IN THE EMPLOYMENT COURT
AUCKLAND

[2016] NZEmpC 120
EMPC 326/2014

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WHANAU TAHI LTD Plaintiff
AND	KIRAN DASARI Defendant

Hearing:	19 November 2015, 18 May 2016, closing submissions filed on 15 and 28 June 2016 (Heard at Auckland)
Appearances:	M Ryan, counsel for plaintiff A Swan, counsel for defendant
Judgment:	20 September 2016

JUDGMENT OF JUDGE M E PERKINS

Introduction

[1] These proceedings involve a challenge to a determination of the Employment Relations Authority (the Authority). An oral determination was dated 17 November 2014 followed by a written determination dated 20 November 2014.[1] Costs were reserved in the written determination. No application for costs appears to have been made to the Authority by either party.

[2] Following the investigation meeting the Authority made the following findings:

[1] *Dasari v Whanau Tahi Ltd* [2014] NZERA Auckland 476.

(a) Kiran Dasari, the defendant, was an employee of Whanau Tahi Ltd, the plaintiff;

(b) Mr Dasari was unjustifiably dismissed by Whanau Tahi Ltd;

(c) Whanau Tahi Ltd was ordered to pay two months ordinary remuneration, less PAYE, to Mr Dasari. The rate at which the payment is to be made is that set out in the individual employment agreement sent to Mr Dasari under cover of a letter dated 27 August 2013. The order was made pursuant to ss 123(1)(b) and 128 of the Employment Relations Act 2000 (the Act).

(d) Whanau Tahi Ltd was ordered to pay compensation of $5,000 to Mr Dasari pursuant to s 123(1)(c)(i) of the Act.

(e) Pursuant to s 124 of the Act there was to be no reduction in remedies due to any contributory behaviour.

[3] Following the oral determination the parties sought clarification as to whether it included wages owing to Mr Dasari for the period 26 August 2013 until 3 October 2013, which were the dates of commencement and termination of his employment. The wages sought amounted to $7,361.54. The Authority Member, in an addendum to the written determination, confirmed that those wages were not part of the determination and that if Mr Dasari was to make a claim for them then an application would be required and a further investigation would need to be made. It appears from the addendum that the Authority was not advised during the investigation meeting that Mr Dasari received no wages during his period of employment. If it had been advised, the Authority could have resolved that matter in its determination even without a formal application having been made.[2]

[4] The plaintiff challenged the whole of the determination and sought a hearing de novo. However, in the relief sought in the pleadings now before the Court, the plaintiff does not dispute the finding by the Authority that the defendant (Mr Dasari)

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[2] Employment Relations Act 2000, ss 122 and 160(3) and the general objects contained in s 143 of that Act.

was its employee. The relief now sought by the plaintiff in an amended statement of claim dated 17 November 2015 is as follows:

(a) A finding that the defendant, Mr Dasari, was not unjustifiably dismissed.

(b) That the orders for lost remuneration and compensation made by the Authority be overturned;

(c) Mr Dasari is ordered to pay costs to the plaintiff in respect of the challenge;

(d) Mr Dasari is ordered to pay the plaintiff costs in respect of the Authority proceedings.

[5] Following the filing of the challenge, Whanau Tahi Ltd applied to the Court for an order staying execution of the Authority's determination against it. An order for stay was granted on the basis that the plaintiff pay the sum of $13,018.38 into Court pending the outcome of the challenge. The Registrar of the Court placed the funds in an interest bearing account.

[6] On the first day of the hearing of the challenge there were discussions with counsel relating to the Court's concern arising from the addendum to the determination that Mr Dasari, during the period when he had been employed by Whanau Tahi Ltd, had not received any wages. The proceedings could not be completed on the first day of the hearing and a lengthy adjournment followed until the hearing could be resumed on 18 May 2016. During that adjournment a joint memorandum of counsel was filed on 24 November 2015 in which it was agreed that Mr Dasari's claim to wages could be paid from the funds held in Court. The following orders were made by consent:

(a) That the sum of $8,081.54 be paid out to Mr Dasari from the funds in full payment of wages owed to him for the period 21 August 2013 until 3 October 2013.

(b) That, in addition, Mr Dasari was to be paid 62 per cent of the interest accrued on the funds while held by the Court. The figure of 62 per cent was the percentage which the sum of $8,081.54 bore to the total sum held of $13,018.38.

[7] This payment to Mr Dasari meant that the remaining issues to be determined by the Court were those raised by the plaintiff in the pleadings commencing the challenge. However, if the sum of $8,081.54 mentioned above does not include payment of Mr Dasari's entitlement to holiday pay at termination of employment then this must now also be paid to him.

Pleadings

[8] The original statement of claim filed by the plaintiff contained the following allegations:

(a) The draft employment agreement contained a trial period of 90 days.

(b) The offer of employment was conditional upon Mr Dasari accepting the terms and conditions of the employment and being legally able to work in New Zealand.

