

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

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

**[2025] NZEmpC 98
EMPC 257/2024**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN THE CHIEF EXECUTIVE OF ORANGA
TAMARIKI – MINISTRY FOR
CHILDREN
Plaintiff

AND IOANA HILL
Defendant

Hearing: 13 February 2025
(Heard at Auckland)

Appearances: J Hardacre and J Kimpton, counsel for plaintiff
G Macdonald, counsel for defendant

Judgment: 16 May 2025

JUDGMENT OF JUDGE M S KING

[1] These proceedings involve a non-de novo challenge to a determination of the Employment Relations Authority (the Authority).¹

[2] Ioana Hill was a youth worker at a youth justice residence operated by Oranga Tamariki. On 5 March 2021 she was summarily dismissed for using force described as excessive and unnecessary on a rangatahi.² Ms Hill brought a claim for unjustified

¹ *Hill v The Chief Executive, Oranga Tamariki – Ministry for Children* [2024] NZERA 336.

² A young person.

dismissal against the Chief Executive of Oranga Tamariki. The Authority found that the dismissal was unjustified.³

[3] Oranga Tamariki has filed a challenge on a non-de novo basis. Essentially it challenged the parts of the determination where the Authority applied reg 22 of the Oranga Tamariki (Residential Care) Regulations 1996 (the Regulations) in relation to Ms Hill's decision to use force against a rangatahi. It also challenged the finding that Oranga Tamariki considered Ms Hill had choked/strangled the rangatahi and that this influenced its decision to dismiss, the finding that Oranga Tamariki failed to sufficiently explore Ms Hill's psychological state before making the decision to dismiss, and the finding that Ms Hill was unjustifiably dismissed. Ms Hill defends the challenge.

[4] The key issues to be determined by the Court are:

- (a) whether the Authority correctly applied reg 22 in relation to Ms Hill's decision to use force against a rangatahi – specifically, whether the Authority:
 - (i) correctly applied reg 22 to Oranga Tamariki's operations in youth justice facilities;
 - (ii) adequately considered reg 22 in its assessment of whether the defendant's actions might have been justified in self-defence;
 - (iii) erred in finding that Ms Hill's psychological state may have justified the use of force under reg 22 and the "Working with tamariki and rangatahi in residences" policy;
 - (iv) erred in distinguishing or applying various previous decisions;
- (b) whether Oranga Tamariki made a finding that Ms Hill had choked or strangled the rangatahi, and whether this influenced its decision to summarily dismiss her;

³ *Hill*, above n 1, at [179].

- (c) whether Oranga Tamariki failed to sufficiently investigate Ms Hill's psychological state before making the decision to summarily dismiss her; and
- (d) whether Oranga Tamariki unjustifiably dismissed Ms Hill.

[5] An agreed statement of facts and an agreed common bundle with documentary evidence and witness statements which the Authority member had before it, including an electronic copy of the CCTV footage, were produced. These documents were provided and admitted by consent for the purposes of providing context in respect of the Authority's findings that are not being challenged.

[6] During the hearing a non-publication order was made over the names and identifying details of any rangatahi identified in the evidence and/or other documents before the Court.

The facts

[7] It is necessary to have a full appreciation of the facts considered by the Authority at the investigation meeting. Only then can an accurate assessment of the key issues be undertaken.

[8] Oranga Tamariki is a crown agency responsible for supporting tamariki and rangatahi in New Zealand whose wellbeing is (or will be) at significant risk of harm. It operates youth justice residences, which are highly complex and regulated environments. The purpose and goal of the youth justice residences is to provide a safe environment and high standard of personalised care for rangatahi in Oranga Tamariki's care.

[9] Korowai Manaaki is a youth justice residence located in Auckland that cares for rangatahi, usually between the ages of 14 and 18, who have been remanded or sentenced to Oranga Tamariki's care by a court order.

[10] On 8 April 2017 Ms Hill commenced work as a residential youth worker at Korowai Manaaki on a casual basis. Her position became permanent in December 2017. In her role she was responsible for, among other things:

- (a) providing professional care and protection for rangatahi entrusted to residential care; and
- (b) managing non-compliant behaviours through the use of appropriate consequences for undesired behaviours which are consistent with Oranga Tamariki's policy and the Regulations.

The 5 March 2021 incident

[11] A summary of the Authority's key findings on the facts is set out below.⁴

[12] At the time of the incident Ms Hill was working in the Nikau Unit within Korowai Manaaki. She had a good relationship with the rangatahi (referred to on occasions as M) involved in the incident. M's file described him as violent, having been involved in assaults on other rangatahi and staff, which is not dissimilar to other rangatahi held at Korowai Manaaki.⁵

[13] The incident occurred in a lounge facility.⁶ There were six other rangatahi and four male staff members present.⁷ A summary of Ms Hill's description of events is:⁸

- (a) Ms Hill gave a different rangatahi a pen. When she asked for it to be returned, he said he did not know where it was.
- (b) Ms Hill began asking other rangatahi, including M, about the whereabouts of the pen. M began acting defiantly and laughed when she asked about the pen. She offered amnesty if the pen was returned. Having failed to find the pen, Ms Hill sought and obtained approval for a pat search to find the pen.

