

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 705
3287719

BETWEEN CLAIR MCCONCHIE
Applicant

AND ST ALBANS COMMUNITY
PRESCHOOL INCORPORATED
Respondent

Member of Authority: Peter van Keulen

Representatives: Maryline Suchley, advocate for the Applicant
William Fussey, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further
Information Received: 23 August 2024 and 9 September 2024 from the Applicant
6 September 2024 from the Respondent

Date of Determination: 26 November 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Clair McConchie was employed by St Albans Community Preschool Incorporated (the Preschool) from 12 September 2021.

[2] In September 2022 Ms McConchie raised a personal grievance in relation to concerns she had raised about behaviour of other employees. In short, this employment relationship problem progressed to the point that Ms McConchie and the Preschool reached a settlement.

[3] The terms of settlement between the parties were set out in a record of settlement dated 20 November 2023 (the Record of Settlement) and a mediator from the Mediation Services of the Ministry of Business Innovation and Employment signed the Record of Settlement, pursuant to s 149 of the Employment Relations Act 2000 (the “Act”).

[4] The Record of Settlement included a non-disparagement clause at clause 11. Ms McConchie claims the Preschool breached clause 11 of the Record of Settlement when it made a mandatory report about her to the Teaching Council of Aotearoa.

[5] Based on this allegation, Ms McConchie lodged a statement of problem in the Authority seeking to have the mandatory report replaced with one that was not disparaging and to have a penalty imposed against the Preschool for its breach.

[6] The Preschool says it did not breach clause 11 of the Record of Settlement.

The Authority's investigation

[7] I investigated Ms McConchie's employment relationship problem on the papers by receiving written affidavit evidence and documents and written submissions of the parties' representatives.

[8] As permitted by 174E of the Act I have not recorded all the evidence and submissions received, in this determination; I have set out my findings of fact and law, then based on this I have expressed conclusions on issues as necessary to dispose of the matter, and then I have specified the orders made as a result.

The events

[9] Ms McConchie commenced employment with the Preschool on a fixed-term agreement on 12 September 2021. Ms McConchie then accepted an offer of permanent full-time employment, which commenced on 18 April 2022.

[10] Ms McConchie says that in 2022 she had concerns about other employees at the Preschool and she raised these concerns with the Preschool.

[11] On 21 September 2022, Ms McConchie raised a personal grievance for unjustified disadvantage based on allegations that the Preschool had not adequately addressed the concerns she had raised about other employees.

[12] On 22 September 2022, Rebecca Dalton, the Preschool Board Chair (on an interim basis) began dealing with Ms McConchie's personal grievance; she responded to

Ms McConchie's representative and undertook an investigation into Ms McConchie's concerns.

[13] As part of her investigation, Ms Dalton became aware of allegations of potential misconduct by Ms McConchie. By way of a letter dated 14 October 2022, the Preschool invited Ms McConchie to an investigation meeting on 19 October 2022, to discuss the following allegations:

- (a) Taking photographs of children at the Preschool, adding scary Halloween filters, and storing them on a Preschool computer;
- (b) Commenting on a preschool private Facebook group to say there were other photos which were "not that bad";
- (c) Encouraging strangers walking past the Preschool to talk with Preschool children and vice-versa;
- (d) Failing to actively supervise the children in her care, while engaging with passers-by; and
- (e) Failing to renew her practising certificate in accordance with the obligations in her employment agreement.

[14] In the letter dated 14 October 2022 the Preschool also stated:

St Albans Community Preschool is subject to certain mandatory reporting requirements. In this respect, we note that if following its investigation the Board has reason to believe that you have engaged in serious misconduct it is required, without exception, to report the matter to the New Zealand Teachers Council.

[15] On 17 October 2022, Ms McConchie raised a further personal grievance, alleging that the Preschool's investigation into her conduct, and subsequent allegations, was retaliatory. Ms McConchie also provided some responses to the allegations against her. And Ms McConchie requested that the misconduct allegations be put on hold until such time as her personal grievances were resolved.

[16] After this further personal grievance was raised Ms McConchie and the Preschool exchanged email correspondence (through their representatives) about the personal grievances, the ongoing investigation and possible settlement.

[17] The settlement negotiations included discussion about any mandatory reporting that might be required to be made by the Preschool to the Teaching Council. Ms McConchie sought a commitment from the Preschool that it would not make any mandatory report. In response the Preschool's position was that it could not agree to not make a mandatory report to the Teaching Council as that was a statutory requirement which, it said, had already been triggered by the investigation.

[18] On 20 November 2022 the Record of Settlement was signed by both parties in full and final settlement of Ms McConchie's personal grievances.

[19] The Record of Settlement contained the following clauses:

Clause 8: These terms of settlement, all matters discussed in negotiations achieving settlement and all other communications between the parties relating to the end of the employment relationship shall remain, so far as the law allows and subject to the remaining provisions of the Record of Settlement, confidential to the parties.

Clause 9: Clause 8 does not prevent the Employer from complying with its mandatory reporting obligations to the Teaching Council of Aotearoa.

...

Clause 11: Neither party will make, cause to be made, publish or endorse any disparaging or negative statements or comments about the other party, whether directly or indirectly. For the avoidance of doubt, this includes publication on social media.

[20] Shortly after the Record of Settlement had been signed and Ms McConchie's employment at the Preschool had come to an end, Ms Dalton completed the required mandatory report for the Teaching Council.

[21] When Ms Dalton says that when she compiled the mandatory report she obtained advice from various sources regarding the report and based on this decided to keep the report factual and to include all of the allegations the Preschool had received in it.

[22] Ms Dalton's summary of the Preschool's concerns as outlined in the mandatory report was:

Causing serious harm to children through the use of horrific/scary tiktok filters. A complaint from a parent was received in regards to the filtered images she saw of her son. We are unsure when the images were taken, but they were uploaded to the preschool computer and discovered by a staff member on

around September 2022 and reported to the Board on 29 September. Prior to this, no one within the Preschool was aware of the images.

There is communication on the Preschool's private whanau facebook page showing evidence that other scary filters were used, however, these images have not been sighted.

Breaching privacy agreements between whanau and preschool in regards to the use of photography by using filters on tiktok, with no links to learning or the curriculum.

When investigating the issues regarding photographs taken by Clair McConchie, the Preschool was also made aware of an ongoing activity undertaken by Clair to encourage a student/child at the Preschool to engage in an inappropriate relationship with a teacher. This lasted for 3 or 4 months and only ceased once the child had left the Preschool to go to school (January 2022). The preschool understands other teachers attempted to get Clair to cease this behaviour, but she carried on with this behaviour despite requests to cease. The behaviour included encouraging/assisting the child to write letters to the teacher, encouraging the child to refer to the teacher as his "girlfriend" and it was also reported that the child would get angry when the teacher's partner was referred to.

[23] Ms Dalton also attached all relevant documentation in relation to the Preschool's concerns. This included:

- (a) An enrolment agreement form containing privacy expectations and agreements around photographs of children;
- (b) A written complaint from a parent in relation to the photographs;
- (c) A complaint from a fellow teacher regarding Ms McConchie encouraging a child at the Preschool to engage in an inappropriate relationship with a teacher;
- (d) A post from Ms McConchie on the Preschool Facebook group, including her comments; and
- (e) Two of the photographs that were the subject of the allegations.

[24] Ms Dalton signed and dated the mandatory report 7 December 2022, and lodged it the next day.

Analysis

[25] The issue to be resolved in this employment relationship problem is whether the Preschool's summary and attached documents set out in the mandatory report of 7 December 2022 were disparaging of Ms McConchie such that these amounted to a breach of clause 11 of the Record of Settlement.

[26] In *Byrne v The New Zealand Transport Agency*, Judge Corkill noted that the assessment as to breach of a non-disparagement clause involved consideration of the scope of the clause in the particular context and whether the particular facts amounted to a breach.¹

[27] In *Byrne*, Judge Corkill assessed the scope of the clause in question by starting with the ordinary meaning of the words used in the clause and then cross-checking that meaning against the context.²

[28] The ordinary meaning of clause 11 of the Record of Settlement is relatively easy to establish:

- (a) Clause 11 means that neither party will make disparaging or negative statements about the other.
- (b) "Make" covers various forms of communication including publishing, endorsing or stating.
- (c) Disparaging or negative statements means expressing an opinion or conclusion about a party that belittles them, diminishes their value or importance or lowers people's opinions of them.

[29] So, in this case Clause 11 of the Record of Settlement means neither party shall publish, endorse or state an opinion or conclusion about the other which belittles them, diminishes their value or importance or lowers people's opinion of them.

[30] In my view the key aspect is that the publication, endorsement or statement that is said

¹ *Byrne v The New Zealand Transport Agency* [2019] NZEmpC 187 at [102].

² *Byrne v The New Zealand Transport Agency*, above n 1 at [75] and [76], applying the contractual interpretation principles outlined in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147 and *New Zealand Airline Pilot's Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111.

to be disparaging or negative is an opinion or conclusion about the party. So, for example stating in a letter of reference that an employee was often late starting work is not disparaging or negative if it reflects what occurred, i.e. it is a statement of fact; in contrast a statement in a reference that an employer considered that an employee was lazy because they were often late starting work would be disparaging.

[31] This view is fortified by the context of the Record of Settlement. That is, it was the end of the employment relationship and as an employer the Preschool might be required to make statements about Ms McConchie as an employee and it should be free to make factual statements in order to discharge such obligations. This is even more so in the context of the mandatory report as the Preschool had advised Ms McConchie in negotiations that it was bound to make the report and the parties agreed both that it would and the Record of Settlement would not prevent that.

[32] All of this means that if the Preschool has only made statements of fact as to what occurred, in the mandatory report, then this report cannot be disparaging.³

[33] The statements made in the mandatory report by the Preschool are statements of fact. The Preschool outlined its concerns and advised that it had received complaints which had informed those concerns. The Preschool has not expressed any conclusions about Ms McConchie's character or abilities as a result of the complaint.

[34] That the statements made in the mandatory report might cause a reader to form a disparaging view of Ms McConchie is not the Preschool's responsibility as the reader is drawing their own conclusion, which is disparaging – this is not the Preschool's expressed opinion and it cannot be an opinion that it is liable for.

[35] My conclusion is that the Preschool has not breached clause 11 of the Record of Settlement in making the mandatory report.

³ *Evans-Walsh v Southern District Health Board* [2018] NZEmpC 46.

Orders

[36] The Preschool has not breached clause 11 of the Record of Settlement. Ms McConchie's claim is dismissed.

Costs

[37] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[38] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the Preschool may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Ms McConchie will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[39] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.⁴

Peter van Keulen
Member of the Employment Relations Authority

⁴ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1