IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA

[2021] NZEmpC 186
EMPC 102/2021

IN THE MATTER OF	a challenge to determinations of the Employment Relations Authority
BETWEEN	RESTAURANT BRANDS LIMITED Plaintiff
AND	DILSHAAD GILL Defendant

Hearing:	23 and 24 September 2021 (Heard at Wellington)
Appearances:	S Langton and L Briffett for the plaintiff (via VMR) H Joubert and J C Gwilliam for the defendant
Judgment:	2 November 2021

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] Mr Dilshaad Gill was employed permanently by Restaurant Brands Ltd (RBL) as an Assistant Restaurant General Manager (ARGM). As an immigrant from India, he required a visa for work purposes. It was a condition of his employment that he did so. After a period of a little over two years of employment, Mr Gill was dismissed because he no longer held a work-related visa.

[2] Mr Gill then brought both disadvantage and dismissal grievances which were investigated by the Employment Relations Authority.[1] The Authority concluded RBL had failed to act as a good employer by failing to assist Mr Gill in his application for

[1] *Gill v Restaurant Brands Ltd* [2021] NZERA 61 (Member O'Sullivan).

a visa which would have enabled him to continue working for RBL, whilst at the time giving the impression it was; and had failed to be open and communicative with him by providing information regarding its intentions and by pre-emptively dismissing him when a replacement for his role was appointed on 14 February 2019.

[3] The Authority held that as Mr Gill did not hold a visa which would have entitled him to work beyond the date of his dismissal he could not be recompensed for lost wages. The Authority did, however, award him the sum of $18,000 for humiliation, loss of dignity and injury to feelings. Later, it also awarded him costs.[2]

[4] RBL challenged the Authority's substantive determination on a de novo basis, asserting that the termination of Mr Gill's employment was a consequence of his immigration status, and that the steps it took to assist him were those of a fair and reasonable employer. It also challenged the costs award made by the Authority in Mr Gill's favour. Mr Gill disputed the challenges, asserting in essence that the Authority had reached the correct conclusion as to liability, although it had erred as to the extent of remedies awarded.

The facts

[5] The core facts are not in issue since many of them involve email communications. The interpretation to be placed on some of these, however, is more controversial.

Mr Gill's employment by RBL

[6] On 16 January 2017, Mr Gill was offered permanent employment as an ARGM at RBL's Johnsonville KFC restaurant, starting work on 24 January 2017.

[7] At the time of his application to RBL for employment, Mr Gill held an open post-study work visa, set to expire on 11 March 2017. He was entitled to such a visa having recently obtained a qualification in New Zealand. This type of visa entitled him to work for a New Zealand employer.

---

2 *Gill v Restaurant Brands Ltd* [2021] NZERA 175.

[8] Mr Gill's offer of employment from RBL was conditional on him being legally entitled to work in New Zealand, and subject to him obtaining and providing evidence of his legal right to do so.

[9] The individual employment agreement (IEA) also referred to this requirement. Mr Gill was required to advise RBL if his work status in New Zealand changed. The relevant clause also stated that "[s]hould for any reason the legal right to work in New Zealand be withdrawn, the Employee's employment will terminate".

[10] Soon after Mr Gill's appointment, he applied for an employer-assisted Post-Study Work Visa (PSW visa).

[11] For such a visa application required an employer was required to complete and submit to Immigration New Zealand (INZ) a form referred to as INZ 1113 (the INZ form). An applicant would therefore need to engage with his or her employer to have the form completed. Mr Gill did so on this occasion.

[12] RBL was well used to meeting such requests from its staff. Accordingly, on 3 February 2017, a human resources administrator forwarded the necessary documentation to Mr Gill. It included confirmation of Mr Gill's employment by RBL, a copy of his IEA, a copy of the letter of offer of employment, a copy of his position description, and a copy of the INZ form completed with regard to those provisions which related to a PSW visa application.

[13] I interpolate that this form applied not only to an application for the type of work visa Mr Gill was seeking at the time, but also to another type of visa application, known as an Essential Skills Work Visa (ESW visa), which will need to be considered later.

[14] The application for a PSW visa was successful. Its commencement date was 6 March 2017, and its expiry date was 7 March 2019. It stated Mr Gill could only work as an ARGM for RBL in Wellington. A copy of the visa, once issued, was held by RBL.

Mr Gill's application for an Essential Skills Work Visa

[15] On 21 November 2018, Mr Gill emailed Ms Sarah Douglas, another HR administrator. He said he needed further documents from RBL so he could apply for his "next Essential Work Visa". He asked whether she could assist. This request was in anticipation of the expiry date of his existing visa on 7 March 2019.

[16] In essence, this was a request for RBL to again provide a completed INZ form. There were, however, different criteria for this visa application than had applied previously. The form made it clear that unless the applicant was on an INZ skill shortage list or wish to continue working in a skilled migrant's role, the employer would have to be able to answer a series of questions. First, the employer would have to state that genuine attempts to recruit New Zealanders for the role offered had been undertaken. Second, it would need to be shown that efforts had been made to train New Zealanders to fill the position. Third, if New Zealanders were not considered suitable for the role, it would need to be explained why, including details as to how many candidates had been considered, why they could not perform the duties described in the job description, and why they were not able to be trained. For the purpose of these questions, the employer would need to show it had conducted a "labour market test".

[17] RBL's restaurant roles were not on INZ's skilled migrant list or essential skills list, both of which related to roles where there were skill shortages. The ARGM role was ranked by INZ as ANZSCO Level 4 – Retail Supervisor role. Such a role was considered "low skilled". Thus, there was an obligation to advertise the role as a vacancy, including through Work and Income New Zealand (WINZ), so as to establish a labour market test had been conducted.

[18] RBL's policy was to run a labour market test. Ms Douglas said although the test involved time and effort for RBL's recruitment team and interviewing area managers, RBL was happy to do so if this meant helping an employee with a visa application. As will be explained more fully later, Ms Douglas said the vast majority of labour market tests in which she had been involved did not result in a recruitment or training of a New Zealander. This meant the test could be considered a pass and that RBL could then support the visa application.

[19] Ms Douglas responded to Mr Gill's email of 21 November 2018, stating that as with "the last Essential Skills visa application we did for you we will need to first go through a recruitment process before we can provide the documents needed."

[20] Ms Douglas told Mr Gill that RBL usually started the recruitment process four to five weeks before visa expiry. Because INZ would be busy after a Christmas shutdown period, he was told the process could be started a few weeks earlier on 21 January 2019. Ms Douglas had copied in Mr Gill's manager so he could "open a job" on 21 January, as well as a representative of the recruitment department so she would be aware "this one is for a visa application process."

[21] On 9 January 2019, Ms Douglas sent an email to Mr Gill, copied to his manager at the Johnsonville KFC restaurant, Mr Matt Mason.

[22] Ms Douglas explained that the email was in a templated form. It confirmed that Mr Gill's visa was due to expire on 7 March 2019, that to remain employed by RBL he was legally required to hold a visa, and that it was his responsibility to attend to this. The letter gave him formal notice that his employment with RBL would terminate on 7 March 2019 unless a new visa had been obtained by that date.

[23] Mr Gill said he was confused as to why this letter had been sent to him, as he had already requested the necessary documents from Ms Douglas to support his visa application.

[24] He therefore responded noting that he was looking forward to receiving the required documents from RBL so that he could deal with this issue.

[25] She responded stating "no worries" and that her communication had been a "reminder email" that had to be sent out. She then said that he needed to make sure his general manager "opens the job for your role" on 21 January 2019, and to advise "recruitment" that it was for his visa.

[26] Mr Gill said he was very relieved after receipt of this email, as it confirmed Ms Douglas was simply following a procedure, and that he did not have to be concerned. He thought the process that was being undertaken was a "formality".

[27] The next day, Mr Gill emailed Ms Douglas again, stating Mr Mason was on leave, and would not return until 22 January 2019. He said he would appreciate guidance.

[28] Ms Douglas again responded "no worries", stating Mr Mason could "open the job" when he returned. She went on to say RBL was already starting the process a few weeks earlier than would be usual. Mr Mason and a representative from RBL's recruitment team, Ms Rachel Hollomon, were copied into the email.

[29] Mr Gill did not at that stage fully appreciate what "open the job" actually meant. It occurred to him a few days later that the references to a recruitment process and to the job being opened, might suggest there was a process in which he should engage. He checked this. On 18 January 2019 he asked Ms Douglas to confirm that if his job were to be opened on 21 January 2019, whether he should apply for it again. She confirmed he should and told him that he could do this once it was open the following week.

[30] On 21 January 2019, Ms Hollomon, now responsible for running the relevant recruitment process, emailed Mr Gill stating that his role was now open on RBL's platform for vacancies, PeopleNOW, which provided for internal applications. Mr Gill responded immediately by stating that he had made an application.

[31] Ms Douglas told the Court that it was necessary for Mr Gill to take this step, so that he could be appointed by default if a New Zealander suitable for the role did not apply. She said that Mr Gill would not be interviewed or be required to undertake any other sort of assessment. These details were not explained to Mr Gill at the time.

[32] On 8 February 2019, Mr Gill emailed Ms Douglas stating that he was "curious to know the status." She responded stating the recruitment process had not been

completed, and they were awaiting an update from the area manager. She would let him know as soon as any update was available.

[33] Mr Gill sent a further query on 14 February 2019. In Ms Douglas' absence, another HR administrator acknowledged Mr Gill's email stating that the area manager would call him some time that day with an update. Ms Douglas told the Court that RBL knew by this stage that the labour market test had not provided a favourable outcome for Mr Gill. As a result, RBL considered it could not support Mr Gill's visa application. Ms Douglas said the email sent by her colleague to Mr Gill suggested HR had decided that this was unfortunate news for him, and it would come best from his manager as someone with whom he had a relationship.

[34] Mr Mason spoke to Mr Gill that day by telephone. He told Mr Gill his application was unsuccessful. According to an explanatory email later sent by Mr Mason to Ms Douglas, in the conversation he told Mr Gill he was very sorry about the situation, but reminded him that for RBL to endorse him, it would have been necessary to show that a recruitment process had been undertaken. Mr Mason was not called to give evidence to expand on this brief account.

[35] Ms Douglas said there were eight applicants for the role, including Mr Gill, two of whom were suitable New Zealand citizens or residents, Ms X and Ms Y. The selection process had been undertaken by Mr Mason and Ms Hollomon.

[36] Ms X was selected for the role as she had previous work experience at another KFC restaurant. She was offered, and accepted, her role by signing an IEA before Mr Mason telephoned Mr Gill.

[37] Mr Gill was, he said, very upset on receiving this information. When he arrived at work on 19 February 2019, he discovered Ms X had already started work in his position. He said he felt extremely embarrassed and upset. He was not offered any alternative position. He felt, in the absence of any further explanation, that his employment with RBL had ended.

14 February to 7 March 2019

[38] Although Ms X was appointed to Mr Gill's role on 14 February 2019, a second vacancy had arisen at the Johnsonville KFC, also for an ARGM. The incumbent, Ms Z, had resigned on 8 February 2019; advertising had commenced on 13 February 2019. There is no evidence that Mr Gill was aware that a vacancy for a second ARGM role had arisen. This role was not filled until 13 June 2019.

[39] Nor is there any evidence of any further relevant communications with Mr Gill about his future, or in respect of any other roles at RBL.

[40] Mr Gill's last day at work was 5 March 2019, as he was not rostered to work on 6 and 7 March 2019, a Wednesday and a Thursday.

[41] Two material events occurred on 6 March 2019. The first was the resignation of Ms X, who had been appointed to Mr Gill's role. There is no evidence that this development was drawn to Mr Gill's attention prior to the termination of his employment the next day, 7 March 2019.

[42] The second development was an email sent by Ms Douglas to Mr Gill. In it she said she was just checking to see if he had applied for a new visa. If so, before the end of the following day, RBL would need a copy of a new or interim visa that showed he could continue working. She said that if this had not been received, RBL would have to "put through a termination", as previously advised in her email of 9 January 2019. It appears that Ms Douglas considered it possible he may have gained a visa through another form of application, for example a Partnership visa, although this was not well explained in the email.

[43] Although he was not required to work that day, Mr Gill apparently received the email. He said he was "totally confused" by what had occurred. He said Ms Douglas knew that RBL had not given him the necessary documents to apply for the visa he had requested, and that he could not apply for a visa without RBL's support. He could not understand therefore why she was referring to the possibility of him having obtained one without that support. He also assumed she knew that someone else had been appointed into his role, so that on the face of it, his employment was ending.

From his perspective, he had no basis to say he had ongoing employment prospects at RBL. Accordingly, he did not reply to Ms Douglas' email.

[44] However, he did take legal advice. On 6 March 2019, a lawyer on his behalf wrote to Ms Douglas describing the facts from Mr Gill's perspective, and stating he intended to raise a personal grievance for unjustified action and unjustified dismissal. It had been impossible for him to renew his work visa because his position had been given to someone else. Confirmation was requested as to whether RBL was willing to attend a meeting to discuss the matter.

[45] On 8 March 2019, a senior ER/IR advisor responded, stating in summary that RBL had acted appropriately, and that it was therefore not prepared to attend a meeting.

[46] Further correspondence was exchanged, which did not result in resolution of Mr Gill's grievances. Litigation followed.

Overview of the parties' cases

[47] Ms Joubert, counsel for Mr Gill, submitted in summary:

(a) Mr Gill was in effect dismissed on 14 February 2019. He believed from that time onwards he had no job. Thereafter he worked out a notice period.

(b) Prior to 6 March 2019, Mr Gill was not told that "all is not lost" and that he still had a chance of continuing his employment at RBL.

(c) RBL breached its obligations of good faith. By placing Mr Gill on a permanent IEA, it had created a reasonable expectation it would support his application for a further visa.

(d) He understood from Ms Douglas' placatory emails that the recruitment process was a formality only.

(e) After Ms X was appointed to his role on 14 February 2019, no one contacted him to explain what prospects of work could be available at RBL.

(f) RBL wanted to support Mr Gill's application for a visa if it could; it was open to it to complete the INZ form with the necessary information as to its recruiting process and outcomes. It should have completed the INZ form even though the labour market test had failed, so as to support Mr Gill as a permanent employee.

(g) By 6 March 2019, both Ms X and Ms Y had resigned. The expert evidence called by RBL confirmed it could then have used the labour market test results to support Mr Gill's visa application, summarising its recruitment efforts of the previous three months. The labour market had been properly tested.

(h) On the basis of expert evidence, this information would have been sufficient for INZ to issue a six-month interim visa, effective from 8 March 2019.

(i) RBL's breaches of its good faith obligations constituted both disadvantage and dismissal grievances, entitling Mr Gill to substantial remedies.

[48] Mr Langton, counsel for RBL, submitted in summary:

(a) With regard to Mr Gill's disadvantage claim, there was no condition of employment requiring RBL to support Mr Gill's application for an ESW visa.

(b) Nor had Mr Gill shown any disadvantage by the breach of this alleged duty. He had not shown that if RBL had completed the INZ form indicating a failed labour market test, that Mr Gill would nonetheless have obtained a visa. Expert evidence showed it was not normal for

employers to complete the form if the test failed. INZ officers would rarely grant an ESW visa on this basis, since to do so would undermine the "New Zealanders first" policy.

(c) Similarly, Mr Gill had not proved that a failure to provide details to him as to the recruitment process, and/or to consult with him about it, led to him being disadvantaged. It was not shown that if such explanations and/or consultation had been given, this would have caused him to do something differently, would have opened up another visa avenue for him, and made his employment more secure. Nor had Mr Gill provided evidence that it was a condition of his employment that RBL had to explain the requirements of his ESW visa application to him. To do so would have infringed provisions of the Immigration Advisors Licencing Act 2007.

(d) As to Mr Gill's assertion that RBL was obliged to provide him with options before and after conducting the labour market test, he had not shown how the lack of explanations as to options disadvantaged him; that is, that he was placed in a worse position than already existed. It was also argued that Mr Gill could not point to any contractual obligations or conditions of employment requiring them to provide such options.

(e) No evidence had been adduced to support Mr Gill's case since there was more than one vacancy for ARGM positions after the labour market test commenced, it should be concluded that there were insufficient New Zealand citizens or residents to perform the work, and thus the test should be regarded as a pass. The issue was not about the willingness of New Zealanders to fill vacancies, but whether New Zealanders were in fact available.

(f) Ms Douglas had not misled Mr Gill. She never indicated that RBL would support his visa application. As he accepted, it was his responsibility to

obtain the renewal. Rather, she was clear throughout that a labour market test had to be undertaken for an ESW visa application.

(g) Turning to the dismissal grievance, Mr Gill was not "permanently and terminally" sent away on 14 February 2019. On his own case he worked to early March 2019, which included a notice period. Accordingly, he remained in employment as rostered.

(h) His employment terminated on 7 March 2019 in accordance with his IEA, and by operation of the 9 January 2019 notice.

(i) The termination was substantively justified. Mr Gill failed to comply with a condition of his employment, because he did not provide documentary evidence of a legal right to work beyond his visa expiry date.

(j) It was also procedurally fair. RBL investigated whether it could support Mr Gill's application for an ESW visa by running a labour market test. When it was clear he would be unlikely to obtain such a visa, it consulted with him on 6 March 2019 as to whether he had any alternative right to work. The evidence was that if he had, RBL would have allowed Mr Gill to continue in his ARGM role and would have consulted with Ms X with a view to moving her to another KFC restaurant.

(k) It was also submitted that excessive remedies were being sought by Mr Gill.

Issues

[49] Distilling the way in which the case was presented by counsel, the issues are as follows:

(a) Was RBL subject to relevant good faith obligations; if so, were they breached?

(b) For the purposes of Mr Gill's disadvantage grievance, has Mr Gill proved any breach of good faith obligations caused disadvantage?

(c) For the purposes of Mr Gill's dismissal grievance, what was the date of his dismissal and was the dismissal substantively or procedurally justified?

(d) If one or both grievances are established, what remedies are appropriate?

Analysis

Good faith issues

[50] Good faith is of course a cornerstone concept of the Employment Relations Act 2000 (the Act), underpinning the "relational approach" that is to be maintained between employer and employee.[3]

[51] Section 3(a) provides that the objective of the Act is to build "productive employment relationships" through the promotion of good faith in "*all aspects* of the employment *environment*".

[52] Section 4 sets out the mandatory obligations which require parties to an employment relationship to deal with each other in good faith. Without limiting that duty, the Act prohibits parties doing anything, either directly or indirectly, to mislead or deceive each other, or which is likely to mislead or deceive.

[53] The section emphasises that the duty of good faith is "*wider in scope* than the implied mutual obligations of trust and confidence". Parties are to be "active and constructive" in establishing and maintaining a "productive employment relationship in which the parties are *amongst other things* responsive and communicative".

---

3 *FMV v TZB* [2021] NZSC 102 at [47].

[54] The section goes on to refer to specific applications of the duty, including the requirement where an employer is proposing to make a decision to provide the employee with access to information relevant to the continuation of the employee's employment.[4]

[55] The standard of good faith behaviour is high and responsive.[5] It is also fact specific. An assessment of compliance requires a careful analysis of the particular circumstances.

[56] It is well established that a breach of good faith can constitute an unjustified disadvantage.[6] That is because the duty of good faith is a condition of employment.[7] Further, given the breadth of the test of justification which involves an assessment of what a fair and reasonable employer could have done "in all the circumstances" at the time the dismissal or action occurred[8] the duty of good faith may well fall for consideration as being a relevant circumstance.

[57] Turning to the present context, there are several factors indicating that Mr Gill was reliant on RBL as his employer for assistance with regard to his application for a visa.

[58] First, he had been offered a permanent role. Although the continuation of the agreement was plainly dependent on him having the legal right to work in New Zealand, the use of the word "permanent" understandably suggested to him there would be a long-term employment relationship where mutual obligations would subsist. Ms Douglas confirmed the role was one which required continuity, which I infer would have been apparent to Mr Gill.

[59] There was debate at the hearing as to whether, in fact, RBL should have entered into a fixed term employment agreement, given the visa context.

---

4 Employment Relations Act 2000, s 4(1A)(c)(i).
5 *Coutts Cars Ltd v Baguley* [2002] 2 NZLR 533, [2001] ERNZ 660 (CA) at [83].
6 See for example *Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192; *Booth v Big Kahuna Holdings Ltd* [2014] NZEmpC 134.
7 See *ANZ National Bank Ltd v Doidge* [2005] ERNZ 518.
8 Section 103A.

[60] Mark Williams, a lawyer specialising in immigration law, gave expert evidence for RBL. He said that aligning employment agreement terms to visa expiry dates had been a relatively common practice, until INZ took an employment law-based approach to fixed-term arrangements. This appears to have occurred in mid-2016 when INZ expressed the view that an employee holding a temporary visa was not in and of itself a reasonable ground for a fixed-term employment agreement, since the only reason for offering employment on this basis, as opposed to being offered permanent employment, was because the employee needed to retain a visa to continue performing the work.

[61] If one was to adopt that distinction, RBL was entitled to take the position it did. There was an ongoing need for the ARGM role.

[62] However, in my view, the issue is not whether RBL should or should not have entered into the type of IEA it chose to offer. The key point is that this is indeed the step it took. It caused Mr Gill to believe he had a permanent role and that his employer would support him to maintain his employment relationship.

[63] Next, it is necessary to focus on Mr Gill's communications from late 2018 about his need to obtain a renewal of his visa.

[64] At the inception of these communications when he emailed Ms Douglas on 21 November 2018, he referred to a type of visa which did not exist when he said he would apply for his "next Essential Work Visa". This implied he was not necessarily familiar with the visa regime since this was not the type of visa he currently held; indeed, there was no visa of this type at all.

[65] Mr Gill's evidence confirmed his understanding of the visa regime was rudimentary. He said he had made inquiries of INZ as to his immigration position in 2017. He learned he would need to apply for a PSW visa. At the time, he was told his next visa, two years on, would be what he described as an "Essential Work" visa, and his employer would need to support him.

[66] In March 2017, RBL supported him when he applied for a PSW visa. The process was very straight-forward. RBL sent him the supporting documents. He did not check them but assumed they could be relied on and he could lodge his application, which was then granted.

[67] When he was considering applying for his next visa, he assumed the process would be similar, and that RBL's support would be forthcoming.

[68] Ms Douglas was also in error in her response of 21 November 2018, when she referred to Mr Gill's "last Essential Skills Visa application". As she properly acknowledged to the Court, this was a mistake, since he had not previously held such a visa.

[69] The problem was that the reference to the "last Essential Skills Visa application" conveyed an inference that the process on this occasion could be similar to the previous one.

[70] However, Ms Douglas also stated that there would be a need to first undertake a "recruitment process" before RBL could provide the documents needed. No further elaboration was given as to how this process would take place and in particular that a vacancy would have to be notified both internally and externally, including with Work and Income New Zealand, for the purposes of a labour market test; and that Mr Gill's role was at risk.

[71] Mr Gill was cross-examined as to his familiarity with the INZ form, which RBL would have to complete for the purposes of Mr Gill's ESW visa application, as described earlier.

[72] Although such a form had been used by Mr Gill when applying for a PSW visa in 2017, which included requirements relating to an ESW visa application, Mr Gill did not take notice of these details at the time; nor did he check the position online or otherwise in 2018-2019. He told the Court he only learned about the specifics of the INZ form at the time of the Authority's investigation meeting.

[73] I find Mr Gill's lack of understanding of the process when applying for an ESW visa was apparent from Mr Gill's responses, at least to this point.

[74] Next, Ms Douglas sent a templated communication on 9 January 2019 confirming that a failure to provide RBL with evidence of obtaining a new work/study visa by 7 March 2019 would result in termination of Mr Gill's employment.

[75] As noted earlier, Mr Gill said he was confused as to why the letter had been sent to him, as he had already requested the necessary documents from Ms Douglas. He therefore stated he was "positively looking forward" to receiving the required documents from RBL for him to proceed with his application.

[76] Although Mr Gill did not state expressly that he was confused, his email suggested he did not understand the details of RBL's process, or that his employment could be at risk.

[77] Ms Douglas' own extensive prior experience was that in the vast majority of instances where a labour market test was undertaken, there is was a pass. She considered that it was unusual to find New Zealanders who apply for and are suitable for "low skilled" roles such as Mr Gill's.

[78] I find that this experience influenced the language she used when communicating with Mr Gill and led her to make placatory statements which he relied on.

[79] Accordingly, Ms Douglas' "no worries" response of 9 January 2019, which included the statement that the email she had just sent was "a reminder email that we have to send out", appeared to confirm that RBL was undertaking formalities about which he did not need to be concerned. Understandably, Mr Gill said he was relieved by this statement.

[80] The other statements in the email to Mr Gill ensuring that his manager "opens the job", and "let Recruitment know it is for your visa", did not clarify how the process would take place.

[81] Mr Gill's lack of understanding was once again evident when he told Ms Douglas on 10 January 2019 that Mr Mason was on leave until 22 January 2019. He said he wished to be guided so that "things" would be done in an appropriate time.

[82] However, Ms Douglas repeated her assuring statement of "no worries", indicating that Mr Mason could "open the job" when he returned on 22 January 2019.

[83] It was another week before Mr Gill realised that he himself might need to apply for his own job, a point he raised for clarification on 18 January 2019.

[84] Ms Douglas simply told him he could apply. After the repeated requests for information as to what RBL was doing, it is surprising that she did not explain to him, in light of his several emails seeking support and information, that a "New Zealanders first" labour market test had to be, and was being, undertaken. A fair and reasonable employer could be expected to have done so, at least at this point.

[85] On 21 January 2019, Ms Hollomon told Mr Gill the ARGM role was "now open" on PeopleNOW. Since Mr Gill now knew he needed to apply for his own ARGM role, he did so. He continued, however, to regard the process as being a formality only.

[86] There is no evidence of any further explanation being given to Mr Gill by any of the RBL personnel who were now involved as to the process that Ms Douglas, Mr Mason and Ms Hollomon were following.

[87] After waiting for more than a week, on 8 February 2019 Mr Gill sought an update. Ms Douglas confirmed the recruitment process had not been completed.

[88] He again sought information on 14 February 2019. The response from Ms Douglas' colleague was that the area manager would be calling him some time that day "with an update".

[89] As noted earlier, there was then a brief conversation when Mr Mason called Mr Gill to tell him another appointee had successfully applied for his role. Mr Gill was shocked.

[90] As described earlier, Mr Gill believed that this unexpected development meant his employment had been terminated. He believed it was now clear RBL would not be supporting his application for an ESW visa, this being the only option open to him as he understood it.

[91] His belief that his employment was being terminated was reinforced by the fact that when he was next rostered on, he was required to work alongside the appointee, Ms X, now the occupant of his position.

[92] There is no evidence that, in the face of this unexpected development, Mr Gill's manager, Mr Mason, nor any other RBL employee such as Ms Douglas, explained to him that all was not lost and that there might be other work options at RBL. To have done so would have been consistent with the good faith obligations I outlined earlier which could be expected of a fair and reasonable employer.

[93] An obvious option for consultation had arisen. A vacancy for a second ARGM role at the Johnsonville restaurant occurred on 8 February 2019 when Ms Z resigned. Advertising for that role had commenced on 13 February 2019.

[94] There is no evidence that Mr Gill was consulted about this development and whether it would be appropriate for Mr Gill to consider applying for the second ARGM role.

[95] Mr Langton submitted on this point that there were in fact two short-listed candidates from the recruitment process that had been undertaken for Mr Gill's role. Ms X was one of them and she was appointed. The second short-listed New Zealander was Ms Y.

[96] As noted earlier, although advertising for the vacancy in respect of Ms Z's role occurred on 13 February 2019, it was not filled until 13 June 2019. There is no evidence that Ms Y was appointed to that role; obviously it took some time to recruit someone else to it.

[97] Nor is there any evidence that relevant dialogue took place with Mr Gill between 14 February and 6 March 2019.

[98] Mr Gill was not rostered to work on that day or the next, when RBL had said his employment would end. Ms Douglas said that she "consulted" with Mr Gill that day. Her email asked him whether he had obtained a relevant visa. That was also the day when Ms X resigned from the position to which Mr Gill had previously been appointed.

[99] At this point, the duty of good faith became even more relevant. A fair and reasonable employer could have reached the conclusion that there was now an urgent requirement for RBL to consult constructively with Mr Gill as to whether it should in fact revoke the notice of termination, since RBL was now in a position to conclude that the labour market test which had initially been regarded as a "fail", was now a "pass".

[100] Ms X had resigned; the position had to be advertised once again on 19 March 2019 and was not filled until 9 April 2019. I have already noted that Ms Y, who had originally been ranked as a possible candidate for the role, was not appointed to it. In the absence of any evidence to the contrary, there continues to be an inference that as at 6 March 2019, she was not interested or available to fill an ARGM position.

[101] Mr Gill did not respond to Ms Douglas' email of 6 March 2019, because he was confused by its contents. However, a suggestion that his role had in fact now become "vacant", requiring prompt consultation, would not have been confusing.

[102] Ms Douglas told the Court that a difficulty with regard to communication at that stage arose from the fact that she was not a licensed immigration advisor and therefore could not provide immigration advice to Mr Gill, or to tell him what visa to apply for.

[103] It is not altogether clear that this was regarded as a live issue at the time. Be that as it may, the question was not whether RBL would provide Mr Gill with immigration advice, but whether as a fair and reasonable employer in all the

circumstances, it could have provided him with information as to the employment circumstances that now pertained to his ARGM role. Such an employer could have concluded the labour market test had not, by the date of expiry of Mr Gill's visa, resulted in a recruitment of a New Zealander on an ongoing basis, so that the test should not be regarded as a fail but a pass, and that his ESW visa application could be supported. He could also have been told that RBL wished to maintain the employment relationship, a fact which, on the evidence before the Court, had not been made clear since Mr Mason spoke to Mr Gill on 14 February 2019.

[104] At the very least, Mr Gill could have been advised of the changed employment-related circumstances and that he needed to obtain prompt legal or other advice. He was obviously willing to do so, because he had in fact consulted a lawyer by or on 6 March 2019. I conclude that there was a yet further breach of RBL's good faith duties at that point.

Disadvantage grievance

[105] A disadvantage grievance requires an assessment of the test of justification.[9] Thus, an applicant may need to establish a prima facie case that there was a relevant action affecting their employment to their disadvantage.[10] The onus then lies on the employer to justify the alleged action under the s 103A test of justification.

[106] For the purposes of Mr Gill's disadvantage grievance, it is necessary to consider the circumstances up to the termination of his employment. That said, the factual basis for the disadvantage grievance overlaps, in some respects, with the factual basis for the dismissal grievance.

[107] I have found that there were breaches of good faith duties in multiple respects from January 2019 onwards.[11]

---

9 Employment Relations Act 2000, s 103A.

10 *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1989] 2 NZILR 883 (LC); *New Zealand Labourers Union v Shell BP Todd Ltd* (1988) NZILR 471 (LC) at 474.

11 See paras [84], [92], [99] and [104].

[108] Because I am satisfied that the obligations of good faith constitute statutory terms or conditions of Mr Gill's employment, he has established this element of his disadvantage grievance.

[109] The remaining question relates to whether he has met the prima facie onus as to disadvantage.

[110] There is no doubt that Mr Gill was surprised and very upset when informed on 14 February 2019 that another person had been appointed to his role. As noted, there was no constructive communication with him thereafter as to other employment options. He did not understand these existed, and that it was open to him to consider such alternate possibilities, initially for another ARGM role, and later for his own role when Ms X resigned.

[111] I am not satisfied, however, that Mr Gill has shown, that on or about 14 February 2019, a fair and reasonable employer could have completed the INZ form, recording that the labour market test had failed as far as the employee was concerned, but that nonetheless, the employer supported his application for an ESW visa.

[112] Although it is apparent from extracts of an INZ manual which was placed before the Court that an immigration officer held a discretion to consider granting an ESW visa even where the labour market test has failed, the evidence is that such an occurrence is rare. Mr Williams confirmed this. For her part, Ms Douglas said she had completed an INZ form on this basis only once. I am not satisfied that a fair and reasonable employer could have been expected to support Mr Gill's visa application notwithstanding the failed labour market test.

[113] Nor is it proved that had this step been taken, INZ would actually have granted the visa by exercising the discretion it held. No evidence was called from INZ or otherwise which would allow the Court to conclude on the balance of probabilities that this would have occurred.

[114] In short, I accept Mr Langton's submission that on this particular point, there is insufficient prima facie proof to constitute disadvantage arising from an alleged failure by RBL to support Mr Gill by completing the INZ form, in spite of the failed test.

[115] In the result, Mr Gill has proved some, but not all, aspects of his disadvantage case. He has established that significant upset was caused, but no more.

[116] I will return to the effects of this conclusion when considering remedies.

Dismissal grievance

[117] The dismissal grievance involves different considerations.

[118] In applying the test of justification as described in s 103A of the Act, the Court must objectively assess substantive and procedural fairness.[12]

[119] I begin with the issue of substantive justification. I have already reviewed the circumstances giving rise to RBL's decision to terminate Mr Gill's employment. This possibility was flagged in Ms Douglas' email of 9 January 2019. Although not well understood, the email did state that unless Mr Gill obtained a renewal of his visa, his employment would terminate on 7 March 2019.

[120] I do not regard the events of 14 February 2019 as constituting the dismissal. Rather, the advice given to Mr Gill that a New Zealander had been appointed to his role reinforced the notice of termination which had already been given.

[121] There was, at that stage, a failure by RBL to communicate constructively with Mr Gill, as already discussed. That this did not occur appears to have been due to poor communication between relevant RBL personnel, particularly Ms Hollomon and Mr Mason who were involved in recruitment issues for the Johnsonville restaurant on the one hand, and Ms Douglas who was dealing with Mr Gill's visa issues on the other.

---

12 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466; *Cowan v Idea Services Ltd* [2020] NZCA 239, [2020] ERNZ 252.

[122] In light of my earlier discussion as to the circumstances, I am satisfied that a fair and reasonable employer could be expected to have engaged constructively with Mr Gill as to his employment options, as already discussed.

[123] Mr Williams told the Court that it was at the time standard practice for INZ, if necessary, to grant an interim visa whilst an application for a work-related visa, such as an ESW visa, was processed.

[124] He said that if such an application was made in excess of seven days before the expiry date of the underlying visa, there would be an automatic issue of an interim visa. If such an application was made within seven days of expiry, a request would have to be made for a manual issue of the interim visa. He said that typically, such a visa would be granted for six months from the expiry date of the underlying visa; such a period was deemed to be a reasonable time for INZ to complete processing of the underlying extension request.

[125] He explained that in circumstances where an application is made for an interim visa without the INZ form accompanying it, the application for the interim visa may be accepted, with a grace period granted for the form to be provided.

[126] Mr Williams also said that if an application for an interim visa was filed with the INZ form signed by an employer a few days before the underlying visa expired, that would have been sufficient for INZ to have granted an interim visa whilst the application was considered.

[127] The effect of this evidence is that it was possible to make a successful application for an interim visa, close to expiry of the previous visa.

[128] Evidence was also given that a period of three months from the date of advertising would normally be regarded by INZ as a reasonable period for conducting a labour market test. Mr Williams confirmed that if no candidate was available within a three-month period, reliance could be placed on that fact for concluding whether the labour market test was a pass or a fail.

[129] From this evidence I conclude that in the circumstances which existed on 6 March 2019, a fair and reasonable employer could have concluded that the labour market test was no longer a fail from Mr Gill's perspective, that it was appropriate for the form to be the INZ form to be completed, explaining in full the circumstances, and that it is more likely than not that Mr Gill could have obtained an interim visa.

[130] The circumstances were not, of course, without complexity. A fair and reasonable employer could have elected to obtain immigration advice. It could also have recommended Mr Gill do the same. I have no doubt that Mr Gill was motivated to obtain such advice.

[131] In answer to a point made for RBL to the effect that it was concerned Mr Gill avoid unwarranted expense by applying unsuccessfully for a visa, Mr Gill said he definitely would "have taken the chance". I do not consider the cost of a late application would have been an impediment.

[132] In short, Mr Gill was not given a reasonable opportunity to respond to the circumstances which were known to RBL, and not known to him. That meant he was denied the opportunity of requesting, on an informed basis, that the notice of termination be revoked.

[133] For these reasons, I am not satisfied that RBL's decision to terminate was justified.

[134] Procedural factors overlap. RBL did not, on 6 March 2019, provide relevant information. It did not inform Mr Gill as to the employment circumstances pertaining to this role, and in light of those whether it could now be concluded the labour market test was no longer a fail but a pass, and whether he should take advice as to his immigration position. It was its position that it wished, subject to immigration issues, to continue employing Mr Gill.

[135] Accordingly, Mr Gill's dismissal grievance is established.

Remedies

Compensation for humiliation, loss of dignity and injury to feelings

[136] Mr Gill seeks compensation under s 123(1)(c)(i) of the Act for $25,000.

[137] Mr Langton noted that this was more than the $18,000 amount awarded by the Authority, and more than the $20,000 he claimed in his statement of problem.

[138] Because the present challenge has been brought on a de novo basis, I place the conclusions of the Authority as to quantum to one side.

[139] Nor is Mr Gill bound by the pleading which was filed on his behalf in the Authority with regard to the quantum of compensation claimed. The statement of defence which was filed for him in the Court made it clear that the sum he was seeking was $25,000. This is the claim I must consider.

[140] No detailed submissions were made for Mr Gill as to the makeup of his claim for compensation.

[141] For RBL, Mr Langton submitted that the hurt and humiliation which Mr Gill experienced resulted from the loss of his job and having to find another way to financially support his family. Mr Langton argued these effects did not arise as a result of RBL's actions, but were attributable to INZ policy, the outcome of the labour market test, and the fact Mr Gill was unable to apply for, and obtain, an ESW visa.

[142] It was submitted that the maximum extent of any compensation would appear to be the alleged confusion Mr Gill felt, his sense of a lost opportunity to apply for the visa, and his feelings at having to work alongside Ms X. Consequently, any compensation for these limited outcomes should be at the lowest end of the lowest band.

[143] In assessing an appropriate amount of compensation under s 123(1)(c)(i), I adopt the analytical framework set out in cases such as *Waikato District Health Board*

v Archibald,[13] and *Richora Group Ltd v Cheng*.[14] These cases set out an approach where Band 1, nought to $10,000, covers cases where there is less serious harm, Band 2, $10,000 to $40,000, covers cases where there is moderate harm, and Band 3, over $40,000, covers cases of serious harm.

[144] I begin by assessing the consequences of the disadvantage grievance. It is apparent that Mr Gill was significantly affected by the advice given to him by Mr Mason on 14 February 2019. I have no doubt that there were several elements to his reaction.

[145] On the basis of Mr Mason's statement, the way in which the unexpected news was conveyed to Mr Gill was brief, and by telephone.

[146] Not only were other employment options not discussed with him at the time, but on the evidence, he was not told that he would be working alongside Ms X, who had been appointed to his role. I have no doubt that was indeed a further humiliation when he discovered this was the case.

[147] It is evident that he was worried not only about the loss of his ability to work, but the impact on his ability to support his family. This continued for nearly three weeks.

[148] I am satisfied that Mr Gill has established effects under each of the heads of s 123(1)(c)(i) of the Act. In my view, an award towards the mid-range of Band 1, $5,000, is appropriate.

[149] Turning to compensation for the dismissal grievance, I am satisfied that Mr Gill suffered very significant harm as a result of RBL's actions. At the time of his dismissal, his wife was unemployed. He had to support her, and their son. He explained in his evidence how the only option he had to even work part-time was to obtain a student visa, so that he could by this means provide for his family. This meant he had to enrol as a student, incurring significant fees at Victoria University; and he

---

13 *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791; an
14 *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337.

had to borrow money from family and friends to survive. He had to sell off personal possessions to do so.

[150] Mr Gill said that he felt a complete failure as a husband and a father, and that the entire situation made him feel helpless. He became depressed. These factors caused strain on his relationship with his partner and son.

[151] These effects cannot be put down to INZ policy. All of them were inextricably linked and flowed from the unjustified dismissal. That dismissal caused financial stress which he felt keenly, as well as relationship issues, and depression.

[152] I consider that Mr Gill has suffered effects in each of the categories of humiliation, loss of dignity and injury to feelings.

[153] An award in respect of the dismissal grievance, which is towards the mid-point of Band 2, that is, $20,000, is appropriate.

[154] The total amount payable under s 123(1)(c)(i) is accordingly $25,000.

Lost wages

[155] Mr Gill sought reimbursement for lost wages for a period of six months. It was submitted on his behalf that this is the period for which he would have held an interim visa, and thus the minimum period that he would have continued to work for RBL.

[156] Mr Gill's salary was $42,000 per annum, so that the sum he thereby sought was $21,000 gross, approximately $17,500 net.

[157] For RBL, it was submitted that Mr Gill's claims seemed to be a direct causation of a loss claim, although in the statement of defence a lost opportunity case was also pleaded.

[158] Mr Langton addressed both possibilities. He submitted that any wages lost did not arise directly from unjustified dismissal, if proved, but from the operation of INZ policy, the state of the labour market in early 2019, and because Mr Gill had failed to

apply for an ESW visa without RBL having provided an INZ form, and/or for an interim visa.

[159] The lost opportunity claim would need to be considered on a different basis; that is, but for RBL's actions, Mr Gill would have been granted the ESW visa, or an interim visa and so lost the opportunity to apply for an ESW visa, and thus wages from RBL.

[160] It is convenient to clarify the position as to claims based on lost opportunity. Claims can indeed be brought on such a basis.[15]

[161] However, loss of chance principles apply only where the occurrence of the loss is uncertain, not where uncertainties arise in the context of quantification. This distinction is succinctly drawn in *McGregor on Damages*, where the issue is expressed in this way:[16]

> Losses of a chance appearing in the process of quantification do not fall within the loss of a chance doctrine. Loss of a chance proper, as it may be termed, has a more limited field. It comes in before we get to quantification; indeed it comes in at the causation stage.

[162] In my view, the evidence in the present case, allows for a direct causation conclusion. RBL's actions directly affected Mr Gill's ability to work following the expiry of his visa on 7 March 2019.

[163] I refer again to the evidence already summarised as to the position at that date. RBL had a vacancy for an ARGM role at the Johnsonville restaurant, and wanted to continue employing Mr Gill. Moreover, had all the facts been made known to Mr Gill, I am satisfied he would have applied on 6 or 7 March 2019 for an ESW visa, as well as an interim visa for six months. In short, the loss of wages was directly linked to the unjustified actions giving rise to the dismissal grievance.

---

15 *Waitakere City Council v Ioane* [2006] 2 NZLR 310, [2005] ERNZ 1043 at [29].
16 James Edelman *McGregor on Damages* (21st ed, Sweet & Maxwell, London 2020) at [10-048].

[164] Section 128 of the Act provides that where the employee has a personal grievance and has suffered loss remuneration as a result, that person is entitled to three months' ordinary time remuneration; but there is a discretion to order payment of a sum greater than that. Given the certainty that if the unjustified actions had not occurred, Mr Gill would have been able to continue working for RBL at least for the period of the interim visa, I consider it appropriate to award a lost wages remedy for six months, rather than three months.

[165] Next, I deal with the issue of mitigation.

[166] In *Xtreme Dining Ltd v Dewar,* a full Court confirmed that the employer must plead, and carries the burden of establishing a failure to mitigate, although there is an evidential burden on the employee to provide relevant information.[17] The question which then arises is whether the employee acted reasonably.

[167] The assertion of failure to mitigate was not pleaded by RBL either in its amended statement of claim or in its reply to the statement of defence.

[168] That said, I am satisfied there is sufficient evidence to suggest Mr Gill acted reasonably. This is for the following reasons.

[169] I have already referred to the issues of financial stress which Mr Gill faced after the termination of his employment.

[170] He told the Court he was able to find a job as a shift supervisor at a café on a part-time basis during October 2019, which he said brought some relief to a very dire situation.

[171] In the evidence he filed with the Authority on 30 March 2020, Mr Gill said he was then earning approximately $340 gross per week as a caregiver, whilst on his student visa.

---

[17] *Xtreme Dining Ltd (T/A Think Steel) v Dewar* [2016] NZEmpC 136, [2016] ERNZ 628.

[172] Although the date when Mr Gill obtained his study visa was not provided, it is probable he would not have been entitled to work for the period during which he was applying for a visa. He also faced the challenge of having to raise substantial funds to enable him to enrol at Victoria University. Only then could he apply for part-time work as the holder of a study visa. It is appropriate also to take into account the mental impact of the circumstances on Mr Gill, as discussed earlier. I do not consider it unreasonable that Mr Gill appears to have taken until October 2019 to sort out his immigration status and then obtain work.

[173] Taking all these factors into account, I am not satisfied it has been shown Mr Gill failed to mitigate his lost wages claimed for the six months that followed his termination.

[174] In the result, Mr Gill has established his lost wages claim for $21,000 gross.

Contribution

[175] Under s 124 of the Act, the Court is required to consider the reduction of remedies where the actions of the employee contributed towards the situation that gave rise to the personal grievance.

[176] Mr Langton submitted that such a finding in respect of Mr Gill's last wages claim should be made because Mr Gill had failed to take advice. This contributed to his confusion over the process and knowledge of other options to apply for an available work visa. His failure to apply for an ESW Visa without the INZ form, and for an interim visa, also contributed to him not being able lawfully to work.

[177] Mr Gill made it clear that in late 2018, when he commenced his dialogue with Ms Douglas as to the steps which needed to be taken so he could apply for an ESW visa, that he did not then or later seek assistance, for example, from an immigration advisor; he said this would have incurred fees that he did not wish to incur. Given the particular circumstances he has described, that was not an unreasonable position to take on his behalf, at that stage. He had confidence in his employer who appeared to be familiar with the necessary processes.

[178] More problematic, however, is that he did not contact INZ itself to obtain advice, or access any of the online information available from that quarter, either then or later, when he became confused as to the process.

[179] What would this have achieved? It is conceivable that by obtaining information as to what an application for an ESW visa would entail, Mr Gill would have had a better understanding of the process that RBL was undertaking. It is possible he would have been more proactive and/or may have taken legal advice sooner than he did. At the least, he may have been advised to seek an interim visa. I cannot rule out these possibilities.

[180] That said, the fundamental problem was the failure on the part of RBL to engage properly with Mr Gill as to his work options.

[181] I conclude that a very modest discount should be made, five per cent, reducing his last wages claim to $19,950.

Result

[182] RBL's challenge is dismissed. This decision replaces the Authority's determination. Because Mr Gill's disadvantage and dismissal personal grievances are established, RBL is to pay him:

(a) $25,000 for compensation for humiliation, loss of dignity and injury to feelings.

(b) Lost wages of $19,950.

[183] I reserve costs. These should be determined on a 2B basis. Counsel should attempt to agree cost issues directly. If this does not prove possible, an application may be made within 21 days, and responded to within a like period thereafter. Submissions should not exceed five pages in each instance.

[184] RBL's challenge as to costs in the Authority is dismissed.

[185] The funds paid into Court by RBL as security are now to be paid by the Registrar to Mr Gill.

B A Corkill
Judge

Judgment signed at 3.30 pm on 2 November 2021