⁴ *Hill*, above n 1. The Authority's factual findings about the incident and disciplinary process at [34] to [159] of the determination have not been challenged.

⁵ At [34].

⁶ At [35].

⁷ At [39].

⁸ At [35].

- (c) As this was going on, she was informed by another staff member that M had taken the pen from his pocket and handed it in. Learning this, Ms Hill directed M to the Non Participation Table (NPT) located in the corner of the lounge, which is where those with challenging, non-compliant or disruptive behaviour are sent.
- (d) When she directed M to the table, he started to challenge her, asking why. She replied that she had given multiple chances to hand over the pen and that because he refused, he was to sit there for his non-compliance.
- (e) As she walked away, she thought she heard him calling her a “fucking slut”, leading to other boys responding “ohhhh shit”. Ms Hill felt embarrassed, humiliated and degraded in a room full of boys at what she describes as slut-shaming. She felt like it was a personal attack on her mana.
- (f) She made her way over to M, who was now standing by the NPT. She moved within inches of his face and asked M what he said. Ms Hill says M started repeating aggressively “you fucking slut, you’re a slut, you’re a slut”. She had not heard him speak like this before.
- (g) Ms Hill admits that she got a lot closer than she intended. Fearing for her own safety, she says she used an approved Safe Tactical Approach and Response (STAR) defensive technique called a “Train stop”, which involved her using both hands to push M away from her; palms are applied to either side of the (upper) chest below the collarbone to create distance. M fell back on to the seat.
- (h) She says M repeated his previous comments, getting louder and louder and smirking at her. He leaned forward to get up and put his hand on the table to push himself up. Ms Hill says she feared for her safety and performed a second Train stop. She says she intended to push M by the shoulders but that as she pushed him back onto the chair, her hands slipped and moved higher towards his collarbone (as he was sitting). The first Train stop had pushed him backward onto the chair in such a

way that there was no chair back behind him, so when she applied the second Train stop, he was pushed back, and she leaned forward further than she had anticipated.

- (i) Ms Hill had not been aware of the location of the other staff members in the lounge, but at this point other staff members intervened.
- (j) Ms Hill left the unit. She was upset and informed the Team Leader Operations (TLO) about the incident. She admitted that she had “fucked up”, placing her hands a bit higher than what they should have been, closer to his collar bone. She demonstrated to the TLO, indicating her hands were still on the torso rather than the neck.
- (k) There was a team debrief, and Ms Hill was told by colleagues shortly after the incident that the rangatahi expressed remorse and regret at his choice of words and sought to apologise to her personally.

[14] Ms Hill believed that if she had not intervened, it would have caused greater problems down the road, with the STAR system recommending that issues arising be dealt with and not ignored. She acknowledged that it would have been ideal if another staff member had intervened, but that did not happen.⁹

[15] The TLO drafted a SOSHI (a security incident report), with Ms Hill having some input. It includes her statements:¹⁰

Being labelled and called derogatory names in front of 6 other young people and 4 male staff triggered me ... as a female and I was overcome with rage and shame. As [M's] taunts became louder and he continued to slut shame me I was worried that he was becoming more and more aggressive. [M] started to lean forward and I feared that he would physically harm me so instinctively I sought to protect myself. In doing so I reactively put my hands around the top of his shoulders to push him away from me.

⁹ At [36].

¹⁰ At [39].

Oranga Tamariki's disciplinary process begins

[16] Mr Kepu was the acting residence manager.¹¹ Shortly after the incident, he was informed by the TLO that Ms Hill had choked a rangatahi. The TLO was not present during the incident.¹²

[17] About an hour after the incident Mr Kepu viewed the CCTV footage. This captured visual images without sound. The camera is at almost the opposite end of the lounge from where the incident occurred. The lounge is a fairly large room.¹³

[18] Mr Kepu described seeing footage of Ms Hill walking towards a door while M was at the opposite corner of the lounge. His description was that:¹⁴

- (a) Ms Hill then turned and walked to M, pushing M. He fell into a chair.
- (b) She stepped in and put her hand around the neck area.
- (c) Ms Hill held on in a back-and-forth strangling/choking motion.

[19] Having seen the CCTV footage, Mr Kepu believed Ms Hill's hands were around the rangatahi's neck area. He had seen the footage on a large screen with the ability to zoom in and out.¹⁵

[20] Ms Hill met with Mr Kepu and another staff member. She expressed that she could have dealt with the situation better and not been so quick to react. She told Mr Kepu that she had a good rapport with M, that the incident was out of character for both of them, and that she would like to mediate. That was a common process at Korowai Manaaki.¹⁶

[21] The parties disagree on whether M was aggressive on this occasion. The Authority determination records that Ms Hill's evidence was that her actions were proportionate to the threat which existed given M's aggressive manner and putting his

¹¹ At [41].

¹² At [42].

¹³ At [43].

¹⁴ At [44].

¹⁵ At [45].

