

**IN THE DISTRICT COURT
AT WAITAKERE**

**CRI-2016-004-005264
[2017] NZDC 12211**

COMMERCE COMMISSION
Prosecutor

v

KOWHAI MONTESSORI PRESCHOOL LIMITED
Defendant

Hearing: 8 June 2017

Appearances: A McClintock and A Luck for the Prosecutor
M Edwards for the Defendant

Judgment: 8 June 2017

NOTES OF JUDGE J JELAS ON SENTENCING

[1] The defendant company, Kowhai Montessori Preschool Limited, has pleaded guilty to seven charges under s 13 Fair Trading Act 1986. All of the charges are laid representatively.

[2] The prosecution relates to false and misleading statements made by Kowhai Montessori Preschool to its parents about the level of funding it received for its pupils under the Ministry of Education's Early Childhood Education Subsidy Scheme.

[3] Pleas of guilty to all charges were entered on the morning the prosecution was set down for a three day Judge-alone hearing. The Commerce Commission and Kowhai Montessori Preschool jointly submit a sentence of \$220,000 would be within the appropriate range.

Background facts

[4] The Ministry of Education administers an early childhood education, (ECE), scheme that provides funding for all children aged three to five years that attend an approved ECE service provider or Kohanga Reo. Under the scheme the Ministry of Education pays an hourly rate to the ECE provider, or Kohanga Reo, for each hour a child attends. Under this part of the scheme the Ministry of Education will pay up to a maximum of 20 hours per week for a child to attend an approved facility.

[5] In addition, the scheme provides for a reduced hourly rate to subsidise those children who attend an ECE service provider or Kohanga Reo more than 20 hours per week. The maximum of 10 hours at a subsidised rate is available per child per week.

[6] In summary, the Ministry of Education will fully fund a child attending up to 20 hours per week and then subsidise their attendance for up to a further 10 hours per week. Parents are entitled to receive the benefit of this funding scheme for a total of 30 hours per week per child.

[7] Under the ECE scheme parents are only required to pay the portion of the preschool hourly centre fee that exceeds the applicable ECE subsidy.

[8] The purpose of the ECE subsidy scheme is described in the agreed summary of facts as follows:

“Funding under the ECE scheme is primarily designed to reduce the cost of ECE services for parents, which in turn encourages greater participation of children in education from an early age”.

[9] Kowhai Montessori Preschool was first registered in June 1998. It operated from premises in Orakei. During the period of the offending it was managed by Rebecca Brindle, a 50 percent shareholder of the business. Ms Brindle’s¹ responsibilities include setting child care fees, communicating those fees to parents, producing invoices and sending invoices to parents, overseeing all written communications to parents and managing all contact with the Ministry of Education.

¹ The prosecution against Ms Brindle was not pursued.

[10] Five of the charges reflect the five invoicing periods at the commencement of each school term during the period of the offending (from 14 October 2013 to 13 October 2014). At the beginning of the five school terms, during that 12 month offending period, Kowhai Montessori Preschool sent out invoices to all of its parents misrepresenting the ECE subsidy for the 20 hours per week per child. It invoiced parents for the shortfall between the Kowhai's prescribed hourly rate and the misrepresented ECE subsidy. The invoices were further misleading and false in that no mention was made of the additional 10 hours per week subsidised funding available for those children who spent between 20 to 30 hours a week at the preschool. For example, all of the invoices sent out to parents on 13 October 2014 recorded Kowhai Montessori Preschool prescribed hourly rate at \$13.70 per hour. The ECE subsidy under the 20 hour scheme was recorded at \$4.70 per hour. No mention was made in the invoices of the additional 10 hours subsidy funding available.

[11] The invoices sought for parents to pay shortfall between the Kowhai's hourly rate and the false and misleading 20 hour ECE subsidy rate. The shortfall was \$9 per hour. The actual subsidy being received by Kowhai under the 20 hour ECE subsidy was \$10.32 per hour and under the additional 10 hour ECE subsidy \$5.73 per hour. There was significant misleading and false information given by Kowhai Montessori Preschool as to the level and existence of the subsidy being received.

