

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 203  
5432763

BETWEEN

GARY McIVOR  
Applicant

A N D

SAM SAAD trading as PITA  
HOUSE  
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: May Moncur, Advocate for Applicant  
Respondent in person

Investigation Meeting: 15 May 2014 at Auckland

Submissions Received: At the investigation

Date of Determination: 23 May 2014

---

**DETERMINATION OF THE AUTHORITY**

---

- A. Mr McIvor was employed by Mr Sam Saad trading as Pita House, he was not a volunteer.**
- B. Mr McIvor resigned from his employment, he was not constructively dismissed.**
- C. Mr McIvor is owed \$2031.43 gross in arrears of wages and holiday pay.**
- D. No award of costs.**

**Employment relationship problem**

[1] The applicant, Mr Gary McIvor, claims he was constructively dismissed by the respondent, Mr Sam Saad trading as Pita House, on 7 September 2013 and that the constructive dismissal was unjustified. Mr McIvor also claims a breach of the

Minimum Wage Act 1983 and the Holidays Act 2003 and seeks a penalty for failures by Mr Saad to provide him with an employment agreement and wage and time records upon request.

[2] Mr Saad denies the claims on the grounds that he never employed Mr McIvor. He states that Mr McIvor was a volunteer on an unpaid trial to determine his suitability for employment. Prior to the completion of the trial period and before any decision was made as to his suitability, Mr McIvor resigned. Mr Saad denies he constructively dismissed Mr McIvor.

### **Issues**

[3] The Authority must determine the following issues:

- (a) Was Mr McIvor employed by Mr Saad?
- (b) If Mr McIvor was employed by Mr Saad, was he constructively dismissed?

### **First issue**

#### **Was Mr McIvor employed by Mr Saad?**

[4] Mr Saad operates a pita bread bakery, Middle Eastern supermarket and kebab takeaway shop from premises in Neilson Street, Onehunga.

[5] Mr McIvor contacted Mr Saad about the prospect of employment in early August 2013 following a conversation with a mutual acquaintance, Mr Khaled Barakat. Mr McIvor is a recent convert to Islam and met Mr Barakat through the Mosque at the University of Auckland.

[6] Mr McIvor told Mr Barakat that he had been out of work for some time and asked him if he knew of any jobs going. Mr Barakat wished to help Mr McIvor as a “new Muslim” and told him he had a good friend who owned a bakery and there might be a job there.

[7] Mr Barakat contacted Mr Saad and explained Mr McIvor’s situation and that as a fellow Muslim it would be good if Mr Saad could help. Mr Saad told Mr Barakat that currently there were no jobs available, but if Mr McIvor wished to meet with him

they could discuss some work possibilities. Mr Saad says he did this as a favour to Mr Barakat and to show support for a “Muslim brother”, Mr McIvor.

[8] Approximately three or four days after being contacted by Mr Barakat, Mr McIvor telephoned Mr Saad, introduced himself as “Ali” and asked if it would be possible to meet with him about work possibilities. Mr Saad told Mr McIvor that he should come to the factory to see if he liked the work and then they could discuss matters further.

[9] In early August 2013, Mr McIvor met Mr Saad at the Pita House factory in Onehunga. Mr Saad showed Mr McIvor around the factory including the ovens where the pita bread is baked. Mr Saad says he told Mr McIvor that he might like to try working in the bakery to see whether or not he could handle the hot temperatures. If he liked the job and was suitable, Mr Saad agreed to discuss it further. Mr Saad agreed to pay Mr McIvor \$65 a day which Mr Saad says was for food and petrol, not wages. Mr Saad says he knew Mr McIvor as “Ali” only; it was only following the filing of the Statement of Problem that he became aware his name was Mr Gary McIvor.

[10] Mr McIvor was keen to undertake the trial; he says he really needed the job as he had a wife to support and a student loan to repay. The day after this meeting Mr McIvor started work packing pita bread into bags. Mr McIvor found the work too fast paced and could not keep up. After approximately one week Mr McIvor and Mr Saad discussed the trial. Mr McIvor was struggling with the job but asked Mr Saad for another chance. Mr Saad agreed to trial Mr McIvor as the baker’s assistant mixing the dough for the pita bread. The trial was to be for a couple of weeks.

