ATTENTION IS DRAWN TO THE ORDER PROHIBITING PUBLICATION OF CERTAIN INFORMATION (REFER PARAGRAPH 5)

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 125
5337307

	BETWEEN	A Applicant
	AND	CHIEF EXECUTIVE CHILD YOUTH AND FAMILY Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Ross Jamieson, Advocate for Applicant Peter Chemis & Matt Harrop, Counsel for Respondent
Investigation Meeting:	21 June 2011 at Wellington
Submissions received:	5 July from Applicant 1 & 13 July from Respondent
Determination:	28 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant claims that he was unjustifiably dismissed by the Respondent, the Chief Executive of Child, Youth and Family ("CYF") on 4 February 2011.

[2] The Applicant further claims that he was unjustifiably disadvantaged as a result of the duration of the process and his suspension.

[3] CYF deny that the Applicant was unjustifiably dismissed and claim the dismissal was substantively and procedurally justifiable, and that the dismissal decision was a decision which a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

[4] CYF deny that the Applicant was unjustifiably disadvantaged by the duration of the investigation and claim that it followed a fair and reasonable procedure.

Prohibition on publication

[5] **I order that the name of the Applicant and that of his family members not be published. The Applicant is to be referred to as Mr A, and his son as X, letters bearing no relationship to their actual names. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Issues

[6] The issues for determination are:

- Whether the decision to dismiss Mr A was a decision a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

- Whether Mr A was unjustifiably disadvantaged by the duration of the investigation.

Background Facts

[7] Mr A, whose family background was in the area of social work, became a residential social worker in 1988. Mr A graduated from Massey University with a Bachelor of Social Work degree, and at the time of the incident involving X on 2 May 2010 was employed by CYF as Team Leader, Approvals.

[8] Mr A said that his role as Team Leader, Approvals, was to manage a team of 6 employees whose responsibility was to assess CYF standards of compliance by Non-Governmental Organisations to enable them to work with CYF clients, namely vulnerable children, under the Children, Young Person and their Families Act 1989.

[9] On the evening of 2 May 2010 Mr A accompanied his son X to a tournament at a squash club. Mr A said X, who was losing his match, was behaving inappropriately on the squash court. Following the match, Mr A took X outside the club to commiserate with him for having lost the match and to discuss his behaviour on the squash court. In the course of this conversation Mr A discovered that X had deliberately broken his squash racket. When

Mr A reprimanded X for breaking the racket, X had made an insolent and disrespectful comment. In response to this comment, Mr A slapped X across the mouth.

[10] Unbeknown to Mr A, he had been observed reprimanding and slapping X by a bystander, who was outside the squash club at the time the incident occurred. A further bystander had observed Mr A admonishing X.

[11] Mr A stated that following the incident, he and X had gone back inside the squash club, where X had gone to play with his friends. On the way home, Mr A said X apologised for breaking his squash racket.

[12] On 18 May 2010 the CYF Care and Protection Team ("CPT") received a complaint that Mr A had assaulted his son X outside the squash club. Ms Sarah Lewis, an experienced social worker with CPT, was assigned to investigate the notification, working with her Supervisor and Practice Leader. Ms Lewis explained that the notifier of the complaint ("the Notifier") had become aware of Mr A's employment with CYF.

[13] Ms Lewis explained in evidence that the Children, Young Person and their Families Act 1989 required CYF to undertake an investigation as soon as practicable upon receiving any notification alleging that a child or young person has been, or was likely to be, harmed (whether physically, emotionally or sexually), ill-treated, abused, neglected, or deprived.

[14] Ms Lewis further explained that the nature of the alleged abuse by Mr A met the criteria for referral as a Child Protection Protocol (CPP) case. The protocol criteria which were relevant were the action being '*a blow or kick to the head'*, and as a factor or circumstance the '*abuse undertaken in public, or in front of non-relatives'*. The CPP is an agreement between CYF and the New Zealand Police ("the Police") which sets out the process for working together when responding to situations of serious child abuse.

[15] As the allegation met the threshold for referral, Ms Lewis notified the Police and a joint investigation plan was agreed with the Police's District Child Protection Team ("DCPT").

[16] Ms Lewis said that upon receiving a notification, the first step is to ascertain the child or young person's immediate safety. If it is ascertained that the child is immediately safe, an investigation into the incident notified is carried out.

