



- C. The Respondent is ordered to pay the Applicant:**
- (a) \$10.00 wage arrears;**
  - (b) Lost remuneration from 28 April to 24 September 2011;**
  - (c) \$10,000 distress compensation.**
- D. The Respondent breached its good faith obligations under s.4(1A) of the Employment Relations Act 2000 (“the Act”).**

### **Employment relationship problem**

- [1] The Applicant pursued the following claims;
- a. Personal grievance for unjustified dismissal arising from his summary dismissal on 28 April 2011;
  - b. Breach of contract claim arising from;
    - i. The Respondent’s alleged failure to comply with the termination provisions in clause 9 of his IEA; and
    - ii. The Respondent’s alleged unilateral variation to his hourly rate for various hours worked over the pay periods ending 8 October to 21 November 2010;
  - c. Wage arrears claim of \$1,257;
  - d. Alleged breach of statutory good faith obligations in s.4(1A)(b)<sup>1</sup> and (c)(i)(ii)<sup>2</sup> of the Act;
  - e. Penalties against the Respondent for;
    - i. Alleged breaches of his IEA; and
    - ii. Alleged breaches of s4(1A) good faith obligations under the Act.

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<sup>1</sup> Obligation to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative.

<sup>2</sup> Obligation to provide access to information relevant to the continuation of an employee’s employment and an opportunity to comment on it.

[2] The Applicant claimed:

- a. 38 weeks' lost remuneration;<sup>3</sup>
- b. Loss of a benefit, being the ability to continue working in New Zealand.<sup>4</sup> This was sought in the alternative should 38 weeks' lost remuneration not be awarded;
- c. \$12,000 distress compensation;
- d. \$1,275 wage arrears;
- e. \$1,873 out of pocket expenses;
- f. Penalty under s4A for breaches of s4(1A) of the Act;
- g. Penalty under s.133 of the Act for breaches of the IEA;
- h. That any penalties imposed against the Respondent be paid to him personally;
- i. Interest pursuant to clause 11 of Schedule 2 of the Act;
- j. Legal costs.

[3] The Respondent said it summarily dismissed the Applicant because Ms Ngarei Reid (the Respondent's sole director) was told by an Immigration New Zealand ("INZ") on 28 April 2011 that the Applicant was not legally entitled to work for it.

[4] The Respondent said it acted on the basis that the INZ information was correct so it immediately terminated the Applicant's employment via a letter which was couriered to him just before close of business on 28 April 2011.

[5] The Respondent stated it had to end the Applicant's employment so quickly to avoid committing an offence under the Immigration Act 2009 ("IA") by continuing to employ a person who was not legally entitled to work for it.

[6] The Respondent admitted it did not:

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<sup>3</sup> This claim was never quantified.

<sup>4</sup> This lower level work was different from what they had been employed to do so it was outside of their normal duties.

- a. engage in or undertake any process before dismissing the Applicant;
- b. conduct any investigation into the Applicant's ability or otherwise to legally continue working for it;
- c. inform the Applicant about the information it had received from INZ;
- d. provide the Applicant with any relevant information;
- e. give the Applicant any opportunity to comment on any of the information it believed was adverse to his employment continuing.

[7] As it turned out, the parties and INZ all agree that the information given to Ms Reid by the INZ call centre employee on the morning of 28 April 2011 was incorrect. The Applicant was legally entitled to work for the Respondent at the time he was summarily dismissed. The Respondent would not have been committing an offence under the IA had it not terminated his employment on 28 April 2011.

[8] The Respondent argued that it should not have been required to comply with either the s.4(1A) good faith obligations or any of the s103A(3) procedural fairness requirements in the Act because it said to do so would have resulted in it committing an offence under the IA.

[9] The Respondent said that the breach of contract claim was in effect "*a double up in order to punish the Respondent for the same event, which was to rely on information provided by INZ and act on it.*"

[10] The Respondent said that during the recession the work it had available for its employees to do reduced. Because the Applicant was not guaranteed a minimum number of hours work each week his actual hours of work, and therefore pay, also decreased as a result of the recession. The Respondent said that in order to keep key staff working it offered them additional lower level work<sup>5</sup> which was paid at the lower hourly rates applicable to those low level tasks.

[11] The Respondent said that, apart from the first occasion, whenever the Applicant was offered lower level work<sup>6</sup> he was told it would be paid at the lower

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<sup>5</sup> This lower level work was different from what they had been employed to do so it was outside of their normal duties.

<sup>6</sup> Such as basic administration or data entry work.

hourly rate associated with those basic tasks, not at his contractual hourly rate. The Respondent said the Applicant had the chance to decline any offers of extra work outside of his normal duties if he was not satisfied with the reduced hourly rate that had been offered. It said the Applicant could not now claim that the reduced hourly rate offered for lower level work amounted to wage arrears.

[12] The Respondent acknowledged that the first time the Applicant was offered lower level work he was not told in advance of him accepting the offer of extra hours that he would be paid \$13.75 per hour for the hours worked instead of his normal contractual rate \$21.75 per hour. It says the Applicant only worked 1.25 hours during the pay period ending 8 October 2010 at the reduced rate of \$13.75 per hour. It said that if there was a wage arrears claim it was limited to this first occasion only.

[13] The Respondent stated this was not an appropriate case for penalties because there had been “*no purposeful breach of either the Applicant’s employment agreement or the good faith provisions in the Act*”. The Respondent submitted the evidence disclosed it “*was acting with a good motive*”.

### **Dismissal letter**

[14] Just before close of business on 28 April 2011, and whilst the Applicant was absent from work on certified sick leave, he received a couriered letter from the Respondent, which had been signed by Ms Reid. This stated:

*“As of 23 March 2011, your employment with Reid Research Services Ltd, was no longer lawful, so your employment with the company has ceased effective from that date.*

*Any outstanding holiday pay will be credited to your bank account.”*

[15] This letter summarily dismissed the Applicant because it terminated his employment without notice.

### **Relevant legislation**

[16] The issue to be determined is whether summary dismissal was justified in all the circumstances.

[17] Justification is to be assessed in light of the s103A justification test in the Act as it applied post 1 April 2011. The factors set out in s103A(3) are mandatory in that

they must be considered by the Authority when it is assessing justification. I do not accept Mr Harrison's submission that they did not or should not apply in this case.

[18] Another element for the Authority to consider when assessing justification is compliance or otherwise with statutory good faith obligations, because a fair and reasonable employer is likely to comply with its statutory obligations.

[19] I reject Mr Harrison's submission that the statutory good faith obligations in s.4(1A) of the Act do not and should not apply to this matter.

[20] I consider that the obligation on an employer to provide an employee with information relevant to a decision that may adversely affect their continuing employment and to give that employee an opportunity to comment on relevant information aims to avoid the very situation which has occurred here where the employer has acted on incorrect information that the employee, had he known about it, could have been corrected.

### **Immigration Act**

[21] Section 350 of the IA relates to offences by an employer. It states:

*“(1) Every employer commits an offence against this Act who –*

- (a) allows or continues to allow any person to work in that employer's service, knowing that the person is not legally entitled under this Act to do that work; or*
- (b) allows a person who is not entitled under this Act to work in the employer's service to do that work.*

*[...]*

*(6) For the purposes of this section, an employer is treated as knowing that an employee is not entitled under this Act to do any particular work, if at any time in the preceding 12 months (whether before or after the commencement of this section), the employer has been informed of that fact in writing by an immigration officer.*

*(7) No employer is liable for an offence against this section in respect of any period during which the employer continues to allow any person to*

*work in the employer's service in compliance with the minimum requirements of any employment agreement (within the meaning of the Employment Relations Act 2000) relating to the giving of notice on termination of employment."*

[22] The relevant points from s350 include;

- a. An employer is deemed to have knowledge that an employee is not legally entitled to work if they have been informed of that in writing by an Immigration Officer (not verbally by a call centre employee);
- b. An employer does not commit an offence by allowing an employee to work out their contractual notice.

### **Immigration history**

[23] The Applicant was born in South Africa so he requires a work visa<sup>7</sup> in order to legally work in New Zealand. His background is mainly in IT, customer service, sales, marketing and logistics.

[24] The Applicant first came to New Zealand in 2001. He was granted a work visa which permitted him to live in New Zealand and to work for Star Service Stations New Zealand Limited from 2001 to 2003.

[25] When this first work visa expired in 2003 the Applicant moved to Holland, where he worked from 2003 to 2007.

[26] In early 2007 the Applicant applied for and was granted a working holidaymaker visa for New Zealand which allowed him to work. The Applicant then moved back to New Zealand in 2007 and obtained work with Consumer Link. The Applicant left this job to take up an offer of employment from TNS-Direct.

[27] When the Applicant's holidaymaker visa was due to expire around March 2008, TNS-Direct assisted him to obtain a work visa. This new work visa was issued on 23 April 2008 for employment with TNS-Direct as a CATI Field Manager and was due to have expired in March 2009.

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<sup>7</sup> The current term is work visa, but it was previously referred to as a "work permit".

[28] In late 2008 TNS-Direct closed its New Zealand operations and all staff were made redundant. A colleague recommended the Applicant to Ms Reid and she offered him a position as a Field Manager with the Respondent. Based on this offer of suitable employment from a New Zealand employer, the Applicant applied for and was granted a change of his work visa conditions to permit him to work for the Respondent.

[29] The Applicant commenced full time employment with the Respondent in December 2008. On 24 February 2009 the Applicant applied for and was granted an extension of his work visa to allow him to continue working in the same position for the Respondent until 23 March 2011.

[30] On 16 March 2011 the Applicant applied to INZ for an extension of his work visa. His application was supported by the Respondent. Ms Reid signed a “*Work Visa – Employer Supplementary Form*” on 15 March 2011. Ms Reid recorded on this form that the Applicant was “*a current employee and we wish to continue his employment.*”

[31] On 28 March 2011 INZ automatically granted the Applicant an interim work visa which allowed him to maintain his lawful status, and to continue the same work conditions for his same employer in New Zealand whilst his work visa application was being processed.

[32] The interim visa was valid from the day after his work visa expired<sup>8</sup> until a decision was made on his work visa application or for up to a maximum of six months<sup>9</sup> (which ever was earlier).

[33] The interim visa was electronic so it did not appear in the Applicant’s passport, which was being held by INZ pending its decision on his work visa application.

[34] The interim visa expired if the Applicant left New Zealand which meant he was unable to re-enter New Zealand on his interim visa if he left the country.

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<sup>8</sup> i.e. 24 April 2011

<sup>9</sup> i.e. 24 September 2011

**May 2011 travel**

[35] In September/October 2010 the Applicant applied for annual leave from 21 March to 23 May 2011 to travel to South Africa to see family and to attend his brother's wedding and grandmother's 90<sup>th</sup> birthday.

[36] Although his leave request was initially approved, the following day Ms Reid told the Applicant it was inconvenient for him to take his scheduled annual leave because another employee was due to have a baby around that time, so would be away from work on parental leave over the same period. Ms Reid said that if both employees were away at the same time the business would not have the resources it needed to continue operating.

[37] As a result of Ms Reid's concerns, the parties agreed that the Applicant would travel to South Africa over the Christmas period<sup>10</sup> to see family and from 5 – 15 May 2011<sup>11</sup> so that he could attend his brother's wedding on 7 May 2011.

**Relevance of travel arrangements**

[38] The Respondent alleged that the Applicant failed to disclose he had been granted an interim visa which did not permit him to re-enter New Zealand if he left the country so as not to jeopardise his trip.

[39] I do not accept that proposition. I make the following factual findings;

- a. The Applicant had disclosed his interim visa to the Respondent by 27 April 2011;
- b. INZ was fully aware of the Applicant's travel plans;
- c. INZ had indicated to the Applicant that it was working to assist him to be able to travel as planned so the Applicant was unlikely to have believed his trip was in jeopardy;
- d. The Applicant was primarily trying to get his work visa application dealt with by INZ before he was scheduled to depart on 5 May 2011 because he could leave and re-enter the country on a work visa;

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<sup>10</sup> 14 December 2010 to 2 February 2011.

<sup>11</sup> Returning to work on Monday 16 May 2011.

- e. If that was unsuccessful, INZ had indicated that another option would be for it to issue him with a temporary work visa for the period he was away, so he could leave and re-enter New Zealand. His actual work visa application would then be processed in the usual way;
- f. The Applicant did not conceal information from the Respondent;
- g. The Respondent did not make it clear to the Applicant what immigration related information it required, why it was needed, or the date by which he had to provide it. If it had, I consider it likely the Applicant would have fully complied with any such request because he was highly motivated to retain his employment.

### **Effect of dismissal on immigration status and travel**

[40] The Applicant advised INZ on 29 April 2011 that he had been dismissed from his employment with the Respondent and that he would be challenging his dismissal.

[41] Because the Applicant's work visa application was based on his employment with the Respondent, the loss of his job meant he no longer met the necessary criteria which had entitled him to apply for a work visa, so his work visa application was declined.<sup>12</sup>

[42] The Applicant's interim visa was valid pending the outcome of his work visa application, so once that was declined his interim visa was automatically withdrawn.

[43] This required the Applicant to apply for a visitor visa to enable him to lawfully remain in New Zealand pending the resolution of his employment issues.

[44] Ms Reid unilaterally cancelled the Applicant's May 2011 flights to South Africa. Ms Reid said she cancelled the Applicant's tickets because she believed he would not be able to travel on his interim visa<sup>13</sup> and she wanted to ensure the

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<sup>12</sup> Formal confirmation from INZ was provided to the Applicant on 2 May 2011.

<sup>13</sup> As it turned out the Applicant's interim visa had been withdrawn as soon as his work visa application was declined. Ms Reid was not aware the Applicant had moved to a visitor visa or what that meant for his travel plans.

Respondent would get at least some of its money back which she was worried may not happen if the Applicant did not in fact travel as planned.<sup>14</sup>

[45] As a result of losing his job the Applicant also missed his planned May trip to South Africa and therefore his brother's wedding.

## **IEA**

[46] The parties entered into an IEA dated 8 December 2008.<sup>15</sup> Clause 9 dealt with termination and it stated:

- “9.1 Employment shall be terminated by either party giving six weeks’ notice, with wages being paid up to the date of termination only.*
- 9.2 In instances of serious neglect of duty, misconduct, or disobedience, the employer may terminate the agreement without notice.*
- 9.3 The employer shall observe the rules of procedural fairness which apply to termination of employment.*
- 9.4 [...]”*

## **Respondent's requests for visa information**

[47] On 8 March 2011 Ms Patricia Williams, the Respondent's Business Manager, emailed the Applicant asking for a copy of his new work visa. The Applicant raised concern about this request with Ms Reid, who said she told Ms Williams not to worry about it at that stage because the Applicant's work visa application had only just been submitted.<sup>16</sup>

[48] On 21 April 2011, the Respondent emailed the Applicant asking for a copy of his work visa. The Applicant was on certified sick leave at the time so said he did not open the email, and was therefore unaware of that request. I accept that evidence. I do not accept the Respondent's suggestion that the Applicant deliberately ignored its request because he had no reason to have done so.

[49] The Applicant telephoned the Respondent on 27 April 2011 asking for a copy of his job description so he could send it to INZ. Ms Williams said she attempted to

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<sup>14</sup> The Respondent had agreed to pay for the Applicants' flights for the May trip and consideration of him changing his leave arrangements to accommodate its business needs.

<sup>15</sup> The Applicant was not provided with set days or hours of work, he just had to complete the work which had been assigned to him.

<sup>16</sup> This was urgent because of his impending planned travel.

get information from the Applicant about his visa status, without success. The Applicant explained that his mobile was about to run out of credit so he had wanted to use the limited time left to ask the Respondent to provide the information INZ required to enable it to process his work visa application.<sup>17</sup>

[50] Ms Reid's evidence was that the Applicant had told Ms Williams he had an interim visa but could not provide a copy of it because INZ had his passport. I accept his evidence about that because the transcripts of the INZ calls with Ms Williams and Ms Reid demonstrate they both knew the Applicant was on an interim visa. I consider it likely their knowledge about that came from the Applicant.

[51] Ms Williams phoned INZ on 27 April 2011 to find out more about the Applicant's immigration status. She was originally told by INZ that Caltex and not the Respondent had been listed as the Applicant's employer, so no information could be released to her.

[52] However, despite that advice the INZ call centre employee then went on to give Ms Williams a lot of information about the Applicant's immigration status. INZ confirmed that the Applicant has been granted an interim visa on 28 March 2011 which was valid for six months and which meant he was legally entitled to work.

[53] INZ also told Ms Williams that it had received the Applicant's work visa application on 16 March 2011, that it would take 60 days to process, and that it was awaiting information about his application from its medical assessors.

[54] Ms Williams specifically asked "*Ok, so he has got an interim work visa?*" and was told by INZ "*Yip, he's got an interim work visa to allow him to stay lawfully in New Zealand, with the conditions that he is eligible to work.*" Ms Williams then asked "*Ok, so he's got to be able to work to be able to stay?*" and INZ replied "*That's correct*".

[55] I find the information from INZ put the Respondent on notice that the Applicant was legally entitled to continue working for it.

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<sup>17</sup> This was urgent because of his impending planned travel.

### Ms Reid's telephone call with INZ

[56] Ms Williams and Ms Reid said they then reviewed the INZ website and discovered the Applicant was not permitted to travel overseas on an interim visa. That caused Ms Reid concern about the Applicant's impending departure to South Africa on 5 May 2011, so she called INZ around 11am on 28 April 2011 to discuss her concerns.

[57] When Ms Reid spoke to the call centre employee she asked for clarification of the Applicant's visa status. Ms Reid stated the Applicant had informed them he had an interim visa but that INZ had his passport. She said she was concerned because although she had been told by the Applicant that he had an interim visa, the Respondent did not have a copy of it.

[58] Ms Reid wanted to know what the Respondent's position was in terms of continuing to employ the Applicant. Ms Reid was told "*Well technically, he shouldn't be working at all, because from what I can see here he has applied for an extension but its under a different employer [...] it's not with your company.*" When Ms Reid asked who it was with she was told "*I think it's Caltex [...] It's a different employer. So technically he shouldn't be working for you at all because he has changed employer.*"

[59] Given the serious ramifications of this discussion, I have set out the key parts of the INZ transcript in full (my emphasis has been added):

(NR = Ngaire Reed and MT = INZ call centre employee)

*NR So, does he have a work visa now?*

*MT No, he has the interim.*

*NR And the interim is working for Caltex?*

*MT The interim, and let me just double check, the interim should be a visa interim because he has changed employer.*

*NR He has changed employer?*

*MT Yes.*

*NR When did he do that? Yeh I don't know –*

*MT Yeh, we don't know, he's just put in the application in March with, for a new employer. I don't know whether he's*

*changed, physically changed, or not. I can't give you that specific date.*

NR *Okay. See, I don't know anything about this, I don't know that he's leaving.*

MT ***Yeh, its something that you need to discuss with, with Nicholas about I'm afraid.***

NR ***So what do I do?***

MT ***Well you need to speak with Nicholas –***

NR *He won't speak. He won't speak.*

MT *- about what to do, well, yeh I can't give you much more information because he's lodged an application under a different employer –*

NR *Yeh.*

MT *So you no longer have that authorisation to –*

NR *To employ him?*

MT *- to get info, yeh, or employ him at all.*

NR *So I had, so I'm just writing this down, so I have no authorisation to employ him?*

MT *Well you have no authorisation to get information about his current application.*

NR *Okay. So. Am I, if he wants to come to work tomorrow here, am I able to give him work?*

MT ***Well you'll be breaking the law because he doesn't have a current work visa. And the interim doesn't allow him to work for you because he's changed employer, okay so technically, technically he doesn't, he cannot work basically.***

NR *Okay. All right. So. I'd be breaking the law to have him back in here.*

MT *Yeh, not if he doesn't have the visa to work for you –*

NR *And he doesn't.*

MT *Which he doesn't, no.*

[...]"

[60] The two key points to note from this transcript are that the call centre employee told Ms Reid;

- a. She needed to speak to the Applicant about his change of employer;  
and
- b. His interim visa did not allow him to work for the Respondent because he had changed employer.

[61] Ms Reid did not communicate with the Applicant. She should have done so in order to find out if he had changed employer, and if so when that had occurred given the work visa application she signed on 15 March 2011 had named the Respondent as the employer. If the Applicant denied changing employer then Ms Reid should have ascertained why INZ believed he had.

[62] Such inquiries were not onerous and did not necessitate much time or resource. Ms Reid could have called the Applicant to obtain this information. If she had done so the INZ error was likely to have been discovered, and corrected. Instead of making any inquiries Ms Reid proceeded to summarily dismiss the Applicant.

### **INZ information**

[63] Mr Kevin Cameron, INZ's Branch Manager of the Auckland Central Branch Immigration Group Visa Services, reviewed INZ's involvement in this matter and advised that the information it had conveyed to Ms Reid was incorrect. In particular Mr Campbell advised;

- a. The Applicant had not named Caltex as his employer on his work visa application;
- b. The Respondent had been named as the Applicant's employer, as per the application Ms Reid had signed on 15 March 11;
- c. The Applicant had never applied for a work visa with Caltex;
- d. The Applicant had never advised INZ that he had changed employer;
- e. The Applicant's work visa application was for continued employment with the Respondent;

- f. INZ had incorrectly recorded information about Caltex on its computer system<sup>18</sup>;
- g. The Applicant had been granted an interim visa to continue working for the Respondent whilst his work visa application was processed;
- h. The interim visa did not relate to Caltex;
- i. The Applicant would not have been granted an interim visa if he had changed employer because an interim visa only allows an employee to continue work with their current employer. If the Applicant had changed employer then he would have been issued with a visitor visa pending the outcome of any work visa application involving a new employer;
- j. The Applicant's work visa expired on 23 March 2011;
- k. The Applicant's application for a new work visa which named the Respondent as the employer was filed on 16 March 2011. That automatically triggered an interim visa to allow him to continue working with the Respondent whilst his work visa application was processed<sup>19</sup>;
- l. The interim visa was not stamped in the Applicant's passport because INZ was holding that pending the outcome of his work visa application;
- m. The Applicant was informed of the interim visa by email and by post on 28 April 2011;
- n. The Applicant's work visa application was linked only to his employment with the Respondent so his dismissal left him with no permission to work elsewhere for a different employer;
- o. The outcome of the Applicant's application for a new work visa was not guaranteed as it fell to be considered against the current work visa policy at the time it was assessed by INZ;

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<sup>18</sup>

This was a data entry error by INZ which incorrectly recorded Caltex as the employer.

<sup>19</sup>

An interim visa is automatically generated by INZ, an employee does not apply for it.

- p. INZ did not have sufficient information about the nature of the Applicant's employment to enable it to assess the likely outcome of his work visa application. It would have had to have obtained further information from both the Applicant and Respondent before it could have formed a view on the likely outcome. This was an issue that INZ would had to have fully and properly investigated before it made a decision on the work visa application. That did not occur because of the Applicant's dismissal;
- q. The additional medical information INZ had required from the Applicant would not have adversely affected the outcome of his work visa application;
- r. The Applicant was never told by INZ that it had advised Ms Reid that he was not legally entitled to continue working for the Respondent;
- s. When the Applicant called INZ on 29 April 2011 it did not tell him that;
  - i. INZ had spoken to Ms Reid about his visa issues the previous day;
  - ii. Ms Reid had been told he had changed employer, so as far as INZ was concerned Caltex was his employer;
  - iii. Ms Reid had been told the Applicant had applied for a work visa for Caltex and not the Respondent;
  - iv. Ms Reid had been told that the Applicant's interim visa and therefore the right to continue working pending the outcome of his work visa applied to employment with Caltex only, not to employment with the Respondent.

[64] INZ and both parties agree that at the time of his dismissal, the Applicant was legally entitled to continue working for the Respondent.

**Background to dismissal**

[65] The Applicant had a run-in with Ms Reid over a work issue on 11 April 2011. That resulted in Ms Reid sending him an email on 13 April 2011 recording her concerns about his behaviour. This incident together with other prior workplace issues distressed the Applicant to the extent that he became too ill to work. He was sent home by his manager, who told him he needed to see a doctor.

[66] The Applicant sought medical assistance from his GP who placed him on certified sick leave from 14 April 2011 until 5 May 2011, the date he was due to fly to South Africa.

[67] On 18 April 2011 the Applicant's manager turned up at his home unannounced. The Applicant gave her his medical certificate so the Respondent was aware he would not be back at work before 16 May 2011. The Applicant also told his manager "*off the record*" that he attributed his ill health to stress arising from what he described as Ms Reid's "*abuse*" against him.

[68] When he received the dismissal letter the Applicant believed his manager must have conveyed his adverse comments about Ms Reid to her, which had then caused her to end his employment, using the visa issue as an excuse to get rid of him.

[69] The Applicant's view about that was supported by his telephone call to INZ on 29 April 2011 which confirmed that as at 28 April 2011 he was in fact legally entitled to continue working for the Respondent. The Applicant did not think at any point that Ms Reid genuinely believed he was not legally entitled to work for the Respondent.

[70] I consider the Applicant's view of the Respondent's lack of bona fides over his work visa status was reasonable in the circumstances because;

- a. The Respondent had supported his work visa application as his employer. The application could not have proceeded without the Respondent's support;
- b. Ms Reid had signed the work visa application which clearly named the Respondent as the employer just 12 days earlier;
- c. He had a number of run ins with Ms Reid;

- d. He had specifically told the Respondent he had an interim visa which allowed him to continue working for it pending the outcome of his work visa application;
- e. The Respondent had never notified him that it believed he was no longer legally entitled to work for it.

### **Justification test**

[71] Justification falls to be determined in light of the s.103A justification test in the Act, as it applied from 1 April 2011.

