New Zealand Employment Relations Authority Decisions

Kocaturk v Zara's Turkish Limited (Christchurch) [2017] NZERA 1145; [2017] NZERA Christchurch 145 (1 September 2017)

Last Updated: 10 September 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2017] NZERA Christchurch 145
5630130

BETWEEN IBRAHIM KOCATÜRK First Applicant

GÜLER KOCATÜRK Second Applicant

A N D ZARA'S TURKISH LIMITED

Respondent

Member of Authority: David Appleton

Representatives: Applicants in person

Stephen Sansom, Counsel for Respondent

Interpreter: Murat Yanbakan

Investigation Meeting: 14 and 15 February 2017 at Nelson

Further information received:

15 March, 28 April, 8 May, 19 May, 29 June & 18 July 2017

Submissions Received: 7 August 2017, from the Applicant

9 August 2017, from the Respondent

Date of Determination: 1 September 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The Applicants do not need to raise personal grievances in order

to claim payment of unpaid wages.

B. Both Applicants are entitled to awards of unpaid wages calculated by reference to hours worked, as set out in this determination.

C. Both Applicants are entitled to awards of unpaid holiday pay and

statutory holiday pay as set out in this determination.

D. Mr Kocatürk was not unjustifiably dismissed. Mrs Kocatürk was unjustifiably dismissed (in respect of which

a valid personal grievance was raised orally) and is entitled to the remedies set out in this determination.

E. The respondent's counterclaim fails as the loans to the Applicants were made by Mr and/or Mrs Kokcu personally, not by the respondent.

F. The Applicants' disbursements are to be paid by the respondent

as set out in this determination.

Employment relationship problem

[1] The applicants, who are husband and wife, claim that they are owed arrears of pay in respect of hours they worked at either no, or low, pay (below the applicable minimum wage), holiday pay and statutory holiday pay. They also claim that they were unjustifiably dismissed in or around October 2014.

[2] The respondent claims that the applicants have been paid what is owed to them, save for holiday pay, although they claim a set off in respect of those sums owed. The respondent denies that the applicants were unjustifiably dismissed, saying that Mr Kocatürk left his employment abruptly without notice, and that Mrs Kocatürk had indicated several weeks earlier that she would not be returning to work after the couple's return to New Zealand from holiday. The respondent also raised a jurisdictional issue saying that the applicants did not raise their personal grievances until after the expiry of 90 days from the date on which they say they were dismissed.

[3] Although the alleged dismissal occurred in Upper Hutt, the investigation has been conducted by the South Island registry of the Authority in Nelson on an exceptional basis because of the location of the applicants and of the respondent's counsel.

[4] After the Authority's investigation meeting on 14 and 15 February 2017, both parties served and lodged further information and statements, including a report from a forensic handwriting expert. This accounts for the delay between the investigation

meeting and the date of this determination. I am satisfied that both parties have had a full opportunity to comment on all further information served and lodged.

Background and material events

[5] The applicants are Turkish nationals who speak little English. Their evidence to the Authority was given with the assistance of an experienced independent interpreter.

[6] At the material times, the respondent owned and operated at least one Turkish take away restaurant in Richmond, near Nelson and, later, in Upper Hutt. It was represented at the Authority's investigation by its directors, Mr Ügur Kokcu and Mrs Hanife Kokcu. The applicants are related to the respondents by marriage. It was clear that, during the employment relationship, the applicants were very reliant upon the respondents, and especially upon Mrs Kokcu, to assist them with navigating New Zealand institutions such as the immigration authorities, schools and the health service.

[7] Mr Kocatürk says that he started working for the respondent as a chef around October or November 2009. According to Mr Kocatürk, for the first five months of his employment, he was only paid $200 per week, the first $100 of which went towards rent. He said that he was working between 9am and 9pm every day with no break and no days off. Mr Kocatürk says that he had to carry out a significant number of duties, including cleaning the toilets.

[8] According to the respondent, Mr Kocatürk was working for another company, Mirac Limited, at this time, and was not employed by the respondent until March

2010. Mrs Kokcu also said that Mr Kocatürk could not have worked for the respondent so quickly, because he was a shoemaker by profession and did not know how to be a chef, and so needed to spend a lot of time being trained by the owner of Mirac Limited.

[9] However, Mr Kocatürk produced two documents in Turkish, with English translations, in rebuttal. One stated that Mr Kocatürk had completed the Professional Chefs' Association training in the Development and Promotion of Turkish Cuisine from 20 September to 20 October 2003. The other document was a letter dated 10

March 2009 from Mr Mustafa Yilmaz, the proprietor of the Köytür restaurant in

Fatsa, Turkey, attesting to Mr Kocatürk's having worked there from 6 July 2005 until the date of the letter. This described his duties as a chef.

[10] Mrs Kokcu challenged the authenticity of these two documents. She says that Turkish government records show that Mr Kocatürk was a self-employed shoemaker until 2008 and so could not have worked for the Köytür restaurant, which she "question[ed] even exists".

[11] Given that Mrs Kokcu said that Mr Kocatürk was not granted a visa to work for the respondent until March 2010, the Authority obtained from Immigration New Zealand (INZ) a copy of documents relating to Mr Kocatürk's application for a work visa for Mirac Limited. Mr Kocatürk's passport indicates that he was employed by Mirac Limited until that date, but also that the conditions were varied on 17 February

2010.

[12] However, the copy of the work visa application form dated 4 October 2011 obtained from INZ states that Mr Kocatürk was employed for the respondent company in Richmond as a chef between November 2009 and May 2011, and that he had worked as a chef previously in Turkey between July 2005 and August 2009. Crucially, this form was signed by Mrs Kokcu as the person assisting Mr Kocatürk, in which she agrees that she assisted him as an interpreter/translator and in which she certified that Mr Kocatürk agreed that the information provided was correct. If Mrs Kokcu's evidence to the Authority is to be believed, she assisted Mr Kocatürk knowing him to have been lying in his application form. Mrs Kokcu says in her evidence that she did not notice that the dates of employment with the respondent company had been stated to have started in November 2009, but I find that unlikely, as she would have been translating the questions and helping Mr Kocatürk write his answers in English.

[13] Therefore, in light of the above evidence, I accept that Mr Kocatürk was not only an experienced chef when he started working for the respondent, but that he did so from November 2009.

[14] Mr Kocatürk says that, from March 2010, he began to be paid $570 per week, after tax, straight into his bank account, but that he was working around 72 hours a week. Whilst Mr Kocatürk's bank statements show that he first received a payment of

$570 on 18 March 2010, the respondent denies he was working 72 hours a week. They assert he was working 40 hours a week.

[15] On the second day of the investigation meeting, the respondent produced in evidence a book entitled "Time, Pay and Wages Record" which recorded that Mr Kocatürk's start date was 15 March 2010. It showed manuscript entries from the week ending 3 April 2010 to the week ending 31 May 2011, and showed total hours worked every week of 40 hours. The record also recorded total gross pay, PAYE and "net pay to worker". Every month, it appears that Mr Kocatürk signed the book.

[16] Mr Kocatürk, on the other hand, vehemently denied at the investigation meeting that he had ever signed such a book, and claims that the entries and his signature have been forged, and the entries written the night before the Authority's investigation. He also pointed out that at least one other individual named in the book who had worked in the respondent company around the same time, but who no longer did, had not signed the book. He says that this shows that his signature had been forged, as the Kokcus had been unable to get the other worker to sign the entries retrospectively.

[17] On 8 May 2017 a report was prepared by Linda Morrell, a forensic document examination and handwriting expert based in Wellington, which had been commissioned by Mr and Mrs Kocatürk at their own initiative. A copy was sent to the Authority by Mr Kocatürk. The purpose of the examination carried out by Ms Morrell was to determine whether or not Mr Kocatürk had made the sixteen signatures in the log book which he denied were his own. Ms Morrell examined the sixteen questioned signatures against eight reference signatures and noted similarities and differences, the main difference being that the pen path of the questioned signatures differed to that of the reference signatures.

[18] Ms Morrell's conclusion was that "owing to the differences detailed above the sixteen questioned signatures are probably attempted copies or simulations by another writer/s to make it appear that I. KOCATÜRK has signed the LOG BOOK. My opinion is slightly qualified owing to the limited amount of reference signatures supplied for the examination".

[19] Mr Kokcu responded to Ms Morell's report by way of a written statement

dated 16 May 2017. He stated that he cannot understand who signed the PAYE

booklet if it was not Mr Kocatürk, and that neither he nor his wife had forged the signatures. He said that the book had been found when he and his wife returned to Nelson for the Authority's investigation meeting amongst a box of documents that had largely been damaged in the severe floods which Nelson had suffered in December 2011.

[20] On balance, I believe that Mr Kocatürk did not sign the entries that have been attributed to him. I make this finding for the following reasons:

a. Ms Morrell's report concludes that he did not;

b. The credibility of his denial at signing the log book;

c. The fact that Mr Kocatürk would be unlikely to spend $2,500 (according to him) engaging the services of a handwriting expert (which he did without any directions to do so) if he was not adamant he did not sign the entries;

d. There are corrections to four consecutive entries in the log book (in terms of the date and amount paid) which appear suspicious, as it is unlikely that the same error would have been perpetuated for four weeks in a row; and

e. it is inherently unlikely that Mr Kocatürk would have worked a straight

40 hours per week, every week, in a family business.

[21] This finding does not mean that I find that Mr Kokcu or Mrs Kokcu forged Mr

Kocatürk's signatures, as I have no evidence on which to found such a conclusion.

[22] Around September 2010, Mrs Kocatürk arrived in New Zealand with her child. She says that she started working for the respondent 4 hours a day, receiving

$150 cash in hand a week. It appears from her evidence that Mrs Kocatürk worked around 26 hours per week. She says that she later worked longer hours, around seven hours per day, for six or seven days a week and received $250 cash in hand.

[23] Mrs Kocatürk's passport, however, shows that she was in New Zealand on a visitor's visa when she first arrived. The respondent denies that Mrs Kocatürk worked at all for the respondent until May 2013. The respondent says that Mrs Kocatürk would be at the premises of the restaurant to be with her husband from time

to time, and would help him out, but was not employed by the respondent. The respondent says, effectively, that Mrs Kocatürk was a volunteer, to support her husband. The respondent also says that, as the Kocatürks and the Kokcus were related by marriage, the Kokcus gave the Kocatürks a lot of financial and other support.

