

**ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION OF CERTAIN
INFORMATION (REFER PARAGRAPH 4)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2013] NZERA Auckland 330
5404483**

BETWEEN PHILLIPA PLESSIS
Applicant

AND KIDICORP LTD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Pascal Plessis, Advocate for Applicant
Adrienne Rekké, Advocate for Respondent

Investigation Meeting: 16 July 2013 at Tauranga

Submissions received: 16 July 2013 from Applicant
17 July 2013 from Respondent

Determination: 01 August 2013

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Ms Phillipa Plessis, claims that she has been unjustifiably constructively dismissed by the Respondent, Kidicorp Ltd (Kidicorp) following a complaint that she had mistreated a child in her care.

[2] Kidicorp denies that Ms Plessis was unjustifiably constructively dismissed, and claims that it had followed a fair and reasonable disciplinary process in relation to the complaint received.

Issues

[3] The issue for determination is whether Ms Plessis was unjustifiably constructively dismissed by Kidicorp.

Prohibition on publication

[4] **I order that the name of the child involved is not to be published. The child is to be referred to as Child A, a letter bearing no relationship to the child's actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

Background Facts

[5] Kidicorp is a nationally based childcare company offering various child care services including Montessori, Preschool, Day-care and Kindergarten services at eight centres across New Zealand.

[6] Ms Plessis commenced employment at the Kidicorp Kids to Five Dey Street Centre (the Centre) in Hamilton, initially on a casual basis and then on a permanent basis with effect from 2008 as a Teacher-in-training.

[7] During the period of her employment Ms Plessis had received performance appraisals which had been positive about her performance. In the performance appraisal completed for the period September 2010 to September 2011 Ms Debbie Jackson, Centre Manager, had written: "*You are always professional and always respect the children*".

[8] Ms Jackson, who had worked with Ms Plessis since 2008, said that she had had opportunities to observe Ms Plessis from time-to-time, and she had had no reason to think Ms Plessis's actions in regards to the children in her care were inappropriate.

[9] Ms Celeste Marsh, at that time Area Manager for the Hamilton area, said she had provided with Ms Plessis with teacher registration support over a five month period. This had involved one formal one hour observation and several informal observations. During those observation periods Ms Marsh confirmed that she had seen Ms Plessis, who had presented very well, engaging in appropriate practices.

Incident on 20 December 2011

[10] On 20 December 2011 the Centre, which was licensed for 70 children and which employed approximately 12 teachers, had a reduced number of children and teachers present due to the Christmas holiday break. As a result the use of some rooms had been combined to provide a better staff/child ratio.

[11] Ms Plessis, who had normally worked as a nursery teacher, said that on 20 December 2011 she had been asked to relieve in the pre-school room where she was to work with Ms Jeshika Remsi, another teacher.

[12] During the morning Ms Plessis said that Child A had repeatedly returned to the water cooler in the room, despite her having asked the child several times not to do so. Ms Plessis said that water had started to accumulate on the floor and she had been concerned that either Child A or another child might slip and be injured as a result.

[13] Ms Plessis said she had moved Child A away from the water cooler by taking hold of the child's hand and after she had moved the child away Ms Plessis said that Child A had gone over to see Ms Remsi.

[14] Ms Remsi said that she had observed Ms Plessis telling Child A to move away from the water cooler and on or about the fifth occasion she had seen Ms Plessis go over to Child A and heard her speak sternly to the child, following which she had heard Child A cry out and the child had then run to her with a hand held out.

[15] Ms Remsi said she had spent a few minutes calming Child A down, and then had taken the child with her to see Ms Jackson.

[16] Ms Jackson said she had been told by Ms Remsi that she had witnessed Ms Plessis grabbing and twisting Child A's fingers. Ms Jackson said that Child A had been crying softly, but she did not recall the child favouring any particular part of the body. After hearing the report of the incident Ms Jackson told Ms Remsi to return to the pre-school room and speak to Ms Plessis about the incident.

[17] Ms Jackson said another teacher, Ms Cheryl McCaskill, had overheard the report made by Ms Remsi and had remarked to her: "*This isn't the first time and I need to tell you about it*".

[18] Ms Jackson said she had telephoned Ms Fiona Bielby, an HR Advisor, for advice as she considered the incident to be potentially quite serious because Ms Remsi had said that Ms Plessis had twisted Child A's fingers.

[19] Ms Jackson said that Ms Bielby had asked her to obtain statements from employees immediately, and she had done so. Ms Jackson explained that the obtaining of witness statements had not been confined to those employees who may have witnessed the incident with Child A, but also included other employees due to the comment made by Ms McCaskill.

[20] Ms Plessis said that when Ms Remsi had returned to the pre-school room and spoken to her about the incident involving Child A, she had denied clasping Child A's fingers, and had explained that children often cry if something is taken away from them.

[21] Ms Plessis said she had gone to see Ms Jackson as she had been leaving work that day and had told her that she had not hurt Child A. Ms Plessis said Ms Jackson had said that she would speak to her the following day, and explained that she had felt humiliated because Ms Jackson had not turned around from what she had been doing to speak to her.

[22] Ms Jackson said that she had spoken to the employees who had made statements concerning Ms Plessis, and had told them not to speak to Ms Plessis should she make contact with them. However as it had been the first incident of its type in which she had been involved, she had wanted to obtain advice before speaking to Ms Plessis.

[23] Ms Marsh said she had received a telephone call from Ms Jackson on 20 December 2011 immediately following the incident involving Ms Plessis and Child A, and that she had also received a call from Ms Bielby who had discussed with her the next steps to be undertaken.

Events following the incident

[24] Ms Plessis had attended for work the following morning, 21 December 2011, as scheduled. Ms Jackson said she had attended for work early in case there were any repercussions arising from the incident the previous day, and Ms Marsh also had arrived early at the Centre.

[25] Ms Marsh said she had spoken to Ms Jackson about the incident the previous day, and Ms Bielby had arrived a little later and had spoken to the employees who had provided the statements.

[26] Ms Remsi said that as a result of her conversation with Ms Bielby she had amended her original statement to explain that she had not seen Ms Plessis twist Child A's fingers.

[27] Ms Marsh said she had spoken to Ms Remsi about the incident and had formed the view that it was serious. Ms Marsh said she had then spoken to Ms Plessis in the presence of Ms Jackson and explained that a complaint about her actions in relation to Child A had been received and about the investigation process. Ms Plessis said she had denied the allegation made by Ms Remsi about her treatment of Child A.

[28] Ms Marsh said that the option of suspension had been discussed with Ms Plessis who had indicated that her preference had been not to stay at the Centre during the investigation. Ms Marsh had confirmed the suspension in a letter to Ms Plessis dated 21 December 2011.

[29] Ms Plessis said she had not been given the opportunity to discuss the suspension, but had been told that she was being placed on suspension during the investigation.

[30] The following day, 22 December 2011, Ms Marsh had written to Ms Plessis advising that she was to attend a meeting the following day to discuss three allegations:

- *That you twisted a child's fingers causing the child to cry*
- *That on other occasions you have been observed pulling a child's arm quite hard and lifting the child off its feet and dumping him on the ground and*
- *That you have been heard to talk to the children without respect and tap a child on its bottom.*

[31] The signed witness statements were attached to the letter, which advised Ms Plessis that the allegations were serious and if substantiated could involve disciplinary action up to and including dismissal. The letter invited Ms Plessis to bring a support person to the meeting.

[32] Ms Plessis said she had been shocked to receive the statements made by the other employees which alleged that she had acted inappropriately with the children at the Centre.

[33] Ms Plessis attended the meeting on 23 December 2011 accompanied by her husband as her support person. Ms Marsh and Ms Bielby attended the meeting for Kidicorp.

[34] During the meeting Ms Plessis had been provided with an opportunity to explain what had occurred during the incident with Child A, and had denied that she had twisted Child A's fingers or hurt the child.

[35] Ms Marsh said that there had not been much discussion about the other allegations made against Ms Plessis, and the notes of the meeting made by Kidicorp and provided in evidence do not indicate that any discussion was held about them.

[36] During the meeting Ms Plessis had raised complaints about other employees, these had not been discussed, however Ms Marsh had asked Ms Plessis to submit these to her subsequently.

[37] Ms Marsh said that the meeting had been adjourned and she and Ms Bielby had telephoned Ms Fiona Hughes, Chief Operations Officer, and discussed what had occurred. The decision had been made to issue Ms Plessis with a final written warning

[38] A letter confirming the decision had been drawn up and presented to Ms Plessis when the meeting resumed. The letter confirmed the decision by Kidicorp to issue her with a final written warning. The letter stated:

We have considered your explanation of the alleged behaviour. However, we believe that there is substance to the claims raised by other team members. In your role as an Early Childhood Teacher you are responsible for the safety of all the children in your care and we cannot condone or tolerate harsh treatment of children.

[39] The letter further stated:

We have also made the decision to move you from the Nursery Room to one of the other rooms at Kids to Five on Dey Street. Your practice will be constantly monitored and supervised until such time as we feel confident that your handling of children in your care is appropriate at all times.

[40] Ms Marsh said that Ms Plessis had been comfortable with the decision to move her to work in a different room at the Centre and that she (Ms Plessis) had hugged her at the conclusion of the meeting and thanked her for trying to help her be safe as well as the child.

[41] Ms Plessis said that she had accepted the decision to work in another room at the Centre, however she had asked Ms Marsh not to put her to work in the same room as Ms Remsi, and Ms Marsh had assured her that this would not occur.

Events following Ms Plessis's return to work in January 2012

[42] Ms Plessis returned to work on Monday 9 January 2012 following the Christmas break and said that she had felt that the other employees were looking at her, and that Child A had followed her and was crying but she had been afraid to interact with the child.

[43] Ms Jackson said that having been made aware of the employee allegations of Ms Plessis's rough treatment of children, her attitude towards Ms Plessis had altered and she had been more watchful of her. When questioned during the Investigation Meeting Ms Jackson agreed that Ms Plessis would have been aware of the change in her attitude towards her.

[44] Ms Marsh said that the investigation involving Ms Plessis had raised concern that employees had not been reporting incidents of inappropriate behaviour and as Licensee of the

Centre; Ms Hughes had required a meeting to be held with all the Centre employees to outline Kidicorp's expectation that all such incidents would be reported.

[45] Ms Marsh confirmed that she had been conscious that Ms Plessis might feel uncomfortable about the proposed staff meeting to discuss the complaints reporting procedure to be held on Tuesday 10 January 2012, and therefore she had spoken to her on 9 January 2012 to explain that no names or specific incidents would be mentioned.

[46] Ms Marsh said she had also advised Ms Plessis that she did not have to attend the meeting if she felt uncomfortable at so doing; however Ms Plessis had not objected to attending the meeting.

[47] Ms Marsh said she had also spoken to Ms Plessis the following day to check that she did not object to attending the meeting to be held later that day.

[48] On 11 January 2012 Ms Plessis said she had been advised by Ms Jackson that she was to work in the same room as Ms Remsi.

[49] Ms Remsi said she had also been advised that she would be working with Ms Plessis, and as she had felt uncomfortable about this, she had asked Ms Jackson to ensure a third person also be rostered to work with them.

Resignation

[50] On the evening of 11 January 2012 Ms Marsh said she had received a telephone call from Mr Plessis in which he had informed her that Ms Plessis was very upset and did not feel she could carry on, and that she felt she could not work with Ms Remsi.

[51] Ms Marsh said Mr Plessis had said that he considered Ms Plessis's best option would be to resign, and she had agreed that that was an option, but that it was a decision for him and Ms Plessis to make.

[52] The following day, 12 January 2012, Ms Jackson said Ms Plessis had given her a letter of resignation and had asked if she could leave immediately. In the letter of resignation Ms Plessis had written:

Working for Kidicorp has been a wonderful experience. I could not ask for a better group of colleagues ...[I] will treasure the wonderful time and opportunities that the company has provided to me. While I will always miss my little ones and colleagues here at Kidicorp, I feel that it is time for a new challenge and experience.

[53] Ms Plessis explained that the sentiments expressed in her letter of resignation described how she had felt about her job at Kidicorp; however she had decided to resign on the basis that she considered that in the circumstances she would be vulnerable to complaints and afraid that she could be reported for any little incident. Further that she believed she could no longer have the same relationship with the other employees.

[54] Ms Plessis said Ms Jackson had not tried to dissuade her from resigning but had accepted the resignation and advised her to telephone Ms Marsh to confirm whether she could be allowed to leave her employment immediately.

[55] Ms Marsh said it had been agreed that Ms Plessis did not have to work out her notice period.

[56] On 6 December 2012 Ms Plessis had filed a Statement of Problem with the Authority.

Determination

Was Ms Plessis unjustifiably constructively dismissed by Kidicorp?

The Law

[57] A constructive dismissal occurs where an employee appears to have resigned, but the situation is such that the resignation has been forced or initiated by an action of the employer.

[58] In the Court of Appeal case *Auckland Shop Employees Union v Woolworths (NZ) Ltd*¹ Cooke J listed three situations in which a constructive dismissal might occur, although noted that these were not exhaustive. The three situations were:

1. Where the employees is given a choice of resignation or dismissal;
2. Where the employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
3. Where a breach of duty leads a worker to resign.

