IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2021] NZERA 61
3069072

	BETWEEN	DILSHAAD GILL Applicant
	AND	RESTAURANT BRANDS LIMITED Respondent

Member of Authority:	Geoff O'Sullivan
Representatives:	Henriette Joubert, counsel for the Applicant Laura Briffett, representative for the Respondent
Investigation Meeting:	24 September 2020
Submissions [and further Information] Received:	2 October 2020 and 15 October 2020 from the Applicant 9 October 2020 from the Respondent
Date of Determination:	19 February 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Dilshaad Gill was employed by Restaurant Brands Limited (RBL) on a permanent basis as an Assistant Restaurant General Manager at Johnsonville. At the time he was appointed, in January 2017, RBL was aware that his open work visa expired on 11 March 2017. RBL provided him with all the documents necessary for him to apply for an employer assisted work visa which was issued on 6 March 2017 and had an expiry date of 7 March 2019. Mr Gill says RBL was well aware of these dates. He says that he expected RBL to continue to support him in respect of visa issues.

[2] On 21 November 2018, Mr Gill emailed RBL asking for further documents that he would need to complete an application for an essential skills work visa. He says both parties were aware that he would need this in order to continue in his role with RBL. On 9 January 2019, he received an email from RBL noting that his work visa was due to expire on 7 March 2019 and pointing out his need to have a valid work visa to remain employed by the respondent. The email made it clear that his employment would terminate on 7 March 2019 should he fail to provide RBL with evidence that he had obtained a new work/study visa by 7 March 2019.

[3] On 14 February 2019, three weeks before his visa was due to expire, Mr Gill received a phone call from RBL advising that his application to retain his position, was unsuccessful and as a result, RBL could not support his application for a new visa. He took from the phone call that he was being given notice of dismissal. Indeed, on 6 March 2019 the day before his work visa expired, RBL emailed him asking if he had applied for a new visa and requesting a copy of any new or interim visa before the end of the day on 7 March 2019. RBL's email provided, "if we haven't received this we would have to put through a termination as below".

[4] Mr Gill regards the termination of his employment as unjustified. He further claims RBL disadvantaged him by failing to assist in the application for his visa by giving his position to someone else whilst he was still permanently employed.

[5] RBL denies it unjustifiably dismissed Mr Gill or disadvantaged him in his employment. Rather, it says it had to follow New Zealand Immigration Law and simply couldn't continue Mr Gill's employment under circumstances where he did not have the appropriate visa. The following issues need to be determined:

(a) Did RBL unjustifiably disadvantage Mr Gill in the lead up to the termination of his employment by not assisting with his application or did it mislead him?

(b) Did the appointment of another person to Mr Gill's position, whilst he was still employed, effectively terminate his employment in February 2019?

(c) Was there a positive obligation on RBL to support Mr Gill in his visa application?

(d) Was the dismissal of Mr Gill unjustified and if so, what remedies should flow?

(e) In terms of the employment agreement between the parties, when could notice of termination be given?

The Authority's investigation

[6] At the investigation meeting held in Wellington, I heard evidence from Mr Gill, Sarah Douglas on behalf of RBL, and Elina Fleming, an immigration specialist accepted as such by both parties. Ms Fleming's evidence was by written statement and had been accepted and approved by the parties. I also received submissions from Ms Joubert and Ms Briffett.

The evidence

Mr Gill

[7] Mr Gill had said at the time of his appointment, RBL was aware it would be necessary for him to apply for an employer assisted work visa. This was issued on 6 March 2017 and RBL was aware it expired on 7 March 2019.

[8] On 21 November 2018, Mr Gill emailed Sarah Clark (now Sarah Douglas), the HR Administrator of RBL, asking for documents RBL would need to complete as part of Mr Gill's application for an essential skills work visa. Apparently this was the only visa Mr Gill could apply for, following on from the employer assisted work visa he had previously obtained. Ms Douglas replied the same day stating that prior to providing the documentation, RBL would need to go through a recruitment process. Mr Gill was advised that this would start on 21 January 2019. Ms Douglas also stated that she would send the email to her General Manager and to the recruitment department, so that everyone was aware that the purpose of the recruitment process was for a visa application process. Mr Gill says that it didn't occur to him that he would have to reapply for his own job, bearing in mind he was a permanent employee. He thought the process was a simple administrative process.

[9] On 9 January 2019, Mr Gill received an email from Ms Douglas noting that his visa was due to expire on 7 March and that he would need a valid work visa to remain employed. The email stated it was Mr Gill's responsibility to renew his visa prior to the expiry date (BOD page 93). The email went further providing:

> This letter therefore serves to give you notice in writing that your employment with Restaurant Brands Ltd will terminate effective 7 March 2019 due to your immigration status should you fail to provide the company with evidence of obtaining a new work/study visa by 7 March 2019.

[10] Mr Gill says he was confused when he received this because he had already requested the necessary documents from RBL for his visa application on 21 November 2018. Accordingly, he emailed Ms Douglas on 9 January 2019, again asking for documents so that he could proceed with his application. The reply he received "*No worries – this is a reminder email that we have to send out*" (BOD page 94). Mr Gill says that that statement put him at ease, as from his perspective it confirmed RBL was simply following a procedure.

[11] The following day he emailed Ms Douglas again, pointing out that his General Manager, Matthew Mason, was on leave until 22 January 2019. He asked for help so that he could get everything done in the appropriate time. By way of response, Ms Douglas replied that he didn't have to worry because Matthew would just "open the job" when he returned to work on 22 January 2019 (see exhibit D SOP).

[12] By this stage Mr Gill was becoming concerned about timing. He wasn't sure what it meant to open the job but wondered whether or not it meant that it would be open to other people to apply for, and whether he would have to apply for his own job again. As a result of this, he emailed Ms Douglas on 18 January 2019 (exhibit D SOP), asking whether he needed to apply for his job when it opened on 21 January 2019. Ms Douglas replied (exhibit D, page 2 SOP) saying that he could apply once the job opened the following week. Although frustrated, Mr Gill says he filed his application for the position on 21 January 2019, still believing it was a formality which would assist RBL in getting the paperwork ready for his visa application.

[13] He followed that email up on 8 February 2019 asking what the status of his application was. Three weeks before his visa was due to expire, on 14 February 2019, he emailed Ms Douglas again asking for an update. He was advised that the Area Manager would call him sometime during the day with an update. He then received a phone call from the General Manager, Mr Mason, who said to him that his application for the position was unsuccessful and that RBL could therefore not support his application for a new visa. He was advised that his job had been offered to a New Zealand citizen.

[14] Mr Gill says this news was extremely upsetting and that it was clear to him he no longer had a job. He understood the phone call to be notice of his dismissal as this was when he was notified for the first time his job had been offered to someone else.

[15] On 6 March, the day before his work visa expired, Mr Gill received an email from Ms Douglas asking whether he had applied for a new visa and requesting a copy of a new or

interim visa before the end of the day on 7 March 2019 (exhibit E, SOP). The email noted, "*If we haven't received this we would have to put through a termination as below*".

[16] Mr Gill says he found this very confusing. Ms Douglas knew that RBL had not given him the necessary documents to apply for the essential skills visa and that he could not apply for this visa without the respondent's support. Further, RBL had already appointed another person in his position and the new employee had already started work on 19 February 2019. He felt therefore he had been dismissed on 14 February 2019.

[17] Mr Gill says that not only had he been dismissed, but he was disadvantaged in his employment because RBL had:

(a) Failed to assist him in his application for the essential skills visa, despite the fact he was employed on a permanent employment agreement; and

(b) RBL should not have advertised his position as being available when he was already in it.

[18] Mr Gill gave evidence of the effect on him, both financially and emotionally. He was concerned he was unable to provide for his partner and child given the loss of his only source of income. As he was not able to apply for an open work visa again, he says he was forced to apply for a student visa to allow him to work part-time in order to provide for his partner and child. He enrolled as a student at Victoria University.

[19] When he was employed by RBL, his salary was $42,000 gross per annum. He said it had been very embarrassing to ask for money from family and friends to feed his family. He advised he also had to sell some of his possessions which included his son's gaming device. He said he felt like he failed as a husband and father, that he felt mistreated and humiliated. He claimed lost salary for six months plus compensation for hurt and humiliation in terms of s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in the sum of $20,000.

Evidence of Sarah Douglas

[20] Ms Douglas gave evidence from her perspective as ER/IR Advisor to RBL. She said that she had joined RBL on 27 March 2017 as HR Administrator. She became ER/IR Advisor on 7 January 2020. She was the person responsible for tracking visas and processing visa renewals and advised that out of approximately 3,600 employees, 768 had visas of some sort, so visa issues comprised about 20 per cent of her workload. Ms Douglas's evidence seemed

to be that she accepted Mr Gill believed she had given the impression that all was okay with his application. She stated she had thought, incorrectly, that Mr Gill had been through an essential visa recruitment before when he hadn't.

[21] Ms Douglas explained that the labour market had altered so that whilst initially they had been unable to fill Mr Gill's position with a New Zealand citizen when they first employed him that was no longer the case.

[22] She noted that Mr Gill's employment agreement was for permanent employment, and specifically noted that it provided for on page 3, at clause 5, *"... Should for any reason the legal right to work in New Zealand be withdrawn, the employee's employment will terminate*". Ms Douglas was unable to advise as to why Mr Gill's employment agreement was a permanent agreement and not fixed term. She said fixed term roles were rare in RBL's stores but that in any event, Mr Gill's employment would always be conditional upon his right to work in New Zealand.

[23] Ms Douglas explained that when Mr Gill emailed RBL on 21 November 2018, it was to seek assistance to support his application for an essential skills work visa (SOP. He needed this because his second visa was due to expire on 7 March 2019. Ms Douglas advised that this was essentially a request for RBL to provide a form INZ1113. That meant RBL would need to complete Section C and undertake the "labour market test", meaning they would need to test the market to see whether or not they could find a New Zealand citizen. This was because Mr Gill was employed in a position which was classified as "low skilled". She said that if the labour market test failed, they would not complete the form and give it to the applicant (in this case Mr Gill) because in her view the form was only intended to be completed where the labour market test resulted in a pass. She said even if they had completed it, which in Mr Gill's case they had not, the application would have been immediately rejected by INZ. Further, although she accepted there had been no discussion with Mr Gill about this, she said she did not want Mr Gill to waste money on an application that might be automatically rejected. The essential skills work visa application cost $495 which she felt was a lot of money.

Ms Fleming

[24] Elina Fleming, an immigration specialist, gave evidence that the granting of a visa was discretionary. She said that even if Mr Gill hadn't satisfied a requirement included in immigration instructions WD1 post-study work visa – employer assisted, it was open to an

immigration officer on a discretionary basis to grant a temporary entry class visa so although RBL was required to undertake a labour market test, that didn't preclude the possibility of Immigration New Zealand (INZ) exercising a discretion. INZ would have needed to follow procedural fairness and natural justice requirements contained in immigration instructions A1. If an application had been made, Mr Gill would have been given an opportunity to make any comments or submit any additional evidence or information in response to any official refusing of his visa application. Having said, that, Ms Fleming considered that whilst uncertain, the most likely result in such a scenario as Mr Gill's, would have been a visa refusal. The outcome, however, was uncertain.

Discussion

[25] This determination has been issued outside the timeframe set out at S174C (3) of the Act in circumstances the chief has decided are exceptional, as he is permitted by S.174C (4) to do.

[26] In regard to 174E of the Act, I do not refer in this determination to all the evidence received during the investigation meeting. Further, whilst I have not referred to all the submissions from the parties in this determination, I record I have fully considered them.

[27] What seems clear from the evidence is that both parties had different views about what they were discussing when it came to talking about Mr Gill's employment vis a vis his visa application. From Mr Gill's perspective, he was a permanent employee who needed an essential skills work visa if he were to continue in his role with RBL. He felt this was a formality but in order to apply for that visa, he needed certain documentation and support from RBL. This would then form the basis of an application for the appropriate visa. From RBL's perspective however, it was doing nothing of the sort. It was aware that Mr Gill required the essential skills work visa, if he were to continue his employment, but did not regard that as imposing any responsibility on it. It was simply waiting to see whether or not Mr Gill would obtain the visa, believing it had an obligation to appoint a New Zealand citizen to the role if it could, hence it's recruitment process. RBL's evidence was that it knew it could assist more but believed Mr Gill had no chance of success in obtaining his visa. It felt the application fee was a significant barrier to Mr Gill and would be simply a waste of money and believed he could not afford to file his application unsuccessfully.

[28] Section 4 of the Act requires parties in an employment relationship to deal with each other in good faith. Amongst other things, this means that there was a positive duty on RBL to be very clear in its communication with Mr Gill. It needed to let Mr Gill know as early as possible, that it was not intending to support his application and the reasons why. Mr Gill could then have been part of the discussion and would have been in a position to make it clear he was quite happy to pay the application fee. RBL's failure to discuss the issue properly could not be said to be active and constructive in maintaining the employment relationship. Further, it had made decisions which Mr Gill remained absolutely unaware of to his detriment.

[29] It is clear that Mr Gill continued to hold a mistaken view as to what RBL's intentions regarding his visa application were. He believed they were following a process to assist him in his application. The communications between Ms Douglas and Mr Gill reassured him. He was never informed that RBL had decided that it would not continue to support him with his visa application, and was actively seeking a New Zealand citizen to fill his role. RBL's actions in that regard disadvantaged Mr Gill and although it is now impossible to ascertain whether or not RBL's support of Mr Gill's visa application would have meant it was successful, and his employment could have continued, it is clear that one pathway Mr Gill had towards obtaining a visa, was taken away from him.

[30] A second more important point in terms of the process is the date of termination of employment. In that regard the evidence from both parties is clear. On 8 February 2019, following Mr Gill's request for an update, he received a phone call from Mr Mason advising he had been unsuccessful in his application, RBL would not support his application for a new visa, and his job had been offered to a New Zealand citizen who had apparently accepted the position. Accordingly, as at 8 February 2019, Mr Gill's role had been given away and effectively the decision to dismiss him had been made. This is notwithstanding that his last day of actual employment was 7 March 2019.

[31] Mr Gill's then current visa was not due to expire until 7 March 2019 and he had been given until then to obtain his visa. By replacing him prior to that date, RBL unjustifiably dismissed Mr Gill.

Summary and conclusions

[32] RBL failed to act as a good employer in all the circumstances in that:

(a) It failed to assist Mr Gill in his application for the essential skills visa, whilst at the same time giving the impression it was;

(b) It failed to be open and communicative with Mr Gill and did not provide him with the information regarding its intentions at the time, namely that it believed Mr Gill would not be successful in an application for his visa and accordingly it had made a decision not to support him but instead was actively looking at replacing him. It ignored the fact that Mr Gill was employed on a permanent employment agreement and it should not have advertised his position or indeed replaced him until there had been a full discussion of Mr Gill and until it was certain Mr Gill had failed to achieve his employer assisted work visa and with that, his right to be employed by RBL in New Zealand;

(c) By employing Mr Gill's replacement on 14 February 2019, RBL effectively dismissed Mr Gill. This dismissal was pre-emptive and accordingly was unjustified as it was some three weeks before Mr Gill was required to have his visa or some form of temporary visa which he could have applied for, had he known and understood the process RBL was undertaking. Further, by taking away Mr Gill's opportunity to progress his application, amongst other things on the basis it would be a waste of money, which Mr Gill would not have wanted to spend, RBL predetermined the matter and second guessed the outcome. I find therefore that Mr Gill was disadvantaged in his employment and unjustifiably dismissed.

Remedies

[33] As Mr Gill was not entitled to continue his employment after 7 March 2019 because he did not have the requisite visa, he cannot be recompensed for any wage loss he suffered, because he suffered that loss as a result of his inability to work as opposed to any personal grievance. Whether or not Mr Gill would have obtained his essential skills work visa or some other form of temporary visa if RBL had assisted him and the application had been filed, is unknown.

[34] Mr Gill gave compelling evidence regarding the impact of the dismissal on him. He found the news his job was gone, extremely upsetting and as noted in paragraph 19 felt mistreated and humiliated. I order RBL to pay Mr Gill the sum of $18,000 pursuant to

s 123(1)(c)(i) of the Act. Section 124 of the Act requires me to consider whether or not Mr Gill contributed in any way to his dismissal. I find he did not.

Costs

[35] Costs are reserved. As Mr Gill has been successful, under normal circumstances he will be entitled to costs. The parties are encouraged to resolve any issue of costs between themselves. The Authority commonly uses a tariff-based approach to costs. The daily tariff is currently $4,500 which is pro-rated where the hearing occupies less than a day.

Geoff O'Sullivan
Member of the Employment Relations Authority