

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 259/09
5098439**

BETWEEN BRYNYCE OWEN
 Applicant

AND YOU & ME LIMITED t/a WEE
 WISDOM MONTESSORI
 PRESCHOOL
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 Fiona McLaren and Kristal Mendez for Respondent

Investigation Meeting: 7 & 8 October 2008

Submissions: 22 October 2008
 6 November 2008

Further Information: 5 March 2009

Further Submissions: 20 March 2009

Determination: 5 August 2009

DETERMINATION OF THE AUTHORITY

The problems

[1] The applicant Mrs Brynyce Owen ("Mrs Owen") raises a number of "complaints" against her former employer You & Me Limited t/a Wee Wisdom Montessori Preschool ("You & Me"). I have dealt with the multiple allegations as claims for unjustifiable constructive dismissal, unjustifiable disadvantage and arrears of wages. The parties were unable to resolve the problems between them by mediation.

[2] Mrs Owen came to New Zealand from the United Kingdom on 18 March 2006. She commenced employment with You & Me on 22 March 2006. Mrs Owen was employed as *Montessori Supervisor* according to the position description and as Head Teacher according to You & Me's managing director Ms Anna Stowell ("Ms

Stowell") at You & Me's Sunnynook preschool centre ("the centre"). The terms of the employment were recorded in an individual employment agreement signed by both parties and dated 7 November 2005 ("the IEA").

[3] Mrs Owen says that there have been continuing consequences from her experience at You & Me. She says she has had prowlers in her garden late at night. She says papers relating to her claim before the Authority have been stolen out of her home as have details of her health problems and other personal belongings. She says someone has been letting themselves into her house and that she has reported a burglary to the Police. She suspects someone has been listening into her telephone line because she can hear people "clicking in and out" and there is something untoward happening at the exchange. She reports seeing a man up at the roadside cabinet box. Mrs Owen says she now keeps all her electronic data on a portable hard drive. Mrs Owen confirmed to the Authority she suspected her former employer of being involved in these "difficulties".

[4] Each of Mrs Owen's claims are now dealt with in turn. I declare at the outset that having seen and heard from various witnesses including Mrs Owen, I find Mrs Owen an unreliable witness and I have very serious doubts about her credibility. I prefer the evidence of other witnesses to that of Mrs Owen in every instance.

Wage arrears

[5] Mrs Owen claims she is owed a higher hourly rate than the agreed rate because of her duties and responsibility. There is no basis for this claim. **I find that Mrs Owen is not owed any arrears of wages.**

Unjustifiable constructive dismissal

[6] This is Mrs Owen's principal claim. It is the only grievance formally raised on Mrs Owen's behalf by her previous advocates in letters dated 22 August 2006 and 1 March 2007. Mrs Owen pleads that she tendered her resignation *"following a series of incidents in which [she] had been belittled, undermined and even threatened within the workplace"*.

[7] The settled tests for constructive dismissal are:-

- (i) did the employee resign?
- (ii) was the resignation caused by a breach of duty on the part of the employer?
- (iii) if it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[8] Mrs Owen did resign. She wrote this letter dated 23 June 2006 to Ms Stowell:-

Dear Anna

It is regret that I hereby give two weeks notice of leaving your employment. My last day of working at Wee Wisdom Montessori Preschool, Kapiti Place, Sunnynook will be 7th July 2006. I was unable to discuss this situation with yourself yesterday as I was awaiting a reply from enquiries regarding university studies. I intend to study fulltime for a Masters of Education, commencing in July 2006. I accepted your offer of employment with a view that I would be able to progress to at least middle management level within your company. However, through the difficulties in communication between [VG] and myself, it has been made very clear to me that I would not be considered for a future management roll(sic). As a result of which I assessed my whole situation. Due to my current age I obviously have limited time to improve my level of employment. This has been the paramount consideration in making this decision. I again repeat the fact that I think on a personal basis you and I would have enjoyed working together. We do appear to share similar views on the Montessori philosophy. I regret not being able to give you a longer period of notice.

Yours sincerely

Mrs Brynyce Owen

[9] Was there a breach of duty by You & Me that was causative of Mrs Owen's resignation? I note immediately that the resignation letter makes no mention of Mrs Owen's multiple claims now before the Authority. Her letter gives no hint of the extent of the conflict she would now have the Authority believe. It is necessary to deal with each of Mrs Owen's various complaints to ascertain whether there has been a breach of duty.

