

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA  
ŌTAUHAHI**

**[2020] NZEmpC 31  
EMPC 273/2017**

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for discovery against a non- party
BETWEEN	ZARA’S TURKISH LIMITED Plaintiff
AND	GÜLER KOCATÜRK Defendant

**EMPC 158/2018**

AND IN THE MATTER	of a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for discovery against a non-party
BETWEEN	IBRAHIM KOCATÜRK AND GÜLER KOCATÜRK Plaintiffs
AND	ZARA’S TURKISH LIMITED Defendant

Hearing: 3 March 2020  
(Heard at Christchurch via Audio Visual Link)

Appearances: B Buckett and M Belesky, counsel for Zara’s Turkish Ltd  
A Sharma, counsel for Ibrahim and Güler Kocatürk  
G La Hood, counsel for Ministry of Business, Innovation and  
Employment

Judgment: 13 March 2020

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**INTERLOCUTORY (NO 2) JUDGMENT OF JUDGE K G SMITH**  
**(Applications for non-party discovery)**

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[1] Zara's Turkish Ltd has applied for an order that the Chief Executive of the Ministry of Business, Innovation and Employment (MBIE) provide discovery of immigration files relating to Ibrahim Kocatürk and Güler Kocatürk. The orders are sought against MBIE because Immigration New Zealand is part of that ministry. The application is opposed by MBIE but not by Mr and Mrs Kocatürk.

[2] Zara's Turkish sought the following documents or information:

- (a) All files held by Immigration New Zealand in respect of Ibrahim Kocatürk from the period between 1 January 2009 and 1 January 2015.
- (b) More specifically, the employment agreement that was supplied to Immigration New Zealand in support of an application to vary Ibrahim Kocatürk's work visa which occurred on 17 February 2010.
- (c) Copies of all written and oral correspondence between Immigration New Zealand, including any of its agents, and Ibrahim Kocatürk between 1 January 2009 and 1 January 2015.
- (d) All files held by Immigration New Zealand in respect of Güler Kocatürk from the period between 1 January 2009 and 1 January 2015.
- (e) Copies of all written and oral correspondence between Immigration New Zealand, including any of its agents, and Güler Kocatürk between 1 January 2009 and 1 January 2015.

[3] At the hearing Ms Buckett, counsel for Zara's Turkish, amended the application to remove references to oral communication, which could not have formed part of an order for discovery in any event. MBIE opposed the application and, in

doing so, relied on Privacy Principle 11 from the Privacy Act 1993.<sup>1</sup> MBIE also challenged the scope of the application as unnecessarily broad.

[4] To place the application into context a brief comment is necessary about the Employment Relations Authority's determination and the challenges to it.<sup>2</sup> On 1 September 2017 the Authority determined employment relationship problems between Mr and Mrs Kocatürk and Zara's Turkish. The Authority found that Zara's Turkish was indebted to them for arrears of wages and holiday pay. Mr Kocatürk's claim that he had been unjustifiably dismissed was unsuccessful. Mrs Kocatürk's claim that she had been unjustifiably dismissed was successful and the Authority ordered Zara's Turkish to pay her lost wages arising from that dismissal and compensation for humiliation, loss of dignity and injury to feelings.

[5] The determination resulted in challenges from Zara's Turkish and Mr and Mrs Kocatürk. Zara's Turkish confined its challenge to the conclusions reached about Mrs Kocatürk. It disputed that she had been unjustifiably dismissed and the award for wages and holiday pay. Mrs Kocatürk's challenge sought to increase the compensation Zara's Turkish was ordered to pay to her. Mr Kocatürk challenged the determination that he had not been unjustifiably dismissed. He also sought to increase the amounts awarded to him for unpaid wages and holiday pay.

[6] Mr Kocatürk is a Turkish citizen and is allowed to work in New Zealand because he obtained a work visa before his arrival here. The initial period of Mr Kocatürk's work in New Zealand has assumed some importance to the litigation. He claims to have worked for Zara's Turkish from the time of his arrival, resulting in some uncertainty because, until his visa was amended, it authorised him to work for another business. Filling in the chronology of Mr Kocatürk's work history has led to the hunt for a copy of an employment agreement between him and Zara's Turkish that was signed in late 2009 or early 2010. Neither party has been able to locate this agreement, but Zara's Turkish believes a copy of it must have been provided to Immigration New Zealand as part of an application by Mr Kocatürk to vary his visa, which variation was granted in February 2010.

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<sup>1</sup> Section 6.

<sup>2</sup> *Kocatürk v Zara's Turkish Ltd* [2017] NZERA 145 (Member Appleton).

[7] The present application has been made to attempt to obtain a copy of the agreement but has been extended to capture all and any documents held by Immigration New Zealand about Mr and Mrs Kocatürk, covering several years.

[8] MBIE is not a party to these proceedings so the application must be dealt with by using clause 13 of schedule 3 to the Employment Relations Act 2000 (the Act). Non-party discovery is dealt with as follows:

### **13 Discovery**

- (1) The court may, in relation to discovery that relates to proceedings brought or intended to be brought in the court, or intended to be brought in the Authority, make any order that the District Court may make under section 105 or 106 of the District Court Act 2016; and those sections apply accordingly with all necessary modifications.
- (2) Every application for an order under section 105 or 106 of the District Court Act 2016 (as applied by subclause (1)) is to be dealt with in accordance with regulations made under this Act.
- (3) Nothing in subclauses (1) and (2) limits the making of rules under section 212 or regulations under section 237.

[9] Section 106 of the District Court Act 2016 deals with discovery against a non-party after a proceeding has commenced.<sup>3</sup> Under that section the Court is empowered to order a non-party to disclose whether documents are in that person's possession, custody or power. Section 106 reads:<sup>4</sup>

### **106 Discovery against non-party after proceeding commenced**

- (1) This section applies if it appears to the court, at any stage of a proceeding and in such circumstances as may be prescribed, that a document or class of documents may be or may have been in the possession, custody, or power of a person (C) who is not a party to the proceeding.
- (2) The court may order C—
  - (a) to disclose to the court and to any other prescribed person whether the document or documents are in C's possession, custody, or power; and

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<sup>3</sup> Section 105 is not relevant because it is about pre-trial discovery.

<sup>4</sup> The prescribed circumstances referred to are where the person who is not a party to a proceeding may be or may have been in control of one or more documents or group of documents that the person would have had to discover if the person were a party to the proceeding; District Court Rules 2014, r 8.21.

- (b) if a document has been but is no longer in C's possession, custody, or power, to disclose to the court and to any other prescribed person when C parted with it and what has become of it; and
- (c) to produce such of those documents as are in C's possession, custody, or power to the court or to any other prescribed person.

[10] Clause 13(2) of sch 3 requires every application for non-party discovery to be dealt with in accordance with regulations made under the Act. However, the Employment Court Regulations 2000 do not provide for non-party discovery. Despite that shortcoming there are some regulations that assist in determining this application.<sup>5</sup>

[11] The starting point is reg 6. Under reg 6(2)(a)(i) any case for which no form of procedure has been provided must be disposed of as nearly as is practicable in accordance with the provisions of the Act or the regulations.

[12] Regulations 37–43 (inclusive) provide for disclosure and inspection between parties to the litigation. The object of this part of the regulations is to ensure that, where appropriate, each party has access to the relevant documents of the other party. There is a potential limit to what might be disclosed, however, because the regulations provide that there are circumstances in which such access may be unnecessary or undesirable or both.<sup>6</sup>

[13] A document is relevant if it directly or indirectly:<sup>7</sup>

- (a) supports, or may support, the case of the party who possesses it; or
- (b) supports, or may support, the case of a party opposed to the case of the party who possesses it; or
- (c) may prove or disprove any disputed fact in the proceeding; or
- (d) is referred to in any other relevant document and it is itself relevant.

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<sup>5</sup> See the discussion in *Nisha v LSG Sky Chefs New Zealand Ltd* [2016] NZEmpC 77, [2016] ERNZ 568 at [88]; and *Matsuoka v LSG Sky Chefs New Zealand Ltd* [2013] NZEmpC 165, [2013] ERNZ 605 at [20].

<sup>6</sup> Regulation 37.

<sup>7</sup> Regulation 38; for the extended definition of what constitutes a document see reg 38(2).

[14] Given the requirement in cl 13(2), and the broad language in reg 6(2), I consider the approach to take is to assess if Immigration New Zealand is or is likely to have been in possession of relevant documents within the meaning of the regulations. If that is the case a decision is required about whether discovery of them would be unnecessary, undesirable or both.

### **The application considered**

[15] Ms Buckett submitted that all of the documents sought are relevant and necessary.<sup>8</sup> She accepted there are limits to the application derived from *Bank of New Zealand v Trotter* as follows:<sup>9</sup>

- (a) An application would not be granted if it was doing no more than fishing or where the orders might be unreasonably oppressive.
- (b) There must be grounds for belief that the documents exist.
- (c) The documents must be shown to be relevant to a matter in question in the proceeding.

