

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 30
5399831

BETWEEN	HAMDI ELFEIL Applicant
A N D	SOUTH PACIFIC MEATS LIMITED Respondent

Member of Authority: M B Loftus

Representatives: Sarah McKenzie, Counsel for Applicant
Rachel Webster, Counsel for Respondent

Investigation Meeting: 13 February 2014 at Invercargill

Submissions Received: At the investigation

Date of Determination: 20 February 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Hamdi Elfeil, claims various unjustified actions of the respondent led to a diminution in his earnings.

[2] The respondent, South Pacific Meats Limited (SPM), denies any impropriety and claims to have acted in accordance with both the relevant employment agreement and an order of the Employment Court.

Background

[3] Mr Elfeil commenced work with SPM in 2006. He claims he was employed as a halal slaughterman, which is a role that attracts the highest rate of pay offered under SPM's employment agreements – A grade.

[4] SPM denies Mr Elfeil's was app

[5] appointed to the specific position of halal slaughterman. SPM says it does not offer employment to a particular position but assigns an employee to a department (paragraph 2.5 of the Statement in Reply) which, in Mr Elfeil's case, was the slaughter board (Schedule one of his employment agreement). SPM says notwithstanding that:

The employment agreement ... also states "it is acknowledged and agreed that the employee may be required to carry out any other task that he/she is capable of doing safely, and will do so at Management requests." Employees are transferable at the discretion of SPM to meet its business and operational requirements.

[6] For his first three seasons, Mr Elfeil was engaged on the night shift. He was predominately engaged in halal slaughter and, as a result, never paid other than an 'A' grade rate.

[7] For his fourth season (2009-10), Mr Elfeil was appointed to the day shift. The day shift comes with a longer season than the night shift and is therefore more lucrative and sought after work. Mr Elfeil's appointment came at the expense of Mr Mohammed. Mr Mohammed subsequently replaced Mr Elfeil on the night shift for the following three seasons while Mr Elfeil worked the day shift.

[8] Mr Mohammed was dissatisfied with the situation in which he found himself and challenged it in the Authority. He was successful (*Sahizad Mohammed v. South Pacific Meats Ltd* [2011] NZERA Christchurch 164). The Authority's decision was then challenged by SPM.

[9] The Employment Court's decision ([2012] NZEmpC 96) was issued on 21 June 2012. The Court also found in Mr Mohammed's favour and concluded SPM had failed to comply with various terms of his employment agreement.

[10] One of the remedies sought by Mr Mohammed was a compliance order (s.137) requiring SPM reinstate him to the position of halal slaughterman on the day shift. The Court did not do so on the grounds it is reluctant to order compliance in the absence of an opportunity to comply. The Court went on to say:

That is especially so where, as here, there was a genuine dispute about the interpretation of employment rights and obligations. The plaintiff will be aware, from the terms of this judgment, of its contractual obligations in terms of the re-engagement process involving Mr Mohammed.

[11] SPM interpreted this as an instruction it reinstate Mr Mohammed. It concluded a failure to comply would result in the Court making an order Mr Mohammed be reinstated to the position of halal slaughterman on the day shift.

[12] On 19 July 2012, Mr Elfeil was sent a letter advising a time at which he should attend a drug screening test. The test was a prerequisite to an offer of employment in the 2012/13 season. Having successfully passed the test, Mr Elfeil was advised the new season would commence on 2 August 2012 and he would be required to attend an induction presentation on 31 July.

[13] Mr Elfeil says he was approached by Mr Paul Shanks (his supervisor) on the completion of the induction and told they needed to talk. He says they proceeded to the office of Mr Norris Tait (the production manager) and:

Mr Tait said to me words to the effect that:

- (a) I could not be hired as a dayshift halal slaughterman this season because Mr Mohammed won his case; and*
- (b) That Mr Mohammed had to get his job back; and*
- (c) I was going to instead do a variety of tasks or I could wait until Halal work on the night shift was available; and*
- (d) That he couldn't promise me that I would get paid the same money to work in the positions they had available to me.*

[14] This later comment is a reference to provisions in the employment agreement to the effect workers would only be paid at the rate applicable to the work performed and some of the tasks Mr Elfeil would now be required to perform were paid at the lower grades of B and C.

