

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 520  
3057372

BETWEEN

SAHIL TALWAR  
Applicant

AND

MCDONALD'S  
RESTAURANTS (NEW  
ZEALAND) LIMITED  
Respondent

Member of Authority: Vicki Campbell

Representatives: Applicant in person  
Tim Oldfield for Respondent

Investigation Meeting: 19 July 2019

Additional information received: 25 July 2019 from Applicant  
24 July 2019 from Respondent

Determination: 3 September 2019

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**DETERMINATION OF THE AUTHORITY**

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- A. One or more conditions of Mr Talwar's employment were affected to his disadvantage by the unjustified actions of McDonalds Restaurants (New Zealand) Limited and it is ordered to pay to Mr Talwar the sum of \$1,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.**
- B. Mr Talwar was justifiably dismissed.**
- C. Mr Talwar's application for arrears of wages is declined.**

**D. Costs are reserved.**

**Employment relationship problem**

[1] Mr Talwar is an Indian immigrant who worked for McDonald's Restaurants (New Zealand) Limited from March 2012 until November 2018 under various visas. Mr Talwar is no longer living in New Zealand. Arrangements were made to allow Mr Talwar to attend the investigation by skype and telephone.

[2] McDonald's owns and operates 16 of its own restaurants. Other McDonald's restaurants are owned and operated as franchises. Each of the 16 McDonald's owned and operated restaurants has a Restaurant Manager who reports to an Operations Consultant who, in turn, reports to McDonald's Operations Manager.

[3] Mr Talwar was initially employed as a crew member based at McDonald's Mangere restaurant. After completing the required training he was promoted to Crew Trainer which is a prerequisite for becoming a Shift Manager.

[4] Mr Talwar was transferred to McDonald's Lincoln Road restaurant where he worked as a Shift Assistant and Crew Trainer before undertaking training to become a Shift Manager. While there is no official position of Trainee Shift Manager it is not uncommon for those training to become a Shift Manager to be referred to as a Trainee Shift Manager. While undertaking their training the employee continues to be paid as a Shift Assistant and Crew Trainer.

[5] Mr Talwar took a leave of absence from McDonalds from October 2017 to March 2018. After he returned to work he raised concerns with McDonalds about promises that had been made to him about training and promotion to a Shift Manager role.

[6] On 17 July 2018 Mr Talwar formalised his concerns by raising claims that one or more conditions of his employment were affected to his disadvantage by McDonald's unjustified actions.

[7] Mr Talwar took a second leave of absence from 16 September 2018. His absence was approved until 29 October when he was due to return to work. Mr

Talwar did not return to work on the due date and was dismissed for not returning to work following a period of approved leave. Mr Talwar challenges that dismissal and says it was unjustified. He also claims he is owed arrears of wages.

[8] McDonalds denies the claims and says that Mr Talwar's claim that he was disadvantaged by having to take annual leave is barred because he did not raise a personal grievance in respect of that claim within the requisite 90 day period.

### **Issues**

[9] In order to resolve Mr Talwar's application I must determine the following issues:

- a) Were one or more conditions of Mr Talwar's employment affected to his disadvantage by McDonald's unjustified actions and if so what if any remedies should be awarded?
- b) Was Mr Talwar's claim that he was disadvantaged by having to take annual leave raised within the statutory 90 day period?
- c) Was Mr Talwar unjustifiably dismissed and if so, what if any remedies should be awarded?
- d) Is Mr Talwar owed any arrears of wages?

[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 as a result. It has not recorded all evidence and submissions received.

### **Unjustified disadvantage**

[11] Mr Talwar says one or more conditions of his employment were affected to his disadvantage by McDonald's actions when it:

- a) Failed to meet his visa conditions;

- b) Issued him with a final written warning;
- c) Required Mr Talwar to take annual leave;
- d) Failed to provide a safe and healthy workplace;
- e) Discriminated against him.

***Failure to meet visa conditions***

[12] There are two elements to this claim. Firstly, Mr Talwar asserts that his visa required McDonalds to employ him as a Shift Manager and it failed to do so. Secondly, McDonalds failed to provide him with the requisite training so that he could be promoted to the Shift Manager position.

Mr Talwar's Visa

[13] Mr Talwar relies on the endorsement stated on his visa to support his claim that he was not put into the role he had been offered. The endorsement reads:

...the holder may only work as a Shift Manager in Auckland for McDonald's Restaurants (NZ) Ltd." [emphasis added]

[14] On 24 February 2017 Mr Matt Elms, the Lincoln Road Operations Consultant signed a letter of endorsement drafted by Mr Talwar to assist him with an application for a Graduate Work Experience Visa. Attached to the letter of endorsement was a job description for a shift manager. The letter describes Mr Talwar's role as Trainee Shift Manager, records his current rate of pay and states that he will receive a pay increase when he completes the managers training.

[15] The description of Mr Talwar's status of Trainee Shift Manager was reiterated in a form completed by Mr Elms and which accompanied Mr Talwar's application for a work visa. Mr Talwar also described his position as Trainee Shift Manager on the form he completed when he submitted his application for his visa.

[16] Mr Talwar's application was successful and he was granted a visa on 19 April 2017 for a two year period. The visa issued by Immigration New Zealand recorded Mr Talwar's role as Shift Manager.

[17] I have concluded it is more likely than not that the endorsement by Immigration NZ that Mr Talwar was employed by McDonald's as a Shift Manager was an error. All of the documents submitted to Immigration New Zealand by Mr Talwar indicate that he was a "Trainee Shift Manager" and the letter of endorsement from McDonald's made it clear that Mr Talwar first had to complete his Shift Manager training before he would be eligible to take on a Shift Manager's role.

[18] The result of my conclusion is that Mr Talwar is unable to rely on the visa endorsement as being definitive of his role with McDonalds.

#### Shift Manager training

[19] Mr Talwar claims McDonalds failed to provide him with the required training to undertake the role of Shift Manager.

[20] In order to be qualified as a Shift Manager employees are required to undertake a Shift Management Excellence (SMX) course. This is a five day training course provided in-house by McDonalds. Following completion of the SMX training Shift Managers are required to complete further on-the-job Post Class Action Plan (PCAP) training with McDonald's training manager.

[21] Mr Talwar had been allocated access to the training modules for his Shift Manager training in 2017. When Mr Talwar raised concerns about not being given the opportunity to complete his training McDonald's concluded that he had not completed the online training modules because of his extended period of absence between October 2017 and March 2018.

[22] To address Mr Talwar's concerns Mr Greg Barclay the Operations Manager for McDonalds met with Mr Talwar on 11 July. At this meeting it was agreed Mr Talwar would be transferred from Lincoln Road to Ash Street with effect from 16 July 2018 and that Mr Talwar would:

- a) Commence his Shift Manager training on 17 July by completing the required online course work and work book activities;

- b) Attend the next SMX class on 27 August;
- c) Attend a First Aid Course on 28 September; and
- d) McDonalds would provide Mr Talwar with one-on-one support to ensure he was ready to attend the SMX class on 27 August.

[23] In its letter confirming the discussions from 11 July, McDonalds set out the agreed training timetable. McDonalds reminded Mr Talwar he needed to complete the online course work and book work activities by 13 August in order for him to attend the SMX class on 27 August.

[24] Mr Barclay confirmed that at the same time Mr Talwar would receive Food Safety training at Ash Street and his performance review contained in the course workbooks would be completed by the Ash Street Manager.

[25] Mr Talwar attended a first aid course run privately for which he was reimbursed. He completed the SMX course in August but did not complete the PCAP aspect of his training. Mr Talwar commenced a period of leave and travelled overseas in September 2018. At that time he had not completed all of the online modules.

[26] Despite him not completing all aspects of the required training McDonalds began paying Mr Talwar the appropriate rate for a Shift Manager from 1 September after he had completed the SMX training.

### Conclusion

[27] I am satisfied Mr Talwar was not employed as a Shift Manager but was employed as a Shift Assistant and Crew Trainer until he completed his SMX training at which time his rate of pay was adjusted to reflect the training he had completed.

[28] From the documents and evidence I have received it is clear it was always intended that Mr Talwar complete the required training and would be employed in the role. This was recognised by McDonalds in July 2018 when it took immediate steps to assist Mr Talwar through the training process after he had raised concerns about the lack of training.

[29] Mr Talwar has not established one or more conditions of his employment were affected to his disadvantage as a result of a failure to pay him in accordance with the endorsement on his visa or for the failure to provide the requisite training. The initial training was to have been completed independently by Mr Talwar online and through work books. He had access to the online training system in 2017 but took no steps to commence his training.

[30] When the issue was raised with McDonalds immediate steps were taken to ensure Mr Talwar was able to progress his training in a short timeframe. I am satisfied McDonald's acted in a way a fair and reasonable employer could have acted in all the circumstances.

### ***Warning***

[31] In a letter dated 17 July 2018 Mr Talwar formally raised a personal grievance regarding a final written warning issued to him in May 2018.

[32] Mr Talwar attended a meeting with Mr Elms on 22 May 2018 where a number of issues were discussed including inappropriate comments Mr Talwar allegedly made to a female crew member, refusing instructions from his supervisor and drawing inappropriate images which were left in areas where they could be viewed by other employees. With Mr Elms' consent the meeting was recorded by Mr Talwar. I have had an opportunity to listen to the recording and have a received a full transcript.

### **Inappropriate comments**

[33] A female crew member complained that Mr Talwar had made an inappropriate comment to her when she was bending down to pick something up from the floor.

[34] Mr Talwar denied he had made any comments.

### **Refusing instructions**

[35] This complaint related to concerns that Mr Talwar had refused to undertake tasks, had disrespected his managers and had made drawing of inappropriate images.

[36] Mr Elms was concerned that Mr Talwar had been eating his meal in the manager's office and when told to leave he refused. Mr Talwar acknowledged he had used the manager's office to eat his meal and when he was told to leave he refused because he felt offended at the way the manager had spoken to him and because he had almost finished he decided to stay and finish his meal.

[37] It was pointed out to Mr Talwar that there was a dedicated crew room which was used by all crew members to eat their meals. Mr Talwar accepted he usually ate his meals in the crew room.

[38] Mr Elms gave Mr Talwar a second example where he had refused instructions of his supervisor. This related to Mr Talwar's refusal to change the rubbish bin liner for a female manager and telling her that he would not do it for her but would for a male manager. During the meeting Mr Talwar explained that he would not do it for the female manager because she had put the bin bag on the floor. He acknowledged he told the female manager that he would not do it for her but would do it for a male manager.

[39] He explained to Mr Elms that the bin bag should not be on the floor and he felt offended by it being on the floor.

#### Inappropriate images

[40] Mr Elms had received a number of complaints about images Mr Talwar had drawn while at work. Mr Talwar explained he drew a face, that he had finished his tasks and was just drawing.

[41] Mr Talwar acknowledged the image he drew was of a face with eyes. Mr Elms was concerned that a number of complainants said the drawing was of a super hero who could see through clothing.

[42] Mr Talwar said the picture was to depict an alien with blue eyes and denied the image was inappropriate. He maintained he only drew a face and that the complainants had provided false information. He maintained he put on the image that the image could see underneath weapons not clothing. He couldn't recall naming the image.

[43] Mr Talwar told Mr Elms that the employees had misinterpreted him but he undertook not to do similar things in the future.

#### Finishing work early

[44] This complaint related to Mr Talwar leaving the workplace about 15 minutes before the ending of his shift, doing nothing productive in that time and clocking out at his rostered time.

#### Conclusion

[45] As a result of the meeting Mr Talwar was issued with a final written warning. Following Mr Talwar's complaint to McDonalds about the warning it was removed from his file. The warning was on his file for approximately six weeks.

[46] I have concluded the warning was issued in the absence of any procedural fairness and McDonalds correctly determined the warning should be removed. Issuing a final written warning made Mr Talwar's employment less secure for the time it was on his file. This caused a disadvantage to Mr Talwar's employment or one or more conditions of his employment. Clearly the warning was unjustified due to the absence of any procedural fairness. That is not an action an employer acting fairly and reasonably in all the circumstances could take.

[47] Mr Talwar has established a personal grievance and so the question becomes whether compensation should be awarded. Mr Talwar has not provided any substantive evidence of humiliation, loss of dignity or injury to feelings caused by the issuing of the warning. Neither is there any evidence that McDonalds sought to rely on the warning for the time it was on Mr Talwar's file.

[48] Given the relatively short time it was on his file, and the lack of any evidence to support his claim for compensation I have made a low award to reflect that Mr Talwar would have been impacted by the issue of the warning and that his conduct in refusing to carry out his manager's instructions contributed in a blameworthy way to the action by McDonalds to issue him with a warning.

[49] McDonald's Restaurants (New Zealand) Limited is ordered to pay to Mr Talwar the sum of \$1,000 under s 123(1)(c)(i) of the Act within 28 days of the date of this determination.

***Requirement to take leave***

[50] Mr Talwar claims he was subject to a disadvantage when he was required to take leave in September 2017. Mr Talwar raised this matter for the first time in his 17 July 2018 letter. McDonalds says the Authority lacks jurisdiction to investigate and determine this claim as it was not raised within the statutory 90 day time period and it does not consent to the matter being raised outside the 90 day period.

[51] Section 114 subsections (1) and (2) of the Act deal with the timeframe for the raising of personal grievances in the following terms:

**114 Raising personal grievance**

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[52] Section 114(2) makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[53] McDonald's restaurant at Lincoln Road was refurbished during the month of October 2017. For the period of the refurbishment the restaurant was closed. McDonalds began consulting with its Lincoln Road employees at the beginning of September 2017 regarding the restaurant closure. Mr Talwar was told in writing on 25 September that he would be taking leave for the period of the closure starting on 16 October.

[54] The date for calculating the 90 day period under s 114 of the Act was the date Mr Talwar commenced his leave. That was 16 October. The latest date he could raise his grievance was 14 January 2018. Mr Talwar did not raise a personal grievance until 17 July 2018 and as such, he is out of time for raising a personal grievance in respect of the closure of the Lincoln Road restaurant.

[55] Even if I am wrong in my conclusions with respect to the 90 day issue one or more conditions of Mr Talwar's employment were not subject to disadvantage as a result of the closure of the Lincoln Road restaurant. He was not instructed to take leave without his agreement. Mr Talwar applied for and was granted an extended period of absence from October 2017 to March 2018.

[56] Not only that, Mr Talwar was provided with a letter on 4 September advising him of his available 168 hours of leave that he could take during the closure but was also advised that if he did not wish to do so McDonalds would endeavour to transfer him to another restaurant in the same position.

[57] I find on balance, the choice as to whether Mr Talwar worked or took leave for the refurbishment period was always his to make. He chose to take an extended period of leave.

### ***Health and safety***

[58] Mr Talwar says he experienced problems with his eyes when cleaning behind the grills and was required to clean electrical wires with a wet cloth.

[59] McDonalds has strict cleaning protocols in place and during each shift all employees including managers are required to undertake cleaning duties. I have accepted Mr Elms' evidence that night shift workers may end up doing more cleaning due to having less customers to service. Mr Talwar worked predominantly night shifts.

[60] Mr Talwar raised his concerns formally in his letter dated 17 July. In response Mr Barclay assured him the products used for cleaning had been tested and would not under normal circumstances have a detrimental impact on an individual's health. Mr

Talwar was invited to provide further information from his doctor about his health and about the circumstances in which he felt the cleaning products had affected him.

[61] McDonalds offered to undertake further investigations once the information had been provided. In addition Mr Talwar was reminded that PeopleSafe, McDonalds reporting system for hazards was available to him for reporting workplace hazards.

[62] Mr Barclay's uncontested evidence is that Mr Talwar had been provided training on how to work with hazards but never reported any hazards during his employment. Mr Talwar's training included training about cleaning behind the grills and isolating electrics.

[63] Mr Talwar did not provide the information requested of him and took no further steps to have the issues addressed.

[64] Mr Talwar has not established to my satisfaction that one or more conditions of his employment were affected to his disadvantage as a result of any failures by McDonalds to provide a safe workplace.

### ***Discrimination***

[65] Mr Talwar has raised claims that he was discriminated against in his employment. This claim was also raised in his letter of 17 July. Apart from general statements no details of when or how Mr Talwar believes he was subject to discrimination were included in the statement of problem or his written evidence.

[66] In response to Mr Talwar's 17 July letter McDonalds invited Mr Talwar to provide more information about his claim if he wished McDonalds to investigate the matter further. Mr Talwar did not provide that information and McDonalds was unable to address the matter.

[67] Mr Talwar has failed to establish that he was discriminated against during his employment by McDonalds or that one or more conditions of his employment were subject to his disadvantage as a result of discrimination.

## **Dismissal**

[68] Mr Talwar was dismissed by McDonalds after failing to return from an approved leave of absence.

[69] Under s 103A of the Act I must objectively determine whether McDonalds actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[70] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, McDonalds sufficiently investigated issues, raised its concerns with Mr Talwar, gave him a reasonable opportunity to respond and genuinely considered his explanation prior making the decision to dismiss him.

[71] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in Mr Talwar being treated unfairly.<sup>1</sup> A failure to meet any of the s 103A(3) tests is likely to result in an action being found to be unjustified.

[72] On 10 September 2018 Mr Talwar requested a period of annual leave to visit his sick mother who resides in India. He asked for leave from 15 September but was not clear about the end date, providing an approximate date of 15 November 2018.

[73] McDonalds approved a period of leave from 16 September to 29 October and told Mr Talwar that he was to contact McDonalds by 22 October to advise it of his intentions.

[74] At the time it approved Mr Talwar's leave McDonalds was, of course, aware Mr Talwar had taken a significant period of leave between October 2017 and March 2018 to accommodate Mr Talwar's personal needs.

[75] On 22 October, having heard nothing from Mr Talwar, McDonalds emailed him reminding him that his leave was granted with the condition that he contact

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<sup>1</sup> Employment Relations Act 2000 (the Act), s 103A(5).

McDonalds by 22 October giving written notice as to whether he would be returning on 29 October or not.

[76] Mr Talwar responded on 25 October requesting a further six weeks leave. In his email Mr Talwar states (verbatim):

...Due to some reasons I cannot Come next week. I would want my leave to be extended as right now the fares are really high. I would love to be back in my current position when back but right now due to personal circumstances I cannot assure my date of arrival for about 4 weeks.

[77] Mr Talwar's request was declined. Mr Talwar was reminded that he had already been granted extended leave from October 2017 to March 2018. He was advised that his extended leave had contributed to his being unable to complete the SMX classes. McDonalds reiterated to Mr Talwar its intention to complete his manager verification (his PCAP training) and have him running shifts in the lead up to the busy holiday season. Mr Talwar was advised that if he did not attend work on 29 October it would be treated as absence without authorisation and disciplinary action up to and including the termination of his employment may result.

[78] On 29 October Mr Talwar responded (verbatim):

I cannot come on the due date due to personal reasons which are high airfare, mother not in good health,Iam the only son so has the responsibility,my mother financially dependent on me .

Plus I have spent a lot of money on her health condition.

Lastly I would have to ask someone to help me with ticket and then arrive in New Zealand.

So I cannot come back only after 4 weeks as I do need employment.

I would not mind your decision but I would need four weeks to come back.

Your final decision would be appreciated with all due respect and with no worries ,if do not get a reply then at would be aljud as well.

[79] Unknown to McDonalds at the time Mr Talwar was not in India looking after his sick mother. Documents produced to the Authority by Mr Talwar indicate he never actually went to India instead it seems he was living in Calgary and was attempting to secure residency in Canada.

[80] Mr Talwar did not attend work on 29 October and as a consequence McDonalds wrote to Mr Talwar reminding him that he had already had six weeks to

deal with his family commitments and he had failed to make contact in the timeframe set down at the time his leave was granted. Mr Talwar was advised that he was needed back at work for operational reasons including that his absence was putting pressure on scheduling and other managers.

[81] Mr Talwar was advised that he was considered absent without authorisation and steps would be taken to terminate his employment. He was given until 31 October to respond to the proposal to terminate his employment. Mr Talwar did respond saying he had nothing to say except that he would challenge McDonald's decision. McDonald's terminated Mr Talwar's employment on 31 October.

[82] Mr Talwar's deliberate defiance of McDonald's refusal to grant him leave beyond 29 October is capable of being considered serious misconduct by a fair and reasonable employer.

[83] I find the decision to dismiss Mr Talwar in all the circumstances at the time the decision was made was a decision an employer acting fairly and reasonably could make. Mr Talwar was not unjustifiably dismissed and his application for remedies is declined.

#### **Arrears of wages**

[84] This claim has two elements. Firstly, Mr Talwar claims he is owed wages at the Shift Manager rate from 24 February 2017. Secondly, following his move to Ash Street Mr Talwar says his hours of work were reduced to 20 hours per week and seeks reimbursement of the difference between what he was paid and payment for 30 hours each week.

[85] The first element of Mr Talwar's claim relies on his misapprehension that he was a Shift Manager from the date he received his visa from Immigration New Zealand. For the reasons set out earlier in this determination I am not satisfied he was entitled to be paid as a Shift Manager until he had completed his training. Once he had completed the SMX training his rate of pay was adjusted accordingly. Mr Talwar's application for payment of wages is declined.

[86] The second element of Mr Talwar's claims is that his hours were reduced when he moved from the Lincoln Road restaurant to the Ash Street restaurant. I have received Mr Talwar's records regarding the hours he was rostered and worked at Lincoln Road and Ash Street. A comparison of his average hours worked at both restaurants shows that Mr Talwar worked an average of just over 30 hours overall at each restaurant. Given that, his application for reimbursement of wages has not been established and is declined.

### **Costs**

[87] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so McDonalds shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Talwar shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[88] The parties could expect the Authority to determine costs, if asked to do so, on its usual "daily tariff" basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell  
Member of the Employment Relations Authority