New Zealand Employment Relations Authority Decisions

Alkazaz v Enterprise It Limited (Auckland) [2017] NZERA 400; [2017] NZERA Auckland 400 (22 December 2017)

Last Updated: 15 January 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 400
3005551

BETWEEN AHMED ALKAZAZ Applicant

A N D ENTERPRISE IT LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Andrew Riches, Counsel for Applicant Counsel for Robbie Bryant and Madeleine Lister, Respondent

Investigation Meeting: 21 and 22 September 2017 at Auckland Submissions Received: 29 September 2017 from both parties
Date of Determination: 22 December 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Ahmed Alkazaz was unjustifiably dismissed by Enterprise IT Limited.

B. **Within 21 days of the date of this determination Enterprise IT Ltd is to pay Mr Alkazaz the following:**

(i) $22,999.99 gross in lost wages; and

(ii) $12,000.00 as compensation for humiliation, loss of dignity and injury to feelings.

C. Enterprise IT Ltd breached Mr Alkazaz's employment agreement by failing to pay him in lieu of notice on termination of employment, although payment was later made.

D. Within 21 days of the date of this determination Enterprise IT Ltd is ordered to pay a penalty of $1,500.00, of which $500.00 will be paid to the Crown via the Authority and $1,000.00 paid to Mr Alkazaz.

E. Costs are reserved.

Employment relationship problem

[1] Ahmed Alkazaz is a database analyst. From early September 2016 he worked for Enterprise IT Limited (e-IT or the company) as a Senior Oracle Database Analyst (DBA). E-IT is a company specialising in database work, including the

operating of Oracle database software and technology. It has around 65 employees based in three offices.

[2] During his employment several meetings were held with Mr Alkazaz where his work was discussed.

[3] Then by letter of 7 December 2016 e-It informed Mr Alkazaz that his employment would not be extended beyond his 90 day trial period and his last day of work was to be 9 December 2016. E-IT later accepted that the trial period was not effectual.

[4] Mr Alkazaz claims that he was unjustifiably dismissed. E-IT denies that it unjustifiably dismissed Mr Alkazaz and says that dismissal was justified on the basis of his performance. Even if it is found to have done so, e-IT says that there was substantial contribution by Mr Alkazaz, including his work performance, and conduct discovered by e-IT after dismissal, which means that he should not receive any remedies or alternatively, a significant reduction should be made.

[5] On 21 and 22 September 2017, the Authority held an investigation meeting heard evidence from Mr Alkazaz and his wife Nagham Eldemiri. Evidence was also heard from e-IT's Paul Sadler (chief operations officer), Stephen Zemba (senior database administrator), Callum Taylor (database manager), a co-worker and also Grant McKenzie, the chief executive officer of Mr Alkazaz's subsequent employer.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The issues

[7] The issues for determination by the Authority are:

(a) Was Mr Alkazaz unjustifiably dismissed by e-IT?

(b) If so, what remedies (if any) should Mr Alkazaz receive, including a consideration of contribution and subsequently discovered conduct?

(c) Did e-IT fail to pay Mr Alkazaz's notice period, and if so, should it be required to pay a penalty for that?

90 day issue

[8] E-IT's employment agreement with Mr Alkazaz contained a trial period clause which purported to prevent him from pursuing an unjustified dismissal claim. The termination letter refers to Mr Alkazaz's employment not being extended beyond the

90 day trial period.

[9] Shortly after the dismissal, when challenged by Mr Alkazaz's lawyer, e-IT acknowledged that the clause did not meet the requirements under s 67A and s 67B of the Act. I am informed that e-IT has now updated its clauses to comply with those sections.

[10] Mr Alkazaz is therefore free to bring an unjustified dismissal personal grievance claim.

Mr Alkazaz's work history

[11] Due to e-IT's claims regarding contribution Mr Alkazaz's work history and curriculum vitae became the subjects of rather more scrutiny in this case than would usually be the case in an unjustified dismissal case.

[12] Prior to coming to New Zealand in late 2013, Mr Alkazaz had worked for several years in the Middle East, for the later years focusing on training others. On his arrival in this country Mr Alkazaz worked for over two and a half years for a large firm which offered, amongst other things, training in Oracle products. Mr Alkazaz operated as an educator or trainer. He also undertook some project based work when not providing training. He left when the firm discontinued Oracle training. For a short period prior to coming to e-IT Mr Alkazaz worked for another database company.

E-IT applications

[13] Mr Alkazaz put his curriculum vitae forward to e-IT on several occasions applying for senior DBA or DBA team lead positions. Then in August 2016 Mr Taylor from e-IT approached Mr Alkazaz about a possible opportunity. Mr Alkazaz had been mentioned as a possible appointment by an e-IT senior DBA who had undertaken his training.

[14] Usually Mr Sadler was involved in interviews for such roles but on this occasion he delegated to Mr Taylor. Mr Taylor undertook the interview, which included technical questions in a standardised, structured format. This was followed by a meeting with some team members to get a sense of Mr Alkazaz's fit with the team.

[15] E-IT offered Mr Alkazaz an employment package of $115,000 gross base salary and an incentive component of $4,000

after four months based on operational performance. The performance component was stated by e-IT to be in recognition that he had not undertaken a support role for some time.

Induction

[16] Mr Alkazaz started work on 12 September 2016. He was later critical of what he saw as the lack of induction by e-IT when he started his role. At the investigation

meeting he had a strong view of what he expected and that what was provided was inadequate. This was disputed by e-IT.

[17] There was clearly an aspect of self-directed learning in what e-IT provided as induction, which may have not been what Mr Alkazaz expected. He did not raise concerns about his induction with e-IT while he was working there. Rather he told Mr Taylor that he was well supported. He was provided with mentoring by another team member. I am not satisfied that e-IT's actions regarding induction contributed to Mr Alkazaz's dismissal.

Work meetings

[18] As Mr Alkazaz's manager, Mr Taylor had one on one meetings with him on

23 September and 4 October 2016. Both of these were in the nature of usual meetings with a new employee. Over time however, Mr Taylor and others became concerned that Mr Alkazaz appeared to be struggling in the role, in terms of keeping up with the volume and technical aspects of the role.

[19] Mr Sadler became involved and attended meetings with Mr Alkazaz on 14

October, 4 November and 22 November 2016. The meetings were set up by email through calendar invitations so Mr Alkazaz did not receive any letters through this process.

[20] Mr Alkazaz saw these as what he described as catch up meetings. He believed that he was just having the usual orientation, or check in meetings that all new employees would have, especially where they had not operated in the role recently.

[21] E-IT saw the meetings which they were having with Mr Alkazaz as out of the ordinary but they did little to indicate that to him. He was not aware that other new employees did not have the same series of meetings or with the same level of managers.

[22] I accept that e-IT had performance concerns regarding Mr Alkazaz. It had a sense that Mr Alkazaz did not have the level of skills or expertise which the company thought an employee of his seniority should have. There was some disagreement between the parties regarding whether senior and junior database administrator roles existed or were clearly distinguishable. He was seen by e-IT as having the skill level of a junior database administrator.

[23] E-IT did considerably more to deal with its concerns with Mr Alkazaz than some employers do who are relying on a 90 day trial period.

[24] Neither party took notes of the meetings, which contributed to the dispute at the hearing about the content and emphasis of the meetings. Behind the scenes e-IT was assembling a list of what were seen as mistakes and errors by Mr Alkazaz from at least 31 October 2016. However, that list was not put to him whilst he was still employed, although some matters from it were discussed with him. As part of the Authority's process Mr Alkazaz made detailed responses to some issues which had not been raised previously. Broadly speaking e-IT does not accept that Mr Alkazaz had legitimate explanations.

[25] However, e-IT did not convey to Mr Alkazaz the seriousness of the concerns which it had. I accept that it was trying to ensure performance at the level it wanted but also consider that because of the belief about the efficacy of the 90 day trial period, it did not follow the same process which it might otherwise have done. Mr Alkazaz's personality appears not to have inclined him to readily recognise concerns about his own performance. However, the only time when e-IT advised Mr Alkazaz formally that his employment was in jeopardy was in an email of 31 October 2016. This was not followed up with a warning or written instructions to improve.

[26] Mr Alkazaz was not told that he was going through a performance management process or a disciplinary process. There was no formal performance management or improvement plan. He did not receive any warnings.

[27] Mr Alkazaz was critical of the lack of training which he received. The support appeared to be largely in the form of oversight from a co-worker and provision of a book on an aspect of the work which he was having difficulty with due to lack of experience. Mr Alkazaz did not see that he was being provided with much in the way of guidance. There appeared to be a lack of clear communication that the level of oversight was considerably more than e-IT usually expected to provide to senior DBA's.

The last meeting

[28] Prior to the final meeting Mr Alkazaz was not informed that he was potentially facing termination at this meeting, or given the opportunity to address any issues

which were the subject of the meeting. He was not offered the opportunity to have a support person present.

[29] The last meeting was held with Mr Alkazaz on 6 December 2016. Mr Sadler accepted that the decision had already been made prior to the meeting with Mr Alkazaz on 6 December 2016. This was on the basis of the understanding that Mr Alkazaz was on a valid 90 day trial period. Mr Sadler did inform Mr Alkazaz of other decisions he had considered making, but this was out on the basis that he had already discarded them.

Unjustified dismissal

[30] Under s 103A of the Act I need to determine whether on an objective basis, the employer's actions, and how the employer acted, were what a reasonable employer could have done in all the circumstances.

[31] In doing so I must consider under s 103A(3) whether the employer:

(a) Having regard to the resources available, sufficiently investigated the allegations against the employee before dismissing;

(b) Raised the concerns with the employee before dismissing;

(c) Gave the employee a reasonable opportunity to respond to the employer's

concerns; and

(d) Genuinely considered the employee's explanation (if any).

[32] For the reasons outlined above I am not satisfied that Mr Alkazaz's dismissal can be said to be something which a fair and reasonable employer could have done at the time.

[33] There was insufficient process followed to enable a dismissal to occur at that point. A fair and reasonable employer would have done more to make Mr Alkazaz aware of the issues which he faced and the seriousness with which the company viewed the situation. It would have warned him and given him sufficient training or assistance to improve. It would have advised him about his right to have a support person involved, particularly for the last meeting. It would also have gone through a final meeting where Mr Alkazaz was aware that his employment was on the line and had a chance to respond.

[34] Mr Alkazaz was unjustifiably dismissed by e-IT.

Remedies for unjustified dismissal

[35] Mr Alkazaz seeks reimbursement of lost wages and compensation for distress as a result of his dismissal. E-IT opposes awards being made to Mr Alkazaz, including on the basis of reduction for contribution. Alternatively, the company says that if awards are to be made they should be substantially less than what is sought.

Lost remuneration

[36] Mr Alkazaz claims salary lost as a result of his dismissal. He was unemployed for five months after the dismissal. However, in light of the payment by e-IT of the notice period, after these proceedings commenced, only four months' salary is claimed. At a monthly rate of $9,583.33, that totals $38,333.34 gross.

[37] Once Mr Alkazaz obtained employment he was initially on a slightly lower rate than at e-IT but he has not made an issue of that. However, subsequently due to events at Mr Alkazaz's new employment, his pay reduced substantially and he claims

$12,189 gross being the difference between the initial rate with his new employer and what he actually received until 8 September 2017.

[38] E-IT says that at most an award of four week's lost wages should be made on the basis that it was highly unlikely that Mr Alkazaz's employment would have endured for more than that time due to his performance. It also seeks a reduction of

30% on the basis of Mr Alkazaz's undertaking Uber driving. No figure was provided by Mr Alkazaz for the amount earnt from the driving.

[39] Mr Alkazaz applied for a large number of positions. Some of these were made whilst he was in the Middle East. However, given that he was applying during the Christmas period I consider that his absence from the country had little or no effect on his ability to participate in employment processes in New Zealand.

[40] Under s 128 (2) of the Act where the employee has lost remuneration as the result of a personal grievance, I must order payment of the lesser of the lost remuneration or three months' ordinary time remuneration. I then have a discretion under s 128(3) of the Act to order a sum of compensation for lost remuneration greater than the three month period.

[41] I am not inclined to exercise my discretion to grant Mr Alkazaz more than three month's lost remuneration, as there is little certainty that his employment would have continued for longer than that. An award of three month's salary ($28,749.99) is appropriate, subject to any subsequently discovered misconduct and contribution discussed below. I do not make a reduction for the Uber driving as that only began after Mr Alkazaz's later employment began.

Compensation for non-pecuniary loss

[42] Mr Alkazaz claims $15,000 for his humiliation, loss of dignity and injury to feelings caused by the dismissal.

[43] Mr Alkazaz's dismissal occurred at a most unfortunate time for him. His wedding was scheduled a week later on 15 December 2016 in Egypt. E-IT were aware of this. He had been scheduled to return to New Zealand on 8 January 2017.

[44] Mr Alkazaz described his wedding as being ruined by the fact that he was now unemployed, had invested his savings in the wedding and had no income going forward. He felt ashamed to face people in his family and his soon to be wife's family. He felt emasculated as he was not going to be able to provide for her. Her family pressured her to postpone or cancel the wedding and there was some volatile reaction to the couple. The honeymoon was described as very depressing, with Mr Alkazaz having to search for and apply for jobs online during that time.

[45] Mr Alkazaz initially remained in Dubai with his family. He was unable to bring his wife to New Zealand immediately as had been planned, as he had no job to support or sponsor her for immigration purposes. His wife became pregnant which has added to the stress and upset of being unemployed.

[46] On his return to New Zealand he lived in his car for a time because he was unable to afford any accommodation without work. He was too embarrassed to tell his wife about that situation. He has not found it easy to obtain other employment and is concerned about his loss of reputation in the industry.

[47] In considering the effect of the dismissal on Mr Alkazaz, I observed during that during the investigation meeting Mr Alkazaz frequently spoke in absolutes. In addition, some of what has happened to him since then could not be said to be foreseeable. However, I am satisfied that Mr Alkazaz has been seriously affected by

his dismissal. He has claimed $15,000 under this head and his distress well justifies an award of that amount, before consideration of any subsequently discovered misconduct and contribution.

Subsequently discovered conduct

[48] The Respondent relies on conduct known to the employer before the dismissal and that was not discovered until afterwards to remove or reduce the remedies which Mr Alkazaz might otherwise be awarded. Conduct known to the employer beforehand is dealt with under contribution below.

[49] I firstly deal with subsequently discovered conduct as under *Salt v Fell*, Governor for Pitcairn, Henderson, Ducie and Oeno Islands 1 such conduct could and should be taken into account when determining monetary remedies under s 123 of the Act. In that case the Court of Appeal emphasised that it was referring only to misconduct of a "truly significant nature"2. The example discussed is stealing from an employer.

[50] The two matters relied on by e-IT under this head are Mr Alkazaz's alleged misrepresentation of his skills and experience in his covering letter applying for the job and at interview, and secondly his alleged misrepresentation on LinkedIn regarding the duties and responsibilities which he had at e-IT.

[51] There is some cross over between the performance issues which are relied on under the contribution heading and whether Mr Alkazaz misrepresented himself going into the role, which is dealt with under subsequently discovered conduct. Although it had Mr Alkazaz's application materials at the time of dismissal, e-It did not concentrate on them as part of that process and only focused on them after dismissal.

[52] The onus is on the company to prove that Mr Alkazaz misrepresented himself.

Appointment process

[53] E-IT claims that Mr Alkazaz misrepresented himself during the employment process. It was aware that many of his previous roles were training–related.

However, it says that he made representations about his ability to perform a hand-on

1 Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands [2008] NZCA 128; [2008] ERNZ 155 at [47]

2 *Salt v Fell* at [84]

role, and that was why he was offered the senior database administrator role with e- IT. It has concerns about his application

letters, his CV and his interview.

[54] Mr Alkazaz's connections with e-IT seem to influence the extent or thoroughness of his appointment process. E-IT sent staff to various training sessions run by Mr Alkazaz's firm, and so there was a connection between the two organisations regarding that. Mr Alkazaz's name was mentioned as a possible candidate by an e-IT DBA who had undertaken education with him as lecturer previously. He did not get the first job but applied for other jobs with e-IT after that. He was then approached by Mr Taylor regarding a job which had not yet been advertised.

[55] There was a lack of clarity regarding which version of Mr Alkazaz's CV was seen by e-IT managers at which time. E-IT suggested that Mr Alkazaz had altered his CV in a misleading manner. I do not accept that. Like many other job applicants Mr Alkazaz made changes to his CV to emphasise particular tasks he had undertaken within jobs, depending on the nature of the job applied for. Mr Alkazaz added or removed job functions. As long as those included are actually something which was undertaken, albeit infrequently, that should not amount to misrepresentation.

[56] E-IT operated a formal technical knowledge component as part of the interview process, which Mr Alkazaz passed. The technical test had two questions about a particular area 3 which later became a concern as a deficit area of knowledge. Mr Alkazaz passed that part of the test albeit only answering the questions to what was seen as an average degree.

[57] The employment agreement contained a schedule of position duties which referred only to "All tasks associated with the professional management of customers' technical database and OS environments". Mr Alkazaz was not provided with a more specific job description.

[58] E-IT did not do reference checking on Mr Alkazaz. Whilst I accept Mr Sadler's evidence of his experience that the firm which Mr Alkazaz worked at does not provide references, there was no evidence of exploration of other options.

Reliance was placed on the staff member who had attended Mr Alkazaz's training, on

3 RAC

the fact that Mr Alkazaz had worked for the large, reputable firm and on his passing of the technical questions.

[59] Mr McKenzie's testimony was offered by e-IT as propensity evidence regarding misrepresentation.

[60] However, the alleged misrepresentations to e-IT relate to more subjective matters of how proficient Mr Alkazaz was at tasks which were listed in his CV as having been undertaken previously, rather than whether he had done them before.

[61] At the investigation Mr Alkazaz gave the impression of someone who could speak volubly about his own experience. He was strongly confident in his own abilities. This may well have been persuasive to e-IT. However, I do not accept that he mislead the company about the nature of his previous experience at the interviews. Appointment processes, particularly for an employer of e-IT's size, should help test the candidate for the role and drill down into broad assertions that a particular task has been performed previously.

[62] In summary e-IT was not pleased with the level of Mr Alkazaz's experience in operation. However, I do not accept that Mr Alkazaz misrepresented himself in his application letter, curriculum vitae or at interviews.

Description of E-IT role

[63] E-IT says that Mr Alkazaz misrepresented his e-IT role on his LinkedIn profile about himself. It raised this issue with him some months after his employment finished. The evidence of Mr Alkazaz's conduct related to the post-employment period and so I am not satisfied that I can take it into account as subsequently discovered misconduct.

Contribution

[64] Under s 124 of the Act I must consider the extent to which Mr Alkazaz's actions contributed to the situation that gave rise to his personal grievance. The actions must be both causative of the outcome and blameworthy to be taken into

account in reducing remedies.4 To be taken into account as contribution conduct must have been known to the employer before the dismissal.

[65] E-IT says that Mr Alkazaz's behaviour was so egregious that I should not award any remedies, relying on *Xtreme Dining Ltd t/a Think Steel v Dewar5*, or alternatively make a substantial reduction for contribution. It relies on Mr Alkazaz's performance as contribution. With one exception, Mr Alkazaz does not accept that he made mistakes when working at e-IT.

[66] Mr Alkazaz had not worked in a support role for some years. His recent experience was predominantly in training. I do accept that he seemed unable to perform at the level which e-IT expected from a senior DBA within the 90 day period which e-IT gave him. In addition, he appears to have acted as someone who does not readily accept that he has erred or has deficits. I am satisfied that a reduction should be made regarding Mr Alkazaz's performance and unwillingness to recognise inadequacies in that. I assess that a 20% reduction is appropriate. This means that the awards are $22,999.99 as lost

remuneration and $12,000 as compensation for non- pecuniary loss.

Breach of employment agreement

[67] Mr Alkazaz was initially only paid two days of notice.6 In the statement of problem he claimed that he should have been paid for his full notice period.7 Under the employment agreement four weeks' notice was to be given or paid in lieu. E-IT did not, at the time of termination, regard this as applicable as they were terminating

pursuant to a 90 day trial period clause.

[68] After the Authority raised the notice period at a case management conference, e-IT made payment for the remainder of the notice period. This was on the basis that it could have dismissed Mr Alkazaz on notice for performance issues, without reliance on the 90 day trial period.

[69] Mr Alkazaz continues to pursue a penalty for breach of the employment agreement.

4]*Harris v The Warehouse Limited* [2014] NZEmpC 188 at [178]

5 *Xtreme Dining Ltd t/a Think Steel v Dewar [2016] NZ EmpC 136*

6 For 8 and 9 December 2016

7 Cl 6 (a) of the employment agreement

[70] Under s 134 of the Act a penalty may be imposed on a party who breaches an employment agreement, with s 133A now setting out matters to which I must have regard. These include the nature and extent of the breach, the loss or damage suffered, whether steps have been taken provide reparation or the like, and the circumstances, including the vulnerability of the employee. For companies the applicable maximum penalty is $20,000.8

[71] The breach here was the failure to pay the notice period on termination, or allow Mr Alkazaz to work it out. The amount which was not paid at the time was around $8,600 gross, taking into account the days which were paid as notice.

[72] The decision not to pay was based on the understanding at that time that the 90 day trial period was effective. However, in December 2016 when it was pointed out that that was not the case, E-IT accepted that but did not offer payment for a considerable period of time. In late May 2017 E-IT offered to make payment, and that was then done.

[73] This was one breach which was rectified almost six months later. Mr Alkazaz was not in low paid employment, but he is an immigrant. He was in a fairly dire financial situation after returning to New Zealand. Earlier receipt of payment for the notice period would likely have assisted.

[74] Taking into account all the circumstances, I consider that $1,500 is the appropriate penalty. I order that within 28 days of the date of this determination e-IT pays a third of the penalty (namely $500) to the Authority and two-thirds ($1,000) to Mr Alkazaz.

Costs

[75] Costs are reserved and the parties are invited to attempt to resolve that issue between themselves.

[76] If the parties are unable to resolve this matter, Mr Alkazaz shall have 21 days from the date of this determination in which to file and serve a memorandum on the costs issue. E-IT shall have a further 14 days within which to file and serve a

memorandum in reply.

8 S 135(2)(b) of the Act

[77] Any claim for costs are to include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

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

Nicola Craig

Member of the Employment Relations Authority