

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 145
3141361

BETWEEN

CHRISTINE RANKIN
Applicant

AND

TRANSFORMING JUSTICE
FOUNDATION
First Respondent

SCOTT GUTHRIE
Second Respondent

RODNEY FINCH
Third Respondent

SUSAN KAY FREEMAN
Fourth Respondent

Member of Authority

Marija Urlich

Representatives:

Max Whitehead and Jan Marie Quinn, advocate for
Applicant
Jenny Murphy, advocate for First, Third and Fourth
Respondents
Second Respondent, in person

Investigation Meeting:

16 – 17 November 2023 (by audio-visual link)

Submissions and further
information received:

23 November and 6 December 2023, from the Applicant
30 November and 8 December 2023, from First, Third
and Fourth Respondents
30 November 2023, Second respondent

Determination:

11 March 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In an earlier determination Christine Rankin was found by the Authority to have been employed by Transforming Justice Foundation (TJF) from 6 June 2020.¹ Mrs Rankin now seeks the following orders - wage and holiday pay arrears, interest, findings of aiding and abetting breach of employment agreement and liability for default in payment of wages by persons involved in any found breach and penalties.²

[2] TJF, Mr Finch and Mr Freeman say TJF does not have the funds to meet any arrears award and Mrs Rankin has acknowledged this. They also say the claim against Mr Finch and Ms Freeman are unfounded because they had no knowledge of the contract or the offer of employment Mr Guthrie has been found to have made and entered with Mrs Rankin.

[3] Mr Guthrie says he acted with the approval of the TJF Board in negotiating and entering an employment agreement with Mrs Rankin. He says he worked closely with her on TJF work and that it is unfortunate the expected funding with which to pay her did not eventuate. He says he is not liable for any claim because at all times he was acting on the instruction of the Board of TJF.

The Authority's investigation

[4] During the investigation meeting the Authority heard evidence from Mrs Rankin, Susan Freeman, Rodney Finch and Scott Guthrie. By consent the investigation meeting was held by audio-visual link. Following the investigation meeting the parties filed further submissions and information.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

¹ *Christine Rankin v Transforming Justice Foundation & 5 Ors* [2023] NZERA 420.

² Kirsten Harper and Nicola Williams were removed as respondent parties by application of Mrs Rankin 9 September 2023. They have reserved their position as to costs.

Issues

[6] The following issues are those identified for determination:³

Claims against TJJ

- (i) Are wage and holiday pay arrears owed to Mrs Rankin by TJJ?
- (ii) If so to what amount?
- (iii) Should interest be ordered on any arrears?
- (iv) How can any outstanding PAYE issue be resolved?
- (v) Should penalties be ordered against TJJ for breaches of section 134 of the Act and section 75 of the Holidays Act 2003?

Claims against Mr Guthrie, Mr Finch and Ms Freeman

- (vi) Have Mr Guthrie, Mr Finch and Ms Freeman aided and abetted the breaches of the employment agreement?
- (vii) Is TJJ in default of any arrears?
- (viii) If so, does the default involve a breach of employment standards?
- (ix) Are Mr Guthrie, Mr Finch and Ms Freeman persons involved in any found breach of employment standards?⁴
- (x) If so, can Mrs Rankin recover any defaulted arrears from Mr Guthrie, Finch and/or Ms Freeman?⁵
- (xi) Has Mr Guthrie obstructed the Authority's investigation of this employment relationship problem?⁶
- (xii) If so, should a penalty be ordered?

Costs

- (xiii) Are any parties entitled to costs including Ms Williams and Ms Harper who have reserved their position with respect to costs?

³ Directions of the Authority 21 November 2023.

⁴ Employment Relations Act 2000, section 142W.

⁵ Employment Relations Act 2000, sections 142Y and 142ZD.

⁶ Employment Relations Act 2000, section 134A.

Background

[7] TJF was incorporated as a charitable trust on 11 July 2019. Mr Guthrie was listed as the only trustee. On 17 July a meeting was held with people interested in TJF. Four people attended including Mr Guthrie and Mr Finch. At the meeting it was resolved Mr Guthrie would be appointed as chief executive officer of TJF and Mr Finch and one of the other attendees would become trustees. On 21 July Mr Guthrie updated the Companies Office records. He was not removed as a trustee.

