

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2016] NZERA Wellington 126  
5618134

BETWEEN            LEEANNE HOUIA  
                                 Applicant

AND                    NGA TAONGA TUKU IHO I TE  
                                 WA KAINGA (NTTI)  
                                 First Respondent

AND                    HEATHER FUIMAONO  
                                 Second Respondent

AND                    MAHIA FUIMAONO  
                                 Third Respondent

Member of Authority:    M B Loftus

Representatives:        Alice Porter, Advocate for Applicant  
                                 Heather Fuimaono and Mahia Fuimaono, on behalf of  
                                 Respondents

Investigation Meeting:    10 October 2016 at Wellington

Submissions Received:    At the investigation meeting

Determination:            10 October 2016

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**DETERMINATION OF  
THE EMPLOYMENT RELATIONS AUTHORITY**

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**Employment relationship problem**

[1]    The applicant, Leeanne Houia, claims she was unjustifiably dismissed, albeit constructively, by the respondents on or about 25 January 2016. Ms Houia also claims she is owed various sums by way of unpaid wages, holiday pay and

reimbursing allowances. She also asks the respondents be penalised for a failure to bargain fairly<sup>1</sup> or otherwise act in good faith.<sup>2</sup>

[2] The respondents failed to address the claims in good faith. They did not provide a statement in reply or participate in a telephone conference called to discuss the claim and its investigation. They also failed to provide witness statements despite advising the Authority these were being prepared. That said there was a document filed about an hour and a half prior to the investigations commencement which advised *we do dispute all her claims* but provided no detail as to how or why and they did attend the investigation.

### **Background**

[3] Ms Houia was engaged as Kaiako Tautoko – Visiting Teacher in November 2013. Her employer operated a home based early childhood education service. The employment was subject to a written agreement which, amidst other things contained the following clauses relevant to this claim. The employer was identified as Nga Taonga Tuku Iho i te wa Kainga (NTTI). Ms Houia was *Full Time* and was to work 37.5 hours a week.<sup>3</sup> She would be paid a salary of \$45,000 a year<sup>4</sup> and be reimbursed for employment related expenses.<sup>5</sup>

[4] It would be fair to say NTTI faced various difficulties and this resulted in some irregularity in the payment of Ms Houia's salary and instances of underpayment. This included a period six week during which Ms Houia was not paid in April and May 2015 though there were promises this would be addressed at a later date.

[5] On 26 November 2015 Heather Fuimaono approached Ms Houia and advised the financial situation was such her hours were to be cut to 20 a week though this would be reviewed when the next years funding was known in March 2016. The two also discussed continued failures regarding salary payments without resolution.

[6] Ms Houia was then given a form and asked to sign an acknowledgment she accepted the change to her hours. She refused and advised Ms Fuimaono accordingly.

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<sup>1</sup> Section 63A(3) of the Employment Relations Act 2000

<sup>2</sup> Section 4A of the Employment Relations Act 2000

<sup>3</sup> Ms Houia's individual employment agreement dated 2 December 2013 at clause 6.1

<sup>4</sup> n 3 at clause 7.1

<sup>5</sup> n 3 at clauses 7.3 and 7.4

[7] Ms Fuimaono accepts her response was *we are doing it anyway* though nothing further was said and Ms Houia was not aware the change had been actioned till she received a reduced pay at the end of December.

[8] Her response was to tender her resignation which she did by letter dated 9 January 2016. In it she gave notice and advised her last day would be 25 January though she did not say why she was leaving.

[9] Her departure had the effect of meaning NTTI could no longer fulfil various obligation to the Ministry of Education and as a result it no longer trades.

## **Determination**

### ***Identity of the employer***

[10] The first issue is who employed Ms Houia? Here it should be noted notwithstanding its being identified as the employer in the written employment agreement NTTI is not a legal entity. It is what Ms Houia describes as a trading name while the Fuimaono's use the label *service name*. NTTI could not be the employer.

[11] Ms Houia says she believed she was employed by Heather Fuimaono who taught her during her early childhood teacher training and who approached her about the job.

[12] Both Heather Fuimaono and Mahia Fuimaono initially said no – they both employed Ms Houia. They later amended that by saying they did so in their capacity as shareholders and directors of a company known as Kare-Fui Limited.<sup>6</sup>

[13] Ms Houia's response is she had not heard of Kare-Fui till it was mentioned at the investigation meeting and had no idea it could possibly be her employer. To this the Fuimaono's say that may not be correct as they thought Ms Houia received some payslips which identified Kare-Fui and she gave teachers a document which identified it as the holder of the early childhood care license.

[14] That said they could provide neither document and accepted when questioned that while they thought Ms Houia should have known of Kare-Fui's existence they could not guarantee it. Nor could Heather Fuimaono say the issue was discussed during the interview process.

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<sup>6</sup> Company number 4532178

[15] Having heard the evidence, and in particular the Fuimaono's initial response it was they who employed along with their inability to provide any evidence supporting the suggestion Kare-Fui was the employer, I find Ms Houia was employed by both Heather Fuimaono and Mahia Fuimaono. They shall be held jointly and severally liable for the awards that are going to be made in this determination.

### *Constructive dismissal*

[16] Ms Houia claims she was constructively dismissed.

[17] In *Wellington etc Clerical Workers etc IUOW v Greenwich*<sup>7</sup> the Court stated that for a dismissal to be constructive:

*It is not enough that the employer's conduct is inconsiderate and causes some unhappiness to the employee. It must be dismissive or repudiatory conduct.*

[18] In *Auckland etc. Shop Employees etc IUOW v Woolworths (NZ) Ltd*<sup>8</sup> the Court of Appeal held that constructive dismissal includes, but is not limited to, cases where:

- a. An employer gives an employee a choice between resigning or being dismissed;
- b. An employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign.
- c. A breach of duty by the employer causes an employee to resign.

[19] There must also be a causal link between the employers conduct and the tendering of the resignation<sup>9</sup>.

[20] Ms Houia says her resignation was brought about by two events. The first was the employers continued failures in respect to payment and while she tolerated this for some time that was due to the fact she needed an income and the situation was mitigated to some extent by promises the issue would be rectified. When, however, she added the pressure of reduced income the situation become intolerable and

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<sup>7</sup> (1983) ERNZ Sel Cas 95; [1983] ACJ 965

<sup>8</sup> (1985) ERNZ Sel Cas 136; 2 NZLR 372 (CA)

<sup>9</sup> *Z v A* [1993] 2 ERNZ 469

confirmed in her mind the employer no longer intended honouring the agreement between the two.

[21] Having heard the evidence I conclude Mr Houia was, as claimed, constructively dismissed. At its simplest an employment agreement is an exchange of labour for remuneration. An employer's failure to honour its obligations in respect to payment is, in my view, a significant breach. To then advise it will nearly halve the hours and with it the employees ability to earn is, as Ms Houia said, a clear indication the employer intended breaching the agreement as it then stood.

[22] This must be especially true when, as the Fuimaono's admit was the case here, they were of the view (which as it turned out was correct) they could not run the business without Ms Houia. Therefore they were not, given their financial predicament, willing to offer any alternate or otherwise consider a compromise. They accept they were intent on acting and would not allow the agreement to continue according to its terms. These admissions confirm breaching the extant agreement was their objective and the magnitude of change means the intended breach was significant. They also accepted when questioned it was foreseeable Ms Houia might resign in response.

[23] The conclusion Ms Houia was unjustifiably dismissed raises the question of remedies. In her statement of problem she sought three months lost wages and \$10,000 as compensation for hurt and humiliation.

[24] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration. Additional amounts may be awarded on a discretionary basis and Ms Houia now asks I exercise this discretion and reimburse her loss, which exceeds 3 months, in full.

[25] While Ms Houia took immediate steps to mitigate her loss she failed to find replacement employment within three months. This, and s 128(2), means three months (\$11,250) must be paid. The question is whether I should increase that award as is now being asked. The answer is no. The purpose of a Statement of Problem is to put a party on notice of what is being sought. That was three months and it should not be subject to change without notice.