[17] Ms Lewis explained that the investigation was an information gathering exercise and could include:

- Speaking to the notifier to get more details/clarification/context;
- Speaking with the parents and any other adult family members;
- Information gathering from independent sources (e.g. schools);
- Speaking with witnesses;
- Interviewing the children/young people about the incident(s) in the notification.

[18] Ms Lewis said that she followed the usual investigation process in relation to the notification about Mr A hitting X. Between 24 May and 28 June 2010 Ms Lewis said she spoke with the Notifier several times by telephone and undertook other preliminary enquiries. Ms Lewis said that the Notifier subsequently raised concerns about Mr A's behaviour towards his (Mr A's) two daughters, as a result of which she created a new notification to cover them. It was ascertained at an early stage in the process that X was at no immediate risk of harm.

[19] Ms Lewis stated that, in co-operation with the DCPT, meetings were arranged with Mr and Mrs A, X, and his two siblings, which took place between 29 June and 10 August 2010. Apart from Ms Lewis and representatives of the Police, Ms Lewis's Supervisor, Ms Jan Fisher, Ms Lewis's Acting Supervisor, Ms Michelle Olds, and the Practice Leader, Ms Mary Gasson, attended some of the meetings. Ms Lewis was present at all but one of these meetings.

[20] Ms Lewis said that as a result of these meetings it was ascertained that all three children were hit regularly by both parents, including being hit with a broom, and consequently Ms Fisher and Ms Gasson met with Mr and Mrs A on 12 July 2010 to update them on the status of the investigation. In this meeting, Mr A denied ever having hit his daughters but had admitted to giving A "*the odd slap across the lips"*.

[21] Mr Tony Waddel, who during the period June 2010 to April 2011 was contracted as a Human Resources Advisor in the CYF Workforce Development Team, said that during June 2010 he had been briefed by Mr Ken Rand, Acting National Manager of the CYF Approvals Team, about the situation concerning Mr A.

[22] Mr Waddel, who had been asked to provide Human Resources support throughout the disciplinary procedure, said Mr Rand had told him that a serious allegation had been made about Mr A, a Team Leader in the Approvals Team. Specifically the allegation was that Mr A had hit his son "*with a blow to the side of the head*". Mr Rand advised Mr Waddel that the CPT had received the notification and immediately informed Mr A's line manager, Mr Dave Terse, who had in turn referred the matter to Mr Rand, as his own line manager.

[23] Mr Waddel said that on 12 July 2010 he and Mr Rand met with Mr A to request that he attend a preliminary disciplinary meeting in relation to the incident involving X with them on the following day, 13 July 2010. Mr A was encouraged to bring a representative to the meeting and advised that if the timing of the meeting was a problem, or if he had difficulty in obtaining representation, he should advise them.

[24] At the initial meeting on 12 July 2010, in response to Mr A having asked about the CPT investigation, Mr Rand had advised him that although the same incident was the catalyst for both investigations, they were separate processes.

[25] Mr Rand gave Mr A a letter dated that same day, 12 July 2010, which outlined the nature of the allegations and advised Mr A that: "*The alleged conduct has the potential to bring the Department into disrepute and reflect badly on CYF in our relationship with the Government and the general public*". Mr Rand also advised Mr A that he considered the alleged incident constituted a potential breach of the CYF Code of Conduct.

[26] The letter further advised Mr A that:

- The question of whether suspension would be appropriate would be discussed at the meeting;
- Mr A would have an opportunity to provide an explanation;
- Mr A would have the right to have representation at the meeting; and
- EAP assistance was available.

[27] Mr A attended the meeting on 13 July 2010 with a support person. Mr Rand repeated the allegation and CYF's concern about it. Suspension was discussed. Mr Waddel said that Mr Rand had stated that any form of inappropriate discipline (of a child) could not be

supported by CYF and that as Mr A was a senior member of staff, the risk for the organisation around the allegation was heightened. Mr A was asked for a response before Mr Rand made a decision as to suspension. Mr A had stated that he could not see the need for suspension as his was not a frontline position and further that he believed there was a distinction to be made between parental discipline and abuse.

[28] After a short break to consider Mr A's response, Mr Rand advised Mr A that his decision was to suspend Mr A on full pay until the conclusion of the disciplinary process. The decision was confirmed in a letter dated 14 July 2010.

[29] An interim preliminary meeting was held on 19 July 2010 between Mr A, Mr Rand and Mr Waddel. Mr Waddel stated that Mr A had denied at this meeting that he had hit X, stating that he had just berated X for breaking his racket.

