IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2013] NZEmpC 28
CRC 17/11

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MAORI HILL AND BALMACEWEN PHARMACY LIMITED Plaintiff
AND	SIRAYA O'SULLIVAN Defendant

CRC 24/11

AND IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MAORI HILL & BALMACEWEN PHARMACY LTD Plaintiff
AND	LABOUR INSPECTOR (JO-ANNE DUFF) Defendant

CRC 28/11

AND IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	MAORI HILL AND BALMACEWEN PHARMACY LIMITED Plaintiff
AND	LABOUR INSPECTOR (JO-ANNE DUFF) Defendant

Hearing: 20, 21 and 22 November 2012
(Heard at Dunedin)

Counsel: Werner van Harselaar, counsel for Maori Hill and Balmacewen Pharmacy Limited
Meghan Zetko, counsel for Siraya O'Sullivan
Greg La Hood, counsel for Labour Inspector (Jo-Ann Duff)

Judgment: 8 March 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff company operated a pharmacy. Mr Vohora is a director of the company and a qualified pharmacist. He was responsible for employing Ms O'Sullivan, Ms Hughes and Ms Jordan (the three employees). They were paid at less than the adult minimum wage during their time at the pharmacy. The Department of Labour became involved and a Labour Inspector, Mr Henning, undertook an investigation. Issues arose about the way in which Mr Vohora was responding to requests for various documents and records. Mr Henning ultimately formed the view that the company had underpaid the three employees and had failed to adequately maintain and respond to requests for wage and employment records. A claim was brought in the Employment Relations Authority (the Authority).

[2] Each of the three employees left their employment with the company within 12 months of their arrival. Ms O'Sullivan contends that she was actually or constructively dismissed. She raised a grievance in this regard.

[3] The Authority found that Ms O'Sullivan had been both constructively dismissed[1] and underpaid for the duration of her time with the company. It also found,[2] in separate proceedings, that the company had breached its obligations under the Minimum Wage Act 1983 (the MWA) and that it owed each of the three

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[1] [2011] NZERA Christchurch 115.
[2] [2011] NZERA Christchurch 123.

employees outstanding wages. It ordered the company to pay penalties[3] and wage arrears.

[4] The company challenges the determinations of the Authority on a de novo basis.

[5] While a considerable amount of evidence was traversed by the parties, the key issues reduce to relatively narrow points. There is no dispute that each of the three employees was over 16 years of age but was paid below the minimum adult wage during their time with the company. Rather, they were paid at a rate equivalent to the training rate specified in the Minimum Wage Order then in force. The key issue is whether the company was entitled to pay them at this rate from first employment and prior to enrolment in an approved course. Subsidiary issues also arise as to whether the plaintiff failed to meet its obligations under the MWA and whether penalties ought to be imposed in the circumstances. The plaintiff also challenges the Authority's finding that Ms O'Sullivan was unjustifiably dismissed from her employment.

Facts

[6] The company advertised for trainee pharmacy technicians from time to time. Mr Vohora said that he went through a number of points during the interview with prospective trainees, including making it clear that they would initially be on paid work experience, and that this was intended to provide an opportunity for them to find out whether the job was to their liking and whether he considered they were good at it. In this sense it is clear that Mr Vohora regarded this initial phase as something of a trial period.

[7] Ms Hughes applied for a position as trainee pharmacy technician on 21 September 2008. Her evidence was that Mr Vohora led her to believe that she would be put through a training course resulting in a formal qualification. She says that there were delays in providing a written employment agreement (which Mr Vohora

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[3] [2011] NZERA Christchurch 141.

accepted). She also says that she raised the issue of training with Mr Vohora shortly after she started work, but he was unreceptive. Ms Hughes' employment did not come to a happy end. She resigned on 4 June 2009, advising this by way of handwritten note and requesting that all her outstanding salary be paid to her.

[8] Ms Jordan applied for a position as a trainee pharmacy technician in January 2009. She was appointed, initially on a part-time basis. She said that she accepted the position at the pharmacy on the condition that she would be enrolled in a recognised training course. The advertisement she responded to was expressed in the following terms:

> We have an opening for an additional Trainee Technician. Suitable position for school leavers and others wishing to gain a National Certificate in Pharmacy.

