



**Issues**

- [5] The issues for determination are:
- a. Whether Mr Hartung was unjustifiably dismissed
  - b. Whether McKay breached section 12 of the Fair Trading Act
  - c. Whether McKay breached section 6 of the Contractual Remedies Act 1979
  - d. Whether McKay breached the good faith obligations it owed to Mr Hartung under the Employment Relations Act 2000 (“the Act”)
  - e. Whether Mr Hartung was unjustifiably disadvantaged in his employment

**Background Facts**

[6] McKay is a multi-disciplined electro-technology company with offices in Whangarei, Hamilton, Auckland, Warkworth and Abu Dhabi, United Arab Emirates (“UAE”). McKay had a contract to manage and supervise the electrical installation on a mega yacht being constructed in Abu Dhabi, a project known as ‘The Swift 141 Project’.

[7] Mr Lindsay Faithfull, Chief Executive Officer of McKay, explained that the Swift 141 construction was carried out by the primary contractor Abu Dhabi Mar Ship Builders (“ADMS”). ADMS had total control of the project and McKay was contracted to provide staff to supervise local UAE workers.

[8] Mr Faithfull stated that the Swift 141 project was strictly controlled in terms of the contractors and site access and that it was a contractual term between McKay and ADMS that ADMS could, without notice, reduce the numbers of contractors that were in attendance by requesting that they were removed from the site.

[9] Prior to Mr Hartung’s interview with McKay, Mr Faithfull stated that ADMS had ordered the removal of two McKay Filipino employees from the site in UAE on the basis that their employment on superior terms was causing issues with the local Filipino workforce, and that subsequently McKay had also been instructed by ADMS to remove two South African employees for simply ‘not fitting in’.

[10] Mr Faithfull explained that employees working in the UAE who were not UAE nationals were required to have work visas; however there were frequently significant delays in these being obtained. As a consequence it was the practice that employees waiting for a work visa would work while on a visitor's permit and at 30 day intervals do a 'border run' to Oman and refresh their visitor's permit for a further 30 days before re-entering the UAE.

[11] McKay retained the services of an employment recruitment agency, Refocus Recruitment, to recruit employees for the Swift 141 Project. Mr Gary McKinney, principal of Refocus Recruitment, explained that the vacancies had been advertised on line and that Mr Hartung had replied to the advertisement.

[12] Mr McKinney said he had met with Mr Hartung on several occasions and that they had had discussions by telephone. Mr McKinney stated that he had informed Mr Hartung that he would be able to take his wife with him, but that this would be at his own expense. At the Investigation Meeting Mr Hartung agreed that Mr McKinney had not told him that his wife's airfare would be paid, but that he had assumed this to be the case from Mr McKinney's assertion that 'everything would be taken care of by McKay'.

[13] Mr McKinney said that he had explained to Mr Hartung that there were delays in obtaining work visas would necessitate the so called "border runs".

[14] On 26 July 2010 Ms Galbraith, McKay's Human Resources Manager, and Mr Faithfull interviewed Mr Hartung. Ms Galbraith said that Mr Hartung, who had recently been made redundant from his previous employment, was excited at the prospect of employment.

[15] Mr Faithfull said that at the interview on 26 July 2010 he had explained to Mr Hartung in general terms what the role and the conditions of employment on the Swift 141 Project would be. Mr Faithfull said that he made all employees who were employed by McKay in the UAE aware that the employment came with its own inherent risk and that continued guaranteed employment in the UAE was not possible, explaining that although McKay endeavoured to ensure that employees would be there for at least a year, McKay did not have the ability to control that aspect.

[16] Mr Faithfull stated that he had illustrated this point by telling Mr Hartung about the expulsion of the two South African employees who had been removed from the ADMS site in the UAE.

[17] At the Investigation Meeting Mr Hartung confirmed that Mr Faithfull had told him about the fixed term nature of the employment and he had understood the reasons for it, and that Mr Faithfull had told him about the two South Africans who had been removed from the site in the UAE.

