

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2019] NZERA 535
3061894

BETWEEN	SARAH HANSEN Applicant
AND	BLOOM CHILDCARE LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Warwick Reid for Applicant Katrina Pfeifer for Respondent
Investigation Meeting:	13 September 2019
Oral Determination:	13 September 2019
Record of Oral Determination:	16 September 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

- A. One or more conditions of Ms Hansen's employment were affected to her disadvantage by the unjustified actions of Bloom Childcare Limited.**
- B. Bloom Childcare Limited is ordered to pay to Ms Hansen the sum of \$4,500 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.**
- C. Costs are reserved.**

Employment relationship problem

[1] As the name suggests Bloom Childcare Limited (BCL) owns and operates a childcare facility where Ms Hansen worked as a teacher. Following a complaint that Ms Hansen had handled a child incorrectly she was issued with a written warning. Ms Hansen challenges the warning which she says was unjustified.

[2] BCL denies the claims.

Issues

[3] In order to resolve Ms Hansen's application I must determine whether one or more conditions of her employment were affected to her disadvantage by the issue of the warning and if so what if any remedies should be awarded.

[4] As permitted by s 174E of the Employment Relations Act (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 as a result. It has not recorded all evidence and submissions received.

Relevant terms and conditions of employment

[5] The terms and conditions of Ms Hansen's employment are set out in a written employment agreement and policy documents published by BCL. Clauses 21.3 and 21.4 of the employment agreement sets out the parties definitions of serious misconduct and misconduct. Included in the examples of behaviour that may amount to misconduct are breaches of work rules or policies which are not considered serious.

[6] BCL has published a policy setting out its expectations around the treatment of children in its care. This includes expectations that teachers will not use force by way of correction or punishment nor speak harshly toward children or belittle them.

[7] It was common ground that Ms Hansen was aware of and had been inducted into the expectations set out in the policy.

Prior conduct

[8] Ms Nicola James, Centre Manager, says she observed Ms Hansen roughly handling a child at the centre on 18 December 2018. This incident informed the decision made by BCL to issue a warning to Ms Hansen in January 2019.

[9] At a regular one on one meeting already scheduled for 21 December 2018 Ms James raised with Ms Hansen what she had observed three days earlier. During the meeting Ms James recorded notes on her laptop. These notes record Ms James had observed Ms Hansen rough handling and growling at children a few times. No further details were provided or set out in the record of the meeting. Ms Hansen told me the discussion was not focussed on her conduct toward children so much as her apparent stress levels in dealing with the children.

[10] Ms James told me she discussed a number of strategies with Ms Hansen for dealing with stressful situations including that Ms Hansen take regular annual leave breaks, make contact with her team leader, swap out with another teacher, or take a ten minute break.

[11] Ms Hansen denies being told to take regular leave but acknowledged the strategies as set out by Ms James were discussed. Ms Hansen made use of the swapping out strategy on at least two occasions between 21 December 2018 and 14 January 2019.

[12] I am satisfied it is more likely than not that the focus of the meeting on 21 December was on identifying strategies to support Ms Hansen during stressful times working with the children and did not focus on particular events or incidents.

The warning

[13] Ms Hansen was issued a written warning for rough handling a child in breach of BCL's policy around the handling of children. The written warning was drafted following a meeting with Ms Hansen on 14 January 2019 and handed to her on 16 January 2019.

[14] Ms Hansen bears the onus of establishing on the balance of probabilities that she was disadvantaged in her employment. I am satisfied she has done that. Having a warning on your file is a disadvantageous action. It put Ms Hansen closer to dismissal than would have been the case if there had not been a warning issued.

[15] A warning has consequences for teachers not apparent in other employment relationships. This is because when a teacher is issued with a warning it is mandatory for the employer to report this action to the Teacher's Council which may impact on Ms Hansen's registration.

[16] Having established one or more conditions of her employment were affected to her disadvantage the burden moves to BCL to establish on the balance of probabilities that the disadvantage Ms Hansen suffered was justified. The justification test in s 103A of the Act is to be applied by the Authority in determining justification of an action. This is not done by considering what the Authority may have done in the circumstances.

[17] The Authority is required under section 103A of the Act to consider on an objective basis whether BCL's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances.

[18] On 13 January 2019 Ms James received a verbal report from a parent who informed her that she had observed Ms Hansen being rough with a child at the centre. It was common ground that the child in question had behavioural issues which contributed to difficulties in dealing with the child.

[19] After arriving at work on 14 January Ms Hansen was asked to attend a meeting with Ms James and Mr Daryl Scott an owner of BCL. During this meeting Ms Hansen was told that an allegation had been made against her. Ms Hansen was told she had been observed handling a child roughly.

[20] No notes were taken during the meeting and at the Authority's investigation meeting there was a dispute about what information was disclosed to Ms Hansen and whether Ms Hansen agreed she had roughly handled a child.

[21] In order to reach my conclusions in this matter I have carefully evaluated the evidence I heard and considered how reasonable, plausible and probable the evidence is. I have also taken into account what documentation exists to support one version or another.

[22] The onus of proof is on the balance of probabilities. This means I am required to determine which version of events is more likely than not. I have found this to be a difficult exercise. This is because no notes were taken or made at the time about the parent's disclosure or during any of the meetings between Ms Hansen and her employer.

[23] When Ms Hansen attended the meeting on 14 January it was intended to be an investigation meeting and was not considered by either Ms James or Mr Scott to be a disciplinary meeting. The consequence of this is that there was an absence of any notion of procedural fairness applying to the meeting on 14 January.

[24] Ms Hansen was not forewarned that disciplinary action was a possibility, she was given no opportunity to seek advice or support during the meeting and was not provided with all relevant information regarding the allegations against her.

[25] Ms Hansen told me she was only given very general information about the allegation and that when she asked for more particulars she was told they did not matter. BCL says Ms Hansen asked for the name of the parent but because the parent had asked for anonymity it refused to provide it. BCL says Ms Hansen identified who the child was and apologised which lead Ms James and Mr Scott to believe Ms Hansen knew of the circumstances and was sorry for her behaviour.

[26] I have accepted Ms Hansen's evidence that she requested additional information during the 14 January meeting. The information was important to allow Ms Hansen a proper opportunity to respond. Ms Hansen was entitled to know who the child was and the circumstances around the incident. BCL's failure to provide this information was unreasonable.

[27] The nature of the meeting changed when, during the meeting, Ms James and Mr Scott became satisfied Ms Hansen had agreed that she had conducted herself as alleged and apologised. It is clear from the evidence at the investigation meeting that Ms Hansen did not intend her apology to confirm an acceptance that she had misconducted herself.

[28] Ms Hansen told me she did ask if it was a particular child due to the difficulties associated with dealing with that child. Ms Hansen told me she did say

she was sorry, but was not apologising for her conduct, rather for any embarrassment that may have been caused to the reputation of the center.

[29] It was common ground that after the meeting Ms Hansen left the workplace for about 10 minutes. During that time she says she sat in her car and her head was spinning. When she returned to the workplace Ms Hansen met again with Ms James. The content of that discussion is disputed. I find it is more likely than not that the focus of that discussion was about whether Ms James wanted to keep Ms Hansen employed at the centre and about BCL's obligation to report to the Ministry of Education and was not concerned about whether a warning was an appropriate sanction.

[30] Mr Scott met with the parent on 14 January after the meeting with Ms Hansen. No notes were made of that discussion and the content of the discussion was not disclosed to Ms Hansen. It is not known what, if any, impact the discussions with the parent had on the decision to issue Ms Hansen with a written warning.

[31] I find the issue of the warning was not an action an employer could fairly and reasonably have taken in the circumstances at the time. Apart from the lack of procedural fairness Ms Hansen's conduct observed on 18 December was taken into account in circumstances where she had not had an opportunity to respond fully to Ms James concerns about that incident.

[32] Ms Hansen has established that one or more conditions of her employment were affected to her disadvantage by the unjustified actions of the employer.

Remedies

[33] Ms Hansen seeks the payment of compensation of \$15,000 under s 123(1)(c)(i) of the Act. Ms Hansen told me she felt sidelined and powerless as a result of receiving the warning. Shortly after being issued with the warning Ms Hansen resigned and left her employment.

[34] The evidence as to impact was limited and does not support an award at the level sought by Ms Hansen. I acknowledge the warning would have had some impact on Ms Hansen and in particular when she left her employment notification that a warning had been issued was notified to the Ministry of Education.

[35] In all the circumstances of this case subject to my findings on contribution I consider an appropriate award to be \$6,000.

Contribtuion

[36] As I have awarded remedies to Ms Hansen, I must now consider whether she contributed to the situation that gave rise to her grievance.¹

[37] When assessing if Ms Hansen's actions contributed to the situation that gave rise to her grievance I am looking for a causal link between her actions and the situation that gave rise to the unjustified disadvantage, that is the warning.

[38] I am satisfied Ms Hansen contributed to the situation that gave rise to the warning that was issued. At the investigation meeting she acknowledged she had used physical intervention to prevent the child from leaving the bathroom area and it is likely this is what the parent observed.

[39] Also, I have accepted the evidence of Ms Hansen's team leader that she had spoken to Ms Hansen on a number of occasions, both individually and as part of the team of teachers working together, about positive ways to deal with the child concerned and that Ms Hansen's actions were outside what would be expected.

[40] I consider Ms Hansen's conduct was causative and blameworthy and warrants a reduction of 25% percent.

[41] Bloom Childcare Limited is ordered to pay to Ms Hansen the sum of \$4,500 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

Costs

[42] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Hansen shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. BCL shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

¹ Employment Relations Act 2000, s 124.

[43] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority