

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 640  
3162221

BETWEEN

GEMMA NEWSOME  
Applicant

AND

STRADA ENVIRONMENTAL  
LIMITED  
First Respondent

Member of Authority: Antoinette Baker

Representatives: Brad McDonald, counsel for the Applicant  
No appearance for the Respondent

Investigation Meeting: 20 September 2022 at Christchurch

Submissions received: On the day from Applicant only

Determination: 2 December 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Ms Newsome from the United Kingdom (UK) was working in New Zealand for several years on skilled migrant work visas that attached to specific employers. She worked as an expert asbestos testing laboratory technician or manager. Her husband, Mr Newsome also from the UK, had New Zealand immigration status dependant on Ms Newsome's visa

eligibility. He developed his own business interests in the asbestos removal industry while in New Zealand.

[2] In February 2020 Ms Newsome's then New Zealand employer, (Company A) was liquidated. At that point her work visa attached to that employer became invalid. This created a problem for the Newsomes because this meant they could not stay in New Zealand.

[3] Ms Newsome began to liaise with INZ sometime after Company A's liquidation occurred. Ms Newsome applied to INZ for a Skilled Migrant Residency. In July 2020, after communications with INZ during which INZ acknowledged she was by then in breach of her existing visa conditions, she applied for a 'Variation of Visa Conditions' (VOC) something suggested by INZ pending the application she had already submitted for residency. The VOC relied on an offer of employment from the respondent (Strada) whose sole director is Mr Stephen Bank. INZ communications show that part of what it needed to determine in deciding whether to grant the VOC was whether the employment offered was sustainable and long term.

[4] The Newsomes had known Mr Bank for some time prior to signing the IEA with Strada. They met through their involvement in the asbestos removal industry in New Zealand. According to Mr Newsome's evidence, Mr Newsome and Mr Bank developed if not a friendship, then a close collegial relationship.

[5] Ms Newsome and Strada had signed an individual employment agreement (IEA) on 19 June 2020 after Mr Newsome had been discussing various 'options' with the sole director of Strada, Mr Stephen Bank. These options included either or both of them together purchasing the business of Company A to run an asbestos testing laboratory for Ms Newsome to work in. Eventually Strada decided to establish a laboratory having never run one before and having previously sourced asbestos laboratory services elsewhere including from Company A. The

Newsomes were involved in helping Mr Bank understand what would be needed including showing him equipment that he could purchase.

[6] Mr Bank told the Newsomes he had never employed people where a visa application had to be approved first. For the VOC, Strada needed to provide information in two forms (INZ 1113 and INZ 1235)<sup>1</sup>. Those forms required the prospective employer to supply information about its business (INZ 1113 and in more detail INZ 1235) and information as to why Ms Newsome should be employed in the offered role rather than any available New Zealanders (INZ 1113). Ms Newsome helped Mr Bank with this. She drafted some of the wording in the INZ 1113 about Strada's recruitment process for the role.

[7] Mr Bank filled in the INZ 1113, but INZ came back and noted that the INZ 1235 form he filled in was missing the first two sections. According to the March 2021 version of an INZ 1235<sup>2</sup> the missing sections included business details including the type of business, the contact person for the business, how long the business had been running, the number of employees current and past including any on work visas, and whether the 'owners, directors or managers' had any history of convictions relating to fraud or business dealings.

[8] Mr Newsome began messaging Mr Bank to prompt him to provide the required missing information. Mr Bank initially replied that he would get onto a response to INZ. After further queries from Mr Newsome asking him to confirm that he had provided the missing information Mr Bank replied with: "I have advised INZ we will not be supplying the information they have requested."

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<sup>1</sup> INZ 1113 'Employer Supplementary Form for employers who have offered a position to a person from overseas who is applying for a work visa'; INZ 1235 'Employer Supplementary Form - Skilled Migrant Category for employers who have offered a position to or currently employ, a person who is applying for a resident visa under the Skilled Migrant Category'.

<sup>2</sup><https://www.immigration.govt.nz/documents/forms-and-guides/inz1235.pdf>

[9] On 7 August 2020 INZ emailed Ms Newsome and confirmed that Mr Bank had said Strada would not be supplying any further information and then explained that “based on the available information that we have already received” it remained concerned that the offer of employment “may not be ongoing and sustainable” and that “we are unable to determine that your employment meets all the requirements for ANZSCO level 1, 2 or 3 occupation.”

[10] On 16 September 2020 a compliance officer from INZ emailed Ms Newsome noting that because she had not been employed by Company A since February 2020 and referencing Company A’s liquidation that month, she no longer had a visa enabling her to “travel to New Zealand” and that this was “sufficient reason to have your visa cancelled.” The letter included that Mr Newsome’s visa was granted on the basis of his relationship with Ms Newsome and would also be cancelled. The cancellation was effective on 25 September 2020. Ms Newsome’s evidence is that she was notified that she and Mr Newsome had to leave New Zealand within 21 days of this notification of cancellation although her evidence is also that they left New Zealand on 1 September 2020. They returned to the UK.

[11] Ms Newsome says that Mr Bank stopped communicating with her or her husband after his message to say Strada would not supply any further information to INZ. The basis of her claim is that this action or inaction caused her and her husband to be removed from New Zealand under urgency and caused financial loss to them.

[12] Ms Newsome raised a personal grievance on 10 August 2020 through a representative.

[13] Ms Newsome says she was an employee as a ‘person intending to work’ pursuant to s 6(1)(b)(ii) of the Employment Relations Act 2000 (the Act). She says that Strada breached the employment agreement by not assisting her to obtain the required work visa needed to commence her employment. She says this disadvantaged her in her employment and on the same allegations, resulted in a constructive dismissal. She says Strada’s breached its good faith obligations to her.

[14] Ms Newsome claims lost earnings, financial loss resulting from having to return to the UK so suddenly, compensation, a penalty for breach of good faith and costs.

[15] Strada replied to the grievance through a representative saying that Ms Newsome was employed by Strada; denied that it was obliged under the employment agreement to take steps to assist Ms Newsome in her visa application; that it could not provide the further information to Immigration New Zealand because the information did not exist; that there was no resignation or dismissal to support the unjust (constructive) dismissal claim; and that Strada did not commence trading. Strada's same position was put forward in these proceedings in a Statement in Reply.

### **The Authority's investigation**

[16] An investigation meeting was held. Ms Newsome and her husband Craig Newsome filed briefs of evidence prior to the meeting. At the meeting the Newsomes appeared by audio visual means from Australia. They each gave oral evidence and answered questions from me and their representative about their evidence. Ms Newsome's representative appeared in person and gave oral submissions with a written synopsis provided. There was no appearance for Strada.

[17] In June 2022 the Authority was informed that the previously instructed representative for Strada no longer had instructions. Since that time Strada did not engage with the investigation process and did not file evidence as timetabled at the phone conference call on 27 May 2022 when its then representative attended. I am satisfied that all information from the Authority has been sent to Strada including the Notice of the Investigation Meeting. In these circumstances I continued the investigation without the benefit of hearing from Strada beyond the brief written statements made through representatives in response to the grievance and in a Statement in Reply.

[18] 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.

### **The issues**

[19] The issues requiring investigation and determination are:

- a. Was Ms Newsome a 'person intending to work' so as to be defined as an employee under ss 5 and 6 of the Act?
- b. If so, has Strada breached a condition of the employment agreement by not providing further information to INZ and if so, did this cause the losses to Ms Strada that she claims?
- c. If so, was Ms Newsome disadvantaged in her employment because Strada breached a condition of the employment agreement by not providing further information to INZ?
- d. If so, was Ms Newsome unjustifiably dismissed by way of constructive dismissal because Strada breached a condition of the employment agreement by not providing further information to INZ and or breached its duty of good faith to her?
- e. Depending on the above what if any remedies are to be awarded?
- f. If there was a breach of good faith by Strada should a penalty be awarded and should any part of this be paid to Ms Newsome?
- g. Should either party be ordered to pay a contribution to the costs of the other?

**Was Ms Newsome a ‘person intending to work’ so as to be defined as an employee under ss 5 and 6 of the Act?**

[20] The Authority has jurisdiction over the employment relationships that are defined in s4(2) of the Act including for present relevance that of an employer and employee.

[21] Section 6(1) of the Act defines an employee as ‘any person of any age employed by an employer to do any work for hire or reward under a contract of service’; and includes at s6(1)(b)(ii) ‘... a person intending to work’.

[22] A ‘person intending to work’ is defined in s 5 of the Act as ‘a person who has been offered, and accepted, work as an employee: and intended work has a corresponding meaning.’

[23] I accept Ms Newsome’s evidence that she did not commence work for Strada. That Ms Newsome did not commence work means that she can only have her claims determined by me if I am first satisfied that she was an employee as defined by her being a ‘person intending to work’ under s 5 of the Act.

[24] The Employment Court<sup>3</sup> has outlined the legislative background to deeming a ‘person intending to work’ to be an employee under s6(1)(b)(ii) of the Act. Parliament’s aim was to reverse the effect of a prior New Zealand employment case where the prospective employer resiled from employing the person who had not yet started work but where offer and acceptance had been completed.

[25] The Authority has previously determined that a person was not ‘a person intending to work’ when an offer of employment was conditional upon satisfactory job references.<sup>4</sup> In

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<sup>3</sup> *Blackmore v Honick Properties Limited* [2011] NZEmpC 152

<sup>4</sup> *Mike Kennedy v Field Nelson Holdings Limited* [2022] NZERA 421

other words, it was found there was no completed offer and acceptance concluded as required under the s 5 definition until the references had been checked and found satisfactory.

[26] The Authority has also found that where a person was not ‘legally permitted to work in New Zealand before INZ granted him a work visa’ ... ‘he therefore could not have been employed before then’.<sup>5</sup> That matter involved a background context of business dealings between the applicant and the respondent.

[27] The Employment Court has considered that when assessing whether there is an employment relationship the Authority must not take a strict contractual approach to the formation of a contract.<sup>6</sup> However, that related to a consideration of the question of whether the true nature of the relationship was employment and not the question of whether a person is ‘a person intending to work’.

[28] In this case Ms Newsome could not work for Strada unless she obtained permission through a visa from INZ. I am fully satisfied by the evidence that the parties knew this was a condition that had to be fulfilled even though they did not include it in writing in the IEA or in the offer of employment from Strada. This understanding is supported by the parties’ actions including Strada completing various documentation for INZ to support Ms Newsome’s application and messaging about this with Ms Newsome and Mr Newsome.

[29] It has been submitted for Ms Newsome that there was an employment relationship because Strada confirms it employed Ms Newsome<sup>7</sup>, there was a signed IEA and Ms Newsome was intending to work. My view departs from the parties’ apparent acceptance that Mr Newsome was employed because it does not address whether offer and acceptance was complete as defined under s 5 of the Act.

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<sup>5</sup> *Fee Weng Yee v NZ Natural Beef and Lamb Limited* [2019] NZERA 388 at [50]

<sup>6</sup> *Prasad v Tulai* [2017] NZEmpC 150 at [18]-[20].

<sup>7</sup> Statement in Reply dated 22 February 2022 at paragraph 1.1.

[30] I do not find that Ms Newsome was a 'person intending to work'. While there was a written and signed IEA it could only be an offer of employment that was incapable of being accepted until INZ visa approval was obtained by Ms Newsome. The IRD forms already mentioned above carry wording that supports that the employment was treated as an 'offer.' This means that because offer and acceptance was not concluded to the point of an unconditional employment relationship, Ms Newsome does not fall within the definition of 'a person intending to work' and as such her claim is unable to proceed in this jurisdiction.

[31] Ms Newsome's claim is dismissed and there is no order as to costs.

Antoinette Baker  
Member of the Employment Relations Authority