[12] The two remaining representative charges relate to letters Ms Brindle caused to be sent to the parents of all children enrolled at the preschool. The first letter was sent on 5 May 2014. The letter advised that fees would increase from term three 2014. The letter advised the increased fees was based on an hourly rate of \$13.70 per hour comprising of a 20 hour ECE contribution of \$4.70 and a parental contribution of \$9. At the time the letter was sent, and for term three of 2014, Kowhai received under the ECE funding scheme \$11.33 per hour for up to 20 hours and additional subsidy for the further 10 hours.

[13] On 22 September 2014, Ms Brindle caused to be sent to all parents a second letter. This letter advised parents that the parental contribution sought by Kowhai Montessori Preschool was set to decrease. The explanation given for the decrease

was extra funding announced in the Government Budget. In particular, the letter advised that as from term one of the 2015 school year Kowhai's fees will be based on an hourly rate of \$13.70 per hour. The letter recorded the ECE contribution of \$5.70 for the initial 20 hours. A parental contribution of \$8 per hour was sought from parents.

[14] Again, this second letter misrepresented the amount of the hourly ECE contribution that the preschool was receiving. The letter made no mention of the funding received under the additional 10 hours available.

[15] As a result of this false and misleading information to parents during the charge period Kowhai Montessori Preschool received \$199,105.68 in funding under the 20 hours ECE scheme that had not been disclosed to parents. Under the additional 10 hour scheme, none of which was disclosed to parents, Kowhai Montessori Preschool received \$22,528.48 during the charge period. In total, it is accepted the preschool received \$221,632.15 in undisclosed ECE funding during the charge period.

[16] In summary, the preschool deliberately gave false and misleading information to parents and omitted to disclose to parents the level of funding it was receiving from the Ministry of Education. The false information was grossly wrong. As a result the parents were required to pay significant additional amounts of child care cost and the preschool unlawfully received additional funding through its parental contribution and under the ECE scheme.

Sentencing principles

[17] The relevant purposes and principles of sentencing requiring emphasis in this case is the need to deter and denounce the false and misleading conduct this prosecution is an example of. Regard must be had to the overall gravity of the offence which has resulted in substantial sums being wrongfully paid to Kowhai Montessori Preschool. As in all sentencing cases, there needs to be consistency with prior like offending to ensure the integrity of the sentencing process is maintained and the least restrictive outcome must also be considered.

[18] The Commission submissions helpfully set out the general approach to sentencing under the Fair Trading Act.² No issue was taken with this approach in the written submissions filed by the defendant company. It is submitted by the Commerce Commission, without issue from the defendant, that the following factors are relevant to determining the appropriate penalty to be imposed.

Objectives of the Fair Trading Act

[19] The objectives of the Fair Trading Act are well known. Its statutory purpose includes contributing to a trading environment in which consumer interests are protected. To that end the Act prohibits unfair conduct and practices in relation to trade. Unfair conduct includes misleading and deceptive conduct, unsubstantiated claims and false statements and representations. The importance of protecting consumers from false and misleading representations is heightened where false statement or representation is made on matters which is within the trade specialist knowledge and falls outside the consumer's general knowledge.

[20] The preschool representations to parents about its entitlements to ECE funding is specialist knowledge which the majority of parents would have no working understanding of. Parents, therefore, placed a greater reliance on Kowhai Montessori Preschool to accurately inform them of the level of funding it was receiving and the appropriate level of parental contribution that was required. There was greater responsibility upon the preschool to give accurate and full information to the parents given the reliance the parents placed upon the preschool's advice to them.

[21] The breach of trust felt by the parents is reflected in the victim's statements I have viewed for the purposes of sentencing today. The statements record the following passages:

² The general approach was considered in *Commerce Commission v LD Nathan and Co Ltd* [1990] 2 NZLR 160 at 165, and expanded upon in *Commerce Commission v Ticketek New Zealand Ltd* [2007] DCR 910.

