



Employment Court of New Zealand

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McIvor (aka Ali) v Saad [2015] NZEmpC 145 (19 August 2015)

Last Updated: 26 August 2015

IN THE EMPLOYMENT COURT AUCKLAND

[\[2015\] NZEmpC 145](#)

ARC 54/14

IN THE MATTER OF a challenge to a determination of
the
Employment Relations Authority

BETWEEN GARY MCIVOR (ALI) Plaintiff

AND SAMIR SAAD Defendant

Hearing: 5 August 2015
(Heard at Auckland)

Appearances: M Moncur, advocate for plaintiff
T Mukusha, counsel for
defendant

Judgment: 19 August 2015

JUDGMENT OF CHIEF JUDGE G L COLGAN

[1] This case is a challenge other than by hearing de novo to a determination of the Employment Relations Authority delivered on 23 May 2014.¹ Although Gary McIvor (also known as Ali) does not dispute the Authority's finding that he was employed by Samir Saad, he disputes the Authority's determination that he resigned from his employment and was not dismissed constructively. Mr McIvor does not challenge the Authority's finding that he was owed \$2,031.43 for arrears of wages and holiday pay.

[2] The plaintiff's case is that he was dismissed constructively and unjustifiably. He claims compensation for lost remuneration and for general non-economic losses under [s 123\(1\)\(c\)\(i\)](#) of the [Employment Relations Act 2000](#) (the Act). Mr McIvor also seeks costs.

¹ *McIvor v Saad t/a Pita House* [2014] NZERA Auckland 203.

GARY MCIVOR (ALI) v SAMIR SAAD NZEmpC AUCKLAND [\[2015\] NZEmpC 145](#) [19 August 2015]

Preliminary questions

[3] There are two matters that must be dealt with at the outset. The first arises out of the following circumstances. On 22 July 2015 the defendant's briefs of evidence and the bundle of documents were filed. The defendant had then recently engaged counsel but there was no suggestion of any amended pleadings being filed by the defendant. Indeed, leave would have been required to do so because the case had been set down for hearing.

[4] First, as the Court's Minute of that date noted, the evidence intended to be called for the defendant was that he had not employed Mr McIvor. Rather, the defendant seemed to say that Mr McIvor's employer had been a company known as Hatem Brothers NZ Ltd or, possibly more correctly, Pita House Ltd, formerly Hatem Brothers NZ Ltd. The Court noted in its Minute of that date that this defence had not been raised previously by Mr Saad, either in the Authority or in the pleadings filed with the Court.

[5] With a view to attempting to avoid having to deal with these potentially disruptive questions at the start of the hearing, the Court

invited Mr Saad to apply for leave to amend his pleadings if his case was to be that he had not been the plaintiff's employer. The Court required Mr Saad, if he chose to do so, to apply for leave and to file a draft application within seven days of the date of that Minute, that is by 29

July 2015. No such application was received by the Court.

[6] At the start of the hearing, Mr Mukusha, on behalf of Mr Saad confirmed that the defendant had elected not to contest the Authority's finding that he, personally, was Mr McIvor's employer. It follows that liability for those remedies provided by the Authority, which are not the subject of this challenge, remains with Mr Saad personally, as may any additional remedies for unjustified dismissal and unjustified disadvantage that Mr McIvor may achieve in this proceeding.

[7] Second, the defendant, in his statement of defence filed on 15 August 2014, purported to counterclaim against the plaintiff for the sum of \$20,000 for "loss of

business time attending to this matter, consultancy and legal costs [and]

compensation for distress". The defendant also sought:

... a full hearing of the entire matter (a hearing de novo) except the findings of the ERA that- 1) The plaintiff was not constructively dismissed and 2) No award of cost

[8] That purported counterclaim can be dealt with at this point. It is rejected for a number of fundamental reasons. The statement of defence does not disclose any cause of action that might support such a claim; there are no particulars of the defendant's alleged loss of business; there is no provision in employment law by which an employer may sue a former employee for compensation for distress; and, more fundamentally, the ability to elect the nature of a challenge under [s 179](#) of the Act lies with the challenger, in this case the plaintiff. These were not issues which were dealt with by the Authority, or at least ones which appear from its determination to have been before it.