[15] Mr Elfeil goes on to say he protested that the day shift position was his and as he was a permanent resident he should have priority in employment over Mr Mohammed (who worked at SPM on a work visa). While there are some differences over exactly what was said, the essence of Mr Elfeil's evidence is accepted by SPM's witnesses.

[16] Mr Elfeil and Mr Tait had a subsequent conversation which led to the latter providing a note which would be used in support of Mr Elfeil's citizenship application. It records Mr Elfeil was employed as a butcher (slaughterman).

[17] The evidence would suggest Mr Elfeil left work after some 4½ hours on 3 August. He accepts he worked a short day but is unsure as to exactly which one.

He says he left due to the stress he was under as a result of losing of his day shift halal position.

[18] The following work day, 6 August, he performed a mix of A and C grade functions. He says the C grade work further aggravated his stress and he eventually said to his supervisor *call me when my job is ready*. He says he received a response to the effect of *ok*. Mr Elfeil then left the plant, expecting a summons to return to halal work as a result of expectations he says were created by Mr Tait and Mr Hamilton, the plant manager, which led him to believe his return was imminent.

[19] As events transpired that was not the case and Mr Elfeil did not return until the night shift commenced in early December.

[20] SPM attempted to portray Mr Elfeil's absence as an abandonment and initially claimed it had made attempts to contact him in the intervening period and get him to return to work. It now accepts, on the basis of telephone records produced at the investigation, the first approach did not occur until 4 December and that led to Mr Elfeil's return on the night shift within a few days.

[21] There was, however, one additional approach which stemmed from a request Mr Elfeil made when advised of his removal from the day shift halal role. He asked that SPM consider deploying him to its Christchurch plant. His request was initially denied by SPM but he was approached Christchurch management in late October. He declined the opportunity of working in Christchurch given the imminent start of the night shift.

[22] As events transpired, Mr Elfeil worked the night shift during the 2012/13 season but has since been reinstated on the day shift for the 2013/14 season. This has been facilitated by a decision to increase the halal manning level from two (the number engaged in the 2012/13 season) to three. This level of manning saw a reinstatement of that which had existed prior to 2012/13 with the reduction that season being an apparent aberration.

Determination

[23] The key question, and that which will effectively resolve Mr Elfeil's claim, is whether he was employed as a halal slaughterman as he claims or whether, as SPM

contends, his appointment was to a department within which he could be deployed as needs dictated.

[24] The answer, I conclude, will favour Mr Elfeil with the key reason being the Employment Court has already decided the matter. When considering a similar argument in Mr Mohammed's case the Court noted [paragraph 60]:

It is clear from the evidence that there were instances of halal slaughtermen undertaking non-halal work as an adjunct to their primary role, and that Mr Mohammed had previously been involved in bobby calf work for a brief period in the lead up to a season. However, there is (as Mr Churchman pointed out) a distinction between miscellaneous work incidental to the primary role of halal slaughterman, and engagement as a general slaughterman or labourer for an extended period of time.

[25] The argument Mr Elfeil's status differs from Mr Mohammed's due to one being on a work permit which restricted the work he could perform while the other (Mr Elfeil) is a New Zealand resident to whom such restrictions do not apply fails to convince me given other findings by the Court. At paragraph 6 the court stated, on the basis of the evidence before it, that Mr Elfeil was a halal slaughterman. That is not surprising given various company witnesses identified him as such and this is recorded in the Court transcript.

[26] Even if that were not the case I note various entries in the Statement in Reply which seem to concede the issue. At paragraph 2.7 it is said *SPM directed the applicant to the position of halal slaughterman* while paragraph 2.11 accepts Mr Elfeil's proposition he was told *another person was required to be given his job...*

[27] The situation appears the same as that referred to by the Court at paragraph 60. The primary role was halal slaughterman and that was the role to which Mr Elfeil was appointed given SPM consistently re-engaged seasonal workers into roles they had performed the previous season (refer the Court's decision re Mr Mohammed at paragraph 73). Mr Elfeil was subsequently removed from that position on the day shift to make way for Mr Mohammed's return.

