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Zara's Turkish Limited (in liquidation) v Kocatürk [2021] NZEmpC 117 (3 August 2021)

Last Updated: 6 August 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 117](#)

EMPC 273/2017

IN THE MATTER OF a challenge to a determination of
the Employment Relations
Authority
BETWEEN ZARA'S TURKISH LIMITED (IN
LIQUIDATION)
Plaintiff
AND GÜLER KOCATÜRK
Defendant

EMPC 158/2018

AND IN THE MATTER of a challenge to a determination of the
Employment Relations Authority
BETWEEN IBRAHIM KOCATÜRK AND GÜLER
KOCATÜRK
Plaintiffs
AND ZARA'S TURKISH LIMITED (IN
LIQUIDATION)
Defendant

Hearing: 8–12 June 2020, 24–28 August 2020 and 3–4 March 2021
(Heard at Nelson)
(Submissions filed 8 March 2021)

Appearances: B Buckett and M Belesky, counsel for Zara's Turkish Ltd
(until 28 August 2020)
A Sharma, counsel for Ibrahim and Güler Kocatürk

Judgment: 3 August 2021

JUDGMENT OF JUDGE K G SMITH

ZARA'S TURKISH LIMITED (IN LIQUIDATION) v GÜLER KOCATÜRK [\[2021\] NZEmpC 117](#) [3 August 2021]

[1] Ibrahim Kocatürk arrived in New Zealand in October 2009 intending to work as a chef in Nelson. He had received an offer of employment from a Nelson-based company called Mirac Ltd. As a Turkish citizen Mr Kocatürk needed to obtain a work visa to take up the offer of employment. A visa was granted to him in September 2009. At the time he entered New Zealand the visa authorised him to work as a chef for Mirac in Nelson and neighbouring Richmond.

[2] Mr Kocatürk worked for about a year before he was joined by his wife, Güler Kocatürk, and their son. They arrived in New Zealand on 25 September 2010 having been sponsored by Ugur Kokcu, who is one of two directors of Zara's Turkish Ltd.

[3] There is a dispute about the identity of Mr Kocatürk's employer when he arrived. What is not disputed is that his work visa was changed on 17 February 2010, authorising him to work for Zara's Turkish which he did until about June 2011. In

June, Mirac took over the business formerly run by Zara's Turkish when that company relocated to Upper Hutt. Mr Kocatürk then began working for Mirac which he did for nearly two years before taking up a second period of employment with Zara's Turkish at its new café in Upper Hutt. His move to Upper Hutt took place in February 2013. Mr Kocatürk ceased working for Zara's Turkish in October 2014.

[4] In July 2016 Mr and Mrs Kocatürk made a claim in the Employment Relations Authority against Zara's Turkish. Both had ceased working for the company in circumstances they said gave rise to personal grievances for unjustified dismissal. They also made claims for unpaid wages and holiday pay.

[5] Mr Kocatürk claimed that he had not been paid wages for all of the hours he worked when Zara's Turkish was based in Richmond and when it operated in Upper Hutt. Holiday pay was claimed on the unpaid wages.

[6] Mrs Kocatürk claimed that she was employed by Zara's Turkish in Richmond immediately after arriving in New Zealand in 2010 and remained working until the business was sold in June 2011. When the business relocated to Upper Hutt she was re-employed and claimed to have been unjustifiably dismissed. She also claimed to have been underpaid and not paid her holiday pay.

The Authority's determination

[7] The Authority analysed Mr and Mrs Kocatürk's claims for unpaid wages under the [Minimum Wage Act 1983](#).¹ An impediment to Mr Kocatürk's claims was the age of them. The statement of problem was lodged in the Authority on 8 July 2016. The Authority held that it was not possible to consider Mr Kocatürk's claims for unpaid (or underpaid) wages for any work performed, or pay said to be owing, that was more than six years old. That part of Mr Kocatürk's claim was determined to be statute barred.² It therefore declined to consider any of his claims before 9 July 2010.³

[8] Mr Kocatürk's claim that he worked 72 hours each week during the two periods when he was employed by Zara's Turkish was accepted.⁴ From 9 July 2010 onwards the amount assessed as owed to Mr Kocatürk was \$16,194.36.⁵ The Authority's calculation is in Table 1:⁶

Table 1

Dates	Gross Shortfall per Week	Number of Weeks	Total Due
9 Jul 10 – 7 Nov 10	\$268.20	17.4	\$4,666.68
8 Nov 10 – 31 Mar 11	\$148.96	20.6	\$3,068.58
1 Apr 11 – 2 Jun 11	\$173.90	9	\$1,565.10
1 Mar 13 – 31 Mar 13	\$68.00	4.4	\$299.20
1 Apr 13 – 31 Mar 14	\$86.00	52	\$4,472.00
1 Apr 14 – 31 Jul 14	\$122.00	17.4	\$2,122.80
Total			\$16,194.36

¹ *Kocatürk v Zara's Turkish Ltd* [2017] NZERA Christchurch 145 (Member Appleton) at [46]–[47].

² The Authority considered the [Employment Relations Act 2000, s 142](#).

³ At [48].

⁴ At [53].

⁵ At [51] the Authority noted changes in the Minimum Wage Orders on 1 April 2010, 1 April 2011, 1 April 2012, 1 April 2013 and 1 April 2014 respectively and all calculations took those changes into account.

⁶ While Table 1 reproduces the final calculation by the Authority there is an obvious transposition error when it calculated the period 1 April 2011–2 June 2011. The Authority's calculation correctly produced the shortfall per week of \$173.70 but the final calculation wrongly computed the gross loss using \$173.90. In Table 1 no adjustment has been made to correct that error.

[9] The Authority held there was evidence Mr Kocatürk had not been paid any holiday pay when his first period of employment with Zara's Turkish ended in June 2011.⁷ It concluded that he was owed holiday pay for the period from 8 November 2010 to 2 June 2011 amounting to \$2,186.78 gross.⁸

[10] Zara's Turkish acknowledged that it owed Mr Kocatürk holiday pay for the second period of time, beginning in early 2013. That acknowledgment brought the total amount due to Mr Kocatürk for unpaid holiday pay to \$4,766.76. The amount is shown in Table 2:

Table 2

Dates	Entitled Gross Income	Holiday Pay Entitlement	Holiday Pay Owing
8 Nov 10 – 2 Jun 11	\$27,334.80	8%	\$2,186.78
1 Mar 13 – 31 Jul 14 (net of leave taken as agreed between the parties)			\$2,028.46
Holiday pay owing on short- paid wages	\$6,894.00	8%	\$551.52
Total			\$4,766.76

[11] The Authority rejected Mr Kocatürk's claim that he had been unjustifiably dismissed. Mr Kocatürk's employment ended after he and Mrs Kocatürk returned from a holiday they took in Turkey. When they returned there was ongoing work for Mr Kocatürk but not for Mrs Kocatürk (the circumstances in which her employment ended are discussed later). The Authority held that Mr Kocatürk resigned his employment, protesting about what had happened over Mrs Kocatürk's job, when there was ongoing work available for him.

[12] The Authority accepted Mrs Kocatürk's claim that she began working for Zara's Turkish in September 2010 in Richmond and that she worked for four hours a day for \$150 gross per week (described as "cash in hand").⁹ It recorded her claim that

7 At [75].

8 At [76]; calculated at 29.6 weeks on a gross income of \$27,334.80.

9 At [60].

these hours of work increased to around 36 hours per week for pay of \$250 gross (again as "cash in hand").¹⁰

[13] There was no formal employment agreement between Zara's Turkish and Mrs Kocatürk for the work in Richmond. However, the Authority was persuaded that an employment relationship existed primarily because of the regularity of the hours it found she worked and the payments made to her.¹¹

[14] The Authority applied a conservative approach to Mrs Kocatürk's claim because it could not establish when the claimed increase in hours of work occurred. It calculated the shortfall payable to her for work in Richmond from 1 October 2010 to 2 June 2011, on the basis of working 26 hours each week for pay of \$150 per week gross.¹² It concluded that between 1 October 2010 and 31 March 2011 she was short paid \$4,719 and between 1 April 2011 and 2 June 2011, she was short paid \$1,692. The total amount of short-paid wages was, therefore, \$6,411 as shown in Table 3.¹³

Table 3

Dates	Gross Shortfall per Week	Number of Weeks	Total Due
1 Oct 10 – 31 Mar 11	\$181.50	26	\$4,719.00
1 Apr 11 – 2 Jun 11	\$188.00	9	\$1,692.00
Total			\$6,411.00

[15] Mrs Kocatürk alleged that she worked 72 hours per week in Zara's Turkish's Upper Hutt business from early 2013. That evidence was accepted by the Authority and the shortfall due to her for this period until her employment ended about 18 months later was calculated as \$29,471.47 shown in Table 4:¹⁴

10 At [60].

11 At [62].

12 At [64].

13 At [67].

14. At [68]–[72]. The Authority chose to begin this calculation from the date when Mrs Kocatürk said she began to be paid directly into her bank account.

Table 4

Dates	Gross Shortfall per Week	Number of Weeks	Total Due
1 May 13 – 31 Mar 14	\$443.0715	47.85	\$21,153.05
1 Apr 14 – 31 Jul 14	\$478.07	17.4	\$8,318.42
Total			\$29,471.47

[16] The combined total of unpaid wages was assessed as \$35,882.47.

[17] The Authority was satisfied that Mrs Kocatürk had been short paid her holiday pay entitlements. For the period up to June 2011 the amount owed was calculated as

\$932.88.16 For the second period, ending in 2014, the short payment was calculated

at \$2,362. A further \$2,357.72 was added to account for final holiday pay.¹⁷ The total gross sum was calculated as \$5,652.60. That calculation is shown in Table 5:

Table 5

Dates	Entitled Gross Income	Holiday Pay Entitlement	Holiday Pay Owing
1 Oct 10 – 2 Jun 11	\$11,661.00	8%	\$932.88
1 May 13 – 31 Jul 14 ¹⁸			\$2,362.00
Holiday pay owing on short- paid wages	\$29,471.47	8%	\$2,357.72
Total			\$5,652.60

[18] The Authority determined that Mrs Kocatürk was unjustifiably dismissed. Before leaving on holiday she had confided in Hanife Kokcu, the other director of Zara's Turkish and her relative by marriage, of her intention to increase her family. The Authority was satisfied that the response from the company was to treat this

15. The table uses the final figure in the Authority's determination but from its earlier calculations it should be \$442.07.

16 At [80].

17 At [81].

18 The amount was accepted by the Authority relying on a calculation by Zara's Turkish's accountant.

information as a statement of an intention not to resume work after the holiday. It hired a replacement.

[19] According to the Authority, Mrs Kocatürk's last day of actual employment was 31 July 2014 but she did not discover her job had gone until returning to New Zealand on about 15 October 2014.

[20] The Authority awarded Mrs Kocatürk three months lost remuneration of \$13,338 and compensation for humiliation, loss of dignity and injury to feelings of

\$7,000.¹⁹ No order for costs was made because Mr and Mrs Kocatürk represented themselves in the investigation meeting.