[9] Ms Jordan says that she did not receive the formal training she had anticipated, and nor was she enrolled in a training course. Rather, she said that Mr Vohora began to raise a number of issues about her work, making it clear at a meeting in March 2009 that she was not cut out to be a pharmacy technician and that she should use the following four weeks to find alternative work. While Mr Vohora did not accept that these were the precise words he used, he did say that he had had a frank discussion with her. He said that he wanted to allow her to reach her own view about her suitability for ongoing employment. Her father subsequently approached Mr Vohora and expressed a concern that she should be receiving the adult minimum wage until she had decided whether to train as a pharmacy technician. Mr Vohora says that this approach took him by surprise and that he suggested that Mr Jordan seek clarification from the Department of Labour. Ms Jordan left the pharmacy on 6 April 2009.

[10] Ms O'Sullivan applied for a position as a trainee technician on 6 April 2009. She commenced work on 22 April 2009. Her written employment agreement was signed on 24 June 2009, some two months after she commenced employment. Ms O'Sullivan was paid at the training rate for the duration of her employment. The company received a subsidy from the Ministry of Social Development of $200 per week for employing her. The documentation that Mr Vohora and Ms O'Sullivan signed in support of the subsidy application made specific reference to the

requirement to be engaged in 60 credits of study a year. Despite this, Ms O'Sullivan was never enrolled for any industry training programme (for which credits could be earned) during the period of the subsidy. The Ministry of Social Development subsequently confirmed in correspondence to the Labour Inspector that it paid the subsidy on the basis that Ms O'Sullivan was enrolled in, and undertaking, an approved course. The subsidy paid to the company for employing Ms O'Sullivan totalled $2,000.

[11] Ms O'Sullivan's evidence was that she thought she would be receiving the recognised industrial training to become a pharmacy technician as soon as she began work but this did not occur. She says that about a week after she started she asked Mr Vohora why the training had not begun and queried when he was going to enrol her. She said that he got angry and told her that her training had started from the first day of her employment. Mr Vohora denied that such a conversation had occurred but I am satisfied that it did. In one sense, Ms O'Sullivan's training had begun on day one. She accepted that, while her tasks were predominantly focussed on activities such as cleaning and dusting, she did handle prescriptions under supervision. Her informal work experience was underway and would no doubt have had some value in terms of completion of a pharmacy technician's qualification. However, it was neither the sort of formal training that Ms O'Sullivan had been led to believe she would be receiving during the course of her employment and while enrolled and nor was it training in the sense required under the legislative framework in order to justify payment below the minimum wage (discussed in further detail below).

[12] Around the end of June, Ms O'Sullivan raised issues relating to the industry training rate with Mr Vohora. Mr Vohora's response proved to be unsatisfactory from Ms O'Sullivan's perspective and her mother became involved. She contacted the Department of Labour in July, querying her daughter's rights in relation to the minimum wage, given that no enrolment in an approved training course had occurred. Mr Vohora gave Ms O'Sullivan the enrolment forms shortly after this. Ms O'Sullivan signed the Pharmacy Industry Training Organisation (PITO) application for membership and the National Certificate in Pharmacy (Technician) enrolment form at the Open Polytechnic. She promptly returned these forms to Mr Vohora, after seeking some guidance from him as to how to fill in certain parts of them. His

response was unhelpful. Although it is apparent that he signed the forms, they were never sent off.

[13] Mr Vohora says that the Open Polytechnic form was delayed, and both forms needed to be sent together. The delay, he said, was caused by needing to get a Justice of the Peace to witness the documentation, which he arranged and which was deferred as not everyone was present and another person did not have her documentation. While this did delay matters, it does not explain the length of the delay that ultimately occurred. Nor does it explain the original delay of some two months in providing the enrolment forms following Ms O'Sullivan's appointment.