[30] Mr Waddel explained that on 26 July 2010 Mr Rand asked to meet with the CPT as he was concerned that Mr A had denied hitting X. Mr Waddel said he and Mr Rand interviewed Ms Olds and Ms Gasson on 27 July 2010. Both Ms Olds and Ms Gasson had separately confirmed that Mr A had admitted to them that he had slapped X across the mouth.

[31] On 26 July 2010 Mr Rand and Mr Waddel had met with X's squash coach. The squash coach had told Mr Waddel and Mr Rand that he had been approached by a young person who had explained that she had seen something she did not like and that she was going to approach the squash club Board about it. The young woman said she had seen Mr A give X "*a slap to the head*". The coach also told Mr Waddel and Mr Rand that another person had seen Mr A give X a slap and that they would be prepared to talk to CYF about it. The coach confirmed that he was aware that the matter had been reported to the Police and to his squash Board and that they were going to make a decision following the Police decision.

[32] On 30 July and 4 August 2010 Mr Waddel explained that Mr Rand and Mr Waddel's colleague, Mr Robin Carey, had met with the two witnesses to the incident, and that Mr Carey had made file notes which were produced in evidence. The first witness had described Mr A giving X a "*verbal bollicking*" followed by a "*whack*" across the side of his face, which was described as a short sharp hit that was enough for X to hold his face. The verbal reprimanding had then continued.

[33] The first witness said she had then spoken to two other people and they had decided to speak to the Police, although it appears that they had not witnessed the incident themselves.

At that time it had been decided not to lodge a complaint with the Police, however one of the individuals did later make a notification to the Police.

[34] The second witness had told Mr Rand and Mr Carey that she believed Mr A had used his size and bulk to tower over X, which she believed would have been intimidating to X. This witness, who had been concerned about the incident, had spoken to the squash club coach about it at the time. This witness had not seen the first part of the incident, but had overheard some discussion about it and observed to Mr Rand and Mr Carey that Mr A was "*known for doing this sort of thing.*"

[35] Mr and Mrs A were informed by the CPT that the next stage in the process would be evidential interviews with the children. Ms Lewis said that although Mr A was not happy at the prospect of his youngest daughter being interviewed, both parents gave their consent.

[36] On 3 August 2011 Ms Lewis said she had met with Mr and Mrs A and explained to them that although they denied hitting the children or using a broom to hit them, she had believed the children and the disclosures they had made about being hit.

[37] Ms Lewis explained that she had been concerned that Mr and Mrs A appeared not to understand the seriousness of the allegations or to acknowledge that physical discipline, as disclosed by the children, had occurred. Ms Lewis said that she had formed a view that the children needed care and protection and recommended that a Family Group Conference ("FGC") take place.

[38] Prior to the FGC, a Family Group Consult had taken place on 5 August 2010. The purpose of the Family Group Consult was to identify risks, strengths and next steps. Ms Lewis said that she formed a view at the Family Group Consult that the risks outweighed the strengths and decided that a Family Group Conference ("FGC") would be the most appropriate level of intervention. Ms Lewis explained that the purpose of a FGC was to ensure that there was a safety plan in place for the children and that there were appropriate services and support for the family.

[39] On 10 August 2010 Ms Gasson and Ms Lewis met with Mr A's family and confirmed that the matter was to be referred to a FGC. Mr A opposed this step, reiterating that he had never hit his girls and that a FGC was unnecessary.

[40] That same day, 10 August 2010, Mr Waddel said that Ms Gasson had confirmed to Mr Rand that Ms Lewis believed there had been physical and emotional abuse by both parents

and that all three children were in need of care and protection. Accordingly the matter was to be referred to a FGC.

[41] On 18 August 2010 Ms Lewis completed a CYF Social Worker's Referral to C&P Co-ordinator Report which listed the risks which had been identified, a copy of which was provided to Mr Rand and Mr Waddel.

[42] Mr Waddel stated that on 23 August 2010, Ms Lewis informed Ms Gasson, who in turn informed Mr Rand, that Mr A had been arrested and charged with one count of assault on a child in relation to the incident with X.

[43] In a letter dated 24 August 2010 Mr Rand wrote to Mr A advising that he hoped to have a report outlining the progress of the employment investigation completed by the end of that week, following which the General Manager of Service Support, Mr Ian Richards, would advise Mr A if he intended to proceed further.

