

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 476  
5466440

BETWEEN

KIRAN DASARI  
Applicant

A N D

WHANAU TAHI LIMITED  
Respondent

Member of Authority: T G Tetitaha

Representatives: A Swan, Counsel for the Applicant  
D Vaoga, Respondent's Representative

Investigation Meeting: 17 November 2014 at Auckland

Submissions Received: 17 November 2014 from the Applicant  
17 November 2014 from the Respondent

Date of Oral  
Determination: 17 November 2014

Date of Written  
Determination: 20 November 2014

---

**DETERMINATION OF THE AUTHORITY**

---

- A. Kiran Dasari was an employee of Whanau Tahi Limited.**
- B. Kiran Dasari was unjustifiably dismissed by Whanau Tahi Limited;**
- C. Whanau Tahi Limited is ordered to pay two months ordinary remuneration, less PAYE to Kiran Dasari. The rate at which the payment is to be made is as set out in the individual employment agreement sent under cover of the letter dated 27 August 2014. This order is made pursuant to s.123(b) and 128 of the Employment Relations Act 2000.**

**D. Whanau Tahi Limited is ordered to pay compensation of \$5,000 to Kiran Dasari pursuant to s.123(c)(i) of the Employment Relations Act 2000.**

**E. There is no reduction in remedies due to contributory behaviour pursuant to s124 of the Employment Relations Act 2000.**

### **Employment relationship problem**

[1] Kiran Dasari brings an application for a personal grievance of unjustifiable dismissal by Whanau Tahi Limited (the respondent). He alleges the respondent offered then refused to sign an employment agreement in October 2013 preventing him from obtaining a variation to his work visa. As a consequence he was unable to continue working for the respondent.

### **Facts leading to dispute**

[2] Mr Dasari came to New Zealand on 10 March 2010 for the purpose of studying towards a diploma of business. He started working full time for Pizza Hut in March 2011. He was granted an work visa specifying Pizza Hutt as his employer (employer specific work visa).

[3] On 7 August 2013 he attended a job interview with the respondent. There is dispute about what was said about his work visa and whether he needed to obtain a variation to specify the respondent as his employer.

[4] On 21 August 2013 Mr Dasari commenced work with the respondent as an independent contractor for a period of three days. At that time Mr Dasari did not have an employer specific work visa allowing him to work for the respondent.

[5] Between 26 August and 3 October Mr Dasari continued working for the respondent. Prior to and during this period the parties discussed full time employment.

[6] On 27 August 2013 Mr Dasari received an offer of employment from the respondent and two copies of a draft employment agreement. He signed and returned both agreements. The same day he told an HR employee, Sonia Dernie, he needed to obtain a variation to his work visa specifying the respondent was now his employer.

[7] On 28 August 2013 the respondent completed an Immigration employer supplementary form. Mr Dasari collected the form for inclusion in his work visa variation application.

[8] On 29 August 2013 Mr Dasari resigned from his job at Pizza Hut.

[9] In September 2013 Mr Dasari applied for a variation to his work visa specifying the respondent as his employer.

[10] On or about 1 October 2013 Mr Dasari was contacted by an Immigration official requesting a copy of his signed employment agreement.

[11] On 3 October 2013 Mr Dasari spoke to Mr Keung about obtaining a copy of the signed employment agreement. He was advised the respondent would not sign his employment agreement. As a consequence Mr Dasari ceased work that day.

[12] On 9 October 2013 the respondent advised Immigration it was withdrawing its offer of employment to Mr Dasari.

[13] On 18 October he received a copy of an email from the respondent to Immigration advising they could no longer hold open the job offer given in August 2013 because he had not secured a working visa.

[14] On 18 December 2013 Mr Dasari raised a personal grievance with the respondent. Matters were unable to be resolved at mediation and a statement of problem was filed in the Authority on 10 June 2014. The matter is now before me for determination.

### **Issues**

[15] Two issues have now arisen for determination, namely:

- (a) Were the parties in an employment relationship? and
- (b) Were the actions of the employer in October 2013 in refusing to sign the individual employment agreement what a fair and reasonable employer could have done in all the circumstances?

**Were the parties in an employment relationship?**

[16] The applicant submits there was an employment relationship because at the time Mr Dasari accepted the offer on 27 August 2013 he became a person “*intending to work*”. Alternatively, the applicant argues that he was an employee because he was in fact working and there was an expectation of reward. The respondent submits there was no employment relationship because it had withdrawn the offer of employment and had not signed the agreement.

[17] Section 6(1)(a) to (b) of the Employment Relations Act 2000 (the Act) defines an “employee” as “*any person of any age employed by an employer to do work for hire or reward under a contract of service*” and includes “... *a person intending to work*”.

[18] I determine Kiran Dasari was an employee of Whanau Tahī Limited. This is because:

- (a) He had been offered and accepted employment on or about 27 August 2013. I accept his evidence both he and Mr Keung signed the agreement that day. The fact Mr Tamihere did not sign it does not prevent an employment relationship from being formed;
- (b) It was accepted by both parties he was working for the respondent from 26 August until 3 October 2013;
- (c) The respondent needed his services because of a short term urgent project;
- (d) Both he and the respondent’s chief information officer, Damon Ninn, expected him to be remunerated for the work he was undertaking during that period i.e. he was not working for free or as a volunteer;

**Were the actions of the respondent what a fair and reasonable employer could have done in all the circumstances?**

[19] The applicant submits he was employed and therefore the respondent had to follow the procedure set out in s103A prior to dismissal. It was well aware of the work visa issues on 27 August 2013 and refers to an email dated 27 August 2013 from the respondent’s HR personnel, Sonya Dernie, to Paula Parkin. The respondent

submits it would not have drawn up the individual employment agreement or made the offer of employment if it had known about the applicant's work visa situation. It points to the application form for employment that Mr Dasari completed and says it does not particularise the need for him to vary his work visa to state he was specifically working for the respondent. The reference in its offer of employment letter dated 27 August 2013 to the employment being conditional upon his legal entitlement to work in New Zealand was a standard phrase and did not indicate that the respondent have any prior knowledge of the specific requirements of Mr Dasari's visa. It further submitted the signature of the chief executive for Te Whanau o Waipareira, John Tamihere, was required before Mr Dasari could be employed.

[20] Mr Dasari referred to his work visa in his application for employment with the respondent on 7 August, although I accept he did not particularise that it needed a variation to include the respondent as his employer. I also accept the respondent may not have known what his status was at 7 August 2013. However, the respondent became aware of his work visa situation subsequently.

[21] The email from Ms Dernie to Ms Parkin is dated 27 August 2013 10.19 am. It recorded Mr Dasari's advice that "*his work visa is employer-specific*" and "*therefore he needs to obtain a new visa before he can work for us*". It then referred to him having an appointment with Immigration in the morning. The letter of offer also refers to it being conditional upon his legal entitlement to work in New Zealand. This indicates they were aware he had required a work visa. The respondent then filled in the employer supplementary form for the purposes of the variation of his employer for his work visa.

[22] It is more probable the respondent was well aware he had work visa issues at the time the offer of employment was made and accepted.

[23] The respondent submitted there was some sort of deceptive behaviour by Mr Dasari and that this was the reason they would not sign the employment agreement. I do not accept that. There is no evidence of deceptive behaviour. Mr Dasari may have failed to have told them about his work visa situation on 7 August, but it was well known by 27 August. They did not withdraw the offer at the time on the basis of deceptive behaviour. Throughout the respondent had maintained Mr Dasari's work visa issues were the basis for withdrawing their offer. More particularly the respondent continued to receive the benefit of his services up until 3 October 2013.

[24] The respondent submitted it was part of a larger group of entities, that there are a number of people dealing with this issue and mistakes may have been made about the work visa. It was the first time they had dealt with it. Unfortunately, that does not prevent the respondent from employing Mr Dasari. Neither does the formal requirement of sign off by Mr Tamihere. If Mr Dasari falls within the legal definition of an employee he is entitled to the protections the law provides.

[25] Whatever reasons the respondent had for not providing a signed agreement, they should have done so in these circumstances. By refusing to sign the employment agreement, they effectively prevented Mr Darai from being able to work for them. His employment was, in October 2013, unilaterally terminated as a consequence. He was dismissed.

[26] Where an employee's employment is terminated the onus falls upon the employer to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or actions occurred and I am referring to s.103A(2). In applying this test I have to consider the matters that are set out in s.103A of the Act. There is no evidence of any compliance with the matters set out in s.103A of the Employment Relations Act 2000 (the Act).

[27] These are not the actions of a fair and reasonable employer in all the circumstances. The respondent had given some partial support to Mr Dasari by filling out the employment supplementary form. It took no steps to withdraw the offer of employment and in fact enjoyed his work for some period of time before it took the action it did in terms of his immigration status. It was expected Mr Dasari would be paid for that work.

[28] Accordingly, I determine that Kiran Dasari was unjustifiably dismissed by Whanau Tahi Limited.

## **Remedies**

### ***Lost Wages***

Mr Dasari has been successful in his application for personal grievance and seeks remedies under s123 of the Act. He seeks six months lost remuneration given he was unable to secure an equivalent job until 4 April 2014.

[29] Where the Authority determines an employee has a personal grievance and has lost remuneration as a result of that grievance, the Authority must order the employer to pay the employee the lesser of the same equal to the lost remuneration or to three months ordinary time remuneration, pursuant to s.128 of the Act.

[30] In considering an order for remuneration under s.128 the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement<sup>1</sup>. An employee who has not acted reasonable to mitigate lost wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate, there is no statutory requirement for me to order reimbursement<sup>2</sup>.

[31] In practice this usually requires evidence of a detailed account of efforts to obtain employment including dates, places, names, copies of correspondence and the like<sup>3</sup>.

[32] The applicant has produced a table showing various jobs he has applied for. From my brief perusal of the table, it would appear he applied for three to six jobs per month. There are no copies of the applications, dates, places, names, copies of correspondence. Whilst I accept I have a wide discretion to admit evidence, this evidence of mitigation of loss is minimal.

[33] Mr Dasari told me in evidence that he had applied for more jobs than are listed in the table but has not been able to provide evidence of that today. I was told by Mr Dasari that there is a period of six weeks where no, or very few, job opportunities were available, during the Christmas break.

[34] I decline to make an order under s128(3) extending lost remuneration to six months. There is no evidence to supporting an extension of the cap under s128(2) of the Act. There would not have necessarily been an expectation of continuous employment. Mr Dasari had only worked for the respondent for a matter of weeks. There was a trial period clause in his agreement. He may also have been unable to obtain a work visa. The impression I gained from Mr Dasari's evidence was that part of the reason he was unsuccessful was due to lack of experience.

---

<sup>1</sup> *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

<sup>2</sup> *Finau v Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

<sup>3</sup> ....

[35] In the circumstances, given the minimal mitigation evidence I determine two months ordinary time remuneration is appropriate in these circumstances.

[36] Whanau Tahi Limited is ordered to pay two months ordinary remuneration, less PAYE to Kiran Dasari. The rate at which the payment is to be made is as set out in the individual employment agreement sent under cover of the letter dated 27 August 2014. This order is made pursuant to s.123(b) and 128 of the Employment Relations Act 2000.

### ***Hurt and Humiliation***

[37] Mr Dasari also seeks \$20,000 compensation for hurt and humiliation pursuant to s123(1)(c)(i) of the Act. He gave evidence as to his feelings of depression and lack of motivation given what had happened to him as a result of his dealings with Whanau Tahi Limited. He sought support from friends but did not require medical intervention. He also referred to his financial hardship as a result of the lost job and how that has impacted his ability to present himself fairly with new prospective employers.

[38] Mr Dasari was not employed by the respondent for very long prior to the dismissal. Mr Dasari knew there were difficulties with his work visa that still needed to be resolved prior to accepting the employment. He also had a trial period clause. I do not accept he could have believed at the time his employment would be trouble free.

[39] An award of around \$5,000 is more than appropriate in the circumstances.

### ***Contributory behaviour***

[40] The respondent submits there was contributory behaviour due to the failure to disclose the work visa situation earlier. It asserts this was deceptive behaviour.

[41] Section 124 of the Act requires the Authority to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. In order for contributory behaviour to be taken into account and

the reduction of remedies, the actions of the employer must be both causative of the outcome and blameworthy.<sup>4</sup>

[42] There may have been some concern around Mr Dasari's non-disclosure of the visa issues on or about 7 August 2013 but there was no doubt this employer was aware of the visa issues on 27 August and took no action. There was evidence respondent was motivated to keep Mr Dasari working due to a short term project even after it became aware of his work visa status. It did not raise the issue of deceptive behaviour with Mr Dasari when it refused to sign the employment contract.

[43] In the circumstances I determine there is no contributing behaviour by Mr Dasari

### **Orders**

[44] The following orders are now made:

- (a) Kiran Dasari was unjustifiably dismissed by Whanau Tahi Limited;
- (b) Whanau Tahi Limited is ordered to pay two months ordinary remuneration, less PAYE to Kiran Dasari. The rate at which the payment is to be made is as set out in the individual employment agreement sent under cover of the letter dated 27 August 2014. This order is made pursuant to s.123(b) and 128 of the Employment Relations Act 2000.
- (c) There is an order that Whanau Tahi Limited pay compensation of \$5,000 to Kiran Dasari pursuant to s.123(c)(i) of the Act.

### **Costs**

[45] Costs are reserved. If either party seeks an order for costs, a memoranda shall be filed and served seven days from the date of this determination. The other party shall have seven days thereafter to file and serve a reply.

---

<sup>4</sup> *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49]

**Addendum**

[46] The applicant filed a memorandum dated 18 November 2014 seeking clarification whether the wages owed for the period 26 August to 3 October 2013 of \$7,361.54 were part of this determination. They were not.

[47] A claim for wages owed for work undertaken should have been made pursuant to s131 of the Act. It was not. Accordingly the evidence at hearing did not directly deal with Mr Dasari's work during 26 August to 3 October 2013. He also gave evidence he had been directed to work from home, had not been attending work in order to deal with Immigration and his work visa and was for part of the period also employed by Pizza Hut. Whether he is entitled to his full wages for that period would be a matter of further investigation.

[48] The applicant appears to be under the mistaken apprehension I can order wage arrears as part of the remedies under s123(1)(b) for lost remuneration. I cannot. Those remedies are only available for remuneration lost as a consequence of the personal grievance. This work was carried out prior to the personal grievance arising. It is not lost remuneration as set out in s123(1)(b). I decline to deal with it accordingly.

**T G Tetitaha**  
**Member of the Employment Relations Authority**