[8] TJF members and trustees including Mr Guthrie were volunteers. This is supported by TJF's bank account records which have been provided to the Authority. The records run from 29 January 2020 to 1 September 2021. They show on 29 January 2020 a bank account was opened for TJF. This is the only bank account opened or operated by or on behalf of TJF. Mr Guthrie deposited \$10.00 to open the account. The only payments made into the account were a \$500 donation on 25 November 2020 and an advance of \$5,000 by Mr Finch on 29 December 2020. At mid-January 2021 the balance of the account was \$510.10 following a payment of legal costs of \$766.66 on 13 January 2021 and a payment to Mr Guthrie of \$4,233.24. There is no dispute the payment made to Mr Guthrie was towards travel costs he had incurred on behalf of TJF.

[9] Mrs Rankin's initial involvement in TJF and the formation of the employment agreement are set out the earlier determination.

[10] On 4 August 2020 TJF became a charitable trust.

[11] On 6 January 2021 a special meeting was held of TJF to discuss funding issues and in particular TJF's perilous financial position. Mr Guthrie, Mr Finch and Ms Freeman attended the meeting. Costs incurred by Mr Guthrie were discussed and the reimbursement payment described above was made to him on 13 January.

[12] On 17 January Mr Guthrie telephoned Mr Finch and advised he was too unwell to continue as chief executive of TJF. That day Mr Finch telephoned Mrs Rankin and advised her of Mr Guthrie's health and that he would not attend a planned upcoming meeting.

[13] On 18 January 2021 Mr Guthrie paid Mrs Rankin \$10,000 from his personal bank account. The payee information is recorded on Mrs Rankin's bank records as "S GuthrieTJF". This payment has been the subject of a case inquiry conducted by Charities Services which found Mr Guthrie's actions in relation to the \$10,000 amounted to financial mismanagement because he had acted unilaterally in the management of a donation of that sum by receiving it into his personal bank account, which occurred on 18 January 2021 and paying it to a third party (Mrs Rankin).⁷

[14] On 27 January 2021 Mrs Rankin telephoned Mr Finch, by then chairperson of TJF, raising concerns about Mr Guthrie and non-payment of her salary.⁸ Mr Finch was surprised to hear Mrs Rankin considered herself an employee of TJF. It is wholly accepted this was the first time Mr Finch was aware of Mrs Rankin's employment agreement with TJF or that she considered herself an employee of the organisation.

[15] On 27 January Mr Finch emailed Ms Rankin, to her TJF email address and asked her to provide the employment agreement she had been given by Mr Guthrie. He emailed her again that day, using the same email address, raising doubt as to the continued viability of TJF and seeking her view on how to confront Mr Guthrie about the matters she had raised. The emails are focussed on Mr Guthrie, his advice that he unwell, and the future, if any of TJF.

[16] On 29 January Mrs Rankin forwarded Mr Finch her employment agreement along with an email she sent to Mr Guthrie of 8 June 2020 referring to the attached executed employment agreement, providing her IRD number and bank account number. Mr Finch passed it onto TJF's lawyer.

[17] On 31 January Mr Finch, in his position as chairperson of TJF met with Mr Guthrie terminating his association with the organisation. He provided him a letter dated that day confirming the termination and advising him to cease all activities on behalf of TJF. The reason given was because Mr Guthrie had engaged Mrs Rankin as an employee without the knowledge of the Board and includes Mr Guthrie's conduct

⁷ Mr Finch was advised on the case inquiry outcome by email dated 18 May 2021. The email included "Charities Services considers that the foundation has acted appropriately in removing Mr Guthrie as a Trustee, before voluntarily deregistering the Foundation".

⁸ Mr Finch had become Chairperson of TJF on 6 January 2021.

had damaged the image and credibility of TJF, may result in it being wound up and with regard to Mrs Rankin states:

The termination of your role as a representative of Transforming Justice Foundation is related to an established serious misconduct in that you formally engaged the services of Mrs Christine Rankin without approval and authority by the Board of Transforming Justice Foundation, whereby Transforming Justice Foundation is liable for remuneration payments for services rendered by Mrs Rankin in accordance with an employment contract you presented to Mrs Rankin and was duly consented to by Mrs Rankin.

[18] In late January TJF members including Mrs Rankin stopped using their TJF email addresses.

[19] On 1 February Mr Finch sent a follow up email to Mr Guthrie which includes:

- (i) legal advice would be sought about the consequences of Mr Guthrie's actions;
- (ii) requesting contact details of the TJF accountant, website master, legal adviser and email administrator; and
- (iii) asked him to no longer use the TJF email address.

[20] Mr Finch wrote the email in his capacity as Chair of TJF and requested the information from Mr Guthrie because he (Mr Finch) did not have it or have access to it and Mr Guthrie had that information because in his role as the CEO of TJF he contracted those services on behalf of TJF. Mr Finch wrote to third parties advising Mr Guthrie was no longer involved in TJF. Mrs Rankin was made aware of this.

[21] On 3 February Mr Guthrie emailed Mr Finch advising he would provide the information by 8 February. The email raises no challenge to the grounds on which his association with TJF was terminated and expresses acceptance of responsibility for his actions and acknowledgment of the harm caused.

[22] TJF instructed counsel who wrote to Mr Guthrie on 3 February including:

- (i) he was required to hand over to TJF all information in his possession relating to TJF immediately and no later than 5pm 8 February 2021;
- (ii) the information was to include copies of any contractual documentation he signed concerning Mrs Rankin;

- (iii) confirming his involvement with TJF had been terminated; and
- (iv) the trustees had been advised of potential risk and liability they may face and were in discussions as to the merits of winding up TJF so as to crystallise any potential liability.

[23] Also on 3 February Mrs Rankin emailed Mr Finch:

Hi Rod You asked me for information regarding amounts due to me.
My contract commenced 6th July
First payment due 3 August and then 31st August-28th September-23rd
November-21st December-18 January.
\$58,333.33gross
Tax at 33% = \$19249.89.
Paid \$10,000.00 in January.
(No tax paid on that amount to my knowledge.)

I travelled for the organisation but never calculated any of that, as I felt my salary should cover any of these kinds of costs.
Warm regards

[24] This email was not received by Mr Finch.

[25] Mrs Rankin last performed work for TJF on 10 February 2021. She does not appear to have sought the direction of TJF to undertake this work.

[26] On 11 February Mr Finch emailed the website administrator instructing him to cancel all TJF email addresses, close down the TJF web page and if possible, remove all reference to TJF from an identified social media platform.

[27] On 1 March Mrs Rankin emailed Mr Finch following up her email of 3 February to which she had not received a reply. She asserted her right to be paid under the employment agreement entered with TJF's representative Mr Guthrie.

[28] On 22 March Mr Finch replied including he had not received the 3 February email and requesting she resend it. The email ends:

As I advised you, the trustees were never involved in the preparation of the employment contract and if it had not been for you providing a copy of the employment contract we would not be any the wiser. I have sought legal advice regarding the employment contract and have advised the lawyer to communicate with you directly...

[29] Mrs Rankin resent the employment agreement. Mrs Rankin and Mr Finch exchanged emails through March, April and May concerning her claim of wage arrears.

[30] On 17 May TJJ's lawyer wrote to Mrs Rankin including if it was found TJJ was bound by Mr Guthrie's representations to her it had no funds to satisfy any claim. The letter confirmed TJJ was in the process of being wound up following the conclusion of the Charities Service case inquiry and advised they were happy to discuss matters directly with her representative.

[31] On 8 April 2021 Mr Finch deregistered TJJ as a Charitable Trust with the Charities Commission.

Discussion

TJJ's liability to Mrs Rankin – wage and holiday pay arrears

[32] Mrs Rankin is entitled to be paid under the employment agreement entered with TJJ at the agreed rate being an annual salary of \$100,000 per annum.⁹ She has established she performed work for TJJ and the type of work performed was consistent with the description of work in the employment agreement.¹⁰

[33] What then are the arrears owed? Mrs Rankin crystallized her claim on 3 February when she emailed her pay claim to Mr Finch seeking arrears up to 18 January 2021. It is accepted Mrs Rankin had repeatedly raised her concerns about non-payment with Mr Guthrie without any payment being received from TJJ. On 17 January Mr Finch had advised her Mr Guthrie could no longer fulfill his duties as chief executive and then on 18 January Mr Guthrie made a lump sum payment of \$10,000 to her from his personal bank account purportedly in fulfillment of part of her outstanding salary by TJJ. By 18 January 2021 on an objective assessment the employment was exhausted – Mr Guthrie could no longer direct her work because she was advised he was unable to work himself and TJJ was unable to meet its obligations to her because Mr Guthrie was making a payment to her from his own bank account.

[34] Transforming Justice Foundation is ordered to pay Mrs Rankin wage arrears for the period 6 July 2020 to 18 January 2021 based on the terms of her employment agreement and which remain unpaid. TJJ and Mrs Rankin are to confer on the arrears

⁹ Refer written individual employment agreement.

¹⁰ Above n 1 at [21].

sum outstanding, including any period of leave taken and the impact on her work for TJJ of any COVID 19 lockdown period. If within 21 days of the date of this determination the matter remains outstanding between TJJ and Mrs Rankin, Mrs Rankin has leave to return to the Authority for determination of that claim. Such application must be accompanied by a detailed breakdown of tasks performed for TJJ during the period of claim.

[35] Holiday pay is to be calculated at the rate of 8 per cent on wage arrears.¹¹

[36] The arrears orders are made cognisant of the fact TJJ has no assets, no income stream and its operations have been deregistered since April 2021. This is clearly a relevant factor in any discussions Mrs Rankin and TJJ have regarding the sum of arrears.

PAYE

[37] Regarding PAYE, that is to be deducted at source. Mr Guthrie made the payment to Mrs Rankin from his personal bank account. Mrs Rankin may consider seeking a determination from the Commissioner of IRD on this matter if she is unable to resolve the issue with Mr Guthrie who made the payment to her.

Should a penalty be awarded?

[38] Mrs Rankin seeks an award of penalties against TJJ for breaches of the employment agreement and failure to keep and maintain holiday records. Both these breaches are established – TJJ failed to pay Mrs Rankin as agreed under her employment agreement and did not keep any records about her employment including holiday records as it was obliged to in law. In the circumstance so this matter including that it faces a significant wage and holiday pay arrears award which it does not appear to have the resources to pay, it would be futile to order a penalty against TJJ.

¹¹ Holidays Act 2003, ss 27, 50 and 56.

Have Mr Guthrie, Mr Finch and Ms Freeman aided and abetted the breaches of the employment agreement?

[39] The particular knowledge required to be proved against an alleged party to an aiding and abetting claim is that they must have known of the contract and deliberately intended to interfere with it. Knowledge of the exact terms is not required - it is sufficient that the defendant “knew of the general contractual situation or practice in a particular field”.¹²

[40] TJF has been found to have breached Mrs Rankin’s employment agreement by failing to pay her as agreed under its terms. Mr Guthrie knew of the situation with Mrs Rankin’s employment agreement and the breach of such because he drafted and provided it to her and he knew TJF had not met the payments agreed to in that employment agreement because as the chief executive he was aware of the parlous financial state of TJF, Mrs Rankin asked him repeatedly where her pay was, he represented the payments would be made, and made a payment to her of \$10,000 from his personal bank account purportedly towards her salary arrears.

[41] A finding has been made that Mrs Rankin’s employment with TJF ended on 18 January 2021. Prior to that date, while her employment was extant Mr Guthrie was the only person involved with TJF who knew Mrs Rankin had been employed by TJF. The actions of Mr Finch and apparently those too of Ms Freeman - though there is no direct evidence of Ms Freeman having any involvement with Mrs Rankin or her arrears claim - occurred after Mrs Rankin’s employment ended. Actionable breaches must be within the employment relationship.

[42] Mrs Rankin has leave to seek a penalty against Mr Guthrie under s 134(2) of the Act.

Is TJF in default of any arrears?

[43] Yes. TJF has not paid any of the wage arrears owed to Mrs Rankin.

¹² *Credit Consultants Debt Services NZ Ltd v Wilson* Employment Court Wellington WC 12B/07, 1 May 2007BC200770302.

If so, does the default involve a breach of employment standards?

[44] Yes, because TJF has failed to pay Mrs Rankin what she was entitled to under her employment agreement.

*Are Mr Guthrie, Mr Finch and Ms Freeman persons involved in any found breach of employment standards?*¹³

[45] Under s 142Y(2)(a) and (b) of the Act, an employee seeking to recover money from a person who is not their employer can only do so with prior leave of the Authority (or court) and, to the extent the employer is unable to pay the money owing.

[46] The first matter the Authority must be satisfied of is whether there has been default in payment of the wage arrears. This is likely given TJF's impecuniosity.

[47] Next, I must be satisfied the default involves a breach of employment standards.¹⁴ Employment standards include the requirement to pay wages without deduction under the Wages Protection Act 1983. Mrs Rankin's wage arrears, albeit to be finally calculated, remain outstanding.

[48] Mr Guthrie, Mr Finch and Ms Freeman's involvement in the breach is now to be considered.¹⁵ Mr Guthrie was the chief executive of TJF. Mr Finch was a trustee and became chairperson of the TJF Board in early January 2021. Ms Freeman says she was no more than a member of TJF because her status as trustee was not recorded and notified appropriately.

[49] In *A Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 the Court of Appeal held that the level of knowledge required to establish liability for a person "involved in a breach" of employment standards under s 142W(1) is knowledge of the essential facts that establish the contravention by the employer. The Court held that it was the directors' knowledge of the primary facts that mattered, and that inferences of fact or law drawn from those primary facts — such as the genuine belief that the drivers were employees — were not relevant. Instead, "the inquiry should focus on whether

¹³ Employment Relations Act 2000, section 142W.

¹⁴ Employment Relations Act 2000, s 5.

¹⁵ Employment Relations Act 2000, s 142W.

they knew the primary facts that led to the finding that the drivers were employees, and the primary facts relevant to the finding that Southern Taxis had failed to make the required payments to those drivers”.¹⁶

[50] The only people with knowledge of the essential facts during Mrs Rankin’s employment were Mrs Rankin and Mr Guthrie. Those facts are that an employment agreement had been entered between TJJ and Mrs Rankin, and that TJJ had failed to meet its obligations under that agreement to pay Mrs Rankin a monthly salary at an agreed rate. Though a volunteer, Mr Guthrie was the chief executive of TJJ and held himself out to Mrs Rankin as such. All her interactions were with him, as were directions as to her work and he exercised significant influence over the administration and management of TJJ.¹⁷ Mr Guthrie drafted and proposed the employment agreement to Mrs Rankin and received her personal details necessary to set up payment under that agreement including her IRD number and bank account. He was the person she raised concerns about non-payment during her employment and he made representations on behalf of TJJ that the payments would be met. Mr Guthrie paid Mrs Rankin \$10,000 from his personal bank account, using TJJ in the payment details coupled with his name, purportedly to ameliorate her concerns about non-payment. Mr Guthrie was a person involved.

[51] The argument is not accepted that Mr Finch and Ms Freeman, if it is correct that Ms Freeman was a trustee, were aware of the essential facts because Mrs Rankin’s employment had ended by the time she had appraised Mr Finch of her employment and the default of payment to her under the employment agreement. They cannot be said to be persons involved because any involvement they could be said to have had with Mrs Rankin’s employment did not occur until after that employment ended.

[52] It is not accepted that they were negligent or wilfully blind to the essential facts. While it is accepted Mr Finch and Ms Freeman knew Mrs Rankin was a spokesperson for TJJ and at the May 2020 meeting a contract had been discussed, the outcome of any further discussion as to the detail of that contract was not shared with Mr Finch until some seven months later, and Mrs Freeman only learnt of the situation in the weeks following the revelation as Mr Finch sought to manage TJJ’s affairs. Further, their

¹⁶ *A Labour Inspector v Southern Taxis Ltd* [2021] NZCA 705 at [7].

¹⁷ Employment Relations Act 2000, s 142W(3)(e).

actions (or inactions) must be viewed in light of the known circumstances of TJF, including that everyone involved with TJF was a volunteer, there was very little money in its bank account and, on the evidence before the Authority, there was no real prospect of any significant funds being secured.

*If so, can Mrs Rankin recover any defaulted arrears from Mr Guthrie, Mr Finch and/or Ms Freeman?*¹⁸

[53] Mrs Rankin has leave to bring such a claim against Mr Guthrie if TJF is unable to pay the arrears due under s 142Y of the Act.

*Has Mr Guthrie obstructed the Authority's investigation of this employment relationship problem?*¹⁹

[54] This claim concerns minutes of the 17 May 2020 TJF Board meeting attached to Mrs Rankin's statement of problem dated 30 August 2021 and referred to by Mr Guthrie statement in reply 15 July 2021. The document has not obstructed the Authority's investigation because no weight can be placed on it given the contemporaneous record of the original document and the addressees.

Summary of orders

[55] The Authority orders as follows within 21 days of the date of this determination:

- (i) Christine Rankin and Transforming Justice Foundation must seek to agree on the calculation of arrears of wages and holiday pay owed to Mrs Rankin; and
- (ii) if agreement is not reached Mrs Rankin has leave to apply for the Authority to determine the arrears of wages and holiday pay in the terms set out in [34] and [35] above.

[56] Christine Rankin has leave to bring a claim against Scott Guthrie as a person involved if Transforming Justice Foundation fails to pay owed arrears of wages and holiday pay.

¹⁸ Employment Relations Act 2000, sections 142Y and 142ZD.

¹⁹ Employment Relations Act 2000, section 134A.

Costs

[57] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[58] If they are not able to do so and an Authority determination on costs is needed a party seeking an award of costs may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the party against whom the award of costs is sought would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[59] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²⁰

Marija Urlich
Member of the Employment Relations Authority

²⁰ For further information about the factors considered in assessing costs see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.