[44] On 31 August 2010 Mr Richards received a copy of Mr Rand's report, and wrote to Mr A, enclosing a copy of the report. In his letter dated 31 August 2010, Mr Richards advised that although he had not reached a decision about the allegations against Mr A, he was concerned that Mr A's actions might amount to serious misconduct. Accordingly he wished to meet with Mr A on 8 September 2010.

[45] Following the meeting on 8 September 2010, Mr Richards wrote to Mr A on 13 September 2010. In this letter Mr Richards advised Mr A that his preliminary view was that Mr A's actions amounted to serious misconduct and that by disciplining X in the manner in which he had done, Mr A had brought the Department into disrepute. Mr Richards advised that his preliminary view was that dismissal was the appropriate outcome, and invited Mr A to a meeting on 16 September 2010 to provide his views and responses to the preliminary view which had been reached.

[46] On 14 September 2010 Mr Richards moved to a different role and Ms Marion Heeney was appointed to his previous position as General Manager of Service Support. Ms Heeney said she instructed Mr Rand to write to Mr A on her behalf on 22 September 2010, informing Mr A of Ms Heeney's appointment and that she wished to form her own preliminary view on the matter. This would involve the disciplinary process being revisited.

[47] Ms Heeney and Mr Waddel met with Mr A and his representative, Mr Ross Jamieson, and other support persons on 7 October 2010. Ms Heeney stated she had commenced the

meeting by reference to a letter which Mr A had provided prior to the meeting, and invited Mr A to respond.

[48] Ms Heeney said that Mr A had admitted smacking X on the lips but advised that it was a 'one-off' incident and that he had never previously hit his son. Ms Heeney said that she and Mr A had discussed Mr A's understanding of CYF's expectations of senior staff in both their personal and professional lives, and that Mr A had confirmed his understanding that CYF's organisational view was zero tolerance of physical abuse of children and that this was the conduct expected of staff.

[49] On 18 October 2010 Ms Heeney explained that she had met with Ms Lewis and Ms Olds to clarify two matters that Mr A and Mr Jamieson had raised about the CPT investigation. These concerns were that the social workers who had first visited Mr A's family at home had indicated that they did not have concerns about the children, and that the CYF interviewer had asked the children leading questions in subsequent interviews.

[50] Ms Heeney said that Ms Olds had explained that whilst they had had no concern for X's immediate safety when they had first met with the family, they had not advised Mr A that they had no concerns whatsoever. As regards the interviews, Ms Heeney said she was advised that the interviews of the children had been carried out by well trained and experienced DCPT interviewers. Ms Heeney said that she had found the explanations provided by Ms Lewis and Ms Olds to be entirely satisfactory.

[51] Ms Heeney stated that Ms Lewis and Ms Olds had proceeded to describe their investigation to her and why they believed that the children's disclosures of being hit were true. Ms Lewis and Ms Olds had told Ms Heeney that they believed the hitting had stopped but that Mr A continued to deny hitting the girls or X, apart from the one incident at the squash club, and this was one of the factors motivating the requirement for a FGC.

[52] On 5 November 2010 Ms Heeney wrote to Mr A outlining her preliminary view, which was that Mr A's actions constituted serious misconduct. Ms Heeney explained that a key point for her was that the incident with X ran against the fundamental organisational values of CYF, whose whole rationale was to protect children and support the law against domestic violence.

[53] Ms Heeney said she had referred in the letter to her particular concern that the incident had taken place after legislative changes regarding the use of force with children. Ms

Heeney advised Mr A of her preliminary view that dismissal might be the appropriate outcome, and invited Mr A to a further meeting to be held on 15 November 2010.

[54] Mr A had responded on 12 November 2010 by advising that he had made a request for information under the Official Information Act (OIA) and was unable to meet until he had that information. The requested information was provided to Mr A on 24 November 2010. After that date Ms Heeney said it had not been possible to find a convenient date to meet until after the Christmas period.

[55] On 9 November 2010 the FGC took place, the outcome of which was a 'non-agreement', which Ms Lewis explained meant that the parties could not agree. Ms Lewis said that this was followed on 18 November 2010 by a case consultation with Ms Olds and Ms Gasson at which it was decided that as a result of changes within the family, particularly the fact that the children had confirmed that the hitting had completely stopped, there were no immediate care and protection concerns. On this basis it was decided that no useful purpose would be served by placing the matter before a Family Court at that stage. Mr and Mrs A were informed of this decision on 24 November 2010.

