

Applicant's claims

[3] Ms van Altvorst claims that Kids Count breached the express confidentiality terms of the settlement agreement when it:

- (a) Attached a copy of it to the online mandatory report form that it submitted to the Teaching Council on 30 January 2019; and
- (b) Recorded the amount she had been paid under it, in a timeline it had prepared and also attached (in addition to the actual settlement agreement) to the online mandatory report form.

[4] Ms van Altvorst seeks that penalties be imposed on Kids Count for these two alleged breaches of the settlement agreement.

[5] Ms Altvorst does not claim that Kids Count's submission of the mandatory report to the Teaching Council breached the settlement agreement. That was a mandatory requirement, and the parties had also expressly recognised in the settlement agreement.

[6] Ms Altvorst's claims relate solely to two of the documents Kids Count attached, to box 8, in the online mandatory report form.

Respondent's response

[7] Kids Count denies breaching the confidentiality provisions of the settlement agreement. It says that the information it attached to the mandatory report it submitted online to the Teaching Council had to be provided in accordance with its obligations under the Education Act 1989 ("EA89").

[8] Section 392(2) of the EA89 required Kids Count to make a mandatory report to the Teaching Council following Ms van Altvorst's agreed resignation.

[9] Section 392(3)(b) of the EA89 required Kids Count to include in its mandatory report "*a description of the conduct or competence issues that it was concerned about, and a report of what (if any) it took with respect to the issues.*"

[10] Mary McLeod, who is the owner of Kids Count Early Childhood Education Group, provided affidavit evidence explaining why she believes that the information Kids Count

attached to the online mandatory report form was required, necessary and did not breach confidentiality of the settlement agreement.

[11] Ms McLeod points out that in the online mandatory report form, box 4 dealt with resignation, and stated:

Please provide the full details of the aspects of conduct or competence that you have been dissatisfied with. Describe the advice that the employer gave to the teacher concerning dissatisfaction with any aspect of the teacher's conduct or competence. Describe the teacher's response and any further action by the employer. State the date of which the teacher resigned, and the date on which the resignation took effect.

[12] Ms McLeod entered a comprehensive summary into the box 4 dropdown, recording the details of Ms van Altvorst's agreed resignation.

[13] Box 5 in the mandatory online report form required a "*brief summary of employer actions*". In the box 5 dropdown, Ms McLeod had entered the details of Kids Count's actions regarding the matters being reported. She also recorded that the parties had agreed, as a result of settlement negotiations, that Ms van Altvorst would resign.

[14] Ms McLeod provided further information in the dropdown that related to box 6 in the online form. This required an explanation of the "*appropriate outcome,*" so Ms McLeod recorded that Ms van Altvorst had resigned.

[15] Ms McLeod also prepared a stand-alone document she titled "*timeline of issues involving Adriana van Altvorst.*" Ms McLeod attached this timeline to box 8 in the online mandatory report form, that had asked for "*relevant documentation*" to be attached. She also attached a copy of the actual, unredacted, settlement agreement.

[16] The timeline Ms McLeod prepared expressly recorded the specific amount that Ms van Altvorst had been paid by Kids Count under the terms of the settlement agreement.

[17] Ms McLeod says the timeline was necessary to summarise what had happened in terms of the resignation and settlement. She further says that because Ms van Altvorst had not provided a stand-alone resignation letter, the record of settlement recorded her resignation, so it was therefore a relevant document that had to be included with the mandatory report.

[18] Ms McLeod maintains that each piece of information she provided in and attached to the mandatory report was necessary to meet Kids Count's obligations to the Teaching Council. She believed it was important context to enable the Teaching Council to understand the full circumstances of the situation involving Ms van Altvorst.

Settlement agreement

[19] In terms of the settlement agreement:

- (a) Clause 1 recorded Ms van Altvorst's resignation date;
- (b) Clause 5 acknowledged that Kids Count would be required to make a mandatory report to the Teaching Council.
- (c) Clause 6 dealt with confidentiality and it stated:

The employee and the employer agreed to keep the fact that this agreement has been entered into and the **terms of any agreement (including the payment of any monies) confidential**. The parties will not disclose such details, (or allow such details to be disclosed) without the prior written consent of the other party, other than the employee's immediate family, the parties' legal advisers and the New Zealand Inland Revenue Department or as may otherwise be required by law. (emphasis added)

Teaching Council requirements

[20] The front page of the Teaching Council's online mandatory report form states "*any settlement agreement should not be provided to the Council.*"

[21] Ms van Altvorst complained to the Teaching Council about the disclosure of the settlement agreement to it by Kids Count. As a result of that complaint the Teachers Council advised Ms van Altvorst that it had removed that attachment from the mandatory report.

[22] It is unclear from the information currently available to the Authority whether or not Ms van Altvorst also complained to the Teaching Council about the disclosure by Kids Count of the amount she had received under the confidential settlement agreement.

[23] However, Ms van Altvorst's affidavit says that information recording the payment she received has not been removed by the Teaching Council so it still able to be viewed by anyone who has access to and/or who receives a copy of the mandatory report Kids Count

filed. The email from the Teaching Council that agreed to remove the settlement agreement does not mention removing or redacting the actual settlement amount from the mandatory report form.

[24] This determination should be provided to the Teaching Council to support a request that it remove or redact any references to the amount that Ms van Altvorst was paid under the terms of the settlement agreement. This will include, but is not limited to, removing the reference to the amount Ms van Altvorst was paid from the timeline that Kids Count attached to its mandatory report.

Authority's findings

[25] Kids Count was permitted by law to disclose that the parties had entered into a settlement agreement, that had provided for Ms van Altvorst's agreed resignation. So disclosing that fact that did not breach Kids Count's confidentiality obligations that were imposed under clause 6 of the settlement agreement.

[26] However, providing a copy of the settlement agreement, and disclosing the amount Ms van Altvorst was paid in the timeline that was attached to the online mandatory report form were both breaches by Kids Count that breached the express confidentiality obligations recorded in clause 6 of the settlement agreement.

[27] There was no legal or other justification for Kids Count to have provided the Teaching Council with a copy of the actual settlement agreement to the Teaching Council. The online form clearly stated it was not to be provided. Ms van Altvorst had not agreed that it could be disclosed, and Kids Count had not asked her to give her consent to disclosure.

[28] There was no need to have attached a copy of the full settlement agreement to establish that Ms van Altvorst had resigned. That fact was not in dispute.

[29] Kids Count had already clearly recorded, numerous times in the 183 pages of documents it provided in its mandatory report, that Ms van Altvorst's employment had ended when she resigned, as part of a settlement of the parties' issues.

[30] If Kids Count had genuinely believed that further information was required to support its report of a resignation then it could and should have either:

- (a) asked Ms van Altvorst to provide a note recording the date of her resignation and that it had occurred under the provisions of a settlement agreement; or
- (b) sought her permission to attach the settlement agreement to its mandatory report.

[31] Neither of those permissible courses of action occurred.

[32] Instead Kids Count made the unilateral decision to:

- (a) disclose the entire settlement agreement; and
- (b) highlight the amount paid to Ms van Altvorst in a timeline it had prepared, without her input.

[33] There was no need, or good reason, for the Teaching Council to receive the information that Ms van Altvorst claims was disclosed by Kids Count in breach of the settlement agreement. It did not have to be disclosed and the Teaching Council had also put Kids Count on notice (via the online form) that settlement agreements were not to be provided.

Should penalties be imposed?

[34] It is appropriate to impose penalties on Kids Count to punish it for its two breaches of the settlement agreement and to deter it, and others, who may be tempted to breach mediated settlements, from engaging in such conduct in future.

[35] The imposition of penalties is consistent with the s 3 objects of the Act. These include (among other things):

- (a) Promoting mediation as the primary problem-solving mechanism;
- (b) Recognising the implied mutual obligations of trust and confidence,
- (c) Supporting good faith behaviour; and
- (d) Acknowledging the inherent inequality of power in employment relationships.

Consideration of s 133A penalty assessment factors

[36] Two breaches have been established that each attract potential maximum penalties of \$20,000 per breach. The maximum potential total penalty that could be imposed on Kids Count is \$40,000, being \$20,000 maximum per breach x two breaches.

[37] These were not deliberate or intentional breaches.

[38] Ms McLeod's affidavit says she had taken legal advice about what Kids Count could and could not include in the mandatory report. She says that the legal advice she received was that the information she had attached to the online mandatory report did not breach the settlement agreement.

[39] That seems surprising, so it is possible Ms McLeod misunderstood what was communicated to her. It is also possible that Kids Count did not specifically instruct counsel to advise on whether the EA 89 legally required the amount Ms van Altvorst had been paid to be disclosed and/or whether or not it required the settlement agreement to be attached, contrary to the Teaching Council's specific advice that it should not be.

[40] The Authority disagrees with the advice that Kids Count claims to have received, about the need for it to supposedly breach the confidentiality obligations in the settlement agreement when submitting the online mandatory report.

[41] The need to make a mandatory report was expressly recognised by the parties in clause 5 of the settlement agreement.

[42] The fact that Kids Count took legal advice indicates that it was attempting to comply with its legal obligations both under the terms of settlement and regarding its mandatory reporting obligations to the Teaching Council. The obtaining of legal advice is a mitigating factor.

[43] However, balanced against the Kids Count's intention to comply with its settlement agreement obligations, is the fact its inadvertent breaches caused Ms van Altvorst considerable stress and distress.

[44] Ms van Altvorst's affidavits say that:

- (a) She has suffered stress as a result of these breaches;
- (b) Her health and well-being has been adversely affected;
- (c) Addressing the breaches has caused her time and money, in addition to inconvenience and distress;

- (d) Kids Count did not take steps to address the breaches after she raised them with it;
- (e) She was put to the trouble of getting the Teaching Council to remove the settlement agreement from the mandatory report;
- (f) She is concerned electronic copies may still exist elsewhere despite the settlement agreement being removed by the Teaching Council, because the mandatory report was filed online;
- (g) She didn't know how many people had seen or could access the confidential information provided by Kids Count, in breach of the settlement agreement, because the mandatory report had been submitted online;
- (h) The disclosure of the amount she was paid is a continuing breach that has still not been addressed or remedied by Kids Count or the Teaching Council.

[45] The Teaching Council's removal of the settlement agreement from the mandatory report mitigates that breach. However there was no evidence that the breach involving the amount paid to Ms van Altvorst has been remedied, so it is presumably continuing. If that is correct, then it is an aggravating factor.

[46] Kids Count has not previously had a penalty imposed on it by the Authority for breaching a settlement agreement.

[47] Taking these factors into account the Authority considers it appropriate to impose a penalty on Kids Count of \$1,000, for each of its breaches of the settlement agreement. This involves total penalties of \$2,000.

[48] Of the total penalties of \$2,000 that have been imposed, \$500 of the penalties imposed is to be paid to the Crown bank account. The remaining \$1,500 of the penalty imposed is to be paid to Ms van Altvorst to recognise the harm she has suffered due to Kids Count's breaches.

Costs

[49] Ms van Altvorst as the successful party is entitled to recover her filing fee of \$71.56. Because she has represented herself in these proceedings, there is no issue as to an award of legal costs in her favour.

Outcome

[50] Kids Count breached the settlement agreement on two occasions.

[51] Total penalties of \$2,000 are imposed for these breaches (\$1,000 per breach).

[52] Kids Count is ordered to pay Ms van Altvorst \$1,500 of the total penalties that have been imposed plus \$71.56 to reimburse her filing fee, within 30 days of the date of this determination.

[53] Kids Count is to pay the remaining \$500 of the total penalties awarded directly into the Crown bank account.

Rachel Larmer
Member of the Employment Relations Authority