[72] Section 103A of the Act states:

- (1) *For the purposes of s.103(1)(a) ... the question of whether a 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*
  - (d) *whether the employer generally 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.*

[73] Justification must still be objectively assessed, having regard to the employer's actions and how it acted, taking into account the specific factors listed in s.103A(3) of the Act together with other relevant matters, such as statutory good faith requirements. The Respondent must establish that summary dismissal was a decision that a fair and reasonable employer could have made in all of the circumstances as they existed on 28 April 2011.

[74] I do not accept Mr Harrison's submission that the s.103A (3) factors identified in the Act have effectively been trumped by the IA. I find that the s.103A (3) factors "must" be considered by the Authority, so therefore are mandatory. Even if I am wrong about that, I find that the circumstances of this case did not justify any departure from basic procedural fairness and natural justice requirements.

### ***Section 103A(3) factors***

*Section 103A(3)(a) – did the Respondent sufficiently investigate before dismissing the Applicant?*

[75] The Respondent did nothing to investigate the information it had received from the INZ call centre employee. I find it did not sufficiently investigate its concern before dismissing the Applicant.

[76] I consider a fair and reasonable employer in the respondent's position could only have reasonably concluded that INZ's information was reliable after making reasonable inquiries with the Applicant to establish the accuracy or otherwise of the information it had been given.

[77] INZ's reference to Caltex was the first red flag. INZ's suggestion that the Applicant had changed employer contradicted the Applicant's actions in providing a medical certificate regarding his absence from work. Ms Reid had seen and signed the work visa application 12 days earlier, which she knew had recorded the Respondent as the employer, so she must have known that was at odds with INZ's information that Caltex had been named in the work visa application as the employer.

[78] The Applicant had advised the Respondent that he had an interim visa that allowed him to continue working for it. That was confirmed by INZ to Ms Williams on 27 April 2011. The INZ information given to Ms Reid appeared to contradict what Ms Williams had been told by a different call centre employee the previous day, so it warranted further investigation.

[79] INZ specifically told Ms Reid to speak to the Applicant, but she made no attempt to do so. He was therefore unaware his ongoing employment was in jeopardy or the reasons for that. I do not accept Ms Reid's view that there was no point in her attempting to contact the Applicant because he was being non-communicative. I consider her view about that was not supported by credible evidence and was one which a fair and reasonable employer could not have arrived at in all the circumstances.

[80] Although the Applicant was on sick leave he had at least one and possibly two telephone conversations with the Respondent over that period. His manager had also visited him at home. He had been receptive to that and had clearly engaged with her on 18 April 2011 so there was nothing to suggest he would not have done so again. The Applicant also knew the Respondent had paid for his airfares to South Africa for his brother's wedding so I consider he would have been highly motivated to engage with the Respondent over anything that may have put that trip in jeopardy, regardless of the fact that he was unwell.

[81] The Respondent did not seek written confirmation of the information provided by the call centre worker nor did it attempt to ascertain what that view had been based on.

[82] I find that the Respondent had sufficient time and resources available to enable it to make inquiries with the Applicant and to seek formal advice from INZ regarding the Applicant's legal ability to continue working for it and that it should have done so.

*Section 103A(3)(b) – did the Respondent raise its concerns with the Applicant before dismissing him?*

[83] The Respondent did not raise its concerns with the Applicant before it dismissed him.

*Section 103A(3)(c) – was the Applicant given a reasonable opportunity to respond to the Respondent’s concerns before dismissal?*

[84] The Applicant had no opportunity to respond to the Respondent’s concern that it would be committing an offence under the IA if it continued to employ him after 28 April 2011.

*Section 103A(3)(d) – was the Applicant’s explanation considered before dismissal?*

[85] The Applicant had no opportunity to provide any explanation or information in response to the Respondent’s concerns before he was summarily dismissed.

***Section 103A(4) – other factors***

*Good faith*

[86] A fair and reasonable employer would comply with its statutory good faith obligations. I have already found the Respondent did not do so, which undermines the justification of its actions.

*Contractual terms*

[87] I find the Respondent breached clauses 9.1, 9.2 and 9.3 of the IEA. A fair and reasonable employer would comply with the contractual obligations it set itself, so the Respondent’s breach undermines the justification of its actions.

***Section 103A(5) – were any process defects minor***

[88] The process defects in this case were not minor. They were serious breaches that resulted in substantial unfairness to the Applicant. I find that s103A(5) of the Act does not prevent a finding that the Applicant’s dismissal was unjustified.

**Procedural fairness**

[89] I find that the way in which the Respondent dealt with the incorrect INZ information was extremely unfair to the Applicant. The information was provided by a call centre employee, not by the Applicant’s case officer or anyone else in authority. The INZ transcript shows that Ms Reid was told to discuss the situation with the Applicant. A fair and reasonable employer could not have reached the conclusions the Respondent did without first at least discussing its concerns with the Applicant. The Respondent failed to do so.

[90] The Respondent breached its s4 (1A) statutory good faith obligation because it did not provide the Applicant with access to relevant information or an opportunity to comment on it. This meant he was unaware of the incorrect information provided by INZ, so could not address it.

[91] The Respondent was unable to satisfy me that it had complied with any of the factors in s103A(3) which the Authority must consider when assessing justification.

### **Substantive justification**

[92] I find that the Respondent did not have a good reason for summarily dismissing the Applicant. He was in fact legally entitled to continue working for the Respondent at the time of his dismissal. Even if the Applicant's visa status had changed, that was not one of the contractual reasons the parties had agreed<sup>20</sup> could result in summary dismissal.

[93] Even if the Applicant had not been legally entitled to work for the Respondent it was contractually required to dismiss him on six weeks' notice.<sup>21</sup> The Respondent did not pay the Applicant wages in lieu of notice, and in any event there was no contractual provision for it to have done so.

[94] Section 350(7) IA specifically provides that an employer does not commit an offence under the IA merely by allowing an employee, who is not or is no longer legally entitled to work, to work out their contractual notice period.

[95] I find there was no requirement for the Respondent to have ended the Applicant's employment immediately and its actions in that regard were unfair, unreasonable, and unjustified.

[96] It follows that I reject Mr Harrison's submission that as soon as Ms Reid was told by INZ the Applicant was not entitled to work for the Respondent the Respondent would have been committing an offence under s.350(1)(a) IA if it had continued to employ him.

[97] The Respondent had merely received unverified information from a call centre employee which contradicted information known to the Respondent at the time and

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<sup>20</sup> Clause 9.2 IEA.

<sup>21</sup> Clause 9.1 IEA.

information provided to it the previous day by both the Applicant and a different INZ call centre employee.

[98] I do not accept Mr Harrison's submission that would have amounted to the Respondent being treated by INZ under the IA as if it knew the Applicant was no longer entitled to work for it because INZ had not informed the Respondent of that in writing, in accordance with s350(6) IA.

[99] I find that the Respondent would not have been acting unlawfully under the IA if it had taken time to comply with its statutory good faith obligations, its contractual obligations, or the s103A(3) factors in the Act. It had a six weeks' notice period it could have legally continued to have employed the Applicant for, even if the INZ information had been correct.

### **Breach of contract claim**

[100] The breach of contract claim has been proven.

[101] In terms of the IEA, I find the Respondent breached;

- a. Clause 9.1 because it dismissed the Applicant without the six weeks' notice he was contractually entitled to;
- b. Clause 9.2 because it dismissed the Applicant without notice in circumstances which did not fall within the provisions of that clause;
- c. Clause 9.3 because it failed to observe any rules of procedural fairness in circumstances where it had specifically contracted it would do so.

[102] The Applicant's employment agreement set out three circumstances in which the Applicant could be dismissed without notice - "*serious neglect of duty, misconduct or disobedience*"<sup>22</sup>. Although no-one of these three grounds applied, the Respondent nevertheless still dismissed the Applicant without notice. That was a breach of contract.

[103] If the Respondent had dismissed the Applicant on notice then his employment would have continued, without the Respondent committing an offence under the IA, until 9 June 2011. I consider it likely that INZ's mistake would have been identified

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<sup>22</sup> Clause 9.2 of the IEA

and remedied prior to the notice period expiring, in which case the Applicant would have been spared the serious adverse consequences he suffered.

[104] Clause 9.3 of the Applicant's IEA required the Respondent to "*observe the rules of procedural fairness which apply to the termination of employment*". I find that the Respondent also breached this provision, because it did not adhere to even the most basic elements of procedural fairness before terminating the Applicant's employment. Had it done so, then it was likely INZ's mistake would have been identified and the Applicant would have been spared the adverse consequences he suffered.

[105] I also find that on one occasion the Respondent unilaterally varied the Applicant's hourly pay rate from \$21.75 to 13.75\$ for 1.25 hours of work. This is discussed under the wages arrears section below.

### **Penalties**

[106] The Authority has jurisdiction pursuant to:

- a. s.133(1)(a) to impose a penalty on a party that breaches an employment agreement; and
- b. s.4A to impose a penalty for a breach of the s4(1) statutory good faith obligations if they fall within the requirements of s4A.

[107] The purpose of a penalty is to punish an employer. It signals the Authority's disapproval and it is intended to act as a deterrent. The Authority's penalty jurisdiction is not to be used as a mechanism for topping up compensation.<sup>23</sup>

[108] The Employment Court has held that where remedies have been awarded for a successful grievance claim then to impose a penalty in respect of the same conduct amounts to double dipping and should be avoided, unless there are special facets of the breach which call for a punishment to be imposed on the employer on top of compensation to the employee.<sup>24</sup>

[109] The breaches of contractual terms and of statutory good faith obligations whilst all serious were nevertheless all factors which formed part of the Applicant's

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<sup>23</sup> *Xu v McIntosh* [2004] ERNZ 448.

<sup>24</sup> *Supra* and *Salt v Fell* [2006] ERNZ 449.

dismissal grievance. Separate remedies have been awarded to compensate the Applicant for his grievance, so the imposition of additional penalties on the Respondent would amount to double dipping.

[110] I therefore decline to impose any penalties.

### **Wage arrears claim**

[111] The Applicant has failed to establish his wage arrears claim of \$1,257.

[112] I find that at various times over the pay periods ending 8 October 2010 to 21 November 2010 the Applicant carried out lower level work which was outside the duties he had been employed to do.

[113] I accept the Respondent's evidence that he was offered this extra work as an entirely separate arrangement so that he could supplement his usual income, which had decreased as his hours of work had reduced due to less work being available during the recession. I have accepted Ms Spencer's evidence about the arrangements regarding the offer of lower level work because her evidence seemed credible.

[114] The Applicant was under no obligation to accept this additional lower level work which had been offered to him on the basis it would be paid at the lower level hourly rate that applied to that type of work. I consider, on the balance of probabilities, that (apart from the first occasion) the Applicant always knew when he accepted offers of lower level work that it would be paid at the rate associated with that work, and not at his contractual rate.<sup>25</sup>

[115] The Respondent accepted that the first time the Applicant accepted lower level work it had not been made clear to him it would be paid at the rate associated with that type of work. I therefore find the Respondent's actions on that one occasion amounted to a unilateral variation of his hourly rate, which was a breach of contract.

[116] I find that Applicant worked 1.25 hours during the pay week ending 8 October 2010 for which he was not aware he would be paid \$13.75 per hour instead of \$21.75 per hour. He is entitled to be paid the difference between his contractual rate of pay and what he was actually paid for that one period of work only. I find that amount is \$10.00 (1.25 hours x \$8.00 per hour).

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<sup>25</sup> i.e. that if he did data entry work he would be paid \$13.75 (not \$21.75) per hour.

[117] I find that on all other occasions the Applicant consented to the reduction in his hourly rate for the work associated with that offer, so he was paid for that work at the rate agreed by the parties at the time. Accordingly, he does not have a wage arrears claim involving an agreed rate for low level work done over the pay periods ending 8 October to 21 November 2011.

## **Outcome**

[118] I find that:

- a. The Applicant's dismissal was substantively and procedurally unjustified;
- b. The Respondent breached its s.4(1A)(c)(i)&(ii) good faith obligations under the Act;
- c. The Respondent breached clauses 9.1, 9.2, and 9.3 of the IEA;
- d. The Respondent unilaterally reduced the Applicant's rate of pay by \$8 per hour for the 1.25 hours he worked during the pay period ending 8 October 2010. This unilateral variation was a breach of contract;
- e. The Applicant is entitled to wage arrears of \$10.00;
- f. Penalties are not appropriate due to the double dipping principle.

## **Remedies**

### *Mitigation*

[119] I am satisfied that the Applicant has attempted to mitigate his loss by following up possible job leads and by speaking to contacts who may have been able to assist him. I consider that his failure to obtain any alternative work since his dismissal was likely to be due to the fact that he is not currently legally entitled to work in New Zealand, which I find was caused by his unjustified dismissal.