[28] That conclusion raises the question of whether or not Mr Elfeil was disadvantaged. The answer is yes as the decision to replace Mr Elfeil with Mr Mohammed would see a significant reduction in Mr Elfeil's earnings. SPM's own figures state he earned \$24,796.55 less than the man who replaced him (refer

paragraph 20 of Mr Hamilton's evidence). Mr Hamilton does, however, contend Mr Elfeil could have earned at least \$15,401.34 had he worked between the date of his departure in August and commencement of the night shift. He says *at least* as absenteeism may have given Mr Elfeil an opportunity to perform higher graded work than that he might otherwise have performed and with that his earnings would increase.

[29] However Mr Hamilton's figures still illustrate a loss in the order of \$9,395.21. That represents some 14% of the amount earned by Mr Mohammed that season. Such a reduction in earning capability is significant and, I conclude, constitutes a disadvantage.

[30] That raises the question of whether or not SPM can justify its actions. Its justification is Mr Elfeil was appointed to the department and SPM had a contractual right to deploy him to any task within it. I have already concluded that is not the case. SPM's actions are therefore unjustifiable. Here I also note SPM employed three halal slaughterman in seasons either side of 2012/13. It could have addressed Mr Mohammed's reinstatement by also doing so in 2012/13.

[31] There is then SPM's contention Mr Elfeil abandoned his employment. That is a proposition I reject. First case law requires an employer attempt to confirm whether or not abandonment has occurred. SPM failed to do so but more importantly there is Mr Elfeil's claim Mr Tait gave a choice of either performing a range of tasks on the day shift or waiting till a halal position was available on the night shift.

[32] SPM did not challenge this assertion and when questioned Mr Tait went so far as to accept it was probably correct. It is difficult to consider Mr Elfeil abandoned his employment when he simply accepted an option proffered by the company that proposed he be absent for the period he was.

[33] Mr Elfeil also argues he should have been preferred over Mr Mohammed given his immigration status. As I advised the parties during the investigation, I take this no further. First I do not need to as Mr Elfeil has been successful with his claim. Second, Mr Mohammed's visa was arranged before the Court's decision and the argument SPM should not have supported the application (if it did and which it denies) was, at the time, irrelevant. Both were required.

[34] The conclusion Mr Elfeil was unjustifiably disadvantaged raises the question of remedies. He seeks lost wages and \$15,000 as compensation for hurt, humiliation and distress.

[35] His wage claim is that he be paid in full for the period between 6 August and 10 December 2012. His claim faces considerable difficulty as there is a general requirement to mitigate loss (*Allen v Transpacific Group (trading as "Medismart Limited"* [2009] 6 NZELR 530 at [78]).

[36] I must conclude Mr Elfeil failed to mitigate his loss. Unlike Mr Mohammed, Mr Elfeil was not restricted in the range of work he could perform by reason of his visa. He could have accepted the offer of other work but chose not to. While he says his decision was influenced by the humiliation he felt in performing such work, I note the relationship was not destroyed to the extent he could no longer work for SPM and when so working he might be asked to performed such tasks, albeit to no great extent. The situation is aggravated by the decision not to accept halal work in Christchurch when it was offered, especially as it was for a short and finite duration.

[37] For these reasons I conclude it inappropriate to award the full wage loss. What Mr Elfeil is entitled to is that he would have lost had he accepted the offer of alternate work. SPM says that is being \$9,395.21 (27 and 28 above) and Mr Elfeil accepts he can not dispute the figure.

[38] Turning to compensation. Mr Elfeil states there is considerable prestige and status attached to the halal work in his community. He also gave evidence of the shame he felt in losing the work, especially as he had done nothing wrong.

[39] SPM, via the answers of Mr Tait, accepts there is *mana* attached to the role and Mr Elfeil would have been humiliated by having it taken from him. It is also this contributed to his choosing to wait for halal work on the night shift rather than accepting other work. Having considered the evidence I conclude an award of \$4,000 to be appropriate.

[40] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Mr Elfeil contributed to the situation in which he found himself. The answer is no.

Conclusion and Orders

[41] For the above reasons I conclude Mr Elfeil has a personal grievance as he was unjustifiably disadvantaged.

[42] As a result the respondent, South Pacific Meats Limited, is ordered to pay the applicant, Mr Hamdi Elfeil, the following:

- i. \$9,395.21 (nine thousand, three hundred and ninety five dollars and twenty one cents) gross as recompense for wages lost as a result of the disadvantage; and
- ii. A further \$4,000.00 (four thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[43] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority