

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 206
5612765

BETWEEN MICHELLE ANN GRIFFITHS
Applicant

A N D CHILDS PLAY PRESCHOOL
LIMITED
Respondent

Member of Authority: David Appleton

Representatives: Applicant in person
Brenda Leonard, Advocate for Respondent

Investigation Meeting: 14 November 2016 at Ashburton

Submissions Received: 14 November 2016 from the Applicant
14 November 2016 from the Respondent

Date of Determination: 16 November 2016

DETERMINATION OF THE AUTHORITY

- A. The respondent is to pay to Ms Griffiths two weeks' pay.**
- B. Ms Griffiths was not unjustifiably dismissed by the respondent and did not suffer an unjustified disadvantage in her employment**
- C. There is no order as to costs.**

Prohibition from publication order

[1] The written evidence, and the oral evidence given during the investigation meeting, referred to a child and his occasional challenging behaviour. It is not appropriate for the identity of that child to be disclosed and I therefore prohibit publication of any information that could lead to the identification of that child, save

for the information given in this determination. The child shall be referred to as Child X in this determination.

Employment relationship problem

[2] Ms Griffiths claims that she was unjustifiably dismissed from her employment in November 2015. She claims \$6,000 compensation under s. 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) and a contribution towards her legal fees. She also claims two weeks' notice pay.

[3] The respondent denies that it dismissed Ms Griffiths and asserts that Ms Griffiths either resigned from her employment, or abandoned her employment. It says it will pay her two weeks' notice pay provided that she confirms her resignation in writing.

Account of the principal events leading to the termination of employment

[4] The respondent runs an early childhood education centre with a licence for up to 71 children per day. Ms Griffiths is a fully registered and qualified Early Childhood Education Teacher and was employed by the respondent between October 2011 and November 2015, first as a reliever, and then as a permanent part time employee working, at the material time, in the Extension Room (for children aged 4 to 5 years old). At the time of the termination of her employment, Ms Griffiths was working 19.5 hours a week, normally on a Monday, Wednesday and Friday.

[5] Relevant provisions of the individual employment agreement between Ms Griffiths and the respondent stated as follows:

5.0 Terms of Employment

5.1 The employee may terminate this contract by giving two weeks' written notice for a childcare worker and four weeks written notice for a head teacher. Provided, however, the employment may be terminated without notice in the case of serious misconduct.

5.2 Where an employee absents him/herself from work for a continuous period exceeding 3 working days without consent of the management or reasonable cause, he/she will be deemed to have terminated his/her employment.

...

15 Disciplinary and dismissal procedures

It is expected that employees will conduct themselves properly and competently in their work. In cases of misconduct or incompetence requiring formal action, the following procedures are to be used.

First Offence:

Verbal or written warning, noted on employees file and advise the employee that the disciplinary procedure in the contract is being followed.

Second Offence:

Final warning given in the presence of a centre representative or union official or a staff member of the employees choice. Provided that the worker does not choose a staff member as provided by this subclause, this shall not preclude the employer from giving a final warning. The final warning shall be confirmed in writing to the employee stating that a further warning will result in dismissal.

Third Offence:

Instant Dismissal.

16 Serious MisconductInstant Dismissal

Serious misconduct shall include but not be restricted to such matters as theft as a servant, physical assault upon any person in the workplace, verbal or physical abuse of clients or colleagues inside or outside the workplace, sexual misconduct in the workplace, threatening behaviour, conviction of a criminal nature liable to result in the disrepute of the centre, intoxication in the workplace, under the influence of mind altering substances (alcohol or drugs not prescribed by a registered practitioner to the person concerned) during working hours (including breaks).

...

Advice of dismissal by the employer shall be given in the presence of another person not directly involved, who shall act as a witness to the dismissal.

[6] Child X, who was four years old at the time of the incident, had been attending the respondent's centre for approximately four years and had displayed disruptive and occasionally aggressive and/or violent behaviours that had led eventually to a Ministry of Education funded Education Support Worker (ESW) being allocated to provide support in respect of the child. This meant that Child X received support on a one-on-one basis with an ESW for approximately three hours per week. It is the evidence of the respondent that Child X's behaviour improved with the support of the ESW, and the use of agreed strategies.

[7] ESWs are generally allocated on a term-by-term basis and are not guaranteed to continue beyond the end of the term. They are also not provided during school holiday periods, even if the preschool is open during that period. Child X's ESW hours were due to expire in December 2015 and were not to be renewed. This decision had been made following a positive report into the child's recent behaviours.

[8] Ms Griffiths taught Child X one day a week. On Tuesday, 10 November 2015, Ms Griffiths found out that the ESW support for Child X was not going to be continued beyond the end of the term. Ms Griffiths' evidence is that she was "disgusted" hearing that, as her head teachers and management had known about that decision, but no one had told her. The head teacher for the Extension Room, Jazzlyn Leonard, conceded that she had found out by chance about the decision, during her absence on sick leave, and had failed to advise Ms Griffiths and other staff of the ESW support not being renewed.

[9] It is the evidence of Brenda Leonard¹, one of the co-owners of the respondent, that she had found out a week or so beforehand about the decision not to renew the ESW hours, but had intended to invite a member of the Ministry of Education to the preschool to explain the decision to the staff, including Ms Griffiths. However, she had not got around to arranging that meeting before Ms Griffiths found out.

[10] Ms Griffiths' evidence is that, on 10 November, after she had heard about the non-renewal of the ESW, she was told that Child X was outside without his hat, and was refusing to have sunscreen put on him. Ms Griffiths spoke to Child X for around 10 minutes but could not persuade him to put on the sunscreen or hat. Ms Griffiths said that she suggested that Child X go inside and play until he was ready to wear his hat and he "walked freely and happily by himself" inside.

[11] Ms Griffiths says that she walked into the room and towards the other children. There were two other teachers in the room, both with their backs towards her. According to Ms Griffiths, Child X "then turned around, ran quickly towards me, and violently kicked me in the stomach stunning me and really hurting me".

[12] Ms Griffiths' evidence is that she grabbed Child X by the arm, "really growled at him" and told him it was not okay to hurt teachers. One of the other teachers spoke to her, and Ms Griffiths said that she would take Child X to the office, as he needed to be sent home. Ms Griffiths' evidence is that her concern was that Child X could hurt another child.

[13] There was contrary evidence of what had occurred from one of the teachers who had been in the room, Ms Holly Charmers, who disagrees with many aspects of

¹ In order to distinguish between Brenda Leonard and Jazzlyn Leonard, I shall refer to these individuals by their full names.

Ms Griffiths' account. The key point of disagreement is that Ms Charmers said she did not see Child X kick Ms Griffiths, and that the reason Ms Griffiths took the child to the office was not because she had been kicked, but because she was unhappy that he was not putting on his sunscreen and hat.

[14] Other witnesses for the respondent doubted in their evidence that the child was capable of kicking Ms Griffiths, so as to hurt her, because he was not big enough, and/or did not have the coordination.

[15] Whilst it is important background information, whether or not Ms Griffiths was kicked is not central to the matter to be investigated. However, whilst I do not doubt that Ms Charmers did not see Ms Griffiths be kicked, I find it unlikely, on balance, that Ms Griffiths would have invented the incident. It also explains why Ms Griffiths was upset later in the day.

[16] According to Ms Griffiths, after she had been kicked, she led Child X by the hand to the office and she was still shaking and visibly upset and crying. She says that she sat Child X down on the floor, telling him "you need time out, you have really hurt me, and I am sad, and it is not okay to hurt the teachers".

[17] Ms Griffiths says she then spoke to Ms Annie Smith, one of the owners of the respondent who was in the office, and told her that it was "disgusting", Child X had kicked her in the stomach and that she needed to ring his parents and have him sent home. She also referred to how staff were going to cope with no ESW worker. Ms Griffiths says that she then went to the staffroom, "very stressed and crying and still shaking and needing to get away from this child!".

[18] The Acting Head for the Extension Room went to see Ms Griffiths, and then Brenda Leonard went to talk to her. According to Ms Griffiths, Brenda Leonard asked Ms Griffiths "Michelle, do you hate X?". Ms Griffiths says that she was shocked at this question and felt that Brenda Leonard did not value her as a staff member or a teacher. Ms Griffiths says that she angrily denied that she hated X. Ms Smith then also entered the staffroom and spoke to Ms Griffiths.

[19] According to Brenda Leonard, when Ms Griffiths brought Child X into the office "the office door flung open and, amidst a loud barrage of noise, X was shoved through the door and landed on the ground". In relation to her alleged question to Ms Griffiths, Brenda Leonard says that Ms Griffiths had made:

... a lot of accusations about safety and no support. After listening to her for a while I realised that X was definitely a problem to her. I did ask her "*do you not like X?*".

[20] Brenda Leonard denies asking whether Ms Griffiths hated Child X.

[21] According to the evidence of Ms Smith, when Ms Griffiths brought Child X into the office, she had Child X gripped by the upper right arm, had thrust him down onto the floor and had "continued to berate him".

[22] Ms Smith said that Ms Griffiths had demanded that something be done about Child X, and Ms Smith agreed, and so she set up a meeting that afternoon, inviting Karen Pearce, a Special Education Service Early Intervention Officer from the Ministry of Education, to discuss what they could do to assist the staff to deal with him, and to explain why the ESW hours were not to be renewed. To this end, a total of eight people attended the meeting, including Jazzlyn Leonard, Ms Smith, Brenda Leonard and Ms Griffiths herself. Ms Griffiths agreed to attend the meeting and offered to arrange for her daughter to come in and cover for her during it.

[23] During the Authority's investigation meeting, Ms Griffiths asserted that the meeting should not have been arranged for that afternoon, and that Ms Smith should have known that Ms Griffiths was too stressed. This does not accord with the fact that she arranged her daughter to cover for her, though. I find that Ms Griffiths willingly attended the meeting, and that it was not unreasonable for the respondent to have arranged the meeting as a matter of urgency.

[24] According to Ms Griffiths, 15 minutes into the meeting, Ms Smith "stood up, and began to target me with verbal accusations against me". Ms Smith then asked Ms Griffiths "Michelle do you not like this child?". Ms Griffiths also says that Ms Smith blew a raspberry at her as she stood up to leave the meeting. According to Ms Griffiths, she is convinced that Ms Smith had the statement "totally planned" and was clearly setting out to upset her and show her up in front of Ms Pearce, and other staff. Ms Griffiths' evidence is that she immediately felt anger boiling over at the treatment of her, and stood up and said:

I am leaving, I am going home. I will not be treated like this, you are nasty bosses and I will not work for you anymore. You will be getting my resignation next week.

[25] Ms Griffiths' evidence is that it was her intention to give two weeks' written notice as was required by her employment agreement. She says that she would have used her two weeks to say goodbye to the children in her care, and the parents.

[26] According to Ms Griffiths, she then told one of the nursery staff that "Annie and Brenda are nasty bitches" and then got in her car to drive home. Brenda Leonard followed her to her car and they had a conversation during which, Ms Griffiths says, she told Brenda Leonard "the true facts about how they were nasty bosses". She says that she told Brenda Leonard that she would not be at work the following day.

[27] Ms Smith denies that she stood up, blew a raspberry or shouted at Ms Griffiths. She says that she had been advocating for a four year old child but does not deny that she asked Ms Griffiths whether she did not like Child X. All of the respondent's witnesses who had been present at the meeting agreed that Ms Smith had not stood up, blew a raspberry or shouted at Ms Griffiths. On these matters, I prefer the evidence of Ms Smith and the respondent's witnesses. Unlike Ms Griffiths, they were not very angry, and so were less likely to have seen the events through the distorting lens of an emotional reaction.

[28] According to the evidence of Jazzlyn Leonard, Ms Griffiths had been accusatory and aggressive towards Ms Pearce during the meeting, and had been demonstrating "with aggression the behaviours [of X] as she spoke, becoming louder and more expressive with her movements". She says that Ms Smith said "we love this little boy and want what is best for him", and when Ms Griffiths then recounted further incidents of Child X's violence, Ms Smith asked Ms Griffiths whether she even liked Child X.

[29] According to Brenda Leonard, she followed Ms Griffiths out to the carpark because she was concerned that she was so angry that she could have an accident in her car. Brenda Leonard says that Ms Griffiths told her that she meant what she said in the meeting, and that she would not return to work. Brenda Leonard says that Ms Griffiths stated "she would rather lose her house" (which she had recently purchased) "than return to work for a pack of bitches like you two". This suggests to me that Brenda Leonard had discussed with her whether she really intended to resign.

[30] Ms Griffiths did not attend work the next day (Wednesday 11 November), although she was rostered to do so. Her evidence is that, on that day, she received a

message from a staff member saying that she had not been rostered to work the following week (commencing 16 November 2015) and that the roster that had been sent out did not show her rostered for that week.