[24] Mr Kocatürk claims that he and Mrs Kocatürk were promised an extra payment of $100 a week each when a co-worker went on holiday, and he had to fill in for him. He says that he did not work extra hours but had to work harder. The respondent denies that such a promise was made and that the worker in question was only away two weeks in Australia in any event.

[25] Around May 2011, according to the respondent, the respondent leased its business to another company, Mirac Limited, at which point Mr Kocatürk's employment was transferred to that company. He began reporting to another person (a relative of Mr and Mrs Kokcu). Mr Kocatürk's bank statements show that he was receiving pay from Mirac Limited between 9 June 2011 and 7 February 2013. Mr Kocatürk says that he was forced to sign papers which he did not understand, as he has a very limited knowledge of English.

[26] Around February 2013, the respondent bought a kebab shop in Upper Hutt. According to Mr Kocatürk, he and his wife moved to Upper Hutt on 14 February

2013 and carried out 20 days' work for the respondent, helping to renovate the property and learning the new requirements of the business, without receiving any pay. He says that he then got paid $800 a week, net of tax, and Mrs Kocatürk got paid

$350 a week through her bank and $150 a week cash in hand.

[27] Mrs Kokcu denies that Mr Kocatürk did 20 days of unpaid work, saying that it had not been possible to get into the business premises at that time because of workmen, and that she spent time with Mr and Mrs Kocatürk looking around Wellington during the time Mr Kocatürk says he was working.

[28] The respondent disclosed to the Authority a copy of the sale agreement showing that it took possession of the shop in Upper Hutt on 24 February 2013. However, from Mr Kocatürk's evidence, which was a little difficult to follow in places, he seems to claim to have observed the operations of the business (including how to use the pizza oven) prior to the possession date.

[29] Mr Kocatürk first received a net salary payment of $800 on 7 March 2013. On the basis that he was paid one week in arrears, it would appear that he started working for payment on 1 March 2013. This indicates that, if he had carried out renovation work and observation, at most it could only have been for 14 days, between 14

February when he arrived in Upper Hutt, and 28 February, the last day of the month. On balance, I prefer the evidence of the respondent in respect of this part of the Kocatürks' claim.

[30] From the beginning of March 2013 Mr Kocatürk started working for the respondent in Upper Hutt, receiving a net income of $800 a week. Mrs Kocatürk started working for the respondent towards the end of April 2013 and received

$352.15 net of tax every week. She also says that she received $150 per week cash in hand. This latter assertion is denied by the respondent. Mrs Kocatürk said that this arrangement was commenced because she was going to apply for permanent residence in New Zealand, and she needed to start paying taxes. I do not fully understand this reasoning, but I shall treat the $150 a week as a gross payment.

[31] Mrs Kocatürk said that once she started working in Upper Hutt, she worked 12 hours a day, for six days a week. She says

she stopped work for 15 minutes to pick up her son from school, and then went back to work. Her son stayed with them in the restaurant until they left at 9pm, as that was his bedtime. When challenged about this evidence, Mrs Kocatürk gave detailed evidence of the work she did every week, which was a combination of food preparation and cleaning.

[32] Mr Kocatürk was given an employment agreement dated 18 April 2013 which stated that he was to work 40 hours a week, receiving $934.75 gross a week. His employment was to end upon one month's notice, and was stated to be for a two year period. Mr Kocatürk was given another employment agreement dated 2 October 2013 which appears to be in identical terms.

[33] Around August 2014 Mr and Mrs Kocatürk went to Turkey for two months and they say that, when they returned, they were told that there was no more work for them. According to the respondent, however, Mr and Mrs Kocatürk stopped working for the respondent of their own volition on 11 November 2014. The respondent says that Mrs Kocatürk had advised the directors that she was going to have a child, and when she returned from holiday she did not want to continue working for the respondent.

[34] Mrs Kokcu also states that she and her husband were unsure when Mr and Mrs Kocatürk would return from Turkey and they paid Mrs Kocatürk two weeks' pay in August because they understood she was not going to return to work. She says that they continued to pay Mr Kocatürk's usual salary for six weeks until 18 September

2014 when the company's accountant advised them to stop paying him his holiday pay because he had no more entitlements left. Mrs Kokcu says that, in fact, Mr Kocatürk has been overpaid his holiday entitlements by two weeks.

[35] Mrs Kokcu says that, in early October 2014 she sent a text to Mr Kocatürk asking when he was returning to work. She also asked whether he needed to be picked up from the airport. She says that she never received a response.

[36] Mrs Kokcu says that, on 13 October 2014 Mr and Mrs Kocatürk returned to New Zealand and she expected them to resume work with them on 15 October 2014, although he had never returned any of their messages. Mr Kocatürk did not turn up for work on that day. Again, Mrs Kokcu texted Mr Kocatürk asking when he was coming back to work, but he did not reply.

[37] Mrs Kokcu says that, on 17 October 2014 Mr and Mrs Kocatürk turned up at the shop and that Mr Kocatürk was angry because they had stopped paying him his wages whilst he had been on holiday. She said that they also discussed with him the fact that their security camera had had to be replaced because Mr Kocatürk would continually turn it on and off, which caused the hard drive to fail. It is Mrs Kokcu's evidence that he turned the camera off because he was trying to hide something. She said that it was then that he said he was not going to work for the company any more, and that he left their shop and drove to Napier to look for a new job.

[38] From October 2014 the respondent employed another worker.

[39] The evidence of Mr and Mrs Kocatürk is that Mrs Kocatürk had never indicated that she did not wish to work for the respondent when they returned after their holiday. She says that her intention was to continue working for another two years, and then to try for another baby. Shortly before Mr and Mrs Kocatürk left for Turkey, Mrs Kokcu had accompanied Mrs Kocatürk to a doctor about her ability to have another baby, and the doctor had said she could still have a baby after some initial doubts.

[40] Mr and Mrs Kocatürk's evidence is that, when they returned to New Zealand from their holiday in Turkey, they went to the restaurant in Upper Hutt, and were told that there was no longer a job for Mrs Kocatürk. On the strength of this, Mr Kocatürk said that he would no longer work there, as "it was not logical for him to do so".

[41] The respondent asked for an additional witness to be heard, as she was the sister of Mr Kocatürk (Nuray Akbaba). Whilst Ms Akbaba denied that Mr Kocatürk had ever complained to her about the hours he had been working, she did say that Mrs Kocatürk had not been employed when she returned because the restaurant was "overstaffed'.

[42] The respondent claims that no personal grievance had ever been raised by Mr and Mrs Kocatürk about the alleged unjustified dismissals until the statement of problem was lodged in the Authority, and that their personal grievances have therefore been raised out of time. However, Mr Kocatürk says that he and Mrs Kocatürk visited the restaurant several times shortly after the dismissals in order to ask for their jobs back. Mrs Kocatürk says that Mr Kocatürk was told he could work, but not her.

[43] Mr and Mrs Kocatürk both said in evidence that they were threatened by the Kokcus. They said that they were told that they could not bring a claim in the Authority because they did not speak English, and if they tried, they would be deported and put in prison. They also said that they were told that there would be consequences for Mr Kocatürk's sister's marriage. Mr Kocatürk's sister is married to Mrs Kokcu's brother.

The issues

[44] The following issues need to be determined by the Authority:

(a) Does the Authority have the jurisdiction to consider the applicants'

claims for unpaid wages?

(b) What arrears of pay are due with respect to Mr Kocatürk's work, if

any;

(c) What arrears of pay are due with respect to Mrs Kocatürk's work, if any;

(d) Whether the respondent has breached the Holidays Act 2003 with respect to Mr Kocatürk;

(e) Whether the respondent has breached the Holidays Act 2003 with respect to Mrs Kocatürk;

(f) Whether the Authority has jurisdiction to consider a personal grievance for unjustified dismissal with respect to the Kocatürks;

(g) If it does, whether Mr Kocatürk was unjustifiably dismissed by the respondent;

(h) If it does, whether Mrs Kocatürk was unjustifiably dismissed by the respondent.

(i) Remedies due

(j) Can the respondent set off sums owed by it by way of a counterclaim for repayment of monies loaned to the applicants?

Does the Authority have the jurisdiction to consider the applicants' claims for

unpaid wages?

[45] The Kocatürks, who were not represented, did not articulate their claims for unpaid wages in terms of any particular legal cause of action. However, they do not have to, as essentially, they claim they were not paid for the "extra hours" that they had worked. This claim is not dependent upon them having raised a personal grievance, as I understand Mr Sansom to be suggesting in his submissions. Section

103 of the Employment Relations Act 2000 (the Act) defines what is meant by

'personal grievance' and the recovery of unpaid or underpaid wages does not fall within the definition, unless an applicant also wishes to argue unjustified disadvantage as a result of unpaid wages, in addition to seeking to recover those wages. I do not understand the applicants to be doing that.

[46] The applicants' claims for unpaid wages by reference to their hours worked could theoretically be characterised as a breach of contract claim, a claim under s 131 of the Act, and/or a claim under the minimum wage legislation.

[47] Mr Kocatürk entered into an employment agreement with the respondent on

18 April 2013 under which he was entitled to $934.75 a week gross. This amount did not change when Mr Kocatürk entered into another agreement with the respondent on

2 October 2013. Therefore, in the absence of evidence of an agreed hourly or weekly rate of pay prior to 18 April 20131, arrears that may be due would have to be calculated by reference to the minimum wage legislation, and the minimum wage orders in force at the relevant times. In addition, it would be necessary to ensure that the sums due to Mr Kocatürk each week under his employment agreement equals or exceeds what he would have been due under the minimum wage legislation by

reference to the hours he worked each week. I shall therefore address the applicants'

claims under the minimum wage legislation.

What arrears of pay are due with respect to Mr Kocatürk's work?

[48] The first issue to address is the statutory limitation period that dictates how far back a claim under the Minimum Wage Act 1983 can extend. Section 142 of the Employment Relations Act 2000 (the Act) states that no action may be commenced in the Authority in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose. The Kocatürks lodged their statement of problem in the Authority on 8 July 2016. Therefore, I am unable to consider Mr Kocatürk's Minimum Wage Act claim in respect of work done prior to 9 July 2010.

[49] Mr Sansom submits that the respondent is prejudiced by the fact that the applicants' claims extend so far back. It is unfortunate that many of its records were destroyed in the December 2011 floods. However, the law entitles each applicant to bring a claim for unpaid wages which extends back for up to six years, and the Authority has no power to exclude the applicants' claims on the basis of the respondent's lost records.

[50] Section 6 of the Minimum Wage Act provides that, notwithstanding anything to the contrary in any enactment, award, collective agreement, determination, or contract of service, but subject to sections 7 to 9, every worker who belongs to a class

of workers in respect of whom a minimum rate of wages has been prescribed under

1 It is likely that Mr Kocatürk had entered into one or more employment agreements with the respondent prior to April 2013, as evidence of such an agreement would have been necessary for immigration purposes, but it or they were likely to have been destroyed in the floods that hit Nelson in around December 2011.

this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate. Sections 7 to 9 do not apply in this case.

[51] The adult hourly minimum wage rates in place during the material time were as follows;

a. From 1 April 2010 - $12.75; b. From 1 April 2011 - $13.00; c. From 1 April 2012 - $13.50;

d. From 1 April 2013 - $13.75; and e. From 1 April 2014 - $14.25.

[52] The respondent argues that Mr Kocatürk was a salaried employee. In the *Law, Colbert v Board of Trustees of Woodford House and others* 2 the Employment Court held that the Minimum Wage Act applies equally to salaried employees. In any event, the employment agreement produced for Mr Kocatürk suggests he was a weekly paid employee.

[53] Did Mr Kocatürk work 72 hours per week during the period he was employed by Zara's Turkish Limited? I am satisfied on a balance of probabilities that he did. First, I found his evidence credible, and sincere. He and his wife were able to give reasonably detailed evidence of his daily and weekly routines. Secondly, whilst the respondent produced wages and time records showing he only worked 40 hours per week, I have found that Mr Kocatürk did not sign the records as he was purported to have done.

[54] Mr Sansom submits that it is not credible that the Kocatürks would not have complained about working so many hours for the pay they were getting. Mr Sansom says that every employee throughout the world knows that they should receive payment for their work. However, even if that assertion is accurate, this was not a case of the applicants receiving no pay at all. The Authority sadly sees many cases of migrant workers who speak poor, or no English who are underpaid by reference to the hours they work and the minimum wage legislation. The majority often do not

complain during their employment because they realise the vulnerable position they

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are in, dependant as they are on their employment to remain in New Zealand. They also often do not realise that they have rights to minimum employment standards.

[55] Having accepted that Mr Kocatürk did work 72 hours a week, then he would have been entitled to receive the following gross pay each week by reference to the minimum wage legislation and his employment agreement:

a. Between 9 July 2010 and 31 March 2011, $918;

b. Between 1 April 2011 and 2 June 2011, $936;

c. Between 1 March 2013 and 31 March 2013, $972;

d. Between 1 April 2013 and 31 March 2014, $990; and e. Between 1 April 2014 and 31 July 20143, $1,026.

[56] Calculating the gross shortfall per week, produces the following amounts:

a. Between 9 July 2010 and 7 November 2010, $918 - $649.804 =

$268.20;

b. Between 8 November 20105 and 31 March 2011 - $918 - $769.046

=$148.96;

c. Between 1 April 2011 and 2 June 2011, $936 - $762.307 = $173.70;

d. Between 1 March 2013 and 31 March 2013, $972 - $9048 = $68;

e. Between 1 April 2013 and 31 March 2014, $990 - $904 = $86; and f. Between 1 April 2014 and 31 July 2014, $1,026 - $904 = $122.

[57] Working out the total sums due in each period produces the following sums:

a. Between 9 July 2010 and 7 November 2010, $268.20 x 17.4 weeks

=$4,666.68;

3 The day before the Kocatürks went on holiday.

4 $570 grossed up at 14%

5 Mr Kocatürk received a pay rise on this date.

6 $674.60 grossed up at 14%

7 $674.60 grossed up at 13% (following a change in the rate of tax in 2011)

8 $800 grossed up at 13%

b. Between 8 November 2010 and 31 March 2011 - $148.96 x 20.6 weeks

= $3,068.58;

c. Between 1 April 2011 and 2 June 2011, $173.9 x 9 weeks = $1,565.10;

d. Between 1 March 2013 and 31 March 2013, $68 x 4.4 weeks =

$299.20;

e. Between 1 April 2013 and 31 March 2014, $86 x 52 weeks = $4,472;

and

f. Between 1 April 2014 and 31 July 2014, $122 x 17.4 weeks =

$2,122.80.

[58] This amounts to a total underpayment of $16,194.36 before tax.

[59] I do not find that Mr Kocatürk is entitled to any extra payment in respect of the alleged promise to pay him and his wife an extra $100 per week when another chef went away on holiday. Mr Kocatürk said in his evidence that this did not result in him having to work extra hours, and the alleged promise was not recorded in writing. I give the benefit of the doubt to the respondent.

What arrears of pay are due with respect to Mrs Kocatürk's work?

[60] Mrs Kocatürk says that she started working for the respondent in September

2010, working 4 hours a day for which she was paid $150 gross, cash in hand. Her hours then increased to around 36 hours a week, and she was given $250 a week gross, cash in hand. Unfortunately, she was unable to remember when her hours increased.

[61] The respondent asserts that Mrs Kocatürk was not an employee until May

2013. Whether a person is an "employee" is a question to be assessed on the basis of

s 6 of the Employment Relations Act 2000 (the Act) which provides:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, **employee**–

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of

service; and

(b) includes–

(i) a homeworker; or

(ii) a person intending to work; but

(c) excludes a volunteer who–

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer;

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority−

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by

the persons that describes the nature of their relationship.

[62] When I consider the totality of the situation, I accept that Mrs Kocatürk was an employee during the disputed time. I reach this conclusion on the basis of the regularity of the hours she says she worked, and on the fact that she received payment. Whilst Mrs Kokcu described the payment as "pocket money", Mrs Kocatürk was receiving the payment because she was working. There is no known reason why the respondent should pay Mrs Kocatürk otherwise.

[63] Of course, this means that Mrs Kocatürk was working in breach of a visitor's visa, and was receiving income which was not taxed. However, the respondent must share responsibility for that situation as Mrs Kocatürk spoke and understood no or very little English, whilst Mr and Mrs Kokcu speak and understand English well, especially Mrs Kokcu.

[64] Having determined that Mrs Kocatürk was an employee between sometime in September 2010 and 2 June 2011, I must determine whether she was paid in accordance with the Minimum Wage Act. I am unable to establish when Mrs Kocatürk hours increased, and so I am going to adopt a conservative approach, and assume that she worked only 26 hours per week between 1 October 2010 and 2 June

2011 for which she received $150 a week, gross. She would have been entitled to receive the following gross pay each week by reference to the minimum wage legislation:

a. 1 October 2010 to 31 March 2011 – $331.50 b. 1 April 2011 to 2 June 2011 - $338.

[65] Calculating the gross shortfall per week, produces the following amounts:

a. 1 October 2010 to 31 March 2011 – $331.50 - $150 = $181.50. b. 1 April 2011 to 2 June 2011 - $338 - $150 = $188.

[66] Working out the total sums due in each period produces the following gross sums:

a. 1 October 2010 to 31 March 2011 –$181.50 x 26 weeks = $4,719. b. 1 April 2011 to 2 June 2011 - $188 x 9 weeks = $1,692.

[67] This amounts to a total shortfall of $6,411 in the first period.

[68] Mrs Kocatürk also claims to have worked 72 hours per week from the point when she began to be paid directly into her bank account (1 May 2013). She says she was paid $352.15 net each week, but was also given $150 cash in hand. This makes a gross total of $547.93 ($397.939 + $150).

[69] I accept Mrs Kocatürk's evidence. Not only was she very convincing in describing all the tasks she had to carry out, but if she had been lying, she would not have been likely to have mentioned the $150 a week she says she was given.

[70] Having accepted that Mrs Kocatürk did work 72 hours a week between 1 May

2013 and 18 September 2014, then she would have been entitled to receive the following gross pay each week by reference to the minimum wage legislation:

a. Between 1 May 2013 and 31 March 2014, $990; and b. Between 1 April 2014 and 31 July 2014, $1,026.

[71] Calculating the gross shortfall per week, produces the following amounts;

a. Between 1 May 2013 and 31 March 2014, $990 – $547.93 = $442.07;

and

b. Between 1 April 2014 and 31 July 2014, $1,026 – $547.93 = $478.07. [72] Working out the total sums due in each period produces the following gross

sums:

9 $352.15 grossed up at 13%

a. Between 1 May 2013 and 31 March 2014, $442.07 x 47.85 weeks =

$21,153.05; and

b. Between 1 April 2014 and 31 July 2014, $478.07 x 17.4 weeks =

$8,318.42.

[73] This produces a total shortfall of $29,471.47 for the second period and a total shortfall of $35,882.47.

Did the respondent breach the Holidays Act 2003 with respect to Mr Kocatürk?

[74] Mr Kocatürk's employment with the respondent came to an end twice, once on

2 June 2011 when he started working for Mirac Limited, and again on 18 September

2014. He should therefore have been paid end of employment holiday pay on two occasions.

[75] There is no evidence that Mr Kocatürk was paid any holiday pay when his employment with the respondent ended in June 2011. His bank statements show that he continued to be paid the same amount on his last week of employment as he had been receiving previously. He was therefore entitled10 to be paid 8% of his gross earnings since he was last entitled to annual holidays, less any amounts paid to him in advance or paid with his pay in accordance with s 28 of the Holidays Act.

[76] I have seen no evidence that he was paid holiday pay in advance or was paid holiday pay with his wage payments during the first period. I will take his anniversary for annual leave purposes during the first period as starting on 8

November 2010. During the period of 8 November 2010 to 2 June 2011 (29.6 weeks) Mr Kocatürk should have received a gross income of $27,334.80. That gives holiday pay due of $2,186.78 before tax due to Mr Kocatürk.

[77] The respondent admits that it owes Mr Kocatürk holiday pay for the second period. Evidence was given by Mr Stewart Wehner, the respondent's accountant. Mr Wehner had produced a table of annual leave taken by Mr Kocatürk during the second period of employment. This was shown to Mr Kocatürk during the investigation meeting and he confirmed that the table accurately reflected the leave he had taken. However, Mr Wehner said that he had miscalculated what leave pay was owed to Mr

Kocatürk in the table. According to Mr Wehner's oral evidence, Mr Kocatürk was

10 In accordance with s 25 of the Holidays Act 2003 as enacted at the material time.

owed the gross sum of $2,028.46, including for working on 7 statutory holidays. I

accept this calculation.

[78] Adding holiday pay owed at 8% in respect of the payment shortfall during the second period ($6,894) adds the gross sum of $551.52. This means that Mr Kocatürk

is due a total of $4,766.76 by way of holiday pay.

Did the respondent breach the Holidays Act 2003 with respect to Mrs Kocatürk?

[79] Again, like Mr Kocatürk, Mrs Kocatürk's employment with the respondent came to an end twice, once on 2 June 2011 when Mr Kocatürk started working for Mirac Limited, and again on 18 September 2014. She should therefore have been paid end of employment holiday pay on two occasions.

[80] Including the shortfall, Mrs Kocatürk was entitled to have been paid the gross sum of $11,661 during the first period. At 8% she was entitled to the gross sum of

$932.88 holiday pay.

[81] In respect of the second period, Mr Wehner on behalf of the respondent calculates that she is owed the gross sum of $2,362 including statutory holiday pay. I accept this sum, but to it must be added final holiday pay in respect of the shortfall she is owed for this period. This would be the gross sum of $2,357.72. That gives a

total gross sum of $5,652.60

Does the Authority have jurisdiction to consider a personal grievance for unjustified dismissal?

[82] Section 114(1) of the Act provides that every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period. The respondent denies that any such personal grievance was raised until the statement of problem was lodged. A personal grievance may be raised orally, but must be done with sufficient specificity to enable the employer to address it.

[83] Mr and Mrs Kocatürk say that they returned to the shop several times to ask for their jobs back, but they were threatened

instead. I accept this evidence. My

reasons for doing so, apart from the general credibility of the Kocatürks' evidence, includes the fact that Mrs Kokcu was expressing curses in Turkish to Mrs Kocatürk while the latter was giving evidence to the Authority. It was thanks to the interpreter that I became aware of this. When I confronted Mrs Kokcu about this, she did not deny it, but apologised. This conduct is indicative of a hostile attitude towards the Kocatürks.

[84] I believe that the Kocatürks asking for their jobs back on several occasions after a dismissal is sufficient to amount to the raising of a grievance as, clearly, the respondent would have known what the Kocatürks wanted, and that they disagreed with the situation that they found themselves in when they returned to New Zealand after their holiday. The Kokcus were fully aware of the Kocatürks' grievance, and were able to respond to it, albeit in a negative way.

[85] I therefore accept that both Mr and Mrs Kocatürk raised personal grievances, orally, with the respondent in respect of what they perceived as their dismissals.

If the Authority does have jurisdiction, was Mr Kocatürk unjustifiably dismissed by the respondent?

[86] From the evidence of both of the Kocatürks, it is clear that Mr Kocatürk chose not to continue working for the respondent unless Mrs Kocatürk was also employed. He was offered his job, but he declined, as "it was not logical" for him to work there without his wife. I must conclude from this that Mr Kocatürk was not dismissed by the respondent.

[87] Mr Kocatürk chose not to work for the respondent after Mrs Kocatürk was told she no longer had a job. Mr Kocatürk therefore resigned. However, this cannot amount to a constructive dismissal as the respondent cannot be said to have repudiated Mr Kocatürk's employment agreement by dismissing his wife; they were employed separately, and Mr Kocatürk's employment was not dependant on that of his wife. Mr Kocatürk could have continued his employment even if Mrs Kocatürk did not work for the respondent.

[88] Mr Kocatürk therefore fails in his personal grievance of unjustified dismissal.

If the Authority does have jurisdiction, was Mrs Kocatürk unjustifiably dismissed by the respondent?

[89] I find that Mrs Kocatürk was dismissed by the respondent. Mrs Kocatürk was not pregnant when she went off on holiday, and it does not make sense for her to have voluntarily stopped working just because her doctor told her that she was capable of having another child. It is my finding that the respondent decided to no longer employ Mrs Kocatürk because she had declared an intention of trying to have another child. Her last day of employment was 31 July 2014, although she did not find out she had been dismissed until around 15 September 2014.

[90] Section 103A of the Act sets out the test that the Authority must apply when deciding whether a dismissal was justifiable. It provides as follows:

Section 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of

whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the

employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations

against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing

or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the

employee before dismissing or taking action against the employee. (4) In addition to the factors described in subsection (3), the

Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an

action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were —

(a) minor; and

(b) did not result in the employee being treated unfairly.

[91] The respondent did not follow any of this procedure, but simply dismissed Mrs Kocatürk. No fair and reasonable employer could have done that in all the circumstances, and so the dismissal is procedurally unjustified.

[92] To dismiss a woman because she has declared an intention to have a baby is an act of indirect discrimination by reason of sex. Mrs Kocatürk has not alleged unlawful discrimination, and so I do not make that finding as a proven personal grievance. However, to dismiss a woman for intimating an intention to try to become pregnant must render that dismissal substantively unjustified, as no fair and reasonable employer could have done that in all the circumstances. It must follow that Mrs Kocatürk was dismissed unjustifiably.

Remedies

[93] Having been successful in her claim of unjustified dismissal, Mrs Kocatürk is eligible for an award of remedies. Sub-section 123(1)(a) to (c) of the Act provides as follows:

123 Remedies

(1) Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide

for any 1 or more of the following remedies:

(a) reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous

to the employee:

(b) the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a

result of the grievance:

(c) the payment to the employee of compensation by the employee's employer, including compensation for—

(i) humiliation, loss of dignity, and injury to the feelings of the employee; and

(ii) loss of any benefit, whether or not of a monetary kind, which the

employee might reasonably have been expected to obtain if the personal grievance had not arisen:

[94] Section 128 provides:

128 Reimbursement

(1) This section applies where the Authority or the court determines, in respect of any employee,—

(a) that the employee has a personal grievance; and

(b) that the employee has lost remuneration as a result of the personal grievance.

(2) If this section applies then, subject to subsection (3) and section

124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to

pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.

(3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal

grievance, a sum greater than that to which an order under that subsection may relate.

[95] Mrs Kocatürk became pregnant around the end of October 2014, after she had been dismissed. She would have been able to

have continued to work for at least another three months. Whilst she may not have stayed if Mr Kocatürk had not been there, I am satisfied that he only left because Mrs Kocatürk was not being allowed to continue working.

[96] However, I see no reason to exercise the Authority's discretion and to award more than three months' ordinary remuneration. Assuming Mrs Kocatürk would have continued to have worked the same hours (72 a week) as she was working prior to her holiday for three months, she is entitled to three months' ordinary time remuneration at the relevant minimum wage rate, which would have equated to a gross sum of

$13,338.

[97] Mrs Kocatürk is eligible to be considered for an award of compensation for humiliation, loss of dignity and injury to her feelings under s 123(1)(c)(i) of the Act. I asked Mrs Kocatürk what the effect of the dismissal was on her. She said she was very upset and would not have returned to New Zealand from Turkey had she known what would have happened. She also gave evidence of the financial effect on the family of her losing her job (although, that effect was exacerbated by Mr Kocatürk refusing to work without his wife also being employed).

[98] I did not hear sufficient evidence to enable me to make a significant award to

Mrs Kocatürk. I fix the award under s 123(1)(c)(i) of the Act at $7,000.

[99] Where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly (s124 of the Act). The reason for the dismissal was Mrs Kocatürk's decision to try to have a baby. That is not a blameworthy reason and no reduction in the remedies will be made.

Can the respondent set off sums owed by it by way of a counterclaim for repayment of monies loaned to the applicants?

[100] Mr Sansom states in his submissions that the respondent has brought a claim for breach of contract against the applicants in relation to monies lent to them during the employment. The respondent says that $3,000 was loaned to the applicants in October 2013 to help them purchase a plane ticket, together with a further $516 for travel around the South Island on 13 October 2013. The respondent also says it paid off a debt owed by Mr Kocatürk in the sum of $2,603.03. These sums total

$6,119.03. I understand that the applicants do not deny that these sums were loaned to them, although they say that a portion of these sums have been repaid.

[101] The Authority saw a copy of a bank statement showing that $3,000 was withdrawn in order to give to Mr Kocatürk. This statement relates to a personal bank account for Mr and/or Mrs Kokcu, and not a company bank account, as it shows a receipt of drawings originating from the respondent company. Therefore, the $3,000 payment was a personal loan between individuals and has nothing to do with the respondent company and cannot be claimed by the respondent against the applicants.

[102] The employment agreements seen by the Authority between Mr Kocatürk and the respondent (perhaps unsurprisingly) makes no mention of any loans and the respondent has not produced any written agreement between the respondent and either or both of the applicants recording any such loans. In light of the fact that the $3,000 was a personal loan from the Kokcus, I am not able to conclude on a balance of probabilities that the other monies loaned to the applicants were not also made by the Kokcus in a personal capacity.

[103] I therefore dismiss the counterclaim.

Orders

[104] I order the respondent to make the following payments:

a. To Mr Kocatürk:

i. The gross sum of $16,194.36 in respect of arrears of pay due;

ii. The gross sum of $4,766.76 in respect of holiday pay and statutory holiday pay due;

b. To Mrs Kocatürk:

i. The gross sum of $35,822.47 in respect of arrears of pay due;

ii. The gross sum of $5,652.60 in respect of holiday pay and statutory holiday pay due;

iii. The gross sum of $13,338 in respect of lost wages arising from her unjustified dismissal; and

iv. The sum of $7,000 pursuant to s 123(1i)(c)(i) of the Act.

[105] Mr and Mrs Kocatürk are to advise the respondent in writing via Mr Sansom's office of the bank account number or numbers into which the payments are to be made. The respondent is then to make the payments set out in this determination within 21 days of the date of Mr Sansom's office receiving notification of the bank account number or numbers.

Costs

[106] Mr and Mrs Kocatürk were unrepresented throughout the Authority's investigation. However, they are entitled to be paid the sum of $71.56 in respect of the Authority's lodgement fee, and to have reimbursed to them the fee they have incurred in respect of Ms Morrell preparing her report.

[107] The lodgement fee is to be paid to Mr Kocatürk within 7 days of the date of Mr Sansom's office receiving notification of Mr Kocatürk's bank account number. Ms Morrell's GST inclusive fee is to be paid to Mr Kocatürk within 14 days of the later of the date of Mr Sansom's office receiving notification of Mr Kocatürk's bank account number and Mr Sansom receiving a copy of a statement showing that Ms Morrell's fee has been paid and the GST inclusive amount.

David Appleton

Member of the Employment Relations Authority