[56] On 22 December 2010 Ms Heeney was advised of the outcome of the FGC and the decision by the CPT Team not to place the matter before the Family Court.

[57] Ms Heeney met again with Mr A on 17 January 2011. Mr Rand and Mr Waddel were also present at the meeting. Mr A had prepared and provided a response to Ms Heeney's preliminary view. Ms Heeney said they had worked through the points raised in this and offered clarification as necessary.

[58] In the letter Mr A had prepared and which he presented, Mr A provided the information that in respect of the Police charge he had been discharged without conviction.

[59] Mr A had expressed that view that zero tolerance to physical abuse did not necessarily mean dismissal but that he had received the impression that it was 'non-negotiable' at the meeting on 7 October 2010. Ms Heeney said that in response to this observation, she had explained that zero tolerance was an organisational principle, but that she was required to consider each case individually as part of a fair process in an employment matter.

[60] Ms Heeney said towards the conclusion of the meeting, Mr A had commented that a decision to dismissal was harsh and that there were other options such as a temporary secondment to be considered.

[61] Ms Heeney advised Mr A that she was on leave until 25 January 2010 but she thanked Mr A for his submissions and informed him that she would make a decision and advise him of it as soon as possible after that date.

[62] Following the meeting Ms Heeney asked Ms Lewis to respond to certain aspects of Mr A's letter of 17 January 2011 which concerned the CPT's investigation. Ms Lewis had replied on 1 February 2011 with a detailed response to each issue raised in Mr A's letter, and Ms Heeney said she had again found Ms Lewis's responses to be entirely satisfactory.

[63] Ms Heeney said that she had not reverted to Mr A after she had interviewed Ms Lewis, as Mr A's comments related to specific comments made by Ms Lewis, and not to inaccuracy in relation to Ms Lewis' substantive findings.

[64] Ms Heeney said that she had carefully considered all Mr A's submissions and had reached the decision to dismiss Mr A. Ms Heeney explained that in reaching this decision she had considered many factors including:

- **The CPT investigation**: although this was a separate process, Ms Heeney had investigated the concerns which Mr A had raised and found them to be unfounded. Ms Heeney said that, based on the information she had, it appeared to her that Ms Lewis' belief that the children were being hit and in need of care and protection was reasonable, as also was Ms Lewis' decision to refer the matter to a FGC.

- **The FGC process**: Ms Heeney said she had also investigated Mr A's claim that the FGC process was institutional bullying and found this to be unfounded.

- **The Police prosecution**: Ms Heeney explained that Mr A in his submissions had taken the view that the Police would not have charged him but for CYF having alerted them to the incident, and that although the courts also had a zero tolerance approach, he had been discharged without conviction. Ms Heeney explained that she had understood that by this Mr A had meant that the matter should not have come to the Police's attention, and that as Mr A

had been 'cleared' by the courts, he should also be cleared in respect of the CYF process. Ms Heeney said that her response to this reasoning was that CYF had acted appropriately in notifying the Police and such action was in accordance with the CYF Child Protection Protocol. Additionally that the Police prosecution had been an independent process.

- **Permanent Name Suppression**: Ms Heeney said she had acknowledged Mr A's submission that the permanent name suppression in the Police prosecution case could limit the potential to bring CYF into disrepute. However Ms Heeney still regarded the issue of bringing CYF into disrepute to be relevant given the fact that the Police, with whom CYF had an important, long-standing, relationship in respect of matters related to child abuse, knew of the incident, as did members of the public who had viewed the incident and who had become aware of Mr A's employment with CYF.

- **CYF Organisational Values:** Ms Heeney said that it had been of great concern to her that Mr A's hitting X was contrary to CYF's fundamental organisational values. Ms Heeney said she had viewed Mr A's conduct as serious and totally inappropriate in the context of his senior role in the Approvals Team.

- **Nature of role:** Ms Heeney said that although Mr A's position did not involve him in the hands-on care of children, his position involved him in the management of staff who assessed the suitability of community organisations to work with vulnerable children. Ms Heeney concluded that Mr A's role required him to lead by example internally and externally consistently with the founding principles and values of CYF. Ms Heeney stated that it was her view that physical discipline was contrary to these principles and values.

- **Dismissal too harsh an outcome**: Ms Heeney said she had considered the fact that Mr A was attending anger management counselling and that he felt dismissal would be too harsh an outcome. Ms Heeney said she had considered alternative employment options such as secondment, but she had reached the view that Mr A's conduct was unacceptable to CYF.

