

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 284
3135520

BETWEEN KIRTI KIRTI
 Applicant

AND FROZEN AGE LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: John Wood, advocate for the Applicant
 Shi Wang for the Respondent

Investigation Meeting: 29 March 2022

Determination: 29 June 2022

DETERMINATION OF THE AUTHORITY

- A. Kirti Kirti’s employment with Frozen Age Limited (FAL) ended by actions which amounted to a constructive dismissal.**
- B. In settlement of Ms Kirti’s personal grievance for unjustified dismissal, FAL must pay the following sums to her within 28 days of the date of this determination:**
- (i) \$3,680 as lost wages; and**
 - (ii) \$12,000 as compensation for humiliation, loss of dignity and injury to her feelings.**
- C. Costs are reserved with a timetable set for memoranda if an Authority determination of costs is needed.**

Employment Relationship Problem

[1] On 6 November 2020 Kirti Kirti resigned from her employment with Frozen Age Limited (FAL). She was working for FAL as an assistant manager in a Domino’s

Pizza store which FAL operated under a franchise agreement. Ms Kirti resigned after FAL director Shi (Annie) Wang told her the company would not continue with an earlier arrangement to support Ms Kirti in an application to renew her work visa.

[2] Ms Kirti said FAL's decision was not fairly made or decided so that her response in resigning that day really amounted to a constructive dismissal. She sought remedies of lost wages, distress compensation and a penalty for a breach of good faith.

[3] FAL denied the employment ended as a result of any unfair actions by it. Rather Ms Wang's explanation was that an earlier commitment to support Ms Kirti's application was overtaken by plans to sell the business and its purchaser deciding not to offer ongoing employment to Ms Kirti. Ms Wang said FAL was not obliged to support Ms Kirti's visa application and was not responsible for the purchaser's decision about any ongoing employment of Ms Kirti.

[4] Steps to remove FAL from the Companies Office register were begun after FAL sold its store franchise but that process was paused pending an outcome of proceedings in the Authority.¹ While FAL has ceased trading, its assets were presumed to include the proceeds of the sale of its previous business.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged from Ms Wang, Ms Kirti and Prabh Narula.

[6] Mr Narula was a store manager in the business and a friend and flatmate of Ms Kirti. Ms Wang understood that, while employed by FAL, Ms Kirti and Mr Narula were also in a personal relationship. Ms Kirti and Mr Narula said they became personal partners only after her employment with FAL ended. This became relevant because the purchaser of the business decided not to offer a job to Ms Kirti based on what Ms Wang told her about the relationship of Ms Kirti and Mr Narula. Ms Wang said the purchaser told her that she did not want employees who were in a "husband and wife"-type relationship as that could cause problems in the workplace.

[7] Mr Narula also gave evidence about discussions between Ms Wang and Ms Kirti on 8 October and 6 November 2020 during which he was present. The first discussion

¹ Registrar of Companies letter of 3 May 2021.

concerned arrangements for Ms Wang to support Ms Kirti's visa application. The second concerned the news that Ms Wang would no longer support the application and Ms Kirti's reaction to that news.

[8] All three witnesses answered questions under oath or affirmation from me and the parties' representatives. The representatives also gave oral closing submissions.

[9] Ms Wang had also provided brief written statements said to have been made by two other former employees of FAL. Neither of those former employees attended the investigation meeting so those statements could not be checked or other information about events sought from them. However, the accounts given in those statements did not differ in any material way from what Ms Wang and Ms Kirti each said about relevant events on 6 November 2020.

[10] 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

[11] The issues requiring investigation and determination were:

- (a) Did FAL unjustifiably disadvantage Ms Kirti by how and why it decided not to proceed with an early undertaking to assist her in seeking a new work visa?
- (b) If so, was that a breach of its duties owed to her which then caused her to resign so that the end of her employment was really a constructive dismissal?
- (c) If FAL did unjustifiably disadvantage or dismiss Ms Kirti, what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate her loss); and
 - Compensation for humiliation, loss of dignity and injury to her feelings?
- (d) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Ms Kirti that contributed to the situation giving rise to her grievance?

- (e) Did FAL breach terms of Ms Kirti's employment agreement and/or its duty of good faith to her, and, if so, is FAL liable to penalties under s 4 and/or s 134(1) of the Act?
- (f) Should either party contribute to any costs of representation incurred by the other party?

The arrangement to support Ms Kirti's visa renewal application

[12] FAL purchased the store franchise in 2018 and from around February 2020 Ms Wang began looking at selling the franchise. The process took longer than she hoped, partly prolonged by discussions with the franchise operator's head office about who would meet costs of some renovations to the store. By around mid-October 2020 a sale process was under way and Ms Wang said she was told by the head office that it could be completed by mid to late November. She did not get confirmation that the sale would go ahead until 4 December. Purchase of the franchise was eventually settled on 7 December 2020.

[13] In late September Ms Kirti had asked Ms Wang for the support of FAL in seeking a new work visa. Ms Kirti's existing visa was due to expire on 21 November.

[14] Ms Wang had supported visa applications of other employees previously and agreed to Ms Kirti's request. She arranged for Ms Kirti to visit her house on 8 October. Mr Narula also attended that meeting.

[15] Ms Wang gave Ms Kirti a new employment agreement which they both signed that day. She used a template provided by the franchise operator's head office. Its title page described the position as permanent, full-time and salaried. A schedule said the role was as assistant manager with normal hours of work being 40 hours a week.

[16] The visa application required proof FAL had advertised the position and there were no suitable local applicants for it. Ms Wang arranged for Ms Kirti to place the advertisement for that position. During their discussion that day Ms Wang also told Ms Kirti and Mr Narula that she was looking to sell the business. As she could not confirm when that might occur, Ms Wang said she also told Ms Kirti that she "could not guarantee anything".

[17] As requested, Ms Kirti made the arrangements for placement of the advertisement. It was posted on three job search websites in mid-October.

[18] Ms Wang had her own full-time job elsewhere. Her visits to the business did not necessarily occur at times when Ms Kirti was working. Some weeks could go by without them seeing one another.

[19] In late October Ms Kirti sent Ms Wang a text message asking for information about responses to the advertisement so she could provide the necessary proof to accompany her immigration application. Ms Wang did not reply to that request or to subsequent message Ms Kirti sent on 2 November. On 4 November Ms Kirti sent a further message, again asking for the information and saying she needed to apply for her visa the next morning.

[20] Ms Wang replied with this message on 4 November: "I will be in store tomorrow and investigate what has happened first. Thanks."

[21] The following afternoon Ms Wang sent Ms Kirti this message at 2.50pm: "Hi I will be in store around 4pm, anyone need to talk anything please come this time. Thanks."

The 6 November discussion

[22] On 6 November 2020 Ms Kirti and Mr Narula took a meal break at a fastfood restaurant across the road from the store where they worked. While there, according to Mr Narula, they saw Ms Wang sitting with a former manager of the store and signing some papers. Ms Wang confirmed, in her evidence, that she had met with that person and had signed a new employment agreement with him that day.

[23] Ms Wang then telephoned Ms Kirti, asking to come and meet with her. On finding Ms Kirti was already in the same restaurant as Ms Wang joined her and Mr Narula at their table.

[24] In the ensuing conversation Ms Wang talked to Mr Narula about an incident at the store a few days earlier. He had argued with one of the store employees who wanted to be rostered on for more hours than he was getting. According to Ms Wang, the employee had complained to her that Mr Narula was using his position as manager to roster Ms Kirti onto easier shifts.

[25] This was the issue that Ms Wang had referred to, in responding to Ms Kirti's 4 November text message, by saying she would "investigate what has happened first".

[26] In the course of the conversation that followed Ms Wang told Ms Kirti she would no longer support her application for a new work visa. Ms Wang told her this was because the purchaser did not want to hire Ms Kirti. The effect of that information was Ms Kirti's employment in the store would end with the sale of the business to the purchaser. Ms Wang told Ms Kirti she could continue working in the store until her visa expired.

[27] Ms Kirti was upset at that unexpected news. She saw little prospect of finding a new employer in the two weeks before her current visa expired and particularly of finding one who would also support her application for a new visa.

[28] Mr Narula said he thought Ms Wang's decision was because of his argument with the other employee over rosters and asked her to reconsider. She declined.

[29] Both Ms Kirti and Mr Narula then each told Ms Wang they were resigning. Ms Wang told Mr Narula he could continue in his job, as she understood the purchaser would offer him continuing employment. However Mr Narula said he did not want to. Mr Narula said he had resigned that day in order to show his support for Ms Kirti.

[30] Ms Kirti left the restaurant, returned to the store, collected her belongings and left. Soon after Ms Wang sent her an email. The email referred to Ms Kirti having "made verbal notice of resignation" and leaving the job immediately. It confirmed Ms Kirti's employment was terminated from 6 November. Ms Wang asked for a formal resignation letter so she could "contact payroll to work out the final pay".

[31] Ms Kirti responded with an email confirming her resignation, thanking Ms Wang for the opportunities during her employment and asking for an "experience letter". In her oral evidence Ms Kirti said she had made no reference in that email to her dissatisfaction with how her employment came to end because she did not want to do or say anything that might jeopardise payment of her final pay.

Unjustifiable disadvantage

[32] Ms Wang's own evidence established her actions in dealing with Ms Kirti and talking to the purchaser of the business about the prospects of ongoing employment for

Ms Kirti had not met the standard of what a fair and reasonable employer could have done in all the circumstances at the time.

[33] Ms Wang correctly submitted she was not obliged to agree to Ms Kirti's request for FAL's support in applying for a new visa. It was open to Ms Wang, in that situation, to decline in light of the upcoming sale of the business, provided she otherwise acted fairly. However, as Ms Wang had agreed to support the application, FAL then had to act in good faith in letting Ms Kirti know information in its possession that could affect that support and consequently her prospects for continuing her employment with FAL.² Good faith in this context included not doing anything likely to mislead or deceive the other party and being active and communicative in maintaining a productive employment relationship.³

[34] Also relevant were terms in the employment agreement Ms Kirti signed on 8 October 2020 headed "employment protection provisions". Those provisions were described as applying where the company was "considering" sale or transfer of the business. They stated:

7.11.1 You will be notified that restructuring is a possibility as soon as is practicable, subject to requirements to protect commercially sensitive information.

7.11.2 We will negotiate with the proposed new employer about the possibility of transferring your employment to them on similar terms and conditions and with continuity of service. We will endeavour to get the new employer to agree to you transferring on this basis.

[35] A further provision stated that, if the new employer did not offer employment, FAL would consult with Ms Kirti "to explore any alternatives to redundancy".

[36] Ms Wang said she had "multiple meetings" with the purchaser of the business about its upcoming sale and transfer. This included talking about the transfer of existing staff. The purchaser was buying the franchise business (which included use of the premises from which it operated), not the shares and ownership of FAL. This meant FAL's employment relationship with existing staff would end. Depending on what offers of employment the purchaser made, those former FAL employees would have to enter new employment agreements with the purchaser.

² Employment Relations Act 2000, s 4(1A)(c) and (4)(d).

³ Section 4(1) and (1A).

[37] Ms Wang said she recommended the purchaser offer jobs to all FAL's existing staff but the purchaser had made a careful inquiry about each worker's background. Ms Wang said that when the purchaser heard Ms Kirti and Mr Narula were in a relationship, the purchaser said she did not want any "husband and wife" situation as this could cause problems in the business. Ms Wang said the purchaser told her she was willing to hire Mr Narula and use Ms Kirti until her current visa expired but was not willing to support Ms Kirti's application for a new visa or offer her ongoing employment.

[38] Ms Wang said the purchaser had heard from other FAL employees, as well as from Ms Wang, that Ms Kirti and Mr Narula were in a personal relationship at the time. However Ms Wang's evidence did not disclose any real endeavour from her to check whether that information was correct. She said simply that was her "understanding" and she had communicated this to the purchaser.

[39] Ms Wang's evidence disclosed another reason for the purchaser's decision. Ms Wang said the purchaser "preferred more male staff for her business". This was said to be because the purchaser thought it was safer having male employees to make late night deliveries of pizzas. And Ms Wang said she "could not disagree with that".

[40] On both points – concerning the nature of Ms Kirti's relationship with Mr Narula and whether women should work in those jobs – Ms Wang had not met the requirement in clause 7.11.2 of the employment agreement to "negotiate with the proposed new employer" about offering a job to Ms Kirti. Rather Ms Wang had contributed to and acquiesced to a decision by the purchaser which appeared to have discriminated against Ms Kirti on the grounds of both her sex and her marital status. Ms Wang then also did nothing to meet FAL's contractual obligation to explore any alternatives to redundancy, which by then was the apparently inevitable outcome for Ms Kirti's role with FAL.

[41] Having learned of the purchaser's view, Ms Wang was slow to communicate with Ms Kirti about her prospects. Ms Wang said this was partly because of delays in finalising the sale. She said confidentiality obligations hindered her ability to communicate with FAL's existing staff about progress with the sale and their prospects for employment with the purchaser. However, Ms Wang had told Ms Kirti as early as 8 October about her plan to sell the business. Her evidence did not establish any sound grounds for saying business confidentiality obligations overrode employment

obligations to actively communicate with an employee about a proposal that could bring her employment to an end and not to engage in misleading conduct.

[42] Although Ms Wang was aware some time before 6 November of the purchaser's views about offering Ms Kirti ongoing work, Ms Wang did not let Ms Kirti know until that date. She did so only after the issue arose, on 1 November, about Mr Narula arguing with an employee over roster arrangements and after Ms Wang had completed the step of employing a new manager. At the Authority's investigation meeting Ms Wang said she had hired that manager, who was a former employee who had contacted her about coming back to work at the store, because she knew Ms Kirti's visa "would expire in a few weeks" and it was "logic" to hire a new employee "as a standby". All those actions amounted to failures in meeting FAL's good faith obligation to be active and communicative in maintaining its employment relationship with Ms Kirti.

[43] Accordingly, largely on Ms Wang's own evidence of what had happened, Ms Kirti had established breaches in duties owed to her as an employee. Those breaches amounted to an unjustified disadvantage to Ms Kirti. The practical effect of the delay in providing her with information about withdrawal of the earlier-promised support for her visa application was that Ms Kirti was denied the opportunity to cast about elsewhere for better employment prospects.

Breach caused resignation

[44] There was no doubt Ms Kirti was caught off guard by Ms Wang's news on 6 November. Her reaction, in resigning immediately, was directly caused by the contractual and good faith breaches already referred to. As a result, Ms Kirti's resignation was caused by unjustified actions of her employer and the end of her employment amounted to a constructive dismissal. Having reached that conclusion, Ms Kirti was entitled to assessment of remedies for her personal grievance.

Remedies

Lost wages

[45] Ms Kirti sought an award of lost wages for the period of around 100 days from 6 November until she found another job in mid-February 2021. The circumstances and evidence, however, did not support an order requiring FAL to pay her for that full period. While what Ms Wang had said to the purchaser affected its decision not to offer

Ms Kirti a job with the new business, FAL was not responsible for the discriminatory views said to be held by the new employer. Rather FAL was responsible for the period up to the eventual sale of its business on 7 December 2020. But for Ms Wang's change of mind, Ms Kirti likely would have successfully sought a new visa to enable her to work for FAL after the expiry of her old one on 21 November and she would have been able to work at the store up to the date of its handover to the purchaser on 7 December. Her employment agreement, signed on 8 October, also required FAL to give her 28 days' notice in writing of redundancy.

[46] On those measures, whether by Ms Kirti working up to the last day of FAL ownership or being earlier given 28 days' notice of redundancy, she was entitled to at least four weeks' more wages than she received following her resignation.

[47] Accordingly, under s 123(1)(b) of the Act, FAL must pay Ms Kirti four weeks' wages as reimbursement for money lost as a result of her grievance. Calculated using the 40 normal hours of work and \$23 an hour pay rate in her employment agreement, this totals \$3,680. FAL must pay this amount to her within 28 days of the date of this determination.

Compensation for humiliation, loss of dignity and injury to her feelings

[48] Ms Kirti was shocked by having the rug pulled out from under her feet on 6 November with Ms Wang's unexpected announcement of a change of heart about supporting her visa application. While there was no guarantee of success in that application or of ongoing employment, Ms Kirti was deeply upset by both that news and the disappointment of not knowing sooner so she could have done something else to advance her employment prospects. She was embarrassed by losing her job in that way and by a subsequent need to borrow from friends to make ends meet until she could get a new visa and find another job. She also reported ongoing feelings of anxiety in her current job that her employment could end unexpectedly.

[49] In those circumstances and taking account of the range of awards in similar cases, an award of \$12,000 as compensation under s 123(1)(c)(i) of the Act was appropriate. FAL must also pay this amount to Ms Kirti within 28 days of the date of this determination.

No reduction for contributory behaviour

[50] The Authority is obliged to consider reducing any remedies awarded if any blameworthy conduct by Ms Kirti contributed to the situation giving rise to her personal grievance.⁴ In this case there were no grounds for such a reduction.

No penalty for breach of good faith or terms of employment agreement

[51] FAL was also technically liable to a penalty for breaches of good faith and the terms of the employment agreement. These breaches included its failure to be active and communicative with Ms Kirti about changes in its support for her visa application and not checking information given to the purchaser which affected the prospects that she would be offered a job. However, those wrongs have been addressed by the remedies awarded for the personal grievance. No penalty is imposed.

Costs

[52] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed Ms Kirti may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum FAL 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.

[53] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate of \$4,500 (for a one-day investigation meeting) unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵ In closing submissions Ms Kirti's representative advised that settlement offers had been made which may need to be taken account of in setting any costs award.

Robin Arthur
Member of the Employment Relations Authority

⁴ Employment Relations Act 2000, s 124.

⁵ See www.era.govt.nz/determinations/awarding-costs-remedies.