[120] The Applicant has previously had four New Zealand work visas. In each case, the following factors have applied to his search for employment and associated work visa applications:

- (a) The Applicant could only apply for a work visa once he had an existing job offer. The job offer had to be from a New Zealand employer, which in turn had to fill out an INZ form, to indicate it supported both the work visa application and in order to register with INZ as an employer which was hiring someone who did not automatically have eligibility to work in New Zealand;
- (b) The Applicant had to provide evidence that he could support himself in New Zealand. This has meant that the Applicant was required to provide proof that the income from any job offer was within the normal range for the position offered and that the position offered to him was a full time position;
- (c) The Applicant had to establish to INZ's satisfaction that no New Zealanders could fill the particular role he had been offered and that the job offer was for a position for which there was likely to be a skills shortage in New Zealand;
- (d) The Applicant had to show INZ that he had the necessary work experience and qualifications for the job which had been offered to him, and for which he was seeking a work permit.

[121] The Applicant gave evidence that most employers have a misconception that work visa applicants were able to obtain a work visa prior to receiving a formal offer of employment. He said that most employers would only give him a firm offer of employment once they were convinced that he was legally eligible to work in New Zealand.

[122] The Applicant said that he obtained a number of informal job offers but the positions were paid at a level which would not have entitled him to be eligible to apply for a work visa.

[123] The Applicant is not eligible to even apply for a work visa until he has received a suitable offer of employment from a New Zealand employer.<sup>26</sup> A prospective employer must also be prepared to support his work visa application.

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<sup>26</sup> It must be a job a New Zealander is not available to do and it must be paid at a sufficiently high level.

[124] Even if the Applicant did manage to meet the eligibility criteria, there would still be a delay between obtaining an offer of employment and being issued with a work visa, assuming his application was successful. The prospective employer would have to be prepared to hold his job offer open for that period, in circumstances where there was no guarantee the application would be successful. It is understandable that many employers would be reluctant to commit themselves to such a process.

[125] I consider the Applicant has taken appropriate steps to mitigate his loss in light of the major immigration status hurdles he faced.

### **Lost remuneration**

[126] The Applicant sought 38 weeks' lost remuneration, being the time from dismissal to the Authority's investigation meeting. I accept the Applicant has been out of work for that entire period and that because he was ineligible for any government assistance due to his immigration status, he has not received any income since 28 April 2011.

[127] I am not satisfied that all of that period of lost remuneration can be attributed to his dismissal grievance. An assessment of what lost remuneration can be attributed to his grievance necessarily involves determination of;

- a. Whether he would have been likely to have been granted a work visa;  
and
- b. When his work visa application was likely to have been dealt with by INZ.

[128] Unfortunately the evidence in support of each of the above variables was not conclusive. I am therefore left to make the best assessment I can about the likely outcome of the above variables.

[129] I do not accept the Respondent's submission that the Applicant should not be awarded any lost remuneration on the grounds that his work visa application would not have been successful. Mr Cameron's evidence satisfied me that the Applicant's work visa application had a reasonable prospect of success, although I recognise that success was not guaranteed.

[130] A question remained over the nature of his job which INZ had yet to resolve at the time of his dismissal. INZ would had to have obtained additional information from the parties and was possibly going to have to make its own workforce inquiries, the outcome of which was unknown.

[131] On the face of it, the interim visa allowed the Applicant to continue working for six months from 24 March 2011 i.e. until 24 September 2011, assuming that his work visa application had not been dealt with before then. If his work visa application succeeded the Applicant would have been legally entitled to continue working for the Respondent. If it was unsuccessful, the Applicant would have been entitled to six weeks' contractual notice of termination.

[132] Because of the unknown nature of the further information that was going to be required before the work visa application could be dealt with, Mr Cameron was unable to say with any certainty how long it was likely to have taken.

[133] I therefore consider that lost remuneration for the remaining duration of the interim visa is appropriate because that is the length of time the Applicant would have continued working for the Respondent, unless his application was dealt with earlier.

[134] I note that even if the Applicant's work visa was declined he would still have been able to continue to work out his six weeks' contractual notice period before his employment would end.

[135] I am therefore satisfied that the Applicant lost remuneration from 28 April to 24 September 2011 as a result of his dismissal grievance. The Authority has a discretion pursuant to s.128(3) of the Act to award more than three months' lost remuneration. I consider it is an appropriate case to exercise that discretion in the Applicant's favour.

[136] I have declined to award lost remuneration past 24 September 2011 to reflect the uncertainty around whether or not the work visa application would actually have been successful.

[137] The Respondent is ordered to pay the Applicant lost remuneration from 28 April to 24 September 2011 pursuant to s128(3) of the Act.

[138] The parties have 14 days from the date of this determination within which to attempt to agree the amount of lost remuneration payable. If agreement is not reached within 14 days by then the Applicant may apply to the Authority to fix the amount of lost remuneration.

### **Distress compensation**

[139] The Applicant alleged the Respondent made unfounded allegations and provided third parties with adverse information about him which he said increased his distress. I accept the Applicant's evidence about those issues and find that such matters were so closely connected to his dismissal that he is entitled to be compensated for the additional distress the Respondent's actions caused him.

[140] These factors include:

- a. Allegations the Applicant had been warned about his work performance when he had not received any formal warnings prior to his dismissal;
- b. Allegations the Applicant had been running a business from its premises during his work hours, which he strongly denied;
- c. The Respondent's disclosure of private and personal information about the Applicant to third parties. The nature of this information was such that Ms Reid recorded in her notes of a conversation with an INZ Compliance Manager<sup>27</sup> he had told her the Applicant "*sounds like an arsehole*";
- d. The Respondent's statement in an email to the House of Travel on 6 May 2011 that the Applicant was a liar. This email also disclosed personal information about his visa status, his family matters, together with other employment issues that should not have been raised.

[141] The Applicant experienced ongoing problems in obtaining information from the Respondent regarding his dismissal. Although he requested disclosure of relevant documentation on 24 June 2011, disclosure did not occur until after the Authority directed the Respondent to make full disclosure by 13 October 2011. I accept the

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<sup>27</sup> His job included taking enforcement against individuals in breach of their immigration status.

Applicant's evidence that this ongoing delay increased his distress because he was not aware of the full circumstances involving his dismissal.

[142] The Applicant's standard of living has seriously deteriorated. He is not eligible for any government assistance so has been depleting his savings in order to cover his daily living expenses. He has had to move to less expensive accommodation, he is limited in his food choices, and he has had to forgo socialising because he cannot afford non essential expenditure. That has isolated him socially.

[143] The Applicant's health has suffered but he has been unable to afford medical expenses, so has not been able to see a doctor or obtain medication when unwell. The Applicant described his dismissal as "*a very big blow to my self esteem*".

[144] The Applicant is stressed and distressed that he may be forced by his personal, financial, and immigration circumstances to return to South Africa, a country he had made a conscious decision to leave a number of years ago. He described his change in immigration status as causing severe disruption to his personal life, which he had established in New Zealand and says that his hopes of applying for a resident's permit so he can permanently live in New Zealand have been seriously impaired.

[145] The Applicant also expressed embarrassment at being legally aided because he had never previously had to obtain any funding from the New Zealand government. He will be required to repay his legal aid out of any money awarded to him.

[146] I am satisfied the Applicant has suffered significant distress, humiliation, and loss of dignity. I consider the evidence warrants an award of distress compensation at the higher end of the scale.

[147] The Respondent is ordered to pay the Applicant \$10,000 pursuant to s.123(1)(c)(i) of the Act.

### **Loss of benefit**

[148] The Applicant has claimed compensation under s123(1)(c)(ii) of the Act for the loss of the benefit of the right to work in New Zealand. His claim was never quantified. It was pursued as an alternative claim should 38 weeks' lost remuneration not be awarded.

[149] I decline this claim because the Applicant's right to work in New Zealand was not a contractual benefit conferred under his IEA. The Applicant's right to work in New Zealand could only be conferred by INZ.

### **Out of pocket expenses**

[150] The Applicant claimed \$1,873 under s.123(1)(b) of the Act for what he described "*out of pocket expenses*".

[151] Section 123(1)(b) allows the Authority to provide for reimbursement of money lost by the employee as a result of the grievance. However, such loss must be related to contractual benefits the Applicant was entitled to under his IEA<sup>28</sup>. That is not the case here, so I find that none of the amounts the Applicant has claimed are recoverable.

### **Contribution**

[152] Having found that the Applicant has a personal grievance, s.124 of the Act requires the Authority when deciding the nature and extent of the remedies, to consider the extent to which the Applicant's actions contributed towards the situation that gave rise to his dismissal grievance, and if so required, reduce remedies accordingly.

[153] The Respondent provided lengthy submissions identifying what it described as "*exacerbating features*" which it said should reduce any remedies awarded. I do not accept any of those submissions for the following reasons:

- (a) It was not blameworthy conduct for the Applicant to file his visa application on 16 March 2011, because that was still prior to the expiry of his work visa on 23 April 2011;
- (b) The Applicant's certified sick leave after Ms Reid's email was not blameworthy conduct because I am satisfied he was genuinely ill;
- (c) I do not consider the Applicant can be blamed for what the Respondent alleged was "*a failure to respond in a timely way to Ms Williams' attempts to obtain a copy of his work visa*". The Applicant was not on notice that this was an issue that may put his employment in jeopardy.

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*Meharry v. Guardall Alarms NZ Ltd* [1991] 2 ERNZ 305.

The first request was made before his work visa application had been filed. The second request he did not receive because it was emailed to him whilst he was on sick leave. At no time was the Applicant on notice that his employment would be in jeopardy if he did not reply to Ms Williams by a specified time;

- (d) I accept the Applicant's evidence that he advised the Respondent that he was on an interim visa because the transcripts of the INZ conversations with Ms Williams on 27 April 11 and Ms Reid on 28 April 11 support that. I therefore reject the Respondent's allegation that the Applicant attempted to conceal his interim visa so as not to jeopardise his trip to South Africa. I consider that allegation was purely speculative and unsupported by the evidence I heard;
- (e) I do not consider that the Applicant was blameworthy by not advising the Respondent that he could not leave New Zealand whilst on an interim visa. He was working with INZ to obtain a visa which would have allowed him to travel to South Africa as planned and then to return to work in New Zealand. INZ had indicated he would be able to travel so I do accept he should have raised a concern about his travel with the Respondent;
- (f) I reject the Respondent's allegation that the Applicant should have attempted to revisit the Respondent's decision to summarily dismiss him or he should have returned to his employment rather than pursuing legal remedies. I accept the Applicant's evidence that he did not believe he had been dismissed because of a misunderstanding over his visa status and that he believed it was due to his run in with Ms Reid on 11 April 2011 and to his adverse comments about her to his manager on 18 April 2011;
- (g) I also reject the Respondent's allegation that the Applicant "*continued down the path of obfuscation*" during the Authority's investigation meeting. I consider that the INZ transcripts of the Applicant's telephone conversations about visa issues support the evidence he gave. They also contradicted the Respondent's adverse interpretation of the Applicant's evidence.

- (h) I reject the Respondent's allegation that the Applicant had not been open in his dealings with it over his work visa. He told the Respondent he was entitled to continue working for it because he had an interim visa and that INZ had his passport. This was correct information. If the Respondent wanted more information from him it was open to it to have identified what additional or specific information it required about his visa status. It never did so. The Applicant cannot be blamed for not providing information he was never made aware was required from him;
- (i) I find that the Applicant had no idea that his ongoing employment was in jeopardy. Had he been on notice that the Respondent required written confirmation of his legal entitlement to continue working for it past 23 April 2011 then I have no doubt the Applicant would have obtained such written confirmation from INZ. Likewise if he had known that the Respondent believed he had obtained work with Caltex, then he would have addressed that. However, he cannot be blamed for not responding to concerns he never knew about;
- (j) I reject the Respondent's allegation that the Applicant purposely avoided responding to its request for updates regarding his visa application because such claim was not supported by reliable evidence.

[154] After carefully reviewing all of the matters raised by the Respondent I have concluded that the Applicant did not engage in any blameworthy conduct which would have justified a reduction in remedies. I find that no reduction is to be made to remedies for contribution.

### **Interest**

[155] Interest cannot be awarded on distress compensation but it may be on compensation for reimbursement under s123(1)(b) of the Act for wages or other money lost as a result of the grievance.<sup>29</sup>

[156] I consider an award of interest is not appropriate at this time because the amount of lost remuneration has not yet been fixed. The parties have been given a short period of time to do that by agreement. If the Applicant has to apply to the

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<sup>29</sup> Ibid 27, *Salt v Fell*

Authority to fix that amount, then I would be prepared to reconsider his application for an award of interest on lost remuneration at that point.

**Costs**

[157] The Applicant has been wholly successful and is entitled to a contribution towards his actual legal costs.

[158] The parties are encouraged to resolve costs by agreement. If that is not possible, then the Applicant has 14 days within which to file a costs memorandum, the Respondent has 14 days within which to reply, and the Applicant has a further 7 days after within which to file any costs memorandum in reply.

[159] This timetable will be strictly enforced. No memoranda will be received outside of it without the prior leave of the Authority.

[160] If the Authority is required to determine costs, then the parties are invited to provide submissions on whether:

- a. This is an appropriate case for full indemnity costs; and/or
- b. The Respondent's conduct unnecessarily increased the Applicant's costs, and if so;
- c. The Authority's notional daily tariff of \$3,500 should be increased to reflect that, and if so, by how much.

**Rachel Larmer**  
**Member of the Employment Relations Authority**