[26] Turning to compensation. Ms Houia supported her claim with evidence of the hurt she suffered though the bulk of this related to the effect of financial strain. There was, however, some medical evidence though this raised a further issue. It evidenced a pre-existing condition. The Fuimaono's were not responsible for that conditions existence and while their action may have aggravated it there is no evidence about the extent to which this may be so.

[27] Having considered the evidence I consider a payment of \$7,500 to be appropriate.

[28] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Ms Houia contributed to her dismissal in a way which justifies a reduction in remedies. There is no evidence she did.

### ***Arrears***

[29] Ms Houia claims she is owed \$11,140.77 in unpaid wages and \$7,586.05 in unpaid statutory and annual holidays. While she accepts there is a degree of estimation to the claim she says she was forced to do this due to a lack of records. She then supported her claim with various documents and spreadsheets showing how she calculated the amounts due.

[30] Ms Houia seeks a further \$2,385.20 as reimbursement of expenses payable pursuant to clauses 7.3 and 7.4 of her employment agreement.

[31] The Fuimaono's accept money owes but say they do not believe it is as much as is claimed. When asked to explain why they hold that belief the answer was *we just don't believe it*. The Fuimaono's concede the reimbursements are due as claimed.

[32] Section 132 of the Employment Relations Act 2000 provides where there is a claim for the recovery of monies the employee may call evidence to show the employer failed to comply with the requirement it keep wage and time records<sup>10</sup> and the failure prejudiced their ability to accurately quantify the claim.<sup>11</sup> The section goes

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<sup>10</sup> Section 130 of the Employment Relations Act 2000

<sup>11</sup> Section 132(1) of the Employment Relations Act 2000

on to say where such evidence is called I may then accept the claim except where the respondent proves it is incorrect.<sup>12</sup>

[33] The evidence described in s 132(1) was called and it should be noted the Fuimaono's accept there are no wage and time records after an unspecified date upon which they changed their accountant. Those they say they have were not produced. They also accept Ms Houia asked for the records more than once and while they initially said they would be provided this did not occur.

[34] Given the evidence and s 132 I accept the arrears claim as lodged.

### ***Penalties***

[35] Ms Houia asks the Fuimaono's be penalised for failing to bargain fairly or act in good faith. The events underlying these claims are the same as those that have led to her successful personal grievance claim – the presentation of a fait accompli regarding hours of work and a failure to pay in accordance with the employment agreement.

[36] When asked to explain why these acts also warrant the imposition of a penalty Ms Houia was unable to answer. To that I add the fact they effectively represent a form of double jeopardy. They are the reasons the Fuimaono's have already suffered the imposition of remedial payments and there is also uncontested evidence their actions stem from ignorance as opposed to malicious intent. In the circumstances I decline the invitation I also penalise them.

### **Conclusion and costs**

[37] For the above reasons I conclude Ms Houia was employed by Heather Fuimaono and Mahia Fuimaono and both be jointly and severally liable for the awards that are to be made in Ms Houia's favour.

[38] I also conclude Ms Houia has a personal grievance as she was unjustifiably dismissed and she has various sums owing by way of unpaid wages, holidays and reimbursing allowances.

[39] As a result the respondents, Heather Fuimaono and Mahia Fuimaono, are to pay the applicant, Leeanne Houia, the following:

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<sup>12</sup> Section 132(1) of the Employment Relations Act 2000

- i. \$11,250.00 (eleven thousand, two hundred and fifty dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$7,500.00 (seven thousand, five hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act; and
- iii. A further \$18,726.82 (eighteen thousand, seven hundred and twenty six dollars and eighty two cents) gross being unpaid wages and holidays; and
- iv. A further \$2,385.20 (two thousand, three hundred and eighty five dollars and twenty cents) being reimbursement of expenses payable pursuant to clauses 7.3 and 7.4 of her employment agreement

[40] Finally I note claims the Fuimaono's are impecunious and incapable of paying the amounts awarded. There was, however, no supporting evidence and no application I apply s 131(1A) and consider instalment payments. This may become an issue should enforcement action be required but until then I take the matter no further. I also add that if it does become an issue I strongly suggest the Fuimaono's support their assertions with evidence.

[41] Costs are reserved

M B Loftus  
Member of the Employment Relations Authority