

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 77
EMPC 8/2020**

IN THE MATTER OF	challenge to a determination of the Employment Relations Authority
BETWEEN	MARIE KAUKAU TRADING AS SEW & SEW Plaintiff
AND	SOPHIE HIRI-GUALENI Defendant

Hearing:	On the papers
Appearances:	M Revell, advocate for plaintiff A Kersjes, advocate for defendant
Judgment:	4 June 2020

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Good Faith Report)**

[1] Ms Kaukau has filed a de novo challenge to a determination of the Employment Relations Authority (the Authority) that found that she had employed Ms Hiri-Gualeni, the defendant, but failed to comply with obligations under the Employment Relations Act 2000 (the Act) and the Holidays Act 2003. The Authority also found that Ms Kaukau had constructively and unjustifiably dismissed Ms Hiri-Gualeni.¹

[2] In total, Ms Kaukau was ordered to pay Ms Hiri-Gualeni, \$28,114.73 by way of penalties, wage arrears, lost remuneration, compensation, costs and disbursements.

¹ *Hiri-Gualeni v Kaukau t/a Sew & Sew* [2019] NZERA 714 (Member Larmer).

Ms Kaukau also was ordered to pay to the Inland Revenue Department the PAYE that was legally required to be deducted from Ms Hiri-Gualeni's total gross earnings, and penalties to the Crown of \$2,000.²

[3] In her de novo challenge Ms Kaukau claims that Ms Hiri-Gualeni was not an employee of hers but a contractor. She also says that the amount awarded for lost remuneration was overstated.

The Court requested a Good Faith Report from the Authority

[4] In the course of the Authority's determination, the Authority recorded that Ms Kaukau did not participate in the Authority's investigation:

- (a) she failed to provide employment records as directed by the Authority;
- (b) she failed to file a statement in reply; and
- (c) she did not attend the investigation meeting.

[5] As a result of those findings, the Court requested a Good Faith Report from the Authority on the basis that Ms Kaukau may not have participated in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved.

[6] This interlocutory judgment concerns the effect on these proceedings of the Good Faith Report that has been provided by the Authority.

The parties commented on the Authority's draft report

[7] Before finalising its Good Faith Report, the Authority provided a draft to the parties for their comment.

² At [82].

[8] Ms Kaukau commented that she had acted on advice as to how to deal with Ms Hiri-Gualeni's claim, which was that, as Ms Kaukau considered Ms Hiri-Gualeni to be a contractor and not an employee, she should not respond to the claim.

[9] She acknowledges receiving the statement of problem on 29 July 2019. She accepts other communications from the Authority were couriered to her on 12 August and 24 September 2019 but says those documents were signed for on her behalf by another contractor operating from her premises. She says she did not view any of this material until after the Authority's determination was made.

[10] Ms Kaukau says she was not contacted by Mediation Services regarding a mediation and, if she had been contacted, she would have sought more advice and realised that she would have to prove that Ms Hiri-Gualeni was a contractor rather than an employee. She notes there was no direction to mediation.

[11] In her response to the draft Good Faith Report, Ms Hiri-Gualeni asked the Authority Member to consider adding that Ms Kaukau did not communicate at all with Ms Hiri-Gualeni or her representative either prior to or post the investigation, despite numerous requests to do so, and that she has failed to pay the remedies contained in the determination.

The Authority concluded that Ms Kaukau did not assist in resolving the employment relationship problem

[12] The Good Faith Report from the Authority notes:

- (a) no statement in reply was filed and no application to file one out of time was made;
- (b) Ms Hiri-Gualeni advised the Authority that, although the Mediation Service had attempted to arrange a mediation date, Ms Kaukau was non-responsive to attempts to contact her regarding such a date;

- (c) it directed Ms Kaukau to provide the Authority with various employment records, which were not provided;
- (d) it invited Ms Kaukau to advise of any dates that she would have been unable to attend an investigation meeting, to which there was no response.

[13] The Authority then set the matter down and sent a notice of investigation meeting to Ms Kaukau. The notice provided that, if in doubt, Ms Kaukau was to contact an officer of the Authority. Ms Kaukau did not contact the Authority at all, for any reason, during the Authority's investigation of Ms Hiri-Gualeni's claim.

[14] Ms Kaukau also failed to attend the investigation meeting or to seek an adjournment of it.

[15] The Authority concludes that, in its view, Ms Kaukau:

- (a) did not constructively assist in resolving the employment relationship problems in a timely, economic, and efficient way; and
- (b) failed to participate in the Authority's investigation meeting in a manner that was designed to resolve the issues involved.

[16] The parties were invited by the Court to comment on the Good Faith Report. Ms Kaukau simply relied on the submissions that she provided to the Authority. Ms Hiri-Gualeni supported the report and submitted that the current proceedings before the Court were vexatious and filed to attempt to avoid paying the amounts awarded by the Authority. Mr Kersjes, Ms Hiri-Gualeni's advocate, advised that she would be applying for security for costs should the matter proceed.

The Court may limit a challenge where there is a failure to participate in good faith

[17] Pursuant to s 182(2) of the Act, the Court may make a direction that the hearing of a challenge is to be other than de novo if it is satisfied that the person challenging

the determination did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved. The purpose of the provisions on good faith reports is to provide a way to sanction parties who fail to properly take part in the statutory mediation and investigation processes. The discretion conferred on the Court by s 182(2), however, must be exercised judicially and consistently with the interests of justice. This involves consideration not only of the blameworthy conduct of the plaintiff but also the overall interests of both the plaintiff and the defendant.³

There is no doubt that Ms Kaukau failed to participate in good faith

[18] This is a case where the plaintiff failed completely to participate in the investigation process. Ms Kaukau's admitted conduct of not opening correspondence from the Authority and deliberately not taking any steps was completely unacceptable and resulted in the Authority having to deal with the matter in her absence. If her non-participation was as a result of advice received, that advice was plainly wrong.

The challenge is to proceed on a limited basis

[19] The key issue raised by Ms Kaukau is the employment status of Ms Hiri-Gualeni. That issue was determined by the Authority but obviously without any input from Ms Kaukau.

[20] I consider that the interests of justice require the Court to consider the employment status issue. While I acknowledge the additional costs Ms Hiri-Gualeni will incur dealing with evidence provided by Ms Kaukau in the Court for the first time, that can be considered in the context of costs.

[21] However, given Ms Kaukau's failures in the Authority process, the appropriate sanction that balances the interests of both parties is limiting the challenge to that question only. If Ms Kaukau fails on the issue of status, the remedies awarded by the Authority will stand.

³ *The Travel Practice Ltd v Owles* EmpC Christchurch CC 15/09, 14 October 2009 at [20].

[22] Accordingly, the challenge will proceed on a non-de novo basis on the question of whether Ms Kaukau employed Ms Hiri-Gualeni under a contract of service.⁴

[23] Ms Hiri-Gualeni now is to file and serve a statement of defence to the statement of claim within 30 days of the date of this judgment. Thereafter a directions conference will be arranged to progress this matter, including to timetable any application for security for costs that Ms Hiri-Gualeni may file.

[24] Costs are reserved.

J C Holden
Judge

Judgment signed at 9.15 am on 4 June 2020

⁴ Employment Relations Act 2000, s 6.