(c) Mr Dasari had difficulty obtaining a variation to his work visa, which was employer specific.

(d) The employment agreement had been signed.

(e) Mr Dasari finished work with the plaintiff on 3 December 2013. He was not dismissed.

(f) Having been contacted by Immigration New Zealand for a copy of the agreement, the plaintiff advised Immigration New Zealand that the offer of employment to Mr Dasari was withdrawn.

(g) Mr Dasari engaged in deceptive conduct over the matter.

(h) The failure of Mr Dasari to disclose that he needed an employer specific work visa amounted to a repudiatory breach for which the plaintiff was entitled to cancel the agreement.

(i) In any event the employment could have been terminated pursuant to the 90-day trial period provision in the agreement.

[9] As will be seen from the factual discussion in this judgment, the causes of action initially pleaded would probably not have been sustained. The day prior to the first day of hearing, the plaintiff applied to amend the statement of claim. The amendments sought were as follows:

(a) The date of finishing work was 3 October 2013, not 3 December 2013.

(b) The pleading relating to the Contractual Remedies Act 1979 of repudiatory breach justifying cancellation was to be deleted.

(c) The pleading relating to the 90-day trial period was to be deleted.

(d) New causes of action based on frustration of contract and illegality were to be added, accompanied by allegations that:

(i) "… the plaintiff would have been committing an offence under s 350 of the Immigration Act 2009 had it employed the defendant"; and

(ii) "The defendant, had he been employed by the plaintiff, would have committed an offence under the Immigration Act 2009".

[10] The assertions remaining in the pleadings – that the defendant commenced employment, executed an employment agreement with the plaintiff on 27 August 2013, and remained employed until 3 October 2013 – would appear somewhat inconsistent with these two additional causes. The allegation of deceptive conduct remained in the amended statement of claim, although for what purpose is not clear

in view of the fact that it formed the basis of the allegation of repudiatory breach now deleted.

[11] Mr Dasari filed a statement of defence to the first statement of claim. Mr Swan, counsel for Mr Dasari, indicated at the commencement of the hearing that Mr Dasari did not object to leave being granted to file the amended statement of claim. This was on the basis that the earlier pleadings of the defendant filed in answer to the first statement of claim would be treated as the response to the amended statement of claim and the further causes added. The further causes were to be denied.

Factual discussion

[12] There is not much in dispute as to the circumstances which occurred in this matter. Mr Dasari came to New Zealand in 2010 on a student visa. The purpose of his visit was to study towards a diploma in business. Whilst studying he worked part-time at Pizza Hut as he was permitted to do by the terms of his visa. Under the terms of the visa he could work up to 20 hours per week. In March 2011 he was issued with an open job search visa for 12 months. During that time he worked full-time for Pizza Hut and when that visa had expired he applied for and obtained a work visa which was granted for two years until 23 March 2014. This visa was employer specific which meant that he was only able to work for a named employer. His visa allowed him to work as a trainee manager for Pizza Hut. If he changed employment then he was required to apply to Immigration New Zealand for a variation of conditions. Any application for a variation needed to be supported with a letter of offer and an employment agreement from the prospective employer.

[13] During the first week of August 2013 Mr Dasari applied for a job as a business analyst with Whanau Tahi Ltd. He attended an interview on 7 August 2013. Present at the interview was Mr Stephen Keung, who was a director of Whanau Tahi, Daymon Nin, an executive officer, and Sonia Dernie, from Human Resources. Mr Dasari indicated in his evidence that during this interview he explained that his visa status was employer specific. He indicated that if he was to obtain the position he had to have support from Whanau Tahi for a variation for his visa. Both Mr Keung and Mr Nin informed Mr Dasari that there were no issues with supporting his visa

variation. There was some dispute in the evidence as to whether Mr Dasari indicated this at that time. I accept Mr Dasari's account, which is consistent with subsequent actions of employees of Whanau Tahi and the contemporary documents.

[14] Following the interview, Whanau Tahi offered Mr Dasari a position of employment for a period of three days. This commenced on 21 August 2013. A written "CONTRACT AGREEMENT" was executed by Mr Dasari and Mr Nin on behalf of Whanau Tahi. A period of a maximum of 24 hours was mentioned in the document. The document described Mr Dasari as "The Contractor". However, Mr Dasari's evidence that he was offered employment for 3 days is not disputed. Mr Dasari commenced work and continued to work beyond the three days.

[15] On 27 August 2013 Mr Dasari received an offer of full-time employment contained in a letter signed by Mr John Tamihere, Chief Executive Officer of Whanau Tahi. The letter of offer attached the standard full-time employment agreement which Mr Dasari was required to accept. The offer was conditional upon Mr Dasari being legally entitled to work in New Zealand. The agreement was signed by both Mr Dasari and the director, Mr Keung. Both copies of the executed employment agreement were forwarded to Mr Tamihere for the purposes of him signing off the agreement, although there was no condition to this effect and Mr Keung clearly had authority to sign on behalf of Whanau Tahi.

[16] On 28 August 2013 Whanau Tahi completed an immigration supplementary form for the purpose of Mr Dasari having his visa rectified to specify Whanau Tahi as his employer. Mr Dasari indicated in his evidence that Brad Norman, a director of Whanau Tahi, completed the form and filed it with Immigration New Zealand.

[17] Mr Dasari remained in employment from 28 August 2013, when Whanau Tahi completed the immigration supplementary form, to 3 October 2013 – although in reality he had commenced continuous employment from 21 August 2013. The original agreement provided that he was to receive payment at $30 per hour. During this entire period he did not receive any income whatsoever from Whanau Tahi. There was some suggestion in the contemporary documents of Whanau Tahi that when the difficulties with the visa emerged, Mr Dasari was to be placed in the

position of a volunteer. However, there was certainly no agreement with Mr Dasari to this effect.

[18] Mr Dasari, through his immigration adviser, dealt with Immigration New Zealand. The original offer of employment was sent to Immigration New Zealand with the indication that as soon as the signed employment agreement was returned to him that would also be forwarded. Mr Dasari did not anticipate that there would be any difficulty in having the visa changed. Employees within Whanau Tahi were fully aware that Mr Dasari's visa was employer specific and it is clear from exchanges of emails between the employees and directors of Whanau Tahi that no difficulties were expected. Certainly no correspondence was received by Whanau Tahi or Mr Dasari from Immigration New Zealand which indicated that there would be any difficulty in Mr Dasari having his visa amended.

[19] Shortly after Mr Dasari commenced employment, and as an indication that Whanau Tahi and Mr Tamihere in particular knew that Mr Dasari's visa was employer specific, Mr Dasari was asked by Mr Tamihere to resign his position with Pizza Hut. It was indicated to Mr Dasari that Mr Tamihere signing the employment agreement was conditional upon Mr Dasari resigning that position. Accordingly he resigned from Pizza Hut. This appears to have occurred on 29 August 2013, quite early on in the employment. Nevertheless Mr Tamihere still did not sign off the agreement.

[20] It appears from the evidence that Mr Tamihere's personal assistant, Neta Tomokino, had indicated to Mr Tamihere there were compliance issues involving Mr Dasari's employment with Whanau Tahi, which in her view meant that Mr Dasari could not be employed as there was a risk of prosecution. Ms Tomokino claimed to have previously worked as an immigration officer with Immigration New Zealand. She gave evidence about her belief as to the compliance issues required, however she was simply called as an employee of Whanau Tahi and was not an expert witness. Mr Tamihere was aware of Ms Tomokino's concerns early on in Mr Dasari's employment and apparently used this as the basis for refusing to finally sign off the employment agreement. Mr Tamihere's signing off of the agreement was not a

condition of Mr Dasari's employment. The agreement had been properly executed by Mr Keung and Mr Dasari.

[21] During September Mr Dasari was contacted by Immigration New Zealand, asking him to submit the signed employment agreement so that his visa application could be processed. There was no indication to him that there would be any difficulty with him being employed by Whanau Tahi for the purposes of his visa application. Mr Dasari continued to work full-time during this period without receiving any pay. From the evidence, it is clear that on 2 October 2013 Ms Tomokino emailed Immigration New Zealand regarding the variation of the condition of Mr Dasari's visa and advised Immigration New Zealand on Mr Tamihere's behalf that Whanau Tahi might not proceed with the job offer. Mr Dasari was not informed of this fact and did not find out about that email until much later.

[22] On 3 October Mr Keung advised Mr Dasari to speak to Immigration New Zealand to find another way to get the visa because Mr Tamihere had indicated he was not going to sign the employment agreement. Mr Dasari realised that without the employment agreement it was not going to be possible to maintain his application for the variation. He had no other job to go to as Whanau Tahi had insisted that he terminate his employment with Pizza Hut. There was then a suggestion to Mr Dasari from Whanau Tahi that he could work from home from that point on. He decided to follow this advice. However, it was clear that without informing him, Whanau Tahi had decided to terminate his employment. His ability to log in to his work computer from home was disabled and his attempts to contact both Mr Keung and Mr Nin were unsuccessful and neither of them returned any calls.

[23] On 9 October 2013 the documents disclose that Whanau Tahi advised Immigration New Zealand that they were withdrawing the offer of employment to Mr Dasari. This fact was not advised to Mr Dasari by Whanau Tahi until 18 October 2013, although his new immigration adviser had informed him of this on 15 October 2013.