- **Impact on Mr A's children**: Ms Heeney said she had taken the impact of a dismissal upon Mr A's children into consideration but having weighed it against CYF's *raison d'être* and Mr A's senior role in CYF, Ms Heeney's

conclusion was that Mr A's conduct was unacceptable and too serious a breach for dismissal not to be the appropriate outcome.

[65] By letter dated 4 February 2011 Ms Heeney advised Mr A of the decision to dismiss him. The letter set out in detail the reasoning behind the decision by Ms Heeney that dismissal was the appropriate outcome in all the circumstances.

Determination

Was the decision to dismiss Mr A a justifiable decision?

[66] Section 103A of the Act sets out the test of justification:

> *For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred"*

[67] Ms Heeney, and Mr Richards before her, regarded Mr A's actions as serious misconduct. Dismissal was a potential outcome in the event of serious misconduct under clause 1.2 of Mr A's employment agreement dismissal:

> *In the case of serious misconduct the Chief Executive may dismiss you and terminate this agreement with less than three month's notice, or without notice.*

[68] Ms Heeney was the decision maker in the matter. In determining the findings of Ms Heeney with regard to serious misconduct, I have to consider s103A of the Act and whether the findings are those which the fair and reasonable employer would have made. In *Fuiava v Air New Zealand Limited*[1] Judge Travis stated:[2]

> *The Court in* Hudson *found that the new s103A did not give the Employment Institutions the unbridled licence to substitute their views for that of the employer. Their role was instead to ask if the actions of the employer amounted to what a fair and reasonable employer would have done and to evaluate this objectively.*

[1] [2006] ERNZ 806; (2006) 4 NZELR 103 (EMC)
[2] At para [50]

Mr A's Employment Agreement

[69] Mr A's employment agreement, signed and dated by Mr A on 22 November 2007, sets out the CYF vision as being:

> *Safe children and young people in strong families and responsive communities*
>
> - *free from abuse*
> - *free from neglect*
> - *free from offending*

[70] Mr A was employed in a management role and his employment agreement set out CYF's expectation that managers would: "*implement the Government's policies and decisions to the highest possible standards of quality, and with the utmost integrity*".

Code of Conduct

[71] Mr A's employment agreement stated at clause 1.1. that CYF policies and procedures including the CYF Code of Conduct applied to Mr A's employment.

[72] The Code of Conduct set out as a principle that:

> *You should not bring your employer into disrepute through your activities, whether inside or outside Child, Youth and Family. Youth and family activities whether inside or outside the Department are not likely to be acceptable if they:*
> *…*
> *- damage the standing or reputation of Child, Youth and Family because of the position you hold in it.*

[73] Under the section entitled "Codes of Behaviour', the Code of Conduct stated:

> *You are to avoid any activity, either work-related or private, which could reflect badly on Child, Youth and Family in its relationship with Government and/or the general public. This means that you are to inform your manager in writing if:*
> *…*
> *:any criminal charges or convictions that may occur while you are employed by Child, Youth and Family are of such a nature that it would be inappropriate for you to continue to be employed in the same capacity by the Department. This may include, for example, charges that involve loss of trust between you and Child, Youth and Family, or charges that damage the reputation of Child, Youth and Family.*

[74] I find that Mr A was aware of the dictates of the Code and bound to act in accordance with the principles contained within it.

[75] I further find that Mr A's action towards X, and the behaviour towards X and his siblings which later came to light as a result of the CPT investigation, to be in breach of the requirements expected of Mr A as an employee in both his employment agreement and in the CYF Code of Conduct.

Government Policy Considerations

[76] Ms Heeney had found it relevant to her decision-making process that the incident with X had taken place after legislative changes regarding the use of force with children, these being legislative changes enacted to support CYF's vision and organisational role.

[77] I observe in this context that the Police prosecution outcome was a discharge without conviction for Mr A. However the investigation and disciplinary process undertaken by CYF was a separate and independent process involving additional considerations and a different standard of proof.

[78] I find that Ms Heeney's concern regarding the context of when the incident had occurred to have been justifiable in circumstances in which Mr A's employment agreement specified that in his role he was expected to implement Government policy to the "*highest possible standards"* and with the "*utmost integrity"*.

[79] Whilst of itself failure to adhere to such high policy expectations might not constitute grounds for a finding of serious misconduct, I find it to have been reasonable for Ms Heeney to have held it to be a relevant factor, especially in circumstances in which Mr A's non-adherence to the policy expectations were known to both the Police and members of the public, who all knew of his employment with CYF.

Zero Tolerance

[80] Mr A confirmed that he was aware of CYF's zero tolerance stance to physical abuse of children. Zero tolerance policies must be approached with some caution[3] and the mere existence of such a policy even when, as in this case, acknowledged by the employee, does not automatically justify dismissal.

[3] *Housham v Juken New Zealand Ltd* [2007] ERNZ 183

[81] I find that Ms Heeney as the decision maker could not solely rely upon CYF's zero tolerance stance in order to justify the dismissal of Mr A; however I find that it was open to her to consider it as one of a number of relevant factors.

Conduct occurring outside the workplace

[82] The incident with X occurred away from Mr A's workplace and did not occur whilst he was engaged in carrying out his role responsibilities. The CYF Code of Conduct provisions were applicable to activities occurring outside the workplace.

[83] The Court of Appeal observed in *Smith v Christchurch City Council*[4] that:[5] "*It has long been recognised that conduct outside the work relationship but which brings the employer or his business into disrepute may warrant dismissal"*. The Court went on to clarify that:[6]

> *…there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way: because the conduct is incompatible with the proper discharge of the employees' duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.*

[84] The action of Mr A in slapping X was seen by members of the public and reported to the Police and the CPT. All three groups became aware that Mr A was employed by CYF.

[85] The CPT investigation revealed additional inappropriate behaviour by Mr A and his wife towards the children. Despite Mr A's view that Ms Lewis was inexperienced, I found Ms Lewis' evidence to show that she acted in accordance with CYF standard procedures and policies in such matters, and I find it relevant that Ms Lewis was supervised throughout the investigation, and that her findings were supported by her supervisor and practice leader.

[86] I also find it relevant that Mr A's role was as Team Leader in the Approvals Team which involved him managing a team that assessed compliance with CYF standards of compliance by non-governmental organisations delivering services to care for and protect vulnerable children, and to champion that work.

---

[4] [2000] ERNZ 624
[5] Ibid at para [21]
[6] Ibid as para [25]

[87] I find Ms Heeney's conclusion that Mr A's actions were inconsistent with the values embraced by CYF, and thus prevented him from leading by example, to be a reasonable conclusion in all the circumstances.

Dismissal a justifiable outcome

[88] I find Ms Heeney's conclusion that Mr A's behaviour constituted serious misconduct a finding that a fair and reasonable employer would have reached given all the circumstances at the relevant time.

[89] In considering whether dismissal was justified I have given consideration to the question of whether Mr A's was what Chief Judge Colgan denoted as:[7] "… *one of those rare cases where, although there was serious misconduct, the employer was nevertheless not justified in summarily dismissing the employee in all the circumstances"*.

[90] Mr A was a senior employee within CYF, an organisation with values centred around the protection and care of vulnerable children. Mr A was found by CYF to have acted in a way that significantly impacted and undermined CYF's trust and confidence in him.

[91] I find that Ms Heeney's conclusion that Mr A's conduct had brought CYF into disrepute to have been a valid one given the above factors. I also find CYF no longer had the requisite trust and confidence in Mr A as a senior manager to be a finding that a fair and reasonable employer would have reached given all the circumstances at the relevant time. In these circumstances, dismissal was the appropriate outcome.

[92] I find that the decision taken by CYF to dismiss Mr A was one which a fair and reasonable employer would have made in all the circumstances at the time the dismissal occurred.

[93] For the above reasons I find that Mr A was not unjustifiably dismissed from his employment with CYF

Was Mr A unjustifiably disadvantaged by the duration of the investigation process?

[94] Mr A was suspended on full pay from 14 July 2010 until his dismissal on 4 February 2011. A period of suspension in excess of 6 months, albeit on full pay, is a significant period of time.

---

[7] *Ministry of Justice v Dodd* (2010) 7 NZELR 578

[95] There are several leading judgments which establish the law on justification for suspension. In *Sefo v Sealord Fisheries Ltd*[8] Chief Judge Colgan observed that justification for suspension is important because the effect of suspension on an employee:[9] "*may, and frequently does, affect the employee's employment or one or more conditions of that employment to the employee's disadvantage*".

[96] In this case there is an express contractual term as set out in the CYF Code of Conduct providing CYF with the power to suspend Mr A. However the Employment Court in *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice*[10] established that there is nonetheless a requirement to apply the rules of natural justice to a decision involving suspension.

[97] Additionally there is a legislative requirement that that parties to an employment relationship deal with each other in good faith as set out in s4 of the Act:

> *S4(1A)The duty of good faith in subsection (1)-*
>
> - *requires the parties in an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
>
> - *without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-*
>
> 1. *access to information, relevant to the continuation of the employees' employment; about the decision; and*
>
> 2. *an opportunity to comment on the information to their employer before the decision is made.*

[98] In *Graham v Airways Corporation of New Zealand Ltd*[11] the Employment Court stated: [12] "*Ultimately the test in each case must be the fairness and reasonableness of the employer's conduct.*"

---

[8] [2008] ERNZ 178
[9] Ibid at para [33]
[10] [1993] 2 ERNZ 546
[11] [2005] ERNZ 587
[12] Ibid at para [104]

[99] Mr A was consulted prior to being suspended. The Employment Court has clarified that there is no immutable rule that the employee must be told of the employer's proposal to suspend[13], however Mr A was consulted and his views were given consideration. CYF's decision was to suspend Mr A on full pay pending the outcome of the investigation and disciplinary process. Given the serious nature of the allegations against Mr A, I find suspension to have been an option available to a fair and reasonable employer.

[100] The disciplinary investigation commenced on 12 July 2010, meetings took place between Mr A, Mr Rand and Mr Waddel on 12, 13 and 19 July 2010. During July and August 2010 there were various meetings between Mr Rand and Mr Waddel with the CPT, the squash coach and the notifiers. On 24 August 2010 Mr Rand wrote to Mr A advising him that he expected to complete his report by the end of that week.

[101] On 31 August 2010 Mr Richards wrote to Mr A enclosing a copy of the report and inviting Mr A to a meeting on 8 September 2010. Mr Richards advised Mr A of his preliminary view that dismissal was an appropriate outcome, and invited Mr A to a meeting on 16 September 2010.

[102] To that point the investigation had taken 9 weeks. Although not a minimal amount of time, I find that steps were being taken throughout the investigatory process and Mr A was being apprised of these at regular intervals. Given the serious nature of the allegations and the preliminary outcome reached by Mr Richards, I find the process to this point to have been fair and reasonable, especially given the fact that the process was somewhat complicated by the parallel CPT and Police processes.

[103] On 14 September 2010 Mr Richards moved to a new role and Ms Heeney became the General Manager of Service Support. Ms Heeney took the decision that she wished to form her own preliminary view of the matter. Whilst this decision had the effect of lengthening the process for Mr A, I believe the decision to have been a reasonable decision on Ms Heeney's part, given the serious nature of the possible consequences for Mr A.

[104] Ms Heeney's investigation involved a meeting with Mr A on 7 October 2010. As a result of concerns raise by Mr A at this meeting, Ms Heeney carried out further interviews with CPT and communicated her preliminary view to Mr A on 5 November 2010, inviting Mr A to a further meeting on 15 November 2010. This meeting did not take place on that date due to Mr A's OIA information request on 12 November 2010.

---

[13] Ibid at para [104]

[105] The information had been provided to Mr A in a timely manner on 24 November 2010, but the parties were unable to meet thereafter due to commitments on both parts, until 17 January 2011. Following the meeting on 17 January 2011 Ms Heeney again carried out further enquiries with Ms Lewis.

[106] After due consideration Ms Heeney advised Mr A of her decision to terminate his employment on 4 February 2011.

[107] It was perhaps unfortunate that Mr Richards transferred to another position just prior to Mr A being advised of a final decision in the matter, however I find that decision to reach her own view rather than to merely implement a preliminary decision without any opportunity for Mr A to have any input, to be a decision which was open to Ms Heeney as a fair and reasonable employer.

[108] I find that this decision disadvantaged Mr A in that it extended the period of his suspension. However to the extent that the extension to the process gave Mr A the opportunity to be heard by Ms Heeney before she reached a final decision, it was not an unjustifiable disadvantage.

[109] In all the circumstances I determine that CYF acted as a fair and reasonable employer and that Mr A was not unjustifiably disadvantaged in his employment.

Costs

[110] CYF is not seeking costs, and accordingly I order that costs are to lie where they fall.

Eleanor Robinson
Member of the Employment Relations Authority