[11] Mr McIvor says in the first week packing pita bread he worked for 60 hours and in the following three weeks he worked 50 hours a week. Altogether, Mr McIvor says he worked 260 hours at the factory. Mr Saad denies that Mr McIvor worked that number of hours because the factory did not open until 8am. Mr Saad did not keep a record of hours worked because he says Mr McIvor was not employed, he was a volunteer on a trial and not “on the books”. In the absence of any wage and time records I accept Mr McIvor worked 260 hours for Mr Saad.

[12] Mr McIvor says he was employed by Mr Saad and is owed wages and holiday pay. Mr Saad says Mr McIvor was a volunteer on a work trial and is not entitled to wages and holiday pay.

[13] Mr McIvor worked for Mr Saad initially packing pita bread and then trialed as the baker's assistant for approximately a couple of weeks. Mr McIvor, in my view, performed work for Mr Saad which contributed to his business.

[14] Mr McIvor expected to be monetarily rewarded during the course of the work trial and he did receive a "reward" being \$65 per day for food and petrol. Applying these facts to the definition of "volunteer" in s.6(1)(c) of the Employment Relations Act 2000 (the Act) Mr McIvor was not a volunteer. I conclude that Mr McIvor was offered work on a trial basis for two purposes, for Mr McIvor to determine whether he liked the job and for Mr Saad to determine Mr McIvor's suitability.

[15] I refer to the decision of Chief Judge Colgan in *The Salad Bowl Ltd v. Amberleigh Howe-Thornley*<sup>1</sup>. The Employment Court in that decision considers trial work periods and their relationship with other provisions in the Act, including ss.66, 67 and 67A. Based on *The Salad Bowl* decision, it is my conclusion that the employment relationship in this case was one of a fixed term employment agreement.

[16] Mr McIvor and Mr Saad had agreed that Mr McIvor was engaged on a work trial to determine his suitability for a position in the event one became available<sup>2</sup>. As found in *The Salad Bowl* employers cannot use fixed term employment agreements for the purpose of establishing an employee's suitability for permanent employment. If employers attempt to do so, "*such arrangements lose their fixed term advantages for employers*"<sup>3</sup>.

[17] In this instance, the fixed term employment agreement was unlawful and in breach of the Act. Mr McIvor was able to, and did, treat the fixed term as ineffective. Mr McIvor, I conclude, was employed indefinitely by Mr Saad. The answer to the first issue is "Yes".

[18] Judge Colgan in *The Salad Bowl* commented on issues arising out of the use of "*pre-permanent employment trials*". At para [106] he stated:

---

<sup>1</sup> NZEmpC 152

<sup>2</sup> See *The Salad Bowl* para.[66]

<sup>3</sup> *The Salad Bowl* para.[68]

*... The enactment by Parliament of ss67A and 67B of the Act, together with the prohibition on suitability of employment being a valid ground for a fixed term agreement under s66, may mean that if a potential employer wants to “try out” a potential employee, that person may have to be engaged as an employee on a trial period of appropriate duration under s67A. Although this would require greater compliance costs on the part of both parties, such an arrangement would offer some protections to the employee during the trial period but would also enable the employer to conclude that the employee is unsuitable for the position and to terminate the arrangement without the risk of an unjustified dismissal personal grievance.*

[19] This is an approach that could have been taken when Mr McIvor approached Mr Saad about a job in the Pita House factory. Such an approach would have provided Mr McIvor with appropriate protections while he determined whether he liked the job. Mr Saad would also have been able to conclude whether Mr McIvor was suitable and if not terminate the relationship without the risk of Mr McIvor raising a personal grievance as has occurred.

## **Second Issue**

### **If Mr McIvor was employed by Mr Saad, was he constructively dismissed?**

[20] After working as the baker’s assistant for a couple of weeks and enjoying the job, Mr McIvor became disenchanted with the hours of work and pay he was receiving. Mr McIvor did not talk to Mr Saad about his issues, he contacted the Ministry of Business, Innovation and Employment (MBIE) formerly the Department of Labour, for advice. Mr McIvor says after taking advice, he wrote a personal grievance letter to Mr Saad about the work and his pay.

[21] Mr McIvor says he hand delivered the letter to Mr Saad on 5 September 2013 and subsequently received a text message from Mr Saad asking him to meet on Saturday 7 September so they could discuss employment matters.

[22] Mr McIvor was not able to provide a copy of the letter to the Authority as he says he did not retain a copy of it. Mr Saad’s version of events differs. Mr Saad says he did not receive the letter and was not aware of any personal grievance claim by Mr McIvor.

[23] Mr Saad says he was telephoned by Mr McIvor on about 5 September 2013 asking to meet him about his work and pay. Mr Saad says he thought Mr McIvor

wanted to talk about the trial and asked Mr McIvor to meet with him on Saturday 7 September and to bring his IRD number and driver's licence with him.

[24] I find that Mr McIvor did not give a personal grievance letter to Mr Saad on 5 September. Mr McIvor has retained all other correspondence and it seems very unusual that he did not keep what was to be an important letter about his employment issues. Mr McIvor was also unable to provide the Authority with a copy of the text message he allegedly received from Mr Saad asking for a meeting. I prefer Mr Saad's version of events that he was telephoned by Mr McIvor and a meeting was set up for Saturday, 7 September.

[25] At the meeting on 7 September at the factory in Onehunga, Mr McIvor and Mr Saad discussed the work trial. Mr McIvor told Mr Saad he wanted to be put "*on the books*" as a fulltime 40 hour a week worker. Mr McIvor also raised his pay rate and said to Mr Saad that he should have been paid the minimum wage for work already performed, and that he was entitled to holiday and sick pay. 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. Mr McIvor did not return to work. Mr McIvor claims his resignation is a constructive dismissal.

[26] Mr McIvor says he had been told about "constructive dismissal claims" when he sought advice from MBIE. Mr McIvor prepared a letter of resignation in advance of his meeting with Mr Saad on 7 September because he felt Mr Saad was not going to deal with his pay issues. In the letter of resignation, Mr McIvor states:

*Thank you for arranging an appointment for Saturday, September 07, at 3pm to discuss employment matters with me.*

*It has become clear through discussions with you both prior to the meeting and during the meeting that you do not intend to address the issues outlined in my letter to you in the form of a written response as outlined.*

*It is sad when an employer does not follow his obligations to staff as required by law including minimum wages and working conditions, for all staff not just some.*

*It is therefore with great sadness that I find myself writing this letter of resignation to you. It should be understood that my resignation is in the form of constructive dismissal. This is because you refuse to fulfil your obligations under the award and address the issues that have been brought to your attention in an appropriate manner."*

[27] The Court of Appeal considered the correct approach to constructive dismissal cases as follows<sup>4</sup>:

*In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is 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.*

[28] Mr McIvor and Mr Saad agreed to a work trial that would end when Mr Saad communicated to Mr McIvor that he was suitable for permanent employment. At the meeting on 7 September, Mr Saad told Mr McIvor he was a volunteer on a work trial and had yet to be offered employment by him. Mr Saad did not believe he had any obligation to pay Mr McIvor more than had been agreed. Mr Saad and Mr McIvor discussed ongoing employment. Mr Saad offered Mr McIvor a job for 30 hours a week at the minimum wage. Mr McIvor refused to accept the offer and resigned.

[29] For the reasons already given in this determination, Mr McIvor was employed indefinitely by Mr Saad but both parties understood the relationship to be that of a work trial on terms agreed to. Mr McIvor, in my view, determined prior to the meeting on 7 September that if he was not paid what he believed to be minimum entitlements owing for work performed by him during the trial period and was not offered employment on terms acceptable to him he would resign. This is what occurred.

[30] I do 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. Mr Saad understood the meeting was to discuss the “trial” and the possibility of ongoing work. Mr McIvor decided he was unhappy with the terms of the “trial” and the job offer and decided to resign.

---

<sup>4</sup> *Auckland Electric Power Board v. Auckland Provincial District Local Authority Officers IUOW* [1994] 1 ERNA 168 at p.172

[31] In all the circumstances, I conclude that Mr McIvor resigned voluntarily and has no grounds for claiming a constructive dismissal.

[32] Mr McIvor is entitled to claim arrears of wages for the time he worked for the Mr Saad. Mr McIvor worked 260 hours and was paid the equivalent of \$1829.57 gross. Mr McIvor was entitled to be paid at the rate of \$13.75 per hour which totals \$3575.00 gross. Therefore, Mr McIvor is entitled to \$1745.43 gross. Mr McIvor is entitled to holiday pay amounting to \$286.00 gross. Both these sums which total \$2031.43 gross are to be paid to Mr McIvor by Mr Saad within 14 days of the date of this determination.

### **Costs**

[33] Both Mr Saad and Mr McIvor have had a level of success. In the circumstances I make no award of costs.

**Anna Fitzgibbon**  
**Member of the Employment Relations Authority**