NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

4/3

CP No. 71/93

ISO

IN THE MATTER of the Judicature Amendment Act 1972

LOW PRIORITY

BETWEEN

GHOLAMI

Plaintiff

A N D

THE MINISTER OF IMMIGRATION Minister of the Crown

Defendant

Hearing: 7 February 1994

Counsel: P B Marriott and N T Gray for Plaintiff
Nicola Pender for Defendant

Judgment: 3 March 1994

INTERIM JUDGMENT OF GREIG J

This is an application for review of the decision of the Associate Minister of Immigration, the Hon. R F Maxwell, made on 19 August 1992 refusing the plaintiff's application for a residence permit. The principal ground is that the decision proceeded or was based upon a mistake of fact and, alternatively, in the conduct of the inquiry and the application and in making his decision the Associate Minister breached the rules applicable to such inquiries. As expressed in the plaintiff's submissions he seeks an order declaring the Minister's decision invalid and directing that the Minister or the Associate Minister reconsider the plaintiff's application anew.

The plaintiff is a citizen of the Islamic Republic of Iran. He was born in Teheran on 17 August 1966. He was employed in Iran as a repairer of food making machinery with competence in electrical, electronic, mechanical, refrigerating and engineering skills. His sister has lived in New Zealand for some little time.

In January 1991 the plaintiff arrived in New Zealand and obtained a visitor's permit. In response to an advertisement in the Situations Vacant column published in a local Wellington newspaper for a food machinery technician the plaintiff applied to the advertiser which carries on business under the name of Foodmaid, specialising in the maintenance and repair of commercial food equipment. After some little delay during which a further advertisement was published by Foodmaid, the plaintiff was employed for a six months' trial period on terms set out in the letter of 5 April 1991 which described the job in this way:

> " Your duties would include mechanical and cosmetic reconditioning of food machinery, installation and service of dishwashers, refrigeration services and assisting our Electronics Engineer with fault finding and repair of circuit boards. "

The salary was $25,500 per annum which remained the plaintiff's basic salary throughout the time that he was employed by Foodmaid. He was entitled to and was paid overtime for work done beyond the period of 40 hours in each week.

On 10 May 1991 the plaintiff applied to the New Zealand Immigration Service for a Residence Permit. It was common ground that the application was made on occupational grounds in terms of a policy which had been in force since about March 1990. The policy applicable to the plaintiff was that he had to have an offer of full time employment in an occupation for which the applicant had at least a five year combination of relevant training in a post-secondary educational institute and relevant work experience. The training had to be at least one year. The relevant work experience had to include one year within the five years prior to the application. The applicant appears to have complied with that part of the policy.

It was also a requirement, however, that, as it was described, "the offer of employment will be subject to a local labour market check by the New Zealand Immigration Service". It was then stated as part of the policy that the

applicant's prospective employer must be able to demonstrate that no suitable New Zealand resident or citizen was available or readily trained for the position.

To carry out the local labour market check the Immigration Service seeks advice from the New Zealand Employment Service as to whether there are job seekers registered in the relevant district who would be suitable for the job offered. As well as a general description of the job offered, in this case Food Machinery Technician, a copy of the offer of employment is also provided to the employment service the better to enable it to identify such job seekers, if any, who it would be thought suitable for the job. Foodmaid and its Executive Director, Mr A P Joseph, have at all times supported the plaintiff's application. Mr Joseph wrote to the Immigration Service in support of the application in letters dated 15 April 1991, 24 June 1991 and 22 October 1991. In these letters Mr Joseph referred to the difficulties he had had in recruiting suitably qualified and competent staff in the past, the lack of suitable responses to his advertisements for staff, and the excellent impression that the plaintiff had made.