[31] Ms Griffiths says that she therefore texted Brenda Leonard asking why she was not on the roster and Brenda Leonard directed her to Ms Smith, who prepares the rosters. Ms Griffiths then received a text from Ms Smith. It is worth replicating in full the exchange of texts between Ms Griffiths, Brenda Leonard and Ms Smith on 11 November as Ms Griffiths relies on these text exchanges in support of her claim that she was dismissed by the respondent:

Wednesday, 11 November between Ms Griffiths and Brenda Leonard:

Ms Griffiths: I have just been told by other staff that i am not rostered next week.

Brenda Leonard: Check with Annie you told everyone you were resigning.

Ms Griffiths: I havent resignd yet. I told her i would do it next week and i have to give two weeks notice as stated in my contract.

Wednesday , 11 November between Ms Griffiths and Ms Smith:

Ms Smith: Your verbal resignation has been accepted and we will pay you out two weeks notice rather than have you back. Your conduct is sufficient for instant dismissal but we choose to accept your resignation. If this is not acceptable contact your lawyer as we have done ours.

Ms Griffiths: You cant do that havent resignd i said you will get my resignation next week. I have already contactxd lawer. I have a witness that heard you saying bad things bout me over the phone to an outside party. That ssid i have a good case in court.

Ms Smith: NEVER EVER have I done that, bring your witness absolute rubbish.
Do you really want to work for Brenda and I after all the disgusting things you said about us? If you want a meeting I will make myself available tomorrow at 10.30am as will Bren [Brenda Leonard] and Kylie [?], that's all I can offer, I was left shocked yesterday, absolutely shocked.

Ms Griffiths: So was i annie you new i wS stressd you shouldnt have had that meetn you should have left it. you humiliatd me in front of everyone. I have workd my butt off for you and you just dont support the staff.

Ms Smith: Your apparent hatred of me and Bren and your willingness to share this feeling with all who will listen makes this situation very ugly. A Meeting is the best option in all our opinions. Paying you out is a generous solution. But the ball is now in your court. Please let me know if you wish to meet tomorrow. Failing a solution being reached we will wait to hear from your lawyer.

Ms Griffiths: I will not meet with you.

[32] According to the parties, a new roster was sent to Ms Griffiths by email on Thursday 12 November which showed Ms Griffiths rostered on for the Monday, Wednesday and Friday of the week commencing 16 November 2015, but working in the Stepping Stones Room², rather than the Extension Room. Ms Griffiths acknowledges that the revised roster was sent on 12 November but says she did not see it until 17 November, when she next turned on her computer. However, during her oral evidence, she suggested that she had been aware that she had been put back on the roster before that date. Brenda Leonard also telephoned Ms Griffiths on 12 November asking her to attend a meeting later that day. Ms Griffiths refused to attend the meeting.

[33] Brenda Leonard wrote to Ms Griffiths later on 12 November referring to Ms Griffiths' not attending the meeting that she had suggested, and offering a new meeting on 17 November. The purpose of the meeting was "to discuss the events that occurred at yesterday's meeting"³. In the letter, Ms Griffiths was invited to bring "support people" along.

[34] On or around 12 November Ms Griffiths attended her GP and an ACC injury claim form was submitted for her in respect of the kick in the stomach.

[35] Ms Griffiths did not turn up for the first rostered shift on 16 November and Brenda Leonard called Ms Griffiths to ask her the reason. Brenda Leonard says that Ms Griffiths told her that she would not be back to work until she had spoken with her lawyer. Ms Griffiths accepts that, at some point during the telephone conversations between Ms Griffiths and Brenda Leonard, Brenda Leonard said to Ms Griffiths that she had not been "fired". Ms Griffiths said in evidence that she had not believed Brenda Leonard however.

² For children aged 2 to 4 years old.

³ Presumably, she meant the meeting of 10 November.

[36] On 18 November 2015, a firm of solicitors (Argyle Welsh Finnigan) wrote to the respondent on behalf of Ms Griffiths in which, amongst other things, it sought urgent confirmation as to whether Ms Griffiths' employment was continuing. The letter also raised a personal grievance for Ms Griffiths having been "treated in such an underhand and publicly humiliating way, such as the raspberries blown at her by Ms Smith".

[37] Ms Smith responded to the letter from Argyle Welsh Finnigan by way of a letter dated 20 November 2015. In this lengthy letter Ms Smith set out the respondent's version of the events, and also addressed some of the allegations in the letter from Argyle Welsh Finnigan. Ms Smith did not directly answer the question raised by the solicitors with respect to whether Ms Griffiths' employment was continuing but she did include the following paragraph in her response:

We also need to confirm that should Michelle return to work she would be working in the Stepping Stones area, her unexplained absences without doctor's note or medical certificate made it necessary for us to fill the teaching roll [sic] in the extension room, and the child in question continues to thrive in a positive environment.