[10] Mrs Owen first says that there has been a breach of a verbal contract. She says that Ms Stowell agreed to amend the IEA to revise its term and the notice period but Ms Stowell failed to do so. Mrs Owen adds another allegation to the claim. She also says Ms Stowell promised to assist and advise her with respect to starting an academic course towards Mrs Owen gaining her teacher registration. Firstly, I accept Ms Stowell's denial of any oral agreement about amending the IEA. Secondly, I accept Ms Stowell's evidence that she did in fact assist, counsel and support Mrs Owen

towards further qualification but Mrs Owen frustrated this process. **I find there was no verbal contracts with Ms Owen.**

[11] Mrs Owen says that she suffered intimidation, and was frequently mocked, disrespected and belittled to children and family members. She says she was undermined and her good faith, willingness and experience were exploited.

[12] The allegations when particularised are I regret to say, trivial and petty. Mrs Owen says she had no induction when she commenced her employment. **I accept Ms Stowell's denial and find Mrs Owen was inducted.** Mrs Owen complains the first aid box was incomplete and that there was no building warrant of fitness/log. She also says that when the kitchen was filled with cooking smoke the alarm did not activate. She complains there were no smoke detectors or extinguisher and the fire alarm system was inadequate. **I accept there was a first aid kit, smoke detector, fire extinguisher and building warrant of fitness. I reject Mrs Owen's allegations as incorrect. I also find that Mrs Owen was not mocked, intimidated and threatened in relation to these issues.**

[13] Trivial too, is Mrs Owen's complaint that she did not have access to the centre computer. More so is an allegation that cheese was going missing from the centre refrigerator.

[14] Mrs Owen makes some very serious and unfortunate allegations against another employee she says was her subordinate and whom I shall refer to by her initials Ms VG because I do not wish to cause that employee any further distress already suffered by her because of the scandalous allegations Mrs Owen makes. Mrs Owen says Ms VG "constantly lied and stole". She says Ms VG belittled her in front of parents and children. She says Ms VG worked minimum hours, did not like basic cleaning, treated children without respect and in a manner that in England would be "abuse". She says Ms VG appeared detached from physical contact with children "even when they were hurt or injured" and that Ms VG worked for You & Me illegally.

[15] Mrs Owen says that when \$15 was stolen out of her bag she "felt it must be [Ms VG] as [she] had caught her stealing resources". I accept You & Me's and Ms VG's denials that Ms VG had not stolen resources. When Mrs Owen communicated the

"theft" of her \$15 to Ms Stowell, Ms Stowell reported the matter to the local police who visited the centre. Mrs Owen criticises Ms Stowell's involvement of the police as completely inappropriate. She says the police were called to the centre without her knowledge and this "was a tool of intimidation". She says that it was inappropriate for Ms Stowell to have called the police and to have done so in front of a class of preschool children. Her advocate at the time wrote that the police involvement was "a set up organised by [Ms Stowell] not only to embarrass, belittle and ridicule [Mrs Owen] but also to intimidate, harass and throw her off balance".

[16] I accept Ms Stowell's evidence that Mrs Owen was interviewed by the constable in an office. I also accept Ms Stowell was upset that Mrs Owen had made an allegation of theft and she felt she was obliged to address Mrs Owen's complaint so that she was not subsequently accused of failing to.

[17] Mrs Owen says that she communicated her "grave concerns" about Ms VG working with small children and that she was "completely ignored". I find that Mrs Owen only raised her accusation that Ms VG had stolen \$15 from her with Ms Stowell and nothing else. **I find that Mrs Owen did not raise any other matter concerning Ms VG with Ms Stowell. I find there to be no foundation for any of Mrs Owen's allegations against Ms VG.** I agree with Ms Stowell that Mrs Owen's statements about Ms VG are appalling. Because I am not satisfied of there being any foundation for the allegations Mrs Owen makes against Ms VG, I say the allegations are vindictive, vicious and nasty. I regret the distress caused to Ms VG and commend her for the dignity she showed in conducting herself when she gave her evidence at the Authority's investigation meeting.

[18] Mrs Owen says that Ms Stowell's husband threatened her. I will not name him here. I prefer Ms Stowell's evidence and her husband's. **I find that Mrs Owen was not threatened by Ms Stowell's husband.**

[19] I find Mrs Owen to be wholly unconvincing in respect of her various allegations of intimidation etc. I find her evidence vague and unreliable. But I accept all of You & Me's witnesses when they deny any of the conduct Mrs Owen accuses each of them of. **I find that Mrs Owen was not intimidated, mocked, belittled, undermined, exploited, isolated, degraded, ignored or bullied.**

[20] Mrs Owen says that Ms Stowell threatened her saying that she would never work in New Zealand and that she was a thief and a liar. I prefer Ms Stowell's and her husband's denials. **I find that Mrs Owen was not threatened by either Ms Stowell or Ms Stowell's husband.**

[21] Mrs Owen complains that there were breaches of statutory requirements which were not fulfilled. These include the *Health & Safety in Employment Act 1992*, the *Education Act 1989*, the *Education (Early Childhood Centres) Regulations 1998*, the *Revised Statement of Desirable Objectives and Practices for Chartered Early Childhood Services in New Zealand 1996*, the *New Zealand Teachers Council Code of Ethics*, the *Early Childhood Education Code of Ethics for Aotearoa/New Zealand*, the *Montessori Association of New Zealand Strategic Plan 2006-2001*, the *Ministry of Education: Health & Safety, Worksafe, Emergency Management*, and the *Ministry of Education Professional Standards for Kindergarten Teachers*. Mrs Owen completely fails to identify particular breaches under these legislative provisions separate and distinct from the allegations I have dealt with above. **I make no findings in relation these allegations.**

[22] Mrs Owen alleged that You & Me was operating without a properly qualified person and that Ms Stowell permitted that situation. Ms Stowell rejects that allegation entirely. She says Mrs Owen's allegation is mischievous because Mrs Owen represented she was suitably qualified to act as Head Teacher.

[23] I find that throughout their involvement, Mrs Owen represented to Ms Stowell that her *City and Guilds* qualification (due to be completed in November 2005) was a NZQA equivalent qualification. Mrs Owen wrote in her letter seeking employment dated 10 October 2005:-

I have almost completed a City & Guilds National Vocational Qualification, Level 3, in Early Years and Education (upon completion I will be qualified to work as a nursery manager). I should have finished this qualification this month. However, due to misplacing a fragment of bone in my shoulder and consequently having it removed, I have not completed the in-setting assignments. The college that I am linked with has informed me that they envisage my completion of the course in December 2005. Obviously having previously owned a nursery school I have experience of working at a managerial level. Due to me not currently holding the qualification, the New Zealand Qualification Board is unable to convert it into an equivalent New Zealand standard. However, due to it being a

City & Guilds qualification and it being at a managerial level, I have been verbally assured that there will be no problem with its transference.

[24] I find that Mrs Owen continued to assure Ms Stowell that she had spoken to NZQA and was told the City & Guilds qualification was NZQA recognised. When Ms Stowell asked again in June 2006, Mrs Owen said she had not received the results from NZQA. Ms Stowell telephoned NZQA herself and was told the results had been sent to Mrs Owen but no further information could be given. Ms Stowell then began to suspect that Mrs Owen was not recognised by NZQA despite Mrs Owen's assurances. Ms Stowell says she would not have employed Mrs Owen had she known Mrs Owen's qualifications were not recognised by NZQA.

[25] Mrs Owen was asked to provide this correspondence to the Authority. She advised she could not find the letter and would continue to look for it. She also suggested the letter had been in a document of files that had been stolen some years previously.

[26] Eventually I called for information from the New Zealand Qualifications Authority ("NZQA"). NZQA had written to Mrs Owen by letter dated 7 June 2006 and stated:-

Your qualification cannot be given comparability to a recognised early childhood education teaching qualification in New Zealand.

[27] I find that at no stage did Mrs Owen inform You & Me of the actual advice she received from NZQA in the letter of 7 June 2006. **I find that You & Me was not knowingly operating without a qualified head teacher but rather, Mrs Owen failed to advise You & Me that her qualifications were not recognised by NZQA.**

[28] For all the foregoing reasons, **I find there was no breach of duty by You & Me owed to Mrs Owen.** The question of whether a substantial risk of resignation was reasonably foreseeable does not arise.

[29] Having made the findings above, **I further find that there was no unjustifiable action by You & Me causing disadvantage to Mr Owen.**

The determination

[30] I determine that Mrs Owen is not owed arrears of wages and she does not have personal grievances for unjustifiable constructive dismissal and unjustifiable disadvantage. **There will be no formal orders.**

The costs

[31] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Mendez is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mrs Owen is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application or submission lodged outside that timeframe without leave.

Leon Robinson
Member of Employment Relations Authority