

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2019] NZERA 714
3064114

BETWEEN

SOPHIE HIRI-GUALENI
Applicant

AND

MARIE KAUKAU t/a SEW &
SEW
Respondent

Member of Authority: Rachel Larmer

Representatives: Adrian Plunket, Advocate for the Applicant
No appearance by the Respondent

Investigation Meeting: 14 November 2019 at Rotorua

Date of Determination: 16 December 2019

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Hiri-Gualeni says she was employed by Marie Kaukau, who was trading as “*Sew and Sew*” in Rotorua, as a seamstress from 11 November 2018 until 8 February 2019.

[2] Ms Hiri-Gualeni says she was not provided with a written employment agreement, in breach of s 65 of the Employment Relations Act 2000 (the Act).

[3] Ms Hiri-Gualeni asks that a penalty be imposed on Ms Kaukau for the breach of s 65 of the Act.

[4] Ms Hiri-Gualeni says that Ms Kaukau failed to keep, and produce on request, wage and time records for her under the Act or holiday and leave records under the Holidays Act 2003 (HA03).

[5] Ms Hiri-Gualeni asks that penalties be imposed on Ms Kaukau for her failures to keep records in breach of s 130 of the Act and s 81 of the HA03.

[6] Ms Hiri-Gualeni claims that Ms Kaukau failed to pay her wages for the hours and days that she had worked. She now seeks to recover her wage arrears.

[7] Ms Hiri-Gualeni further claims that she was constructively dismissed on 8 February 2019, when Ms Kaukau responded to Ms Hiri-Gualeni's attempts to obtain payment for her wage arrears from Ms Kaukau by saying that she was not going to pay her anything. Ms Hiri-Gualeni seeks lost remuneration and distress compensation for her unjustified dismissal.

[8] Ms Hiri-Gualeni seeks reimbursements of her costs and disbursements incurred in connection with these proceedings.

Employment records not produced by Ms Kaukau

[9] Although Ms Kaukau was directed by the Authority on 12 August 2019 to provide copies of Ms Hiri-Gualeni's wage and time records, holiday and leave records, individual employment agreement, final pay information, and total gross earnings paid to Ms Hiri-Gualeni, none of that information has been provided.

[10] The failure to provide employment records means that s 132(1) of the Employment Relations Act 2000 (the Act) applies to Ms Hiri-Gualeni's claims.

[11] That means that s 132(2) of the Act allows the Authority to accept as proven all of Ms Hiri-Gualeni's claims about the hours, days and times she worked and the wages she was paid, because the evidence she gave the Authority about that was not proven to be incorrect.

No appearance by Ms Kaukau

[12] Ms Hiri-Gualeni's Statement of Problem was served on Ms Kaukau by the Authority via track & trace Courier Post on 31 July 2019.

[13] The Authority's directions regarding this matter, including the order to produce Ms Hiri-Gualeni's employment records, were served on Ms Kaukau by track & trace Courier Post, and signed for, on 14 August 2019.

[14] The Authority's Notice of Investigation Meeting was served on Ms Kaukau by track & trace Courier Post, and signed for, on 26 September 2019.

[15] Ms Kaukau did not file a Statement in Reply.

[16] In the Authority's directions dated 12 August 2019, Ms Kaukau was informed that because she had not filed a Statement in Reply within 14 days of service of the Statement of Problem on her, then - if she wanted to defend Ms Hiri-Gualeni's claims against her - she was required to apply for leave to file her Statement in Reply out of time.

[17] Ms Kaukau was given extra time (until 19 August 2019) to file an application for leave to file her Statement in Reply out of time. No application for leave was made and no Statement in Reply was filed by Ms Kaukau.

[18] No Statement in Reply has been received.

[19] The Authority's directions to Ms Kaukau to produce information relevant to Ms Hiri-Gualeni's claims have not been complied with.

[20] Ms Kaukau has not had any communications with the Authority and she did not appear at the investigation meeting.

Formal proof of Ms Hiri-Gualeni's claims

[21] Ms Hiri-Gualeni attended the Authority's investigation meeting, confirmed her evidence under affirmation and was questioned about the evidence that she had given in her witness statement.

[22] The Authority has therefore determined Ms Hiri-Gualeni's claims based on the information that was available to it as at the date of this determination.

The issues

[23] The issues to be determined are:

- (a) Did Ms Kaukau employ Ms Hiri-Gualeni?
- (b) If so, did Ms Kaukau provide Ms Hiri-Gualeni with a written employment agreement?

- (c) Did Ms Kaukau keep, and produce upon request, wage and time records and holiday and leave records for Ms Hiri-Gualeni?
- (d) Is Ms Hiri-Gualeni owed wage arrears?
- (e) Was Ms Hiri-Gualeni constructively dismissed?
- (f) If so, was her dismissal justified?
- (g) If not, what if any remedies should be awarded?
- (h) Should penalties be imposed for any breaches that may have occurred?
- (i) Should some or all of any penalties that are imposed on Ms Kaukau be paid to Ms Hiri-Gualeni personally instead of the Crown?
- (j) What if any costs should be awarded?

Did Ms Kaukau employ Ms Hiri-Gualeni?

[24] The Authority only has jurisdiction to investigate employment relationship problems involving parties to an employment relationship.

[25] The absence of any employment documentation has therefore raised a question about whether or not the parties were in an employment relationship.

[26] Ms Hiri-Gualeni bears the onus of establishing on the balance of probabilities that she and Ms Kaukau were in an employment relationship, and not engaged in an independent contracting arrangement.

[27] Section 6 of the Act defines an employee. Section 6(2) of the Act requires the Authority to assess the real nature of the parties' relationship.

[28] After hearing from Ms Hiri-Gualeni, the Authority was satisfied that she has discharged the onus of proving that it was more likely than not that she and Ms Kaukau had agreed to enter into an employment relationship.

[29] Ms Hiri-Gualeni is not someone who was in business on her own account. She did not want to be engaged as an independent contractor and Ms Kaukau had not suggested that that was going to be the arrangement. Ms Hiri-Gualeni approached Ms Kaukau seeking employment (not a contracting arrangement), after seeing a sign in the window of her shop.

[30] The discussions that the parties had before Ms Hiri-Gualeni started work were about entering into an employment relationship. Their relationship did not have the features that are usually associated with an independent contracting arrangement.

[31] There was no discussion about Ms Hiri-Gualeni paying her own taxes. The wages she received were less than the gross amount of pay she was entitled to. That reasonably led Ms Hiri-Gualeni to conclude that Ms Kaukau was deducting PAYE from her wages, as she (Ms Hiri-Gualeni) had expected her (Ms Kaukau) to do.

[32] If Ms Kaukau wanted MS Hiri-Gualeni to be responsible for her own taxes then that could and should have been expressly discussed, and mutually agreed on, before Ms Hiri-Gauleni started work.

[33] Ms Hiri-Gualeni used the tools provided by Ms Kaukau, at the business premises that Ms Kaukau operated her Sew Sew business from.

[34] Ms Hiri-Gualeni agreed to work from 10:00am until 4:00pm Mondays to Fridays and Saturdays as required. This effectively meant (due to her childcare responsibilities) that she (Ms Hiri-Gualeni) was unable to do any other work for any other employer or entity.

[35] Ms Hiri-Gualeni confirmed to the Authority that her only source of income was from Ms Kaukau, she did not do any work elsewhere. Nor was she involved in any other business activity. Her evidence was that she didn't have time because she was expected to be at Sew Sew on a full time basis, working at least 30 hours per week.

[36] Ms Hiri-Gualeni told the Authority that she actually ended up often working longer than her contracted hours. Sometimes Ms Hiri-Gualeni would go back to work from 5:00pm to 8:00pm to make sure that all of the work from clients, that had to be done by a certain deadline, was completed on time.

[37] Ms Hiri-Gualeni said she did that because Ms Kaukau would not be paid by Sew Sew's clients unless/until the work they had asked for had been completed to the required standard.

[38] Ms Hiri-Gualeni says she was well aware that Ms Kaukau needed to be paid by the client in order to be able to pay Ms Hiri-Gualeni her wages. Ms Hiri-Gualeni said that is why she would sometimes work longer than her contractually agreed hours.

[39] The Authority is satisfied that the parties were in an employment relationship, so it does have jurisdiction to investigate Ms Hiri-Gualeni's claims.

Was Ms Hiri-Gualeni provided with a written employment agreement?

[40] Ms Kaukau, as an employer, was legally required to provide Ms Hiri-Gualeni with a written employment agreement that contained all of the information set out in s 65 of the Act.

[41] That did not occur. This was a serious breach, because it led to the problems that have occurred in the employment relationship, and to these proceedings.

Did Ms Kaukau fail to keep, and produce upon request, wage and time records and holiday and leave records?

[42] Ms Kaukau as an employer was legally required to keep wage and time records for Ms Hiri-Gualeni that contained the information set out in s 130 of the Act and holiday and leave records under s 81 of the HA03.

[43] Ms Kaukau was also legally required to produce these employment records upon request.

[44] Although the Authority directed Ms Kaukau on 14 August 2019 to provide these employment records, she failed to produce them. Ms Kaukau has therefore breached her obligations regarding employment documentation under the Act and the HA03.

Is Ms Hiri-Gualeni owed wage arrears?

Proof of claim

[45] In accordance with s 132(2) of the Act, the Authority is able to accept Ms Hiri-Gualeni's evidence regarding the hours, day and time she worked and the wages she was paid.

Wage arrears

[46] Ms Hiri-Gualeni claims that she is owed wage arrears of \$2,677.

[47] In the absence of any information contradicting the evidence that Ms Hiri-Gualeni gave under affirmation to the Authority, her wage arrears claim succeeds.

[48] Ms Kaukau is ordered to pay Ms Hiri-Gualeni wage arrears of \$2,677, for hours she has worked but was not paid.

Holiday pay arrears

[49] Ms Kaukau also owes Ms Hiri-Gualeni unpaid holiday pay arrears. This is calculated as eight per cent of Ms Hiri-Gualeni's total gross earnings of \$3,514.50.

[50] Ms Kaukau is therefore ordered to pay Ms Hiri-Gualeni \$280.16 in holiday pay arrears.

Was Ms Hiri-Gualeni constructively dismissed?

[51] The failure to pay wages is a fundamental breach of an employer's obligation to pay an employee for the work they do, in accordance with the agreed payment arrangements.

[52] The initiative for the ending of the employment came from Ms Kaukau when she told Ms Hiri-Gualeni on 8 February 2019 that she would not be paying Ms Hiri-Gualeni any wage arrears.

[53] This advice from Ms Kaukau made it clear to Ms Hiri-Gualeni that Ms Kaukau:

- (a) Did not intend to be bound by the terms of their employment agreement;
- (b) Would not remedy her past breaches; and
- (c) Would be likely to continue to not pay her for hours she worked.

[54] These fundamental breaches went to the heart of the employment relationship, and therefore made it reasonably foreseeable that Ms Hiri-Gualeni would refuse to continue working in light of such breaches.

[55] Ms Kaukau therefore constructively dismissed Ms Hiri-Gualeni, because her resignation was not a free, voluntary or genuine resignation. Rather it was a foreseeable response to Ms Kaukau's continued breaches of their employment agreement.

Was Ms Hiri-Gualeni's dismissal justified?

[56] Justification is to be assessed in accordance with the justification test in s 103A of the Act. This requires the Authority to objectively assess whether Ms Kaukau's actions and how she acted were what a fair and reasonable employer could have done in all the circumstances, at the time Ms Hiri-Gualeni was constructively dismissed.¹

[57] A fair and reasonable employer is expected to comply with its statutory obligations. These include the good faith obligations in s 4(1A) of the Act and with each of the four procedural fairness tests set out in s 103A(3) of the Act.

