

**ATTENTION IS DRAWN TO THE
NON PUBLICATION ORDER
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**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 228/10
5279674

BETWEEN

MARY BARRATT
Applicant

AND

TE PUNA REO O WAIRAKA
UNITEC MAORI KAUPAPA
EARLY CHILDHOOD
CENTRE INC.
Respondent

Member of Authority: Vicki Campbell
Representatives: Rodney Hooker for Applicant
Glenn Finnigan for Respondent
Investigation Meeting: 15 February 2010 at Hamilton
Submissions Received: 4 March 2010
Determination: 17 May 2010

DETERMINATION OF THE AUTHORITY

Non Publication Order

[1] Pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 I order that the names of any children or any evidence that may lead to their identification, shall not be published. This order extends to and includes the content of Ms Burke's report.

Employment Relationship Problem

[2] Ms Barratt was employed by Te Puna Reo O Wairaka Unitec Maori Kaupapa Early Childhood Centre Inc ("the Centre") as an early childhood teacher on 20 February 2009 under the terms of a written employment agreement.

[3] The Centre received allegations that Ms Barratt had smacked one child, hit another child across the back of the head and had threatened her own grandchild with smacking while working at the centre. Ms Barratt was suspended from her employment on 18 August 2009 and was subject to a disciplinary process which resulted in her dismissal on 20 October 2009. Ms Barratt claims the dismissal was unjustified and seeks remedies including the reimbursement of lost wages and compensation.

[4] Ms Barratt says that a full and fair investigation into serious misconduct claims was not undertaken before the decision to dismiss was made and that if a full and fair investigation had been undertaken a fair and reasonable employer would not have dismissed her in all the circumstances.

[5] Pursuant to section 103A the Authority must scrutinise the respondent's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[6] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer¹.

[7] Although the Authority does not have unbridled licence to substitute its decision for that of the employer² it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred³.

Background

[8] The Respondent is a licensed Early Childhood Centre run as a bilingual centre with Kaupapa Maori philosophy. It has a roll of 37 children aged from 6 months to 5 years. Ms Barratt worked with children aged between 2 to 5 years of age. Ms Barratt

¹ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

² *X v Auckland District Health Board* [2007] 1 ERNZ 66.

³ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

worked with another full time employee, Ms Jocelyn Albert, the assistant manager, and other part time employees.

[9] On 18 August 2009 Ms Jennifer Potter, the Centre Manager was advised of a report by a parent of a child who attends the Centre that the parent had witnessed Ms Barratt smack a child (not the parent's child) who was aged 2 at the time of the alleged incident. This information was conveyed to Ms Potter by Ms Albert who had learned of the incident from Ms Nicole Job, a Unitec Early Childhood Education Lecturer. The parent who had witnessed the incident discussed what she had seen with Ms Job.

[10] On hearing of the allegation Ms Potter spoke with both Ms Job and the parent who had reported witnessing the incident. Ms Job confirmed to Ms Potter that a parent had witnessed Ms Barratt smacking a child at the centre. When Ms Potter spoke to her, the parent gave a detailed account of what she had witnessed, including that she had seen Ms Barratt pull the child down off some cushions and smack him once, on the bottom. At this stage Ms Potter was unaware that the incident had occurred about four months earlier on 22 April 2009.

[11] Ms Potter sought advice about how to proceed from both the Chairman of the Board and the Early Childhood Council, of which the Centre is a member. Ms Potter then met with Ms Barratt and advised her of the allegation. Ms Barratt told Ms Potter that she could not remember the incident and that she did not think she would have acted as alleged.

[12] Ms Potter advised Ms Barratt of the allegations, that they were serious, that the Centre had legal obligations to ensure the safety of its children, that the Centre needed to investigate the allegations and that she was to be suspended on full pay that day. Ms Barratt was advised a meeting would take place on Thursday 20 August and that she would be entitled to have support with her at the meeting.

[13] The following day, while gathering written statements from those concerned, Ms Potter recognised that meeting on the 20th would be too soon and contacted Ms Barratt and advised her the meeting would be held on 24 August instead. This was then confirmed in writing by way of letter which was delivered to Ms Barratt.

[14] Statements were provided by the parent who witnessed the alleged incident and Ms Albert on 19 August. In her statement Ms Albert makes further allegations that

Ms Barratt had told her [Ms Barratt's] grandchild that she would smack her and raised other concerns about Ms Barratt's behavioural management strategies. At the end of Ms Albert's statement she advised that she had not raised them previously as she did not feel her concerns were sufficiently serious.

[15] The disciplinary meeting took place on 25 August 2009. Present for the Centre was Ms Potter and Mr Neal, the Board Chairman. Ms Barratt was represented by Mr Shane Wealleans an NZEI representative while her sons Mr Hiriana Wehongi and Mr Timi Tairi, together with Mr Tino Wihongi were present as support.

[16] At the meeting Ms Barratt denied the allegations and protestations were made about the statement by Ms Albert (which was only provided to Ms Barratt at the meeting) and the unspecified concerns outlined in that statement. It also became clear that the original incident occurred some four months previously on 22 April 2009, a fact that had not been known to either Ms Potter or Ms Barratt at the time of the suspension.

[17] Mr Wealleans asked for a side meeting with Mr Neal and Ms Potter. During this discussion a proposal was put to the Centre to resolve the matters. Mr Neal wished to take time to consider the proposal and take advice. The Meeting was adjourned to allow that to occur.

[18] The meeting was reconvened on 2 September by which time Ms Barratt was represented by legal counsel. At the reconvened meeting Ms Barratt was advised that a further allegation relating to smacking a second child had been received. This latest incident was alleged to have occurred in early August 2009. The meeting was then postponed to allow further investigations into the second allegation.

[19] It was agreed that a child psychologist be engaged to interview the child involved in the second allegation. A full report was provided to Ms Barratt for her response. The report indicates the psychologist interviewed the child from the second incident and the daughter of Ms Albert, who had reported the incident to Ms Albert. Both children gave different descriptions of a smacking incident.

[20] While this process was underway, Ms Barratt lodged a statement of problem in the Authority seeking the removal of Ms Potter as the investigator and decision maker in the disciplinary process. In the interests of proceeding with the disciplinary process the Centre agreed that Ms Potter would stand aside from the investigations

and Mr Neal would conduct the investigation and make the decision with respect to Ms Barratt's employment.

[21] A further meeting was held on 18 September to discuss Ms Barratt's responses to the allegations and the psychologist's report. Ms Barratt denied ever smacking a child at the Centre and tabled two written statements in response to the second allegation and the psychologist's report. The meeting was adjourned once more. During the adjournment Mr Neal undertook further enquiries as a result of Ms Barratt's explanations provided during the meeting.

[22] A third meeting took place on 23 September. Ms Barratt was informed that members of the staff had been interviewed in relation to the allegations. Mr Neal advised Ms Barratt that her explanation with regard to a tapping incident was possibly accurate. Mr Neal, having spoken to the mother of the child involved in the first incident, told Ms Barratt the mother had advised him that it was highly likely that if the incident had occurred it was probable her son would have told her. He had not done so.

[23] Other enquiries made by Mr Neal were also consistent with explanations provided by Ms Barratt, and this was acknowledged by Mr Neal. At the end of the meeting Ms Barratt provided Mr Neal information that a similar, if not identical, complaint which had been found to be unsubstantiated, had been made by the parent who made the initial allegations.

[24] Following the end of the meeting Mr Neal undertook further enquires about the prior complaint. Mr Neal found that there appeared to have been a legitimate explanation for what the parent may have perceived as being rough handling of her son. He concluded that the parent's son had been removed from a situation where he might fall and hurt himself. No formal complaint had arisen from the concerns raised by the parent as Ms Potter was satisfied the son had not been abused or dealt with inappropriately.

[25] Mr Neal made file notes of all his additional enquiries and provided full copies of all notes to Ms Barratt to enable her to respond if necessary at the next meeting.

[26] The meeting reconvened on 14 October at which time Ms Barratt again denied she had smacked or used force on any child at the Centre. The explanations already provided by Ms Barratt were discussed at this meeting. Rather than provide any

further comments to the Centre orally, Ms Barratt chose to leave the meeting insisting that she be provided with an opportunity to provide further written submissions. These were provided to the Centre on 16 October.

[27] Mr Neal considered all the information available to him and concluded Ms Barratt had, on the balance of probabilities, on two separate occasions smacked a child at the Centre. He considered this to constitute serious misconduct and advised Ms Barratt, through her representative that dismissal was a strong possibility.

[28] Mr Neal, concerned about the impact a dismissal would have on Ms Barratt's career, invited Ms Barratt and her representative to meet one last time to allow them to provide a response to the proposed disciplinary sanction. No further communications were received from Ms Barratt or her representative.

[29] After receiving no further communication Mr Neal confirmed his decision to dismiss Ms Barratt for serious misconduct.

Determination

[30] It is not the Authority's task to find whether the alleged misconduct is proved but rather to investigate and consider the way the Centre enquired into the allegations against Ms Barratt and the conclusion it reached that there had been serious misconduct. Also the Authority is to investigate the conclusion that dismissal was the appropriate outcome in all the circumstances. Further the evidence must be as convincing as the charge is grave⁴ and must be sufficiently compelling if it is going to warrant Ms Barratt's immediate dismissal.

[31] As has been mentioned by the Chief Judge of the Employment Court⁵, in the case of professional employees such as Ms Barratt, a dismissal from employment has wide ramifications for Ms Barratt. The Centre was obliged to notify the Teacher Registration Council that it had dismissed Ms Barratt. As a consequence Ms Barratt is currently under investigation by the Teachers Registration Board. The outcome of this investigation may affect Ms Barratt's ability to earn a living in her chosen career.

[32] Ms Barratt was suspended on full pay from 18 August until 20 October 2009. I am satisfied the suspension was carried out in a procedurally fair manner. Ms Barratt

⁴ *New Zealand (with exceptions) Shipwrights etc Union v Honda NZ Ltd* [1989] 3 NZILR 82.

⁵ *Lewis v Howick College Board of Trustees* [2010] NZEC 4.

was told of the allegation against her and was provided the opportunity to comment before being suspended. The Centre, for good reason, took the allegation that Ms Barratt had smacked a child very seriously.

[33] I am not satisfied the investigation into the complaints was either full or fair to Ms Barratt. Mr Neal's evidence was that Ms Barratt's explanations were consistent with other explanations received from other members of staff. The mother of the child at the centre of the first allegation told Mr Neal that if the child had been smacked as alleged then the child would have alerted her. That fact that the child had not told its mother of the incident lends credence to Ms Barratt's explanation that she did not smack the child but rather used her hand to guide the child.

[34] Mr Neal investigated Ms Barratt's concerns about the credibility of the parent making the original complaint. He had concluded that with regard to a previous remark made to Ms Potter by that same parent, that what the parent may have perceived as being rough handling was not but was indeed the actions of a concerned caregiver removing a child from a situation where he might fall and hurt himself. In that case no formal disciplinary proceeding was instigated.

[35] As established during the Centre's disciplinary process, the original incident which led to the disciplinary action being instigated had happened long before it came to Ms Potter's attention and for that reason Ms Barratt was unable to recall the incident exactly. Her explanation that she may have been assisting a child down from cushions seems credible and seems consistent with the situation which had arisen previously when the same parent had raised concerns but the Centre determined she had been mistaken in the amount of force used to encourage the child out of harms way.

[36] Further, the delay of four months in alerting the Centre to the incident was not satisfactorily explained. Mr Neal seems to have accepted the explanations that the parent did not report the incident because she feared for the safety of her own child if she did make a complaint, and Ms Job's explanation that she did not want to breach confidentiality.

[37] The parent's explanation should have raised alarm bells for Mr Neal. Any parent genuinely concerned about the safety of her own child, would be expected to raise such an important issue immediately with the Manager of the Centre.

[38] Also, Ms Job is a lecturer in Early Childhood Education and has previously worked at the centre. I would have expected that in her role she would be expected to know what was acceptable and unacceptable behaviour of teachers in the industry. On that basis, Ms Job would certainly have advised the parent to report the matter immediately. The statements given by the Centre relating to interviews with Ms Job show conflicting accounts. In one statement Ms Job is said to have advised Ms Potter that the parent had reported a smacking incident. In the next statement Ms Job is reported as telling Mr Neal that she did not recall the parent talking about smacking.

[39] Further, I accept as valid, the concerns raised by Ms Barratt about the reliance by the Centre on the report by the psychologist. It is obvious when reading this report that the children interviewed were already aware that Ms Barratt had been sent home from the centre for smacking children. This, together with the inconsistencies between the children's accounts of a "smacking" incident should have indicated to the Centre that the report should be treated with some caution.

[40] Overall, I find the Centre was not properly in a position, on the information it had available to it, to feel confident that serious misconduct had been established. The actions of the Centre in dismissing Ms Barratt for serious misconduct were not the actions of an employer acting fairly and reasonably. Ms Barratt was unjustifiably dismissed and is entitled to remedies.

Remedies

Lost wages

[41] Ms Barratt seeks six months wages lost as a result of the dismissal. Section 128(2) of the Employment Relations Act requires the reimbursement of three months' lost wages in the event of a dismissal being found to have been unjustified. Any greater award is both discretionary and subject to proof of loss and mitigation.

[42] Ms Barratt has made no efforts to find alternative employment since her dismissal. I therefore exercise my discretion not to award more than three months lost wages. I will leave it to the parties to calculate the precise sum, however, leave is reserved to fix this if required.

Te Puna Reo O Wairaka Unitec Maori Kaupapa Early Childhood Centre Inc is ordered to reimburse Ms Barratt the equivalent of three months lost wages pursuant to section 123(1)(b) of the Act. Payment shall be made within 28 days of the date of this determination.

Compensation

[43] Ms Barratt seeks \$15,000 under section 123(1)(c)(i) of the Act. I accept Ms Barratt suffered as a consequence of her dismissal. In the circumstances of this case the award will be modest only.

Te Puna Reo O Wairaka Unitec Maori Kaupapa Early Childhood Centre Inc is ordered to pay to Ms Barratt the sum of \$7,000 pursuant to section 123(1)(c)(i) of the Act. Payment shall be made within 28 days of the date of this determination.

Contribution

[44] I am required to consider the extent to which the actions of Ms Barratt contributed toward the situation that gave rise to the personal grievance, and, if required, reduce the remedies that would otherwise have been awarded. I am satisfied Ms Barratt did not contribute to the situation giving rise to her grievances and therefore the remedies will not be reduced.

Costs

[45] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Barratt may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority