

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 258
5624761

BETWEEN ST JOHN'S COLLEGE
 PRESCHOOL
 Applicant

A N D NIRMALA JOSEPH
 Respondent

Member of Authority: Nicola Craig

Representatives: Natalie Donald, Advocate for Applicant
 Respondent in Person

Investigation Meeting: On the papers

Date of Determination: 28 July 2016

DETERMINATION OF THE AUTHORITY

A. A compliance order is issued requiring Nirmala Joseph to refrain from using any list of the parents of the Preschool's children, or their email addresses, and return to the Preschool by 19 August 2016 all copies (hard copy or digital copy) which she has of the parents and/or their email addresses.

Employment relationship problem

[1] St John's College Preschool (the Preschool) employed Nirmala Joseph (Ms Joseph) to work as an early childhood teacher from 2011 to 2015. Ms Joseph resigned from her employment in July 2015. The Preschool says that this was in the course of a disciplinary process against Ms Joseph.

[2] About a week after finishing her employment at the Preschool, Ms Joseph sent an email to parents whose children attended the Preschool, using the Preschool's parent email database. Ms Joseph set out her view on why she had resigned from the Preschool. The Preschool did not accept Ms Joseph's account of events.

[3] In May 2016, Ms Joseph again contacted parents of children attending the Preschool. Ms Joseph stated that she had applied for teacher registration with the Education Council. She asked the parents to write to the Education Council regarding her "*teaching ways*", in order to assist her to get her registration.

[4] Shortly after that, the Preschool filed an application to the Authority seeking the destruction of all copies (both hard copies and digital) of parent contact details as per clause 15 of the parties' employment agreement. In her statement in reply, Ms Joseph stated that she wanted the parents to be aware of what was happening and had emailed to explain and ask for parental support regarding her registration.

[5] Ms Joseph also filed a letter to the Authority which stated that parents had contacted her regarding why she had resigned without notice and a formal goodbye. A message was reportedly written on the whiteboard at the entry to the Preschool saying that Ms Joseph had left due to personal medical reasons and this had led to at least some parents considering that she was extremely unwell.

[6] Ms Joseph committed that as of 24 May 2016 (the date of the letter) she would not make contact with any parents currently attending the Preschool. This letter has an annotation stating that it was signed by Ms Joseph in the presence of a parish priest.

[7] The Preschool remained concerned that Ms Joseph had not destroyed the parents' email addresses. The Authority contacted Ms Joseph to see if she could provide confirmation on that issue. By way of email, Ms Joseph advised on 6 June 2016 that she was overseas but would be home soon and then could provide a sworn affidavit in two weeks' time.

[8] Nothing further has been heard by the Authority from Ms Joseph since then. A case management conference by way of telephone was arranged for 11 July 2016. The Preschool's representative was available but Ms Joseph was not. Efforts were made by the Authority officer to contact Ms Joseph but with no success.

[9] By way of email dated 12 July 2016, the parties were advised that the Authority proposed to consider this matter on the papers already filed and issue a determination regarding the compliance order sought by the Preschool. The parties were given until 21 July 2016 to notify the Authority in writing if they objected to that course of action. The Preschool notified the Authority that it had no objection to this proposal. No response was received from Ms Joseph and I am now proceeding to issue this determination.

The issue

[10] The issue for determination is whether a compliance order should be issued against Ms Joseph regarding the parent information.

Compliance order

[11] The employment agreement signed by the parties on 14 November 2011 contains clause 15 on confidentiality and conflict of interest, which includes the following:

- 15.1 The Employee will not, except in the course of his/her duties, disclose or use any confidential information belonging or relating to the Employer Confidential information includes but is not limited to, any information, knowledge or material which the employer has designated or may designate as proprietary and/or which relates to business methods, services..., client information or research of the Employer (the “Confidential Information”). This clause applies both during and after the Employee’s employment.
- 15.2 On ceasing to be employed by the Employer, the Employee will return any Confidential Information that is in his/her possession or under his/her control to the Employer.

[12] The employment agreement refers at clause 25.1 to a number of policies which the Preschool has, and requires the employee to ensure that she knows these policies and observes them at all times.

[13] The Preschool’s General Staff Requirements document requires staff to maintain confidentiality pertaining to various matters including “families”. The Centre Rules document lists matters which constitute serious misconduct including:

9. Possession of the employer's property without written authorisation.

[14] I find that a list of names of parents of children at the Preschool and their email addresses comes within the phrase "client information" in the confidential information description set out above. Clause 15.1 of the employment agreement therefore applies to that information. That clause specifies that it continues to apply after Ms Joseph's employment ceased.

[15] Clause 15.2 requires that on ceasing to be employed by the Preschool, Ms Joseph shall return all confidential information in her possession or under her control to the Preschool.

[16] In the letter to the Authority and statement in reply, Ms Joseph accepts that she emailed parents of the Preschool twice after her resignation. Although Ms Joseph had her reasons for thinking that the emails were important, she was still using confidential information, not in the course of her duties for the Preschool.

[17] Under s 137 of the Employment Relations Act 2000 (the Act), where any person has not observed or complied with any provision of an employment agreement¹, the Authority may order that person to do any specified thing or cease any specified activity for the purpose of preventing further non-observance of or non-compliance with that provision².

[18] In the present case, I am satisfied that there has been non-compliance by Ms Joseph with clause 15.1 of the employment agreement by her use of confidential information.

[19] The Authority has a discretion whether to make a compliance order or not³.

[20] Although there appeared to be a prospect that this proceeding could be resolved by Ms Joseph providing an affidavit confirming that she had destroyed the confidential information, that affidavit was not forthcoming and Ms Joseph has not been in contact despite requests from the Authority for over six weeks. The Preschool remains concerned about the prospect that Ms Joseph may use the list of parents' names and email addresses again.

¹ S 137(1)(a)(i) of the Act

² S 137(2) of the Act

³ *United Food and Chemical Workers Union of NZ v Talley* [1992] 1 ERNZ 756 (LC)

[21] I therefore order that Ms Joseph complies with clause 15 of her employment agreement with the Preschool by refraining from using any list of the parents of the Preschool's children, or their email addresses, and returning to the Preschool by 19 August 2016 all copies (hard copy or digital copy) which she has of the list of parents or their email addresses.

Costs

[22] The Preschool was not represented in this proceeding and has not sought costs.

Nicola Craig
Member of the Employment Relations Authority