his supervisor about his health and wellbeing, and the impact that had on his ability to attend work and for his supervisor to be able to support him;

- (d) was unwilling to engage in formal “case consults” which meant that the supervisor had no clear understanding of some of the cases on his caseload and how he was maintaining the safety of children and young people;
- (e) may not be following his supervisor’s “case direction”;
- (f) over a period of time had several incidents during engagement with the supervisor or site manager where he may have escalated from a calm demeanour to aggressive, intimidating and less respectful behaviour – reflected in his body language and tone of voice – resulting in the supervisor having to ask him to stop; and
- (g) in the week of 24 May 2017, may have used CYRAS to challenge guidance and direction from his supervisor and manager about financial approvals for clients with no justification or considered thought.¹⁸

[30] The first of these seven points contained four sub-paragraphs elaborating on the stated concern: resistance to accepting new cases, management direction, support to complete KPIs in a timely manner, and accountability for case work consultation about practice decisions and the use of Tuituia in his assessment and decision making.¹⁹

[31] There are two other notable features about this letter. The first of them was that Ms Dickson mentioned two examples of earlier problems before listing the seven concerns that prompted her to write. The first example was a letter of caution she wrote to Mr Gumbeze dated 17 July 2015 in which she concluded his behaviour was inappropriate, unprofessional and unacceptable.

[32] The letter of caution followed an attempted placement of a university student. Mr Gumbeze was said to have taken unauthorised steps to accept a student placement within Child, Youth and Family, despite being instructed not to do so.

¹⁸ CYRAS is an internal case noting facility.

¹⁹ Tuituia was described as a tool which supports holistic assessments regarding children.

[33] The second feature was a warning letter issued to him on 22 July 2016. The warning letter stemmed from one case, involving Family L. Mr Gumbeze was said to have refused an instruction from his acting site manager and supervisor because he insisted on continuing to act as a social worker involved with the family after the case had been reassigned to another social worker. This conduct was described in the letter as a refusal to accept a manager's decision. The warning recorded concerns as to unprofessional and disrespectful conduct by Mr Gumbeze directed towards that manager and supervisor at the time.²⁰

[34] In short, when the process began in June 2017, Mr Gumbeze was given a letter comprehensively identifying concerns and inviting his responses. The letter proposed a meeting on 26 June 2017. It stated that the discussion to which he was being invited may lead to disciplinary action which could include dismissal.

[35] Ms Dickson's letter ended with an instruction to observe confidentiality. Mr Gumbeze was told that he was not to discuss this matter with his colleagues or those who might be involved in the process. He was invited to bring a support person to the meeting and advised of the existence of an employee assistance programme.

26 June 2017 meeting

[36] Ms Dickson and Mr Gumbeze met on 26 June 2017. The meeting was recorded and the recording transcribed. He responded to each of the seven concerns raised. One of his responses was that his supervisor escalated her concerns to the regional manager without first attempting to resolve them with him. He also referred to the relative newness of the supervisory relationship with Ms Joseph, having been in place for only about three months, and commented about time being taken to build rapport and learn each other's supervisory styles. He requested more information to substantiate the concern that he was unwilling to engage in supervision, because the comment did not match his perception of his conduct. Subsequently, he provided to Ms Dickson letters complaining about the Grey Lynn Practice Leader, Toni Luxton.

[37] During this meeting, Mr Gumbeze let Ms Dickson know that he had unsuccessfully applied for roles elsewhere. Her impression was that those other

²⁰ At the hearing no issue was taken with the letter of caution and the warning letter being referred to, but Mr Fleming questioned whether they could be relied on in justifying the dismissal.

opportunities were referred to because he wanted a fresh start in a different location. That was a possibility she was prepared to consider. She said she would reflect on it, but decided her concerns needed to be addressed first.

[38] At the conclusion of the meeting, Ms Dickson decided she wanted to consider what more immediate options were available and to progress the actions outlined during it. She wanted to better understand whether there was a valid basis for the concerns and, specifically, if they were impacting on Mr Gumbeze's social work practice. To that end, he was informed that all relevant information would be reviewed, including material about his complaints. She agreed to speak to other staff and decided to review his caseload with a senior advisor, Barbara Kallu, in what was described as an independent review.

Four-way supervision

[39] The 26 June 2017 meeting ended with an agreement to provide a short-term response to the alleged supervision problems. Ms Dickson and Mr Gumbeze agreed to implement what was described as a bespoke "four-way" supervision arrangement". It involved Ms Luxton and Patricia Prchal (as Mr Gumbeze's support person), attending supervision meetings between Mr Gumbeze and Ms Joseph. The arrangement was confirmed in a subsequent email.

[40] During the 26 June 2017 meeting Ms Dickson described the need to have a constructive and supportive supervised arrangement for Mr Gumbeze's work. She agreed to make further inquiries about resources that might be available to help work through what had become a difficult situation, one that was not based on "fault-finding or blame". Ms Dickson described this process as taking a holistic and solution-focused approach.

The inquiry widens

[41] What happened next was a widening of the scope of the inquiry. It moved from dealing with the supervision-related concerns identified in Ms Dickson's 19 June 2017 letter, to investigating complaints about two cases Mr Gumbeze was handling. They were referred to as Baby M and Family K.

[42] On 2 August 2017, Ms Dickson wrote to Mr Gumbeze to advise him that additional concerns had been brought to her attention. She informed him that they were in relation to his ability to engage appropriately and respectfully with clients in a safe and accountable social work practice and in line with required competencies. Before outlining these further complaints, this letter expressed Ms Dickson's concern about the potential impact that there could be on his decision-making regarding safe practice and engagement with vulnerable children and families.

[43] Accompanying this August 2017 letter were copies of the letter sent to Mr Gumbeze on 19 June 2017, a note or list of occupational-specific competencies for a senior practitioner, his job description, and a copy of the Ministry's policy "The Oranga Tamariki Way". Attached to this letter were summaries of client information about Baby M and Family K.

[44] In this letter, Ms Dickson gave Mr Gumbeze her preliminary view that he needed to be placed on special paid leave while an investigation was conducted. He was told that an independent investigator would be appointed who would contact him to arrange a date and time to meet. His response to the proposed leave was sought. He was informed that, if placed on leave, he was to remain away from the workplace during the investigation.

[45] Ms Dickson did not identify what aspect, or aspects, of each case summary Mr Gumbeze was to respond to, or what exposed him to concerns about engaging appropriately and respectfully with clients in a safe and accountable social work practice.

Baby M

[46] The case summary about Baby M included in the letter to Mr Gumbeze was prepared on 25 July 2017 by Ms Joseph. It was a summary of social work involvement after he was allocated the file in February 2017, based on information stored on Oranga Tamariki's CYRAS system and direct observation of his casework. The summary listed extracts from case file notes followed by four statements of practice issues, although some statements contained more than one point.

[47] The first practice issue was that Mr Gumbeze had not progressed a family group conference referral resulting in that conference being delayed by five months. Part of this issue was that he placed the referral of the conference on hold, which Ms Joseph recorded as being contrary to social work practice.

[48] The second practice issue had several components beginning with a complaint that no duty of care checks had been completed on the baby's maternal grandmother who was caring for the child. This issue included observations there was insufficient engagement with the parents to assess risks, their intentions and plans.

[49] The third practice issue was essentially that Mr Gumbeze discussed a confidential report with one professional, made by another professional, who effectively dismissed the concerns raised. This action was criticised as not being a professional way to assess concerns and not encouraging a collaborative approach to working with a family. It was also said that a critical approach to information can create a "dangerous dynamic of assumptions and misinformation". Support for this issue was provided by three file notes, two in April 2017 and one in May that year.

[50] The fourth practice issue was a statement that it was evident Mr Gumbeze had formed a view on incomplete information and with no assessment. He was said to have remained committed to that view and did not seek out information, or listen to the views of others that may support an alternative plan. It followed a file note Mr Gumbeze made of a conversation with a PPS social worker who was recorded as advocating on behalf of Baby M's mother.²¹ Mr Gumbeze's note, it seems, was that he informed the social worker that the case was in the process of consultation and was likely to be closed. The note included the observation "it's not good enough for the Ministry to hold back Baby M's progress on the unknown".

[51] Some of these practice issues touched on concerns that Mr Gumbeze was acting without adequate supervision and, at least in some respects, that the family was left with an impression Oranga Tamariki had more legal authority than it actually had.

²¹ Which seems to refer to a Community Alcohol and Drugs Pregnancy and Parental Services Social Worker.

Family K

[52] This complaint was about a letter Mr Gumbeze wrote to Family K in January 2017. It told them that he was a social worker for their children and described five unsuccessful attempts by him to sight the children and/or meet with the family at their home. The dates of those unsuccessful attempts were 6, 14, 16 and 30 December 2016 and 4 January 2017. What concerned Ms Dickson was the following passage in the letter:

This letter is a final warning and I need to meet with you before 11th January 2017 for the purpose of determining whether your children are in need of care and protection on the grounds specified in Section 14(1) of this Act or/and as per the Family Group Conference Plan. ...

[53] Ms Dickson's concern was that this letter may have been perceived by the family as a threat. The content of a further case note from 11 January 2017 was referred to as supporting this concern, because it was said to confirm that the family interpreted the letter as a threat that the children would be removed.

Special leave

[54] Ms Dickson and Mr Gumbeze met on 3 August 2017. After the meeting he was placed on paid special leave from 4 August 2017 until the investigation was completed. He never returned to work before being dismissed in December 2017.

The inquiry widens again

[55] In August 2017, a verbal complaint by the father of Family S, made on 28 June 2017, was brought to Ms Dickson's attention. The essence of the complaint seems to have been that the father was to have supervised access with his children every week at a specified address but that had not happened. This complaint was recorded in a brief note that was subsequently reviewed by Oranga Tamariki, in line with its standard complaints process.

[56] By letter dated 31 August 2017, provided to Mr Gumbeze on 1 September 2017, Ms Dickson wrote to him about this complaint. Her letter began with a reminder about the letters dated 19 June 2017 and 2 August 2017, before expressing essentially the same concerns she previously raised, about whether his ability to engage with clients appropriately, safely and competently, was compromised.

[57] Mr Gumbeze was again instructed to remain away from the workplace during the investigation. To drive home this message, Ms Dickson stated her expectation that he would not undertake any tasks as a social worker, was not to make contact with clients or professionals, or access Ministry or client records. He was told that, if he had a legitimate need to access the office, he was to contact her or the site manager.

[58] Ms Dickson's letter passing on this complaint did not identify which aspect or aspects of these notes provided needed to be addressed.

[59] Mr Gumbeze replied by letter dated 2 September 2017 requesting further information, including the minutes from the 26 June 2017 meeting and the sources of information for the three cases being investigated. He also raised an issue about the special paid leave and whether it had in fact been agreed.

[60] Ms Dickson replied on 5 September 2017. As requested, she provided the transcript of the meeting and informed him that her sources were Ms Joseph for Baby M, records in CYRAS for Family K and a client complaint made by phone by Mr S. In relation to the special leave, her response was essentially that because he had not refused to be placed on it, and had provided no information for her to consider about the proposal, she concluded he agreed.

Investigator appointed

[61] On 21 August 2017, Ms Dickson spoke to Justine O'Connell to ask her to undertake an investigation into the concerns she had about Mr Gumbeze. Ms O'Connell was provided with an overview of what would be required.

[62] Ms O'Connell is an experienced investigator, but she is not a social worker. Ms Dickson decided that it was not necessary for the investigator to have social work expertise but, if necessary, specialist advice would be made available.

[63] Ms Dickson prepared the terms of reference for Ms O'Connell's investigation dated 29 August 2017. Those terms required the investigator to make findings of fact and, where possible, identify the evidence to substantiate them. They began with a short statement of the purpose of the investigation. Eleven people were named as key contacts for the investigator including Mr Gumbeze.

[64] The matters to be investigated were in discrete paragraphs. Ms O’Connell was informed that the inquiry was initiated to investigate three sets of concerns. The first set was about matters raised by Mr Gumbeze’s supervisor with seven itemised points further explaining them, following what was first raised with Mr Gumbeze in June 2017. The second set of concerns were those raised about Baby M and Family K. For the Baby M case the expressed concern was that Mr Gumbeze drew conclusions about the child’s mother’s ability to care for the baby without adequate assessment or engagement. As to Family K, the expressed concern was that the letter written to the family may have been perceived by them as a threat. The third concern was the complaint by the father in Family S.

[65] In relation to all of those concerns, the terms of reference invited an investigation about Mr Gumbeze’s ability to engage in safe and accountable social work practice.

[66] The investigator was informed that the concerns needed to be viewed in the context of historical findings that Mr Gumbeze had refused to follow lawful and reasonable directions; that was a reference to the warning letter in 2016.

[67] The terms of reference listed three broad indicative tasks. The first task was a review of all documentary information. Nine bullet points listed the documents supplied to the investigator. They included a transcript of the meeting on 26 June 2017 and notes of interviews completed to that point in time. The documents also included relevant case “recordings”, Ms Kallu’s practice review, certain email correspondence, records of supervision, some documents provided by Mr Gumbeze, KPI reporting and documentation, employment documents, and Ministry policies and procedures.

[68] The investigator’s second task was to interview Oranga Tamariki staff. Mr Gumbeze was identified as a person to interview, as was Ms Joseph, Ms Luxton (the practice leader), the site manager, previous site manager, Denise Fox (who reviewed the Family S complaint), and Ms Kallu, who was described as completing a “caseload analysis” of Mr Gumbeze’s work.

[69] The investigator’s third task was the possibility of interviewing persons external to Oranga Tamariki. While such interviews were stated to be possible, the

investigator was cautioned that interviewing the Ministry's clients would require careful planning in conjunction with a social work practitioner and prior consultation.

[70] Mr Gumbeze was informed of Ms O'Connell's appointment on 1 September 2017, in the same letter that provided information to him about the Family S complaint. He was not consulted about her appointment or the terms of reference for the investigation. In fact, the terms of reference were only provided to him towards the end of the investigation, about ten weeks after it began after several requests were made for them.

The investigation

[71] Ms O'Connell contacted Mr Gumbeze by phone on 11 September 2017. Mr Gumbeze informed Ms O'Connell that he did not consider her to have the appropriate specialist knowledge required to investigate because the matters related to vulnerable children. Ms O'Connell's response was that her understanding of the investigation was that it was not so much about the details of each case, but how he engaged with supervisors and had undertaken his role. In Ms O'Connell's report to Ms Dickson of the same day she relayed his reservations about her ability to conduct the investigation.

[72] Mr Gumbeze had explained to Ms O'Connell his understanding that he would be provided with the parameters of the investigation and that he did not know what they were. She told him that the investigation was about the three letters he received dated 19 June, 2 August and 31 August 2017, but did not mention the existence of the terms of reference.

[73] Ms O'Connell suggested to Ms Dickson that someone from Oranga Tamariki needed to speak to Mr Gumbeze so that he understood the process and her role. That was because, if Mr Gumbeze had issues with her undertaking the investigation, it was better to have that conversation at the outset. Ms O'Connell also drew Ms Dickson's attention to the fact that Mr Gumbeze was asking if the investigation was a code of conduct matter, or about case management issues. She suggested Ms Dickson should clarify that with him.

[74] On 12 September 2017, Ms Dickson wrote an email to Mr Gumbeze outlining her view that the three letters previously sent to him provided the details of what was

being investigated. She said that she had taken steps to ensure that there would be professional and sound social work practice advice available to Ms O'Connell throughout the investigation, including from a senior advisor at the Office of the Chief Social Worker. Her email did not clarify whether she considered the investigation to be a code of conduct or a case management matter, beyond warning him that disciplinary action could take place depending on the outcome of the investigation. She did not provide the terms of reference.

