



Employment Court of New Zealand

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Zara's Turkish Limited v Kocaturk [2019] NZEmpC 139 (8 October 2019)

Last Updated: 14 October 2019

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2019\] NZEmpC 139](#)

EMPC 273/2017

IN THE MATTER OF a challenge to a determination of
the Employment Relations
Authority

AND IN THE MATTER of an application for joinder

BETWEEN ZARA'S TURKISH LIMITED
Plaintiff

AND GÜLER KOCATÜRK
Defendant

EMPC 158/2018

AND IN THE MATTER of a challenge to a determination of the
Employment Relations Authority

AND IN THE MATTER of an application for joinder
BETWEEN IBRAHIM KOCATÜRK AND GÜLER
KOCATÜRK
Plaintiffs

AND ZARA'S TURKISH LIMITED
Defendant

Hearing: 1 October 2019
(Heard at Christchurch via Audio Visual Link)

Appearances: B Buckett and M Belesky, counsel for Zara's Turkish
Ltd A Sharma, counsel for Mr and Mrs Kocatürk

Judgment: 8 October 2019

INTERLOCUTORY JUDGMENT OF JUDGE K G SMITH

(Application for Joinder)

ZARA'S TURKISH LIMITED v GÜLER KOCATÜRK [\[2019\] NZEmpC 139](#) [8 October 2019]

[1] There are two proceedings before the Court both challenging a determination of the Employment Relations Authority issued as long ago as 1 September 2017.¹

[2] The Authority determined that Ibrahim Kocatürk and Güler Kocatürk were entitled to awards for unpaid wages and holiday pay.² It also concluded that Mr Kocatürk had not been unjustifiably dismissed but Mrs Kocatürk had been and she was entitled to remedies. A counterclaim by Zara's Turkish Ltd, for loans said to have been made to Mr and Mrs Kocatürk, failed.

[3] The Authority ordered Zara's Turkish Ltd to pay Mr Kocatürk \$16,194.36 for arrears of wages and \$4,766.76 for holiday

pay. It ordered the company to pay Mrs Kocatürk \$35,822.47 for arrears of wages, \$5,652.60 for holiday pay, \$13,338 for lost wages following her unjustified dismissal, and \$7,000 for compensation pursuant to [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act).

[4] The response by Zara's Turkish Ltd was twofold. It accepted the Authority's determination about Mr Kocatürk and paid him the amount he was entitled to. While accepting Mrs Kocatürk had been an employee at some point in time, it challenged the conclusion she had been unjustifiably dismissed and the amounts she was awarded.

[5] On 5 June 2018 Mr and Mrs Kocatürk challenged the determination.³ Mr Kocatürk challenged the determination that he was not dismissed and the amount of arrears of wages and holiday pay awarded to him. He sought an increase in the award of lost wages, holiday pay, and compensation for unjustified dismissal. Mrs Kocatürk challenged the amount of the Authority's awards to her for lost earnings and for unjustified dismissal.

[6] Both challenges were defended and the proceedings have reached a reasonably advanced stage.

¹ *Kocatürk v Zara's Turkish Ltd* [2017] NZERA Christchurch 145.

² At [104].

³ Leave to extend time was granted in *Kocatürk v Zara's Turkish Ltd* [2018] NZEmpC 51.

Application for joinder

[7] On 11 July 2019 Mr and Mrs Kocatürk applied to join the directors of Zara's Turkish, Hanife Kokcu and Ugur Hasbi Kokcu, to both proceedings. The application relies on [s 221](#) of the Act. The grounds of the application were:

- (a) that the directors ought to have been joined as defendants to the proceedings;
- (b) their presence may be necessary to enable the Court to adjudicate and settle all matters in the proceedings;
- (c) joining them would enable the Court to effectively dispose of the matters before it according to the substantial merits and equities of the proceedings;
- (d) the overall justice of the cases required it;
- (e) the application was prosecuted in good faith;
- (f) without the order being made Mr and Mrs Kocatürk will be unfairly prejudiced; and
- (g) in reliance on the Court's equity and good conscience jurisdiction in [s 189](#) of the Act.

[8] The application asserted that joining Mr and Mrs Kokcu would be just in the circumstances and the overall balance of convenience favoured the application being granted. The application was supported by affidavits by Mr and Mrs Kocatürk.

[9] The application was opposed. The notice of opposition relied, among other things, on an assertion that joining Mr and Mrs Kokcu would obfuscate and unjustifiably extend the matters to be decided. In particular, it stated that Mr and Mrs

Kokcu were not parties to the Authority proceeding and the possibility that they might be joined was not previously in issue.

Joinder principles

[10] [Section 221](#) of the Act gives the Court a wide discretion to direct a party be joined to a proceeding to "...more effectually dispose of any matter before it according to the substantial merits and equities of the case...". The power in [s 221](#) may be exercised at any stage of the proceeding.⁴

[11] Ms Sharma's submissions in support of the application were:

- (a) The discretion to make the order should be exercised where that may be necessary to enable the Court to effectually and completely adjudicate and settle the questions between the parties.⁵
- (b) [Section 221](#) is, or should be, informed by the High Court Rules and in particular those at rr 4.56 and 1.2. The former rule gives two grounds to join a party as a defendant;
 - (i) they ought to have been joined as a defendant; and
 - (ii) their presence may be necessary to enable the Court to adjudicate on and settle all questions in the proceeding.⁶
- (c) In practice the questions informing both jurisdiction to make the order, and the Court's discretion, tend to overlap.⁷

⁴ On application by a party, or on the Court's own motion; the power can be exercised on such terms as the Court considers fit.

⁵ Section 221(a), and see *Lorigan v Infinity Automotive Ltd* [2018] NZEmpC 88 citing *Taylor v McDougall* [1963] NZLR 694 at 696.

⁶ Rule 4.56(1)(b)(i) and (ii).

(d) Joinder can occur at any stage, if that is in the interests of justice. Delay is, therefore, not fatal. The more substantial the plaintiff's case the better the prospects will be of persuading the Court to make the order, despite possible detriment caused by the other parties incurring costs or the inevitable delay that will follow from an application succeeding.⁸

(e) The High Court in *Brooker* adopted, and reiterated, a liberal approach to a "...fairly low threshold, particularly to what is now the second limb of r 4.56(1)(b)..."⁹

(f) The criterion is wider than the wishes or interests of the existing parties. It permits joinder to enable complete and effectual adjudication on the issues raised in the pleadings and all questions involved in the case because of the broad phrasing of the High Court rule.¹⁰

[12] Ms Buckett took issue with any reliance being placed on the High Court Rules, because reg 6 of the [Employment Court Regulations 2000](#) restricts the circumstances where those rules can be used.

[13] Regulation 6 requires every matter coming before the Court to be disposed of as nearly as may be in accordance with the Act or regulations.¹¹ Regulation 6(2) specifies that, if any case arises for which no formal procedure has been provided, it may be disposed of in accordance with the High Court Rules "...affecting any similar case".¹² Ms Buckett said that the rules could not be resorted to because reg 6 was not satisfied; joinder is dealt with in s 221 of the Act precluding consideration of the High Court Rules.

[14] I consider that submission to be an unnecessarily narrow reading of reg 6. While the words of s 221 confer a discretion it is to be exercised in such a way as to

⁸ *Bridgeway Projects Ltd v Webb* HC Auckland CIV-2003-404-1965, 7 July 2003 at [12].

⁹ *Brooker v IAG New Zealand Ltd*, above n 7, at [23].

¹⁰ From *Brooker* relying on *Knight v Attorney-General* HC Wellington CP 566/92, 29 October 1992.

¹¹ Regulation 6(1) and (2).

¹² Regulation 6(2)(a)(i) and (ii).

"...more effectually dispose of any matter before [the Court] according to the substantial merits and equities of the case...". In *Lorigan v Infinity Automotive* Judge Corkill noted the similarity between this Court's jurisdiction and the High Court Rules.¹³ I agree. The section serves the same purpose, and is to the same effect, as r

4.56 of the High Court Rules. That means cases decided under the High Court Rules will be relevant in informing the exercise of the discretion under s 221.

[15] Ms Buckett's remaining submissions were that:

- (a) The application did not make clear what was intended.
- (b) Mr and Mrs Kokcu were not parties to the Authority investigation and/or determination.
- (c) The application was misconceived because the Court was acting in an appellate capacity.
- (d) The joinder application was unmerited, unnecessary and superfluous. Zara's Turkish Ltd had accepted responsibility as Mr and Mrs Kocatürk's employer.

Analysis

[16] The capacity in which Mr and Mrs Kokcu were intended to be joined to the proceedings was not obvious from the application. That was because Zara's Turkish Ltd is a plaintiff in the first proceeding and a defendant in the second one. The application did not nominate the capacity in which they were to be joined and, in any event, faced a significant hurdle if the intention was to add them as a plaintiff.¹⁴ I raised this problem with Ms Sharma, who confirmed the application was for them to be added as defendants in the claim brought by Mr and Mrs Kocatürk against Zara's Turkish Ltd.

¹³ *Lorigan v Infinity Automotive Ltd*, above n 5, at [32].

¹⁴ See High Court r 4.56(3); a person may not be added as a plaintiff unless he or she consents.

[17] Underlying the application is a claim that the identity of the employer is in dispute and Mr and Mrs Kokcu need to be joined to the proceeding to enable that dispute to be resolved. The theme in this application is that Mr Kocatürk was employed by Mr and Mrs Kokcu personally, shortly after he arrived in New Zealand in October 2009, and Mrs Kocatürk was employed by them subsequently. Some confusion over the identity of Mr Kocatürk's employer was said to arise because of the circumstances in which he was first offered employment with a Nelson-based company, while living in Turkey, and then

was unable to be employed by it when he arrived in New Zealand. In his affidavit supporting this application he deposed to an arrangement being made by that company for him to be employed by Mr and Mrs Kokcu, which is what he understood took place.

[18] Significant portions of Mr Kocatürk's affidavit described matters which are about the substantive proceeding and, therefore, are not material to the application but he did depose to being paid small amounts of pocket money by Mr and Mrs Kokcu in late 2009 and early 2010. These payments were said to indicate either that Mr and Mrs Kokcu were Mr Kocatürk's employer or, at least, some doubt about the identity of the employer existed so that joinder was appropriate.

[19] Conversely, Mr and Mrs Kokcu maintain that there was never any confusion about the identity of the employer. They say that Mr and Mrs Kocatürk knew at all times that their employer was Zara's Turkish Ltd.

[20] All that can be said, at this stage, is that there is disagreement now about who employed Mr and Mrs Kocatürk. However, the existence of the dispute is not dispositive of this application.

[21] There is a significant hurdle confronting this application. That is, the Authority was never asked to determine the identity of Mr and Mrs Kocatürk's employer because it was not in dispute.

[22] The Authority investigated an application in which Mr and Mrs Kocatürk named the company as the respondent to their employment relationship problem using

its full and correct legal name. The nature of the employment relationship problem was clearly set out in the statement of problem and was about unpaid salary, holiday pay entitlements and compensation for loss of money because of what was referred to as "unfair dismissal". No part of the statement of problem touched on an issue about the identity of their employer, or could reasonably be interpreted that way.

[23] Section 187(1)(a) of the Act confers on the Court exclusive jurisdiction to hear and determine elections under s 179:

...for a hearing of a matter previously determined by the Authority..."

[24] Section 179 deals with challenges. A party to a "matter" before the Authority dissatisfied with a written determination may elect to have "...the matter heard by the court".¹⁵

[25] In combination these sections contemplate that what can be challenged is the whole or any part of what was before the Authority. The sections do not confer on the Court, for the purposes of a challenge, an originating jurisdiction. The Authority was not called on to deal with a dispute about the identity of Mr and Mrs Kocatürk's employer. The scope of what was before the Authority was whether Zara's Turkish Ltd owed any money to Mr and/or Mrs Kocatürk for wages, holiday pay, and had unjustifiably ended the employment of either of them. The clear way the statement of problem was written would not have invited any wider consideration.

[26] Ms Sharma attempted to identify passages in the determination where the Authority embarked on resolving a dispute about the identity of the employer. She referred to paragraphs [7] and [11] of the determination. Paragraph [7] reads:

Mr Kocatürk says that he started working for the respondent as a chef around October or November 2009. According to Mr Kocatürk, for the first five months of his employment, he was only paid \$200 per week, the first \$100 of which went towards rent. He said that he was working between 9am and 9pm every day with no break and no days off. Mr Kocatürk says that he had to carry out a significant number of duties, including cleaning the toilets.

¹⁵ Section 179(1). See the discussion in *Abernethy v Dynea New Zealand Ltd* [2007] NZEmpC 83; [2007] ERNZ 271 (EMPC) at 31-33; *Bourne v Real Journeys Ltd* [2011] NZEmpC 120; and *Udovenko v Offshore Marine Services (NZ) Ltd* [2013] NZEmpC 174.

[27] Paragraph [11] reads:

Given that Mrs Kokcu said that Mr Kocatürk was not granted a visa to work for the respondent until March 2010, the Authority obtained from Immigration New Zealand (INZ) a copy of documents relating to Mr Kocatürk's application for a work visa for Mirac Limited. Mr Kocatürk's passport indicates that he was employed by Mirac Limited until that date, but also that the conditions were varied on 17 February 2010.

[28] Those paragraphs do not support the contention being put forward. Paragraph

[7] is the Authority recording a claim by Mr Kocatürk about when he started work and supported the statement of problem seeking to have determined whether he was owed any money, and if so, how much. It does not touch on any uncertainty over the identity of the employer.

[29] Paragraph [11] is similarly unhelpful to the application. Ms Sharma submitted that the Authority's discussion in this paragraph was an indication that there was uncertainty about the identity of the employer, evident in mentioning Mirac, but it had arrived at the wrong conclusion. I do not accept that submission. The passage was not about resolving a dispute about the employer's identity. It was discussing Mr Kocatürk's employment history as background to the matters to be considered. The Authority did not need to delve into identifying the employer because the pleadings showed it had the employer and employees before it at all times.

[30] For completeness, there was no attempt to argue that the identity of the employer had been raised with the Authority but that the determination had failed to address the subject.¹⁶

[31] Ms Sharma emphasised the fact that both Mr and Mrs Kocatürk have very limited competence in spoken and written English, presumably on the basis that some allowance could be made as a result. I am not persuaded that their lack of proficiency in English is relevant. The statement of problem is written in clear and unequivocal

16 There is an issue that should be mentioned although it was not raised by counsel in their submissions. In exercising the discretion in s 221 care would need to be taken to ensure that the application did not have the effect of circumventing the time limits imposed by the Act for raising a personal grievance, filing a statement of problem in the Authority or for challenging a determination.

English. It was written on their behalf by a person who translated from Turkish to English, and who wrote a note at the foot of the statement of problem that she had completed the statement of problem having translated it for them.

[32] The second problem faced by this application is that, despite the threshold being fairly low, the application would not have been able to surmount it. All of the indicia are that Mr and Mrs Kocatürk knew and understood they were dealing with Zara's Turkish Ltd. That was the name of their employer they gave when completing the statement of problem. That name, or combinations of it such as "Zara's Turkish" or "Zara's", appeared on business records they had access to including on bank statements showing direct payments of wages into their bank account.

[33] Several affidavits were filed dealing with interlocutory steps in these proceedings where Mr and Mrs Kocatürk referred to "Zara's Turkish" as their employer. An example was their affidavit of 6 November 2017. That affidavit explained their delay in filing a challenge to the determination within time. They deposed to unfamiliarity with the legal process and explained the delay in taking action was because they were waiting for the money that had been awarded to them to be paid by "Zara's Turkish Ltd" and could not understand why they had not been paid.

[34] In the same affidavit Mr Kocatürk deposed to signing two contracts of employment with "Zara's Turkish Ltd", one version on 18 April 2013 and the other, (perhaps the same version) on 2 October 2013. The context in which the statement was made was his puzzlement about why he was asked to sign twice. However, that is a clear statement on his part that, at least by April 2013, he knew his employer was the company. There are other passages of the same affidavit, such as paragraph [37], where both Mr and Mrs Kocatürk made statements that they had always thought that "Zara's" was their employer.

[35] Against that background, the only evidence of any uncertainty about the identity of their employer was the possibility of some confusion when Mr Kocatürk first arrived in New Zealand and general statements that he, and Mrs Kocatürk, were employed by Mr and Mrs Kokcu. That evidence, when weighed against other

statements they made, would have been insufficient to get over the threshold especially without any explanation for the earlier statements. Had it been necessary to do so I would have held that the threshold to order joinder had not been reached.

[36] There is a final issue which needs to be addressed that arose during submissions. Ms Sharma was asked to clarify whether the application sought to add defendants to the proceeding or substitute Mr and Mrs Kokcu as defendants in place of the company. In the course of that discussion Ms Sharma was asked if the application should be treated as one seeking to lift the corporate veil. She considered such a course of action would be appropriate. Conversely, Ms Buckett submitted that there is no reason for the corporate veil to be lifted in this case.

[37] Strictly speaking, and on reviewing the application, it could not reasonably be said to incorporate such an application. However, if I am wrong about that, this is not a situation where such an outcome would be justified. Recently the principles applying where a corporate veil is to be lifted were discussed by Judge Perkins in *Bennett v Michaels*.¹⁷ Such an order is rare.¹⁸ What is involved is a process of imposing personal liability on corporate officers, directors or shareholders in certain well-defined circumstances where that would not otherwise be the case.¹⁹ It is necessary to establish that the company was set up with the intention of evading personal legal responsibility and includes circumstances where the company is a sham or has been used fraudulently.²⁰

[38] This application, and the evidence from Mr and Mrs Kocatürk, falls well short of satisfying the high threshold required

to lift the corporate veil. The most that might be said is that there may have been uncertainty for a brief time in late 2009, or early 2010, but that is insufficient. Had the application been broad enough to encompass Ms Sharma's submissions it would have failed.

[39] I am satisfied that the application cannot succeed. It is dismissed.

17 *Bennett v Michaels* [2016] NZEmpC 137, [2016] ERNZ 247.

18 At [24].

19 At [19].

20 At [35].

[40] Costs are reserved.

K G Smith Judge

Judgment signed at 4.45 pm on 8 October 2019

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