[16] Mr La Hood, in submissions for MBIE, accepted that the Privacy Principles are relevant factors for the Court to consider in deciding whether disclosure is to be ordered.<sup>10</sup> In particular Privacy Principle 11(e)(iv) allows for disclosure of information where it is for proceedings before a court. However, he criticised the application as extremely broad, describing it as a blanket request for all files and communications over an extended period.

[17] Are the documents sought relevant? The first three parts of the application (at [2](a)–(c) above) are about Mr Kocatürk. I begin this assessment by considering the second part of the application (at [2](b) above), for a copy of the employment agreement. There is a dispute between Mr Kocatürk and Zara’s Turkish about when

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<sup>8</sup> Relying on *Bracewell v Richmond Services Ltd* [2014] NZEmpC 63.

<sup>9</sup> *Bank of New Zealand v Trotter* EC Auckland AC 36/07, 18 June 2007 at [13].

<sup>10</sup> Relying on *Talbot v Air New Zealand Ltd* [1994] 2 ERNZ 216; and see *The Vice Chancellor of Massey University v Wrigley and Kelly* [2010] NZEmpC 52.

he started working for the company and in what circumstances. It is common ground that the parties do not have the original agreement or a copy of it.

[18] Zara's Turkish supported its application with an affidavit from a director, Hanife Kokcu, explaining signing the employment agreement and sending a copy of it to Immigration New Zealand. That step was done, she said, as part of obtaining a variation to Mr Kocatürk's work visa that was granted in February 2010. I accept that it is likely that a copy of the employment agreement was sent to Immigration New Zealand and that the agreement may be relevant in the proceeding. Correspondence about that agreement, if it exists, may also be relevant.

[19] What was sought in the first and third parts of the application were all documents on Immigration New Zealand's files covering a span of six years including all correspondence between it and Mr Kocatürk. They are extremely broad and significantly overlap to the extent that they are almost identical. The only information offered to explain why they had been made was an unsupported statement by Mrs Kokcu of her belief that Immigration New Zealand's file might contain helpful documents. She did not say what they might be or how they could have a bearing on these proceedings. In submissions, Ms Buckett attempted to fill that gap by suggesting the file might hold time and wage information that could be relevant to Mr Kocatürk's claim. She did not explain why Immigration New Zealand would hold such information.

[20] I consider that the first and third parts of the application are engaging in inappropriate fishing, of the sort referred to in *Trotter*, and involve trying to obtain access to documents that have not been shown to be relevant or potentially relevant. They would fail on that ground alone but the breadth of these parts of the application far exceeds what is reasonable, making them oppressive. Applying the language of reg 38, the discovery sought is unnecessary and undesirable.

[21] The remaining two parts of the application (at [2](d) and (e) above) seek extensive material that may be held by Immigration New Zealand in relation to Mrs Kocatürk. The application spans the same six-year time frame. Again, the only information to support this claim is the brief passage in Mrs Kokcu's affidavit and her

opinion about what may be on the Immigration New Zealand's file. That is insufficient to establish that the documents sought are relevant or may be relevant and the breadth of these parts of the applications is also oppressive and undesirable.

## **Outcome**

[22] Zara's Turkish's application is partially successful because discovery about the employment agreement and related correspondence is appropriate, but the remaining requests are dismissed. The following orders are made:

- (a) Within ten working days of the date of this judgment Immigration New Zealand is to file and serve an affidavit of documents that:
  - (i) discloses whether it holds or has held a copy of the employment agreement between Ibrahim Kocatürk and Zara's Turkish entered into at any time in 2009 or 2010, supplied to enable the work visa to be varied in February 2010;
  - (ii) states, if a copy of that employment agreement is no longer held by it, when that agreement was last in its possession or under its control. If the agreement was sent to any person that person is to be identified;
  - (iii) discloses and lists any document including file notes, memoranda, emails, letters, or other correspondence relating to the receipt of a copy of the agreement by Immigration New Zealand, in response to receiving it, or in which the agreement was the subject matter; and
  - (iv) states, for the avoidance of doubt, if privilege is claimed for any document. If privilege is claimed that document is to be identified by its date, a description of its general nature, and details of the sender and recipient.



- (b) Within a further seven working days Immigration New Zealand is to allow inspection of those documents disclosed in the affidavit, except where privilege is claimed.

[23] Immigration New Zealand is entitled to an order for costs. As a non-party it could reasonably expect to have its actual and reasonable costs met. If agreement on costs cannot be reached, memoranda may be filed.

K G Smith  
Judge

Judgment signed at 4.40 pm on 13 March 2020