In the course of these letters reference was made to the obtaining of the necessary permits from the Electrical Registration Board and to extra training that he had received on the job. It appears that the Immigration Officer in charge of the case received from the New Zealand Employment Service an unsigned handwritten memorandum dated 5 November 1991 which said:

> " Wgton Regional register shows 30 plus people seeking work in the electrical field. Some of these are qualified & registered with the Electrical Registration Board.
>
> The register also has qualified electronic or mechanical technicians.
>
> We would be able to fill this position if the employer wanted to list the vacancy with and supply specific quals, exp etc required. "

On 21 November 1991 the Immigration Officer wrote to the plaintiff declining the application. The reasons are expressed in the letter in this way:

> " We have given careful consideration to your application, but must advise that it is not one that we

> are able to approve, because I do not feel that you possess the minimum work experience and qualifications as outlined above, and after discussions with the New Zealand Employment Service, I do not consider that you have provided an offer of a job in New Zealand that could not be filled by a New Zealander. The New Zealand Employment Service have advised that their register in the Wellington area show 30 plus people seeking work in the Electrical field, some of whom are qualified and registered with the Electrical Registration Board. The Register also has qualified Electronic or Mechanical Technicians seeking employment. Accordingly our Employment Service would be able to fill this position. "

It will be seen that the second reason for declining the application reflects and quotes the comments received by the officer from the Employment Service but omitting the conditional clause at the end. That clause was written on the back of the form which is a small piece of paper, 145 mm x 95 mm.

Following this the plaintiff sought assistance from Tradewinds Consulting Services Ltd by way of appeal and reconsideration by the Minister of the Immigration Service's decision. A number of letters were written in support of this appeal and reconsideration by Tradewinds and Foodmaid. In the course of this Tradewinds Consulting Services Ltd challenged what it described as "the unsubstantiated claim that there are in excess of 30 persons registered for employment in the Wellington area and that the New Zealand Employment Service would be able to fill the position." On 16 June 1992 the Immigration Officer sought a further employment check from the New Zealand Employment Service. On this occasion the regular form was used which, as has been noted, described the position offered as Food Machinery Technician and attached the original offer of employment of April 1991. The response from the Employment Service on 22 June 1992 was, "There are suitable New Zealanders registered for this type of work."

On 19 August 1992 the Associate Minister of Immigration wrote to Tradewinds Consulting Services Ltd declining or maintaining the Wellington officer's decision to decline the application. In that letter, after referring to the earlier advice that the Wellington register of the New Zealand Employment Service showed 30 plus people seeking work in the electrical field and the further inquiry made about that, the Associate Minister recorded that he had now been advised that there were suitable people registered for this type of work and that the position

would not be difficult to fill. The Associate Minister then referred to the advice from Foodmaid about his dealings with the New Zealand Employment Service and concluded:

> " After careful consideration I am satisfied that Mr Bahrami-Gholami's position can be filled from within the local labour market. Mr Joseph has not convinced me otherwise. "

A little later the Minister Associate Minister said:

> " I am not prepared to approve his application as an exception to normal policy while there are qualified unemployed New Zealanders who are able to do the job. I can only suggest that Mr Joseph approach the New Zealand Employment Service to advertise the position. "

Tradewinds Consulting Services Ltd responded to that letter on 25 August 1992 seeking an assurance that letters from them dated 17 July and 11 August 1992 had been considered. The Associate Minister responded on 23 October 1992, noting that these letters had not been considered but that he had now considered them and they did not alter his decision. Notwithstanding that there was then further correspondence to the Associate Minister from Tradewinds and from Foodmaid. The Associate Minister, however, was not prepared to accede either to the requests for a meeting with the parties or to give further consideration to the matters that were now raised.

This application then followed. In support of the application the plaintiff filed an affidavit by himself and on his behalf by Mr Joseph of Foodmaid and by Mr Bond of Tradewinds Consulting Services Ltd. Affidavits were filed on behalf of the Immigration Service and by the officer of the New Zealand Employment Service, Miss McQuillan, who had given the advice in June 1992 that there were suitable New Zealanders registered for this type of work. The plaintiff, Mr Joseph, an officer of the Immigration Service and Miss McQuillan were all required to appear and were cross-examined on their affidavits.

It seems that the plaintiff has not worked for Foodmaid for some considerable time. I infer that it was decided and agreed between the plaintiff and

Foodmaid that until the question of his residence and work permit were resolved that he should desist from working and he has done so. Foodmaid, however, is willing and, indeed, anxious to re-employ him because they have such regard for his ability and competence and are confident in his reliability. In the meantime it seems, however, that the business operated by Foodmaid has continued without the plaintiff.

