

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 221
ARC 41/12**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN SUNIL KUMAR BALI
Plaintiff

AND SRG HOLDINGS LIMITED TRADING
AS SUPER VALUE
Defendant

ARC 78/12

BETWEEN SUNIL KUMAR BALI
Plaintiff

AND SRG HOLDINGS LIMITED TRADING
AS SUPER VALUE
First Defendant

AND NZ LIQUOR MERCHANTS LIMITED
TRADING AS SUPER LIQUOR
Second Defendant

Hearing: 23 September 2013
(Heard at Auckland)

Appearances: Mr S Bali, in person supported by Mr V Koli
Mr M Kyne, advocate for the defendants

Judgment: 29 November 2013

JUDGMENT OF JUDGE M E PERKINS

[1] Mr Bali was formerly employed by SRG Holdings Limited t/a Super Value (SRG).

[2] The plaintiff is an Indian citizen who came to New Zealand seeking a permit to remain here as a resident. Mr Bali has family in New Zealand. Mr Bali managed to procure a work permit and was then able to take up employment with SRG. He held the position of Duty Manager and Checkout Supervisor with that company.

[3] Mr Bali's work permit expired on 16 December 2011. As a result, his employment with SRG came to an end. The undisputed evidence confirms that Mr Bali notified SRG on 16 December 2011 that his work permit had expired. He was on sick leave at the time and he did not return to work. His employment was terminated by SRG on the grounds that it was not permitted as a matter of law to employ him without a current work permit.

[4] At the time of the termination of his employment Mr Bali appears to have had an application pending for residence.

[5] Correspondence took place at the time Mr Bali's visa expired. There is a dispute as to whether SRG could validly terminate his employment at that time. He commenced a personal grievance on the grounds that he was not given the required notice of termination. In addition he stated in evidence that he had a valid work visa. In an effort to resolve the grievance, the parties attended mediation. After two attempts at mediation a settlement was reached which was confirmed in a binding Record of Settlement dated 23 May 2012.

[6] The terms of the settlement reached at the second mediation were as follows:

...

1. These terms of settlement and all matters discussed in mediation shall remain, so far as the law allows, confidential to the parties. The parties acknowledge that the company may be required to supply information to the Immigration Service.
2. NZ Liquor Merchants Ltd t/a Super Liquor Manukau shall provide Sunil Kumar Bali within one day of the date hereof, with an offer of employment. The terms of this offer shall include that Sunil Bali shall be employed as a Sales Supervisor; he shall be employed for 30 hours per week at an hourly rate of \$14.50 per hour; he shall work according to a roster with the hours to be between 10am and 11pm Monday to Sunday; and his other terms of employment to be substantially the same as contained in his individual employment agreement with SRG Holdings Ltd.

3. If Sunil Bali is not able to commence work on or before June 8, 2012 then the above offer shall lapse and shall not be extended.
4. SRG Holdings Ltd shall provide Sunil Kumar Bali within seven days of the date hereof, with a reference relating to his employment with the company.
5. SRG Holdings Ltd shall provide Sunil Kumar Bali within one day of the date hereof, with a letter of explanation for immigration purposes. The company shall state that while it is no longer able to provide employment with the company [its] sister company is prepared to make an offer of employment as detailed above.
6. In reaching this agreement the parties confirm that neither has agreed to forgo minimum entitlements (monies payable under the Minimum Wage Act 1983, or the Holidays Act 2003, as defined by the Employment Relations Act 2000).
7. This is the full and final settlement of all matters between the Applicant and Respondent arising out of their employment relationship.

...

[7] Mr Bali therefore had approximately two weeks to put his immigration status in order and be able to commence work. Mr Bali was not able to take up and commence employment with SRG or more properly NZ Liquor Merchants Ltd t/a Super Liquor (NZ Liquor) as he had no valid work permit at the time specified in the terms of settlement.

[8] Without a valid work permit, NZ Liquor refused to allow him to commence employment. It claimed that the terms of settlement were then no longer enforceable. Mr Bali commenced proceedings for compliance orders in the Employment Relations Authority (the Authority) at Auckland.

[9] There were two determinations from the Authority. The first was dated 7 June 2012.¹ That determination was a decision in respect of proceedings Mr Bali had commenced solely against SRG Holdings. The Authority held that SRG had complied with the terms of settlement and, accordingly, did not issue a compliance order. In addition Mr Bali was ordered to pay costs.