[75] Mr Gumbeze was not mollified by this explanation. On 16 September 2017, he complained to Ms Dickson about the integrity of the process including:

- (a) as to the relevance of, and reliance on, the warning letter; he complained that the warning was baseless because he had not disobeyed the manager and that it may not be valid;
- (b) that the decision to put him on paid special leave was unilaterally blocking access to information or his ability to talk to anyone; he called into question whether being placed on leave could be properly described as a mutual decision and if it was lawful;
- (c) about case notes in CYRAS being altered or deleted making him suspicious about the actions taken;
- (d) that the response regarding the source of Ms Dickson's concerns was ambiguous; and
- (e) criticising the appointment of Ms O'Connell without clear terms and conditions or parameters to maintain the integrity of the process.

[76] In this correspondence Mr Gumbeze commented that, if Ms O'Connell was appointed to deal with what was now a wider investigation, her credentials were questionable. He added that he did not "wish to grace a deeply flawed investigation process" by providing her with sensitive information. He questioned whether what had happened so far was what a fair and reasonable employer could have done.

[77] Mr Gumbeze also stated that Ms Dickson had ignored matters he raised with her regarding health and safety relating to what he described as “extreme bullying, systemic discrimination, abuse of children in state care etc”. Those matters were described by him as the real issues that required investigation by the Children’s Commissioner or Ombudsman. He asked for urgent steps be taken.

[78] Mr Gumbeze reminded Ms Dickson that she was aware of recent issues that had ignited retaliation from the leadership team as highlighted in her letter of 19 June 2017. He stated that he would not be deterred or derailed from those issues and made six specific complaints. He concluded his letter by adding that he would not accept “bullying tactics” or “unethical and illegal processes purported to be done in good faith”.

[79] Ms Dickson was not drawn into the wider debate Mr Gumbeze’s letter invited. In her reply she reiterated the point previously made; an external investigator was appointed as a platform for natural justice. Mr Gumbeze was invited to raise his concerns with the investigator.

[80] On 10 October 2017, just before the investigation concluded, Mr Gumbeze was provided with the terms of reference. What prompted the decision to supply them was that on 5 October Ms O’Connell sent him some notes she had made of meetings with staff and the next day he requested a copy of the terms of engagement she had from Oranga Tamariki. In so doing, he declined to comment without knowing what those terms were.

[81] Mr Gumbeze acknowledged receipt of the terms of reference on 11 October 2017, but reiterated his previous complaints, stating that the Ministry’s refusal to address them was why he did not wish to submit sensitive information to a “fraudulent” process. This response was interpreted by Ms Dickson as a concern about discussing sensitive information with Ms O’Connell. She gave him permission to provide to Ms O’Connell any information he believed relevant. He was assured that sensitivity, privacy and confidentiality would be maintained.

[82] Mr Gumbeze did not agree to an interview with Ms O’Connell. On 13 October 2017, he was told by Ms Dickson that if he chose not to meet Ms O’Connell by the

end of the following week there would be no option but for the investigation to be completed on the available information.

[83] Ms O'Connell completed her investigation without interviewing Mr Gumbeze. She interviewed other people identified by Ms Dickson in the terms of reference but did not interview any members of Baby M's family, Family K, or Family S or interview Mr Gumbeze's previous supervisor.

[84] Before completing the final report, a draft of it was sent to Mr Gumbeze on 3 November 2017 for comment. He was allowed just under a week to respond. He did not provide any response.

The report's conclusions

[85] The report was comprehensive, outlining each of the matters investigated followed by a summary of the interviews and investigations that were conducted. All of the concerns relating to Mr Gumbeze's supervision, except one, were found to have been proved. The exception was that the investigator did not consider that he had refused to engage in the PDA process.

[86] As to the Baby M complaint, the conclusion was that Mr Gumbeze had not met the child's mother at any time before 21 July 2017. Ms O'Connell concluded that he had formed a view that Baby M's mother was using the child to avoid a prison sentence. It appeared to her that he had formed this view without consulting Baby M's mother or father, his supervisor or practice leader.

[87] Ms O'Connell found that at the time this file was allocated to Mr Gumbeze, on 1 February 2017, a family group conference referral was in place. The basis for this finding was that the case notes from the previous social worker, who was allocated this file before it was reassigned to Mr Gumbeze, recorded the family being advised that this step had happened. She concluded that, on 24 February 2017, Mr Gumbeze noted that this conference was "on hold" and found that there was no evidence of any further action by him to make the referral until the case was discussed with a supervisor on 28 March 2017. However, the report commented that at least one witness spoken to, Ms Luxton, raised the prospect that the Family Group Coordinator may not have made the referral and that it could have slipped "as that can happen".

[88] Ms O’Connell concluded that, in the absence of information which would support the decision to place the conference on hold, Mr Gumbeze had failed to refer the case to a family group conference in a timely manner.

[89] The last finding about the Baby M case was that Mr Gumbeze had not made it clear to the baby’s mother and grandmother that the child was not in the custody of the Chief Executive of Oranga Tamariki. The conclusion was that his management of the case meant members of the family did not understand that he had no statutory authority in relation to Baby M or the ability to make a decision about where the baby should live.

[90] The conclusion about Family K was that the letter written to them may have been perceived as a threat that the children could be removed from the family’s care. Mr Gumbeze was considered to be sufficiently experienced to appreciate that the language in his letter risked that perception, particularly in light of the mother’s responses as recorded in a subsequent file note. The report concluded that the letter, and the language used, were inconsistent with the practice expectations and values of Oranga Tamariki. The effect was said to be that the mother was left with the impression that Mr Gumbeze had the power or authority to make a decision about removing children from her care.

[91] Some aspects of the complaint about Family S were upheld. First, Mr Gumbeze was found not to have undertaken the expected actions by failing to arrange access between the father and his children. Second, that the children’s father may have been “judged” by Mr Gumbeze. This conclusion was an inference drawn from an assessment of information on the Ministry’s file, but what was meant by “judged” was not described. Finally, Ms O’Connell concluded that Mr Gumbeze’s communication with Mr S may have been, or at least may have been perceived as, intimidating.

[92] A further part of the investigation surrounding Family S was a concern that Mr Gumbeze may have threatened to take the children into care. This concern was not upheld.

[93] Ms O’Connell then moved on to assess Mr Gumbeze’s ability to engage in safe and accountable social work practices. She concluded that he was not meeting the

requirements and responsibilities of his job description. After reviewing passages from the Oranga Tamariki Way, and the Oranga Tamariki Act, she concluded that he was not engaging in safe and accountable social work practice and that there were gaps in his case management.

[94] Those findings were essential to the subsequent decisions made by Ms Dickson.

The preliminary decision

[95] Ms Dickson and Mr Gumbeze both received Ms O’Connell’s final report on 10 November 2017. A few days later, on 15 November 2017, Ms Dickson sent Mr Gumbeze an email about it. He was informed that the report was being considered and further advice would be given to him about the next steps in the process.

[96] Mr Gumbeze replied the next day. He informed Ms Dickson that he did not take his social work role lightly. His response included a comment that he had continued to comply with the restrictions she had placed on him about not contacting colleagues and remaining away from the workplace. He characterised her instructions as a restraining order, trespass order and a total ban on talking to colleagues, other professionals, or clients of Oranga Tamariki.

[97] In this response, Mr Gumbeze informed Ms Dickson that he was waiting to engage in a robust and professional investigation, by which he was referring to one undertaken by a person appointed from the Office of the Children’s Commissioner or the Office of the Ombudsman. He described Ms O’Connell’s report as the “so called independent investigation”.

[98] Eight days later, on 24 November 2017, Ms Dickson sent Mr Gumbeze a letter inviting him to a meeting in early December 2017. The purpose of the meeting was stated as being to provide Ms Dickson’s “preliminary thinking and views” and “supporting rationale and justification”. The invitation was rejected. He repeated his previously stated concerns and said that he was waiting for the expiry of the constraints imposed on him.

[99] On 8 December 2017, Ms Dickson sent her preliminary view to Mr Gumbeze. In a detailed letter she set out a summary of the investigation process, an outline of her rationale supporting her preliminary view, and what were described as the most serious findings of fact arising from the investigator's report. Seven findings were specifically addressed in this letter which can be summarised as:

- (a) That Mr Gumbeze's practice demonstrated he was not willing to participate in formal "case consults" unless directed, and that he had been given a case direction which he had not followed.
- (b) He communicated in a manner that was reasonably perceived as aggressive and intimidating.
- (c) He had used CYRAS to challenge management decisions.
- (d) In relation to Baby M that he:
 - (i) failed to meet with the mother before July 2017;
 - (ii) formed a view about the mother attempting to avoid a prison sentence;
 - (iii) failed to refer the case to a family group conference in a timely manner; and
 - (iv) failed to meet with the mother and grandmother and they did not understand he did not have statutory authority over Baby M and did not have the ability to make decisions about where she should reside.
- (e) As to Family K, that his letter was likely to have been perceived as a threat of some legal action and that it led the mother to believe Mr Gumbeze had the power or authority to remove the children.
- (f) In relation to Family S, that he failed to arrange access between the father and children, that an inference could be drawn that he "may have

judged the father”, and that his communications may have been perceived as intimidating or as a threat that the children could be removed.

- (g) A general finding that he was currently not engaged in safe and accountable social work practice and that there were gaps in his case management.

[100] Ms Dickson responded to some of Mr Gumbeze’s previously stated concerns, describing them as his mitigation. Among those responses was a reply to the criticism that it was unreasonable to place him on paid special leave. She did not accept that criticism because he did not explicitly object to being placed on leave when she proposed it. Her reply to the allegations of workplace bullying, on reviewing what he had provided alongside other information, was that there were no concrete examples or evidence to substantiate the claims. She rejected the suggestion that there was any element of discrimination involved in what Oranga Tamariki did. She considered that Mr Gumbeze was “given significant support and assistance to address longstanding performance concerns over a period of time that have not resolved”.

[101] The preliminary view expressed in this letter was emphatic. Ms Dickson said the findings were accepted, and they substantiated the serious concerns raised in correspondence. Her letter commented:

...Furthermore, it is my view that these findings evidence a continuation of concerns about your performance and conduct which current and previous supervisors and managers have endeavoured to address with you since approximately, April 2015.

[102] In reaching the preliminary view, Ms Dickson described Mr Gumbeze’s behaviour, actions and social work practices as found in the report to amount to “serious and persistent misconduct”.

[103] The observations about Mr Gumbeze’s work did not finish at that point. Ms Dickson expressed a further view that the Ministry had no confidence in his ability to undertake his role. He was told that his conduct was “incongruent” with the expectations in his job description and the competency framework for senior practitioners. She further described this behaviour as over time eroding the trust and

confidence the Ministry had in him to undertake his role as a senior practitioner social worker. She also considered it was inconsistent with the principles and objects of the Oranga Tamariki Act, the Ministry's purpose and values (as expressed in "The Oranga Tamariki Way"), and that his engagement during the investigation process was not constructive.

[104] Ms Dickson informed Mr Gumbeze of her opinion that the employment relationship was at a point where it was untenable and that his employment should be terminated. He was given an opportunity to provide further information in advance of her final decision, but he did not respond.

[105] On 13 December 2017, Ms Dickson wrote again to let Mr Gumbeze know that in the absence of a response she would make her final decision based on the information available to her.

Termination of employment

[106] The decision to dismiss Mr Gumbeze followed by letter dated 14 December 2017. Not surprisingly, given the preliminary decision, the conclusion was that serious misconduct had occurred. He was dismissed summarily with effect from 15 December 2017.

[107] There were further consequences arising from the dismissal. A copy of the dismissal letter was placed on Mr Gumbeze's personal file, as was a note that he was not suitable for future employment within the Ministry. Oranga Tamariki also informed the Social Work Registration Board that he was dismissed due to "serious and persistent concerns regarding his actions, behaviour and social work practice".

[108] Mr Gumbeze replied by letter dated 18 December 2017, advising his response would be submitted to the Minister of Children and/or other stakeholders. On 5 January 2018, he raised a personal grievance.

What conduct was relied upon as serious misconduct?

[109] Of the issues counsel identified, the primary one was whether the conduct attributed to Mr Gumbeze was serious misconduct. Oranga Tamariki has policies called Disciplinary Action and Disciplinary Process Guideline.

[110] The Disciplinary Action policy differentiates between misconduct and serious misconduct. In it misconduct is described as covering situations where an employee does not meet the standards of behaviour, performance or conduct required of an employee where that would not warrant dismissal. The process is to focus on identifying the problem with the employee, providing a solution to avoid further instances and issuing a warning so the employee is aware that further or continued instances of misconduct may result in dismissal. The policy lists actions usually treated as misconduct. On that list is a failure to follow a lawful and reasonable instruction.

[111] The Disciplinary Action policy's description of serious misconduct is referred to as behaviour that strikes at the heart of the employment relationship and destroys the Ministry's trust and confidence in the employee. It is conduct that the Ministry cannot and will not condone.

[112] In the Disciplinary Process Guideline, misconduct and serious misconduct are again defined. A subset of serious misconduct is described as "zero tolerance". Each of those categories lists behaviour falling into them. Misconduct is described as behaviour that does not meet the Ministry's standards but does not warrant dismissal. An example given is a failure to perform work to the required standard. Serious misconduct is defined in a way consistent with the legal test referred to earlier. The Disciplinary Process Guideline raises dismissal (with or without notice) as an option where serious misconduct has occurred.

[113] Both policies provide a non-exhaustive list illustrating what sorts of behaviour might be regarded as serious misconduct, such as consumption of unlawful drugs while at work, theft or other dishonesty. The Disciplinary Process Guideline goes further and provides that a repeated or deliberate refusal to follow a lawful and reasonable instruction may be serious misconduct. In contrast, the Disciplinary Action

policy provides that a failure to comply with a lawful and reasonable instruction is treated as misconduct. Threatening or intimidating behaviour falls into the serious misconduct category under both policies.

The submissions

[114] Ms Butler submitted that Oranga Tamariki satisfied s 103A. That was because of the issues investigated, the findings made, the evidence in support for them and the careful consideration by Ms Dickson measured against the Ministry's policies, the Oranga Tamariki Act, and Mr Gumbeze's employment agreement. On this analysis, Oranga Tamariki's case was that the decision to dismiss was both procedurally and substantively justified. It was submitted that Oranga Tamariki was entitled, and obliged, to adopt a conservative and risk adverse approach to matters of conduct because its clients are vulnerable people.²²

[115] As to the first concern, about supervision, Ms Dickson had described that conduct in the preliminary decision letter as Mr Gumbeze's unwillingness to participate in "reflective" supervision and/or formal "case consults". Ms Dickson had accepted that he attended supervision but the issue was about his engagement. The submission was that Mr Gumbeze's resistance to supervision supported the conclusion reached, that he had engaged in repeated or deliberate refusal to follow a lawful and reasonable instruction.

[116] As to the concern that Mr Gumbeze had failed to follow case direction, that was said to be supported by reference to his job description, Ministry policies, and the Oranga Tamariki Act. The submission was that Ms Dickson reasonably formed the view that there was a failure to follow a lawful and reasonable instruction, given the evidence of his practice gathered through the investigation and case review and her assessment that there was nothing which suggested he accepted a need to change or to behave as anticipated by the relevant policies.

[117] It was submitted that Ms Dickson reasonably concluded that Mr Gumbeze's conduct towards Ms Joseph breached Oranga Tamariki's policy on Disciplinary Action

²² Citing *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 40, [2013] ERNZ 72.

given the investigation's findings that Ms Joseph did not feel safe at work, measured against the definition of serious misconduct in the policies.

[118] As to the complaint about challenging management decisions through the CYRAS records, Ms Butler argued that Ms Dickson reasonably formed the view this behaviour was serious misconduct based on the investigation's findings, and the case review by Ms Kallu. Ms Dickson's concern was that the case notes could reflect poorly on Oranga Tamariki and created a significant business risk; those records reflected how the Ministry makes decisions and can be requested by clients and other professionals.

[119] As to the complaints about Baby M, Family K and Family S, Ms Butler submitted that the conclusions about each of them supported the decision to dismiss. In particular, because Mr Gumbeze appeared to be practicing in isolation and failing to consult with his supervisor about significant decisions. On that basis it was, therefore, open to Ms Dickson to conclude that this conduct was inconsistent with Mr Gumbeze's statutory responsibilities.

[120] Ms Butler submitted that the findings about Baby M were available to Ms Dickson on the evidence in the investigation report, including the case review and case notes entered by Mr Gumbeze. Part of this submission was that it was open to her to conclude that his case management mis-represented both his authority, and the Ministry's authority, to make decisions about the baby.

[121] Similarly, the conclusions reached by Ms Dickson about the letter to Family K were said to be justified by the evidence. There was an acknowledgment in these submissions that Mr Gumbeze may have had concerns for the children following an incident of family violence, but that the lack of awareness and insight into the power imbalance between him and the family was material. In response to Mr Gumbeze's evidence at the hearing, that the letter was based on a template, Ms Butler argued that there was no evidence to support what was said. None of the senior social workers interviewed in the investigation had suggested that possibility and it was unlikely a template existed because its content would be inconsistent with the Oranga Tamariki Act.

[122] The concern that Mr Gumbeze had failed to arrange for Mr S to have access to his children was also relied on. While Ms Butler acknowledged that it was appropriate for Mr Gumbeze to take steps to protect the children in the family, the argument was that there was no good reason for the father not to be involved in decisions about them and that the proper statutory procedures were not followed. Mr Gumbeze was described as having accepted, in cross-examination, that a social worker is responsible for monitoring agreed plans arising out of family group conferences.

[123] Finally, it was submitted that, while Oranga Tamariki did not have the benefit of Mr Gumbeze's responses, it was reasonable to rely on case notes as providing an accurate record of his actions to reach a conclusion as to the level of seriousness of his behaviour.

[124] Ms Butler argued that the loss of trust and confidence in Mr Gumbeze flowed from this specific behaviour. It was noted that Ms Dickson was concerned with the cumulative impact of Mr Gumbeze's actions.

[125] The process used to investigate was described by Ms Butler as inherently fair. Mr Gumbeze knew what the complaints were because he received correspondence throughout the process. He had received all the information Ms Dickson possessed and knew what she was thinking because that information was relayed to him in at least the preliminary decision letter. To the extent that adverse findings were made, which he now wished to revisit, that was a problem of his own making because he declined to participate in the investigation.

[126] In summary, Oranga Tamariki's case was that having established serious misconduct occurred, it was reasonable for Ms Dickson to conclude that there were no alternatives to dismissal. That decision was supported by the caution and warning letters to show that Mr Gumbeze would not respond to concerns being raised with him and the likelihood he would repeat poor-quality behaviour. That was linked to his refusal to engage in the investigation and disciplinary process; a willingness to engage in discussions to resolve matters was described as being at the heart of good social work practice. Ms Butler submitted it was reasonable for Oranga Tamariki to decide that the appropriate disciplinary action was to dismiss Mr Gumbeze pursuant to his employment agreement.

[127] Mr Fleming was deeply critical of the reasons given by Ms Dickson to conclude that serious misconduct had occurred and what he characterised as her failure to consider whether a decision other than summary dismissal could have been made. These submissions canvassed three broad areas where the decision to dismiss was argued to be deficient. First, because Oranga Tamariki failed to consider and apply its own policies about what constitutes misconduct and serious misconduct so that it mischaracterised what was investigated. The consequence of that mischaracterisation was that a decision was made which, had it properly instructed itself, would not have been made.

[128] The second broad criticism was that Oranga Tamariki had failed to adhere to its statutory obligation to be a good employer. The third criticism was that there was little support for the adverse findings made about Mr Gumbeze, even though he did not participate in the investigation.

[129] Strong criticisms were directed to the overall quality of the disciplinary process including the role Ms Dickson played in establishing the terms of reference, her material influence over the structure of the investigation and making the decision to dismiss. All of those steps were taken by her when she had decided it was appropriate to have an independent person investigate given her previous experiences with Mr Gumbeze. The submission was that the resources of Oranga Tamariki meant that, to comply with s 103A, she should have stepped aside.

[130] Mr Fleming's criticism of the categorisation of the concerns about Mr Gumbeze as serious misconduct flowed from the Ministry's policies. His point was that, even seen through a lens of the highest scrutiny, the breaches attributed to Mr Gumbeze in the investigation did not fall into the category of serious misconduct. Part of this submission was that many of the complaints were framed as related to performance, competence or relationship issues. That is, they fell to be determined as performance-related matters and not as potential serious misconduct. The point was that some of them were initially treated as performance matters by the Ministry and it could not legitimately repackage them subsequently as serious misconduct.

[131] Mr Fleming submitted that a generalised loss of trust and confidence cannot be relied on to justify a summary dismissal in the absence of specific, proven acts of

serious misconduct.²³ He argued that, at the worst, the complaints may have fallen within the policy definition of misconduct. Repeated acts of misconduct could only justify dismissal on notice, following corrective action, but that did not occur here.

[132] An allied submission was that the policies misconstrued the legal test for serious misconduct. The submission was that they create a presumption of dismissal rather than promoting genuine consideration of alternatives. That is, it was said, effectively what Oranga Tamariki did here.

[133] Two other submissions were made touching on the substratum of Oranga Tamariki's decision. The first submission has already been mentioned, namely that Oranga Tamariki had a statutory obligation to be a good employer under the State Sector Act 1988.²⁴ The submission was that, since the Ministry was required to operate a personnel policy that complied with the principle of being a good employer, that must have an influence in considering whether it met s 103A. The challenge was whether Oranga Tamariki's decision, in particular the nature of the complaints and the way they were investigated, would meet the statutory good employer standard.²⁵

[134] The second further submission was that, in fact, the Ministry had not complied with its own policy in "The Oranga Tamariki Way". One of the values expressed in that policy was that the mana of people is respected, explained in the expression in that policy, "we listen, we don't assume, and we create solutions with others". Another value was that aroha is vital, explained in the policy as keeping "us focused on what is right". The criticism was that Ms Dickson did not adhere to this policy in the way she decided to widen the inquiry and move on to dismissal. That is, she moved on from attempting to find a solution at the conclusion of the 26 June 2017 meeting immediately to a disciplinary path and did not at any subsequent time pay attention to the policies focussed on finding solutions or the commitment she made to do so at the conclusion of that meeting.

[135] Turning to the substance of the complaints about the files Mr Gumbeze managed, the submission was that the conclusions were unsound and unbalanced. In

²³ Citing *Edwards*, above n 17.

²⁴ Now repealed by the Public Service Act 2020.

²⁵ Citing *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409.

relation to Baby M, that was because it was not clear who decided to put the family group conference on hold, since the social worker to whom the file was originally assigned was recorded in the same case notes as having referred the matter to a conference. The investigation report did not, it was said, consider whether the referral had already occurred at the point where Mr Gumbeze was assigned the work. The significance of this submission was that, once the referral had taken place, the coordinator of the family group conference has sole responsibility for fixing the date, time and location of the conference.²⁶ Further, Mr Fleming pointed out that the file notes suggested a history before Mr Gumbeze was assigned the file where conferences for this family were arranged but not progressed without criticism.

[136] The quality of the investigation in relation to Family K and Family S was also said to be deficient. Many of the conclusions were criticised as unsound because they were not based on reliable evidence and drew inferences that could not be supported. For example, there was an adverse finding about how Family K perceived Mr Gumbeze's letter which was reached entirely by reading and assessing the letter and file notes without speaking to any member of the family. That led to two supplementary submissions. First, that the conclusion was not sustainable without speaking to the family. Second that, since the family was within the purview of Oranga Tamariki and a family violence incident had occurred that prompted Mr Gumbeze to write in the first place, there could well have been other entirely justified reasons for the family to perceive that there was some risk to them. Mr Fleming's submission was that it was unreasonable to reach adverse conclusions about Mr Gumbeze's letter without considering those points.

[137] As to the Family S matter, Mr Fleming submitted that the investigation did not adequately take into account other information held by Oranga Tamariki. For example, there was information which suggested that Mr S had, for at least some part of the relevant time, resumed his relationship with the children's mother and through spending time with her may have had access to his children.²⁷ For example, the day before Mr S complained there was a family violence incident involving smashing car windows where both parents and the children were present which resulted in the police

²⁶ Oranga Tamariki Act 1989, ss 18 and 20.

²⁷ Whether that access may have contravened a Court order is unclear.

being called. Further, the file notes indicated that on the day of the complaint Mr S and Mr Gumbeze had an unsatisfactory phone conversation.

[138] While not attempting to downplay what Mr Gumbeze should have done in managing this file, the criticism was that the investigation concentrated on some information to the exclusion of other information without adequately explaining why.

[139] The investigation was also criticised as containing elements of predetermination and lacking independence. Mr Fleming submitted that Ms Dickson had shaped its parameters and identified what to provide to the investigator. Mr Fleming was also critical of the way Oranga Tamariki framed the preliminary decision letter which was, he argued, almost a draft letter of termination rather than an opportunity to persuade the employer to a less onerous outcome.

[140] Rounding out these submissions, Mr Fleming was critical about the letter of caution and the warning letter being relied on. As to the letter of caution, it was written that way expressly because its substance was not intended to be disciplinary in nature or quality, but that was how it was treated. As to the warning letter, the complaint was that it was taken into account as part of the investigation process, rather than at a separate point when Ms Dickson was evaluating what decision to make.

Analysis

[141] It is important to recall the test is whether the decision to dismiss Mr Gumbeze was one which, viewed objectively, Oranga Tamariki could have reached in all the circumstances; it is not what decision the Court considers should have been or might have been reached.

[142] When Ms Dickson was asked what aspect of Mr Gumbeze's conduct amounted to serious misconduct, she did not articulate the issues or problems beyond referring to the investigation and stating that the findings from it illustrated a departure from social work best practice.

[143] The first finding made against Mr Gumbeze was that his practice demonstrated he was not willing to participate in formal "case consults" unless directed. The finding made in the report is inconsistent with the evidence available to the investigator and

Ms Dickson. Ms O'Connell knew that Ms Joseph had only been supervising Mr Gumbeze for a short time. She also knew that Mr Gumbeze did not refuse to talk to Ms Joseph. When asked, Ms Dickson could not refer to any supervision records provided to the investigator where the supervisor had noted that Mr Gumbeze was not participating. At no point in the process, or during the hearing, was evidence referred to which would suggest he declined to participate or to address subjects Ms Joseph wanted to discuss. Rather the concern was about the general quality of his engagement during supervision.

[144] Oranga Tamariki did not explain how the quality of that engagement might fall into the category of serious misconduct. Mr Gumbeze and Ms Joseph were subject to Oranga Tamariki's policy outlining how they would engage in supervision, something which appears to be routine social work practice. There was no suggestion in the investigator's report that Mr Gumbeze had deviated from that policy. Amongst the materials included for the investigator was a document entitled "contract for supervision" between Ms Joseph and Mr Gumbeze. It set out the Ministry's expectations for fortnightly supervision of between one and one and a half hours duration. This document set out Ms Joseph's expectations as the supervisor and Mr Gumbeze's as the person supervised. There were also notes made from what appear to have been a sample of the supervision actually undertaken including listing the topic, comment in detail and stating certain action points.

[145] Additionally, Ms O'Connell had available to her the transcript of the 26 June 2017 meeting and knew from it that a temporary arrangement of four-way supervision had been made. She knew that Ms Dickson had proposed a solution but could not recall if she had discussed with Ms Joseph whether a permanent solution might be possible if there was appropriate support from management.

[146] Despite the breadth of criticism about how Mr Gumbeze behaved during supervision, Ms O'Connell did not interview his previous supervisor with whom he worked for about four years. She could not, therefore, shed any light on the nature or quality of Mr Gumbeze's interactions with his previous supervisor. Rather, the most that might safely be said is that the supervision meetings between Mr Gumbeze and Ms Joseph were less satisfactory than Ms Joseph wanted them to be.

[147] Ms Dickson knew that Mr Gumbeze had been attending supervision with Ms Joseph; she provided the supervision records to Ms O'Connell as part of establishing the terms of reference and had them available to her when reaching the preliminary decision to dismiss. She also knew about the four-way supervision arrangement because she created it. She knew that Mr Gumbeze had attended at least one four-way supervision without criticism, not long before the revised complaints began and he was placed on leave.

[148] There are two difficulties confronting Oranga Tamariki's decision making about supervision. The first difficulty is that the shortcoming attributed to Mr Gumbeze remained somewhat elusive throughout the investigation and during the decision-making; he was participating and he did so especially in the bespoke solution Ms Dickson created. The second difficulty follows the first; if that shortcoming led to the conclusion that he had failed to observe a lawful and reasonable instruction, it is difficult to see how such a conclusion could have safely been reached.

[149] Oranga Tamariki is entitled to specify the sort of behaviour and engagement in supervision it requires. However, it has not established that a finding of serious misconduct in relation to supervision was reasonably open to it on the basis of the investigation and disciplinary process.

[150] The second finding was about aggressive and intimidating communication. In accordance with the Ministry's disciplinary policies, assaulting, intimidating or threatening another person in the course of employment is capable of being serious misconduct.

[151] The investigator did reach conclusions, after interviewing certain staff, that Mr Gumbeze had behaved inappropriately in his dealings with Ms Joseph. There may have, furthermore, been a link to the behaviour that was the subject of the warning letter. Mr Fleming criticised this aspect of the investigation, and Ms Dickson's decision relying on it, as lacking any specificity. The allegations were said to be somewhat vague as well as being reasonably aged. In other words, even if Mr Gumbeze had behaved inappropriately by, for example, being too forthright in the way in which he communicated, that alone could not have formed the basis of serious misconduct allegations.

[152] Mr Fleming's submission, that Ms Dickson could not refer to a particular event or events, was a compelling one. The investigator's report describes general incidents of poor behaviour but it is difficult to tell when they occurred and, it seems, they may have been dealt with at the time. When cross-examined Ms Dickson referred to general observations about what Ms Joseph said or considered, but she was unable to point to a specific incident or event that might be properly identified as intimidating or threatening behaviour.

[153] I agree with Mr Fleming that a fair and reasonable employer could not, in the circumstances, have concluded that this aspect of the complaint amounted to serious misconduct without being able to tie the allegations to a specific event that was current and being investigated.

[154] As to the third finding, that the CYRAS recording system was used for improper purposes to challenge management decisions, it is difficult to see how expressing a contrary view about a funding decision may have got to the point of serious misconduct as that test was described in *BP Oil*.

[155] Drawing together the points made about Mr Gumbeze's supervision and personal behaviour, plainly there were difficulties that needed to be addressed. They appear to have prompted the inquiry in the first place, but they have about them a ring of being performance-related issues. The most that might be said is that they were potentially susceptible to allegations of misconduct, rather than serious misconduct.

[156] As to the Baby M file, apart from Ms Dickson's observation that Mr Gumbeze's manner of handling the case fell short of expected standards, it was difficult to discern from either the investigation report, or the evidence, why what happened was serious misconduct. For example, there was no suggestion in Oranga Tamariki files or the investigator's report that his file management placed Baby M in jeopardy or was otherwise compromising. There was information on the file recording that the baby was settled. It is also instructive that, in the professional review undertaken by Ms Kallu, she noted shortcomings in several of Mr Gumbeze's files, but there was nothing which suggested that in relation to Baby M his work was so lacking that it might reach the level of serious misconduct.

[157] Turning to the specific concerns about Baby M expressed in the preliminary decision letter, one was that Mr Gumbeze had formed a judgment about the motives of Baby M's mother. Ms Joseph's concerns about that were noted on the file before the inquiry began. It was not explained why, if Mr Gumbeze's attitude to the mother was so inconsistent with his professional obligations, a complaint about this subject was not raised before it was drawn to his attention as part of Ms Dickson's widening of the scope of the inquiry.

[158] The final issue about the Baby M case is whether Mr Gumbeze delayed making a family group conference referral. The investigator concluded that he did and that he was responsible for the note on the file. At the hearing Mr Gumbeze denied responsibility for both the delay and the note.

[159] As has already been mentioned, the report found that Mr Gumbeze inherited the file from another social worker. Oranga Tamariki's records raised the possibility that the other social worker had referred the matter to a family group conference before the file transferred to Mr Gumbeze. That other social worker was not interviewed. There were also no inquiries of any Family Group Conference Co-ordinator to establish if the matter had been placed in that person's hands. The investigator knew, from Ms Luxton, that slips occasionally happen but that possibility did not feature in the conclusions or Ms Dickson's decision-making.²⁸ The available information should have been sufficient to prompt some further inquiries and it cannot be safely said that the delay can be placed at Mr Gumbeze's feet.

[160] Furthermore, Ms O'Connell was also aware, or ought to have been aware from reviewing Oranga Tamariki's file relating to Baby M's mother, that there had been more than one previous referral for a family group conference that had resulted in monitoring and file closure without a conference occurring.

[161] Those matters potentially assisted Mr Gumbeze but the report did not adequately explain why they were discounted. I agree with Mr Fleming's submission that a fair and reasonable employer could not have safely accepted the investigation's finding on this subject.

²⁸ See above at [87].

[162] The same conclusion applies to the letter in the Family K case. A lot was made of the tone of the letter. Ms Dickson was entitled to view the letter as being written in an ill-advised way, but she struggled to explain why the choice of language was serious misconduct. In this respect context is important. When Mr Gumbeze wrote his letter he had tried several times, unsuccessfully, to contact the family and to see the children. Shortly before his letter was written there was an incident of family violence, which the report mentioned, but that incident received relatively little attention in the investigator's report or Ms Dickson's subsequent decision.

[163] I agree with Mr Fleming that there may have been other reasons to cause the family to express the fears attributed to them in the file besides receiving the letter.

[164] Finally, in the finding in relation to Family S, the significant delay in drawing the complaint to Mr Gumbeze's attention was not explained. The complaint was made in late June 2017, while he was still at work, but not provided to him until early August 2017 after the scope of the inquiry was first broadened. While the complaint was being dealt with according to the Oranga Tamariki complaint processes the delay brings into question whether it was initially considered as raising a matter that could be treated as serious misconduct.

[165] As to the conclusions reached about Family S, there was inadequate attention to and an analysis of information available to the Ministry. The underlying complaint was to the effect that Mr Gumbeze had fallen down in his professional obligations because he had not taken steps (or adequate steps) to arrange suitable access for the father to his children. No doubt Oranga Tamariki was entitled to direct criticism at Mr Gumbeze if he failed to take the steps required of him. However, Oranga Tamariki's file disclosed that the situation was not as it first appeared to be when the complaint was made. That raised the possibility of the apparent failure to take steps about access being seen in a different and more favourable light.

[166] Potentially, Oranga Tamariki could have concluded that some of Mr Gumbeze's work fell below its expectations and required remediation. What has not been shown, however, is that either individually or together the concerns about him amounted to serious misconduct.

[167] There were also problems with the investigative process. They began when a decision was made not to provide Mr Gumbeze with the terms of reference when he first asked for them and that shaped over time his responses to, and attitude towards, Ms O'Connell's work.

[168] Ms Butler submitted that there was no requirement under the Act, or in the employment agreement between the parties, for the terms of reference to be agreed.²⁹ That statement is correct but the point is whether the actions taken by Oranga Tamariki compromised the investigation. Under s 4 of the Act the duty of good faith requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship. Part of that statutory duty is to be responsive and communicative.³⁰ Mr Gumbeze was asking to have explained to him the nature and extent of the investigation. The refusal to provide him with the terms of reference was not consistent with the duty of good faith and it shaped how he responded.

[169] At one stage, it seems, the request for the terms of reference may have been confusing, when Mr Gumbeze asked about Ms O'Connell's terms of engagement. That request may have been interpreted as wanting information about the financial arrangements between her and Oranga Tamariki. That possible confusion is not, however, a sufficient explanation to justify the approach Oranga Tamariki. The refusal to engage with Mr Gumbeze over them may have also led to some of the strong criticisms he levelled at others in Oranga Tamariki and his efforts to broaden the inquiry into a wider one about children in care, rather than to concentrate on the issues.

[170] I accept Mr Fleming's submission that there was an element of predetermination in the decision to dismiss. It was probably unconscious, but the risk ought to have been identified. Reasonably early in the process Ms Dickson decided she should use an independent investigator. That decision appears to have been because of her previous involvement with Mr Gumbeze. However, subsequently no attention was given to the resources available to Oranga Tamariki, as required by s 103A, to assess whether she should have stepped aside as the decision-maker. It

²⁹ Relying on *AJY v Chief Executive of the Department of Corrections* [2023] NZEmpC 168.

³⁰ Employment Relations Act 2000, s 4(1A)(b).

follows that the independence potentially gained by using an external investigator was lost.

[171] Finally, I accept Mr Fleming's criticism of the approach adopted by Oranga Tamariki in the preliminary decision letter. That is, instead of providing Mr Gumbeze with an opportunity to respond to a possible decision still being formed, the letter articulated such strong and concluded views that it reads as a draft dismissal letter which, barring something extraordinary and unexpected coming forward, indicated what the final result was to be. In those circumstances, it is not surprising Mr Gumbeze declined to respond since the result appeared to be a foregone conclusion. He faced what was probably regarded as an insurmountable hurdle of inviting Ms Dickson to change her mind.

[172] Mr Gumbeze was unjustifiably dismissed by Oranga Tamariki. As a result of the conclusion that serious misconduct has not been established, it is unnecessary to consider the remaining issues identified by counsel.

Remedies

[173] Mr Gumbeze sought as remedies reinstatement to his former role, or an equivalent one, pursuant to s 123(1)(a) of the Act; compensation of \$50,000 pursuant to s 123(1)(c)(i); and reimbursement of lost earnings, in amount equivalent to one year's gross salary at his rate of pay at the time of his dismissal pursuant to s 123(1)(b) of the Act.

Lost remuneration

[174] Mr Gumbeze's was dismissed in 2017 and has not worked as a social worker since then. There was a period during which he retrained after which he began working for his own company, but he also experienced periods of unemployment.

[175] Mr Gumbeze seeks lost remuneration of one year of income. His evidence was that he did not receive any income during that period following the dismissal. If he had remained employed as a senior practitioner for a further year his salary would have been approximately \$79,015.

[176] Under s 123 of the Act, the Court may order reimbursement of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance.³¹ Section 128(2) directs that the minimum amount that must be awarded in circumstances where a successful grievant has lost remuneration is the lesser of a sum equal to the lost remuneration or to three months' ordinary time remuneration. That is, however, subject to a discretion under s 128(3) to award a greater sum.

[177] Mr Smith, who presented Oranga Tamariki's submissions on remedies, referred to *Sam's Fukuyama Food Services Ltd v Zhang* for principles to guide the exercise of the Court's discretion.³² In that case, the Court of Appeal described the principles guiding that discretion as the employee's actual loss setting the upper limit, with moderation being exercised, and awards accounting for the individual circumstances of the case. Contingencies and a counterfactual analysis must also be considered to allow for the possibility that the employee would not have remained employed.

[178] As to Mr Gumbeze's actual loss, the evidence about it was criticised as being uncertain. Mr Smith argued that the absence of information about the financial affairs of Mr Gumbeze's company meant that there could be no assessment of its income and therefore the loss incurred. He also submitted not applying for any roles for 12 months was unreasonable and Mr Gumbeze had failed to mitigate his losses.

[179] As well as criticising the evidence supporting Mr Gumbeze's claimed losses, Mr Smith submitted that a counterfactual analysis and assessment of contingencies indicated that the discretion to award more than 3 months' lost remuneration should not be exercised. That was because there was a real chance Mr Gumbeze's employment may not have continued.

[180] Mr Gumbeze was not cross-examined about his evidence over mitigation of losses, which is telling. I do not accept the criticism that he failed to mitigate his loss by looking for social work roles elsewhere. Certainly, Oranga Tamariki is not the only place where a person with social work qualifications can be employed, but is by far

³¹ Employment Relations Act 2000, s 123(1)(b).

³² *Sam's Fukuyama Food Services Ltd v Zhang* [2011] NZCA 608, [2011] ERNZ 482.

the largest. Oranga Tamariki properly acknowledged that finding work in this profession following a dismissal from it for serious misconduct would be challenging. When that is combined with Mr Gumbeze's evidence that he struggled to come to terms with the dismissal, it is not surprising that he was out of work for as long as he was.

[181] A counterfactual analysis does not assist. It cannot be reliably said that Mr Gumbeze's dismissal was an inevitability. Certainly, there may have been a basis for Oranga Tamariki to place him on some sort of performance management where it considered his social work practice to be deficient. It would go too far, however, to conclude that he would probably have failed any remediation efforts.

[182] I am satisfied that it is appropriate to exercise the Court's discretion and to order more than three months' remuneration. Mr Gumbeze should be awarded one year's salary gross; that is \$79,015.

Compensation

[183] Mr Gumbeze sought \$50,000 under s 123(1)(c)(i) of the Act. That was described as being at the top of band 2 as reformulated in *GF v Comptroller of the New Zealand Customs Services*.³³ In *GF*, the Court reviewed bands of compensation previously outlined in *Richora Group Ltd v Cheng*.³⁴ The revised bands are up to \$12,000, between \$12,000 and \$50,000, and over \$50,000.

[184] Mr Smith relied on the analytical steps in *Richora*, to submit an appropriate amount would be \$15,000. That submission would place this compensation near the beginning of band 2.

[185] There was a high level of humiliation. Mr Gumbeze lost his position as a senior social work practitioner in circumstances described as serious misconduct, which impacted on his professional standing. I accept that he suffered a severe loss of dignity. There was his uncontested evidence of the mental toll the decision took,

³³ *GF*, above n 25.

³⁴ *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

including that he felt depressed and helpless, and that it took time for him to get back on his feet.

[186] Assessing this compensation is not a science. It is more in the nature of an impressionistic decision weighing up the evidence that has been given and, if appropriate, making comparisons with other cases. Comparisons are likely to be extremely difficult because the cases will not be on all fours. I assess the impact on Mr Gumbeze as falling into the mid-range of band 2 and award \$35,000.

Reinstatement

[187] That leaves for assessment whether Mr Gumbeze should be reinstated. Under the Act reinstatement is the primary remedy, wherever practicable and reasonable.³⁵ Until reasonably recently, Mr Gumbeze maintained his practicing certificate as a Registered Social Worker. Mr Fleming addressed reinstatement by pointing out that staff engaged by Oranga Tamariki are routinely given orientation and training, as necessary, as they are integrated into the workforce. There was, therefore, no impediment to Mr Gumbeze returning to the workforce; while he has continued to have professional standing, any concerns about the currency of his knowledge could be addressed in that induction process. As to the reasonableness of reinstatement, the submission was that Oranga Tamariki had not provided sufficient evidence to show the potential effects of reinstatement on the employer, employee and third parties.³⁶

[188] Mr Smith submitted that it would not be reasonable or practicable to reinstate Mr Gumbeze, reiterating Oranga Tamariki's concerns as to safe social work practice and its loss of trust and confidence. He referred to practicable in the Act meaning more than just a possibility and something capable of being carried out, it is to be feasible, and having the potential to re-establish the employment relationship successfully. He drew attention to matters which may not have been sufficient to justify dismissal nevertheless being relevant to an ongoing employment relationship. As to the reasonableness of reinstatement, the Court was asked to consider the possible effects, not only on Oranga Tamariki and Mr Gumbeze, but on other employees in the Ministry.

³⁵ Employment Relations Act 2000, s 125.

³⁶ Citing *Hong v Auckland Transport* [2019] NZEmpC 54.

[189] Despite the seeming attractiveness of Mr Fleming's submission, I am not satisfied that it is reasonable or practicable to reinstate Mr Gumbeze either to the role he had or to one no less advantageous to him. The Ministry's process for orientating and inducting new employees does not adequately deal with the matter. Mr Gumbeze has been absent from this workplace for approximately six years. That length of time, notwithstanding how Oranga Tamariki deals with its induction processes, tells heavily against being reinstated.

[190] I also bear in mind the tension to the point of dysfunctionality that emerged between Mr Gumbeze and some senior managers who continue to be employed by Oranga Tamariki. Reinstatement would raise practical issues that are not likely to be overcome either by the passage of time or the induction process just mentioned. What also needs to be borne in mind is that throughout the investigation process, and more recently, Mr Gumbeze expressed a deep distrust in Oranga Tamariki's management. He expressed strong views about whether Oranga Tamariki was discharging its statutory functions. The request to be reinstated does not sit comfortably with those criticisms and suggests that reinstatement is unlikely to be workable.

Contribution

[191] Mr Smith submitted that, if Mr Gumbeze was successful, there ought to be an assessment under s 124 of the Act of his contribution.

[192] Oranga Tamariki pointed to the basis on which it began the investigation to illustrate that Mr Gumbeze's behaviour ought to be taken into consideration by discounting any remedy awarded to him. It was relying on the concerns about supervision, threatening or intimidating conduct and challenging management decisions through CYRAS, and the appropriateness of its investigations,

[193] I am not prepared to make a reduction for contributory conduct. What needs to be considered is culpable or blameworthy conduct. All that can be safely said is that Oranga Tamariki investigated allegations about Mr Gumbeze's work performance and behaviour. In the absence of an adequately conducted investigation it can go no further in establishing that grounds exist which might justify reducing the compensation to be awarded.

Outcome

[194] Mr Gumbeze's challenge to the Authority's determinations is successful. He is entitled to a finding that his dismissal by Oranga Tamariki was unjustifiable. It follows that the Authority's determination is set aside.

[195] Oranga Tamariki is to pay to Mr Gumbeze one year's gross salary of \$79,015 pursuant to ss 123(1)(b) and 128 of the Act and \$35,000 under s 123(1)(c)(i) of the Act.

[196] Mr Gumbeze was ordered to pay \$9,000 to the Registrar of this Court as part of obtaining a stay of execution of the Authority's costs decision.³⁷ The Registrar is directed to refund that money to Mr Gumbeze, and any associated interest, forthwith.

[197] Mr Gumbeze is entitled to costs. If they cannot be agreed memoranda addressing costs of this proceeding and arising from the Authority's costs determination may be filed.

K G Smith
Judge

Judgment signed at 11.45 am on 24 July 2024

³⁷ *Gumbeze v The Chief Executive of Oranga Tamariki – Ministry for Children* [2023] NZEmpC 86.