The challenges

[21] The Authority's determination produced two challenges. The first in time was by Zara's Turkish. At least initially, the company decided to accept the Authority's determination as it related to Mr Kocatürk and paid him the amount owed for unpaid wages and holiday pay of \$20,961.¹² gross. It challenged the findings about Mrs Kocatürk, disputing the conclusion that she was employed by it in Richmond, that she worked 72 hours per week while employed in Upper Hutt, was not paid holiday pay and was unjustifiably dismissed. It claimed she resigned for personal reasons before starting her holiday.

[22] Zara's Turkish also pleaded that Mrs Kocatürk's personal grievance had not been raised within the time allowed under [s 114\(1\)](#) of the [Employment Relations Act 2000](#) (the Act). A full hearing of the entire matter as it related to Mrs Kocatürk was requested.

[23] Mr and Mrs Kocatürk challenged the determination. Mr Kocatürk placed in issue the decisions that:

(a) between 13 October 2009 and 15 March 2010, he was employed by Mirac not Zara's Turkish;

19 At [96] and [98].

(b) for the period from 13 October 2009 to 9 July 2010 his claim was statute barred;

(c) he had resigned; and

(d) the calculation of the remedies awarded for unpaid wages and holiday, seeking to increase them.

[24] Mrs Kocatürk confined her challenge to the remedies awarded to her by the Authority. She sought to increase the award for lost remuneration beyond the three months awarded by the Authority following the finding she was dismissed and to increase the compensation for humiliation, loss of dignity and injury to feelings.

[25] Several matters were pleaded in Mr and Mrs Kocatürk's statement of claim that were not before the Authority. They were alleged breaches of employment standards relating to good faith, breaches of s 9 of the New Zealand Bill of Rights Act 1990 and [s 22\(b\)](#) of the [Human Rights Act 1993](#). Despite those pleadings, no relief was claimed relating to them. In the absence of claims for remedies those additional pleadings need not be considered any further.

[26] Initially it was unclear from Mr and Mrs Kocatürk's statement of claim if the intention was to put in issue in the Court the whole matter that was before the Authority. Ms Sharma, counsel for Mr and Mrs Kocatürk, confirmed that the whole matter before the Authority was the subject of this challenge. The case proceeded on that basis.

Procedural history

[27] These proceedings have had a protracted history. The parties left no stone unturned in attempting to advance their respective cases and that resulted in several contested interlocutory applications. There was an application for a stay, one to extend time to file a challenge, another for security for costs, and one seeking to join others to the proceedings.²⁰ The application for a stay resulted in an order for the payment

²⁰ *Zara's Turkish Ltd v Kocatürk* [2017] NZEmpC 151; *Kocatürk v Zara's Turkish Ltd* [2018] NZEmpC 51; *Kocatürk v Zara's Turkish Ltd* [2018] NZEmpC 130; and *Zara's Turkish Ltd v Kocatürk* [2019] NZEmpC 139.

to the Registrar of the Court the total sum awarded by the Authority to Mrs Kocatürk amounting to \$61,813.07. That amount was paid by instalments from December 2017 to March 2018. Those funds are currently under the control of the Registrar.

[28] The vigour with which the parties contested this litigation has had a deleterious effect. Zara's Turkish was placed in liquidation by shareholders resolution after the second week of the hearing. The liquidator's first report recorded the reason for the shareholders' resolution was the inability to meet ongoing legal costs.

[29] The liquidator did not consent to the proceedings continuing. That decision meant Mr and Mrs Kocatürk were forced to apply to the High Court for an order pursuant to [s 248](#) of the [Companies Act 1993](#). The order was granted on 25 November 2020.²¹

[30] After leave was granted the case was timetabled for the hearing to resume. After some uncertainty, the liquidator advised the Court that he would not participate any further. By the time the hearing resumed Zara's Turkish had presented evidence supporting its challenge and responding to Mr and Mrs Kocatürk's challenge. Mr Kocatürk had completed his evidence in chief but cross-examination was incomplete. Mrs Kocatürk, and the other witnesses they relied on, had not given evidence.

The issues

[31] The issues in these proceedings are:

- (a) Is Mr Kocatürk's claim for unpaid wages and holiday pay for the period prior to 9 July 2010 statute barred?
- (b) Did Mr Kocatürk work hours for which he was not paid?
- (c) If the answer to (b) is yes, how much is he owed for unpaid wages and holiday pay?

(d) Was Mr Kocatürk dismissed?

21 *Kocatürk v Zara's Turkish Ltd (in liquidation)* [2020] NZHC 3124.

(e) If the answer to (d) is yes, was that dismissal unjustifiable and, if so, is he entitled to compensation?

(f) Was Mrs Kocatürk employed by Zara's Turkish to work at its business in Richmond?

(g) If the answer to (f) is yes, how much, if anything, is owed to her?

(h) Did Mrs Kocatürk work for 72 hours per week in Upper Hutt?

(i) If the answer to (h) is yes, how much is owed to her?

(j) Was Mrs Kocatürk dismissed and, if so, was that decision justified?

(k) If the answer to (h) is no, what, if anything, is she entitled to by way of compensation?

Is the pre-9 July 2010 claim statute barred?

[32] There is a dispute about who employed Mr Kocatürk when he arrived in New Zealand. The events leading to his arrival began on 13 May 2009 when Mirac wrote to him in Turkey offering a full-time job as a chef. The offer was subject to a work visa being obtained. Mr Kocatürk signed the offer letter on 18 May 2009. The directors and shareholders of Mirac are Omer and Nuray Akbaba and they are related to Mr and Mrs Kocatürk by marriage.

[33] While the existence of the offer was undisputed what happened when Mr Kocatürk arrived was contested. At first his application for a work visa was declined. Immigration New Zealand (INZ) was not satisfied the position offered to him by Mirac was sustainable. A revised application was made, this time with the assistance of Mirac's accountant. In the revised application INZ was advised that Mirac intended to expand by taking over the lease of the business then being operated by Zara's Turkish in Richmond.

[34] The visa was granted in time for Mr Kocatürk to arrive in New Zealand in October 2009. The exact date of his arrival was the subject of debate but it does not need to be established.

[35] Contrary to expectations, Mirac did not acquire Zara's Turkish's business in Richmond in 2009 or 2010, for reasons that are not material. The dispute that followed about the identity of Mr Kocatürk's employer is over what he knew about his future employment before leaving Turkey and the information relayed to him when he arrived in New Zealand. This dispute was central to the claim about the limitation period and its applicability.

[36] Mr Kocatürk said that he knew before leaving Turkey that he would be working for Zara's Turkish; as he described it, working for Hanife Kokcu and Ugur Kokcu (the company's directors and who are also related to Mr and Mrs Kocatürk by marriage). Conversely, Mr and Mrs Kokcu, and Mr Akbaba, all said that the previous arrangements were revised when Mr Kocatürk arrived in New Zealand and not before.

[37] What was not disputed is that an amendment to Mr Kocatürk's visa was made in February 2010 permitting him to work for Zara's Turkish. By that time, he had been in the country for several months.

[38] What happened from October 2009 until mid-March 2010 is a significant part of Mr Kocatürk's challenge. Mr and Mrs Kokcu said that he did not begin working for Zara's Turkish until his visa was amended and that he began work in March 2010. Mr Kocatürk said he worked for the company from the time of his arrival in New Zealand and that was how he paid for his board in Richmond, having arrived with very little money and no means of supporting himself other than by working. He said that, until his amended visa was granted, he was paid \$200 in cash by Zara's Turkish. For that he was required to work 12-hour days every day of the week.

[39] This part of Mr Kocatürk's claim relied on [ss 2](#) and [48](#) of the [Limitation Act 2010](#); essentially that, because of fraud by or on behalf of Zara's Turkish, the six-year limitation period applied by the Authority did not apply to his situation (or perhaps, more correctly, the start of the limitation period was delayed).

[40] What constituted the behaviour Mr Kocatürk relied on was stated in different ways in the statement of claim all culminating in an allegation that he was taken advantage of by Zara's Turkish.

[41] The alleged offending conduct included concealment by Zara's Turkish over the problems that emerged after Mr Kocatürk arrived in New Zealand and before the visa was amended in February 2010.

[42] One allegation was that Zara's Turkish was experienced and conversant with New Zealand immigration processes and failed to inform Mr Kocatürk that the employer would no longer be Mirac. That was said to mean that Zara's Turkish was

“properly knowledgeable of Mr Kocatürk’s work visa arrangements as represented to INZ”.

[43] An allied claim was about the close family connection between the directors of both companies with a further allegation that Zara’s Turkish unreasonably failed to explain the reasons for the change in Mr Kocatürk’s employment status and the implications of that alteration. The claim did not explain how Zara’s Turkish had assumed the responsibilities attributed to it.

[44] The grounds relied on were summarised in a claim that Zara’s Turkish behaved in a manner such that it was “liable on grounds of dishonest concealment to Mr Kocatürk, to compensate his unpaid wages for the stated period.” This claim was accompanied by a reference to [s 48](#) of the [Limitation Act 2010](#).

[45] Ms Sharma’s closing submissions acknowledged difficulties in seeking to rely on the [Limitation Act 2010](#), because the alleged acts or omissions said to support the delayed onset of the limitation period occurred before that Act commenced.²² Instead, she initially relied on the [Limitation Act 1950](#) but with the same general point, that the limitation period should not prevent this part of Mr Kocatürk’s claim from being considered.

²² [Limitation Act 2010, s 2, 11](#) January 2010.

[46] There are two problems with Ms Sharma’s submissions. The first problem is the [Limitation Act 1950](#), and the [Limitation Act 2010](#), are irrelevant. The defendants relied on the limitation created by s 142 of the Act. The section reads:

142 Limitation period for actions other than personal grievances

No action may be commenced in the Authority or the court 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.

[47] In fairness, when presenting submissions Ms Sharma accepted that the 1950 and 2010 Limitation Acts do not apply, but argued the same considerations that had been advanced in relation to them should apply to s 142, so that there was no bar to this part of Mr Kocatürk’s claim being considered. I disagree. Section 142 is an absolute bar to a proceeding that is stale, meaning where the cause or causes of action are more than six years old before the action commenced.

[48] Section 142 does not contemplate delaying the beginning of the limitation period. That was the conclusion in *Blue Water Hotel Ltd v VBS*.²³ While that case dealt with the time limit for raising personal grievances in s 114(1) of the Act the full Court also commented that its analysis had implications for s 142.²⁴ I consider *Blue Water* is applicable. The Authority was right to conclude that Mr Kocatürk’s claims that were more than six years old as at the date when his proceeding was lodged were time-barred.

[49] The second difficulty is that, even if s 142 had not created such a barrier, there was no evidence that anyone for or on behalf of Zara’s Turkish misled or deceived Mr Kocatürk or concealed anything from him. All Ms Sharma could point to was the possibility of confusion at the time Mr Kocatürk left Turkey, about what was happening with his employment, and that the letter of offer and the employment agreement were in English. Mr Kocatürk was said to be at a disadvantage because he did not, and still does not, speak English and could not read the letter or agreement.

[50] That evidence does not go anywhere near showing that anything was dishonestly concealed from Mr Kocatürk or that he was misled or deceived.

²³ *Blue Water Hotel Ltd v VBS* [\[2018\] NZEmpC 128](#) at [\[48\]](#) and [\[57\]](#).

²⁴ At [\[57\]](#).

Furthermore, there is no substance to the argument about language difficulties. At all times he was dealing with members of his extended family and the conversations they had about his employment were in Turkish.

[51] This part of Mr Kocatürk’s challenge cannot succeed.

Did Mr Kocatürk work hours for which he was not paid?

[52] The Authority accepted that Mr Kocatürk worked 72 hours per week in both Richmond and Upper Hutt. The company’s contention that he worked only 40 hours per week, later increased to 48 hours, was rejected. He was awarded \$16,194.36 gross calculated using the relevant Minimum Wage Orders that applied during this period of his employment.²⁵

[53] Mr Kocatürk’s claims for an increase in the amount he was awarded for unpaid arrears of wages were broken down into several time periods. The first period was from 13 October 2009 to 15 March 2010, but it cannot be considered because it is time-barred.

[54] The next claim was for the period from 15 March 2010 to 30 May 2011 and was for \$38,033.28 gross. It is not clear why this period begins on 15 March because the amended visa was granted from February, but that is not material because the first part of this claim, up to 9 July 2010, is time-barred. The end date of 30 May 2011 coincided with Zara's Turkish ceasing operations in Richmond.

[55] Central to this part of Mr Kocatürk's claim was an attempt to increase the amount awarded by the Authority by applying the rate of pay offered to him by Mirac in May 2009 instead of the relevant minimum wage. The claim was that Zara's Turkish was liable for unpaid wages to him "...in accordance with representations made to [Immigration New Zealand] under his signed contract of employment with Mirac". It follows that the claim was based on seeking to impose on Zara's Turkish an obligation to pay Mr Kocatürk at the rate previously agreed between him by Mirac in the offer of work made in 2009.

25 Above n 5.

[56] The only way this claim can succeed is if the agreement between Mr Kocatürk and Mirac can be attributed to Zara's Turkish, such as if Mirac was an agent for that company. Such a relationship between those companies was not pleaded. Putting that difficulty aside, accepting such a contention would involve rejecting what Mr and Mrs Kokcu said; that they did not offer employment to Mr Kocatürk before problems over his employment with Mirac emerged; rejecting what Mr Akbaba said about Mirac making the offer in May 2009, and requires a finding that the letter of offer and employment agreement in Mirac's name were deliberately and knowingly wrong. I am not prepared to reach those conclusions. It is far more likely that Mirac over-extended itself so that it could not satisfy the commitment it made to Mr Kocatürk and replacement employment had to be arranged to assist him when he arrived in the country expecting to work.

[57] There is a further difficulty. Ms Sharma submitted that instead of using the applicable Minimum Wage Orders, the calculation should be based on a salary of

\$40,000 per annum. That was not what was pleaded. The claim was that the monthly salary payable to Mr Kocatürk under the agreement with Mirac was \$3,068.49 gross, which equates to approximately \$36,800 per annum not \$40,000 per annum.

[58] Mr Kocatürk's claim for unpaid wages cannot be resolved by shoe-horning the agreement he had with Mirac into applying to the subsequent employment relationship with Zara's Turkish. The Authority correctly made its decision using the Minimum Wage Orders.

[59] What is Mr Kocatürk owed, if anything? He claimed to have worked a consistent 72 hours each week for the whole of his employment. Mr and Mrs Kokcu vehemently denied that Mr Kocatürk worked those hours. They said he worked for 40 hours each week over split shifts and those hours increased to 48 per week in October 2013, when his wage also increased.

[60] A former employee of Zara's Turkish in Richmond, Yuksel Keskin, gave evidence about working split shifts with Mr Kocatürk. Mr Keskin worked for the company for eight years until 10 July 2010. He was the head chef and manager. His employment agreement with Zara's Turkish was to work 40 hours per week. He said

his usual working day began with food preparation from about 9.30 am before opening up the business at around 11 or 11.30 am.

[61] Mr Keskin said the afternoon, after lunch and until about 5 pm, was quiet and staff were not required to work those hours. He said that between 1.30 and 5 pm staff were free to do what they wanted. He described going to the shopping mall and to other nearby places, in the afternoon, sometimes with Mr Kocatürk. He went on to say that Mr and Mrs Kokcu handled those quiet afternoon hours themselves before he started working again for the dinner service, which usually took until 7 pm in winter and about 8 pm in summer, although actual hours varied depending on demand.

[62] Despite what Mr Keskin said, I have decided to accept Mr Kocatürk's claim that he worked for 72 hours per week while employed by Zara's Turkish in Richmond for the following reasons. First, that is the evidence he gave and it is consistent with what he told the Authority. Second, while Mr Keskin said he and Mr Kocatürk worked the same hours, and they were not as long as was claimed, the amount of time his employment overlapped with Mr Kocatürk's was reasonably short. It would be wrong to assume that his working conditions, and working pattern, applied or continued apply to the whole of Mr Kocatürk's employment.

[63] Third, while there were times when Mr Kocatürk was able to go elsewhere, because demand had slackened off, it is more likely than not that he spent long periods in the café providing cover for other staff or assisting Mr and Mrs Kokcu. If split shifts were intended in Richmond, the duty fell on Zara's Turkish to explain that to Mr Kocatürk. The company did not do so.

[64] The situation in Upper Hutt was, however, different. Mr Kocatürk's claim was that he was short paid from when he started work there on 14 February 2013 until 18 September 2014. The selection of September as the end of this period was

not explained when his employment finished in October 2014. He claimed he was owed

\$40,366.08.

[65] Ms Sharma submitted that the Authority's calculation had wrongly used the applicable Minimum Wage Orders when the calculation should have been based on Mr Kocatürk's hourly rate derived from the individual employment agreement he

signed with Zara's Turkish that covered his work in Upper Hutt. Mr Kocatürk signed two versions of the same agreement several months apart, one dated 18 April 2013 and the other on 2 October that year. They are essentially the same. The differences between them are a schedule attached to the October agreement that was not attached to the April one and in the October agreement his hours of work increased to 48 per week.

[66] There is a difficulty with this argument because neither of the agreements contained an hourly rate. For example, the October agreement stated a salary was payable of \$934.75 per week "before tax". In a section of the agreement dealing with hours of work it stated that, where Mr Kocatürk worked additional hours above those in the schedule to the agreement, he would be paid at the ordinary rate in that schedule. No ordinary rate was specified in the schedule or elsewhere in the agreement. In fact, the agreement described the income as a salary and a wage in different places.

[67] In any event, I am not satisfied that Mr Kocatürk worked 72 hours per week in Upper Hutt for the following reasons. First, his employment agreement referred to a 48-hour working week having increased from 40 hours in the April agreement. No change was necessary if the parties were, in fact, paying no attention to the agreement to regulate working hours. Second, for most of the time Mr Kocatürk worked in Upper Hutt Eren Kartum was employed there as a chef. Mr Kartum was paid a salary for 48 hours per week. He said, and I accept, that before he started work the hours were explained to him. His working day ran in split shifts from 9.30 am to 1.30 pm and from 5 pm to approximately 9 pm daily. He was told that the hours between 1.30 pm and 5 pm were his own time. During the afternoon he was free to leave the premises, or he could stay, but was not expected to work and was free to socialise.

[68] Mr Kartum said his hours were essentially the same as Mr Kocatürk's hours, except that they had different days off each week. Mr Kartum's explained that there were times when he was not working, but he and Mr Kocatürk remained on the premises "socialising and playing games". Mr Kocatürk disputed what Mr Kartum said but I prefer Mr Kartum's recollections.

[69] It is more likely than not that during Mr Kocatürk's employment by Zara's Turkish in Upper Hutt he was expected to work, and did work, in the same way as Mr Kartum did. While it is possible that Mr Kocatürk spent more hours in the business premises than was required of him, it does not follow that he was working during that time and entitled to be paid.

Was Mr Kocatürk dismissed?

[70] Ms Sharma submitted that Mr Kocatürk was constructively dismissed for several reasons.²⁶ The first of them was that his employment was repudiated because of how Zara's Turkish dealt with his holiday pay while he was on holiday in Turkey. The second reason was that, while Mr Kocatürk declined to return to work when he returned from holiday, that situation was forced on him because of the company's decision to dismiss Mrs Kocatürk. In other words, the company made it untenable for him to continue working.

[71] The third reason was that a promise made to Mr and Mrs Kocatürk, that they could acquire the café business, was broken.

[72] In mid-July 2014 Mr and Mrs Kocatürk went on holiday for two months. Instead of a lump sum payment for holiday pay Zara's Turkish continued to pay Mr Kocatürk's weekly wages. While they were on holiday the company received advice from its accountant to the effect that Mr Kocatürk's entitlement to paid annual leave had been exhausted. On that advice, and seemingly without consulting Mr Kocatürk, the company ceased paying his wages.

[73] Mr Kocatürk was unhappy at what had happened. When he returned to New Zealand in mid-October 2014 he made his dissatisfaction at what had happened known to Mr and Mrs Kokcu. There was a meeting on or about 15 October 2014, but the parties disagree about what happened at it. Mr and Mrs Kocatürk said that they had both been replaced while they were on leave and "begged" for their jobs back.

²⁶ Relying on *Auckland Electric Power Board v Auckland Provisional District Local Authority's Office IUOW Inc* [1994] NZCA 250; [1994] 2 NZLR 415; *Coy v Commissioner of Police* [2015] NZEmpC 35; and *Auckland etc Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA).

[74] Mr and Mrs Kokcu said that only Mrs Kocatürk had been replaced because she had resigned before going on holiday. They also said Mr Kocatürk's job carried on and he was expected to return and was asked to return. Instead he refused and

took a job in Napier before eventually returning to work again for Mirac in Richmond.

[75] As to the third reason, Ms Sharma submitted that before Mr and Mrs Kocatürk accepted employment in Upper Hutt they had been promised a future opportunity to acquire the business if it was successful. This promise was said to have been a significant inducement to them to accept jobs and to move from Richmond to Upper Hutt. This promise was broken, it was argued, when they returned from holiday to discover they would not be allowed to acquire the business.

[76] All three matters referred to in submissions (the cessation of pay, Mrs Kocatürk being dismissed, and the alleged broken promise to acquire the business) were used to support the claim for constructive dismissal. However, Mr Kocatürk's pleaded claim relied only on the alleged broken promise and the dismissal of Mrs Kocatürk. It did not extend to include allegations about his wages having been stopped while on holiday and submissions on that subject cannot be taken any further.

[77] Mr Kocatürk has not established that he was dismissed. There was a disagreement between Mr and Mrs Kocatürk and Mr and Mrs Kokcu about whether any commitments of any sort were made about acquiring the business. This part of the claim did not indicate whether the alleged promise was made by Zara's Turkish as a commitment to sell its café business or, alternatively, if it was made by Mr and Mrs Kokcu as shareholders to sell their shares. When the commitment was said to have been made was not explained.

[78] The removal of a possible opportunity to acquire the business is far too remote from the circumstances which saw Mr Kocatürk decline to return to work in October 2014 to have been the operative reason for his employment ending. Ms Sharma was not able, for example, to point to any evidence that the parties had discussed when the business might be acquired or any of the other details that are usually part and parcel of such a commercial transaction. Mr and Mrs Kocatürk did not give evidence about

having settled on a purchase price, or to having made arrangements to fund the purchase, or for that matter when the transaction was anticipated to occur.

[79] Even assuming that Mr and Mrs Kocatürk are correct, and there were discussions about the possibility of acquiring the business, they were nowhere near maturing at the point in time when they returned from holiday. There was no evidence of any discussion about the subject immediately before they went on holiday, so that it might have had a connection with what happened when they returned. At the very most, all the evidence could amount to was a vague idea that an opportunity might materialise in future. That is not enough.

[80] All of the parties essentially agreed that, in the discussions in mid-October 2014, the company wanted Mr Kocatürk to continue working. To that extent what the parties said was consistent. Mr Kocatürk, however, decided it was intolerable to carry on working for Zara's Turkish when he regarded his wife as having been unfairly treated by the company. I agree with the Authority that he voluntarily ended his employment and was not dismissed.

Was Mrs Kocatürk employed by Zara's Turkish in Richmond?

[81] The Authority held that Mrs Kocatürk started working for Zara's Turkish in Richmond in September 2010.²⁷ Mrs Kocatürk told the Authority, and said again in this hearing, that when she arrived in New Zealand she began working for the company immediately. She worked for 26 hours per week and was paid \$150 "pocket money" in cash. Her evidence was that she worked two hours each Wednesday, Thursday, Friday, Saturday, Sunday and Monday mornings and two hours in the evenings including Tuesdays. There was a disagreement about whether the payment was a wage, or was an irregular payment made because of her family connection to Mr and Mrs Kokcu and Mrs Kocatürk's occasional need for extra money.

[82] I find that Mrs Kocatürk was working in Richmond. I consider there is no other satisfactory explanation for the regularity of payments to Mrs Kocatürk other than that she was working.

²⁷ *Kocatürk*, above n 1, at [60].

[83] I also prefer her evidence over what was said by Mr and Mrs Kokcu and Furken Kokcu about the work in Richmond. Furken Kokcu is Mr and Mrs Kokcu's son. He disputed that Mrs Kocatürk worked in Richmond because when he went to the café, which was on most days, he did not see her working.

[84] The impression Furken Kokcu intended to convey was that Mrs Kocatürk was not employed by the company and her claim should be dismissed. I do not consider his evidence to be reliable. Much of it was a restatement of arguments by Zara's Turkish rather than his personal observations about how the business was staffed and could not have come from his own knowledge. What he did see did not support Zara's Turkish's case. In late 2010 and early 2011, Furken Kokcu was at high school in Nelson. He travelled to Richmond after school to attend football practice. On the way to practice he said he called into the café and did not see Mrs Kocatürk there concluding, therefore, she was not working for the company. However, there was insufficient time between his arrival and departure for him to make the detailed observations he claimed to have made. More importantly, Mrs Kocatürk said she worked in the mornings and evenings. Those times are unlikely to have

coincided with when he was, briefly, in the café.

[85] Mrs Kocatürk was granted a work visa on 13 May 2011. She said at that time her working hours increased to 36 per week. After the work visa was granted payment increased to \$250 per week in cash. She continued to work the same hours, for the same pay, until 30 May 2011 when Mr and Mrs Kokcu moved to Upper Hutt and Zara's Turkish ceased to operate in Richmond.

[86] Mrs Kocatürk described her loss of income for the period from November 2010 to 30 May 2011, calculated on having worked 12-hour days, six days a week, making a total of 72 hours per week. The difference between what she was paid per week and what should have been earned for a 72-hour week was said to be owed for working in Richmond.

[87] While Mrs Kocatürk worked in the Richmond café I do not accept that she worked 72 hours per week. Her claim to have done so was inconsistent with her own evidence that she worked for two hours in the morning, and two hours in the afternoon

six days per week, and on Tuesday evenings. Those hours added up to 26 per week not the 72 hours now claimed. That inconsistency was not explained.

[88] I agree with the Authority that a conservative approach to the claimed hours of work is appropriate and the amount owed should be calculated at 26 hours per week. The total amount owed to Mrs Kocatürk is \$6,411. She is also entitled to holiday pay and I agree with the Authority that the amount owed is \$932.88.

Did Mrs Kocatürk work 72 hours per week in Upper Hutt?

[89] As to the Upper Hutt business, Mrs Kocatürk said she began work in early March 2013 when the café opened after a period for refurbishment. She claimed not to have been paid for the first 14 days of work before the business opened. When it opened she said she worked six days per week between 9 am and up to 9.30 pm. She said that between 1 March 2013 and 2 May 2013 her husband's wage increased, because of the hours being worked by him but hers did not, even though she worked the same hours. However, from 2 May 2013 onwards she said that her pay became

\$150 cash and \$350.15 paid into her bank account.

[90] The claim for unpaid wages for work in Upper Hutt was from 1 March 2013 to 18 September 2014, again based on six 12-hour days for 72 hours per week. I do not accept that Mrs Kocatürk worked 72 hours per week in Upper Hutt because what she said was inconsistent with what Mr Kartum said and I prefer his evidence. It is possible that Mr and Mrs Kocatürk spent long hours at the café when they were not required to work, but that does not mean they were working and entitled to pay. However, I am prepared to accept that her hours were similar to Mr Kocatürk's hours. There is some uncertainty about them and I consider a calculation of 40 hours per week is the most appropriate. On that basis there is a modest shortfall between the amounts paid for wages and what is owed of \$2.07 per week for the period from 1 May 2013 to 31 March 2014. From 1 April 2014 to 15 October 2014 the shortfall each week was \$22.07.

Was Mrs Kocatürk dismissed?

[91] What happened when Mr and Mrs Kocatürk returned from holiday has already been discussed. Before going on holiday Mrs Kocatürk confided in Mrs Kokcu about her plan to increase her family. It would appear that this information was treated by Zara's Turkish as a resignation.

[92] Mrs Kokcu said that it was always known to the company before the holiday began that Mrs Kocatürk was not going to return to work because of her plan but I do not accept that evidence. I am satisfied that Mrs Kocatürk did not resign before going on holiday. The Authority found that Mrs Kocatürk was dismissed and the dismissal was not a decision that a reasonable employer could have reached in all of the circumstances of this case.²⁸ I agree.

[93] The company did not seek to dismiss for any failure or shortcoming on Mrs Kocatürk's behalf. It did so only because of a perception that her future personal plan amounted to a resignation when plainly it did not. Mrs Kocatürk should have been free to discuss her personal plan, if she wanted to, with Mrs Kokcu without any adverse consequences. The company is unable to satisfy the test in s 103A of the Act.

[94] The Authority awarded Mrs Kocatürk \$7,000 for compensation pursuant to s 123(1)(c)(i) of the Act.²⁹ She explained the despair she suffered from having been dismissed from her job because it "destroyed everything we had worked toward for our future". It was not surprising that Mrs Kocatürk felt considerable anguish and upset at having lost her job, especially given that she had moved to New Zealand and was immersed in an unfamiliar culture where work provided an income and social contact with others in the small Turkish community.

[95] The Court has for some time been assessing compensation for unjustified dismissal in bands as a means of providing a degree of consistency in these awards.³⁰ I consider that Mrs Kocatürk's claim falls towards the lower end of the mid-band and that she is therefore entitled to compensation pursuant to s 123(1)(c)(i) of the Act of

28 [Employment Relations Act 2000, s 103A.](#)

29 *Kocatürk*, above n 1, at [104](b).

30. See *Richora Group Ltd v Cheng* [2018] NZEmpC 113, [2018] ERNZ 337; and *Waikato District Health Board v Archibald* [2017] NZEmpC 132, [2017] ERNZ 791.

\$13,000. There is, however, no reason to alter the Authority's conclusion that compensation for lost income should be set at three months.

Conclusion

[96] These conclusions mean that:

- (a) Mr Kocatürk has failed in his claim for constructive dismissal.
- (b) Mr Kocatürk has failed in his claim to have worked 72 hours per week in Upper Hutt but succeeded in relation to his claim for those working hours in Richmond.
- (c) Zara's Turkish has failed in its challenge to the Authority's conclusion that Mrs Kocatürk was not working in Richmond.
- (d) Mrs Kocatürk has succeeded in increasing the compensation payment to her under s 123(1)(c)(i) of the Act but her claim to payment for long working hours in Richmond fails.
- (e) Zara's Turkish's claim that Mrs Kocatürk did not work all of the hours claimed in its Upper Hutt café succeeds.

[97] Table 6 contains a summary of the revised awards payable to Mr and Mrs Kocatürk.

Table 6

Ibrahim Kocatürk			
Dates	Gross Shortfall per Week	Number of Weeks	Total Due
9 Jul 10 – 7 Nov 10	\$268.20	17.4	\$4,666.68
8 Nov 10 – 31 Mar 11	\$148.96	20.6	\$3,068.58
1 Apr 11 – 2 Jun 11	\$172.70	9	\$1,554.30
Holiday Pay (1st period) ³¹			\$3,464.64
Holiday Pay (2nd period net of leave already taken)			\$2,028.46
Total			\$14,782.66
Güler Kocatürk			
Dates	Gross Shortfall per Week	Number of Weeks	Total Due
1 Oct 10 – 2 Jun 11	\$181.50	26	\$4,719.00
1 Apr 11 – 2 Jun 11	\$188.00	9	\$1,692.00
1 May 13 – 31 Mar 14	\$2.07	47.85	\$99.05
1 Apr 14 – 15 Oct 14	\$22.07	28.14	\$621.05
Holiday Pay (1st period)			\$932.88
Holiday Pay (2nd period)			\$3,388.58
Lost Remuneration (3 months at 40 hours per week)			\$7,410.00
Compensation			\$13,000.00
Total			\$31,862.56

[98] A claim has been made for interest. I am satisfied that interest, calculated in accordance with sch 2 to the [Interest on Money Claims Act 2016](#), is payable on the sums in Table 6. The interest period is to be calculated on both sums (\$14,782.66 and

\$31,862.56) from when Mr and Mrs Kocatürk's employment ended on 15 October 2014 until paid in accordance with the judgment. The Registrar is to pay Mrs Kocatürk the amount in Table 6 plus interest from the funds under her control.

[99] As Mr Kocatürk has already received payment of the amount awarded in the Authority, interest should be calculated from 15 October 2014 until the date that payment was made. He is not, however, entitled to any further payment from the funds held by the Registrar unless, when the interest is added to the amount in Table 6, the

31 The value in Table 2 plus the amount for the period July to November 2010.

total exceeds \$20,961.12. If that is the result of the interest calculation the excess (that is, the amount over \$20,961.12) is to be paid to him from the funds controlled by the Registrar.

[100] Leave is reserved to apply for further orders if there are any problems over calculating the amounts to pay.

[101] The Registrar is to pay any remaining balance of the funds under her control to the liquidator of Zara's Turkish.

[102] Costs are reserved. Given the mixed success, and the liquidation of Zara's Turkish, my present inclination is that costs should lie where they fall. If either party takes a different view memoranda may be filed seeking directions to file submissions.

K G Smith Judge

Judgment signed at 10.10 am on 3 August 2021

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