

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 120
5366095

BETWEEN HARMONY MAY
Applicant
AND FORDELL PRE-SCHOOL INC
Respondent

Member of Authority: P R Stapp
Representatives: Vicki Eades, Advocate for Applicant
Darren Mitchell, Advocate for Respondents
Investigation Meeting: 27 June 2012 at Wanganui
Submissions by: 12 July 2012
Date of Determination: 1 October 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an employment relationship problem that involved two separate complaints made against Harmony May, a preschool teacher, about her allegedly inappropriately touching two children, in separate incidents. The two complaints became the subject of an investigation and disciplinary process. This led to Ms May's dismissal on 28 February 2011. Ms May disputes the version of events involved with both complaints. She denies that she inappropriately touched either of the children.

[2] She claims that her dismissal was unjustified and that the preschool has breached its own procedures and policies making the actions of her employer unfair, biased and prejudicial. The preschool denies all Ms May's claims.

The issues

[3] The issues involved in this matter are summarised as follows:

- a. What did the employer rely upon in reaching its preliminary decision and final decision to dismiss Ms May?
- b. Did the employer breach its own policies and procedures in regard to the investigation and disciplinary action?
- c. Did the employer conduct a fair investigation and reach a decision based on proper and reasonable grounds?
- d. The dismissal occurred prior to 1 April 2011 and the test that is applied is what a fair and reasonable employer would have done pursuant to section 103 A of the Employment Relations Act 2000.

Background to the complaints*Child 1: the first complaint-21 October 2010*

[4] It was alleged by Amanda Miller who was visiting the pre-school that she had seen Ms May get frustrated with a boy and that she stood up and grabbed the boy's upper arm firmly, lifted him off the ground and held him under his arm while saying loudly "*you do not speak while I am speaking and you can sit on the couch for time out*". She complained that Ms May roughly handled the boy. She could not recall the actual date of the incident. She says that although there was some discussion amongst adults present at the time and the incident was reported to the head teacher no action occurred. Instead she says that she mentioned it to Nicky Pearce the pre-school chair person on 4 December 2010 while they were having coffee. Ms Miller wanted to remain anonymous to avoid making any waves. Therefore Ms Pearce made a note of what Ms Miller had seen. Amanda Miller appeared at the Authority's investigation and gave her version of the incident and sequence of events. On 7 December 2010 Ms Pearce gave Ms May the details for comment.

Child 2: the second complaint 3 December 2010

[5] On Friday 10 December 2010 Jane Bowler the head teacher advised Ms Pearce that there had been an incident involving Ms May and a child at the pre-school on 3 December. Ms Bowler put in writing her account of the incident. This involved Ms Bowler saying that at mat time Ms May got agitated when two boys were behind an easel, and a girl walked towards them to see what they were doing and Ms May grabbed the girl's arm roughly and pulled her down on to the mat. The girl cried and was holding her arm.

Notice and conduct of the investigation

[6] A sub committee was delegated responsibility to investigate the matter and involved Nicky Pearce, Cath Cranstone committee member and Anna MacIntosh office manager/secretary. A meeting was arranged for a discussion and to obtain Ms May's comments on both incidents. Initially she was advised personally by Ms Pearce of the first incident and given the letter and the note of the verbal complaint. The second incident involving Ms Bowler's complaint was provided in writing. By this time Ms May had obtained representation. Although the pre-school would have ideally liked to have had a meeting earlier all the parties had to wait until the New Year because of availability, and Ms May had taken stress leave.

A preliminary decision and dismissal

[7] The parties met on 9 February 2011. In attendance were Anna MacIntosh because Ms Pearce could not attend, and Cath Cranstone. Ms May had a support person Dianne Hood present. Ms May read out a prepared statement. It was confirmed that a relief teacher was present and witnessed the first incident, and that she said that she saw Ms May lift the child with two hands. The committee says that this witness supported the claim that Ms May's action was rough and that she used harsh words. The meeting was adjourned to enable the pre-school committee members responsible for the matter to consider what Ms May had said. It was agreed the parties would meet again later.

[8] Ms Pearce says that after the meeting she contacted the complainants (Ms Miller and Ms Bowler) to ask them if they stood by their complaints. Ms Miller could not recall anyone contacting her again, and she says she had no further involvement. Also Ms May advised Ms Pearce that a student teacher was present on the day of the

child one incident. Ms Pearce says she telephoned the student teacher who could not recall an incident. Because the matter was inconclusive with that information Ms Pearce excluded the student teacher as a witness in the process.

The alleged suspension

[9] It has been alleged Ms May was suspended on 11 February 2011. This has been disputed by the preschool, and I accept that the word “suspension” was not used, and it was more likely than not that Ms May accepted taking paid discretionary leave. I accept that Ms Pearce did not use the correct terminology at first, and needed to correct her self in regard to this arrangement and how she presented it to Ms May. I accept Ms Pearce’s version, backed up by Ms Cranstone, because their approach to the meeting followed legal advice on what they needed to do and it was Ms Pearce’s first time being involved in such a situation. Also, Ms May did not complain at the time, and this has only become an issue for her representative. Ms May raised her concerns about how she was to do her work while the matter was being discussed, and I accept that she concurred with the outcome to take leave as a way of resolving the issues. This is consistent with Ms May taking stress leave earlier. Thus, I conclude there was no unjustified suspension as such. Ms May continued to get paid and engaged in the next stages of the procedure with representation. Therefore I hold that this is not a separate employment relationship to be resolved.

14 February meeting

[10] On 14 February 2011 the parties met again and Ms May denied the allegations, despite admitting having some physical contact with the two children. She completely denied that the allegations involved mistreating the children. She explained about child one’s behaviour that led to the incident, and it has been agreed that the child had particular difficulties and behavioural problems. Also, she explained that child two would have walked over other children and that would have led to a possible hazard. The meeting was adjourned for consideration of Ms May’s responses. A full report was completed where it was found that two incidents had occurred, involving inappropriate treatment of children. This was according to Ms Cranstone based on the following:

- i. That Ms May was unable to recall certain things such as the visitor who had complained when she said she knew what the person looked like and was someone unknown to her.
- ii. That Ms May denied saying that she was not “*stepping over the line that day*” and had the chance to comment on it, but did not do so
- iii. That the complainants stuck with what they said. However there is a question about how reliable this was given that Amanda Miller did not recall Ms Pearce going back to her.
- iv. That Ms May was unconvincing.
- v. That Ms May showed no concern and was not remorseful about the welfare of the children.
- vi. That Ms May tried to pass the blame on to others.
- vii. That she allegedly said that she had no confidence in the committee.

[11] In addition the report recorded that the relief teacher’s version was closer to the version provided by Amanda Miller than what Ms May said happened. Ms May’s responses were not accepted and that the allegations had been substantiated. It was recommended that disciplinary action should follow. Ms May and her representative were advised that dismissal was a preliminary decision. Another meeting occurred on 25 February for Ms May to respond on the preliminary decision as to penalty. The dismissal followed.

Determination

[12] The allegations are grave ones and the employer has to have a high level of evidence to meet the gravity of the allegations. Therefore that means the test required of the employer is at the high end of the scale.

[13] First there have been a number of matters raised about the procedure and best practice in regard to the pre school’s policies included by Ms May to claim unjustified action disadvantage claims. I hold that they are out of time and only serve as background in the employment relationship problem, which is essentially about Ms May’s dismissal. I have previously dealt with the suspension issue. The other matters

have been included in an attempt to link them to breaches of good faith. The specific claims relating to causes of action for unjustified action and disadvantage have been pleaded unclearly, and in any event would not meet the 90 day requirement for raising a personal grievance. This was particularly so for the alleged suspension since it was raised for the first time in the representative's letter in terms that were too broad. I have treated them all as background in the matter.

[14] Second the employer relied upon the two incidents (with child one and child two) to reach a conclusion that Ms May inappropriately touched the two children concerned. However, the employer's decision was flawed, I hold. A fair and reasonable employer would not have come to such a decision because of the following:

- i. That Ms May's explanation was not accurately put to Amanda Miller for any comment and response to obtain a fair conclusion. I am not satisfied that Ms Pearce did go back to Ms Miller when she obtained the detail of Ms May's explanation. Even if she had gone back to Ms Miller the evidence is inconclusive that she did any more than just ask if Ms Miller stood by her complaint. A fair and reasonable employer would have done more than that, I hold. This is because this was the first main complaint, and Ms May had an entirely different point of view about what happened.
- ii. That the account of the incident with child one given by Ms Miller was different to the evidence I heard from Gabrielle Downes, relief teacher, about the same incident she says that she saw. For example she said that Ms May picked child one up under the arm pits and demonstrated that she used both arms, while Ms Miller referred to the child being picked up under one arm pit. The preschool relied upon the latter version. I am satisfied that a fair and reasonable employer would have given Ms Downes' information weight as it did and that she also confirmed that there was some force and what Ms May had to say was in a harsh tone. However this has to be considered with the preschool's finding that "[There was some indication of bad behaviour of the children and lack of support from colleagues]" (report).

- iii. That the head teacher never raised the child one incident for 7 weeks after the event. The matter was taken up by the committee as soon as it had been commented on by Ms Miller and Ms Downes. The point is that the committee was entitled to take the matter up, but a fair and reasonable employer would have given more weight to the fact that the head teacher never considered raising the matter for at least 7 weeks in which Ms May remained at work.
- iv. That the student teacher's information was included in the report and a fair and reasonable employer would have taken it into account since she did not see anything, especially since Ms May had a different account of what happened to Ms Miller and Ms Downes and that Ms Miller and Ms Downes even had different recollections of what happened. This does have an implication on the context of what happened since she did not see anything happen in the same room. Instead the employer concluded her information was not conclusive either way. I accept that an employer was entitled to accept that something happened given both accounts from Ms Miller's and Ms Downs' and Ms May's versions, but the head teacher never raised the matter early and only did so when other people had commented on it. These are factors that would put the matter at top end of the scale for serious misconduct. This is consistent with the evidence that the matter related to less serious behaviour.
- v. That Ms Pearce informed me that the decision related to misconduct rather than serious misconduct. In other words the decision was not at the serious end of the scale to match the reasoning provided by the respondent to justify dismissal.
- vi. That the above is consistent with enabling Ms May to continue to work until the decision was made for her to go on leave after Ms May raised problems about being at work and the policy being applied.

[15] In addition, the employer reached an additional and new conclusion to dismiss Ms May when it was decided that she could not be trusted not to do the same thing again. This conclusion was included for the first time in the dismissal letter and statements of evidence from Ms Pearce [page 9, paragraph 40] and another committee

member, Ms Cranstone [page 6, paragraph 22]. Ms May had no opportunity to comment on this conclusion in regard to the tentative decision on a penalty having regard to the findings in the report.

[16] Thus I hold that the employer has not relied on evidence sufficient to meet the gravity of the allegations for serious misconduct.

[17] For the above reasons Ms May has a personal grievance. Although the allegations were not raised in the first instance by the head teacher it was well within the rights of the committee members to pursue the matter and set up a sub committee to deal with the allegations, notwithstanding the minor defects in following the committee's policies and procedures. The failure of Ms May to have a support person present during the first and second meetings in December and February was not fatal because she was being alerted to the allegations and arrangements to meet, she agreed to take leave on pay and she was later properly represented during the important meetings. The head teacher's decision not to raise the matter with Ms May would be one of the circumstances the committee would need to consider. The committee did not need to interview the parents of the children in regard to the employment relationship problem. However a fair and reasonable employer would have interviewed the trainee teacher who says she saw nothing. The committee properly kept Anna Miller out of the decision making process and I am satisfied that the committee members who had been given the responsibility to deal with the problem were entitled to deal with it and that no prejudicial conflicts of interest existed.

Remedies for personal grievance

[18] Reinstatement was withdrawn earlier by Ms May. Ms May was paid \$20 per hour. She worked 30 hours per week. She has been successful in finding a new job (February 2012). She thought about other work immediately to cover her income loss, and she referred to thinking about cleaning, but did not actively seek work. Thus, I reduce her lost wages to three months (13 weeks). I assess her loss at three months (13 weeks). Ms May's lost wages amount to \$7,800. This amount is to be reduced by 25% for touching the children contrary to the preschool's policies and procedure. Her actions which could have been avoided have given rise to this entire problem, when she should have used different methods and interactions with the children, instead of touching them, and better interacted with other people present.

[19] I accept that Ms May was shocked and upset as she says about the events and how she feels she was treated. My assessment is that compensation amounts to \$6,000 to be reduced by 25% for contribution and blameworthy conduct. Fordell Pre-School Inc is to pay Ms May \$4,500 for hurt and humiliation under s 123 (1) (c (i) of the Act.

[20] Fordell Pre School Inc is to pay Harmony May:

- a) \$5,850 lost wages.
- b) \$4,500 compensation for hurt and humiliation.

[21] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority