

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 151
5526631

BETWEEN MUHAMMED KHAN
 Applicant

A N D SOUTH PACIFIC MEATS
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Applicant in person at the investigation meeting;
 James Duckworth, Counsel for Applicant's submissions
 Christine Pidduck, Counsel for the Respondent

Investigation Meeting: 1 September 2015 at Invercargill

Submissions Received: 17 September & 8 October 2015 from the Applicant
 1 October 2015 from the Respondent

Date of Determination: 13 October 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Khan was not unjustifiably disadvantaged in his employment by having been directed to carry out duties which he viewed as “menial tasks”.**
- B. Mr Khan was unjustifiably disadvantaged in his employment by the respondent failing to investigate his complaints about being “abused” by his co-workers.**
- C. Mr Khan was not unjustifiably dismissed at the end of the 2011/12 season.**
- D. The respondent did not breach Mr Khan’s individual employment agreement by failing to re-engage him for the 2012/13 season, and he did not suffer an unjustified disadvantage**

in this respect.

- E. The Authority does not have the jurisdiction to investigate an alleged breach of immigration legislation by the respondent.**
- F. Costs are reserved.**

Employment relationship problem

[1] Mr Khan claims that he was unjustifiably dismissed at the end of the 2011/12 season, that he suffered an unjustified disadvantage in his employment by not being re-engaged for the 2012/13 season and that he suffered unjustified disadvantage in his employment by reason of his duties changing after Easter 2012 and his complaints about being abused by other staff not being investigated. He also claims that the respondent has breached immigration legislation by re-engaging a work visa holder in favour of himself.

[2] The respondent denies that Mr Khan was unjustifiably dismissed, saying that his employment came to an end when the 2011/12 season finished, and that it had no obligation to re-engage him. It also denies that Mr Khan was unjustifiably disadvantaged in his employment and that there has been no breach of immigration legislation, but that the Authority does not have the jurisdiction to investigate such allegations in any event.

Brief account of events leading to the termination of Mr Khan's employment

[3] Mr Khan is a practising Muslim and moved to New Zealand from Fiji in January 2010. He commenced work at the Awarua plant of the respondent company in Invercargill in December 2011. By this time, he had permanent residence in New Zealand.

[4] Although Mr Khan stated in his brief of evidence that he had been employed by the respondent to work on the halal slaughter board as a halal supervisor, during the investigation meeting Mr Khan agreed that his individual employment agreement did not designate his role in that way, and that he was employed to do general duties on the chain.

[5] However, it is common ground that Mr Khan was recruited in order to work predominately as a halal auditor, also known in the Awarua plant as a halal

supervisor. This requirement arose after the respondent company gained access to the Malaysian market which had imposed certain stringent requirements with respect to the importation of halal meat. Evidence was heard from the manager of the plant, Kevin Hamilton, who explained that he initiated a third shift in 2011 in order to deal with the demand created by this market. When Mr Khan commenced his employment, his duties entailed working on the third shift, supervising or auditing the killing of animals for the Malaysian halal market and the rest of the processing of that meat. Another halal auditor/supervisor, Mahmud Mohamed, was employed on the other two shifts.

[6] The Authority heard evidence that, when he first commenced his duties, Mr Khan encountered some problems because the Federation of Islamic Associations of New Zealand (FIANZ) would not allow him to audit the halal slaughter process until he had obtained certain qualifications available through the New Zealand Qualifications Authority. Mr Khan obtained those qualifications, but met further resistance from FIANZ, although this was finally resolved. Although Mr Khan believes that these initial difficulties influenced the respondent to treat him unfavourably, there is no evidence to support such a view, and I therefore do not consider that those problems at the beginning of Mr Khan's employment are relevant to the current investigation.

[7] Mr Khan's concerns about his employment first arose when Mr Mohamed allegedly made a statement that Mr Khan did not want to work weekends, that he could not do his job and that he would be replaced by another halal slaughterman. This caused Mr Khan some upset and he wrote a letter on 19 February 2012 raising his concerns about this. Mr Khan's letter was headed up *To whom it may concern* and Mr Khan said he left it at the reception desk of the plant. Mr Hamilton's evidence is that neither he, nor his managers ever received a copy of that letter.

[8] Two days later, Mr Khan complained to the New Zealand Police about his concerns regarding Mr Mohamed but they declined to take any action, considering it to be a civil matter. Mr Khan also wrote to FIANZ in relation to his concerns on the same day that he visited the Police. It is not known if FIANZ ever replied.

[9] Mr Khan took some leave over the 2012 Easter holiday period and, when he returned, he discovered that two carcasses that had previously been declared as non-halal had gone missing from a chiller on 8 April 2012. He wrote a letter to the

Operations Manager, Norris Tait, raising his concern about this and asking Mr Tait to ask Mr Mohamed to return all documents to his folder. Two days later, he wrote a letter to FIANZ about the same concern.

[10] In his letter to FIANZ, Mr Khan also stated the following:

When I enquired about it [the two missing carcasses] I was told by Mr Norris [sic] that it was condemned by Meat Inspectors. No supervisor was present when this was done. Due to this enquiry the Company has come hard on me. On Wed 11/04/12 they told me to work on chain and also told me to do paperwork for 15 mins only.

Ali Khwaji [a representative from FIANZ] told the Company that Paperwork takes only 8 hours per month.

Please contact me urgently. The problem here is serious.

[11] On 16 April 2012, Mr Khan wrote a letter to Mr Hamilton in the following terms:

Dear Sir,

I have been removed from my normal job as Halal Supervisor from 10/04/12. Norris has told me to work 7 hours on chain and 1 hour for Paperwork.

Deon has accused me that there was no trouble when Mahmud was alone. Trouble started when you came.

The fact is that problem was between me and FIANZ, not with the Company. Since my removal I have been insulted by the workers:

- 1. 13/04/12: sticker on my back which read: BORING F*CKER.*
- 2. While cleaning I wear red hat so one worker said you are PROMOTED.*
- 3. One lady said to me: GOOD ON YOU.*

Please HELP me to solve the problem. I want to talk to you this afternoon.

[12] Mr Hamilton agrees that he received that letter but says that Mr Khan never came to see him. He explained that he has an open door policy and that Mr Khan could have come to see him at any time, provided that he was free.

[13] On 18 April 2012, Mr Khan's lawyers at that time, Preston Russell Law, wrote to Mr Hamilton on behalf of Mr Khan stating that they had been instructed that Mr Khan had been removed from the position of supervisor and had been *redirected to menial tasks*.

[14] Preston Russell wrote another letter to the respondent on 26 April 2012 stating that Mr Khan had been reinstated to his position as supervisor for one day and then directed back to menial tasks. They also stated that Mr Khan may be having health issues because of the company's directive that he undertake menial tasks and that Mr Khan had been told that his shift was due to finish soon and that he would be laid off.

[15] The letter went on to say that, when Mr Khan was to be laid off, another worker was to be retained by the company as a halal-qualified person who was employed subject to *a work permit*. The letter stated that this was unlawful as the company was not permitted to retain a *work permitted worker* in preference to a New Zealand resident.

[16] Preston Russell wrote a further letter to the respondent on 1 May 2012 saying that it had received no response but asking the company to go to mediation. The letter stated that Preston Russell would initiate a complaint with the New Zealand Immigration Department if no answers were received by the following day.

[17] It is not known when a substantive reply was received from the respondent but Mr Hamilton said that, as soon as he received a letter from Mr Khan's solicitors, he would have passed it on to the company's in-house lawyer, Rachel Webster. A copy of correspondence that the Authority saw seems to indicate that the company responded prior to 8 May 2012, on an unknown date.

[18] On 4 May 2012, Mr Khan worked his last day prior to the seasonal shutdown of his shift. It appears to be common ground that around 65 employees ceased their employment on that day, all of whom had been employed on the third shift.

