

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 158
3038273

BETWEEN YI (JOHNNY) ZHANG
 Applicant

AND JUMP START EDUCARE
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Chong Feng and A J Soraya Barker, counsel for the
 Applicant
 Matthew Dearing, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 15 February 2019 from the Applicant
 1 March 2019 from the Respondent

Date of Determination: 19 March 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Yi (Johnny) Zhang, claims Jump Start Educare Limited (Jump Start) breached a confidential settlement agreement (the settlement agreement) it entered in to with him on 25 June 2018. The settlement agreement was signed by a mediator pursuant to s 149(3) of the Employment Relations Act 2000 (the Act).

Mr Zhang's claims

[2] Mr Zhang claims that in breach of the settlement agreement, Jump Start provided the Education Council with a mandatory report which he says was inaccurate, misleading and left out important factual information. Mr Zhang further claims breaches of the non-

disparagement and full and final settlement clauses in the settlement agreement by Jump Start.

[3] Mr Zhang seeks remedies against Jump Start, including a compliance order under s137 of the Act that Jump Start observe and enforce the terms of the settlement agreement, that Jump Start provide an amended mandatory report to the Education Council including further information which he says is required for the report to comply with the settlement agreement, monetary compensation, a penalty for breach of the settlement agreement under s135(2)(b) of the Act and legal costs.

Jump Start's response

[4] Jump Start says that it has not breached the terms of the settlement agreement. It says that the Mr Zhang resigned following the initiation by it of a disciplinary process for serious misconduct. Mr Zhang's resignation triggered s 392 of the Education Act 1989 (the Education Act) which imposes a statutory obligation on Jump Start to provide the Education Council with a mandatory report in respect of Mr Zhang's resignation.

Investigation Meeting

[5] Both parties agreed for the employment relationship problem to be investigated by the Authority on the papers. Mr Zhang filed an affidavit dated 14 December 2018 as did Mr Lele (Tony) Zhang, a friend of Mr Zhang's and Ms Yu (Yoyo) Liu, a friend and neighbour of Mr Zhang. Ms Melissa McFadden the owner's operations representative at Jump Start filed an affidavit dated 25 January 2019 in opposition to Mr Zhang's claims as did Ms Keri Cook, the Centre Manager of Jump Start.

[6] Counsel for both parties filed legal submissions in support of their respective positions.

Relevant Facts

[7] Jump Start is an early childhood learning centre in Cambridge. From October 2015 to May 2018, Mr Zhang was employed by Jump Start as an early childhood learning teacher. On 12 February 2018, Ms Cook wrote to Mr Zhang requesting that he attend a meeting as part of an investigation into incidents on 11, 26 and 31 January 2018 regarding his supervision of children. The letter gave details of the incidents and requested a meeting with Mr Zhang on 15 February 2018 so that the matters could be investigated. Mr Zhang was

informed that there was the potential “for this to progress to a disciplinary meeting for serious misconduct, the outcome of which may result in a performance management plan, and/or a formal written warning or your summary dismissal.” Mr Zhang was invited to bring a representative or support person to the meeting.

[8] Meetings were held on 15 and 22 February 2018 to discuss the issues and to obtain Mr Zhang’s response to the allegations.

Final written warning – 26 February 2018

[9] On 26 February 2018, Ms Cook sent a letter to Mr Zhang in relation to the allegations and the investigation carried out by Jump Start. The letter informed Mr Zhang that the conclusion was that his performance amounted to serious misconduct and that “...while I am thankful for your honesty and appreciate your acceptance and apology, these incidents are unacceptable. Paramount for the centre and for you in your role is the need to ensure the safety of the children.”

[10] Mr Zhang was issued with a final written warning which was to remain on his file for 18 months. Mr Zhang was informed that a performance management plan would be put in place for him with his input. The letter concluded by stating that any further such incidents would not be tolerated and may result in further disciplinary action.