Upon the evidence before the Court I conclude that the position that the plaintiff filled is a highly unusual one. This arises from the fact that, apart from the manufacturers and suppliers of commercial food-making machinery, Foodmaid is the only firm providing a maintenance and repair service to the food industry in the Wellington district. Because of the plaintiff's wide experience and skills he is peculiarly fitted to respond to calls from commercial food-makers and to attend to any breakdown or maintenance of the machinery whether the fault or problem arises in any of the relevant fields which affect the operation of the machinery. That his electrical skills and experience are important is, I think, plain. In addition, however, his other skills mean that when it appears that a fault or problem requires attention, not just in the electrical field but in gas, refrigeration, mechanical or engineering fields, the plaintiff is able to deal with it at once. This means that the customer can be satisfied without delay. This is, of course, of importance to a food-maker who may be in the midst of his production whether as a baker, restaurateur or other food provider when continuity of supply may be crucial. The plaintiff's skills also provide an efficiency for Foodmaid because one call will be sufficient rather than two or more provided by different servicemen each with rather more limited skills.

Although the combination and range of the skills and experience of the plaintiff is unusual it cannot be said that they are unique or that they could not be found in or learnt by another. The technical skills in themselves are of a type and standard which no doubt numbers of others in New Zealand already have or can readily obtain. The combination of some if not all of them is more than likely to be held or to be attainable by a number of persons.

The essential question for the Immigration Service and thus for the Associate Minister was whether, in the terms of the policy, there was a person or persons other than the plaintiff available and possessing to a reasonable degree the skills or being in such a position as might be readily trained in them and with adequate experience to meet the particular requirements of the position which the

plaintiff had held. As I understood Mr Marriott's submissions the plaintiff's claim was not that there was no person who could fill the plaintiff's position. That was not the error that was claimed. Rather it was that the Immigration Service and the Associate Minister had concentrated their attention on the availability of people in the electrical field. That the error or mistake was in treating the job seekers they identified as equivalent to or including persons qualified as food machinery technicians in the role and with the job specifications filled by the plaintiff. This contention was in turn based upon what was said to have been a reliance on the advice from the New Zealand Employment Services in November 1991 as set out in the handwritten note. Two points were made in regard to that. One was that the conditional provision on the back had either been ignored or not seen by those who were involved in the matter and that, in any event, that made a significant difference to the advice or opinion given. It was said that it qualified the opinion that the Service would be able to fill the position. It is clear that the whole of the advice note was recorded separately in a minute which was part of the file and was created in May 1992. This minute led to the further request to the Employment Service which was responded to by Miss McQuillan in June 1992.

I think there is no foundation for the claim that any part of that note had been ignored in any decision made. Moreover I do not accept that the additional words did qualify the opinion. They were the words, "if the employer wanted to list the vacancy with and supply specific quals exp etc required" which followed the words, "we would be able to fill this position". All it meant was that the Employment Service was not prepared to provide names of job seekers until the prospective employer had entered into the normal arrangement of listing with the Employment Service with details of the other particular requirements for the job. That I think did not in any way diminish or derogate from the substance of the advice that there were a number of apparently qualified people available and that on being told the details the Employment Service would produce a suitable candidate.

The further contention of the plaintiff was that the later advice from the Employment Service on 22 June 1992 was no more than a confirmation of the earlier advice and was not the subject of an independent consideration and appraisal of the situation. The foundation for that submission was the fact that Miss McQuillan had no personal recollection of the inquiry, had not kept any notes and was obliged, therefore, to give evidence as to her inquiries on the basis of her usual procedure. In that regard she was unshaken in her assertion that she had

made an independent inquiry, had referred to a number of job classifications and had then considered the particular qualifications of the individual job seekers that those inquiries showed up. On that basis her inquiry was not limited to what has been described as the electrical field. I am satisfied that Miss McQuillan did undertake an independent and careful search. She did not merely confirm what had gone before. There is, indeed, some doubt as to whether that previous inquiry and response was known to her at the time. Her opinion, based upon the information before her as to the specifications of the job, relying on Foodmaid's letter of April 1991, was that there were other job seekers available.

I am in no doubt that in proper cases a mistake of fact in the decision making process is available as a ground upon which judicial review can be based. Miss Pender, for the defendant, did not challenge that. It is, I think, necessary however for the Court to be alert to prevent such a ground being used as a means of appeal upon the facts. As was said by Cooke P in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 552:

> " ... to jeopardise validity on the ground of mistake of fact the fact must be an established one or an established and recognised opinion; and that it cannot be said to be a mistake to adopt one of the two differing points of view of the facts, each of which may reasonably be held. "

Moreover, as is seen in a case such as *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130, mistake of fact may be part of a failure of the duty to take account of relevant considerations or taking into account some irrelevant considerations. In *Daganayasi's* case Cooke J (as he then was) at p 148, after citing and quoting from the speeches of their Lordships in *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014 said:

> " Taken as a whole the observations of the House of Lords seem to me to provide a strong foundation for holding at least that the traditional duty to take into account relevant considerations extends to considerations which should have been within the knowledge of the Minister. "

And a little later at p 149:

> " I would hold in such a case as this that when the Minister instructs a referee to ascertain the facts for him and report, the Minister should bear responsibility for a misleading or inadequate report. The Minister has implied authority to delegate the function of making inquiries, but if as a result the Minister is led into a mistake and a failure to take into account the true facts, it is not right that the appellant should suffer. "

In this case the question for the Immigration Service and the Associate Minister was whether no suitable New Zealand citizen was available or readily trained to fill the job. In this case that was a matter of opinion in the absence of any actual individual New Zealand citizen identified as being suitable. The Service and the Associate Minister formed their opinion on the basis, among other things, of the advice received from the Employment Service. Its original advice, not now attributable to any identified person, was that there were 30 job seekers in the electrical field and others, unnumbered, in the electronic and mechanical fields. The Employment Service was of the opinion that it would be able to fill the position. The clause it appended to that opinion did not, I think, give any substantial qualification to that opinion. When it came to the time for the Associate Minister to make his decision a further inquiry was made. I am satisfied that that was an independent inquiry based upon the job description provided by or on behalf of the plaintiff. Again the opinion was that there were suitable New Zealand citizens who could fill the job.

There was no error in the focus on the electrical field. That was clearly something that was canvassed between the parties with some prominence. It was expressed directly as a matter of importance in the Immigration Service's original letter declining the application. There was never any challenge about that but on the contrary further references as to the additional qualifications or training that the plaintiff was undergoing in the electrical field. Nothing was said by the plaintiff's employer or advisers to correct any misconception on that score but rather the tenor of the correspondence confirmed the importance of the electrical qualification and thus that "field". There was nothing expressed which ought to have alerted or could have alerted the Immigration Service or the Associate Minister or the Employment Service to the thought that the job was other than described in the letter of April 1991. There was, I think, no error or mistake on the

part of the officers of the two services involved which led the Associate Minister into any misunderstanding or mistaken belief or opinion on the matter. This was a case where there is room for more than one opinion on the facts and the material which was put in support of the application by the plaintiff. It has not been shown since, and indeed it may not be possible to show, that no other person, including a New Zealand citizen, would be unable or would not be readily available and trained to undertake the tasks which the plaintiff does for Foodmaid.

It is relevant to note that an important feature of this inquiry, as expressed in the correspondence with the plaintiff and Foodmaid, was evidence of the employer's unsuccessful efforts, if that be the case, to find other New Zealand staff. To that end the Immigration Service sought evidence of listings with the New Zealand Employment Service or any other advertising that had been done or other efforts made to obtain such staff. It was not until October 1992, well after the inquiries had been completed and the rejection of the applications made and repeated, that Foodmaid listed the job with the Service. There had been an earlier listing under another description which did not really test the relevant market. The importance of the application with the Employment Service is that it operates a substantial pool of job seekers and employers. The evidence was that at the relevant time there were some 3,000 job seekers registered in the Wellington metropolitan office. There was no evidence that Foodmaid had undertaken any newspaper advertising apart from the advertisements in February and March before the plaintiff was employed. So, while there was evidence to show how valuable the plaintiff was to Foodmaid, there was really no material which would show that any other person was not available. In my judgment, therefore, there was no mistake and this ground must fail.

The plaintiff raised also allegations of failure to comply with the requisite duties of fairness and natural justice in the conduct of the inquiry. These, too, I think all must fail. On the evidence first the Immigration Service and the Associate Minister, anew, inquired into the matter fully and gave the fullest opportunity to the plaintiff and his advisers to make any submissions they might wish. In the end the Associate Minister relied upon the advice he received from the Employment Service which, in the circumstances, he was well entitled to do. The matter which became the focus of the review proceedings, the importance of the electrical skills, was a matter clearly brought to the attention of the plaintiff in the original letter of declinature in November 1991. The plaintiff was clearly given a fair opportunity to rebut any matters that might have arisen in respect of that

question or point. Since there was no mistake the Associate Minister did not take into account any irrelevant consideration and did take into account the relevant considerations including the opinion as to the availability of New Zealand citizens to fill the job. There was nothing unreasonable in his decision in the sense that it is a decision which no reasonable Minister would have made in the circumstances before him.

In the end the plaintiff's complaint is that the Associate Minister and the Immigration Service were not fully appraised of the particular features of this job and so their inquiries and the opinions made were based upon a false premise. The reason for that was the failure on the part of the plaintiff and his advisers to tell the Immigration Service and the Associate Minister in the detail and to the degree which has now come out in the affidavits and other material since the complete scope and specifications of the particular job. The Minister and the Immigration Service cannot be blamed for that and they cannot be responsible for the mistakes which have arisen from an incomplete presentation of the facts by the plaintiff. The decision maker cannot be held at fault or his decisions found to be reviewable on the ground of a failure by the applicant to apprise the decision maker of facts wholly within the applicant's knowledge unless there is some duty on the decision maker to make full enquiry. The fact remains, as now appears, that the Immigration Service and the Minister did not consider the plaintiff's application for a residence or work permit on the appropriate immigration policy against the real situation. Whether reconsideration in light of the true facts would lead to any alteration in the Associate Minister's opinion I cannot say. Moreover, the policy is that there should be only one right of appeal. That is a perfectly appropriate policy because there must be an end to the process of application. It cannot be right that the matter should remain open for further submission or representation until the applicant gives up. There has to be a finite end to applications such as this just as there must to litigation in the courts. That is not to say, however, that in appropriate cases the Immigration Service or the Minister might not review the matter. Now that there has been a fuller disclosure of the true position it might well seem appropriate that some further consideration should be given to it. There seems to be no other matters which would count against the applicant and it is plain that his employer has the highest regard for the plaintiff's ability and reliability.

In *Tavita v Minister of Immigration* (unreported, Court of Appeal, CA No. 266/93, 17 December 1993) an entirely different case raising matters possibly of far-reaching implication, the Court of Appeal considered that in light of the

circumstances as newly disclosed before it the opportunity of reconsideration by the appropriate Minister should be given. Although each case depends upon its own facts and in this one the circumstances, now disclosed, arise not because of events which have occurred since application or decision but rather the failure on the part of the plaintiff to make a full and adequate disclosure, I believe that this is a case where there should be an opportunity for review and reconsideration.

As was done in *Tavita's* case I adjourn the application sine die to be brought on by either party on seven days' notice. This will enable the plaintiff and his advisers to take such steps as may be thought appropriate and to enable the Immigration Service and the Minister or Associate Minister the opportunity to reconsider the matter.

I note that, in response to an application for interim relief, the Immigration Service undertook not to issue any removal order and that undertaking has remained in force since. I assume that that will remain in place. The plaintiff otherwise will be entitled to bring on the adjourned application for interim relief, if necessary, without notice.

Solicitors: Hornblow Carran Kurta & Bell, WELLINGTON, for Plaintiff

Crown Law Office, WELLINGTON, for Defendant

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