

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 129
5567998

BETWEEN PURE NEW ZEALAND FOODS
 LIMITED
 Applicant

AND DINESH SHARMA
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Ross Jamieson for Applicant
 Dinesh Sharma in person

Investigation Meeting: 12 October 2016

Submissions Received: On the day from Applicant and Respondent

Determination: 18 October 2016

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Pure New Zealand Foods Limited ("PNZFL" or "the company"), claims its former employee, Dinesh Sharma, breached his employment agreement by not giving the required period of notice before ending his employment on 10 July 2015. PNZFL claims Mr Sharma acted in bad faith towards it by leaving his employment in the manner he did without informing it of his intentions or plans.

[2] In the course of the investigation meeting PNZFL claimed two further breaches of good faith by Mr Sharma, one relating to an alleged misrepresentation on his curriculum vitae and the other relating to his alleged false claim regarding his ability to produce a specified number of naan and samosa in a nine to nine and a half

hour shift. I informed the company those matters would not be treated as separate breaches. However, evidence relating to those claims would be heard for the purpose of assisting the determination of credibility and good faith issues.

[3] PNZFL seeks penalties against Mr Sharma for the breach of his employment agreement and for acting in bad faith towards it. It asks the Authority to impose the maximum penalty available under the law.

[4] Mr Sharma, in his statement in reply, acknowledges he did not comply with the contractual notice period of his employment agreement. He says this is because he had obtained an offer of employment from a restaurant for which he wished to work.

[5] This entailed his applying for a transfer of his work visa from his current employer to the new employer. After obtaining the visa transfer he says he was told it would be unlawful for him to return to work for PNZFL. Mr Sharma denies acting in bad faith towards PNZFL.

Relevant facts

[6] PNZFL is a food manufacturing business located in Kilbirnie, Wellington. It manufactures various ethnic food items including frozen meals and naan bread. It employs a small number of workers, some of whom, including Mr Sharma, were recruited from India. Its products are supplied nationwide through supermarkets and other selected outlets.

[7] Mr Sharma was recruited to join PNZFL in mid-2014. On 20 August 2014 he signed an employment agreement with PNZFL containing terms and conditions that included the following *General Termination* clause:

*"The Employer may terminate this agreement for cause, by providing
15 working days notice in writing to the Employee.
Likewise the Employee is required to give 3 months notice of
resignation. The Employer may, at its discretion, pay remuneration
in lieu of some or all of this notice period."*

[8] On 10 July 2015 Mr Sharma took one day's sick leave from his employment. That evening he informed PNZFL he had been to the New Zealand Immigration Service (NZIS) and had his work permit transferred to another employer. He had obtained employment in a Wellington restaurant. He did not give notice in accordance with the provisions of his employment agreement.

[9] On 15 July PNZFL lodged its statement of problem in the Authority.

Issues

[10] The issues for the Authority to determine are:

- (1) Whether Mr Sharma breached his employment agreement with PNZFL; and, if so,
- (2) Whether a penalty is warranted.
- (3) Whether Mr Sharma acted in bad faith by leaving his employment without advising his employer; and, if so,
- (4) Whether a penalty should be imposed.

Legal considerations

[11] Section 133 of the Employment Relations Act 2000 (the Act) conveys jurisdiction on the Authority to deal with all actions for the recovery of penalties under the Act. Penalties may be imposed for any breach of an employment agreement or for the breach of any provision of the Act for which a penalty is provided.

[12] Section 4A provides for the imposition of a penalty on a party to an employment relationship for certain breaches of the duty of good faith. The situations relevant to the current matter apply where the failure was deliberate, serious and sustained or if it was intended to undermine an individual employment agreement or an employment relationship.

[13] The maximum penalty for an individual is \$10,000 and for a company or other corporation is \$20,000.¹

Did Mr Sharma breach his employment agreement?

[14] In his statement in reply Mr Sharma stated he felt he had let down his former employer but he had no choice in the matter due to NZIS rules. He acknowledged he had not given or worked out notice as required by the provisions of his employment

¹ Section 135 of the Act

agreement. He says he did not deliberately do so but was forced into that position by immigration rules.

[15] That is a matter to be considered in the context of whether a penalty should be imposed on Mr Sharma and does not impact on the issue of whether he did or did not breach his employment agreement.

[16] It is clear that Mr Sharma did not give three months' notice to PNZFL. As that was the amount of notice required under his employment agreement, I find he did breach his employment agreement.

Is a penalty warranted for Mr Sharma's breach of his employment agreement?

[17] The Employment Court in *Xu v McIntosh*² said:

A penalty is imposed for the purpose of punishment of a wrongdoing which will consist of breaching the Act or another Act or an employment agreement. Not all such breaches will be equally reprehensible. The first question ought to be, how much harm has the breach occasioned? How important is it to bring home to the party in default that such behaviour is unacceptable or to deter others from it?

[18] Surinder Sandhu, one of two Directors of PNZFL, seeks the imposition of a significant penalty on Mr Sharma. He says it is difficult to recruit skilled cooks for wholesale food production locally and this results in the company having to go through a long, time-consuming and expensive process to recruit them from overseas. During the process he says the company's contractual obligations to its supermarket customers means there is increased pressure on its other employees to keep up with the ongoing demand. Mr Sandhu said this was the reason for requiring three months' notice from the company's cooks.

[19] In its statement of problem, which was signed by Mr Sandhu five days after Mr Sharma's resignation, PNZFL appears to accept Mr Sharma's breach of his employment agreement was unintentional. It refers to Mr Sharma "*inadvertently*" breaching his employment agreement by not giving the required notice to end his employment. In written and oral evidence to the Authority more than a year later, however, the company resiled from that description and categorised Mr Sharma's breach as deliberate.

² [2004] 2 ERNZ 448 at 464

[20] Mr Jamieson submitted on behalf of PNZFL a substantial penalty should be imposed "*principally to deter further immigrants from cavalierly ignoring their agreed employment terms*". In his submission Mr Sharma's breach of his employment agreement was intentional and had been costly for his former employer. He said Mr Sharma had done nothing to avoid or mitigate the effects of his breach on PNZFL pursuant to s. 133A(e) of the Act.

[21] Mr Sharma said he had not wanted to breach his employer's trust or harm PNZFL in any way. He said what happened was by mistake as he did not have knowledge in advance of the effect the transfer of his work visa to another employer would have on his employment with PNZFL. He regretted letting his employer down and said that had not been his intention. He had thought he could change his work visa and then resign and work out his notice period for PNZFL. He had also believed his employer would agree to a lesser period of notice than the three months required by his employment agreement. Mr Sharma said he was new to the country and not familiar with immigration rules and his employer should have made him aware this was not possible.

[22] I accept Mr Sharma did not intend to resign without giving any notice to his employer and I also accept he did not know that once his visa had been changed he could not lawfully work for PNZFL, although I do not accept it was his employer's responsibility to inform him of this. However, Mr Sharma knew his notice period was three months and he did not intend to give that amount of notice. In his written evidence he referred to his intention to give one month's notice. He may have hoped his employer would agree to a lesser period of notice once he informed Mr Sandhu of his resignation but he was not entitled to rely on that occurring. It follows therefore that, regardless of his lack of knowledge of the effect of changing his work visa to another employer, Mr Sharma did not intend to comply with the three month notice period of his employment agreement.

[23] While that is a very long period of notice for a food preparation position, Mr Sharma acknowledged he was aware it was a term of his employment agreement and he had breached it. In his statement in reply he said he decided to give notice to his employer after his visa had been transferred to another employer, rather than before the transfer took place, because he had no guarantee the visa transfer would be granted.

[24] He referred to the risk he would have faced if he had given notice and then applied for a transfer of his work visa to his intended employer. If NZIS had rejected his request for a transfer, he would have lost his position with PNZFL and been unable to take up the offer of employment with his new employer. In that situation he would have been left without a work visa and may have had no option other than to leave New Zealand.

[25] Mr Sandhu and Mrs Namita Sandhu, who is the other director of PNZFL, gave evidence of the problems caused by Mr Sharma's abrupt departure and the company's requirement to continue to fulfil its contractual obligations to the supermarkets it supplied. Those obligations meant the existing staff had to carry the extra workload. Mrs Sandhu said the company had tried without success over the last year to recruit locally but had now applied to NZIS for an approval to recruit from overseas. She said in the meantime the work pressure had been split among the remaining cooks in the team. No evidence was provided of any adverse financial impact on the company.

[26] Mr Sharma's acknowledgment that he did not intend to give three months' notice supports PNZFL's request for the imposition of a penalty.

Did Mr Sharma act in bad faith?

[27] PNZFL says Mr Sharma was looking for alternative employment without giving any indication to his employer that he intended to leave. Mr Sandhu deposed he had explained in detail to Mr Sharma during the interview process the offer of employment made by the company. This included discussing the provisions of the employment agreement and in particular the long notice period. He said Mr Sharma assured him he understood all the contents of the agreement.

[28] Mr Sandhu says in or around July 2015 he met Mr Sharma over concerns that he might be struggling with his work and over his suspicion Mr Sharma might be looking for other employment. He said he took the opportunity to check with him if he had any such plans to end his employment with PNZFL. Mr Sandhu said he told Mr Sharma he was welcome to go if he wished to leave PNZFL but he must observe the appropriate provisions of his employment agreement. Mr Sandhu said he told Mr Sharma he should not behave rashly and make his life in New Zealand complicated for his future.

[29] It is Mr Sandhu's evidence that Mr Sharma assured him all was fine and he would speak with Mr Sandhu if he needed to. Mr Sharma did not attend work on Friday 10 July, informing his employer he was sick. Mr Sandhu said Mr Sharma told him that evening he had changed his work visa to a different employer. Mr Sandhu said he informed Mr Sharma he had failed to give PNZFL the required three months' notice and now his visa had been changed he would not be able to work out a notice period with the company.

[30] As noted earlier Mr Sharma's evidence is that he did not know before changing his visa he would be unable to work out his notice period with PNZFL. He said Mr Sandhu had not informed him about this and he did not believe he had done anything wrong. In Mr Sharma's view it was up to Mr Sandhu to make him aware he could not continue working for PNZFL after changing his visa. I have already found his employer did not have that responsibility.

[31] The requirements of good faith in an employment relationship apply to both employer and employee. Section 4 of the Act provides (in part) that parties to an employment relationship

- (a) must deal with each other in good faith; and
- (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything –
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.

[32] In this instance Mr Sharma was not frank with his employer about his intention to apply for employment better suited to his skills or preferences. However, I would be loath to find there was an obligation on him to inform his employer he was looking at work opportunities elsewhere. That would be stretching the good faith obligation to be "*active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*"³ too far in this instance.

[33] There is no doubt that, once Mr Sharma accepted alternative employment and resigned there was an obligation on him to abide by his contractual notice period.

³ Section 4 (1A)(b) of the Act

[34] PNZFL's position is that Mr Sharma knew of the three month notice period as Mr Sandhu had explained it to him in the interview process and Mr Sharma had acknowledged when signing his employment agreement he had had the opportunity, and reasonable time, to take legal advice on it. Mr Sharma denied Mr Sandhu had brought the three month notice period to his attention in the interview process but acknowledged that a third party who had assisted him through the process had informed him of the provision.

[35] Mr Sharma signed the employment agreement on 8 August 2014. At that time he was still residing in India. In signing it, he acknowledged he had been advised of his right to take independent advice on the agreement and had been allowed reasonable time to do so. However, Mr Sharma did not arrive in New Zealand until late January 2015 to commence his employment with PNZFL. I am sceptical that he had a genuine opportunity to take legal advice on a New Zealand employment agreement while living in India although he was made aware of its content by the third party. The opportunity for advice on the content was more apparent than actual. When questioned about this Mrs Sandhu, whose duties with the company include administration and human resources, said she did not expect Mr Sharma to cross reference his employment agreement to New Zealand law. Her expectation was that he would receive advice about his obligations under the agreement and the attached Job Description. I find that response reflects a lack of appreciation on the part of PNZFL of the mutual nature of good faith obligations under the Act.

[36] It is likely Mr Sharma had no way of knowing whether the provisions of the employment agreement he had been offered were standard, or even lawful, in New Zealand. He would not have known the problematic nature of some of the clauses, for example a *Breach of Agreement* provision. This specifies it would be considered a breach of the employment agreement for an employee to leave their employment within 36 months where the employee had obtained a work permit through the employer's support to travel to New Zealand to take up their job offer. The agreement provides the employer would charge the employee \$1,000 in that situation. Mrs Sandhu explained that provision had been included in employment agreements on the advice of an immigration consultant but the company had never applied it.

[37] While the inclusion of such provisions in his employment agreement does not justify a lack of communication from Mr Sharma to his employer after he had

accepted an alternative work offer, it may explain his reluctance to confide his intentions.

[38] I alerted PNZFL to my concerns over some of the provisions of the employment agreement in the course of the investigation meeting and suggested it have the document reviewed by someone well versed in employment law to ensure compliance with New Zealand statutory requirements.

[39] I find Mr Sharma's behaviour in using sick leave to arrange a transfer of his work visa to a new employer did not demonstrate good faith to his employer. His action was deliberate and was viewed adversely by PNZFL. In answer to questioning about why he had taken sick leave for that purpose Mr Sharma expressed fear of the action Mr Sandhu could have taken if he had been more forthcoming about his intentions. He believed that if he had told Mr Sandhu why he needed leave that day, which would entail telling him of his intention to resign, his employer could have had his work visa cancelled. While I have no evidence PNZFL would have taken such action, I accept this was a genuine concern of Mr Sharma's at the time.

[40] Mr Sharma's action of misleading his employer about the reason for taking sick leave on 10 July 2015 does not, on its own, merit a penalty under s. 4A. It was a single action rather than a sustained failure and in my view it was not intended to undermine Mr Sharma's employment relationship or employment agreement.

[41] PNZFL raised an issue regarding Mr Sharma's curriculum vitae (CV) which, in its view, demonstrated bad faith on his part. During the Authority's investigation Mr Sandhu produced the CV Mr Sharma had submitted when he applied for the position with PNZFL. He said Mr Sharma had misrepresented his qualifications by not disclosing he had a university degree or that he had completed an apprenticeship. That information came to light when Mr Sharma asked his employer to assist him to renew his passport.

[42] Mr Sharma denies deliberately misleading PNZFL about his qualifications. He explained he had provided his full CV to a third party in India through whom he had been advised to receive and submit documentation about the role. The third party had put forward a (shortened) version of his CV that was appropriate to the requirements of the PNZFL role. When cross examined about his university degree, Mr Sharma disclosed his subjects were Hindi, English, Political Science and History.

He had completed the degree by distance learning at the same time as undertaking his cooking apprenticeship.

[43] Mr Sandhu conducted at least one interview by Skype with Mr Sharma before offering him the position. He could easily have questioned him about his educational qualifications and experience. Mr Sandhu did not suggest Mr Sharma had misled him in the Skype interview process in relation to those matters: the concern he expressed was over the omission of qualifications from his CV. I am not convinced by the evidence there was any intent on Mr Sharma's part to mislead or deceive PNZFL. In any event, there was no evidence PNZFL had raised this as an issue at the time it became aware Mr Sharma was more qualified than it had originally believed.

[44] As further evidence of Mr Sharma's bad faith towards PNZFL, Mr Sandhu raised the matter of Mr Sharma's failure to meet his production targets. The Job Description attached to his employment agreement contained as one of the *Key Tasks* of the position the production of a minimum of 600 naans per shift. The *Performance Standard* section of the Job Description specified that "(a)ny non-compliance may be subject to immediate action (written notice or dismissal)". Mr Sandhu claims Mr Sharma struggled to reach his targets.

[45] I am not persuaded by this evidence, particularly as one of the other PNZFL cooks who gave evidence on behalf of the company stated in answer to a question that Mr Sharma did meet his targets. At best the evidence was mixed. I note also Mr Sharma worked for PNZFL for approximately six months and the adjustment to a new country, new working conditions and equipment may well have required a period of settling in and adaptation. There was no evidence Mr Sharma had been subjected to any disciplinary action in relation to his alleged failure.

[46] In summary I find Mr Sharma breached his duty of good faith to PNZFL by his use of sick leave on 10 July for the purpose of visiting NZIS to change his work visa. That breach was deliberate and, arguably, serious. However, it was a single action rather than a sustained failure to comply with his obligations of good faith. I do not believe it was intended to undermine either Mr Sharma's employment agreement or his employment relationship with PNZFL. It therefore does not warrant a penalty in terms of s. 4A of the Act.

Determination

[47] Mr Sharma breached his employment agreement in failing to provide his employer with the three month contractual notice period he was required to give. The breach was in part deliberate and in part inadvertent. It was deliberate in that Mr Sharma had no intention of providing three months' notice. It was inadvertent in that he had intended to provide notice to his employer, albeit a lesser period of notice to which he hoped to gain his employer's agreement, but was prevented from giving any notice once he had changed his work visa to a new employer.

[48] While Mr Sharma exercised poor judgement in using his sick leave for a purpose other than illness, his failure to comply with his duty of good faith in that instance did not incur liability for a penalty under s. 4A of the Act for the reasons given above.

[49] In the circumstances I consider a penalty of \$750 for the breach of his employment agreement to be appropriate. Mr Sharma is ordered to pay that amount to the Crown Account, through the Employment Relations Authority.

Costs

[50] It was submitted PNZFL had incurred representation costs of \$2,000 and it has asked the Authority to award that amount. The company was partially successful in its claims and is entitled to a contribution to its costs. It was not fully successful and I find an award of \$750 to be reasonable in the circumstances. Accordingly I order Mr Sharma to pay costs in that amount to Pure New Zealand Foods Limited.

Trish MacKinnon
Member of the Employment Relations Authority