[59] In *Auckland Electric Power Board v Auckland Provincial Local Authorities Officers IUOW Inc*² the Court of Appeal said regarding the correct approach to constructive dismissal:³

¹ [1985] 2 NZLR 372

² [1994] 1 ERNZ 168

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[60] Therefore in examining whether a constructive dismissal has occurred the two relevant questions are:

- i. First, has there been a breach of duty on the part of the employer which has caused the resignation. To determine that question all the circumstances of the resignation have to be examined, not merely the terms of the notice or other communication whereby the employee has tendered the resignation.
- ii. and secondly if there was such a breach, was it sufficiently serious so as to make it reasonably foreseeable by the employer that the employee would be unable to continue working in the situation, that is, would there be a substantial risk of resignation.

[61] Williamson J in *Wellington Clerical Workers IUOW v Greenwich*⁴ observed in describing this type of constructive dismissal:⁵

It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

Was there a breach of the duty owed to Ms Plessis by the Kidicorp?

[62] The allegation made by Ms Remsi that Ms Plessis had acted inappropriately towards a child at the Centre was a serious allegation, and it was appropriate that Kidicorp investigate it. However there is duty placed upon an employer to act in a fair and reasonable manner when carrying out an investigation into alleged employee misconduct.

³ Ibid At p 172

⁴ [1983] ACJ 965

⁵ at [975]

[63] A process fundamentally and palpably unfair will have the effect of rendering a disciplinary action unjustifiable. There are three major principles applicable to the disciplinary process: a duty to inform the employee of the allegations, an informed opportunity for the employee to respond, and a decision that is free from bias and pre-determination. Additionally the fair and reasonable employer will inform an employee of their entitlement to have representation at a meeting of a disciplinary nature.

[64] Kidicorp had reached a decision to dismiss Ms Plessis in light of the serious nature of the allegation made by Ms Remsi about Ms Plessis's treatment of Child A. I observe that whilst Ms Remsi initially told Ms Jackson that she had seen Ms Plessis "*grabbing and twisting*" Child A's fingers, this statement was later amended to explain that she had not in fact witnessed Ms Plessis twisting Child A's fingers.

[65] Ms Plessis had denied handling Child A roughly, the notes taken by Kidicorp at the meeting record Ms Plessis's explanation as being that she had: "*gently removed*" Child A from the water cooler where she had believed the child had been in danger of slipping.

[66] Ms Marsh said that the allegations which had been made by the other employees in respect of rough treatment of children by Ms Plessis had enforced her view that Ms Plessis had acted inappropriately during the incident involving Child A on 20 December 2011.

[67] I find it significant that, other than Ms Remsi, none of the employees who had provided statements had actually witnessed the incident involving Child A on 20 December 2011. Moreover the statements had referred in general terms to alleged rough handling of children, but lacked specificity and were vague in nature.

[68] Ms Marsh confirmed at the Investigation Meeting that there had been little discussion about the employee allegations of rough interactions with the children by Ms Plessis during the meeting on 23 December 2011 and I observe that, given the lack of specificity, it would have been difficult for Ms Plessis to address them.

[69] Ms Marsh said that the employee allegations had enforced her view of the complaint made by Ms Remsi about what had occurred on 20 December 2011, and it is clear from the letter dated 23 December 2011 that Kidicorp had considered that there had been substance in the claims raised by other team members, and that these factors had influenced the decision to issue Ms Plessis with a final written warning.

[70] This is confirmed in a letter dated 28 March 2012 from Kidicorp to the lawyer at that time acting for Ms Plessis which confirmed the reasons for the written warning and states:

On the balance of probabilities based on Jeshika Resmi's statement of what she saw and the statements of other staff members at the centre, we came to the view that Phillipa had acted in such a way as to deliberately inflict pain on [Child A]

[71] I find that a fair and reasonable employer would not have taken the employee statements into consideration without further investigation and without providing Ms Plessis with specific details as to the nature, and date, of the complaints made about her conduct, such that she would be provided with a full opportunity to provide an explanation in respect of them.

[72] I further find that a fair and reasonable employer would not have reached the view as contained in the letter dated 28 March 2012 that Ms Plessis had '*deliberately inflicted pain*' without any specific evidence, noting Ms Marsh's evidence in which she states that: "*We were unable to determine if her actions were to deliberately twist the child's finger*"

[73] I note that prior to the complaint raised by Ms Remsi, there had been no disciplinary action taken against Ms Plessis, the performance appraisals had been positive about Ms Plessis's relationship with the children in her care, and neither Ms Jackson nor Ms Marsh had ever witnessed Ms Plessis behaving in an inappropriate way towards the children. I find that the fair and reasonable employer would have taken these factors into consideration prior to reaching a decision to issue Ms Plessis with a final written warning; however there is no evidence that Kidicorp did so.

[74] In respect of the issuing of a final written warning I find that there had been a lack of substantive and procedural justification which constituted a breach of duty towards Ms Plessis.

[75] Following her return to work on 9 January 2012 Ms Plessis had been informed that she had been allocated to work in the same room as Ms Remsi, the person who had made the complaint about her which had resulted in her being given a final written warning.

[76] There is a duty placed on an employer to provide an employee with a safe and healthy working environment. Ms Remsi herself had made it clear to Ms Jackson that she had not felt comfortable about being placed in the situation which involved her working with Ms Plessis, and in fact had requested that a third person be rostered to work with them.

[77] I find that by rostering Ms Plessis to work with Ms Remsi Kidicorp had failed in its duty to provide Ms Plessis with a safe and healthy working environment.

Reasonable foreseeability

[78] Following the disciplinary process which had resulted in Ms Plessis being issued with a final written warning, and her return to work on 9 January 2012, Ms Plessis said she had felt uncomfortable in respect of the attitude of the other employees towards her, which I consider to have been a reasonable reaction given the complaints which had been made about her by several of these employees.

[79] I further note that Ms Jackson said that she believed that her change in attitude towards Ms Plessis following the disciplinary action would have been discernible by Ms Plessis.

[80] On the day following her return to work on 9 January 2012, there had been staff meeting to discuss the procedure in respect of staff complaints.

[81] Whilst I appreciate that Kidicorp considered it had been advisable to address the employees about the reporting of complaints, Ms Marsh had clearly been concerned and had anticipated that Ms Plessis might feel uncomfortable about the topic matter of the meeting, and had therefore twice addressed Ms Plessis on the subject.

[82] Following this meeting, Ms Plessis had been informed that she was to be rostered to work with Ms Remsi, a situation which she said she had been assured would not occur by Ms Marsh following the disciplinary meeting, and which Ms Remsi herself had been concerned about and had discussed with Ms Jackson

[83] Mr Plessis had advised Ms Marsh during the telephone conversation on the evening of 11 January 2012 that Ms Plessis was very upset and did not think that she could continue to work in the situation in which she had been rostered to work with Ms Remsi.

[84] Given all these circumstances, I find that there had been a breach of the duty owed to Ms Plessis by Kidicorp such as to render it reasonably foreseeable by Kidicorp that Ms Plessis would be unable to continue working in that situation such as to render a substantial risk of resignation by Ms Plessis.

[85] I determine that Ms Plessis was unjustifiably constructively dismissed by Kidicorp.

Remedies

[86] Ms Plessis has been unjustifiably constructively dismissed by Kidicorp and she is entitled to remedies.

Reimbursement for Lost Wages

[87] Ms Plessis said that she had obtained alternative employment with effect from 9 March 2012.

[88] Kidicorp is ordered to pay Ms Plessis lost wages for the period from 12 January until 9 March 2012. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[89] Ms Plessis is also entitled to compensation for humiliation and distress. Ms Plessis had been employed by Kidicorp for approximately 4.5 years at the date of termination of her employment; it is clear from her letter of resignation that this had been a job which she had greatly valued, and that she had been very sad to leave the Centre.

[90] Additionally, in the letter dated 28 July 2012 Kidicorp had confirmed its view that Ms Plessis had deliberately inflicted pain on a child in her care, a very serious allegation, based on the evidence of Ms Remsi which had been subsequently amended to confirm that she had not in fact witnessed Ms Plessis twisting Child A's fingers

[91] Following the termination of her employment Ms Plessis said that she had suffered from depression and her doctor had referred her for counselling treatment.

[92] I find that Ms Plessis suffered significant hurt and distress and I order Kidicorp to pay Ms Plessis the sum of \$10,000.00, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[93] I have considered the matter of contribution as I am required to do under s124 of the Act. Ms Plessis did not contribute to either of the situations which gave rise to the grievances. There is to be no reduction in remedies.

Costs

[94] Costs are reserved. I note that Ms Plessis had been not been legally represented at the Investigation Meeting, however Ms Plessis had obtained legal advice during the investigation process. Accordingly the parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority