

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 686  
3139505

BETWEEN JOLINE GUNTER  
Applicant

AND KIDS WORLD CHILDCARE  
LOWER HUTT LIMITED t/a  
ALL ABOUT CHILDREN  
Respondent

Member of Authority: Michael Loftus

Representatives: Dave Cain, advocate for the Applicant  
Mike Harrison, advocate for the Respondent

Investigation Meeting: 17 November 2022 at Wellington

Submissions Received: 18 November and 30 November 2022 from the  
Applicant  
25 November 2022 from the Respondent

Determination: 20 November 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The Applicant, Joline Gunter, originally claimed she has been both unjustifiably disadvantaged and unjustifiably dismissed. That said, the unjustified disadvantage claims were never expressly pleaded, nor were they identified in evidence or closing submissions. Indeed, the submission stated the claim was simply one of unjustified dismissal and was progressed accordingly. In those circumstances so shall I.

[2] The Respondent, Kids World Childcare Lower Hutt Limited (Kids World), accepts it dismissed Ms Gunter but believes it can justify its decision. It claims Ms Gunter breached confidentiality to such an extent her actions constituted serious misconduct warranting summary dismissal.

**The Authority's investigation**

[3] For the Authority's investigation written witness statements were lodged on behalf of Ms Gunter, while for Kids World there were statements from the Operations Manager, Trina Tuki, the Area Manager, Rose Duffy, the head teacher at the centre at which Ms Gunter was employed, Nicole Reder, and Michelle Hancock, the Centre Manager. Mesdames Gunter, Tuki and Hancock answered questions under oath or affirmation from me and the parties' representatives. The representatives also lodged subsequent written submissions.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[5] This determination has not been issued within the three month period required by s 174C(3) of the Employment Relations Act (the Act). As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances existed to allow a written determination of findings at a later date.

**Background**

[6] Ms Gunter is an overseas trained teacher who has worked in both primary and early childhood education. She came to New Zealand in January 2020, having already obtained employment with Kids World. Ms Gunter commenced on 13 January 2020 and worked 40 hours a week, though her times of attendance could vary between 7 am and 6 pm Monday to Friday.

[7] She says that when she first arrived there was no manager and she did not receive any formal induction or training. She says Ms Duffy simply gave her a key, showed her where everything was and introduced her to other staff. She then got straight into the work. Kids World disagrees stating Ms Duffy conducted an adequate induction which was subsequently repeated with Ms Hancock after she later commenced as Centre Manager in mid-February.

[8] Ms Gunter is of the view that initially things went well, with positive feedback from parents, Ms Tuki and Ms Hancock.

[9] On 18 May an incident occurred which would, with the addition of subsequent events, lead to the dismissal. On that day Ms Gunter says she saw Ms Hancock grab a child (a girl) in a rough and aggressive manner then take the child into the sleep room to calm down. Ms Gunter says that when the child's mother came to pick her daughter up later in the day she heard Ms Hancock advise the child had been misbehaving. Ms Gunter says that upset her as she did not think Ms Hancock's actions were either justified or acceptable and she was now worried the child would be further disciplined at home. Ms Gunter adds she had already spoken to Ms Hancock about the incident and the latter had acknowledged she shouldn't have acted as she had.

[10] Ms Gunter says that on 21 May she raised the incident with Ms Reder, who said, *"Just leave it for now. She (Ms Hancock) has a lot to deal with."*

[11] Ms Gunter says that having heard no more she concluded her concerns were being dismissed so she attempted to call Ms Tuki on 9 June. She tried twice and having not had her call answered, left a message asking what chain of command applied if there was a situation that was not being resolved. She says she never received a response.

[12] Ms Gunter says her feeling of frustration continued and she therefore raised her concerns with Kids World's owner, Manjot Juneja, when he visited on 16 June. She says she raised the incident of 18 May along with a couple of other items which she summarised in an email she sent Mr Juneja later that evening. The additional items included a disagreement Ms Gunter had with Ms Hancock about getting a child to sleep on 20 May (and which she says led to change in the applicable policy which she received on 7 July) and the timekeeping of various staff.

[13] Ms Gunter says Mr Juneja assured her the incident would be investigated, but advised he would not give any further feedback as it was not Ms Gunter's business. That said Mr Juneja advised Ms Tuki of the approach the next day which was also that upon which there was a one on one meeting between Ms Gunter and Ms Hancock and which was also attended by Kids World's head teacher. This was not mentioned in Ms Gunter's brief and suffice to say the thrust of the relevant evidence for Kids World is that it accentuated the fact both Ms Gunter and Ms Hancock had "strong minded personalities" and confirmed evidence from more than one witness that they had differing views about how the children should be managed. It was this that was behind

some of the later raised concerns which were not ultimately held to be grounds for the dismissal so this aspect of the evidence will not be discussed in any detail.

[14] Mr Juneja's advice to Ms Tuki included a request she follow the matter up as Mr Juneja was apparently unclear as to what the real issues were. She says she unsuccessfully tried to call Ms Gunter, missed the return call and the two then spoke on the third attempt. Ms Tuki says that led to the provision of a list of concerns and advice they would be investigated. She says this she did, including a review of CCTV footage and a disciplinary meeting with Ms Hancock on 25 June while the later was suspended. The ultimate outcome was that no action was warranted other than a change to the 'sleep policy' which was promulgated on 7 July and Ms Gunter was advised the investigation was complete on 6 July though not told of the outcome.

[15] Here it should also be noted none of the interested external bodies (Ministry of Education, Oranga Tamariki and the Teachers Council) found reason to pursue any issues against Ms Hancock.

[16] In the interim, and on 19 June, Ms Gunter says she again saw Ms Hancock grab the same child aggressively and take her to the sleep room to calm down. Ms Gunter says the child scratched Ms Hancock during the incident and that was reported to the mother.

[17] On 22 June the mother came into Kids World demanding to speak to the teachers as she was concerned that both of her children had been mistreated. Her son also attended Kids World and had gone home with a bruise. Ms Gunter says none of the other teachers would speak to the parent so she felt she should.

[18] Ms Gunter says the mother explained her daughter had been disciplined over the weekend as a result of having scratched Ms Hancock. Ms Gunter says that while she had to explain things carefully as she knew she had a duty to the business, she felt compelled to explain the child was being removed from the room at the time which is why she was resisting and scratching. She says she advised the parent she had informed management of an earlier incident and the parent then queried the bruise on her son's arm. Ms Gunter says she was able to reassure the parent that that was an accident and he had fallen from a bench.

[19] The mother then chose to raise her concerns which she did via a call to Ms Duffy. Ms Duffy advised Ms Tuki on 29 June and the later then called the mother. She says she advised Kids World was already aware of the issues. It was investigating and that “a staff member had been placed on suspension.” Ms Tuki says it was at that point the parent disclosed that Ms Gunter had informed her of the incident and she then described what was alleged to have been said. She says this “*mirrored Jolene’s statement in her complaint*” and “*it was therefore evident Joline had breached policy in informing the parent about the incident.*” In the statement of problem it was said the detail provided “*...confirmed she had been given very specific details of alleged incidents in the centre by Ms Gunter.*”<sup>1</sup>

[20] That Kids World’s management took this seriously was confirmed on 15 July when a letter was sent to Ms Gunter inviting her to attend a disciplinary meeting. The letter raised not only that issue but what it said were ongoing issues with Ms Gunter’s behaviour and performance. The concerns were specified as:

- (a) Unprofessional behaviour;
- (b) Repeated failure to achieve acceptable standards of work performance in respect of quality, procedure or standards;
- (c) Breach of your confidentiality obligations or a serious breach of your obligations under your contract.

[21] The specifics were said to be:

- (a) Continuously question and do not follow the direction of your Centre Manager;
- (b) Choosing to behave in a manner that causes a child to become unsettled and upset. Putting staff in an uncomfortable position.
- (c) Failure to work in a positive professional manner, this includes the way you communicate and make negative comments towards children, parents, and other staff.
- (d) Failure to follow through with behavioural plans/strategy to the children.
- (e) Disclose private and confidential information while in an investigation is pending.

[22] Various documents were appended allegedly illustrating the concerns raised, though this did not apply to the last, namely the allegation of breach of confidentiality.

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<sup>1</sup> Statement in Reply at [1.4]

That was stated, in the letter, to relate to the discussion Ms Gunter had had with the parent on 22 June.

[23] Ms Gunter now takes issue with a number of these allegations on the grounds that had there been legitimate concerns they should have been raised with the Teachers Council and yet they weren't. She says she now sees this as a blatant attempt to fabricate allegations against her and that while she regularly participated in one-on-one meetings, as did all other staff, performance issues had never been raised.

[24] According to Ms Tuki there was a preliminary discussion in which Ms Gunter denied informing the parent of the incident followed by a second in which the conversation was admitted but justified on the basis nothing was being done about it.

[25] This Ms Gunter denies and there are no notes of the first discussion. When questioned further about this Ms Tuki advised the second discussion was on 3 July though they make no mention of the alleged justification. They simply record:

I asked Jolene "how did mum come to know that you had made a formal complaint about Che and what is this was all about?" Jolene said that she had told mum as she was concerned, and that mum needed to know about what was happening

[26] A disciplinary meeting proceeded as scheduled on 20 July. Ms Gunter was accompanied by a support person and Ms Tuki represented Kids World management attended via Zoom.

[27] Ms Gunter says she tried to explain what had happened in the conversation with the parent, that there had been no breach of confidentiality but Ms Tuki interrupted her explanation and said that she had enough information regarding that allegation. Ms Gunter claims she was unable to explain her side of the story properly.

[28] Here I note that while notes of the meeting are relatively comprehensive with respect to the other allegations those pertaining to the confidentiality issue are sparse. They simply record that Ms Gunter acknowledged that talking to the mother was inappropriate and Ms Tuki stated that as Ms Gunter had "*...taken ownership of realising that you shouldn't have spoken to the parent in that manner, so this is pretty straightforward*".

[29] On 23 July Ms Gunter received a letter advising the Kids World's preliminary decision. The letter advises that with respect to the allegations of unprofessional

behaviour, Kids World had noted Ms Gunter's acknowledgment her actions were perceived as unprofessional but as she was willing to work with the manager, upskill and be more mindful of her communication, it would be taken no further. A similar outcome was notified with respect to the allegations of a failure to achieve acceptable standards of work performance, with it again being acknowledged that Ms Gunter was willing to keep trying and have correct support and mentoring systems that would allow her to learn and understand early childhood within New Zealand.

[30] The same, however, did not apply to the allegation regarding breach of confidentiality. The letter cites the following outcome:

During the meeting you acknowledged and confirmed that you did share confidential information with a parent and this information did have detrimental effects on a pending investigation. This is a serious breach of confidentiality and privacy for all parties concerned.

[31] The letter then went on to advise that those actions constituted serious misconduct warranting summary dismissal in accordance with company policy. Ms Gunter was then allowed an opportunity to provide any further argument as to why that outcome should not be applied. Ms Gunter was given 24 hours to respond.

[32] At 8.49 the next morning, 24 July, Ms Gunter emailed her response to Ms Tuki. Ms Gunter summarised the email as follows:

I took responsibility for my actions but that I felt unsupported by management. I re-told all the details of the incident and highlighted that I believe what I did was for the safety of the child involved and that I believed being dismissed was too harsh. This was more than just a dismissal to me, it was also a risk that I would be deported and I was willing to do what it takes to work on the relationship. I asked them to reconsider their decision.

[33] Ms Gunter says that at 6 pm that day Ms Hancock asked for her keys and uniform, handed her a certificate of appreciation and a Cadbury's chocolate. She says she was shocked and told Ms Hancock that she had not yet received any formal notification of dismissal. To that, Ms Hancock replied that Ms Tuki had instructed her to get the keys and uniform.

[34] Shortly thereafter Ms Gunter emailed her representative advising she thought she had been fired and asked if the representative had received an email from Ms Tuki. The answer was no.

[35] At a similar time Ms Gunter received an email from Ms Tuki stating the latter was sorry she had not replied earlier, that she had received Ms Gunter's response to the preliminary decision and would take it into consideration. The letter also advised a final determination would follow.

[36] That occurred 29 minutes later when Ms Gunter received a letter terminating her employment. The letter was also copied to her representative. Ms Tuki explains the abbreviated time by saying she had received Ms Gunter's email earlier and while she thought she had acknowledged that, the reply had remained in her outbox and not gone till prompted around 6.00pm.

[37] The letter also advised that relevant Government agencies would be notified, which led to Immigration New Zealand withdrawing Ms Gunter's skilled migrant visa and a mandatory report to the Teaching Council.

[38] As events transpired, the Teaching Council determined that no further action need be taken and Ms Gunter's visa was renewed once she found another job.

[39] Further issues arose as Ms Gunter only achieved replacement employment three days before an Immigration New Zealand imposed deadline she leave the country should she not do so. There were also issues over an application for residency which was initially declined though that decision has now been successfully appealed.

### **The issues**

[40] As already said, and while there were originally claims of unjustified disadvantage these were not pursued. There is therefore only one issue that requires determination. It is whether or not Kids World can justify Ms Gunter's dismissal. In the event it fails to do so the question of remedies will have to be considered, as will costs irrespective of the outcome.

### **Discussion**

[41] With respect to justification s 103A of the Employment Relations Act 2000 (the Act) states the issue:

*... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.*

[42] Traditionally and while issues of substance and process overlap and there is no such thing as a firm delineation, separation has often been used for analytical purposes especially as the requirements of s 103A of the Employment Relations Act (the Act) are enshrined in statute and a number have a procedural focus.<sup>2</sup>

[43] While the parties disagree on a number of points as evidenced by the above narrative, the evidence of various witnesses essentially remained true to their brief. That said there were a number of concessions given in response to oral questions, particularly from Ms Tuki, and it is those that will determine this matter.

[44] One is that the letter of dismissal states Kids World is mindful of Ms Gunter's response to the first two issues before identifying the breach of confidentiality and privacy as the serious breach. That that was the reason for dismissal was confirmed in the Statement in Reply which records at paragraph 1.8 that:

The investigation [meeting of 13 July] reached a provisional decision that Ms Gunter had breached confidentiality. It was determined that her actions constituted serious misconduct warranting dismissal ...”

[45] That the breach of confidentiality was the reason for dismissal was also initially confirmed by Ms Tuki though that quickly changed with her statement all three concerns had influenced the decision. That raises the point that Ms Tuki accepted the performance issues constituted the bulk of those raised by Kids World and that they could not be deemed serious misconduct warranting dismissal. That this was, in the circumstances, a fair concession is in my view confirmed by Ms Tuki's admission that while issues were raised with Ms Gunter and performance improvements/changes sought, there is no suggestion this was done in a formal disciplinary setting. The letter of 15 July was the first time that had occurred. Employees must, as a general rule, be advised of performance deficiencies and be allowed time and support to address them. If in this case they did influence the decision to dismiss, as is now claimed, that did not occur which falls short of the actions of a fair and reasonable employer

[46] There was then a question predicated on a belief the disciplinary meeting had ended on a positive note so “what changed?” The answer was that the decision makers had weighed up the correspondence which largely related to the performance issues which, as already said, Ms Tuki concedes did not warrant dismissal. Add to that the

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<sup>2</sup> Employment Relations Act 2000 at ss 103A(3)(b) to (d)

fact the documents relate to meetings and events Ms Tuki had no personal knowledge of and there is evidence she did little to confirm their veracity.

[47] Ms Tuki also conceded she was only one of the decision makers and that she had feed information to the businesses owners who had been part of what she described as a joint committee decision. It has long been accepted that an employee accused of transgressions warranting disciplinary action has a right to address all decision makers. That did not occur here.

[48] The quotes in paragraph [19] also create an impression of pre-determination and that was not removed by the answers Ms Tuki gave under questioning.

[49] The next issue is that the evidence is Ms Gunter was not fully appraised of Kids World's concerns. She was not given a copy of the parent's complaint and while she accepts she received copies of Kids World policies these are not before the Authority. The evidence leaves questions as to whether or not the policies even address question of privacy and confidentiality at least in respect to staff as opposed to the children and when asked about the relevant policy Ms Tuki referred to one covering positive guidance regarding challenging behaviour. Add to that a concession by Ms Tuki that the induction may actually have been less than fulsome and there is perhaps a mitigation for the alleged failures that influenced the decision to dismiss.<sup>3</sup>

[50] Finally there is another issue. Ms Gunter is said to have breached confidentiality by discussing an incident with a parent but there must be serious questions as to what confidentiality existed. Ms Tuki's notes of her interview with the parent open with "*[The parent] explained that she is sick of her children coming home and saying [Ms Hancock] grabs them and pulls them and yells at them.*" That was followed by a similar comment with the parent saying "*... she was sick of her children saying [Ms Hancock] was hurting them, so she went in and asked the teachers and Joline told her.*"

[51] The note does go on to record Ms Gunter then made some injudicious reflections about Ms Hancock but the evidence is the parent was already armed with considerable knowledge, or at least views, about what was happening. That raises question about

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<sup>3</sup> See also letter of preliminary decision at [2]

just how much Ms Gunter's comments really constituted a breach of confidentiality, yet there is no evidence this was considered or taken into account.

[52] When questioned about this Ms Tuki put it down to the fact Ms Gunter described a specific incident and that she "*wouldn't have expected a day teacher to have a conversation like this with a parent.*"

[53] Simply put these deficiencies must lead me to conclude the investigation was inadequate and the outcome was not therefore one a fair and reasonable employer could safely reach. The dismissal is unjustified and that raises the question of remedies.

[54] Ms Gunter seeks lost wages, \$30,000 as compensation pursuant to s 123(1)(i) of the Act and costs.

[55] Section 128(2) of the Act requires the payment of three months wages or the actual loss, whichever is the lesser. There is then a discretion to increase the amount.

[56] Ms Gunter's loss exceeded three months with her attaining replacement employment on 9 November. Her actual loss is therefore 15 weeks but the question of whether or not I should award that does not arise as she has restricted her claim to 13 weeks.<sup>4</sup> Thirteen weeks wages is \$13,000 gross and that is payable.

[57] Turning to compensation. Ms Gunter supported her claim with considerable evidence of the hurt she felt and, in particular, the angst arising from the fact she had abandoned her old life and country for new and safer prospect with her dreams then coming within 3 days of ending. To that I add evidence of the hurt she felt as a result of her character and teaching competency being undermined and the effect these events had on her confidence.

[58] Having noted the evidence and current awards I consider \$18,000 appropriate.

[59] Finally the conclusion Ms Gunter has a grievance and remedies accrue means I must also consider whether or not those remedies should be reduced by reasons of contributory conduct.<sup>5</sup> The answer is no. The decision to dismiss is primarily attributable to her alleged breach of confidentiality. I have found that unjustifiable for

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<sup>4</sup> Brief of evidence at [64]

<sup>5</sup> Section 124 of the Employment Relations Act 2000

a variety of reasons including questions over its actuality and extent which were not adequately investigated. With respect to the other issues which influenced the decision to dismiss I can do no more than note they were never formally brought to her attention and she was given no opportunity to address them.

### **Conclusion and Orders**

[60] For the above reasons I conclude Ms Gunter has a personal grievance in that he was unjustifiably dismissed. As a result I order Kids World Childcare Lower Hutt Limited pay Joline Gunter:

- (a) \$13,000.00 (thirteen thousand dollars) gross as recompense for wages lost as a result of the dismissal; and
- (b) A further \$18,000.00 (eighteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[61] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves but if they are not able to do so and an Authority determination on costs is needed Ms Gunter may, as the successful party, lodge a memorandum on costs within 14 days of the date of issue of this determination. From that date Kids World will then have 14 days to lodge any reply memorandum. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors require an upward or downward adjustment of that tariff.<sup>6</sup>

Michael Loftus  
Member of the Employment Relations Authority

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<sup>6</sup> For further information about the factors considered in assessing costs, see [www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1](http://www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1).