The issues

[19] The following are the issues that the Authority must investigate and determine:

- (a) Whether Mr Khan suffered an unjustified disadvantage in his employment by reason of the company failing to investigate Mr Khan's complaints about being *abused* by other staff;

- (b) Whether Mr Khan suffered an unjustified disadvantage in his employment by being made to carry out menial tasks and by being removed from, or restricted in his duties as a halal supervisor;
- (c) Whether Mr Khan's termination of employment amounted to an unjustified dismissal; and
- (d) Whether the respondent company was obliged to re-engage Mr Khan at the start of the 2012/13 season.

Did Mr Khan suffer an unjustified disadvantage in his employment by reason of the respondent failing to investigate his complaints?

[20] The first complaint raised by Mr Khan was the one concerning Mr Mohamed making statements about Mr Khan which Mr Khan objected to. Mr Hamilton said that none of the managers received that letter and I accept that evidence. Mr Khan admits that he left the letter at reception and did not address it to anyone in particular. On its face, it is not addressed to anyone in particular. Whilst it is obviously possible that the letter did find its way to somebody in authority within the Awarua plant, there is no reason to disbelieve Mr Hamilton.

[21] Therefore, having accepted that Mr Khan's complaint about Mr Mohamed did not come to the attention of the company, the company cannot be in any way to blame for having failed to investigate Mr Khan's concerns about Mr Mohamed.

[22] The situation was different, however, with respect to Mr Khan's letter to Mr Hamilton of 16 April 2012. Mr Hamilton admits receiving that letter. I accept Mr Hamilton's evidence that he expected Mr Khan to visit him that afternoon, as that is a possible interpretation of the last sentence of Mr Khan's letter. I also accept that, very shortly after having received Mr Khan's letter, he received a letter from Mr Khan's solicitors. That raised only the question of Mr Khan allegedly being removed from his duties as a supervisor, but I do accept that Mr Hamilton, having received a solicitor's letter, very reasonably would have passed that letter to Ms Webster. Naturally, he would have passed the two following letters to Ms Webster as well. However, this does not change the fact that Mr Khan had stated in his original letter that he felt he was being *insulted by the workers*.

[23] Whilst the respondent gave no evidence about this, I accept that workers in freezing works will occasionally be witness to a reasonable amount of banter and

teasing that is part and parcel of the environment in which they work. It is possible that this was the spirit in which the issues that Mr Khan complained about occurred. However, as Mr Khan's letter of 16 April 2012 makes clear, he was unhappy with the treatment he was receiving at the hands of his colleagues and he could reasonably have expected his employer to at least have made some inquiries.

[24] Section 103(1) of the Employment Relations Act 2000 (the Act) provides that *personal grievance* means any grievance that an employee may have against the employee's employer or former employer because of a claim that the employee's employment, or one or more conditions of the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer.

[25] However, the Act also makes clear, at s 114(1), that any personal grievance must be raised by an employee with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred. One exception is where the employer consents to the personal grievance being raised after the expiration of the 90 day period. Whilst Mr Khan complained about the conduct of his co-workers within 90 days of the treatment that he says they afforded him, he did not, it appears, complain about the respondent failing to investigate the matter until he lodged and served his brief of evidence on 29 July 2015. He certainly did not make this complaint in his statement of problem, and it is not referred to in any of the letters sent by his representatives. This would clearly be significantly after the 90 days expired, which I would have expected to have started running at 4 May 2012, Mr Khan's last day of employment, at the latest.

[26] No objection has been raised by the respondent that the personal grievance relating to the specific allegation (that the respondent did not respond to his letter of complaint dated 16 April 2012) was not raised with sufficient specificity within the 90 days' time limit or was raised outside of the 90 day time limit.

[27] In *Hawkins v Commissioner of Police*¹ the Employment Court held that s 114 of the Act does not abrogate the common law tests for consent, and an employer may impliedly consent to a personal grievance being raised out of time. In that particular

¹ [2007] ERNZ 762

case, the respondent's lack of protest and active engagement provided sufficient evidence of implied consent to the grievance being raised out of time. This approach was approved by the Court of Appeal², which held that whether consent has occurred is a matter of fact and degree and that:

The real issue is not whether, in formal terms, the Commissioner 'turned his mind' to the extension, but rather whether he so conducted himself that he can reasonably be taken to have consented to an extension of time.

[28] In light of this principle, and the respondent's active addressing of the specific allegation in Mr Hamilton's witness statement, I accept that, although the personal grievance was not raised until 29 July 2015 in Mr Khan's witness statement, the respondent impliedly consented to it being raised after the expiration of the 90 day time limit.

[29] Section 103A of the Act sets out the test of justification in determining whether an action was justifiable. Section 103A provides as follows:

- (1) *For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) *In applying the test in subsection (2), the Authority or the Court must consider –*
 - (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*

² *Commissioner of Police v Hawkins* [2009] NZCA 209, [2009] 3 NZLR 381

- (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the Court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
 - (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[30] There is no doubt that being subject to unwanted teasing in the workplace can cause some people significant distress and, where they are unable to stop that unwanted teasing themselves, they have a legitimate expectation that their employer will step in and take steps to investigate the allegations of unwanted teasing, once the employer has been advised of it. Once an employer has been told about those concerns, it must be the case that the employer, failing to investigate the concerns and to take steps to prevent further unwanted teasing, constitutes a disadvantage in that employee's employment.

[31] The respondent essentially gave no evidence as to why Mr Khan's concerns about the teasing he was receiving was not investigated either by Mr Hamilton, one of his managers or by Ms Webster. Even if Mr Hamilton expected Mr Khan to turn up on that afternoon of 16 April 2012, that he did not free Mr Hamilton of all further responsibility to investigate the matter.

[32] Therefore, the respondent's complete failure without any reason to investigate Mr Khan's concerns about the unwanted teasing must make the disadvantage Mr Khan suffered unjustified. In other words, no evidence whatsoever was given by the respondent to justify the failure to investigate Mr Khan's concerns and so I must conclude that no fair and reasonable employer could have failed to have taken steps to have investigated Mr Khan's concerns in all the circumstances that prevailed at the time.

[33] Accordingly, Mr Khan has suffered an unjustified disadvantage by not having his concerns about the unwanted teasing investigated.

Did Mr Khan suffer an unjustified disadvantage in his employment by his duties changing after the Easter break?

[34] Schedule one of the individual employment agreement entered into by Mr Khan contained the following terms:

Schedule One

Employees Name: Muhammad Khan
Commencement Date: 8.12.11
Position: S/Board
Note: 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.

[35] It was not until Mr Hamilton's oral evidence before the Authority that the true picture of what had occurred with respect to Mr Khan's duties after Easter became clear. Mr Hamilton explained that the Malaysian market listing requirements were relatively new and that the respondent company, like other meat processing companies in New Zealand, including the respondent's competitors, had been taking great pains to ensure that the halal rules were being strictly adhered to. Mr Hamilton explained that the plant and its halal processes, including its written protocols, were being audited not only by the Ministry of Primary Industries but also by three separate Muslim bodies, including FIANZ.

[36] Mr Hamilton said that some time before Easter 2012, however, the FIANZ representative advised the respondent company, as well as other meat processing plants, that their processes, especially with relation to the paperwork being kept, were more stringent than was required. Mr Hamilton described the approach prior to this as *overkill*.

[37] In any event, as a result of this advice from FIANZ, the respondent decided that it could relax some of its requirements with respect to the oversight of the halal meat production process. This had a direct impact on the paperwork that Mr Khan was required to complete.

[38] Mr Khan's evidence was that, after Easter, he was required to carry out menial tasks such as sweeping and picking up rubbish. However, he accepted in cross-examination that he still carried out his supervisory duties. Indeed, this was evident

from documents disclosed by the respondent which showed that he had continued to audit the halal process right up to the end of his employment.

[39] Mr Khan said that, whilst he agreed that he had continued to work as a halal supervisor on the third shift right until the end of his employment, he was restricted in his movements up and down the chain. These restrictions were imposed by one of the supervisors of the chain who was identified as Jayson.

[40] Mr Khan also accepted that he was obliged under the terms of his contract, as stated in Schedule 1 of his employment agreement, to carry out any other tasks that he was capable of doing safely and that he would do so at management's request.

[41] In light of the evidence from Mr Hamilton, which I accept, and the express wording of Mr Khan's individual employment agreement, which he had signed, I am bound to find that Mr Khan could not have suffered a disadvantage in his employment as he had agreed by way of his employment agreement that he would carry out the tasks of which he complains. Furthermore, it is the evidence of the respondent, which Mr Khan did not contest, that he continued to be paid an A grade hourly rate.

[42] Mr Khan did say in his evidence that he did not know that FIANZ had decided, and had subsequently advised the respondent company, that less paperwork needed to be processed by the halal supervisor. He then said that he had found this out when another worker had told him. In addition, in Mr Khan's letter to the CEO of FIANZ dated 12 April 2012, three days after Easter, Mr Khan stated that the representative of FIANZ, Mr Ali Khwaji, had told the company that the paperwork only took eight hours a month.

[43] Therefore, I conclude that, whilst the respondent company may not have formally advised Mr Khan of the advice from FIANZ, he knew this in any event by 12 April 2012, if not earlier, prior to him writing to Mr Hamilton on 16 April 2012 when he complained about Mr Tait telling him to work seven hours on the chain and one hour on paperwork. He therefore must also have known it prior to Preston Russell writing to Mr Hamilton on 18 April 2012.

[44] In light of this evidence, I am not able to find that Mr Khan suffered a detriment in his employment, but that even if he did, such a detriment was not unjustified as the respondent company was contractually entitled to require Mr Khan

to carry out other duties and Mr Khan was not unaware that the requirement to complete paperwork associated with his auditing duties had diminished.

Did Mr Khan's termination amount to an unjustified dismissal?

[45] I accept the respondent's submissions that Mr Khan's employment was seasonal. Clause 2 of the individual employment agreement provides:

This agreement shall come into effect from the 8-12-11 and shall remain in force until terminated under the provisions of this agreement or 46 weeks, whichever is the earlier.

The employee acknowledges that the basis of his employment is weekly and only a limited number of employees can be employed as seasonal.

[46] Clauses 4.4 to 4.6 provide:

4.4 Subject to satisfactory completion of the trial period your employment will be on a weekly basis and for a maximum duration of the 2011/12 season, you shall be given 5 calendar days notice of termination [sic].

4.5 Employment will not necessarily finish on the same day for all employees; e.g. a night shift may start later and finish earlier; the two day shifts will revert to one day shift when demand drops off, some areas of work may finish before others and or numbers employed in any department may decrease as livestock availability or processing requirements change.

4.6 Where the amount of work available drops off such that not all employees are required the employer may terminate employment of staff on a progressive basis. In selecting employees to be terminated, the employer shall take into consideration the skills required to operate a balanced workforce.

[47] The respondent's evidence is that all employees employed on the third shift, as Mr Khan was, had their employment terminated on the same date. This manifestly demonstrates that there was no longer a need to utilise a third shift with effect from 4 May 2012.

[48] Section 66 of the Act sets out the law in relation to fixed term employment, as follows:

66 Fixed term employment

(1) An employee and an employer may agree that the employment of the employee will end—

- (a) at the close of a specified date or period; or*
- (b) on the occurrence of a specified event; or*
- (c) at the conclusion of a specified project.*

(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—

(a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and

(b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.

(3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):

(a) to exclude or limit the rights of the employee under this Act:

(b) to establish the suitability of the employee for permanent employment:

(c) to exclude or limit the rights of an employee under the Holidays Act 2003.

(4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—

(a) the way in which the employment will end; and

(b) the reasons for ending the employment in that way.

(5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.

(6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—

(a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or

(b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.

[49] In *Turner v Talley's Group Ltd*³ Chief Judge Colgan held that seasonal agreements in the fish processing industry fall squarely within the definition of a fixed term agreement under the Act and must therefore be governed by s 66 of the Act. I find that the same principle must have applied to the seasonal work in the respondent's Awarua plant in 2011/12.

[50] Mr Khan's employment agreement does not state expressly, in one single place, that his employment was seasonal and that it would end when the season of the shift he was employed on came to an end. However, clause 4.4 does state that his employment was for a maximum duration of the 2011/2012 season, and that he would be given 5 calendar days' notice of termination. I find, on balance, that this satisfies both requirements of s 66(4) of the Act, and that Mr Khan's employment was therefore a valid fixed term employment.

³ [2013] NZEmpC 31

[51] There is no evidence that Mr Khan was not given the 5 days' notice of termination. I am also completely satisfied that his employment ended solely because the shift he was employed on for the 2011/12 season came to an end.

[52] Sub-section 103(1) of the Act provides:

103 Personal grievance

(1) For the purposes of this Act, **personal grievance** means any grievance that an employee may have against the employee's employer or former employer because of a claim—

(a) that the employee has been unjustifiably dismissed;

[53] In the Employment Court case of *Iritana Horowai Ngawharau v The Porirua Whanau Centre Trust*⁴, His Honour Judge Ford reviewed relevant case law on the meaning of a dismissal. At [67] to [69] he stated as follows:

[67] In *Ramsbottom*⁵, the Court of Appeal also considered the concept and definition of a dismissal. It adopted dicta from other reported cases to the effect, relevantly, that:

[19] ... On an ordinary use of language 'dismissal' is a unilateral act by the employer which terminates the employment contract. ...⁶

[20] ... defined dismissal as '**the termination of employment at the initiative of the employer**'.⁷
(emphasis added)

[68] In *Sharpe v MCG Group Pty Ltd* [2010] FWA 2357, Fair Work Australia considered cases dealing with the concept of termination at the initiative of the employer.⁸ In my view, the principles discussed in those cases would have equal application in any consideration of the meaning of the same expression in this jurisdiction. In *Sharpe*, it was noted:⁹

[24] ... Essentially, termination at the initiative of the employer involves as an important feature, that the act of the employer results directly or consequentially in the termination of the employment, so that the employee does not voluntarily leave the employee relationship. ...

[69] Reference was made in *Sharpe*¹⁰ to a particular passage by Justice Moore in the case of *Rheinberger v Huxley Marketing Pty Ltd*,¹¹ which had subsequently been referred to with approval by the

⁴ [2015] NZEmpC 89

⁵ *EN Ramsbottom Ltd v Chambers* [2007] NZCA 183

⁶ *Principal of Auckland College of Education v Hagg* [1997] ERNZ 116 at 124

⁷ *Wellington etc Clerical etc IUOW v Greenwich* ERNZ (1980) Sel Cas 95 at 103

⁸ *Sharpe v MCG Group Pty Ltd* [2010] FWA 2357

⁹ At [24]

¹⁰ At [26]

¹¹ (1996) 67 IR 154

full Court of the Australian Industrial Relations Commission in O'Meara v Stanley Works Pty Ltd.¹² Justice Moore stated¹³:

However, it is plain from these passages that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable consequence of the employer's conduct.

[54] As the termination of Mr Khan's employment occurred by way of the expiry of a fixed term I find that it does not fall within the scope of s 103 of the Act, as the termination was not a dismissal, as defined in the cases cited above. Rather than being a termination at the initiative of the employer, it was a termination by mutual agreement in accordance with the agreed terms of a valid fixed term employment agreement. When the mutually agreed conditions were satisfied (the season ending) the termination was triggered.

[55] It follows that Mr Khan cannot bring a personal grievance for unjustified dismissal in relation to the termination of his employment on 4 May 2012.

Was the respondent required to re-engage Mr Khan at the start of the 2012/13 season?

[56] As well as clauses 4.4 to 4.6 cited above, the employment agreement entered into by Mr Khan contained the following clauses:

4.7 *Upon termination you are responsible for keeping the company advised of your current address and phone number if you wish to be contacted for potential employment as work becomes available.*

...

16. *Security of employment*

¹² [2006] AIRC 496 at [20]

¹³ At [160] – [161]

- (a) *The Company acknowledges the value of a stable, competent and trained workforce which is familiar with the processing methods and procedures required.*
- (b) *When engaging workers at the commencement of each season priority shall be given to the employment of those workers who have been competent and satisfactory workers at that particular site during the previous season and who are ready, willing and able to commence work when required.*
- (c) *The parties acknowledge the difficulties of accurately predicting livestock flow throughout the season and the consequential effects on production planning. Notwithstanding this, the Company shall provide five calendar days notice of any lay-off. Such notice to be given no later than 10am on the first day of the period.*

[57] The evidence was not completely clear as to whether Mr Khan kept the respondent advised of his contact details after the termination of his employment. I am prepared to find, however, that the respondent had contact details to hand at the start of the 2012/13 season.

[58] The respondent gave no evidence to suggest that Mr Khan was not a competent and satisfactory worker, nor that he was ready, willing and able to commence work when required. Indeed, the respondent gave no evidence of any cogent kind that it had even attempted to contact Mr Khan after his employment came to an end on 4 May 2012.

[59] However, Mr Hamilton gave evidence that, in the 2012/13 season, there was no longer a third shift and that he therefore did not require a second halal supervisor. When he explained why he had re-engaged Mr Mohamed and not Mr Khan, it was because Mr Mohamed had a longer length of service than Mr Khan. Mr Hamilton explained, which I accept, that when deciding who to re-engage, as well as looking at past performance, the respondent would also always take into account length of service. Indeed, this is a well-known criterion for re-engaging employees in the New Zealand meat processing industry.¹⁴

[60] The legal principles governing the implying of a term into a contract by custom and practice are well established. A leading New Zealand case is *Woods v NJ*

¹⁴ Mr Duckworth asserted in his submissions that no evidence was given of what criteria for selection for re-engagement were considered. However, Mr Duckworth was not present at the investigation meeting, and this assertion is incorrect.

*Ellingham & Co Ltd*¹⁵ in which the His Honour Judge Henry set out the three main principles as follows:

- (a) The custom must have acquired such notoriety that the parties must be taken to have known about it and intended it should form part of the contract;
- (b) The custom must be certain; and
- (c) The term must be reasonable.

[61] In the case of *Muollo v Rotaru*¹⁶ the Employment Court referred to the principle that, if a custom or practice is sufficiently well established, *it may not even matter that one of the parties to the contract may be unaware of it at the time of making the contract.*¹⁷

[62] Mr Khan was obviously not an employee at the time when the company was looking to engage staff for the 2012/13 season. However, it is my view that clause 16(b) of Mr Khan's individual employment agreement conveyed upon Mr Khan a right that survived his termination. This was because the clause serves no other purpose than to indicate who would be re-engaged the following season. However, I also find that, by way of custom and practice, the respondent also was entitled to rely upon another criterion not expressly referred to in clause 16(b), namely the criterion of length of service. I find that the implying of this term fulfils the three principles referred to in paragraph 60 above.

[63] It is not contested by Mr Khan that, in the 2012/13 season, the respondent only needed one halal supervisor. He also does not contest that Mr Mohamed had longer service in the company than him. Therefore, inferring that Mr Mohamed was also competent and a satisfactory worker, and that he was ready, willing and able to commence work when required, I cannot fault the respondent for having chosen to re-engage Mr Mohamed instead of Mr Khan given that Mr Mohamed trumped Mr Khan in the sense of having a longer length of service.

[64] Having made that finding, I am unable to find that Mr Khan was either unjustifiably disadvantaged by the failure to re-engage him for the 2012/13 season, or

¹⁵ [1977] 1 NZLR 218

¹⁶ [1995] 2 ERNZ 414

¹⁷ Page 424.

that he suffered a breach of his individual employment agreement for that failure. The evidence of Mr Hamilton is, I understand, that the Awarua plant no longer operates a third shift, so that there has been no need to recruit extra halal supervisors in subsequent seasons.

[65] Mr Khan has made the assertion that the respondent company was in breach of New Zealand immigration law by re-engaging Mr Mohamed, who was a work visa holder, in preference to him, when he was a New Zealand resident. However, first, it is the Meat Industry Association that engages with Immigration New Zealand to obtain work visas on behalf of its members, including the respondent, and if there were any breach, in respect of which I make no finding either way, that may not have been the responsibility of the respondent in any event. In addition, reviewing the labour market test instructions sent in by Mr Duckworth with his submissions suggests that it is the immigration officer who has to be satisfied that the test has been complied with. Presumably, if Mr Mohamed has been granted a work visa in 2012/13 and subsequent years, INZ has been so satisfied.

[66] Second, as I believe Mr Khan accepts, the Authority does not have the jurisdiction to determine whether any breaches of New Zealand immigration law have occurred. It would appear that Mr Khan has never made a complaint to the immigration authorities about his concerns and so this is a matter which remains unresolved. However, I am unable to reach any conclusions as the Authority does not have any jurisdiction under New Zealand immigration legislation to do so.

[67] Third, even if the Authority could consider whether Mr Khan was disadvantaged by a failure of the respondent to comply with New Zealand immigration law, no expert evidence was made available to the Authority with regard to the requirements of immigration law as at the material time. The Authority is not competent to make such assessments without such expert evidence, as the requirements of New Zealand immigration law are complex and a separate specialist judicial body¹⁸ exists for adjudication on such matters.

¹⁸ The Immigration and Protection Tribunal

Remedies

[68] Having made the finding that Mr Khan suffered an unjustified disadvantage in his employment by the company failing to investigate his allegations of unwanted teasing by his co-workers, I must now consider what remedies he is due.

[69] Mr Khan has suffered no loss of earnings as a result of that failure and so the only remedy available to him would be a payment to him of compensation by the respondent, including compensation for humiliation, loss of dignity and injury to his feelings pursuant to s 123(1)(c)(i) of the Act. The Employment Court has made it clear that, in order for a successful applicant to be eligible to be awarded compensation under s 123(1)(c)(i), that applicant must lay an evidential foundation for an award in their favour¹⁹.

[70] Mr Khan's evidence on the effect on him of the company not investigating his concerns was not very detailed, although he said that he did suffer *mentally* and that he was disturbed thinking about it. However, he also said, effectively, that it was a good thing that his employment came to an end shortly afterwards so that the unwanted teasing was relatively short-lived.

[71] However, I accept that Mr Khan would have suffered some humiliation, loss of dignity and injury to his feelings by the company not taking any action to investigate his complaint and I believe that a just award of compensation is \$2,500.

[72] Pursuant to s 124 of the Act, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[73] The respondent gave no evidence at all to suggest that Mr Khan in any way contributed to the teasing that he suffered and Mr Khan said nothing to make me believe that he in any way contributed to the teasing. I therefore do not consider that it is necessary or appropriate to reduce the award of compensation.

¹⁹ *Scarborough v. Micron Security Products Ltd* [2014] NZEmpC 183

Orders

[74] I order that the respondent pay to Mr Khan the sum of \$2,500 by way of compensation pursuant to s 123(1)(c)(i) of the Act.

Costs

[75] I reserve costs. As Mr Khan was only partially successful in his claims, I appreciate that both parties may wish to ask for a contribution towards their costs. However, first, I direct that the parties seek to agree how costs are to be dealt with between them. If they are unable to reach agreement within 21 days of the date of this determination, either party seeking a contribution to their costs has a further 14 days within which to lodge and serve a memorandum explaining the basis on which they believe that contribution should be made, and setting out the costs incurred. Any party opposing that application has a further 14 days within which to lodge and serve a reply.

David Appleton
Member of the Employment Relations Authority