

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 580
3169603

BETWEEN	MOHAMAD AFZAL DHALA Applicant
AND	FUTUREED AUSTRALIA NEW ZEALAND PTY LIMITED First Respondent
AND	AMEER MOHAMMED YOUSUF KHAN Second Respondent

Member of Authority:	Sarah Blick
Representatives:	David Fleming, counsel for the applicant No appearance for the respondents
Investigation Meeting:	28 June 2023 in Auckland
Submissions and information received:	28 June 2023, 4 and 5 July 2023 from the Applicant None for the Respondent
Determination:	5 October 2023

DETERMINATION OF THE AUTHORITY

What is employment relationship problem?

[1] Mohamad Dhala was employed by FutureEd Australia New Zealand Pty Limited (FutureEd) which is an English language school and IELTS exam centre of the British Council.¹ In 2018 Mr Dhala was employed as an Exam Manager and later in the position of Centre Head. Mr Dhala is an Indian national who applied for a residence visa under the Skilled Migrant category under an ANZSCO listed occupation. FutureEd's support in the provision of documents was needed.

¹ It was incorporated in Australia and is registered to carry on business in New Zealand.

[2] An employment relationship problem arose in 2020 resulting in Mr Dhala's termination, but after raising a personal grievance and entering into a settlement agreement in October 2020 (ROS 1) he was reinstated. Problems persisted and a further settlement agreement (ROS 2) was entered into in February 2021.

[3] Mr Dhala says from April 2021 FutureEd stripped him of his work duties, required him to work from home and gave him minimal tasks to perform. In October 2021 Mr Dhala's work visa expired. He remained at home on leave until on 24 November 2021, when he raised a personal grievance for unjustified disadvantage. He claimed FutureEd had failed to provide reasonable assistance with his visa applications and his wages were not paid on time on repeated occasions.

[4] A day after raising these grievances, Mr Dhala received a payslip showing the only payment as "termination pay", which was received into his bank account. He later raised a personal grievance for unjustified dismissal. His claims before the Authority are numerous and include a claim for unjustified disadvantages, unjustified dismissal, a claim for special damages relating to legal costs, claims for penalties for breaches of a record of settlement, good faith, and of the Wages Protection Act 1983 (WPA). He has also applied for a penalty in relation the alleged delay or obstruction of the Authority's investigation.

[5] The respondents' statement in reply denied Mr Dhala's claims and the remedies sought in the statement of problem.

What was the Authority's process?

[6] The respondents engaged in the Authority's case management processes, but there were delays in holding an investigation meeting due to adjournments. These were granted as a result of medical concerns cited by one of FutureEd's Australian-based directors, Ameer Khan, which were said to prevent his travel to New Zealand.

[7] Witness statements were lodged for Mr Dhala and Mr Khan, who had oversight over FutureEd's operations in New Zealand.

[8] Prior to the investigation meeting, the Authority attempted to set up a case management conference which Mr Khan would engage in for the purpose of agreeing a new investigation meeting date. The conference did not take place because the

respondents' counsel was unable to obtain obstructions to attend. The Authority then set down the investigation meeting. The respondents' counsel advised they did not have instructions to attend and represent the respondents at the investigation meeting. Counsel confirmed a copy of the Authority's notice of investigation meeting had been provided to Mr Khan, along with online meeting details in the event Mr Khan wished to attend remotely (the Authority having previously indicated it granted leave for him to do so).

[9] Being satisfied the respondents were aware of the date and time of the meeting, and with no good cause shown for their failure to attend or be represented, the Authority proceeded with the meeting in the respondents' absence.²

[10] Mr Dhala answered questions under affirmation from the Authority at the investigation meeting and his counsel gave submissions. The evidence in Mr Khan's witness statement was not able to be tested through questioning or cross-examination, which has greatly affected the weight that could be accorded to it.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and/or law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

What are the issues?

[12] The issues requiring investigation and determination are:

- (a) Does Mr Dhala have a personal grievance for unjustified disadvantage?
- (b) Does Mr Dhala have a personal grievance for unjustified dismissal?
- (c) If FutureEd's actions were not justified, what if any remedies should be awarded and are there any issues of contribution?
- (d) Has FutureEd breached agreed terms of settlement?
- (e) Should damages in respect of legal costs incurred be awarded?
- (f) Has FutureEd breached its duty of good faith to Mr Dhala?
- (g) Has FutureEd breached s 4 of the WPA?
- (h) Have the penalty actions been commenced in time?

² Mr Khan failed to join the online meeting which was started at the beginning of the investigation meeting.

- (i) Should a penalty or penalties be ordered against one or both respondents, with some or all payable to Mr Dhala?
- (j) Should a penalty be imposed on one or more of the respondents for delaying or obstructing the Authority's investigation?
- (k) Should either party contribute to the costs of representation of the other party in the Authority application?

What is the background?

[13] The terms and conditions of the parties' employment relationship were set out in a written employment agreement dated 30 July 2018. As noted above, Mr Dhala's employment ended in around July 2020, following which he raised a personal grievance for unjustified dismissal. The parties attended mediation in September 2020 which was unsuccessful in resolving problems between them. Following mediation counsel lodged an Authority application on Mr Dhala's behalf, saying he had been unjustifiably dismissed and sought interim and permanent reinstatement, among other remedies.

ROS 1

[14] On 1 October 2020 FutureEd and Mr Dhala entered into ROS 1, which provided FutureEd would:

- (a) reinstate Mr Dhala to his role as of 5 October 2020 or the date he was granted a visa allowing him to work for FutureEd;
- (b) pay him \$25.50 per hour for a minimum of 30 hours per week;
- (c) provide reasonable assistance with Mr Dhala's immigration and visa applications, including completing an Employer Supplementary Form (ESF) and providing any information or documentation required by Immigration New Zealand (INZ);
- (d) not say or do, or cause any other person to say or do, anything that would jeopardise or reduce the chances of success of Mr Dhala's applications;
- (e) Pay \$5,000 plus GST toward Mr Dhala's legal costs.

[15] ROS 1 was signed by Mr Khan as FutureEd's signatory and by a mediator pursuant to s 149 of the Act. The Authority application was then withdrawn pursuant to ROS 1's terms of settlement.

[16] Mr Dhala says FutureEd failed to comply with the conditions of ROS 1 and acted in ways that further disadvantaged him. He believes Mr Khan disliked him for historical reasons, and says he was treated like FutureEd had no choice but to keep him on. Mr Dhala said upon his reinstatement FutureEd did not allow him to return to work at the date agreed, him having been granted a visa on 19 October 2020. Mr Dhala said in November 2020 he was asked to attend two disciplinary meetings to address allegations about his behaviour, but no formal disciplinary consequences followed. In December 2020 there was another allegation about his behaviour, in relation to which he received a “letter of expectation”. He was also not able to access his work emails. Mr Dhala raised a personal grievance for unjustified disadvantage on 1 December 2020.

Interactions with INZ

[17] In January 2021 Mr Khan was interviewed by an immigration officer in relation to Mr Dhala’s application for residence. Mr Khan expressed reluctance to support Mr Dhala’s application because at the time of lodgement of the application letters of support had been given by FutureEd’s former Head of Operations, a person no longer employed but working with it as a consultant. Mr Khan apparently expressed reluctance to support the application unless Mr Dhala came to him as an employee and resubmitted “everything regarding his skilled employment”. There is reference to Mr Khan conceding that FutureEd’s lawyers had advised him he should support the application but he felt that he should not have to do so “if he does not know what is going on”.

[18] On 3 February 2021, INZ sent Mr Dhala a letter via his then immigration lawyer, stating Mr Dhala’s duties did not appear to substantially match the ANZSCO occupation of Education Manager. No mention was made of the interview with Mr Khan, or in relation to FutureEd’s support for Mr Dhala’s residence application. The immigration lawyer then asked that Mr Dhala’s employment be considered as a substantial match for a different ANZSCO occupation - Specialist Manager.

Mr Dhala raises another personal grievance

[19] Mr Dhala raised a personal grievance for unjustified disadvantage on 15 February 2021. On 16 February 2021 Mr Dhala lodged a further Authority application through counsel, seeking compliance orders with ROS 1, a claim for arrears of wages, a personal grievance for unjustified disadvantage and an application for penalties.

ROS 2

[20] On 23 February 2021, FutureEd and Mr Dhala entered ROS 2 in resolution of Mr Dhala's grievances and all matters that had by then occurred. The terms included the parties would comply with certain terms of ROS 1, and FutureEd would:

- (a) pay Mr Dhala \$25.50 per hour, for a minimum of 30 hours per week;
- (b) provide reasonable assistance with Mr Dhala's immigration and visa applications, including completing an ESF, and providing any information or documentation required by INZ;
- (c) not say or do, or cause any other person to say or do, anything that would jeopardise or reduce the change of success of Mr Dhala's immigration and visa applications;
- (d) enable and allow Mr Dhala to access his work emails and forward to his personal email any copies of work emails that he considered would support his visa application.

[21] ROS 2 provided Mr Dhala would be paid compensation of \$13,000 under s 123(1)(c)(i) of the Act by instalment payments. It was also agreed Mr Dhala would resign from his employment with FutureEd within 14 days of obtaining residence in New Zealand or receiving a final decision from INZ rejecting his application for residence with all appeal processes having been exhausted.

[22] ROS 2 was again signed by Mr Khan as FutureEd's signatory and by a mediator under s 149 of the Act. The Authority application was withdrawn pursuant to ROS 2's terms of settlement.

Problems continued after ROS 2

[23] On 25 March 2021 Mr Dhala's counsel emailed a draft letter for INZ to FutureEd's counsel, saying that if Mr Khan was willing to sign the letter in support, it would be of significant assistance with Mr Dhala's residence application, and mitigate harm caused by Mr Khan's previous actions. The draft letter stated during his employment, the duties Mr Dhala "has been performing have been as stated in his Job Description".

[24] Mr Dhala has provided a work schedule sent to him by FutureEd's office manager around this period in March 2021, showing Mr Dhala was to be an "invigilator" on those dates, rather than managing or even supervising tests.

[25] On 29 March 2021 FutureEd's counsel responded to the email of 25 March 2021 by saying it was prepared to provide a letter but not the draft one provided. An alternative draft letter was provided to Mr Dhala's counsel, which said Mr Dhala had been reinstated as Centre Head in October 2020 as per a job description provided by the consultant, but that Mr Dhala mostly worked as an invigilator in FutureEd's Auckland centres, along with some test work under the supervision of FutureEd's office manager. Mr Dhala was not happy with the counter draft letter.

[26] On 15 April 2021 Mr Dhala emailed Mr Khan directly complaining that he had only been allocated 20-22 hours that week, and drew Mr Khan's attention to ROS 2 which committed FutureEd to giving him either 30 hours of work per week or paying him for 30 hours per week. He commented on Mr Khan's draft letter being detrimental to the immigration process rather than being any help. He stated:

Once again here I am not being dealt with fairly. As you are the one who now decides who is going to supervise a test or invigilate. So I am of the opinion that you are wantedly [sic] assigning me as an invigilator to work under staff whom I had trained just so that it is detrimental to the future of me and my family in this country. The reason for which I still don't know despite asking several times.

Also you can still write and send us a proper letter of support that will assist in the immigration situation.

I have appealed to you on numerous occasions to kindly allow me to continue to do the work I was brought into this organisation to do as per my job description. Being the sole decision maker in this organisation you have kept me away from. There is still time to set things right and allow me to do my duties as per my job description upon which I was reinstated.

[27] On 16 April 2021 FutureEd's office manager emailed Mr Dhala advising they would try to schedule Mr Dhala 30 hours per week, but if he was scheduled less he would still receive 30 hours payment.

[28] It is common ground FutureEd was late in paying agreed compensation payments under ROS 2 but did so after Mr Dhala's counsel demanded payment. Wage payments were also late, which by Mr Dhala's account had been a long term problem. FutureEd has said the reason the payments were late was because of FutureEd's financial position – its customers were primarily immigrants seeking to satisfy English

language requirements for immigration purposes in New Zealand. The border closure as a result of the COVID-19 pandemic had a sharp impact on FutureEd's business.

[29] A couple of incidents appear to have occurred in April 2021 relating to Mr Dhala's invigilation of tests. He says from April 2021 FutureEd then stripped him of work duties, required him to work from home and gave him minimal tasks to perform. Mr Dhala says FutureEd and Mr Khan obstructed his immigration applications including by delaying providing him with access to his full work emails, and asserting that Mr Dhala's job title was 'exam manager'.

INZ declines Mr Dhala's residence application and he appeals

[30] By letter dated 14 June 2021, INZ declined Mr Dhala's application for residence because his employment was assessed as not meeting the requirement for skilled employment under Skilled Migrant category Instructions. This was on the basis his skilled employment was not a substantial match to the ANZSCO occupation of Specialist Manager for which points were claimed. INZ found the focus of Mr Dhala's role was supervisory and administrative. He says it was declined due to damaging information supplied by Mr Khan which contradicted what Mr Khan and FutureEd had previously told INZ. The letter does not refer to Mr Khan or a decline on those grounds.

[31] On 25 June 2021 counsel for Mr Dhala confirmed to FutureEd that Mr Dhala was lodging an appeal and had engaged an immigration lawyer for that. In response to an inquiry from FutureEd's counsel about the timeframe for a decision, on 19 July 2021 Mr Dhala's counsel advised FutureEd to make direct contact with Mr Dhala's immigration lawyer. Counsel also said the immigration lawyer was "aware of the rather delicate employment situation, and of the fact the parties have agreed to enter into what is effectively a holding pattern while the immigration issue is under consideration".

[32] Mr Dhala's immigration lawyer advised FutureEd's counsel by email on 23 August 2021 the following:

Abiding by the terms of the Record of Settlement, we suggest that Mr Dhala should be genuinely and completely reinstated to his position of Center Head asap. This will enable him to obtain the evidence indicating that he is completing his tasks as required by Immigration New Zealand. On submitting the required documents to Immigration New Zealand, Mr Dhala can obtain his Residence visa and can give his contractual notice to FutureED as per the final settlement. You will appreciate, it is a win-win situation for Mr Khan and Mr Dhala if he is genuinely and completely reinstated.

[33] FutureEd's counsel responded on 23 August 2021 as follows:

1. Mr Dhala was originally reinstated as Center Head in November of 2020. After his reinstatement, issues unfortunately arose with Mr Dhala's employment; and in particular our client had concerns regarding Mr Dhala having access to emails.
2. Therefore Mr Dhala was offered work as an exam supervisor and continued to work in that role until he commenced garden leave. Mr Dhala's current position is that of exam supervisor and he remains on garden leave.
3. Our client can only confirm the truth:
 - a. That Mr Dhala's current role is that of exam supervisor; however
 - b. Mr Dhala is currently on paid garden leave and is not currently carrying out any duties.
4. We note that Mr Dhala's matter is currently on appeal before the Immigration Protection Tribunal; it is unclear on what grounds the appeal has been lodged. Therefore, it is unclear why information is being sought from our client. It also unclear on what basis Mr Dhala's Residency Application was declined. Again, it is unclear why information is being sought.
5. If INZ require information about Mr Dhala's current employment situation; our client is able to assist with the provision of information to the extent that it is able.

[34] On 12 October 2021 INZ granted Mr Dhala an interim visa with visitor conditions which did not entitle him to work.

[35] On 13 October 2021 the Immigration and Protection Tribunal issued its decision, finding INZ did not fairly assess Mr Dhala's application because it failed to inform him of information that might harm his case and did not give him a reasonable opportunity to respond to information before it made its decision - namely it did not put its concerns that the tasks he performed did not substantially match the ANZSCO Specialist Manager occupation. INZ's decision was cancelled and referred back for a correct assessment. The decision noted that the decline letter did not address any concerns arising from the interview with Mr Khan and if concerns remained arising from the interview, INZ must put them to Mr Dhala clearly and provide an opportunity to respond. The decision stated Mr Dhala must understand that the reassessment of his application was no guarantee he would be granted residence.

[36] On 14 October 2021 Mr Dhala wrote directly to Mr Khan by email raising the problem that he was being paid his wages on different days and late payments were causing him immense stress and difficulties for himself and his family with needing to spend a lot of time and energy chasing things up.

Mr Dhala's work visa expires

[37] On 18 October 2021 Mr Khan wrote directly to Mr Dhala asking that he urgently provide a scanned copy of his work visa so that he could verify Mr Dhala's entitlement to work for FutureEd. He chased that email up on 19 October 2021 expressing disappointment that Mr Dhala had not responded with the visa information and "proposing to suspend payment of your salary until I receive this information". He told Mr Dhala to provide any comments on the proposal to suspend payment until information confirming his visa status was provided.

[38] On 19 October 2021, Mr Dhala's one year work visa expired and he was no longer able to lawfully work. On the same date Mr Dhala responded to Mr Khan expressing his own disappointment about the situation, saying it was not too late for FutureEd to provide the required INZ form. He sent Mr Khan a copy of his interim visa.

Mr Dhala raises personal grievance for unjustified disadvantage

[39] On 24 November 2021 Mr Dhala (via counsel) raised another personal grievance for unjustified disadvantage, stating FutureEd had failed to provide reasonable assistance with his visa applications including failing to supply an ESF. He also raised a personal grievance in relation to FutureEd's failure to pay wages on time "on repeated occasions". The email makes no demand that Mr Dhala be reinstated to his duties as Centre Head so that he could demonstrate to INZ he was performing tasks relevant to the ANZSCO occupation – rather he sought urgent provision of an ESF and any other support in relation to his immigration situation, reinstatement to the payroll as soon as "permissible legally", monetary remedies under s 123(1) of the Act and legal costs.

Mr Dhala's employment is terminated

[40] A day after the grievances were raised, on 25 November 2021, Mr Dhala received a payslip from FutureEd which included a sum marked as 'termination pay' for the pay period ending 21 November 2021. There is no evidence before the Authority that Mr Dhala or his counsel contacted FutureEd confirming he had been dismissed.

[41] Mr Dhala received no further payments from FutureEd after 25 November 2021. At that time Mr Dhala had not obtained a residence visa. Nor had he received a final decision, with all appeals exhausted, rejecting his application for residence. The next

interaction the Authority is aware of is one on 13 January 2022 – where Mr Dhala raised a personal grievance for unjustified dismissal through counsel.

[42] Rather than re-apply under the Skilled Migrant category, Mr Dhala says he submitted an application for a 2021 Residence Visa in its first cohort beginning 1 December 2021 based on his employment with FutureEd. He says he had to withdraw that application because it could not succeed due to his loss of employment. The Authority has been told on 1 March 2022 Mr Dhala's wife applied for the 2021 Resident Visa in its second cohort, based on her own employment, with Mr Dhala and their children as secondary applicants. On 27 October 2022 Mr Dhala and his family were granted 2021 Residence Visas.

Does Mr Dhala have a personal grievance for unjustified disadvantage?

[43] A disadvantage grievance requires an assessment of the test of justification under s 103A of the Act. Mr Dhala needed to establish a prima facie case that there was a relevant action affecting his employment to his disadvantage. The onus then falls on FutureEd to justify the alleged action.

[44] Mr Dhala says he was unjustifiably disadvantaged in his employment by FutureEd's failure to pay his wages in full and when due, and by its failure to provide reasonable assistance with his immigration applications.

[45] As a starting point, it is clear Mr Dhala was entitled to rely on the ROS as being validly entered into by FutureEd. Both of the ROS hold Mr Khan's name and signature and I have no reason to doubt that he signed them remotely from Australia. Mr Dhala was entitled to rely on the commitments FutureEd made in the ROS, and on the consultant who submitted information to INZ and who appears to have had involvement in negotiations as having authority to do so on its behalf.

Late payments

[46] There is clear evidence that on several occasions Mr Dhala's wages were not paid on time or in full, and he contacted Mr Khan, the office manager and FutureEd's accountant asking for payment to be made on time. Despite the persisting issues between the parties, FutureEd was obliged to pay Mr Dhala in accordance with his employment agreement as varied by the terms of ROS 2. The failure to pay him affected

Mr Dhala to his disadvantage because it left him struggling to meet his obligations including paying rent on his family home.

Reasonable assistance with visa applications

[47] While in April 2021 Mr Dhala was asking Mr Khan to allow him to carry out the work as per his job description, communications before the Authority from his counsel to FutureEd focused on the requirement to provide assistance in support of the application for residence under ROS 2. The importance of genuinely reinstating Mr Dhala to his position appeared to have taken a back seat.

[48] Following entry into ROS 2, it was clear a fair and reasonable employer in the circumstances could be expected to take the steps necessary to reinstate Mr Dhala to the duties in his job description. It did not do so and the Authority would likely have found the failure to do so was an unjustified action affecting Mr Dhala to his disadvantage, because he was not carrying out the work he was ready, willing, able and employed to do. However, the personal grievance in fact raised by Mr Dhala (and pursued before the Authority) was not about the failure to genuinely reinstate him. It is based on an alleged failure to provide reasonable assistance in relation to his work and residence visa applications. Although I generally accept the proposition that a fair and reasonable employer could be expected to provide assistance to an employee in obtaining or renewing a visa entitling them to work for their employer, I am not satisfied a fair and reasonable employer in FutureEd's situation at the relevant time could be expected to assist an employee in providing factually incorrect information to INZ about tasks Mr Dhala was or was not performing and the state of the employment relationship. Mr Dhala's personal grievance on this ground is not established.

Does Mr Dhala have a personal grievance for unjustified dismissal?

[49] On or about 19 October 2021 Mr Dhala's work visa expired and he was no longer able to work for FutureEd lawfully. Although Mr Khan wrote to Mr Dhala directly saying he proposed to "suspend" Mr Dhala's pay, he provided no warning FutureEd proposed to end Mr Dhala's employment.

[50] I am satisfied that through paying Mr Dhala "termination pay", FutureEd was demonstrating to Mr Dhala that his employment was at an end. Although Mr Khan's untested witness statement denied Mr Dhala had in fact been dismissed, the

respondents' statement in reply did not, acknowledging his employment "came to an end" because Mr Dhala was no longer lawfully able to work.

[51] FutureEd did not conduct any process before terminating employment and provided no notice of termination. Those procedural defects were not minor and resulted in Mr Dhala being treated unfairly. Had FutureEd followed any process shortly prior to termination, Mr Dhala may have had the opportunity to respond and take action in respect of his employment options. A fair and reasonable employer could be expected to have engaged constructively with him around his options, particularly given the long-standing nature of the employment and FutureEd's awareness of Mr Dhala's immigration situation. For these reasons, I am satisfied FutureEd's decision to terminate was unjustified.

[52] Further even if FutureEd believed it would be unlawful for it to continue employing Mr Dhala, it was contractually obliged to give Mr Dhala two weeks' notice in writing of termination. It did not. To be clear, although it is an offence under the Immigration Act 2009 for an employer to allow a person who is not entitled to work in the employer's service, it is not an offence to continue to allow a person to work in compliance with the requirements of an employment agreement relating to the giving of notice on termination of employment.³

If FutureEd's actions were not justified, what if any remedies should be awarded and are there any issues of contribution?

[53] Because I have found Mr Dhala has both a personal grievance for unjustified disadvantage and unjustified dismissal, he is entitled to a consideration of remedies.

Compensation

[54] Mr Dhala submitted that because the facts giving rise to his disadvantage claim and his eventual dismissal formed a continuous series of events having a cumulative effect on him, it would be artificial to make separate remedies awards. Mr Dhala sought a global compensation award under s 123(1)(c)(i) of \$40,000 encompassing the three grievances. Only the two grievances have been established, and the Authority does not intend to deal with compensation with a global award.

³ Immigration Act 2009, sections 350(1) and (7).

[55] I am satisfied the events leading up to his dismissal caused Mr Dhala stress, humiliation, loss of dignity and injury to feelings. In particular Mr Dhala says he felt frustrated and overburdened by FutureEd's repeated failure to comply with settlement agreements; he felt worthless and unproductive as a result of being offered no work duties by FutureEd, he felt embarrassed and degraded with having to beg FutureEd for his unpaid wages; he felt overwhelmingly anxious about his immigration status in New Zealand, fearing that he and his family would be deported; his family have suffered serious financial hardship, struggling to pay for essential expenses; his health has deteriorated, and the accumulated stress resulted in him being diagnosed as diabetic in January 2022; and the whole situation has had a toll on Mr Dhala's family relationships.

[56] I begin by assessing the consequences of the disadvantage grievance. It is apparent Mr Dhala was affected by not being paid regularly and on time. His email messages to FutureEd demonstrate the pressures he was under financially, which I accept resulted in cumulative stress. I am satisfied he ought to be awarded \$5,000 under s 123(1)(c)(i) of the Act.

[57] Turning to the dismissal grievance, due to the other factors outlined. I am satisfied Mr Dhala suffered significant harm as a result of FutureEd's actions. An award of \$20,000 under s 123(1)(c)(i) is appropriate.

Lost wages

[58] Mr Dhala has sought reimbursement of earnings lost as a result of his dismissal pursuant to ss 123(1)(b) and 128 of the Act from the termination date of 25 November 2021 to the date of the investigation meeting, or in the alternative, one years' earnings.

[59] Mr Dhala's evidence was that because he was not in paid employment as of 1 December 2021, he was not eligible for inclusion in the first cohort of the 2021 Resident Visa application process, resulting in his wife applying as the principal applicant instead.

[60] The Authority is not in position to assess whether Mr Dhala would have been granted a further work visa or a residence visa had he been genuinely reinstated to his role as Centre Head. The supposed "holding pattern" of the employment and "win-win situation" envisaged which would have allowed the parties to part ways upon the grant of residence proved unrealistic and fraught with difficulty, and undermines Mr Dhala's

claim for lost wages over the period he seeks. The Authority also does not overlook that had INZ (or the IPT at the point it made its decision) been aware of the parties' confidential agreement which meant Mr Dhala's employment would not be ongoing after the grant of a residence visa, this may have impacted their decision-making.

[61] The Authority notes Mr Dhala returned to India from March or April 2022 for a couple of months and again between October and December 2022. There is insufficient evidence to show Mr Dhala took steps to mitigate his losses until around December 2022 when he gained further employment in New Zealand.

[62] These factors must be reflected in the assessment of any award of lost wages. I do accept Mr Dhala could not reasonably have been expected to find alternative work in New Zealand immediately after his dismissal given his visa conditions did not allow him to lawfully work. Subject to any consideration of contribution, I award the equivalent of three months' lost wages at the agreed rate of \$25.50 per hour at 30 hours per week. I am not persuaded there is a proper basis for exercising the Authority's discretion to award of lost wages in excess of three months.

Contribution

[63] Under the Act I am required to consider whether to reduce remedies where the actions of the employee contributed toward the situation that gave rise to the grievance or grievances. None of FutureEd's allegations about Mr Dhala's behaviour at the relevant times have been backed up by sworn or affirmed evidence or the documentary evidence. Further, I am satisfied Mr Dhala was proactive in resolving employment relationship problems directly and through counsel as they arose. In those circumstances I do not consider Mr Dhala's conduct warrants any reduction for contribution under s 124 of the Act.

Should damages in respect of legal costs incurred be awarded?

[64] Mr Dhala says as a direct result of FutureEd's unlawful actions, he was obliged to seek legal advice in respect of both his employment situation and his immigration application(s) which came at significant cost, for which special damages are claimed. The Authority does not intend to determine the issue of damages in the absence of a full understanding of costs incurred, including in respect of his application before the Authority. Although information has been received in relation to the damages claim,

the outcome on that is reserved pending any further application for costs following the issue of this determination.

Has FutureEd breached agreed terms of settlement of one or both settlement agreements entered into between the parties?

[65] Under ROS 2 FutureEd was required to reinstate Mr Dhala into the Centre Head role, offer 30 hours per week or pay him for that number of hours. It is clear FutureEd failed to comply with those terms. It was also required to pay compensation amounts under s 123(1)(c)(i) through instalment payments, which were paid late on two occasions of which the Authority is aware. It is appropriate to consider awarding a penalty or penalties reflecting those breaches.

[66] ROS 2 also expressly required FutureEd to provide reasonable assistance with Mr Dhala's visa applications, including completing an ESF and providing any other information required by INZ. It further purported to hold FutureEd to not saying or doing anything that would jeopardise or reduce the chances of success of Mr Dhala's visa applications. In the circumstances as outlined, I do not consider it appropriate to award a penalty against FutureEd or Mr Khan in relation to ROS 2 for avoiding a situation where it may have provided incorrect information in support of Mr Dhala's visa applications. No penalty will be awarded in respect of those purported breaches.

[67] Here the Authority comments on the use of the employment institutions where immigration concerns are in issue. Care should be taken by parties and representatives when utilising employment institutions such as the Mediation Service for the purposes of reaching confidential settlements to achieve favoured immigration outcomes. The situation Mr Dhala found himself in will perhaps serve as a cautionary tale for those minded to do so.

Has FutureEd breached its duty of good faith to Mr Dhala?

[68] It is not clear to the Authority how the claim for breach of good faith against FutureEd is distinct from the personal grievance claims for unjustified disadvantage and unjustified dismissal which are addressed above. This penalty claim is declined.

Has FutureEd breached s 4 of the WPA?

[69] The evidence establishes that on several occasions FutureEd failed to pay Mr Dhala's wages on time in accordance with his employment agreement between April

2021 until the end of his employment. Each occasion constituted a breach of s4 of the WPA.

Have the remaining penalty actions been commenced in time?

[70] Yes. The penalty claims in respect of breaches of ROS 2 and the WPA were brought within time.

Should a penalty or penalties be ordered against FutureEd, with some or all payable to Mr Dhala?

[71] I have found FutureEd has breached certain terms of ROS 2 and s 4 of the WPA. The maximum penalty amount that can be ordered against it as a company employer for each breach is an amount not exceeding \$20,000. Against an individual such as Mr Khan the maximum available is \$10,000 for each breach.

[72] In considering whether a penalty is warranted and, if so, at what level, I have had regard to the factors set out in s 133A of the Act, as well as the Employment Court decisions in *Nicholson v Ford* and *A Labour Inspector v Daleson Investment Ltd*.⁴ Relevant factors to penalty here include:

- (a) The breaches involved a continuing course of conduct and a globalised approach is appropriate, resulting in two breaches – one of ROS 2 terms and one of s 4 of the WPA (the latter breach being available only in relation to FutureEd as the employer);⁵
- (b) The failures cannot be said to be either inadvertent or negligent - FutureEd was aware of its obligations when it was paying Mr Dhala late and simply cites financial reasons for that;
- (c) The effects of the breaches were serious in terms of Mr Dhala not being able to meet commitments and support his family, and created ongoing uncertainty;
- (d) Mr Dhala raised the issue of reinstatement to his duties and issues regarding payment on a number of occasions;
- (e) Although FutureEd is overdue in lodging its latest annual return, it remains registered on the Companies Register;
- (f) The only mitigating steps taken by FutureEd were to pay Mr Dhala late;

⁴ *Nicholson v Ford* [2018] NZEmpC 132 and *Labour Inspector v Daleson Investment Ltd* [2019].

⁵ Wages Protection Act 1983, section 13(2).

- (g) Mr Dhala was in a vulnerable position due to his reliance on FutureEd for his immigration status;
- (h) Deterrence is necessary - the breaches fall foul of FutureEd's obligation to provide Mr Dhala with work in accordance with his agreement and pay him amounts he was due. There is a need to deter FutureEd and Mr Khan (in the event FutureEd continues to employ workers) and other employers from the same type of behaviour;
- (i) The rather complicated facts of this case makes comparison difficult, but I find that a penalty of \$4,000 for each breach by FutureEd is proportionate, and \$2,000 by Mr Khan.

[73] The Authority may award the whole or any part of a penalty recovered to any person. I have already awarded compensation to Mr Dhala in relation to the failure to pay him on time in the context of his disadvantage grievance. It is not appropriate to account twice for this failure by apportioning that in penalty orders I make in relation to either the ROS or WPA. The whole of FutureEd's \$4,000 WPA penalty is to be paid to the Authority which in turn will pay this into the Crown Bank Account. It is however appropriate to apportion 50% of the penalties in relation to the other ROS 2 breaches to Mr Dhala.

Did the respondents delay or obstruct the Authority's investigation and if so should a penalty be imposed them?

[74] Although the delays in progressing this matter to an investigation were frustrating for Mr Dhala, the Authority is not satisfied the respondents actions were near the level where it is appropriate to grant a penalty under s 134A of the Act.

Outcome

[75] The Authority orders as follows:

Within 21 days of the date of this determination FutureEd Australia New Zealand Pty Limited is to pay Mohamad Afzal Dhala the following:

- (a) \$5,000 under s 123(1)(c)(i) of the Act (unjustified disadvantage);
- (b) \$20,000 under s 123(1)(c)(i) of the Act (unjustified dismissal);
- (c) Three months lost wages at \$25.50 per hour at 30 hours per week;

(d) \$8,000 penalties (\$2,000 only of which is payable to Mr Dhala and \$6,000 to the Crown).

Within 21 days of the date of this determination Ameer Mohammed Yousuf Khan is to pay Mohamad Afzal Dhala the following:

(a) \$2,000 penalty (half of which is payable to Mr Dhala and the other half to the Crown).

Costs

[76] Costs are reserved. The parties are now given the opportunity to resolve any issue of costs (as well as the issue of special damages) between themselves.

[77] If the parties are unable to resolve costs and damages between them and an Authority determination is needed Mr Dhala may lodge, and then should serve, a memorandum on costs relating to the Authority application within 21 days of the date of issue of this determination. From the date of service of that memorandum the respondents 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. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.

Sarah Blick
Member of the Employment Relations Authority