¹⁶ At [47].

arm on the table, as if about to push himself up towards her. She describes his body language, facial expressions and swearing as leading her to fear for her safety. He was pursing his lips. She felt unsafe.¹⁷

[22] From CCTV footage Mr Kepu did not see M acting in an aggressive way or displaying aggressive body language and therefore described the use of force as unprovoked.¹⁸

[23] On 8 March 2021 Mr Kepu wrote to Ms Hill indicating Oranga Tamariki had serious concerns that she may have unnecessarily used excessive force on a rangatahi. He proposed to suspend her while formal employment processes were undertaken. After meeting with Ms Hill and the Public Service Association (PSA) representatives, Ms Hill was suspended.¹⁹

[24] Around this time Oranga Tamariki decided that the CCTV footage was clear enough and that no further investigation was warranted. Oranga Tamariki moved into a disciplinary process. As a result, other than Ms Hill, none of the staff or rangatahi present were interviewed.²⁰

[25] By letter dated 15 March 2021 Ms Hill was invited to a disciplinary meeting, with Mr Kepu identified as the decision-maker. Oranga Tamariki set out the following as “unnecessary use of excessive force” by Ms Hill:²¹

- (a) marching from one side of the unit to M, then pushing him forcefully with two hands;
- (b) as he falls back into the chair, stepping into his space and placing her hands around the neck area; and
- (c) with her hands in the neck area, applying excessive force to pull the neck area in a “back-and-forth strangling/choking motion”.

¹⁷ At [48].

¹⁸ At [49].

¹⁹ At [50]–[51].

²⁰ At [53]–[54].

²¹ At [55].

[26] Oranga Tamariki identified obligations in various documents, including its code of conduct, values and policies, along with the Regulations. Its concerns were labelled as serious.²²

[27] Ms Hill was offered and took up the opportunity to watch the CCTV footage of the incident.²³

[28] On 25 March 2021 a disciplinary meeting was held. Mr Kepu and Tracy Spence, senior human relations advisor, attended the meeting on behalf of Oranga Tamariki. Ms Hill attended with her PSA representative. There is a voice recording of this discussion. The meeting was adjourned and reconvened on 30 March 2021.²⁴

[29] The 25 March 2021 recording has Ms Hill describing the incident in detail. Ms Spence led the subsequent section, expressing appreciation for Ms Hill's detailed, authentic explanation and her immediate reflection and ownership of what happened.²⁵

[30] Ms Spence talked about the psychological triggers for Ms Hill's reaction to slut-shaming as a wahine and said that needed to be dealt with. She asked Ms Hill what was going on for her personally, with Ms Hill replying that she had never been slut-shamed by a male in her life. Ms Spence mentioned life context, making brief reference to trauma and personal journeys. She asked why M's words cut Ms Hill to the core such that Ms Hill lost control and what tools Oranga Tamariki can provide for Ms Hill to be successful in going forward. Rather than allowing time for comment, Ms Spence informed Ms Hill that she did not have to answer and that it may be personal.²⁶ Ms Spence then moved on to talk about what Oranga Tamariki has to consider. She said:²⁷

What is unclear, we can't visually see where the hands were placed because it's blurred.

²² At [56].

²³ At [57].

²⁴ At [58].

²⁵ At [59].

²⁶ At [60].

²⁷ At [61].

[31] Ms Spence noted that if Ms Hill had choked or strangled M she would be “gone” or dismissed whereas if she had not done so, the threshold would be different.²⁸

[32] There was a break for Ms Hill and her representative to discuss and consider their response.²⁹

[33] No recording is available of the 30 March 2021 meeting, but notes refer to Mr Kepu opening with wanting to talk about the intent of the behaviour and an explanation of Ms Hill’s placement of hands around the “chest-neck” area of M. The meeting notes are not verbatim and appear to be more of a summary.³⁰ They include Ms Hill, reflecting on the CCTV footage:

- (a) acknowledging walking into the rangatahi’s personal space – everything happened quickly;
- (b) acknowledging she could have taken a step back, taken a breather and been less reactive;
- (c) stating that at the time the only thing going on in her head was the “slut shaming” by the rangatahi in the heat of the moment;
- (d) acknowledging that a change of face with another staff member dealing with M would have been a better outcome; and
- (e) acknowledging that she “fucked up”.

[34] Mr Kepu sought reassurance that Ms Hill could uphold her safety with rangatahi. Ms Hill gave a 100 per cent guarantee that it would not happen again and that she had no psychological triggers/trauma. She had never experienced behaviour like this from anyone, personally or professionally. She notes she had had similar comments before when she worked in the girls unit but that she had handled it.³¹

²⁸ At [62].

²⁹ At [63].

³⁰ At [64].

³¹ At [66].

Oranga Tamariki reaches a preliminary view to dismiss

[35] On 30 April 2021 Mr Kepu wrote to Ms Hill setting out his factual findings and his preliminary view that she should be dismissed without notice. The allegation was essentially the same as had been in Oranga Tamariki’s 15 March 2021 letter.³²

[36] Ms Hill’s 25 March 2021 responses are recorded in the letter, including that she did not consider she had M in a strangling or choking motion. There is no mention of the strangling or choking matter when discussing the findings of fact.³³

[37] In terms of the findings of fact, the letter concludes that Ms Hill’s actions were contrary to the organisation’s “Working with tamariki and rangatahi in residences” policy as it relates to the use of physical force. It also concludes that the allegation that the use of force may have been unlawful was found to be substantiated and that it does not make any difference whether verbal humiliation comes from boys or girls.³⁴

[38] The letter identifies that Ms Hill’s actions amount to serious misconduct because they were in breach of the Regulations, Oranga Tamariki’s policy and code of conduct and the Public Service Commission’s Standards for Integrity and Conduct.³⁵

[39] In considering the appropriate sanction, the letter identifies Ms Hill’s openness and responsiveness throughout the process, her reflections and remorse, her length of service and the infrequency of the STAR refresher training.³⁶

[40] Unfortunately, Ms Hill did not receive Oranga Tamariki’s letter at the time.³⁷

The final meeting prior to dismissal

[41] On 5 May 2021 Oranga Tamariki offered to meet with Ms Hill to discuss its preliminary view. Ms Hill said she felt pretty optimistic. She turned up for the meeting

³² At [68].

³³ At [69] and [71].

³⁴ At [70].

³⁵ At [72].

³⁶ At [73].

³⁷ At [74].

only to discover Mr Kepu had given his preliminary view to dismiss her. An apology was offered for the letter not reaching her, and it was printed out for her.³⁸

[42] Ms Hill was surprised and distressed by the preliminary view, including because she understood Oranga Tamariki had dealt with more serious allegations of male staff members assaulting rangatahi which did not result in dismissal. She had also received an earlier indication from her representatives that a warning was the likely outcome.³⁹

[43] The PSA delegate and organiser attended the meeting, explaining that Ms Hill had only just received the 30 April 2021 letter. There was an offer to reschedule the meeting or to hear from Ms Hill if she was comfortable with proceeding.⁴⁰

[44] About 20 minutes later Ms Hill indicated she was willing to meet, so the meeting went ahead. She had had the opportunity to talk to her representatives before making that decision. Ms Hill told the Authority she was in an emotional state and that she regretted her decision to proceed.⁴¹

[45] Through her representatives Ms Hill apologised and expressed remorse for the whole situation, emphasising she did not intend to harm M. The PSA representatives spoke about her being young, this being a first offence, her passion for working with rangatahi and seeking a second chance. When asked about how she could reassure Mr Kepu that she would not respond the same way again, Ms Hill said that she would remove herself from any similar situation. She also said that she would reflect on how to better manage herself and that she was aware of her triggers. The meeting proceeded to discussion of next steps and how long it would take for a final decision to be reached.⁴²

³⁸ At [76].

³⁹ At [77].

⁴⁰ At [78].

⁴¹ At [79].

⁴² At [80]–[81].

Ms Hill advises that she has obtained new representation

[46] On 9 May 2021 Oranga Tamariki was informed in writing that Ms Hill had a legal representative, Mr Macdonald. His letter noted he had just taken instructions from Ms Hill. A personal grievance regarding two issues that are not being challenged in this proceeding was notified. Concerning the disciplinary process, the letter also noted that if there was an inappropriate disciplinary sanction that would create a third personal grievance. Mr Macdonald also asked whether Oranga Tamariki intended to proceed to mediation.⁴³

[47] Oranga Tamariki wrote to Mr Macdonald advising that it was not going to pause the process at this point. There was no explicit request to do so. Mr Kepu did not consider the fact Ms Hill had a new representative should mean a decision should not be made until that representative had a chance to provide comment. Ms Spence noted that Ms Hill had not expressed any concern about her PSA representation, apart from changing her representative at the end of the process.⁴⁴

The dismissal proceeds

[48] On 14 May 2021 Mr Kepu wrote to Ms Hill, informing her that she was summarily dismissed. He concluded that both the allegations were substantiated on the balance of probabilities and amounted to serious misconduct and that dismissal without notice was the appropriate outcome.⁴⁵

[49] Regarding the first allegation that Ms Hill acted contrary to the organisation's "Working with tamariki and rangatahi in residences" policy, Mr Kepu recorded that "it is clear from the CCTV footage" that she initiated the altercation by crossing the room and pushing M backwards. Mr Kepu wrote that Ms Hill admitted her hands were a lot closer to M's collarbone than they should have been to pin him back and she admitted that she may have "fucked up". There is no mention of choking/strangling. The letter also records Ms Hill's acceptance that she could have used non-force de-escalation techniques.⁴⁶

⁴³ At [82].

⁴⁴ At [84]–[85].

⁴⁵ At [88].

⁴⁶ At [89].

