

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 56
5444118

BETWEEN SUSAN MARY KITCHING
 Applicant

AND AUDREY HARONGA
 TAUKAMO
 Respondent

Member of Authority: P R Stapp

Representatives: John McDowell, Counsel for the Applicant
 No appearance for the Respondent

Investigation Meeting: 27 May 2014 at Napier

Determination: 30 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Kitching's employment relationship problem against Mrs Audrey Taukamo, Te Kohanga Reo licensee, claims that when she and two supporters went to Mrs Taukamo's home they were met with a tirade of abuse, were sworn at and Ms Kitching was called a "*f... ball head*" and was "fired" on the footpath. Also, Ms Kitching claims that she has not been paid holiday pay and no wages in lieu of notice. She is claiming payments for holiday pay and wages in lieu of notice plus compensation and costs.

[2] There has been no reply or any response from Mrs Taukamo.

Service of documents and notice on Mrs Taukamo

[3] Mrs Taukamo's failure to appear before the Authority is without any good cause despite attempts to contact her and a delay to the start of the investigation meeting. No good cause has been identified for her failure to communicate and

respond to requests and correspondence in regard to her rights and obligations. I am satisfied that Mrs Taukamo has been served with the Statement of Problem, details of the claim and the notice of investigation meeting. There is an affidavit of service that was carried out by an independent, professional process server. I decided to proceed in the matter as if the respondent was present and fully represented.

The issues

[4] The issues in the matter are:

- (a) Was Ms Kitching employed and who employed her?
- (b) Was Ms Kitching dismissed from her employment?
- (c) What sums of money are owed to Ms Kitching?
- (d) Is Ms Kitching entitled to compensation?
- (e) What have her costs been?

The facts

[5] Audrey Taukamo is the licensee for Maraenui Kohanga Reo. Te Kohanga Reo is an urban community based early child education provider. It is located in the grounds of the Maraenui Bi-lingual School in Napier. Mrs Taukamo is apparently the licensee and is the chairperson for Whānau hui.

[6] Ms Kitching says that she was employed personally by Mrs Taukamo in the role of a part-time administrator to complete the wage records; and GST, PAYE and banking reconciliations. She was paid a flat rate of \$100 gross for her time to carry out the work, and not on an hourly rate. Her pay was direct credited to her bank. There was no written employment agreement. Te Kohanga Reo is supported by the Kohanga Reo National Trust. It is an organisation run by whanau with at least five paid employees.

[7] Ms Kitching says that she encountered problems with getting documents from Mrs Taukamo to undertake her tasks. Ms Kitching says that she asked for help from the Flaxmere office of the Kohanga Reo National Trust. When Mrs Taukamo failed to attend a meeting Ms Kitching and two other people went to Mrs Taukamo's house.

There they were met with the tirade of abuse, swearing and Mrs Taukamo “fired” Ms Kitching.

Determination

[8] Ms Kitching was employed by Mrs Taukamo for a one-off matter in May 2010 and then regularly from 16 June 2010. She was employed as an administrator at the Kohanga Reo located at the Maraenui Bi-lingual School in Napier. Ms Kitching was employed for the time it took her to complete the wage records; GST, PAYE and bank reconciliations weekly. For the work she was paid \$100 gross per week.

[9] I am satisfied that Ms Kitching was employed by Mrs Taukamo personally despite the absence of an employment agreement. Proof of her employment exists based on the existence of historical wage, time and holiday records that Ms Kitching has produced, the employment of other people, and the regularity of payments made to Ms Kitching for wages since 16 June 2010. Ms Kitching has no knowledge of any other legal entity that could be her employer, such as a Trust. Also, Ms Kitching understood Mrs Taukamo was the Kohanga Reo licensee and that she chaired the Whānau hui. I accept that Mrs Taukamo was the employer because she has not replied and responded to any attempts to contact her and the notice of the claim that she was served with and was signed for by Track and Trace. If by any chance Mrs Taukamo is not the employer, and there is some other legal entity in the background, Mrs Taukamo had a responsibility to disclose it first to Ms Kitching in making the employment arrangements, second to have an employment agreement and third to reply to the statement of problem. Finally she would have had a responsibility to pass the employment relationship problem application on to any such legal entity. In the circumstances I accept that the undisclosed principle applies in the matter. In other words Ms Kitching had no knowledge of any other legal entity that could be her employer.

[10] I hold that Ms Kitching was employed by Audrey Taukamo personally.

[11] I hold that Ms Kitching was dismissed by Mrs Taukamo. This is because she has given evidence that Mrs Taukamo “fired” her from her porch at her home on 26 August 2013. Mrs Taukamo has failed to appear at the Authority’s investigation meeting and failed to provide any reply to Ms Kitching’s representative’s correspondence and failed to provide and/or arrange a Statement in Reply (to the

applicant's Statement of Problem). Mrs Taukamo has failed to communicate with the Authority despite being put on notice of the employment relationship problem (and notice of the investigation meeting). I infer she has decided not to rebut any of the claims. I accept Ms Kitching's evidence in regard to the matters that she has raised. This means that the dismissal has not been justified with any cause, it has been without any investigation (if necessary) and lacking in meeting the procedural requirements under s 103A (3) of the Employment Relations Act. Without any defence from Mrs Taukamo the failure to act fairly was not merely technical and minor.

[12] Ms Kitching has not been paid an entitlement to holiday pay. I accept the calculation as estimated in the absence of Mrs Taukamo rebutting and/or providing the wage, time and holiday records. Evidence was provided on the calculation, which I accept. The holiday pay owing is \$1,328.

[13] In addition, Ms Kitching was entitled to be paid wages in lieu of notice. The dismissal has not been justified. Given that there was no employment agreement with any term for notice, I accept three weeks' notice is a fair claim for Ms Kitching. My reasons for such notice (in the absence of an employment agreement) are:

- (a) Ms Kitching was paid weekly for her work with no set time and hours;
- (b) Ms Kitching's wages were modest;
- (c) Ms Kitching worked at the Kohanga Reo since 16 June 2010;
- (d) Ms Kitching's duties were administrative duties and important to the organisation;
- (e) There is a special character and charter arrangement in the organisation and involving the community.

[14] These are all relevant factors in determining an adequate and fair amount of notice. I award Ms Kitching \$300 wages for payment in lieu of notice.

[15] I am satisfied that Ms Kitching has established her claim for compensation for hurt and humiliation in regard to the personal impact of Mrs Taukamo's conduct in the manner in dealing with the dismissal. The tirade on the footpath and outside Mrs Taukamo's home with two other people present would have been embarrassing and

hurtful to Ms Kitching. The impact of the dismissal on Ms Kitching has been personal and has affected her feelings, particularly Mrs Taukamo's appalling behaviour and the way she dismissed Ms Kitching.

[16] Ms Kitching recognises her failure to mitigate any lost wages and this means that there is no award for compensation for lost wages after the dismissal.

[17] The respondent has breached the Employment Relations Act for failing to provide wage, time and holiday records when requested for the most recent period of employment. The respondent has breached the provisions of the Act by failing to be communicative and responsive to requests for the wage, time and holiday records. The respondent breached the Act by not retaining an employment agreement. Also, the respondent failed to take the opportunity to be involved in pre-arranged mediation and failed to cooperate with the Authority to put her side of the story in the matter. If there was any defence to the claims, Mrs Taukamo has failed to reply in the time available by failing to attend the Employment Relations Authority's investigation meeting without good cause.

[18] This matter was set down for one full day but was never going to take that amount of time. The hearing was delayed to enable Mrs Taukamo to appear. She failed to do so and has put Ms Kitching to unnecessary cost in regard to the need to prepare and to cover all the opportunities as if the employer was present and represented at the hearing. A claim of \$2,000 contribution to costs has been made.

[19] Based on the fact that Ms Kitching has been successful and needed to come to the Authority with Counsel to have the matter determined, the approach to costs is in the range of the daily tariff having regard to preparation and attendances. I award \$2,000 costs to Ms Kitching.

Summary of the Authority's orders

[20] Audrey Taukamo is to pay Susan Kitching:

- (a) \$1,328 unpaid holiday pay;
- (b) \$300 wages in lieu of notice;
- (c) \$5,000 compensation for hurt and humiliation and loss of dignity under s.123(1)(c)(i) of the Act; and

- (d) \$2,000 costs plus \$71.56 filing fee.

P R Stapp
Member of the Employment Relations Authority