By placing her in stepping stones she has more staff working alongside her which means there is more accountability for actions.

[38] Ms Smith's letter ended as follows:

In the event we hear nothing from Michelle by December 10th we will assume she was telling the truth when she offered her resignation, enquired for employment at other centres and has no intention of returning to work.

I am not clear what Michelle's proposed outcome is.

[39] There does not seem to be any further correspondence between the parties until Ms Griffiths sent an email to Ms Smith and Brenda Leonard on 26 November 2015 which stated the following:

After seeing my lawyers Kirsten Maclean and Madeline Henderson at Tavendale and partners on Tuesday they have advised me of the following details.

I am not employed at Child's Play anymore, and will not be returning. I have been illegally dismissed from my job by a text message from Annie Smith. I have not resigned from my job, there has been no written resignation giving you two weeks notice as written in my Employment contract.

You are legally required to instantly pay me out my two weeks notice (39 hours), as Annie said in her text message to me. You are also legally required to pay me my holiday paye [sic] owing. If this is not payed into my bank account by midnight on Friday the 27th of November I will be following the advice of my two lawyers, the Labour Department and the Ministry of Education.

[40] Ms Smith responded to Ms Griffiths saying:

We are more than happy to pay you out your holiday pay owing and also your 2 weeks' notice pay.

[41] Ms Smith also said that Brenda Leonard was out of the office on holiday until 7 December and that Brenda Leonard would deal with the matter as her "first priority" upon her return.

[42] On 3 December 2015, Brenda Leonard wrote to Ms Griffiths saying that all holiday wages owing had been deposited into her account but that two weeks' wages would be paid "on receipt of an official written resignation dated from the day of your 'verbal resignation' (10 November 2015)". Ms Griffiths characterises this letter as "blackmail".

[43] On 18 February 2016, Tavendale & Partners wrote a personal grievance letter to Brenda Leonard and Ms Smith in which they characterised the meeting on 10 November 2015 as a "disciplinary meeting" and saying that the respondent's reliance on Ms Griffiths' "heat of the moment" threat to resign was substantively unjustified. Whilst this personal grievance was raised more than 90 days after the events of 10 November 2015, I am satisfied that Ms Griffiths' personal grievance had been raised previously, both by her and Argyle Welsh Finnigan.

The issues

[44] The following issues need to be determined by the Authority:

- a. Whether Ms Griffiths was dismissed by the respondent, or whether she resigned from her employment;
- b. If she resigned, whether that resignation was a constructive dismissal;
- c. Whether Ms Griffiths suffered an unjustified disadvantage in her employment; and
- d. Whether Ms Griffiths should be paid two weeks' notice.

The applicable legal principles

[45] The starting point is the duty of good faith, owed by employers to employees, and vice versa. Section 4(1)(a) to (b) of the Act provides:

4 Parties to employment relationship to deal with each other in good faith

(1) The parties to an employment relationship specified in subsection (2)—

(a) must deal with each other in good faith; and

(b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—

(i) to mislead or deceive each other; or

(ii) that is likely to mislead or deceive each other.

(1A) The duty of good faith in subsection (1)—

(a) is wider in scope than the implied mutual obligations of trust and confidence; and

(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[46] In *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust*⁴ the Employment Court examined the concept of a dismissal, and reviewed a number of authorities. The following, overlapping principles can be extracted:

- a. Dismissal occurs at the initiative of the employer;
- b. Dismissal involves an act of the employer which results directly or consequentially in the termination of the employment, so that the employee does not voluntarily leave the employment relationship;
- c. It may not be necessary for the employer to intend the employment to end, but a termination at the initiative of the employer occurs if the cessation of the employment relationship is the probable consequence of the employer's conduct

[47] In *Taylor v Milburn Lime Ltd*⁵ the Employment Court addressed heat of the moment resignations. It stated⁶:

Where such doubt exists [as to whether an employee genuinely wishes to end the employment relationship] the good faith obligation to be “active and constructive in ... maintaining a

⁴ [2015] NZEmpC 89

⁵ [2011] NZEmpC 164

⁶ At paragraph [32]

productive employment relationship” requires an employer to investigate the situation further before responding to the supposed resignation. Put another way, where there is doubt, a fair and reasonable employer will ensure that its response is based on the employee’s actual intentions rather than on what might be inferred from equivocal words and conduct.

[48] At paragraph 34 of *Taylor*, the Court stated:

The duty to deal in good faith is a mutual one. Employees have the same duties as employers to be active and constructive in maintaining the employment relationship. They too are required to be responsive and communicative.

Was Ms Griffiths dismissed by the respondent, or did she resign from her employment?

[49] The starting point is that Ms Griffiths indicated her intention to submit her resignation when she walked out of the meeting on 10 November 2015. This indication was undoubtedly declared in the heat of the moment, as Ms Griffiths was clearly angry at what she saw as an attack on her. However, she appears to have never changed her position in respect of her intention to leave. She also says that her intention was to work two weeks’ notice, so that she could say goodbye to the children and parents.

[50] The respondent initially did not take any steps to repair the relationship⁷. By removing Ms Griffiths from the roster for the following week, and Ms Smith sending her the text accepting the resignation, the respondent was taking advantage of Ms Griffiths’ emotional, heat of the moment declaration of an intention to resign. Ms Smith’s text was also, in my view, an emotional (if not exactly a heat of the moment) response, as she was angry at the way Ms Griffiths had behaved, including insulting her and Brenda Leonard.

[51] However, soon after Ms Griffiths stated that she had not resigned, the respondent did then embark on a series of actions which I am satisfied were intended to attempt to repair the relationship. First, Ms Griffiths was restored to the roster. This should have been a signal to Ms Griffiths that she was still regarded as an employee. However, Ms Griffiths made no effort to attend work on the three days that she had been rostered to work.

⁷ Save for Brenda Leonard speaking to Ms Griffiths in her car immediately after she walked out of the meeting.

[52] Second, Brenda Leonard sought to meet with Ms Griffiths, first with Ms Smith present, and secondly without her, as it was believed that Ms Smith's presence may inflame the situation. Ms Griffiths flatly refused to meet with her employers until she had seen her lawyers. However, in my view, it was appropriate for the respondent to seek to meet with Ms Griffiths to discuss matters, given the unsatisfactory way that matters stood between the parties.

[53] Third, as Ms Griffiths concedes, Brenda Leonard expressly told Ms Griffiths on or around 17 November 2015 that she had not been fired, but Ms Griffiths says she did not believe her. Whilst this disbelief on Ms Griffiths' part may have been reasonable had there been continuing signals from Ms Smith that she did not want Ms Griffiths back, the fact of Ms Smith putting Ms Griffiths back on the roster contradicted such a view.

[54] Finally, Ms Smith's letter of 20 November, whilst not expressly saying that Ms Griffiths had not been dismissed, clearly contemplated her return to work as a possibility, as it speaks about Ms Griffiths returning to work in Stepping Stones. It is not surprising, however, that Ms Smith would have been uncertain as to Ms Griffiths' intentions given, on the one hand, her outburst on 10 November, the declaration of an intention to resign, the refusal to attend meetings to discuss her situation and her failure to work the rosters that she had been assigned to, and her lawyer's question as to her employment status on the other hand. The question posed by the lawyers for Ms Griffiths, as to whether her employment was continuing or not, was one that the respondent could equally have posed to Ms Griffiths.

[55] Both parties had a duty to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative⁸. There is clear evidence that, as soon as Ms Griffiths stated that she had not resigned, the respondent made efforts on several occasions to keep a line of communication going with Ms Griffiths, up until 20 November 2015. In other words, the respondent "investigate[d] the situation further before responding to the supposed resignation", as contemplated in *Taylor*.

[56] On the other hand, Ms Griffiths was not active and constructive in establishing and maintaining a productive employment relationship. Whilst I accept that Ms

⁸ Section 4(1A)(b) of the Act.

Griffiths originally genuinely believed that her employment had been terminated by the text from Ms Smith, and that her lawyers apparently advised her that this was the case, that view became increasingly unsustainable as the respondent attempted to take steps to meet with Ms Griffiths so as to clarify her intentions, reinstated her to the roster, stated expressly that she had not been fired and contemplated her return to Stepping Stones. Ms Griffiths' duty of good faith obligated her to engage proactively in these attempts to resolve the relationship problem, but she failed to do so.

[57] On the contrary, it appears that Ms Griffiths grasped fixedly onto the presumed dismissal in Ms Smith's text, while doggedly ignoring the respondent's subsequent attempts to resolve the matter. However, an employment relationship is of a dynamic nature, which s.4(1A)(b) recognises, and an unbending and intransigent refusal to adapt to the changing circumstances of the relationship risks breaching the duty set out in that subsection.

[58] Furthermore, Ms Griffiths wished to dictate when her resignation would take effect by asserting that it did so only when she chose to confirm it in writing. She seeks to rely on the terms of the employment agreement to argue that, notwithstanding her angry and insulting words to and about Ms Smith and Brenda Leonard, her clear declaration of an intention to resign and her continued absence from work, she cannot be taken to have resigned from her employment until she chose to signal that decision in writing.

[59] With respect to Ms Griffiths, this is a misconceived approach. Whilst the employment agreement states that the employee may terminate the contract by giving two weeks' written notice, that wording does not preclude an employee taking other actions that signal an intention to resign upon which the employer is entitled to rely, at least by inferring that the intention will be carried out. There must be implied into the wording of the clause a requirement to behave reasonably on the part of the employee. It is not reasonable for an employee to declare an intention to resign, and then take no action to either do so or to withdraw that intention, as the employer is entitled to know whether or when their employee would be leaving.

[60] Ms Griffiths also stated in evidence that she could choose how much notice she gave, and could have given six weeks' notice if she wished. This is not, however, the case. The contract stipulated two weeks' notice. She could only vary that notice period with the agreement of the employer.

[61] Furthermore, the text that Ms Griffiths relies on to argue she was dismissed did not constitute in clear terms a dismissal, speaking as it does of Ms Griffiths' conduct being sufficient for instant dismissal, but the company choosing to accept her resignation instead. This wording does not clearly lead to a conclusion that Ms Griffiths had been dismissed.

[62] However, even if it did, the respondent quickly changed its position. Ms Griffiths seeks to rely upon the doctrine relating to heat of the moment resignations, whereby an employer is expected to make enquiries where there is doubt as to the employee's intentions, but at the same time closed her mind to the signals that the employer were sending to confirm she had not been dismissed.

[63] In conclusion, I do not accept that the termination of Ms Griffiths' employment was at the initiative of the respondent. In other words, Ms Griffiths was not dismissed by way of Ms Smith's text message to her.

Was Ms Griffiths' resignation a constructive dismissal?

[64] I shall briefly consider whether Ms Griffiths' resignation can be viewed as a constructive dismissal, even though this has not been pleaded, as the facts lend themselves to such a possible interpretation. In order for it to be so, she must have resigned in response to an action which constitutes the repudiation of the contract by the respondent⁹. Furthermore, the resignation must have been foreseeable¹⁰.

[65] What prompted the resignation was Ms Smith asking if Ms Griffiths "even liked the child", after Brenda Leonard has asked a similar question earlier that day¹¹. Ms Griffiths believes that Ms Smith and Brenda Leonard had conspired to ask the same question in order to humiliate her. On balance, I am satisfied that they had not done so. Not only was their evidence credible, but there was no obvious reason why the respondent should have chosen to have done so.

[66] I understand that Ms Griffiths is particularly upset that Ms Smith had deliberately conspired with Brenda Leonard to ask the question in front of the Minister of Education representative, and her colleagues. This has two elements – the

⁹ *Auckland Shop Employees Union v. Woolworths (NZ) Ltd*, [1985] 2 NZLR 372 (CA)

¹⁰ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc.* [1994] 2 NZLR 415 (CA)

¹¹ I do not regard it as material as to whether Brenda Leonard used the word "hate" or not.

alleged conspiring, and the asking of the question in front of Karen Pearce and Ms Griffiths' colleagues.

[67] I have already found that there was no conspiring between Brenda Leonard and Ms Smith. Ms Griffiths has made a presumption for which I find there is insufficient evidence.

[68] With respect to the asking of the question in front of Karen Pearce and Ms Griffiths' colleagues, I do agree that it would have been better if Ms Smith had not asked the question in front of the others, as it was clearly likely to be seen as a public criticism of Ms Griffiths. However, the context in which the question was asked is important. That context was Ms Griffiths demonstrably conveying to the same people in the same meeting that she had difficulty dealing with Child X and his behaviour, and that she was not happy with the Ministry of Education's decision to not renew the ESW hours.

[69] Within the context of the evidence I have heard, I do not believe the question asked of Ms Griffiths was itself an unreasonable one, as I believe Ms Griffiths' behaviour and words in respect of Child X were capable of implying a dislike of him. The key issue is, was the asking of the question at the meeting, in front of the six other participants, capable of being a repudiatory breach of contract, so as to allow Ms Griffiths to resign?

[70] I do not believe it was. Whilst the asking of the question could foreseeably have made Ms Griffiths uncomfortable, I do not accept that it could reasonably be treated as having fundamentally destroyed the duty of trust and confidence between the parties. Ms Griffiths' fury at the question resulted partly from her belief that the question was a set-up, resulting from collusion between Ms Smith and Brenda Leonard. Without that element of deliberate conspiracy though, the action of Ms Smith in asking the question in the meeting was no more than one of questionable judgement, when viewed with the benefit of hindsight. I do not believe that it could have foreseeably led to Ms Griffiths' resignation.

[71] Therefore, I am clear that Ms Griffiths' resignation was not a constructive dismissal.

Did Ms Griffiths suffer an unjustified disadvantage in her employment?

[72] Whilst Ms Griffiths did not plead expressly that she had suffered an unjustified disadvantage in her employment, it is arguable that the personal grievance raised on her behalf by Argyle Welsh Finnigan in their letter dated 18 November 2015 does so when it refers to Ms Griffiths being treated “in such an underhand and publically humiliating way, such as raspberries blown at her”.

[73] Section 103 (1)(b) of the Act provides as follows:

103 Personal grievance

(1) For the purposes of this Act, *personal grievance* means any grievance that an employee may have against the employee's employer or former employer because of a claim—

...

(b) that the employee's employment, or 1 or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;

[74] Section 122 of the Act makes clear that nothing in Part 9 of the Act or in any employment agreement prevent a finding that a personal grievance is of a type other than that alleged. Therefore, the Authority has the jurisdiction to consider this question.

[75] The possible alleged disadvantage that Ms Griffiths suffered, therefore, is being asked by Ms Smith in a meeting with five colleagues and an outside visitor from the Ministry of Education whether she even liked Child X, such a question having been deliberately planned in collaboration with Brenda Leonard, and then having a raspberry blown at her.

[76] First, I have already found that there was no collaboration between Ms Smith and Brenda Leonard to ask the question. The collaboration, and planning part of the alleged action did not happen therefore.

[77] Second, I have found that Ms Smith did not blow a raspberry at Ms Griffiths.

[78] Third, the question was asked of Ms Griffiths in the meeting. Is this capable of being a disadvantage in Ms Griffiths' employment? I believe it is, as it caused Ms Griffiths embarrassment. Was that disadvantage unjustified? Given the context in which the question was asked, where Ms Griffiths was displaying animosity towards

Child X in that same meeting, I believe that the question was justified, as I find that a fair and reasonable employer could have asked that question in all the circumstances that prevailed at the time. Therefore, no unjustified disadvantage was suffered.

[79] If I am wrong in that respect, then I would find that Ms Griffiths contributed to the disadvantage in such a degree, that it would not be just or equitable to award her any compensation in respect of it. I rely on *Xtreme Dining Limited trading as Think Steel v Leighton Dewar*¹² to reach that alternative conclusion.

Payment for two weeks' notice

[80] I see no legitimate reason for the respondent to continue to withhold two weeks' pay from Ms Griffiths, given its stated willingness to do so if Ms Griffiths' provides a written resignation. The reason for this stipulation was, according to Brenda Leonard, because the company needs "the paperwork" to justify the payment.

[81] However, Ms Smith had stated expressly that Ms Griffiths would be paid two weeks' notice pay both in her text of 11 November, and in her letter of 20 November 2015. Brenda Leonard then unilaterally imposed the condition that Ms Griffiths had to provide a written resignation.

[82] It would appear that, but for Ms Griffiths' misunderstanding as to the meaning of the text she received from Ms Smith, which made her think that she had been dismissed, Ms Griffiths had been prepared to work the two weeks' notice. Her failure to do so arose out of her misunderstanding. I do not believe it would be just to deprive Ms Griffiths of two weeks' pay in lieu of notice in these circumstances, and I therefore order the respondent to pay her the sum of two weeks' wages. This determination can provide the paperwork that the respondent requires.

Order

[83] I order the respondent to pay to Ms Griffiths a sum equivalent to two weeks' net pay.

¹² [2016] NZEmpC 136, at paragraph 216.

Costs

[84] The respondent has not been represented professionally during the Authority's proceedings and has not, presumably, therefore incurred any costs in respect of them. I therefore make no order as to costs.

David Appleton
Member of the Employment Relations Authority