[50] On the second allegation, Mr Kepu found there was no lawful ground to use force, with Ms Hill crossing the room and almost immediately pushing M. Mr Kepu concluded that this was not self-defence. Mr Kepu’s view was that the CCTV footage did not show threatening body language by M.⁴⁷

[51] Mr Kepu repeated his view that it did not make any difference which gender rangatahi any name calling came from.⁴⁸

[52] Mr Kepu expressed having lost trust and confidence in Ms Hill. This included because, in his view, her responses during the disciplinary process focused on blaming the rangatahi and suggesting that he was a bad person and that she was fearful of her safety when footage did not support that. He noted she would have to work closely with rangatahi if returning to her youth worker role.⁴⁹

[53] Mr Macdonald raised a personal grievance on behalf of Ms Hill on 19 May 2021 in relation to her dismissal.

Did the Authority err in its application of reg 22?

The issue in more detail

[54] Ms Hill used force against M. Regulation 22 of the Regulations sets out the situations where the use of force by a staff member against a rangatahi in a youth justice residence is lawful. One of the situations in which force can lawfully be used is where the staff member is acting in self-defence. Where force is used unlawfully, that would normally constitute serious misconduct under Oranga Tamariki’s “Disciplinary Policy”.

[55] Ms Hill said that she was acting in self-defence and that her actions were lawful. Oranga Tamariki said that she was not acting in self-defence and that her actions were unlawful and constituted serious misconduct.

⁴⁷ At [90].

⁴⁸ At [91].

⁴⁹ At [92].

[56] In its determination the Authority concluded that Oranga Tamariki was not in an adequate position to decide there was no self-defence element in Ms Hill's actions. It found that Ms Hill had unnecessarily moved towards M but that in the absence of evidence from the other people present, it was not in a position to rule out her actions as being in self-defence once she had moved towards him.⁵⁰

[57] The Authority then went further and determined that there was "a self-defence element at least as regards the pushes after the first one. The decision maker did not focus on that because he could not see the macro signs of aggression on the CCTV footage."⁵¹

[58] In its statement of claim, Oranga Tamariki sought a finding that the Authority erred in its application of reg 22 in relation to Ms Hill's decision to use force against M. I now turn to consider whether such a finding should be made.

When is the use of force lawful in youth justice residences?

[59] The meaning of reg 22 must be ascertained from its text and in light of its purpose and context.⁵² Regulation 22 sets out the grounds for when use of force at a youth justice residence is lawful.

22 Use of force in dealing with child or young person

(1) No member of staff of a residence shall use physical force in dealing with a child or young person in the residence unless that member of staff has reasonable grounds for believing that the use of physical force is reasonably necessary—

(a) in self defence, or in the defence of another person, or to protect that child or young person from injury; or

...

(2) Any person who uses physical force for any of the purposes referred to in subclause (1) shall—

(a) use no more than the minimum amount of force that is reasonably necessary in the circumstances; and

(b) record in the daily log the details of the use of such force, and of the circumstances giving rise to its use.

...

⁵⁰ At [165]–[169].

⁵¹ At [175].

⁵² Legislation Act 2019, s 10(1).

[60] Under reg 22, for Ms Hill's use of force to be lawful it had to clear three hurdles. First, she needed to have reasonable grounds for believing that the use of physical force was reasonably necessary in self-defence. Second, the force used needed to be in defence of herself or another. Third, she was entitled to use no more than the minimum amount of force that was reasonably necessary in the circumstances.

[61] Ms Hill also submits that she was entitled to use force pursuant to s 48 of the Crimes Act 1961. That provision has a slightly different test for when the use of force is justified:

Every one is justified in using, in the defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.

[62] In considering whether self-defence has been established under s 48, it is necessary to consider three questions:

- (a) what did Ms Hill believe about the circumstances when she used force?
- (b) did she use force for the purposes of defending herself?
- (c) was the force used reasonable in the circumstances as Ms Hill believed them?

[63] For the purposes of this decision, I consider it is appropriate to apply the broader test in s 48 rather than the narrower test in reg 22. That is because Oranga Tamariki's STAR training programme expressly included an extract from s 48.

[64] Given that Oranga Tamariki held out s 48 as a test for when force is justified, it is only fair that, for disciplinary purposes, Ms Hill's behaviour be measured against that standard, even if her behaviour would have otherwise been unlawful under reg 22. In any case, given the analysis below, nothing necessarily hangs on this point because if her actions were not justified under s 48, then they could not be justified under reg 22.

[65] When interpreting and applying reg 22 of the Regulations or s 48 of the Crimes Act, it is helpful to keep in mind the broader framework set out in the Regulations and also in the Oranga Tamariki Act 1989. The following principles are relevant:

- (a) every rangatahi in a youth justice residence is entitled to be afforded a high standard of professional care;⁵³
- (b) in all matters relating to the administration or application of the youth justice provisions in the Oranga Tamariki Act, the well-being and best interests of rangatahi are a primary consideration;⁵⁴
- (c) the rangatahi must be treated with dignity and respect at all times and protected from harm.⁵⁵

[66] More generally, the purpose and nature of youth justice residences provide helpful context. Korowai Manaaki is one of only five youth justice residences located across the country. The purpose of a youth justice residence is to provide a safe environment and high standard of personalised care for rangatahi in Oranga Tamariki's care. Oranga Tamariki care for some of the most complex and challenging rangatahi in New Zealand. These rangatahi come from backgrounds of criminal offending, mental health or addiction issues and physical, sexual and emotional trauma. There is an inherent power imbalance between staff and rangatahi. This is due to the legitimate and authorised power and control that Oranga Tamariki employees have over rangatahi in the youth justice residence.