[24] It was apparent from the actions of Whanau Tahi that by 3 October 2013 they had no further use for Mr Dasari's services. If there had really been a legal difficulty with the visa, this was well known back in August 2013 and steps were not taken at that early stage to deal with the matter. There was no evidence whatsoever that Whanau Tahi took independent advice on the immigration position, which one would have expected. Even if Whanau Tahi believed by 3 October 2013 that it would be illegal for them to continue employing Mr Dasari, there was a clear obligation to ensure that he was paid for the work which he had carried out to that point. Any reasonable employer would have known that Mr Dasari would by then likely be in a desperate financial position.

[25] The consequences to Mr Dasari of the actions of Whanau Tahi were graphically set out in his evidence and corroborated by the evidence of his friend, Chitra Subramanian, who is a health care professional. Mr Dasari's evidence on this is set out as follows:

> 21. The whole situation left me in a desperate financial situation. I knew very few people in New Zealand. I was at such a low point that I had suicidal thoughts.
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> 22. It is unimaginable what I went through over the following months. The whole situation nearly broke me. It might have been different if I had been in my own country and had support but the fact was I wasn't. I lost a significant amount of weight, my emotional state was poor. As stated earlier, I was on the verge of suicide. There was nowhere or no-one I could go to. Perhaps the most humiliating factor was that I had been taken for a complete ride. I worked untiringly whilst I was in the employment of Whanau Tahi. I developed many of their systems whilst improving them. When my task was completed, I was discarded and ignored. I did not think it possible to treat somebody in such a bad manner.
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> 23. From 16th October 2013 onwards I applied for numerous jobs. A schedule of the jobs I applied for appear at page 49. Attached at page 51 is various correspondence pertaining to the various applications I made. I finally managed to get a job on 4th April 2014 as a Business Manager in an automotive workshop called Tiverton Automotive. A variation of work visa to work for Tiverton was obtained from Immigration within 4 or 5 working days.
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> 24. In summary, I was offered employment and accepted it. The conditions of me being employed by Whanau Tahi were well-known by them at the outset and certainly at the time when I was given the employment agreement; that was that I was to seek a variation of my work visa, which was employer specific. All that entailed was an

application to immigration supported with a letter of offer and signed employment agreement.

25. The signed employment agreement was offered to me by Whanau Tahi on the condition I resigned from Pizza Hut. To my detriment I resigned. Despite my numerous requests for the signed employment agreement I was eventually advised that the offer of employment was withdrawn.

[26] Ms Subramanian described contact she had with both Mr Dasari and his girlfriend concerning the clear effects on Mr Dasari. She indicated that as a result of his deteriorating financial position he was getting behind with his rent payments and had to borrow money from other friends. Ms Subramanian herself paid an immigration adviser's fee of $3,000 on Mr Dasari's behalf using her credit card. She could see that Mr Dasari was becoming stressed and withdrawn. She also observed, following the termination of Mr Dasari's employment in the first week of October 2013, his distraught reaction when he realised that Whanau Tahi had withdrawn the job offer. Ms Subramanian assisted Mr Dasari in getting him other accommodation. She also described a conversation resulting from a chance meeting with Mr Nin when she and Mr Dasari were at the airport to pick up Mr Dasari's girlfriend who was returning from India. Mr Nin's reaction was dismissive and offhand.

[27] Ms Subramanian also confirmed Mr Dasari made efforts to mitigate his loss by securing another position of employment. She indicated that she was aware that he went for quite a few job interviews and over the period was losing his confidence and self esteem, was withdrawn and kept falling sick. She and other friends became concerned for his personal safety at this time.

[28] If, as Whanau Tahi maintains, the employment relationship came to an end as a result of intervening difficulties with Mr Dasari's visa, then one would have expected an expert witness from Immigration New Zealand or an immigration consultant to have been called to support these contentions. The contemporary documents, which have been disclosed, show that even towards the end of Mr Dasari's employment with Whanau Tahi, employees of Whanau Tahi were assisting him in the matter of having his visa varied. No indication was received from Immigration New Zealand that there was going to be a difficulty, and in fact quite

the contrary is the case with Immigration New Zealand indicating that it was simply awaiting the signed copy of the employment agreement to confirm the employment.

[29] Even if Ms Tomokino's evidence is correct, that Whanau Tahi was required to make an application to be an approved employer, Whanau Tahi did not take steps to put itself in this position and there was no evidence that it could not have done so. Mr Tamihere was aware from an early stage as to the employer specific nature of Mr Dasari's visa. He had received Ms Tomokino's advice early on and yet he allowed the position to run on with Mr Dasari continuing on in employment until the beginning of October while aware of the fact that Mr Dasari was not receiving any payment for his services. Mr Tamihere's behaviour as an employer in these circumstances could only be described as negligent.