[58] Ms Kaukau failed to comply with any of these statutory obligations. It is also not fair or reasonable for her to have refused to pay Ms Hiri-Gualeni for work she had done or to refuse to pay her wage arrears for days and hours of work that she had already worked but not been paid for.

[59] Ms Kaukau is unable to discharge the onus of justifying Ms Hiri-Gualeni's dismissal.

[60] Ms Hiri-Gualeni's unjustified constructive dismissal claim succeeds. Accordingly, her dismissal was substantively and procedurally unjustified.

What if any remedies should be awarded?*Mitigation of loss*

[61] Ms Hiri-Gualeni gave evidence of the steps that she took to mitigate her loss. This included cold calling potential employers, applying for jobs online and obtaining the assistance from Work and Income New Zealand of an employment consultant.

[62] The Authority is satisfied Ms Hiri-Gualeni took appropriate steps to mitigate her loss.

Lost remuneration

[63] Ms Hiri-Gualeni was out of work from 8 February 2019 until she started a training course on 22 July 2019. She therefore seeks 23 weeks' lost remuneration.

¹ Section 103A(2) of the Act.

[64] The minimum wage over that period was \$16.50 prior to 1 April 2019 and then increased to \$17.70 from 1 April 2019 onwards.

[65] Ms Hiri-Gualeni is therefore owed \$3,465 gross for the period 8 February to 31 March. This is calculated at the minimum wage rate of \$16.50 x 30 hours per week for seven weeks.

[66] For the period from 1 April 2019 to 21 July 2019 Ms Hiri-Gualeni is to be paid \$8,496. This consists of \$17.70 per hour for 30 hours a week for 16 weeks.

[67] Ms Kaukau is therefore ordered to pay Ms Hiri-Gualeni total lost remuneration of \$11,961, being the actual remuneration she has lost.

Distress compensation

[68] Ms Hiri-Gualeni was very upset that she was not only paid wages for the work that she had already done, but that she was constructively dismissed. She explained how she needed that income as the sole income earner with two young children.

[69] The lack of wages and the dismissal resulted in Ms Hiri-Gualeni suffering financial stress and hardship, which was increased by the fact that she had no money to pay for the school fees, school uniforms and stationery that she was required to provide for her children on the basis that she could not afford to pay it.

[70] Ms Kaukau is also ordered to pay Ms Hiri-Gualeni \$10,000 distress compensation under s 123(1)(c)(i) of the Act to compensate for the humiliation, loss of dignity and injury to feelings her unjustified dismissal caused her.

Should penalties be imposed for any of the breaches that occurred?

[71] The imposition of penalties on Ms Kaukau for her breaches is consistent with the objects of the Act, in particular, the objects in s 3 of the Act which include:

- (a) Promoting good faith aspects of the employment environment in employment relationships;
- (b) Promoting the enforcement of employment standards; and
- (c) Acknowledging and addressing inherent inequality of power in employment relationships.

Failure to provide written employment agreement

[72] After considering all of the factors in s 133A of the Act, the Authority imposes a penalty of \$2,000 on Ms Kaukau for its breach of s 65 of the Act.

Failure to keep and produce employment records

[73] Ms Kaukau's failure to keep and produce wage and time records and holiday and leave records is a breach of employment standards and contrary to her obligations under s 130 of the Act and s 81 HA03.

[74] Having regard to the factors in s 133A of the Act, the Authority imposes a penalty of \$2,000 on Ms Kaukau for its failure to keep, and produce upon request, Ms Hiri-Gualeni's employment records.

Should some or all of any penalties that are imposed on Ms Kaukau be paid to Ms Hiri-Gualeni personally instead of the Crown?

[75] \$1,000 of the penalty imposed for the failure to give Ms Hiri-Gualeni a written employment should be paid to Ms Hiri-Gualeni to reflect the harm that she suffered as a result of this breach. The remaining \$1,000 of the penalty imposed for this breach should be paid directly to the Crown Bank Account.

[76] \$1,000 of the penalty imposed for the failure to keep and produce employment records is to be paid directly to Ms Hiri-Gualeni to reflect the harm that this breach caused her. The remaining \$1,000 of the penalty is to be paid directly to the Crown Bank Account.

What if any costs should be awarded?

[77] Ms Hiri-Gualeni as the successful party is entitled to a contribution towards her actual legal costs.

[78] Costs are to be assessed in accordance with the Authority's usual notional daily tariff-based approach to costs. The current notional daily tariff is \$4,500 for the first day of an investigation meeting.

[79] The Authority's investigation meeting in this matter took 1½ hours so the notional starting point for assessing costs is \$1,125.

[80] Ms Kaukau is ordered to pay Ms Hiri-Gualeni \$x towards her actual legal costs and to reimburse her \$71.56 for her filing fee.

Outcome

[81] The Authority makes the following findings and orders:

- (a) Ms Hiri-Gualeni was employed by Ms Kaukau trading as Sew Sew;
- (b) Ms Kaukau failed to provide Ms Hiri-Gualeni with a written employment agreement, in breach of s 65 of the Act;
- (c) Ms Kaukau is ordered to pay a total penalty of \$2,000 for the failure to provide a written employment agreement;
- (d) \$1,000 of the total penalty imposed for the failure to provide a written employment agreement is to be paid to Ms Hiri-Gualeni;
- (e) \$1,000 of the total penalty imposed for the failure to provide a written employment agreement is to be paid to the Crown Bank Account;
- (f) Ms Kaukau failed to keep, and produce upon request, wage and time records in breach of s 130 of the Act, and holiday and leave records in breach of s 81 of the HA03, for Ms Hiri-Gualeni;
- (g) Ms Kaukau is ordered to pay a total penalty of \$2,000 for her failure to keep and produce upon request wage and time records and holiday and leave records for Ms Hiri-Gualeni;
- (h) \$1,000 of the total penalty imposed on Ms Kaukau for her failure to keep and produce employment records is to be paid to Ms Hiri-Gualeni;
- (i) \$1,000 of the total penalty imposed on Ms Kaukau for her failure to keep and produce employment records is to be paid to the Crown Bank Account;
- (j) Ms Kaukau is ordered to pay Ms Hiri-Gualeni wage arrears of \$2,957.16, consisting of \$2,677 wage arrears for hours worked but not paid, plus \$280.16 holiday pay arrears;

- (k) Ms Kaukau constructively dismissed Ms Hiri-Gualeni on 8 February 2019 when she (Ms Kaukau) told her (Ms Hiri-Gualeni) that she would not be paying her wage arrears because she (Ms Kaukau) was unhappy with the work she (Ms Hiri-Gualeni) had done;
- (l) Ms Kaukau is ordered to pay Ms Hiri-Gualeni \$11,961 lost remuneration under s 128(2) of the Act;
- (m) Ms Kaukau is ordered to pay Ms Hiri-Gualeni \$10,000 under s 123(1)(c)(i) of the Act to compensate Ms Hiri-Gualeni for the distress that her unjustified constructive dismissal caused her.
- (n) Ms Kaukau is ordered to pay Ms Hiri-Gualeni \$1,125 as a contribution towards her actual legal costs;
- (o) Ms Kaukau is ordered to reimburse Ms Hiri-Gualeni \$71.56 for her filing fee;

Orders

[82] Within 28 days of this determination, Ms Kaukau is ordered to pay:

- (a) Ms Hiri-Gualeni \$28,114.73 (\$2,000 penalties + \$2,957.16 wage arrears + \$11,961 lost remuneration + \$10,000 distress compensation + \$1,125 towards her legal costs +_ \$71.56 to reimburse her filing fee);
- (b) Inland Revenue Department (IRD) the correct PAYE that is legally required to be deducted from Ms Hiri-Gualeni's total gross earnings, and remitted to IRD; and
- (c) The Crown Bank Account total penalties of \$2,000.

Rachel Larmer
Member of the Employment Relations Authority