Oranga Tamariki policies are relevant

[67] Oranga Tamariki has policies and practices that are helpful in assessing whether a staff member has used reasonable force. In particular, the "Working with tamariki and rangatahi in residences" policy, which was binding on Ms Hill, provides helpful guidance. It provides:

⁵³ Oranga Tamariki (Residential Care) Regulations 1996, reg 3(1).

⁵⁴ Oranga Tamariki Act 1989, s 4A(2).

⁵⁵ Section 5(1)(b).

- (a) if there is a situation with rangatahi, staff must try to resolve the situation verbally;
- (b) physical intervention should be avoided at all times unless all non-physical approaches have failed, and the rangatahi has become out of control and is turning towards physical risk behaviour where they might attempt to assault others or self-harm;
- (c) the use of physical force in the residence must be kept to an absolute minimum and only be used in extreme circumstances and when staff have reasonable grounds (those set out in reg 22) for believing that the use of physical force is necessary;
- (d) when the use of physical force is deemed necessary, at least two staff should be involved to capitalise on staff experience to protect rangatahi from the potential misuse or abuse of such approaches;
- (e) staff must use physical holds that are reasonable in the circumstances, and when it is assessed that physical holds are necessary, it must be the least restrictive form necessary and only applied for as long as necessary to prevent an individual harming themselves or others; and
- (f) physical force must not be used when a less intrusive form of intervention is adequate.

[68] The STAR programme is a verbal and physical intervention model that staff are trained to use to de-escalate situations when dealing with rangatahi at the residences. Under STAR any use of force must be lawful, proportionate, necessary, and reasonable. Physical force is the last resort. STAR specifies that if force is necessary, it must be the minimum amount of force reasonably necessary in the circumstances and must be applied for the least amount of time required.

Ms Hill did not act in self-defence

[69] In light of the analysis above, I turn to apply the test set out in s 48 of the Crimes Act to Ms Hill's actions.

[70] The circumstances, as Ms Hill believed them to be, can be summarised as follows. Ms Hill admitted that when she heard M calling her offensive names, she felt embarrassed, humiliated, degraded and slut-shamed. The CCTV footage shows that Ms Hill, immediately upon hearing what M had said, turned and moved quickly across the room towards M. At the time, M did not pose any threat to Ms Hill's safety, the safety of others or to property. He was making offensive comments, but nevertheless he was complying with her instruction to go to the NPT in the corner of the room.

[71] Ms Hill accepts that she got a lot closer to M than she intended, and she says that, fearing for her own safety, she used a STAR approved restraint technique called a Train stop, using both hands to push M away from her. The CCTV footage shows Ms Hill immediately used force when she entered M's space. This caused M to fall back onto the seat of the chair he had pulled out. With no chair back behind him M fell onto the seat of the chair and back against a nearby wall.

[72] M then moved to lean forward. Ms Hill interpreted this as M attempting to stand up. She says she feared again for her safety and performed a second Train stop. As there was no chair back behind M, he was pushed back further, and she leaned forward further than she had anticipated. The second Train stop was performed one second after the first Train stop. Ms Hill said she was not aware of the position of the other staff members in the room at the time.

[73] Ms Hill claims that the force used was for the purpose of defending herself from M. While she accepts that M's conduct was not physical, he was swearing at her, and she claims that his body language and facial expressions, including him pursing his lips, made her fear for her safety.

[74] Ms Hill's admissions during the disciplinary process about feeling slut-shamed and acting in the heat of the moment, together with the swiftness in which she applied force to M, raises the question of whether her intention when using force was plausibly self-defence, rather than confronting M about slut-shaming her. Further, the Authority's findings on contribution, which remain unchallenged, concluded that Ms Hill was upset, angry and she had the urge to confront M.⁵⁶

⁵⁶ *Hill*, above n 1, at [188].

[75] However, Oranga Tamariki only undertook a limited investigation into Ms Hill's explanation regarding fearing for her safety. It failed to speak with M and the other staff members present about the incident. In rejecting her claim that she was in physical danger, it relied solely on the CCTV footage, which does not have audio and is not sufficiently clear to see whether M displayed any microaggressions. That means that there is little evidence before the Court to contradict Ms Hill's evidence on this question. Based on the evidence before it, the Court must accept, on the balance of probabilities, Ms Hill's evidence that she used force for the purpose of defending herself.

[76] The final question is whether the force used by Ms Hill was reasonable in the circumstances as Ms Hill believed them to be. This is an objective assessment, which includes a consideration of the context in which the use of force occurred. The incident occurred in a youth justice facility, which is a highly regulated environment. There is an inherent power imbalance between staff and rangatahi in youth justice facilities due to the legitimate and authorised power and control that staff have over rangatahi.

[77] It is also relevant that rangatahi who are cared for in these facilities have faced serious hardship, including violence, and are often not equipped to respond appropriately to difficult situations. It is not uncommon for them to act out and verbally abuse staff. Staff at these facilities are trained in the STAR model to react appropriately and safely to such challenging behaviours. Staff are expected to uphold the guiding principle of the Oranga Tamariki Act, which puts the wellbeing and best interests of rangatahi as a primary consideration. They are required to comply with Oranga Tamariki's policies on the use of physical force in youth justice facilities. The Regulations, policies and training uniformly provide that physical force must not be used by staff when there are other less intrusive forms of adequate intervention available.

[78] In light of that context, the CCTV footage and Ms Hill's own admissions are the starting point for assessing the reasonableness of the force used. Ms Hill accepted that when she walked into M's personal space, she could have taken a step back, taken a breather and been less reactive. She accepted that a change of face, with another staff member dealing with M's verbal abuse towards her, would have been a better

outcome. While she was critical of the other staff members for not intervening with a change of face, given the speed of her reaction it is difficult to see that there was time for a change of face to occur prior to Ms Hill reacting to M's name calling – the incident took less than 10 seconds before staff intervened and a change of face occurred. After the incident Ms Hill said she accepted and understood that she had “fucked up” and assured Oranga Tamariki that the incident would not happen again and that she did not have psychological triggers/trauma. The Authority's unchallenged finding in relation to contribution was that it was not satisfied that the STAR philosophy of dealing with bad behaviour justified Ms Hill's actions towards M.⁵⁷

[79] After considering the evidence, including the CCTV footage and Ms Hill's statements during the disciplinary process and in the Authority, I find that the use of force was not reasonable in the circumstances as Ms Hill believed them to be. When Ms Hill entered M's personal space, there were other alternative interventions available which did not involve the use of force. She could have taken a step back, taken a breather and been less reactive, opting then for a change of face of staff members to manage M's verbal abuse towards her while she removed herself from the room. The fact that these less intrusive forms of intervention were available, in a youth justice environment, means that any use of force by a staff member in the circumstances as Ms Hill believed them to be was not reasonable and was not justified under s 48 of the Crimes Act.

[80] Mr Macdonald submitted on behalf of Ms Hill that the force used was reasonable because Ms Hill used the Train stop method from her STAR training and that she therefore used no more than the minimum amount of force reasonably necessary. However, given my conclusion that it was not reasonable to use any force, the fact that Ms Hill used an approved technique does not assist her.

[81] For completeness, if s 48 of the Crimes Act does not apply in this situation, I consider that my findings above would similarly apply to the objective elements of the test in reg 22. If I had applied reg 22, I would have concluded that Ms Hill used more

⁵⁷ At [188].

force than the minimum that was reasonably necessary in the circumstances, given the availability of less intrusive forms of intervention.

Conclusion

[82] In its determination, the Authority made two connected findings. It found that Oranga Tamariki was not in an adequate position to decide that there was no self-defence element in Ms Hill's actions and that there was a self-defence element at least as regards the pushes after the first one.⁵⁸

[83] The basis of the Authority's first finding was that, in the absence of further investigation, Oranga Tamariki could not reasonably have rejected Ms Hill's position about her concerns for her safety at the time of the incident. I consider that the Authority's finding on that point was partially correct. Oranga Tamariki ought to have conducted a more thorough investigation before it rejected her position that she had feared for her safety at the time of the incident.

[84] However, the Authority should have gone on to consider whether, even if her version of events was accepted, the force used by Ms Hill was unreasonable for the purposes of reg 22 of the Regulations or s 48 of the Crimes Act. As set out above, I consider that, irrespective of which provision applies, Ms Hill's actions were not reasonable and were unlawful.

[85] In respect of the Authority's second finding, it concluded that there was a "self-defence element". Again, that finding is partially correct. Ms Hill clearly thought and continues to think that she was acting in self-defence. However, for her actions to be lawful, they needed to be reasonable. I consider that they were not reasonable and were unlawful.

[86] In both of its findings, the Authority focused solely on the subjective element of Ms Hill's self-defence claim and failed to consider the objective elements. Accordingly, I find that the Authority erred in its application of reg 22, and s 48 of the

⁵⁸ At [169] and [175].

Crimes Act, insofar as it found that Ms Hill acted in self-defence or possibly acted in self-defence for the first push.

[87] Ultimately, I conclude that Ms Hill did not act in self-defence.

Did the Authority err in its use of previous decisions?

[88] As part of its challenge, the plaintiff states that a question of law to be resolved is whether the Authority erred in its use of the Court's decisions in *Tuilaepa* and *Baillie*.⁵⁹ I accept that the situations in *Tuilaepa* and *Baillie* are somewhat analogous to the present case. Therefore, they provide useful comparators for the analysis required in this case. However, I do not accept that the Authority erred in its treatment of those cases. The plaintiff has not identified any statement of principle from those cases which should have been applied or which was misapplied, and the fact that the Authority reached a different view of the facts and the application of the law to those facts is not, by itself, a reviewable error.

Did the Authority err in its findings concerning choking/strangulation?

[89] Oranga Tamariki alleged in its disciplinary invite letter that Ms Hill's use of force on M was unnecessary and excessive because her hands remained on M's neck area and she applied excessive force to pull the neck area in a back-and-forth strangling/choking motion.

[90] After meeting with Ms Hill, Oranga Tamariki issued a preliminary view letter where it recorded that the allegation of Ms Hill applying excessive force in a strangling/choking motion had been discussed and that Ms Hill had denied that this occurred. After considering Ms Hill's responses, Oranga Tamariki issued its final decision to dismiss Ms Hill for an unlawful use of force. It did not make a finding that Ms Hill had choked or strangled M. Instead, it found that Ms Hill had initiated the altercation with M by crossing the room and pushing him backwards and that she had admitted her hands were closer to M's collarbone than they should have been to pin

⁵⁹ *Chief Executive of the Ministry of Social Development v Tuilaepa* [2017] NZEmpC 84; and *Baillie v Chief Executive, Oranga Tamariki — Ministry for Children* [2022] NZEmpC 233, [2022] ERNZ 1201.

him back until other staff could intervene. While there was no finding of choking or strangling, Oranga Tamariki ultimately decided that this use of force against M was in breach of reg 22 and its policies and that summary dismissal was justified.

[91] It is unfortunate that Oranga Tamariki did not expressly communicate to Ms Hill that Oranga Tamariki did not consider there was sufficient evidence to substantiate the allegation that Ms Hill had choked or strangled M. However, even without an act of choking or strangling, the allegation that the use of physical force on M was unlawful remained and could constitute serious misconduct resulting in dismissal.

[92] While Oranga Tamariki's failure to communicate expressly is unfortunate, I do not accept that there is an evidential basis to find that the choking/strangling allegation remained in play or was otherwise taken into account by Oranga Tamariki when deciding to summarily dismiss Ms Hill. The Authority erred in making such findings.⁶⁰

Did the Authority err concerning Ms Hill's psychological state?

[93] Ms Hill's psychological state at the time of using force was relevant to the subjective factors of establishing self-defence. It was also relevant to Ms Hill's ability to recognise and deal with such issues in the future.

[94] Ms Spence raised the issue with Ms Hill at the meeting on 25 March 2021 but indicated that there was no pressure on Ms Hill to speak about the issue if she was uncomfortable doing so. The meeting moved on before the issue could be discussed. Subsequently, on 30 March 2021 Ms Hill gave her thoughts about the previous meeting on 25 March. She expressly indicated that there were no psychological trauma or triggers.

[95] The Authority was critical of Oranga Tamariki's failures to investigate why Ms Hill was psychologically triggered by what M had said to her. It found that the subsequent statements made by Ms Hill were made "in the context of the decision

⁶⁰ *Hill*, above n 1, at [164].

maker indicating in both the preliminary decision letter and the dismissal letter that he did not consider it makes any difference”.⁶¹

[96] I consider that the Authority erred in its findings. Ms Hill made clear at the meeting on 30 March 2021 that she was triggered by what M said because she had never been slut-shamed before by a male. Given that the language used by M was inherently degrading to Ms Hill as a wahine, Oranga Tamariki was entitled to take Ms Hill’s statement as to why she was triggered at face value. It was also entitled to take her statement that she had no psychological trauma or other underlying triggers at face value.

[97] Further, the statements made on 30 March 2021 were not made in the context of the preliminary decision letter and dismissal letter. Those letters were not sent until over a month later, so Ms Hill’s statements on 30 March cannot have been affected by them.

[98] Therefore, I find that Oranga Tamariki did not fail to sufficiently investigate Ms Hill’s psychological state before making the decision to dismiss her.

Was Ms Hill’s dismissal justified?

[99] Any unlawful use of force constituted serious misconduct for the purposes of Oranga Tamariki’s disciplinary policy. Having found that Ms Hill did not act in self-defence when using force against the rangatahi, I conclude that it was reasonable for Oranga Tamariki to conclude that her actions were unlawful and constituted serious misconduct. Having come to that conclusion, I consider that it was open to Oranga Tamariki to dismiss Ms Hill as a fair and reasonable employer.

[100] I observe that the Authority found that it would have been better if Oranga Tamariki had not proceeded to dismissal immediately after Ms Hill changed representatives.⁶² I agree with that finding. However, I consider that the defect was

⁶¹ At [170]–[172].

⁶² At [173].

minor and did not result in Ms Hill being treated unfairly. Therefore, I find that Ms Hill was not disadvantaged by that step.⁶³

[101] Counsel for both parties also filed submissions on whether the dismissal was justified more broadly. However, those submissions go beyond the pleadings before the Court, and I therefore do not consider them.

Outcome

[102] In light of the findings set out above, I conclude that the Authority erred in finding that Ms Hill was unjustifiably dismissed. Therefore, the awards issued by the Authority in favour of Ms Hill must be set aside.

[103] As the successful party, Oranga Tamariki is entitled to costs. If they are unable to be agreed, memoranda may be filed.

M S King
Judge

Judgment signed at 1.15 pm on 16 May 2025

⁶³ Employment Relations Act 2000, s 103A(5).