



An Employment Standards Failure

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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A recent case, *Mclvor (Ali) v. Samir Saad* [2015] NZEmpC 144, perhaps exemplifies the type of situation that has led to the Government's introduction of the Employment Standards Legislation Bill. Part of that Bill has the following aim:

"• provides for stronger and more effective enforcement of employment standards (such as the minimum wage and holiday entitlements) through amendments to the Employment Relations act, Minimum Wage Act, Holidays Act, and Wages Protection Act."

In the *Mclvor* case, Mr Mclvor appealed an Employment Relations Authority determination that he had not been constructively dismissed but was entitled to some arrears of wages.

Mr Mclvor commenced work at Pita House, a food manufacturing facility owned by Mr Saad, on 5 August 2013. It was agreed that he would work full time and be paid \$65 per day to ascertain his suitability for the job. There was no written employment agreement.

Mr Mclvor in fact worked closer to 50 hours per week, while still being paid \$65 per day (\$6.50 per hour). His initial role was as a packer but after a week he acknowledged that he could not keep up with the speed of the packing process, so instead was engaged as a baking assistant. Both parties accepted that he was performing this role satisfactorily.

After 2 weeks of work, Mr Saad asked Mr Mclvor for his driver licence and IRD number. These were eventually provided, with Mr Mclvor inferring that he was now to become a permanent employee.

Around 5 September 2013, Mr Mclvor raised a personal grievance (having sought advice from the MBIE) around his employment status and rate of pay. Mr Saad then called Mr Mclvor to a meeting on 7 September 2013 and at this meeting Mr Mclvor resigned.

The Court examined the employment relationship and described the events surrounding the second week of Mr Mclvor's employment as follows:

"[20] By agreement, the trial was extended to a second week. As already noted, about two weeks after commencement, Mr Saad approached Mr Mclvor asking him for his driver's licence and IRD details. I accept Mr Saad told Mr Mclvor 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 Mclvor's request that he be recorded formally as performing full-time work, Mr Saad responded that Mr Mclvor 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 Mclvor'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."

As to the detail of the 7 September 2013 meeting, the Court said:

"[21] Mr Saad's response to Mr Mclvor's personal grievance, complaining about hours and wages, came in the form of a text message sent to Mr Mclvor 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 Mclvor then sought minimum wage arrears and an entitlement to sick leave and holiday pay. Mr Mclvor 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 Mclvor 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 Mclvor) were WINZ referrals. Mr Mclvor 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"."

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

Contact Details:

McPhail Gibson & Zwart

Ground Floor

71 Cambridge Terrace

PO Box 892, Christchurch

Tel (03) 365 2345

Fax (03) 365 2347

www.mgz.co.nz

Neil McPhail

Email neil@mgz.co.nz

Mobile 0274 387 803

Raewyn Gibson

Email raewyn@mgz.co.nz

Mobile 0274 387 802

Peter Zwart

Email peter@mgz.co.nz

Mobile 0274 367 757

[23] Mr Saad then reiterated to Mr Mclvor that if the employer had to pay the employee what was owed, the employment could not continue. Mr Mclvor told Mr Saad that the latter had left him no alternative but to resign. Mr Mclvor handed Mr Saad a pre-prepared letter of resignation which Mr Saad declined to accept, saying that Mr Mclvor 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 Mclvor's advocate."

Contrary to the Employment Relations Authority's finding that the resignation did not amount to a constructive dismissal, the Court had little difficulty in concluding that it did:

"[40] Although Mr Mclvor'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 Mclvor'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 Mclvor completed the trial as baker's assistant satisfactorily. It follows, therefore, that the subsequent work performed by Mr Mclvor was as a full-time employee of indefinite duration, sometimes called "permanent employment". For the final two weeks of working at Pita House, Mr Mclvor was Mr Saad's employee of indefinite duration."

"[43] When Mr Mclvor 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 Mclvor 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 Mclvor 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 Mclvor would work at least 50 hours per week."

[44] Equally, Mr Saad's alternative insistence that Mr Mclvor 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 Mclvor or by the Minimum Wage Act. In either of those circumstances, Mr Mclvor was entitled to resign or abandon his employment but to treat that as a constructive dismissal, as he did. Mr Mclvor was amply justified in law in doing so."

The Court went on to find that it was reasonably foreseeable that Mr Saad's insistence on continuing to pay "significantly inadequate" remuneration or have his hours reduced and still receive inadequate remuneration, would lead to Mr Mclvor's resignation. The Court also found that the constructive dismissal was unjustified:

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

Mr Mclvor was awarded three months lost remuneration, \$8,000 in compensation and \$500 as a penalty for Mr Saad's failure to provide a written employment agreement.

We will report more fully on the Employment Standards Legislation Bill in a forthcoming issue of The Advocate. However, whether significantly increasing penalties for breaches of employment standards, increasing the powers of Labour Inspectors and introducing a new infringement notices regime will address the practices that the **Mclvor** case highlighted remains to be seen.

Employment Relations Practice Course

Our next Employment Relations Practice Course has been set down for **Wednesday 4 and Thursday 5 November 2015**.

Places on this course are already filling up fast.

Further information in regard to the course content and registration details can be found on our website – www.mgz.co.nz/training



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