Performance management plan – 8 March 2018

[11] On 9 March 2018 a performance plan for Mr Zhang was established for a period of three months with formal weekly reviews. The performance plan included areas of concern with Mr Zhang’s performance and measures by which Mr Zhang was to remedy those areas of concerns and a time frame within which he was to do so.

Further issues of concern – April 2018

[12] Further issues of concern with regard to Mr Zhang’s supervision of children were raised with him in a letter from Ms Cook dated 20 April 2018. The letter set out the issues of concern and invited Mr Zhang to attend a disciplinary meeting on 26 April 2018. Mr Zhang was suspended while the investigation took place

3 May 2018 – disciplinary meeting

[13] A disciplinary meeting was held on 3 May 2018 with Mr Zhang. Mr Zhang was represented at the meeting, as was Jump Start. Shortly after the meeting commenced, Mr Zhang's lawyer confirmed that Mr Zhang was going to resign from his position and that she had drafted a proposed settlement agreement. The parties were unable to agree the terms of a settlement agreement.

Personal Grievance Claim – 12 May 2018

[14] On 12 May 2018, Ms Barker notified Jump Start of a personal grievance on behalf of Mr Zhang. The letter commenced as follows:

As you are aware we act for Mr Yi (Johnny) Zhang (Mr Zhang). It is acknowledged that the parties have been unable to meet a mutual resolution in regards to the employment dispute. We are therefore instructed to formally offer Mr Zhang's immediate resignation as of Friday 11 May 2018. We are also instructed to raise a personal grievance against Jump Start Educare in relation to the unjustified disciplinary matters as at your letter 20 February 2018 (as a response to your previous letter of 12 February 2018), and 20 April 2018.

[15] The letter went on to set out the grounds for Mr Zhang's personal grievance claim. On 31 May 2018, Mr Tarrin Terry of the EMA responded to Ms Barker's letter, on behalf of Jump Start.

Mediation settlement – 25 June 2018

[16] On 25 June 2018, the parties took part in a mediation. A settlement agreement pursuant to s 149 of the Act was concluded.

Record of Settlement

[17] Relevant provisions of the settlement agreement are as follows:

- (a) These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties.
- (b) Jump Start Educare Limited has advised that they are required to make a mandatory report to the Education Council of New Zealand pursuant to the Education Act 1989. Johnny acknowledges that the employer must co-operate with the Education Council of New Zealand in respect of any questions they have regarding the report. Jump Start Educare Limited will ensure that the report is on a factual basis, but they will

also include the statement that Johnny has a pleasant temperament and that he never intended to cause harm to the children or place them at risk.

- (c) Neither party shall make disparaging remarks about the other.
- (d) This is a full and final settlement of all matters between the parties arising out of their relationship.

This settlement was certified under s 149 of the Act by the mediator. That certification confirmed that before signing the agreement, the parties were advised and accepted they understood the effect of s 148A in respect of entitlement to minimum entitlements, s 149(1) in respect of the authority of the mediator to sign the settlement and s 149(3) of the Act which states that the agreed terms of settlement:

- (i) Were final, binding and enforceable; and
- (ii) Could not be cancelled; and
- (iii) Could not be brought before the Authority or the Court for review or appeal, except for the purposes of enforcing those terms.

[18] A mandatory report to the Education Council was made by Jump Start on 27 June 2018. Mr Zhang claims the report breached clauses 3, 4 and 6 of the settlement agreement.

The Law

Education Act 1989

[19] **s 392(2) of the Education Act 1989 states:**

If, within the twelve months before the resignation of a teacher from a teaching position (including a fixed-term position) or the expiry of the term of a teacher's fixed-term position, the teacher's employer had advised the teacher that it was dissatisfied with or intended to investigate, any aspect of the teacher's conduct, or the teacher's competence, the employer must, immediately after the resignation or expiry, report it to the Education Council.

[20] **s 394 of the Education Act 1989 states:**

Mandatory reporting of possible serious misconduct

(1) The employer of a teacher must immediately report to the Teaching Council if it has reason to believe that the teacher has engaged in serious misconduct.

(2) Every report under this section must—

(a) be in writing; and

(b) include a description of the conduct of the teacher that the employer believes to be serious misconduct; and

(c) include a description of what action (if any) the employer has taken in relation to it.

[21] **s 396 Offence of failing to report**

(1) An employer or a former employer commits an offence and is liable on conviction to a fine not exceeding \$25,000 if it fails without reasonable justification to report to the Teaching Council in relation to any matter of conduct as required under section 392, 393, or 394.

(2) An employer or a former employer commits an offence and is liable on conviction to a fine not exceeding \$5,000 if it fails without reasonable justification to report to the Teaching Council in relation to any matter of competence as required under section 392, 393, or 395.

[22] The Education Council is the body that monitors teacher conduct. It has the statutory power to require a Board or educational institute covered by the Education Act to provide it with a report in the circumstances set out in s 392 of the Education Act 1989. Jump Start had a statutory duty under s392 of the Education Act to provide a mandatory report to the Education Council in respect of Mr Zhang's resignation.

[23] Jump Start's mandatory reporting obligations are independent of any employment or mediation process. The Employment Court in *Evans-Walsh v Southern District Health Board*¹ considered whether there are certain circumstances in which it may be permissible to breach a confidentiality clause in a settlement agreement. Ms Evans-Walsh was employed by the District Health Board (DHB) as a nurse. She resigned after she and the DHB signed a settlement agreement under s149 of the Act.

[24] The settlement agreement in that case contained a confidentiality and non-disparagement clause. The DHB subsequently notified the Nursing Council of New Zealand of the resignation before the conclusion of an investigation into complaints made against her under s34(3) of the Health Practitioners Competence Assurance Act 2003 (HPCAA). The

¹ [2018] NZ Empc 46.

HPCAA requires a health practitioner employer to give notice where an employee resigns for reasons relating to competence.

[25] The Court held that the DHB's disclosure to the Nursing Council of the employee's resignation was not in breach of the settlement agreement. The Court reasoned that s 149 did not have primacy over the statutory duty on the DHB under the HPCAA to give such notification to the Nursing Council.

Alleged breaches of the settlement agreement

[26] Mr Zhang says by failing to disclose to the Education Council the "full factual basis" relating to the employment dispute, Jump Start breached clause 3 of the settlement agreement. Mr Zhang says Jump Start did not provide the Education Council with the full story and was selective with the material it did provide. In addition material provided to the Education Council was disparaging and also breached the terms of the settlement agreement.

Mandatory report to the Education Council

[27] Counsel for Mr Zhang submits that the information provided by Jump Start was selective, misleading and "in bad faith" "... their motivation to provide excess and inaccurate evidence to the EC falls outside their statutory obligation for mandatory reporting".

[28] The request for a mandatory report form from the Education Council requires a considerable amount of information, including relevant documentation, from an educational institute such as Jump Start in relation to investigations undertaken by it into the conduct or competence of a teacher in circumstances set out in the Education Act, including ss392, 393 and 394 of the Education Act.

[29] The mandatory report by Jump Start appears to have provided the information and documentation relating to its investigation into aspects of Mr Zhang's conduct, as requested by the Education Council. The information was a description of the conduct issues that Jump Start was concerned about and a report of the investigation and action undertaken by it.

[30] There is no evidence in my view to suggest that Jump Start was acting in bad faith or outside its statutory obligation for mandatory reporting.

[31] If I am incorrect in this finding, it is my view that as part of the Education Council's process, if he found the contents of Jump Start's mandatory report to be one sided and

misleading, Mr Zhang could have provided information he felt to be more accurate and relevant as part of that process. The Education Council process was independent of the employment and mediation processes.

[32] In conclusion, it is my view that Jump Start did not breach the terms of the settlement agreement with Mr Zhang.

Costs

[33] Costs are reserved. The parties should attempt to resolve the issue of costs. If they are not able to do so, the respondent has 14 days to file a memorandum as to costs. The applicant has 14 days of receipt to file a memorandum of costs in reply.

Anna Fitzgibbon
Member of the Employment Relations Authority