Counsel submissions

[30] It is a little difficult to discern from the amendments to the statement of claim on what basis the causes of frustration and illegality are being pleaded by the plaintiff. For instance it appears that there is a linkage between paragraph 12, that the offer of employment to the plaintiff was frustrated by the defendant not being able to legally work for the plaintiff, and paragraphs 14 and 15, which specify potential illegality in performance by both the plaintiff and the defendant. The intervening paragraph 13 repeats the allegation of deceptive conduct on the defendant's part. However, from the written submissions of Mr Ryan, counsel for the plaintiff, it appears that the argument now being put forward by the plaintiff is to the effect that the employment agreement was frustrated by the impossibility of the plaintiff to employ the defendant because of an Immigration New Zealand requirement – and that the illegality arises as a separate cause by virtue of the provisions of the Illegal Contracts Act 1970 and the Immigration Act 2009. The Illegal Contracts Act is not specifically pleaded in the amended statement of claim but is elaborated upon by Mr Ryan in his submissions.

[31] While the amended statement of claim also pleads that the plaintiff would have been committing an offence under s 350 of the Immigration Act 2009 had it employed the defendant, there is no basis provided for the further pleading that the

defendant would have committed an offence under the Immigration Act 2009 had he been employed by the plaintiffs. No such offence by an employee is contained in that Act. That particular pleading is therefore a little difficult to understand. Mr Ryan, having referred to s 350 of the Immigration Act 2009, submitted as follows:

> 28. The performance of the employment contract was impossible due to the fact that the plaintiff was not an accredited employer in the eyes of the Immigration Service and was not able to get approval in principal (sic). Due to the frustration of the contract which operated automatically means that there was no dismissal of Mr Disari (sic). It does seem anomalous as both parties were keen to continue with the employment relationship but due to the intervening [cause] of s.350 of the Immigration Act and other provisions of the Immigration Act this employment contract was frustrated.

[32] On the basis of the alleged frustration or illegality, Mr Ryan submitted that there was in fact no dismissal of the defendant by the plaintiff. However, if there was a dismissal then it is submitted that it was justified in all of the circumstances.

[33] Mr Ryan then went on to submit that while the employment agreement was illegal and unenforceable by virtue of the provisions of the Illegal Contracts Act 1970, if the Court considered granting relief under that Act then an appropriate order would be to order lost earnings in the amount of two months to be paid as compensation. As indicated earlier in the judgment, Mr Dasari has now received reimbursement of the earnings during the period when he continued in employment with Whanau Tahi. That is no longer an issue unless there is still holiday pay owing. The issue now is whether Mr Dasari is entitled to the loss of future earnings and compensation awarded by the Authority, and whether those awards should be increased.

[34] Finally, Mr Ryan submitted that Mr Dasari contributed towards the situation that gave rise to the personal grievance. However, there is no further submission that any remedies which Mr Dasari may receive should be reduced.

[35] If the plaintiff is intending to proceed with the assertion that Mr Dasari indulged in deceptive conduct, then Mr Swan, counsel for Mr Dasari, submitted that Whanau Tahi knew, virtually from the outset, the requirements as to Mr Dasari's

visa. Mr Ryan did not really pursue this point of deceptive conduct in his closing submissions.

[36] Mr Swan, in his submissions, treated the allegations of frustration and illegality as two separate issues. In respect of the first issue, he submitted that the plaintiff is not able to claim that Mr Dasari frustrated the offer of employment when in fact it was Whanau Tahi's actions in not fulfilling what were clearly requirements of Immigration New Zealand which would have enabled Mr Dasari to continue in employment. He submitted that the real reason for the withdrawal of the offer and the dismissal was the completion of the task that Mr Dasari had been employed to perform.

[37] Insofar as illegality is concerned, Mr Swan relied upon the statement contained in *Law of Contract in New Zealand*:[3]

> A contract may, under section 3 of the Illegal Contracts Act 1970 be illegal either at inception or by performance. Section 5 requires the court to determine whether the statute forbade the formation of the contract or whether the contract could be entered into lawfully. A prohibition may be apparent from the express wording of the statute or it may need to be spelled out by implication from that wording or from the policy underlying the enactment. If the contract could have been entered into lawfully the next question is whether a breach of the statute in the course of performance of the contract has effect to render the contract illegal.

[38] It is this latter principle which applies. An employment contract can invariably be entered into lawfully. What is pleaded in this case is that a breach of the Immigration Act rendered it illegal. However, Mr Swan correctly submitted that there is nothing in the Immigration Act 2009 to say that an employment agreement entered into in breach of it is an illegal contract. Even so, if the agreement was illegal, then Mr Swan relied upon s 7 enabling the Court to grant Mr Dasari relief, and that the Court has wide powers to see a just result.

[39] Finally, Mr Swan submitted that to refuse relief to Mr Dasari in these circumstances would allow Whanau Tahi to benefit from its own wrongdoing and would be contrary to public policy.

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[3] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 475.

[40] Mr Dasari did not file a challenge to the Authority's determination. However, insofar as remedies are concerned, Mr Swan, in his submissions, stated that Mr Dasari seeks six months lost remuneration on the basis that Mr Dasari did take steps to mitigate his loss in this respect, contrary to what the Authority found in its determination. In addition, Mr Dasari claims $20,000 compensation for hurt and humiliation. These were the same remedies sought before the Authority. Mr Ryan, who filed his submissions some time after receiving Mr Swan's submissions, did not oppose the suggestion of increased remedies now clearly sought by Mr Dasari.

Principles applying

Frustration of contract

[41] The Supreme Court of New Zealand briefly outlined the purpose of the law on frustration in *Planet Kids Ltd v Auckland Council*:[4]

> The doctrine of frustration was developed to mitigate the effects of the doctrine of absolute contracts, under which a party who had bound him or herself by contract could not escape liability for damages on the basis that performance had become impossible or futile. The rationale for the doctrine of absolute contracts was that it was open to the parties to have allocated the risk by contract.

[42] According to John Burrows, the doctrine of frustration has three salient features:[5]

> (a) The threshold for frustration is very high: performance must have become impossible, or "totally different"; the contract must have been "fundamentally altered".
>
> (b) With a few exceptions, which are difficult to reconcile, frustration operates in an all-or-nothing fashion. If the contract is not frustrated it remains on foot and both parties remain liable for its non-performance; if it is frustrated it fails completely and both parties are excused. The Frustrated Contracts Act 1944 then allows some restitutionary relief.
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> (c) Frustration is not dependent on the election of either of the parties. It operates automatically.

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4 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [47] (citations omitted).

5 John Burrows "Frustration of Contract" in Law Commission *Contract Statutes Review* (NZLC R25, 1993) 275 at 277. See *Planet Kids*, above n 4, at [48]; and Burrows, Finn and Todd, above n 3, at 783.

[43] The classic and most widely cited formulation of the doctrine of frustration is by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council*:[6]

> …frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do…It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must as well be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

[44] According to Lord Radcliffe, the key question is whether the contract, "on its true construction, [is] wide enough to apply to the new situation: if it is not, then it is at an end."[7]

[45] In another seminal case, Lord Simon framed the doctrine of frustration in similar terms:[8]

> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

[46] "Frustration," according to McGrath J in *Dystart Timbers*, "has a high threshold for fundamental policy reasons, linked to the sanctity of context."[9] McGrath J quotes Lord Bingham in saying:[10]

> Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.

[47] In *Taylor v Air New Zealand*, Chief Judge Colgan noted that:[11]

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6 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (HL) at 729.
7 At 720-721.
8 *National Carriers Ltd v Panalnina (Northern) Ltd* [1981] AC 675 at 700 (HL).
9 *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43, [2009] 3 NZLR 160 at [59].
10 *J Lauritzen AS v Wijsmuller BV (The "Super Servant Two")* [1990] 1 Lloyd's Rep 1 (CA) at 8.

> The test is a high one including such phrases as *"fundamentally different"* and *"radically different"* from the situation earlier contemplated by the parties. Frustration occurs by operation of law: it does not depend on the action or inaction of the parties.

[48] In applying the doctrine of frustration, Rix LJ has advocated for a "multi factorial" approach that takes account of:[12]

(a) the terms of the contract;

(b) its matrix of context;

(c) the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively;

(d) the nature of the supervening event; and

(e) the parties reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.

[49] Rix LJ continued:[13]

> Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient, and that there has to be as it were a breach in identity between the contract as provided for and contemplated and its performance in the new circumstances.

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11 *Taylor v Air New Zealand Ltd* AC 61/04 EmpC Auckland, 28 October 2004 at [29]. See also *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 All ER 34 (HL) at 44.

12 *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517 at [111]. See *Planet Kids*, above n 4, at [8] and [60]–[62].

13 *The Sea Angel*, above n 12, at [111].

[50] The New Zealand Court of Appeal confirmed in *Karelrybflot AO v Udovenko* that the doctrine of frustration is available in employment cases, but should not be easily invoked with respect to vulnerable employees:[14]

> … the doctrine of frustration is applicable to contracts of employment…it is not difficult to conceive of situations in which a supervening event might produce consequences for an employer which would render the situation, and the performance of an employment contract, particularly one for a fixed term, radically different from what had been undertaken when the contract was entered into. Whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree, but it seems to us that, in view of the nature of a contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effect which it would have on the rights of vulnerable employees – the present respondents being an example.

[51] The doctrine of frustration can be applied to "infinitely variable factual situations".[15] The Court of Appeal of England and Wales has stated that the circumstances of such cases "can be so various as to defy rule-making".[16]

Supervening Illegality

[52] It is unclear from the pleadings and submissions on behalf of the plaintiff in this case whether the plaintiff is asserting that frustration arose from some supervening illegality.

[53] Supervening illegality can serve as a basis for frustration of contract. The essential proposition is that "if further performance of a contract is made illegal by legislation, the contract will be frustrated."[17]

[54] As English and New Zealand authorities have established, there is a high threshold for the doctrine of frustration to apply to a contract. A supervening event must have fundamentally changed the nature of the contract so that performance would be *radically different* to what was initially contemplated by the parties.

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14 *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA) at [36]-[37].
15 *Brisbane City Council v Group Projects Pty Ltd* (1979) 26 ALR 525 (HCA) at 536.
16 *The Sea Angel*, above n 12, at [110].
17 Burrows, Finn and Todd, above n 3, at 757.

Illegal Contracts Act

[55] The causes of action pleaded, and the possible relationship of one to the other, are a little difficult to discern. The position is not exactly clarified in counsel's submissions. The four pertinent paragraphs in the amended statement of claim read as follows:

> 12 On 3 October 2013 the defendant finished work with the plaintiff. The defendant was not dismissed by the plaintiff. The offer of employment was frustrated by the defendant not being able to legally work for the plaintiff.
>
> 13 The plaintiff contacted Immigration New Zealand and advised that it was withdrawing its offer of employment to the defendant. As the defendant's offer of employment was conditional on being able to work in New Zealand, the plaintiff viewed the defendant concealing from the plaintiff that he had to have a work visa (employer specific) as deceptive conduct.
>
> 14 The employment contract was an illegal contract in that the plaintiff would have been committing an offence under s.350 of the Immigration Act 2009 had it employed the defendant.
>
> 15 The defendant, had he been employed by the plaintiff, would have committed an offence under the Immigration Act 2009.

[56] As indicated, the plaintiff alleges that performance of the employment agreement was frustrated on the basis that s 350 of the Immigration Act rendered such performance impossible. However, the plaintiff appears to also rely upon a separate cause that the employment agreement was of no effect and unenforceable by virtue of the Illegal Contracts Act 1970. In his submissions Mr Ryan, having set out ss 3, 5, 6 and 7 of that Act in their entirety, made the following submission:

> 44. As the Employment Court is a Court of equity and good conscience this Court may consider granting relief to the defendant by ordering lost earnings in the amount of 2 months to be paid as compensation. Such an order would alleviate the concerns of the plaintiff that if it paid the defendant a salary it would be breaching s.350 of the Immigration Act 2009. As the plaintiff has already confirmed in evidence it always intended to pay the defendant for work performed. Accordingly the plaintiff would not have any objection to the Court crafting a remedy to enable the defendant to be compensated for the services he provided to the plaintiff.
>
> 45. Such a remedy would do justice to the case.

[57] Sections 3 and 5 of the Illegal Contracts Act 1970, when applied to the facts of this particular case, would not appear to be particularly helpful to Whanau Tahi. Section 3 reads as follows:

> **3 Illegal contract defined**
>
> Subject to section 5, for the purposes of this Act the term illegal contract means any contract governed by New Zealand law that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not.

[58] Section 5 of the Illegal Contracts Act 1970 provides:

> **5 Breach of enactment**
>
> A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

[59] The Immigration Act, while containing the offence which Whanau Tahi is alleged to have committed, does not contain any express provision that contracts in breach of it are illegal. In deciding whether that Act contains an implied requirement, the following statement of the authors of *Law of Contract in New Zealand* is useful:[18]

> Where the statute makes no express provision that (as the case may be) a contract made or performed in breach of the statute's terms is illegal, the courts may have to decide whether the object of the statute clearly requires that contracts contravening the statute be illegal… In every such case the courts will have to determine what the intentions of Parliament must have been.

[60] Of the three contexts then described by the authors, the one which is relevant is that the statute may create a criminal offence without stating whether or not the creation of the offence is to have any effect on contracts created during such unlawful conduct.[19]

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[18] Burrows, Finn and Todd, above n 3, at 476.
[19] At 476.

[61] As Mr Swan has submitted on behalf of Mr Dasari, the Immigration Act does not explicitly provide that offending under the Immigration Act will render contracts such as Mr Dasari's employment agreement with Whanau Tahi illegal. While the pleadings allege Mr Dasari would have committed an offence under the Immigration Act, there is no offence under that Act which would apply to Mr Dasari's position in this case.

[62] In the present case Mr Dasari clearly believed with some justification from the surrounding circumstances that Immigration New Zealand would alter his visa to the effect that Whanau Tahi was a nominated employer. There is no evidence from Immigration New Zealand in this case that either Whanau Tahi or Mr Dasari breached the Immigration Act provisions and committed an offence. The courts will be reluctant in a case such as the present to hold an illegality. As Burrows, Finn and Todd state:[20]

> A further consideration in deciding whether or not contracts in breach of the provisions of the statute are required to be classed as illegal and void may be the effect illegality would have on any innocent third party.

Conclusions

[63] Applying these principles to the dual pleadings in the present case, the tests for holding that the employment agreement was frustrated or void for illegality are simply not met. Whanau Tahi in this particular case fails to meet the high threshold required to prove that performance had become impossible. There is nothing contained in the Immigration Act expressly providing that a breach of its terms renders an employment agreement illegal. Nor is there anything contained in that Act from which such an implication could be made.

[64] The facts of the matter disclose that even after Whanau Tahi became aware of the potential difficulties under the Immigration Act it continued to keep Mr Dasari in employment. The indications that its employees received from Immigration New Zealand were to the effect that no difficulty was anticipated in having Mr Dasari's visa changed. If it was necessary for Whanau Tahi to comply with further

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[20] Burrows, Finn and Todd, above n 3, at 477.

requirements of Immigration New Zealand, and there was no evidence that it was so required, then it could easily have carried out those compliance requirements. This is not a case where the performance of the employment agreement was either frustrated or was or became illegal.

[65] As indicated earlier in this judgment, there was no requirement for Mr Tamihere to sign off the employment agreement for it to come into effect. The agreement had been signed by Mr Dasari and a director of Whanau Tahi. Mr Dasari had initially commenced employment on a temporary basis and his position was confirmed in correspondence offering him full-time permanent employment which he accepted. Employees of Whanau Tahi were actively involved in assisting him to have his visa amended and the only evidence before the Court is that Immigration New Zealand would have granted his request. If the contrary was to be asserted then it was incumbent upon Whanau Tahi to call evidence from Immigration New Zealand, which it failed to do.

[66] Even if the employment agreement was an illegal contract this would be an appropriate case, in view of the circumstances, to adopt s 7 of the Illegal Contracts Act 1970 to validate the contract and grant relief to Mr Dasari. This is appropriate because of the conduct of Whanau Tahi. If Whanau Tahi had breached the provisions of the Immigration Act, which is far from clear, that would not be sufficient to deprive Mr Dasari of his rights and entitlements as a matter of equity and justice.

[67] I have already indicated the unfortunate effects that Whanau Tahi's actions had on Mr Dasari in this case. Some remediation has occurred in that he has now been reimbursed for the wages that he earned during the period of his employment although holiday pay may still be outstanding. The actions of Whanau Tahi in terminating Mr Dasari's employment, and holding out to him that it would continue to provide work to him if he worked from home when it had no intention whatsoever of doing so, were not the actions that a fair and reasonable employer could have taken in all the circumstances at the time that the actions occurred. Not only was the termination of the employment substantively unjustifiable but it was patently carried out in a procedurally unfair manner.

[68] Following termination of his employment, Mr Dasari made genuine attempts to find alternative employment and has called evidence to corroborate the awful effects that he suffered from the actions of Whanau Tahi.

Disposition

[69] I have already indicated that in the closing submissions counsel on behalf of Whanau Tahi did not take issue with the fact that Mr Dasari now seeks the remedies which he sought before the Authority. Whanau Tahi elected to have this matter proceed as a hearing de novo. I am satisfied in all of the circumstances prevailing in this case that Mr Dasari was unjustifiably dismissed by Whanau Tahi. The decision to order two months ordinary remuneration pursuant to ss 123(b) and 128 of the Employment Relations Act 2000 was inadequate. Having regard to the relatively short period when Mr Dasari was in actual employment with Whanau Tahi, a more appropriate award of lost wages would be three months ordinary pay less PAYE and there will be an order accordingly. Whanau Tahi will be responsible for accounting to Inland Revenue Department for the PAYE tax.

[70] Insofar as compensation is concerned, the evidence of the humiliation, loss of dignity and injury to feelings which Mr Dasari suffered as a result of the actions of Whanau Tahi would justify an award of compensation greater than $5,000. The position was aggravated by the hardship Mr Dasari suffered. I consider that an appropriate amount for compensation is $10,000 and Whanau Tahi is accordingly ordered to pay that sum to Mr Dasari.

[71] As indicated Mr Dasari has now received reimbursement for his wages, which he earned during the period of his employment, from the funds which were held by the Registrar of the Court. These were paid into Court by Whanau Tahi to procure the stay of enforcement of the Authority's determination. There is a direction that the balance of those funds now held by the Registrar, together with the further interest accumulated, is to be paid to Mr Dasari and may be paid directly to Mr Swan's instructing solicitors. Whanau Tahi will then need to account to Mr Dasari for the balance owing to him under this judgment. If holiday pay at

termination has not been paid to Mr Dasari then Whanau Tahi is ordered to pay such sum as is calculated pursuant to the provisions of the Holidays Act 2003.

[72] Finally, I agree with the determination of the Authority that no contributing behaviour by Mr Dasari has been established. Accordingly, there will be no reduction in the remedies now awarded to him.

Costs

[73] Costs are reserved. Costs will follow the event so that Whanau Tahi will need to reimburse Mr Dasari for his reasonable costs in this matter. If the parties cannot reach agreement on the quantum of such costs then submissions will need to be filed. If such submissions are necessary these are to be filed simultaneously on or before within 14 days of the date of this judgment.

M E Perkins
Judge

Judgment signed at 3.45 pm on 20 September 2016