“As a result of this offence I have been left feeling stupid and ripped off. I feel that emotionally the offence has made me lose trust in what is seen as a very honest profession especially where there are children involved”.³

“A school is a place of learning, play and trust. Having interacted face-to-face with Rebecca Brindle over a period of at least four years (both our children attended Kowhai) I personally feel as if I have been gutted by the very person who I place the trust of my children in the care of”.⁴

“When you entrust your child’s care to someone you do not want to think that they are untrustworthy”.⁵

The importance of untrue statements

[22] The false statements were significant. The purpose was to create the impression that significant parental contributions were required in order to ensure the preschool continued to operate at its present level of service.

[23] The false statements also had the significant effect of undermining the purpose behind the funding subsidy. The ECE programme was introduced by Government for the purpose of making early childhood education more affordable and thereby encouraging increase access to ECE service providers and Kohanga Reos. By falsely stating the amount of subsidy it was receiving Kowhai Montessori Preschool undermined the purpose of the ECE programme by causing its services to appear more expensive than they ought to have been.

[24] It is likely some parents would have chosen to enrol their children at Kowhai Montessori Preschool partly because the centre was an ECE service provider and, therefore, the school would be eligible to the ECE subsidised care. However, those parents did not receive the full benefit of that subsidy despite choosing an approved provider.

³ Victim impact statement of HB.

⁴ Victim impact statement of NN.

⁵ Victim impact statement of JL.

Degree of wilfulness or carelessness involved

[25] I accept the Commission's submission there was a high degree of wilfulness involved in making the statements. This is a significant and serious aggravating feature. Five families have provided the Commission with their invoices during the charge period. Those are evidence that for one family the false statements and misrepresentations began in October 2013. Two families began to receive false and misleading invoices in January 2014. The remaining two families began to receive their incorrect statements in July 2014. It is accepted by the defendant that there has been a substantial financial gain to the Centre and financial losses suffered by the parents.

[26] In September and October 2014, a parent confronted Ms Brindle regarding the false statements and misrepresentations on the preschool invoices. Ms Brindle made no attempt to acknowledge her involvement in her offending before the Court; rather she chastised the parent for bringing the issue to the attention of other parents, a process the parent had adopted in order to ensure transparency.⁶

[27] The Commission has submitted various motivations for the offending. I accept the submission that one of the obvious motivations for the offending was to maximise unlawful financial gain.

The extent to which the statements departed from the truth

[28] The false statements were a substantial departure from the truth. The 20 hour ECE subsidy was grossly understated and the subsidy from 20 to 30 hours was not disclosed at all.

⁶ After the sentencing process was completed Mr Edwards took issue with this passage of my notes. Mr Edwards submitted Ms Brindle's response to the approach from the parent did not form part of the agreed summary of facts. Mr Edwards is correct. This information is however contained in the Commission's submissions paragraph 4.1(d) and the victim impact statement of JL read to me. The defendants submissions did not take issue with this passage in the Commission's sentencing submissions nor was it raised with me in oral submissions at the hearing. No issue was taken with the victim impact statement, prior to it being read.

Degree of dissemination

[29] The degree of dissemination of the false statements and misrepresentations was limited to the parents of the pupils at the preschool. Kowhai Montessori Preschool was licensed to provide ECE services to up to 40 children at a time. Typically the preschool catered for approximately 25 children. The preschool roll fluctuated from time to time due to the revolving nature of new students arriving and others leaving to commence primary school. The Commission estimates the false statements and misrepresentations that would have been made to between 50 and 100 parents across the 12 month charge period.

[30] The exact financial loss to the parent consumers has not been calculated and has been difficult to achieve although estimates have been made. There is, however, a significant difference between what parents were asked to pay ranging between \$7 and \$9 per hour and what parents should have been paying ranging from 37 cents to \$2.27 per hour.

[31] Of those invoices provided by parents to the Commission the amount of overcharging per week ranges from \$45 to \$161 with an average overcharging of \$103.55 per week. I accept the Commission's submission that when those figures are multiplied across the 40 week school year it becomes readily apparent how costly the misrepresentations were for the parents and how lucrative the offending was for the preschool.

Efforts to correct misleading statements

[32] At no stage has Kowhai Montessori Preschool taken any steps to correct these false or misleading statements. As already noted, when a parent made enquiries of the preschool as to its charging practices the parent was chastised for doing so. Ms Brindle further reiterated the false statements in subsequent correspondence with parents and also in other correspondence by attempting to assure parents by a promise of a small increase in Government funding.

The need to impose a deterrent penalty

[33] It is trite to reiterate the need to deter and denounce false and misleading statements to consumers. These statements have had the effect of the parent consumers paying more for services than lawfully required. As already noted, the preschool was fully aware of the ECE funding model and the parents placed significant reliance on the preschool to ensure it was correctly applied. The parents were taken advantage of. A strong deterrent factor is required as has previously been noted by the Court where false statements are deliberate.⁷

[34] The Commission also submits that deterrence is also required in this case because the offending interfered with the intended benefits of the Government subsidy to provide greater access to ECE services. While that is an inference that is available there is no evidence that this occurred at this preschool. There is no evidence of a significant change in the roll numbers at the preschool during the charge period. This is not a factor that I will give significant weight.

The unlawful gain

[35] The Commission has calculated the unlawful gain to the preschool was \$221,632.15. Mr Edwards takes no issue with this agreed sum.

Mitigating Factors

[36] The Commission submits, and again the defendant takes no issue with the submission, that there are no mitigating features of the offending.

Starting point

[37] As noted the Court strives to achieve consistency at sentencing with comparable cases. However, a prior case of similar offending is not always available given the infinite variety of circumstances and factors influencing offending. The Commission submits there is no other authority where the key features of the

⁷ *Megavitamin Laboratories (NZ) Ltd and Stewart v Commerce Commission* (1995) 6 TCLR 231 at 252.

offending that are present in the matters before me are also present. The defendant has not sought to suggest otherwise.

[38] Two cases have however been submitted to provide some assistance.⁸ All have distinguishing features that make comparison with the present offending a strain.

[39] In addition, during the offending period the maximum penalty of the offending was increased from \$200,000 to \$600,000. The increased penalty has been described as a demonstration of Parliament's intent to denounce and deter breaches of the Act which is consistent with the Act's focus on consumer protection.⁹

[40] I accept the approach submitted by the Commission that due to the increased penalty during the period of the offending, I must assess the likely penalty under the previous regime as a guide and then provide a starting point that will give effect to the intention of Parliament through its substantial increase in sentencing levels. As has been previously said in this Court, what is required is overall evaluation of a defendant's culpability bearing in mind the penalties have increased partway through the offending period.¹⁰

[41] The aggravating features of the offending are the level of funds unlawfully received. As noted, the financial gain derived from the offending totals \$221,632.15. The statements were blatantly false as to the amount of ECE subsidy, understating it by a significant percentage. There was also failure to make any mention at all of the additional subsidy available to those parents whose children attended preschool between 20 hours and 30 hours per week. There has been a significant breach of trust between the preschool and the parents whom are reliant to the preschool to accurately inform parents of the true child care cost it being a specialist area of knowledge that no one could expect parents to be conversant with.

⁸ *Commerce Commission v Energy On-Line Ltd* DC Napier 16 October 2006 (Judge Rae), and, *Klir v Commerce Commission* [2014] NZHC 1811.

⁹ *Premium Alpaca Ltd v Commerce Commission* [2014] NZHC 1836 at [76].

¹⁰ *Commerce Commission v Budge Collection Ltd* [2016] NZDC 15542 at 41.

[42] No steps have been taken by the preschool to correct its errors, rather contrary behaviour was initially adopted when a parent began to make enquiries and sought clarification. That parent was effectively reprimanded and chastised for their actions.

[43] While the number of consumers affected by this offending is viewed as relatively small, particularly when compared with the level of offenders in the *Energy Online Limited*¹¹ case that I have referred to, I do not consider the total number of victims to be a determinative factor. As already noted, an overall evaluative approach is required.

[44] The Commission submits the starting point under the previous sentencing regime for the entire offending would be in the range of \$160,000 to \$170,000. This is less than the starting point adopted in the *Energy Online Limited* case where the unlawful gains (\$270,000) were comparable to the present offending but the number of consumers affected are greater.