[10] Mr Bali filed a challenge against this determination on 4 July 2012. A minute was issued by Judge Travis on 15 August 2012. It was pointed out that in view of

¹ [2012] NZERA Auckland 195.

the fact that it was NZ Liquor which had offered the position of employment, the only way to obtain compliance in terms of the settlement would be to recommence the proceedings in the Authority. It would be necessary to join NZ Liquor as a party against whom enforcement then might be sought.

[11] Mr Bali recommenced proceedings for compliance in the Authority, naming both SRG and NZ Liquor as respondents. The same Authority Member considered the matter and issued a further determination dated 16 October 2012 reiterating the earlier refusal to issue a compliance order. She held that both SRG and NZ Liquor had complied with the terms of settlement.² Mr Bali filed a challenge to that determination on 13 November 2012.

[12] The evidence given on behalf of SRG and NZ Liquor was that had Mr Bali attended to renewing his work visa prior to its expiry on 16 December 2011, he could have happily remained in employment with SRG. Following the mediation, NZ Liquor made an offer of employment to Mr Bali, because by that stage SRG had no vacancies available for him. Again, the companies' position in the matter was that had Mr Bali, following the settlement, attended to renewing his work visa by the deadline expressed in the terms of settlement then NZ Liquor would have been happy for him to commence employment with it. Mr Bali did not obtain a renewal of his work permit. The evidence, including the evidence from an Immigration Officer called by the plaintiff as his own witness, was that Mr Bali never in fact applied for a work permit at that time. The Immigration Officer, Mr Oliver Tait, indicated in evidence that from the time that Mr Bali was able to prove to an Immigration Officer that he had a genuine offer of employment, it would take a further 25 days approximately for his application for a temporary visa to be approved in order to allow him to take up the offer and apply for a work visa.

[13] Mr Vipin Garg, who is the principal and director of both defendants, indicated in his evidence that it was Mr Bali himself who specified the date to be included in the terms of settlement for him to be in a position to be able to take up employment with NZ Liquor. That particular clause in the terms of settlement could

² [2012] NZERA Auckland 369.

only have been inserted to cover the necessity for Mr Bali to obtain a renewal of his work permit.

[14] A great deal of the evidence from Mr Bali related to the circumstances surrounding the days immediately prior to the expiry of the time limit in the terms of settlement. Following the mediated settlement, NZ Liquor had, in accordance with the terms of the settlement agreement, provided Mr Bali with a reference and also confirmed in writing the offer of work available to him. For some reason Mr Bali took the view that because the offer of employment was for part time work consisting of a total of 30 hours per week and contained a 90 day trial period, that this would not be acceptable to New Zealand Immigration. He considered, therefore, it was not in compliance with the terms of settlement. The evidence from Mr Tait, Mr Bali's own witness, was that an offer of employment for 30 hours per week and, despite containing a 90 day trial period, would have been an acceptable position of employment to enable Mr Bali to obtain a work permit.

[15] The view taken by Mr Garg was that, NZ Liquor having agreed at the mediation to make an offer of employment instead of SRG, Mr Bali's failure to work expeditiously to procure a work permit and being unable to take up employment on the due date, meant it was not inclined to leave the offer open. The impression from Mr Bali's evidence at the hearing was that SRG and NZ Liquor deliberately set out to obstruct Mr Bali from obtaining a work permit. However, that cannot be a reasonable inference from the evidence as to the actions taken by NZ Liquor in particular.

[16] In addition to alleging that neither SRG nor NZ Liquor had complied with the terms of settlement by making an unconditional offer of employment, Mr Bali also alleged that they had not complied with the requirement to provide him with a reference. When this was examined during the course of evidence, it transpired that the only defect in the reference which was in fact provided was that the wrong date of termination of employment was entered into it. Mr Garg indicated in evidence that he would have been quite happy to provide a further reference with the correct date in it. The difference was a matter of two days.

[17] In opening submissions to me, Mr Bali indicated that in addition to an order forcing NZ Liquor to employ him in accordance with the settlement agreement, he was seeking wages from the time when he should have been taken into employment, and compensation. These proceedings are a challenge to the determinations of the Authority in refusing to make compliance orders and enforcing the terms of settlement negotiated at mediation. The statement of claim Mr Bali has filed commencing the challenge simply seeks what would be tantamount to compliance orders together with lost wages.

[18] No claim for compensation has been made by Mr Bali and indeed it needs to be said that no evidence was led at the hearing which would, in any event, enable the Court to make an award of compensation even if that had been claimed. It was difficult to see, in any event, how a claim for compensation could accompany an action for a compliance order. No proceedings alleging unjustifiable dismissal or action on the part of the defendants have been filed.

[19] One thing which emerged during the course of the hearing is that Mr Bali currently has no permit to remain in New Zealand but is entitled to stay here at the moment as a result of pending appeals in respect of decisions made on his residence application. Apparently, the outcome of these proceedings in the Employment Court may be material to the outcome of those other proceedings. A belated attempt was made by the defendants prior to the hearing of this matter to have the proceedings stayed unless Mr Bali paid all the costs ordered in the Authority together with security for costs in the Court. The defendant's grounds for the application were that the proceedings were without merit and an abuse of process. In my interlocutory judgment dated 10 September 2013 I decided it was not an appropriate case for a stay on those grounds and that Mr Bali should have an opportunity of presenting and arguing his case in the Court.³

[20] I can see from the evidence that Mr Bali is in a difficult position. There are a number of matters however, which are inexplicable. The first is why Mr Bali allowed his work permit to expire in the first place. Secondly, when it had expired it is hard to understand why he did not take immediate steps to have the work permit

³ [2013] NZEmpC 170 at [9].

renewed. It seems that he had a contemporaneous residence application with Immigration New Zealand at that time. He may have been concentrating on that. Thirdly, it is difficult to understand why once the settlement was confirmed, Mr Bali did not expeditiously move to have the work permit renewed, particularly in light of the fact that he had a confirmed offer of employment from NZ Liquor. While he was in discussions with Immigration New Zealand and Mr Tait in particular, he made no formal application. Finally, once his position with NZ Liquor came to an end because he was unable to take up employment on the due date, it is hard to understand why he has allowed all of this time to expire without trying to obtain confirmation of employment from another employer.

[21] Both of the determinations of the Authority make a careful analysis of the factual position including the terms of settlement and the offer of employment made to Mr Bali pursuant to that settlement. I agree with the Authority that the crucial position in the agreed terms of settlement is that if Mr Bali was not able to commence work on or before 8 June 2012, then the offer of employment should lapse and not be extended. As the Member of the Authority has stated in her determinations, the terms of that condition are clear and unambiguous. The only possible purpose for the clause in the context of the surrounding factual circumstances, is that Mr Bali had to be in a position by that date to legally take up employment, or in other words, have a valid work permit. He has confirmed, under cross-examination, during the course of the evidence before the Court, that he neither had the permit by that date, nor had he applied for it. That was confirmed also by the Immigration Officer.

[22] On final analysis, these are challenges to determinations refusing the issue of a compliance order. Obviously if a compliance order was justifiable, then the Court would need to go on and consider whether Mr Bali was entitled to some award of wages lost as a result of the failure of the defendants to comply with the terms of settlement. Such a claim for relief has been pleaded by Mr Bali in both proceedings.

[23] Being effectively now an application for a compliance order, the Court needs to assess the actions of the defendants against the terms of the settlement negotiated and properly recorded at mediation. The intention obviously was that Mr Bali would

receive a certificate of employment, a reference, and a firm offer of employment which would be acceptable to Immigration New Zealand for the purposes of considering an application for new or extended work permits. While the reference contains a relatively minor error, that can be rectified and indeed Mr Garg is prepared to do so. Mr Bali's application in that respect was belatedly raised in his opening submissions before the Court and is not part of the pleaded causes. Insofar as the offer of employment is concerned, it is clear that it was made in a timely fashion after the terms of settlement had been agreed. It is further confirmed by Mr Tait that the offer of employment was in terms adequate to enable Mr Bali to obtain a work permit had he applied in a timely fashion. He did not apply at all, and indeed has still not made any such application. The defendants, having made the offer, cannot be expected to keep it open indefinitely. As Mr Garg indicated in evidence, he has a business to run and there is only so much he could have done to accommodate Mr Bali's position.

[24] In having considered the actions of the defendants in this case, it is clear that they have complied with the terms of the settlement to which they agreed at mediation. There is now no basis upon which the Court can grant the relief which Mr Bali seeks. Mr Bali's challenges against the determinations of the Authority are dismissed.

[25] Mr Bali is obliged to make payment of the costs awarded against him by the determinations of the Authority. I note that there has been no stay of execution of those awards. Costs in respect of this challenge are reserved. Mr Kyne has 14 days in which to file a memorandum of submissions in respect of any application for costs to be made by the defendants. Mr Bali shall then have a further 14 days in which to file any memorandum in answer. In view of the pending holiday break, some flexibility will be allowed to Mr Bali in this regard. The Court will then consider the matter of costs on the challenge.

M E Perkins
Judge

Judgment signed at 2.45pm on Friday 29 November 2013