[9] For the foregoing reasons, the defendant's purported claims must be and are dismissed. The exception to this is Mr Saad's claim to costs which will be determined by the outcome of Mr McIvor's challenge.

General comments on evidence

[10] I now turn to the evidence and my conclusions about the conflicts between the parties, of which conflicts there are many. In reaching the following conclusions, I have employed the conventional range of tests, including requiring the proponent of disputed evidence to establish it on the balance of probabilities, applying corroborative documentary evidence where this has been available and hopefully a commonsense assessment of inherent improbabilities. I have also been conscious that there are cultural factors at play including the religious imperative of assisting others of the same religion, the obligations of a man to provide for his family, and the stigma that may attach to members of the same group litigating against one another.

[11] Unfortunately, because there are some sharp contradictions between the evidence of the parties on essential matters of fact, few, if any, records have been

produced to the Court which may confirm the probability of either account. Such documents as are contained within the parties' bundles relate (largely) to remedies (in the case of the plaintiff) and (completely) to the registration of the companies that the defendant now does not seek to allege were Mr McIvor's employers.

[12] Mr Saad's case is that Mr McIvor was never an employee but was, instead, a volunteer on an unpaid (albeit partially compensated) trial to determine his suitability for possible future employment. Mr McIvor's status during the period when he worked at the factory relates to the period between Monday 5 August 2013 and Saturday 7 September 2013 when he tendered his resignation. There is no documentary confirmation of the nature of the arrangement between the parties covering that period of approximately one month. It cannot, in law, have been a trial period under [ss 67A](#) and [67B](#) of the Act because, to be effective, such a trial must be recorded in writing and the record signed by the parties. Such arrangements are usually contained in written employment agreements but there is none in this case.

Relevant facts

[13] Mr Saad operated and managed a food manufacturing facility known as Pita House in the Auckland suburb of Onehunga. At the request of a mutual friend, Mr Saad agreed to Mr McIvor beginning work for him as a packer (factory hand) on or about 5 August 2013. Mr Saad and Mr McIvor agreed that the plaintiff was to work full-time hours and was to be paid \$65 per day to ascertain his suitability for the job. No written employment agreement was prepared by Mr Saad for what was nevertheless this contractual arrangement.

[14] Almost from the outset, Mr Saad worked more than 40 hours per week. In his first week he worked 60 hours and, thereafter, about 50 hours per week, although his daily rate of pay remained the same, at \$65. He did not work a full last week at the factory. I infer that the shortest working week covered five out of seven days, while the 60 hour week was over six of the seven days.

[15] Mr McIvor was engaged, first, as a packer of pita bread into plastic bags as the product emerged from the baking process. However, after the first week, he

acknowledged that he could not keep up with the necessary packing speed and the required agility or dexterity for this task. He asked Mr Saad if he could, instead, be engaged as a baker's assistant at the start of the process, collating and mixing raw materials for baking. This involved heavy lifting of bulk ingredients. Mr Saad agreed to try Mr McIvor out for this job and, by the end of the second week of

his work at the factory, both parties were satisfied that this was work that he could perform and was performing satisfactorily.

[16] After the initial two weeks or so of work, I find that Mr Saad asked Mr McIvor for his driver's licence and IRD number. Mr McIvor inferred from this that he was to become a permanent employee at Pita House rather than being on trial as he had been from the outset. I accept Mr McIvor's evidence, and not Mr Saad's to the contrary, that the plaintiff gave his driver's licence and began arrangements to get, and later provided Mr Saad with, an IRD number. Mr McIvor continued working 50-hour weeks and being paid \$65 per day.

[17] After contacting the Ministry of Business, Innovation and Employment for advice about his employment status and his rate of pay, I accept that Mr McIvor raised a personal grievance about these matters with Mr Saad on or about

5 September 2013. He did so by letter, although no original or copy of this apparently remains. His doing so is consistent with the contents of later correspondence in writing, a copy of which was in evidence although this, too, was disputed by Mr Saad. By text message (also denied by the defendant and of which there is apparently now no record), Mr Saad notified Mr McIvor of a meeting to discuss employment matters to be held on Saturday 7 September 2013. At this meeting Mr McIvor resigned and never returned to work at Pita House.

Discussion

[18] When Messrs McIvor and Saad met on 4 August 2013 at the factory to discuss employment possibilities, Mr Saad offered Mr McIvor full-time work, initially on "a trial basis" for an uncertain period (but which transpired to be a week), and to be remunerated at the rate of \$65 per day. Mr McIvor had a wife to support and her student loan to repay and considered that if this is what it took to get his proverbial foot in the factory door, he would agree to such a trial period, and to payment therefor, to assess mutually each party's suitability. This arrangement was in the plaintiff's expectation that the rate of remuneration would, as a full-time employee, increase after the completion of the trial.

[19] Mr McIvor describes the work as having been non-stop from about 8 am through to about 3 pm when there was a lunch break of an hour or less. That was when production ceased and he and other staff spent up to a further three hours cleaning and maintaining the machinery and the factory before leaving for the day.

[20] By agreement, the trial was extended to a second week. As already noted, about two weeks after commencement, Mr Saad approached Mr McIvor asking him for his driver's licence and IRD details. I accept Mr Saad told Mr McIvor that he could be put "on the books" as a part-timer working 12 hours per week but being paid the same rate of \$65 per day although being expected to continue on the same hours. Despite Mr McIvor's request that he be recorded formally as performing full-time work, Mr Saad responded that Mr McIvor could only be "on the books" as a part-timer and if this was unacceptable, then it would be deemed to be the end of his employment. I accept Mr McIvor's evidence that Mr Saad told him that if he (Mr Saad) was required to pay employees for the actual hours that they worked, even based on minimum rates, he would not be able to operate his business.

[21] Mr Saad's response to Mr McIvor's personal grievance, complaining about hours and wages, came in the form of a text message sent to Mr McIvor at about

2 pm on 5 September 2013, proposing that the parties meet on Saturday 7 September

2013 at 3 pm to discuss those issues. Mr McIvor then sought minimum wage arrears and an entitlement to sick leave and holiday pay. Mr McIvor also told Mr Saad that it was unacceptable to work without a break from 8 am to 3 pm. Mr Saad's response to this complaint was that the other employees generally had requested this late lunch break to enable them to all eat together after production had ceased for the day. Mr Saad was not prepared to stop production for an earlier lunch break.

[22] Mr Saad then told Mr McIvor that if he wished to be paid the minimum wage, his hours would be reduced to 30 per week and that he had another employee

who had been referred to him from Work and Income New Zealand (WINZ) which subsidised that employee's salary. It appears that most of Mr Saad's employees (although not McIvor) were WINZ referrals. Mr McIvor was given the option of either continuing to work for about 50 hours per week at the rate of \$65 per day (in cash) or 30 hours per week at the statutory minimum rate, the former arrangement being "under the table" with the latter being "on the books".

[23] Mr Saad then reiterated to Mr McIvor that if the employer had to pay the employee what was owed, the employment could not continue. Mr McIvor told Mr Saad that the latter had left him no alternative but to resign. Mr McIvor handed Mr Saad a pre-prepared letter of resignation which Mr Saad declined to accept, saying that Mr McIvor could not resign as "you don't have a job to resign from". Mr Saad then left the premises and did not return. A personal grievance was then raised with Mr Saad by Mr McIvor's advocate.

The Authority's determination

[24] Because this is a challenge to the Authority's determination other than by hearing de novo, the Court's task is to determine, on the evidence adduced and the submissions made to it, whether the Authority's determination was correct. The Authority concluded that Mr McIvor's resignation did not constitute a constructive dismissal of him by Mr Saad. The Authority also concluded that Mr McIvor "became disenchanted with [his] hours of work and pay...". It said that Mr McIvor was unable to provide a copy of his letter hand-delivered to Mr Saad on 5 September

2013 setting out his complaints in the form of a personal grievance. The Authority preferred Mr Saad's evidence that no such letter was

given to him by Mr McIvor and also concluded that Mr McIvor was unable to provide the Authority with a copy of what he said had been Mr Saad's response to his letter seeking a meeting. The Authority found, nevertheless, that at the meeting between Mr McIvor and Mr Saad on 7 September at the factory, Mr McIvor told Mr Saad that he wanted to work a full-time week "on the books" and also raised with Mr Saad that he should have been paid the minimum wage for work already performed, that he was entitled to holiday and sick pay, that he should continue to be paid at least his minimum, and he should

be entitled to receive his minimum statutory requirements for ongoing employment. The Authority then found:

Mr Saad offered Mr McIvor 30 hours a week at the minimum wage but this was not acceptable to Mr McIvor. Mr McIvor refused the offer and handed Mr Saad a letter of resignation.

[25] The Authority cited the judgment of the Court of Appeal on constructive dismissal in *Auckland Electric Power Board v Auckland Provincial District Local Authority Officers IUOW*.² That required the Authority to consider first whether the resignation was caused by a breach of duty on the part of the employer. If that question was answered in the affirmative, the Court of Appeal's judgment said that the next question was whether the breach of duty by the employer was of sufficient

seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing; in other words whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach.

[26] The Authority found that Messrs McIvor and Saad agreed to a "work trial" that would end when Mr Saad communicated to Mr McIvor that he was suitable for "permanent employment". It concluded that at the meeting between the two men on

7 September, Mr Saad told Mr McIvor that the latter was a volunteer on a work trial and had yet to be offered employment by him. The Authority concluded that Mr Saad did not believe that he had any obligation to pay Mr McIvor more than had been agreed and the parties then discussed ongoing employment. The Authority concluded that Mr Saad offered Mr McIvor a 30 hour per week job at the minimum wage. It held that Mr McIvor then refused to accept Mr Saad's offer and, therefore, that Mr McIvor "resigned".

[27] The Authority found, nevertheless, that Mr McIvor was employed indefinitely (sometimes described as "permanently") by Mr Saad but that both parties understood their relationship to be that of a "work trial" on terms agreed to. The Authority concluded that Mr McIvor decided before their meeting on

7 September that if he was not paid what he believed to be his minimum entitlements

² *Auckland Electric Power Board v Auckland Provincial District Local Authority Officers IUOW Inc*

[1994] NZCA 250; [1994] 1 ERNZ 168 (CA) at 172.

for work, performed by him during a trial period, and was not offered employment on terms acceptable to him, he would resign, and that was what occurred. The Authority did not accept that Mr Saad was in breach of any duty to Mr McIvor of sufficient seriousness to make his resignation reasonably foreseeable to Mr Saad who understood that the meeting was to discuss the "trial" and the possibility of ongoing work. In these circumstances the Authority concluded "that Mr McIvor resigned voluntarily and had no grounds for claiming a constructive dismissal".

[28] The Authority found, nevertheless that Mr McIvor was entitled to arrears of wages for the time he had worked for Mr Saad being 260 hours for which he was paid \$1,829.57 (without deduction of tax). The Authority held that Mr McIvor was entitled to be paid at the minimum statutory rate of \$13.75 per hour totalling \$3,575 so that the balance due to him was \$1,745.43 (gross) together with holiday pay of

\$286 which the Authority directed to be paid to Mr McIvor by Mr Saad within 14 days of the Authority's determination. The Authority declined to award costs. None of those payments directed by the Authority has yet been made to Mr McIvor despite there being no challenge to them by Mr Saad.

Issues for decision

[29] The first question has already been decided by the Authority and is not challenged. It is whether Mr McIvor was Mr Saad's employee. Adopting the Authority's conclusion, I find the existence of this employment relationship.

[30] The Court must next determine whether Mr McIvor was dismissed constructively and, if so, unjustifiably by his employer.

[31] Finally, if so, the Court must determine remedies for the unjustified dismissal.

A trial period as a volunteer and not an employee?

[32] Even accepting Mr Saad's evidence that the daily payment of \$65 was simply to reimburse Mr McIvor for costs of travel and food for each day, a trial period

compensated for on that basis could not have extended, reasonably, beyond a week. That was illustrated by the fact that at the end of his first week's work, Mr McIvor realised that he could not pack the pita bread at the rate at which it emerged from the ovens as other packers did. In these circumstances, Mr McIvor admitted to Mr Saad that he would not be able to fulfil that packing job but suggested that he might be better suited to the heavy work of a baker's assistant, preparing the bulk ingredients for mixing before the leaven and baking processes. Mr Saad agreed and, on the second week of the (extended) trial period, Mr McIvor performed these duties. At the end

of that agreed second week both Mr McIvor and Mr Saad were satisfied with Mr McIvor's ability to perform the work, and the standard of his performance, respectively.

[33] At best for Mr Saad, therefore, there was a mutually agreed extension to the initial trial of one week by a similar trial period, as a baker's assistant. The continuation of that work into the third week at the factory, however, meant that Mr McIvor was thereafter no longer on trial but an employee of indefinite duration, "a permanent employee". Indeed, Mr Saad did not appear to take issue with this assessment. Rather, he said that Mr McIvor did not attain this employment status because, Mr Saad alleged, Mr McIvor refused repeatedly to give the employer either/or both his IRD number and his driver's licence. This was Mr Saad's explanation for not drawing up and providing Mr McIvor with a written individual employment agreement as the law required. I have found against Mr Saad on the facts in this regard. Mr McIvor did provide his driver's licence and, after it had been obtained by him, his IRD number.

[34] However, neither an IRD number nor information contained on a driver's licence is an essential component of an individual employment agreement. An employee's IRD number is essential to complete a business's pay and taxation obligations but these details are not usually or certainly required in an individual employment agreement; nor is driver's licence information. Mr McIvor's job did not require driving a motor vehicle. Even assuming that the employer's need for the driver's licence was to confirm Mr McIvor's name, that would have been an easy matter for Mr Saad to have asked Mr McIvor in order to complete preparation of an

employment agreement. There was no question of this information being required for other purposes, for example immigration status.

[35] I find, also, as a fact, that Mr McIvor did provide Mr Saad with his driver's licence within the first three weeks of his employment and that Mr Saad took this to the factory office for a period. Although there appears to have been some difficulty and delay in obtaining an IRD number for Mr McIvor (he had previously worked in Australia), that temporary delay could not have been a reasonable justification for failing to prepare a written individual employment agreement. It certainly did not preclude the parties from entering into an oral employment agreement, as I find they did. I do not accept Mr Saad's excuses for both failing to provide a written employment agreement and resisting any suggestion that Mr McIvor was not still on trial being paid a daily rate of \$65 for petrol and food after several weeks of full-time employment.

[36] In addition, Mr Saad revealed his lack of knowledge of basic employment law obligations when he indicated in evidence that he thought that it was lawful for Mr McIvor to be on a three-month trial period of employment which could end without recourse to claims against him. If, by this, Mr Saad was referring to the statutory provisions under [ss 67A](#) and [67B](#) of the Act dealing with what are commonly known as 90 day trial periods, he was mistaken. As already noted, to be lawful, such trial periods must be contained in a written employment agreement to be effective and there are other statutory prerequisites, none of which applied to Mr McIvor's engagement by Mr Saad.

[37] Another example of Mr Saad's misunderstanding of his employment obligations was his view that because Mr McIvor had approached him for a job (rather than vice versa), he was entitled to treat Mr McIvor as he did. The implication was that if Mr Saad had needed an employee, had advertised, and Mr McIvor had been the successful applicant, or that Mr McIvor had been sent and his remuneration subsidised by WINZ, Mr McIvor's terms and conditions of employment would have been better. By asserting, impliedly, that he had given Mr McIvor a job that was strictly superfluous to the factory's needs and so Mr McIvor

was not entitled to statutory minimum terms and conditions of employment, Mr Saad erred further.

[38] It was in this way that Mr Saad sought to justify what he told Mr McIvor when the latter gave him notice of "resignation". Mr Saad's response to Mr McIvor was that he could not resign from a job that he did not have. The inference from this is that despite working between 50 and 60 hours per week, but being paid only \$65 per day as a contribution to petrol and food, Mr McIvor was not employed by Mr Saad.

[39] I do not accept that assessment of the legal or factual position which was the basis of the defendant's case. Contrary to the logical corollary of Mr Saad's proposition, Mr McIvor did not end his work trial period by telling Mr Saad that he was not suited to the job. Rather, the evidence points to Mr McIvor's resignation having been tendered because of Mr Saad's ultimatum to either continue working for

50 hours per week, paid under the table and at the rate of \$65 per day or,

alternatively, to work for 30 hours per week at the minimum wage "on the books".

Decision - constructive dismissal?

[40] Although Mr McIvor's employment with Mr Saad came to an end by resignation, it is difficult to categorise the resignation as other than a constructive dismissal. That is for the following reasons. His first month's work went well beyond what could reasonably have been an assessment of Mr McIvor's ability and an evaluation by him of the work he was expected to perform. Even if initially engaged on a work trial, that must well and truly have concluded two weeks after the beginning of the job. Mr McIvor completed the trial as baker's assistant satisfactorily. It follows, therefore, that the subsequent work performed by Mr McIvor was as a full-time employee of indefinite duration, sometimes called

'permanent employment'. For the final two weeks of working at Pita House, Mr

McIvor was Mr Saad's employee of indefinite duration.

[41] Mr McIvor worked a very full-time week, sometimes more. Mr Saad paid

Mr McIvor very substantially less than the statutory minimum rate of remuneration.

Calculated on an hourly basis, Mr Saad's pay was less than half the minimum hourly rate and was similarly substantially below the daily rate provided for in the [Minimum Wage Act 1983](#). After his first working week of 60 hours, Mr McIvor continued to work for 50 hours per week, yet remained on the daily rate of \$65. This was confirmed by Mr Saad as being a reimbursement for food and travel costs.

[42] In practice, Mr McIvor worked at least a 50-hour week. It was the parties' bargain that he would work for those hours and, in return, would be paid for them. It was statutorily implicit that Mr McIvor would be paid at least the statutory minimum for those hours, but he was not.

[43] When Mr McIvor came to ask that his pay be brought up to statutory minimum standards and that he receive other statutory minimum benefits such as sick pay and holiday pay, Mr Saad's response was to say that Mr McIvor could either continue to work for 50 hours per week for \$65 per day or, alternatively, his working hours could be reduced by 40 per cent (to 30 per week) for which time he would be paid the statutory minimum. Either way, Mr Saad made it clear to Mr McIvor that the employer would, or would continue to, breach either their agreement (as to hours) or the statutory scheme for minimum wages. A unilateral 40 per cent reduction in the hours of work offered would have been a breach of the parties' agreement that Mr McIvor would work at least 50 hours per week.

[44] Equally, Mr Saad's alternative insistence that Mr McIvor continue to work 50 hours per week but be paid \$65 per day, amounted to a breach of the [Minimum Wage Act 1983](#). Either course amounted to a significant breach of contract and indicated an intention on the part of Mr Saad not to be bound either by his contract with Mr McIvor or by the [Minimum Wage Act](#). In either of those circumstances, Mr McIvor was entitled to resign or abandon his employment but to treat that as a constructive dismissal, as he did. Mr McIvor was amply justified in law in doing so.

[45] Next, was Mr McIvor's resignation in those circumstances a consequence foreseeable to Mr Saad as a result of the employer's breaches? Mr McIvor was earning \$325 per week for 50 hours' work at the rate of \$65 per day. Although tax was not being deducted by Mr Saad, this was still such a significantly inadequate

weekly remuneration for 50 hours' work that it was a reasonably foreseeable consequence for Mr Saad of his insistence upon a continuation of those unlawful arrangements that Mr McIvor would not continue working for him.

[46] Alternatively, Mr Saad's offer of 30 hours' work per week at the statutory

minimum rate of \$13.50 per hour would have seen Mr McIvor paid approximately

\$405 per week before tax. Even assuming that Mr Saad may have deducted tax and made accident compensation arrangements and the like, this would also have seen the plaintiff receiving what for him would have been inadequate remuneration by a combination of only part-time work and a minimum statutory wage.

[47] In either circumstance, I conclude that the consequence of the choices offered by Mr Saad to Mr McIvor was obviously that Mr McIvor would not accept either variation to their employment agreement as proposed by Mr Saad, but would either resign or abandon that employment. The requirement of foreseeable consequence is met in this case.

[48] Finally, was this constructive dismissal also unjustified? That requires the application of the statutory tests under s 103A of the Act, namely whether what Mr Saad did and how he did it, were what a fair and reasonable employer in all the circumstances could have done.

[49] In light of the conclusions just reached, it would have been very difficult for the defendant to have justified his dismissal of Mr McIvor; indeed, he did not attempt to do so, but focused on other or fundamental issues, on which he has not been successful.

[50] I conclude that a fair and reasonable employer in Mr Saad's circumstances could not have dismissed Mr McIvor justifiably for both seeking to adhere to his contractually agreed hours of work and/or resisting a continuation of sub-minimal remuneration.

[51] Mr McIvor was dismissed unjustifiably by Mr Saad. The Authority was wrong to conclude that employment ended by simple resignation which did not constitute a constructive dismissal and, thereby, an unjustified constructive dismissal.

Remedies

[52] Although Mr Saad was treated unjustifiably in his employment after the end of the second week of it, this was an integral part of his unjustified constructive dismissal and remedies for unjustified disadvantage should be included within a single set of remedies for unjustified dismissal.

[53] Pursuant to ss 123(1)(b) and 128(1) of the Act, Mr McIvor is entitled to loss of remuneration which he would have earned for the period of three months following his dismissal. I find that this period coincided approximately with his obtaining alternative employment so that a just outcome is to require that Mr Saad pay Mr McIvor the three months' lost remuneration. This should be at the minimum daily rate for remuneration under the relevant Minimum Wage Order or Orders for that period of three months, which sum can be calculated and should be able to be agreed on between the parties. Leave is reserved to Mr McIvor to apply to the Court to fix that sum if it cannot be agreed. No reductions for contributory conduct under s

124 are warranted in respect of any of the remedies payable to Mr McIvor.

[54] Turning to s 123(1)(c)(i) compensation claimed, I find that, despite the relatively short period of employment with the defendant,

the consequences to Mr McIvor of his unjustified dismissal were significant. The evidence is that the dismissal caused significant strain in the relationship between Mr McIvor and his wife. He had the financial obligation of meeting repayments on her student loan and they were both forced to take in paying boarders and to resort to charity food parcels to get by until Mr McIvor obtained alternative employment after some retraining. In a community in which, as a husband, Mr McIvor was expected to provide for his wife, but could not do so as expected, he suffered significant stress and embarrassment.

[55] I should mention, here, that although grounds in support of this claim to compensation included the stress suffered by Mr McIvor's wife including during her pregnancy and the birth of their daughter, this cannot be compensated for. Better evidence linking those circumstances to Mr McIvor's dismissal would have been required especially where, at the time of dismissal, Mr McIvor's wife was not yet pregnant. Those unfortunate consequences suffered by Mr McIvor's wife could not have been reasonably foreseeable at the time of the unjustified dismissal.

[56] Mr McIvor has sought the sum of \$8,000 as compensation for these consequences of unjustified dismissal. I have to say that, had this claim been left unquantified, I would have awarded more as compensation in these circumstances. Nevertheless, the case law is clear that a grievant cannot be awarded more than is claimed specifically and so the Court's award under s 123(1)(c)(i) in favour of Mr McIvor is for the sum of \$8,000.

[57] The plaintiff has sought that a penalty be imposed on Mr Saad for not providing or ensuring that a written employment agreement was entered into between the parties. That breach of the statutory obligation to do so has been established and, in the circumstances, taking into account the excuses proffered by

Mr Saad, should be the subject of a penalty.³ Again, the plaintiff has proposed the

relatively modest sum of \$500 (the maximum penalty would then have been

\$10,000): and I direct that Mr Saad pay a penalty of \$500 and, pursuant to s 136(2), that this be paid to Mr McIvor personally.

[58] Other remedies sought by Mr McIvor include the imposition of a penalty against the defendant in the sum of \$1,000 for breach of s 63A(2) of the Act. This alleges Mr Saad's failure to meet the specified minimum requirements of bargaining for an individual employment agreement. These include:

- to provide the employee with a copy of the intended agreement under discussion;

³ [Employment Relations Act 2000, s 65\(4\), s 135.](#)

- to advise the employee that he or she is entitled to seek independent advice about the intended agreement;
- to give the employee a reasonable opportunity to seek that advice; and
- to consider any issues that the employee raises in response to them. [59] I consider, however, that these failures should be dealt with as a part of the

employer's failure to provide an employment agreement and the penalty to be imposed for that failure.

[60] Next, Mr McIvor seeks a penalty of \$500 for failing to provide wage and time records. There is no evidence to support this claim and it is dismissed.

[61] Mr McIvor seeks interest on his unpaid wages ordered by the Authority. It is common ground that he has not been paid the wage arrears ordered by the Authority. No application for stay of the Authority's orders was made and, in these circumstances, I consider it just that Mr McIvor should have interest on those payments ordered by the Authority at the rate of five per cent per annum calculated for the period commencing one month after the date of delivery of the Authority's determination (23 June 2015) to the date of payment of those sums by Mr Saad to Mr McIvor.

Costs

[62] The Authority elected to make no orders for costs between the parties. In view of the outcome of this challenge, the plaintiff is entitled to an award of costs in the Authority, as well as to costs on the challenge in this Court.

[63] There is no apparent reason why the Authority's notional daily award of

\$3,500 should not be made to the plaintiff in that forum. The Authority's investigation meeting occupied no more than a day. Mr McIvor is, therefore, entitled to an award of costs in the Authority of \$3,500 plus the Authority's filing fee of

\$71.56 (including GST).

[64] When I inquired at the end of the hearing whether there was any reason for this judgment not to include costs on the challenge, Ms Moncur indicated that there are issues which will or may affect that question, so that it is appropriate to reserve costs. Any application for costs in this Court should be made by memorandum within one month of the date of this judgment, the other party having a period of two weeks thereafter to respond by memorandum, and the applicant for costs having one week thereafter to file a memorandum strictly in reply.

Judgment signed at 8.30 am on Wednesday 19 August 2015

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