[45] However, the offending in that case occurred as a result of carelessness and *Energy Online Limited* took immediate steps to ameliorate and restore its consumers to their financial position prior to the offending. Here, the offending is for a far greater period and although fewer consumers were affected the statements were blatantly false and deliberately done and no steps have been taken to compensate the victim families for their unlawful payments to date, although I acknowledge that the fine that will be imposed will be reduced to reflect reparation payments.

[46] Further, the investigation itself revealed that there was a lack of systematic record keeping that has made the true extent of the offending difficult to qualify. In my view, those factors are far more serious than they were in the *Energy Online Limited* case and can be accorded greater weight.

[47] Accordingly, under the old penalty regime I would have adopted a starting point more in the range of \$200,000.

¹¹ 600 consumers affected.

[48] As the Commission notes, what is now required is an increase in the starting point to take account of the fact that some of the offending occurred after the maximum penalty has been increased. Two of the five invoices charged and one letter occurred after the increased penalty regime. In my view, that would bring the overall starting point to the range of \$300,000 to \$323,000. For present purposes, I adopt a starting point of \$310,000.

[49] There are no aggravating factors attributed to the to the defendant company which would warrant an increase in the starting point sentence. There are, however, a number of mitigating factors. The defendant seeks credit for the two factors in particular. First, its co-operation with the Commissioner's investigation and, second, its guilty plea, albeit entered late on the morning of hearing.

[50] Kowhai Montessori Preschool co-operated with the Commission to the extent Ms Brindle provided background material and sample documentation sent to parents. Further, Ms Brindle did provide written responses to some questions put to her by the Commission. Those questions confirmed her knowledge of the correct ECE rates. In addition, she voluntarily attended an interview with the Commission. Cooperation by persons under investigation by the Commission should be encouraged given the time consuming and detailed nature of these investigations.

[51] Further, the defendant on the morning of the day of hearing pleaded guilty to all charges. I note from the Court file that resolution was being discussed since November 2016. While credit for guilty plea is warranted due to savings to the system including the Commission, to some extent the outcome of the hearing was inevitable given the nature of the offending. That is a legitimate factor that detracts on the level of credit to be given.

[52] Again, however, resolution of charges is to be encouraged reflecting the substantial savings to all. I accept the Commission's submission that credit of approximately five percent should be given for co-operation and 10 percent for the guilty pleas. The total end sentence is, therefore, calculated as follows.

Starting point	\$310,000
Discount for cooperation with the Commission (5%)	\$15,500
Sub total	\$295,000
Credit for (late) guilty pleas (10%)	\$29,500
Total	\$265,500

[53] From this total sum the Commission seeks that reparation payments totalling \$11,400.90 be paid to the four families whom provided invoices to the Commission evidencing the overcharge.

[54] On that basis, the total fine that will be imposed is \$254,099.10. That fine will be apportioned between the seven charges. There will be reparation payments to the four families as follows.

- (a) To HB \$1615.20.
- (b) To victim MN \$4356.76.
- (c) To victim ED \$4928.94
- (d) To victim JL \$500.

[55] The fines and reparation are recorded against each charge as follows:

Representative offending	CRN ending	Fine	Reparation	Maximum Penalty
	2524	\$36,598.05	JL \$500	\$200,000
	2525	\$36,598.05	ED \$4928.94	\$200,000
	2526	\$36,598.05	MN \$4356.76	\$200,000
	2527	\$35,902.30	HB \$1615.20	\$600,000
	2528	\$35,902.30		\$600,000
Representative Charges – Letters	2534	\$36,598.05		\$200,000
	2535	\$35,902.30		\$600,000
	Total	\$245,999.99	\$11,400.90	

[56] The level of reparation ordered in respect of JL is not a true reflection of the total cost that she has suffered. JL has taken action in the Disputes Tribunal and an award has been made in JL's favour totalling \$5311.85. Reparation of that sum cannot be now ordered there already being an enforceable decision made in JL's favour by the Disputes Tribunal.



J Jelas
District Court Judge