[18] Ms Galbraith said that the work visa situation had been explained to Mr Hartung, in particular that obtaining the work visas could take varying amounts of time.

[19] Mr Faithfull stated that he had not said that McKay would pay for Mr Hartung's wife's travel costs as it was not McKay's policy to pay for the travel of those who were not employees.

[20] Mr Hartung said that he had informed Mr Faithfull and Ms Galbraith that he had the medical condition known as Hughes Syndrome. Ms Galbraith said that Mr Hartung had assured her and Mr Faithfull that he was quite capable of carrying out the work for which he was applying with McKay, especially if he maintained his medication.

[21] Ms Galbraith said that Mr Hartung had provided a medical certificate at McKay's request. On the medical certificate Mr Hartung's doctor had written:

*Dear Neville,*

*It is my opinion that you are fit & able to undertake your regular work duties & those intended in Abu Dhabi.*

[22] Mr Hartung stated that he was told at the interview on 26 July 2010 that both he and his wife would be covered by Southern Cross Health Insurance whilst in Abu Dhabi. Mr Faithfull and Ms Galbraith denied that they had informed Mr Hartung that he and his wife would be covered by Southern Cross Health Insurance, but explained that an application form for Southern Cross Health Insurance had been included in Mr Hartung's employment pack.

[23] Ms Galbraith explained that Mr Hartung's application for employment had been accepted and he had been sent an employment pack containing *inter alia* an Individual Employment Agreement Fixed Term Contract ("the Employment Agreement") and a job description. The Employment Agreement specified a salary of €6000.00 (euro) per month and stated at clause 3.0:

### ***3.0 TERM OF THE AGREEMENT***

*3.1 This agreement will come into force on the date of the employee's departure for the Swift 141 project in Abu Dhabi, UAE, expected to be on Thursday 26<sup>th</sup> August 2010 [date deleted and new date of Thursday 30<sup>th</sup> September 2010 inserted in handwriting] and is subject to the client's initial and continuing acceptance of the employee onto the project and may be terminated if it is withdrawn, otherwise this agreement shall remain in force until the end of the employee's involvement with this project, expected to be in one year, or until terminated by either party pursuant to clause 15 of this agreement.*

[24] Mr Hartung said that he had signed and returned the Employment Agreement. Mr Hartung said that he and his wife had then undertaken the following actions:

- a. They had transferred their personal health insurance cover with Southern Cross to be included under the McKay group membership;
- b. Mr Hartung had sold his car, this being at a loss;
- c. Mr Hartung had entered into an arrangement with the IRD for a tax cessation for the year he considered he would be in the UAE, this necessitated his being out of New Zealand for 325 days out of the annual period of 365 days; and
- d. Mrs Hartung had resigned from her employment in which she had 8.5 years service in order to accompany Mr Hartung to the UAE

[25] Ms Galbraith said that Mr Hartung's application to Southern Cross had been accepted and McKay had paid some premiums under the policy which were deducted from Mr Hartung's salary. Ms Galbraith stated that shortly after the policy was established, Southern Cross had cancelled the policy on the basis that it had not known that Mr Hartung would be working in Abu Dhabi. Ms Galbraith said she had enquired as to why Southern Cross had accepted Mr Hartung for cover, but had received no answer to this question.

[26] Mr Hartung said that McKay had booked and paid for his and his wife's airfares and that he had been surprised when Ms Galbraith had requested payment from him for his wife's airfare. However as this had occurred at what Mr Hartung considered to be a late stage, he had decided to acquiesce with the arrangement.

[27] Mr Hartung explained that he and his wife had decided that they would not go to the UAE unless he had a work visa, and that McKay had informed him that a work visa would be stamped into his passport upon entry into Abu Dhabi.

[28] Ms Galbraith said that Mr Hartung had been concerned at the work visa situation, and that she had received several communications from him on the subject and that in her responses she had tried to explain as much as she could about the work visa situation. Ms Galbraith said that she had explained to Mr Hartung and the other new employees who would be travelling with him, that McKay were endeavouring to speed up the process of obtaining the work visas, but that the situation was outside of McKay's control.

[29] On 2 September 2010 Ms Galbraith had written to Mr Hartung and 5 other new employees to update them on the visa situation and in connection with arranging their flights to Abu Dhabi. Regarding the visa situation Ms Galbraith had written:

*I appreciate that some of you have been waiting a long time for news on your UAE visas and I thank you for your patience. We have some news at last. We have been told that the visas have been held up as all but one of the staff in the labour office in the UAE are on holiday, and the only one left broke his leg and is off work, due back on Sunday! We have since had confirmation that for an additional fee to McKay, the visas can be processed while you are in the UAE as opposed to getting the visas prior to arrival. There is a risk to this in that if there is a hold up and it takes longer than 30 days to get your visas after you have arrived in the UAE you may be required to do a "border run". We consider this risk to be slight as all but William's visa application has been received quite some time ago, and by the time we have your departures we feel that the visas will be ready.*

[30] Mr Hartung said that he had read this email as meaning that the work visas would be ready for them on arrival, and he had therefore decided to go to the UAE prior to receiving a work visa.

[31] Mr Hartung said that on arrival at the airport in Dubai he, his wife and another new employee had been met by Mr Denis Crene, at that time Project Manager for the Swift 141 Project. Mr Hartung explained that he had been expecting the work visas to be processed immediately but that Mr Crene had taken them by car to Abu Dhabi.

[32] Mr Crene said that during the hour and a half drive to Abu Dhabi he had gained the impression from the general discussions in the car that Mr and Mrs Hartung were overly concerned about the failure to obtain a work permit. Mr Crene said that he had explained to them that McKay was just a small part of the bureaucracy and that there was nothing more McKay could do to get the work visas through.

[33] Mr Crene said he had further explained that the immigration officer in Abu Dhabi had suggested that McKay did what other companies in a similar position were doing, which was to drive to Oman, cross the border and refresh the visitors' permits.

[34] Mr Hartung stated that once he arrived in the UAE, Southern Cross had informed him that it would not provide him with health insurance cover while he was in the UAE.

[35] Mr Crene said that a few days later he had met Mr Hartung to go through his site induction process and Mr Hartung had again raised the issue of work visas and also that of medical insurance, and Mr Crene said he had concluded that these issues would be of an ongoing concern for Mr Hartung.

[36] Mr Hartung stated that on one occasion McKay had become aware that Immigration was coming to do an inspection of the site and employees without work visas were removed from the site. Mr Hartung said that these employees had been instructed not to return to the site for a period of approximately two weeks, and that McKay had sought their agreement to a reduction in their salaries of half their monthly salary rate during that period.

[37] Mr Hartung said that he had not agreed to this reduction and the reduction had not been actioned.

[38] Mr Martin D'Arcy, who had taken over the Project Manager role from Mr Crene upon Mr Crene's return to New Zealand, explained that on that occasion ADMS had directed that all contract labour that was not in possession of a work visa should stay at the villas and refrain from coming to work. During this period the employees' access to the site was cancelled, however their rate of remuneration had not been affected.

[39] Mr Hartung said that after the two week period, the employees were allowed back on the site, but could only work between 9.00 a.m. and 3.00 p.m. Mr Hartung said that this had resulted in him experiencing taunts from other McKay employees who had work visas.

[40] Mr D'Arcy said that he had negotiated the access to the site with ADMS, albeit for limited hours. Mr D'Arcy explained that this situation had caused some problems within the McKay work force as Mr Hartung and his colleagues had not only received two weeks' pay whilst not at work, but they had returned on reduced hours but still received their full salary.

[41] Mr D'Arcy said that upon becoming aware of the situation, he had spoken to the employees with work visas and given them a warning and this had resolved the situation.

[42] Mr Crene explained that during Mr Hartung's employment in the UAE, he (Mr Hartung) had been offered the position of Supervisor but he had turned the offer down. Mr Crene confirmed the reason as being that: "*Keith is worried about his health*" in an email to Ms Galbraith dated 31 October 2010.

[43] At the Investigation Meeting Mr Hartung explained that he had considered that if he was injured, this would result in no supervision and that this would not be fair to McKay. Mr Hartung said that Mr Thomas Jaroch, a representative of ADMS, had asked him why he had not accepted the supervisory role, and he had explained that it was due to his medical condition.

[44] Mr Hartung said that during the period of employment in the UAE he had suffered two work place accidents which had required him to have x-rays and doctor's consultations.

[45] Mr D'Arcy stated that one of these injuries had been a bump to Mr Hartung's leg which because of his medical condition necessitated Mr Hartung going to hospital for an examination to prevent possible complications. Mr D'Arcy said that Mr Hartung's medical expenses claims had been forwarded to the McKay pay office for approval.

[46] On 10 March 2011 Mr D'Arcy said he had received an email from Mr Jaroch ordering that Mr Hartung and one other employee be removed from the site. The email from Mr Jaroch stated:

*Good morning Martin,*

*Effective immediately, the work services of McKay Electrical LLC employees Keith Hartung (ADM#6399) and Michael Rogers (ADM#6400) are terminated from ADMS Shipyards, Abu Dhabi, UAE.*

*Please have their turnstile swipe card/Swift 141 safety zone swipe card/deck pass/tool bags returned to me by 09.00.*

*These 2 workers will be escorted off site by yourself (Martin D'Arcy) by no later than 08.00 Thursday March 10, 2011.*

[47] Mr D'Arcy said upon receiving the email he had spoken to Mr Jaroch, but it had been made clear to him that it was not a matter for discussion and the instruction was to be carried out.

[48] Mr Hartung said he had sent an email to Mr Jaroch who had replied to him on 15 March 2011. In that email Mr Jaroch had said that Mr Hartung's employment had been terminated because it had come to light that he had a pre-existing medical issue.

[49] Ms Galbraith said that McKay continued to accommodate Mr and Mrs Hartung at the villa accommodation provided by McKay free of charge until they flew back to New Zealand on 22 March 2011.

[50] Mr D'Arcy stated that in April 2011 he had received an email from Mr Jaroch summoning him to his office on the basis that 12 McKay employees were to be removed from the site. Mr D'Arcy said that when he arrived at Mr Jaroch's office he had seen the list of those employees who were to leave the site and his own name was at the top of the list.

[51] Mr Faithfull explained that a further 7 McKay employees had been directed to leave the site since that date.

## **Determination**

### **Was Mr Hartung was unjustifiably dismissed by McKay?**

[52] Mr Hartung was employed by McKay subject to an Employment Agreement, which was specified to be of a fixed term nature. To be valid, a fixed term employment agreement must comply with section 66 of the Act which states:

#### **66 Fixed Term Employment**

1. *An employee and an employer may agree that the employment of the employee will end –*
  - a. *At the close of a specified date or period; or*
  - b. *On the occurrence of a specified event; or*
  - c. *At the conclusion of a specified project.*
2. *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must –*
  - a. *Have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*

*b. Advise the employee of when and how his or her employment will end and the reasons for his and her employment ending in that way*

[53] Section 66(2)(a) provides that an employer must have genuine reasons based on reasonable grounds before the employer and employee can agree on the employment ending in a specific way. Clause 3.1 of Mr Hartung's Employment Agreement specified that he was employed in connection with a specific project, the Swift 141 project, and that his continued employment was subject to: "*the client's initial and continuing acceptance of the employee onto the project*". Failing such continued acceptance the clause specified that Mr Hartung's employment would be terminated.

[54] I find that Mr Hartung was employed subject to a valid fixed term agreement on the basis that clause 3.1 of the Employment Agreement specified a genuine reason based on reasonable grounds for the termination of employment.

[55] Subsection 66 (2)(b) specifies a further condition of fixed term employment, this being that the employer must advise the employee of the reasons for the fixed term nature of the employment. I find that Mr Hartung was advised fully by Mr Faithfull of the reasons for the fixed term nature of his employment at the interview on 26 July 2010.

[56] I determine that Mr Hartung was justifiably dismissed by McKay as a result of the specified event in the Fixed Term Employment Agreement coming to pass, namely that the "*client's initial and continued acceptance of the employee onto the project*" had been withdrawn as confirmed by the email received by McKay on 10 March 2010 which stated:

*Effective immediately, the work services of McKay Electrical LLC employees Keith Hartung (ADM#6399) and Michael Rogers (ADM#6400) are terminated from ADMS Shipyards, Abu Dhabi, UAE.*

This had had the direct result of terminating Mr Hartung's employment pursuant to clause 3.1 of Mr Hartung's employment agreement.

### **Did McKay breach section 12 of the Fair Trading Act 1986?**

[57] Mr Hartung claims that McKay breached section 12 of the Fair Trading Act 1986 which states:

*No person shall, in relation to employment that is, or is to be, or may be offered by that person or any other person, engage in conduct that*

*is misleading or deceptive, or is likely to mislead or deceive, as to the availability, nature, terms or conditions, or any other matter relating to employment.*

[58] Mr Hartung claims that the breach resulted from McKay not having informed their client ADMS of his medical condition and obtained their approval to him working in the UAE prior to his taking up employment with McKay.

[59] McKay agreed that it had not made ADMS aware of Mr Hartung's medical condition and submitted that it was not required to do so under the contract for services which it had with ADMS. Mr Faithfull said that McKay had never made ADMS, or any other client, aware of their employees' medical conditions, and he did not consider that he had the authority to discuss employees' medical issues with any third party.

[60] Hughes Syndrome is a medical condition sometimes referred to as "sticky blood" syndrome. It affects millions of people worldwide and once diagnosed is treated by the use of anticoagulants.

[61] I accept as credible the evidence of Mr Faithfull and Ms Galbraith that Mr Hartung had 'down-played' his medical condition at the interview on 26 July 2010, and further accept that Mr Hartung's assertion at the Investigation Meeting that he had had to inform fellow employees in Abu Dhabi of his medical condition as an injury could result in his suffering a 'bleed out', was the first occasion on which they had heard him use such an expression.

[62] Prior to offering Mr Hartung employment on the Swift 141 Project, McKay had received from Mr Hartung and his General Practitioner a medical assessment of his ability to perform the role in Abu Dhabi, and this had supported Mr Hartung's representations that his medical condition posed no handicap to his undertaking the role for which he had applied, by confirming that Mr Hartung was fit and able to undertake these duties.

[63] I do not find that it was incumbent on McKay to have informed ADMS of Mr Hartung's medical condition since this was stated not to be a term of the contract between McKay and ADMS, and nor was it reasonably foreseeable that such acceptance would be required.

[64] Further there was no reason for McKay to consider that Mr Hartung's medical condition might affect his ability to perform his duties in Abu Dhabi given his own representations on the subject and his General Practitioner's endorsement of his ability to fulfil the requirements of the position in the UAE.

[65] I further observe that the previous employees who had been removed from the Abu Dhabi site on the instructions of ADMS had not been removed for reasons related to any medical condition, but for other reasons. On this basis there was no reason for McKay to anticipate that Mr Hartung might be removed from the site for reasons pertaining to his medical condition, which in any event it had not made known to ADMS.

[66] I do not find that McKay breached s 12 of the Fair Trading Act 1986.

### **Did McKay breach section 6 of the Contractual Remedies Act 1979?**

[67] Mr Hartung claims that McKay breached s6 of the Contractual Remedies Act 1979, which states:

#### *6 Damages for misrepresentation*

- 1. If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract –*
  - a. He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and*
  - b. He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.*
- 2. Notwithstanding anything in section 56 or section 60(2) of the Sale of Goods Act 1908, but subject to section 5 of this Act, subsection (1) of this section shall apply to contracts for the sale of goods.*

[68] Mr Hartung claims that McKay misled him through its agent, Mr McKinney, telling him that his wife's airfare would be paid by McKay. At the Investigation Meeting Mr Hartung accepted that Mr McKinney had not told him that McKay would pay for his wife's airfare, but that he had assumed this to be the case because Mr McKinney had said that McKay would take care of everything.

[69] I do not find that there has been misrepresentation on the part of McKay in relation to the payment of Ms Hartung's airfare.

[70] Mr Hartung also claims misrepresentation in relation to medical expenses. Although Southern Cross Health Insurance forms were supplied to Mr Hartung as part of his employment pack, Ms Galbraith said that McKay had not been privy to Mr Hartung's intention to transfer the cover from his personal policy to that of McKay, and had only become aware of this after the event.

[71] Although Mr Hartung would have been eligible for medical insurance in the UAE once he had his work visa, Mr Crene explained that Mr Hartung was eligible for medical expenses under the McKay travel policy irrespective of having obtained a work visa, and he had advised Mr Hartung of this. However Mr Hartung had not completed the relevant forms.

[72] In regards to Mr Hartung's medical expenses incurred in the UAE, I consider that it was appropriate that McKay's accepted responsibility for these expenses and note that had Mr Hartung completed the relevant forms as advised so to do by Mr Crene, this might not have formed part of Mr Hartung's claims against McKay.

[73] However, following Mr Hartung's confirmation at the Investigation Meeting, I note that the medical expenses incurred by Mr Hartung whilst in the UAE have since been reimbursed in full.

[74] I do not find that McKay breached s 6 of the Contractual Remedies Act 1979.

#### **Did McKay breach the good faith obligations it owed to Mr Hartung?**

[75] McKay was under a duty pursuant to s4 of the Act to deal with Mr Hartung in good faith. Mr Hartung claims that by not disclosing his medical condition to ADMS, McKay was not acting in good faith towards him.

[76] I have addressed this issue in the preceding paragraphs. I find no breach of good faith for the reasons already stated, but note just for completeness that as regards ADMS's knowledge of Mr Hartung's medical condition, I do consider that the duty of good faith required McKay to respect the confidential nature of the information concerning his medical condition which Mr Hartung had revealed as part of his application for employment.

[77] I further note in this context Mr Faithfull and Ms Galbraith's comments at the Investigation Meeting that had Mr Hartung made them aware at the interview on 26 July 2010 of how serious the ramifications of any injury could be for him, they would not have proceeded to an offer of employment.

[78] I find no evidence to substantiate McKay having made ADMS aware of Mr Hartung's medical condition. There is however Mr Hartung's own evidence that he had made Mr Jaroch aware that his medical condition was his reason for having turned down the promotion to the position of supervisor.

[79] Accordingly, if there was any concern on ADMS's part as to Mr Hartung's medical condition I observe this may have emanated from the information provided to ADMS by Mr Hartung himself.

[80] I find no breach of the good faith obligations owed by McKay to Mr Hartung.

**Was Mr Hartung was unjustifiably disadvantaged in his employment by McKay?**

[81] Mr Hartung is claiming unjustifiable disadvantage. Section 103 (1)(b) of the Act is applicable to disadvantage grievances and states:

*That the employee's employment (including any condition that survives termination of the employment), is or are or was (during employment that has since been terminated) affected to the employee's disadvantage by some unjustifiable action by the employer;*

[82] The elements of s103 (1) (b) are:

- a. An action
- b. The action was unjustifiable
- c. The action affected the employee's terms and conditions of employment, and this was to the employee's disadvantage.

*Lack of a Visa*

[83] Mr Hartung did not have a valid work visa for the UAE. Mr Hartung said that the fact that he was working illegally in the UAE and the border runs had caused him to suffer stress and anxiety.

[84] I find that Mr Hartung accepted the employment offered in the UAE knowing that he had no work visa, and knowing that border runs were a common method of dealing with the situation.

[85] Mr Faithfull had stated that the border run was a practice adopted by all companies operating in Abu Dhabi and it was a practice accepted by the officials in the country. I accept that McKay made every effort to obtain work visas for its employees but that the actual timing of the issue of these was outside its control, and that this was a fact made known to all the applicants before they accepted employment.

[86] I find that Mr Hartung accepted the position in the UAE having been made aware that he had no work visa and that he might therefore have to undertake a border run, or even more than one border run. Although Mr Hartung said that he found the border runs stressful, he did state at the Investigation Meeting that he had found the border runs to be “*quite pleasant*” and a way of “*seeing the countryside*”.

[87] I find that undertaking employment in the UAE without a work visa was a condition of employment which applied to all the UAE employees and that employment was accepted by employees on that understanding.

[88] I consider it probable that such an acceptance arose from the fact that the level of remuneration was attractive enough to compensate for the disadvantage of having no work visa for a period of time. I am reinforced in this view by the fact that Mr Hartung, when I asked him why he had not resigned following the non-provision of a work visa by McKay, had explained this with reference to the high salary and the free high class accommodation in the UAE.

[89] I find no unjustifiable disadvantage affecting Mr Hartung’s terms and conditions of employment as regards the non-provision of a work visa.

*Inability to open a local bank account*

[90] Mr Hartung said that as a result of not having a work visa, he was unable to open a local bank account.

[91] Mr Crene explained that several of the UAE employees did not have a local bank account, and that this included himself.

[92] Whilst not having a local bank account involved Mr Hartung in paying an international withdrawal fee when drawing monies out of his NZ bank account, I accept Mr Crene's observation that the amount involved was minimal and that other McKay employees chose not to open a local bank account.

[93] I find that having a local bank account was not part of Mr Hartung's terms and conditions of employment, nor was it a reasonable expectation on his part that it would be since Mr Hartung had accepted employment in the UAE without having a work visa.

[94] I find no unjustifiable disadvantage to Mr Hartung as regards his being unable to open a local bank account in the UAE.

*Hire of a motor vehicle*

[95] Mr Hartung said that as a result of not having a work visa, he was unable to obtain a driver's licence or to hire a motor vehicle for personal use.

[96] Mr Crene disputed the fact that Mr Hartung could not hire a motor vehicle for personal use, stating that the UAE had a mutual recognition of New Zealand licences.

[97] Irrespective of whether Mr Crene's assertion is correct, I find that not being able to obtain a driver's licence for the UAE or to hire a motor vehicle for personal use was not a disadvantage as regards Mr Hartung's terms and conditions of employment.

[98] I find no unjustifiable disadvantage to Mr Hartung as regards his being unable to obtain a driver's licence or to hire a motor vehicle.

*Alcohol Licence*

[99] Mr Hartung stated that that as a result of not having a work visa, he was unable to obtain an alcohol licence in the UAE.

[100] I find that not being able to obtain an alcohol licence was not a disadvantage as regards Mr Hartung's terms and conditions of employment.

[101] I find no unjustifiable disadvantage to Mr Hartung as regards his being unable to obtain an alcohol licence.

*Harassment by other McKay employees with valid work visas*

[102] Mr Hartung said that he had been harassed and humiliated by other McKay employees with work visas as a result of the Immigration inspection.

[103] I consider that asking Mr Hartung to reduce his salary would have constituted a disadvantage affecting Mr Hartung's terms and conditions of employment had it been effected. However Mr Hartung had not agreed to reduce his remuneration level, this had been accepted by McKay and there had been no reduction in the level of salary Mr Hartung received..

[104] In respect of the harassment and humiliation by the McKay employees with work visas, this would have constituted a disadvantage. However I find that Mr D'Arcy had taken effective action and the harassment had ceased.

[105] I consider that the good faith requirements in the Act require employers to exercise good faith with respect to best HR practice in relation to their employees. Once aware of the unacceptable situation of harassment affecting Mr Hartung, Mr D'Arcy had taken effective action. I consequently find no breach of good faith on the part of McKay.

[106] I find no unjustifiable disadvantage to Mr Hartung as regards the harassment by the other McKay employees with work visas.

[107] I determine that Mr Hartung was not unjustifiably dismissed or unjustifiably disadvantaged by McKay, and I am unable to assist him further.

**Costs**

[108] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**