[14] Mr Vohora also sought to blame the Labour Inspector's investigation for the delay. I do not accept this. The Labour Inspector (Mr Henning) was focussed on determining whether or not Ms O'Sullivan, Ms Hughes and Ms Jordan were being paid at the appropriate rate. His progress was slowed by the approach Mr Vohora adopted to Mr Henning's requests for information. These responses were unhelpful and unnecessarily obstructive. In any event, the steps being taken by Mr Henning do not explain the delays in progressing the enrolment issue. If Mr Vohora had genuinely wanted Ms O'Sullivan to be enrolled in the pharmacy technician's course it is likely that he would have facilitated her enrolment at a much earlier stage. Ms O'Sullivan's evidence, which I accept, was that she had not delayed the finalisation of the enrolment forms.

[15] Mr Vohora referred to the requirement of the Open Polytechnic that pharmacy technician trainees have NCEA level 3 or equivalent in English and that, in the absence of this, the employing pharmacist should ascertain a trainee's ability to complete the course and make a statement to this effect to support an application to PITO to enable acceptance for training. However, Ms O'Sullivan did not accept that Mr Vohora had ever made her aware of any issues about this. I do not accept that the delays were explicable on this basis.

[16] Mr Vohora was contacted by Mr Henning on 16 July 2009. Mr Henning raised a number of issues about the rate of pay that Ms O'Sullivan was receiving, and that had been received by Ms Hughes. Mr Vohora spoke to Ms O'Sullivan

requesting details of the concerns she had. He said that he considered this an appropriate course of action as he wanted to hear directly from Ms O'Sullivan about the nature of her complaints. Mr Vohora says that he also spoke to the pharmacy team informing them that he would be challenging Mr Henning's approach as not to do so would amount to an abrogation of his civic duty. His evidence was that he told them that once the Department of Labour matter had been resolved, the industry training rate would be replaced by the adult minimum rate for 30 hours (rather than 40 hours) per week, but that until that point the pharmacy would continue to pay the industry training rate. He said that the staff, including Ms O'Sullivan, agreed to this arrangement Her evidence, which I preferred, was that neither she, nor others, agreed to any such arrangement.

[17] Ms O'Sullivan responded in writing to Mr Vohora on 19 July 2009, advising that she believed that she ought to have been paid the minimum adult rate and that:

> Although you gave me the Polytech forms last week I am still not officially enrolled and feel back pay should be given for the past three months.

[18] She could not have been clearer in articulating the nature of her concerns. The root of the problem was that Mr Vohora did not agree that there was any obligation to pay the minimum adult wage in the circumstances, or that payment of the training rate was linked to enrolment. He considered that Mr Henning had misled Ms O'Sullivan as to the legal position. It also became clear in evidence that Mr Vohora considered that the three workers were engaging in copycat actions and pursuing the wage rate issue for ulterior purposes (namely to extract money from the company).

[19] Each of the employees was concerned about potential underpayment. I do not consider that they can be criticised for contacting the Department of Labour to clarify their legal entitlements. Nor do I accept that such a step was inconsistent with the terms of the employment agreement which refers to the parties seeking to resolve issues between themselves, and prior to involving the Department of Labour. The reality was that they had sought to discuss the issue with Mr Vohora, without success.

[20] Mr Vohora gave evidence that he took the precaution of telephoning the Pharmaceutical Society to clarify the position and that it endorsed the approach he was taking. He did not receive anything in writing to confirm the advice he says he was given, and nor could he recall the name of the person he spoke to. Documentation that was before the Court from the Pharmaceutical Society's website contradicts the advice that Mr Vohora says he received and no other evidence was adduced in relation to the issue that might otherwise support Mr Vohora's version of events, which I found unpersuasive.

[21] On 24 July 2009 Mr Vohora wrote to Ms O'Sullivan in response to her letter of 19 July, advising her of his view that she had been receiving recognised training although acknowledging that the Open Polytechnic forms remained outstanding.

[22] Mr Vohora says that the issue was again raised at a staff meeting at the end of August/beginning of September and that Ms O'Sullivan and other employees confirmed that they were happy with the position. Mr Vohora's further letter of 25 September to Ms O'Sullivan, which he copied to Mr Henning (in response to Mr Henning's July correspondence), referred to the meeting. Ms O'Sullivan did not respond to this letter. She says that she was beginning to feel overwhelmed by the way in which Mr Vohora was dealing with the issue and I have no doubt that this was so having regard to the tenor of his communications. Further, Mr Henning had told her that she did not need to reply as it was now in the Department of Labour's hands.

[23] In his letter to Mr Henning of 28 September (which enclosed the 25 September letter to Ms O'Sullivan along with other documentation), Mr Vohora said that the training that Ms O'Sullivan had been receiving was subject to the provisions of the medicines legislation and that, according to this legislation, training commences on the first day of duties. He observed that he had obtained advice from the Department some years previously confirming that the industrial training rate applied. Mr Vohora says that he considered that Ms O'Sullivan's complaint had been addressed.

[24] On 2 October 2009 Mr Henning replied. Mr Henning reiterated his request for employment records, which Mr Voroha's letter had not dealt with. Mr Henning

advised that he would be making an application to the Authority. Mr Henning sought clarification as to what aspect of the medicines legislation Mr Vohora was referring to and further information as to the basis on which Mr Vohora said he had received previous advice from the Department that supported his position. Mr Vohora said in evidence that he regarded Mr Henning's letter as him "throwing his weight around" and ignored it accordingly. I consider that Mr Henning's requests for clarification, and for the documentation he had previously requested, to be reasonable in the circumstances. Mr Vohora's reaction was not.

[25] On 25 November 2009 the Authority issued a notice of direction, including that Mr Vohora was to reply to Mr Henning's letter of 2 October by 7 December 2009. Mr Henning was then to advise the Authority in due course as to whether he wished to pursue the claims. Mr Vohora says that he took this to reflect the Authority's view that Mr Henning's complaints were frivolous, and giving him an opportunity to back out. The Authority's directions cannot reasonably be interpreted in this way.

[26] Mr Vohora spoke to Ms O'Sullivan on 25 November 2009 and asked her to write to the Labour Inspector advising him that she was withdrawing her complaint. He considered that this would resolve the issues that had arisen. She declined to do so. Mr Vohora says that he regarded this as an about face by Ms O'Sullivan, in light of what he said was her earlier indication that she did not have any issues. I do not accept this. Ms O'Sullivan reasonably believed that the matter was in the hands of the Labour Inspector and had not previously told Mr Vohora that she was content with her rate of pay.

[27] The relationship between Mr Vohora and Ms O'Sullivan took a turn for the worse following the meeting on 25 November and Ms O'Sullivan's confirmation that she would not be withdrawing her complaint.

[28] It was put to Ms O'Sullivan that she ought to have raised any concerns she had directly with Mr Vohora. Her evidence was that she was too scared to say anything and that, when she had previously raised issues with him, it had not gone well. She said that Mr Vohora picked on her, identifying minor faults with her work

and drawing these to her attention in front of other staff. She also said that he would get angry and bang his fist on the table from time to time. Mr Vohora explained his actions on the basis that he engaged in role-playing as a staff training technique designed to demonstrate certain behaviours and responses. Ms O'Sullivan was adamant that he was not role playing and that he appeared genuinely angry. I preferred Ms O'Sullivan's evidence, which was supported by the evidence of Ms Hughes and Ms Jordan. I accept that it was a difficult and unpleasant working environment for Ms O'Sullivan and that she got to the point of dreading coming into work.

[29] On 9 December 2009 Mr Henning responded to Mr Vohora's earlier correspondence, advising that the records supplied appeared to be sufficient, but that holiday and leave records were also required.

[30] It appears that Mr Henning and Mr Vohora had a conversation on 22 January. Mr Henning wrote, on 15 February 2010, following this conversation noting that holiday and leave records remained outstanding, and his view that the three employees had been underpaid, citing the Minimum Wage Order 2009. Mr Henning's letter stated that the conditions relevant to the Order were as follows:

> The worker is 'required by his or her contract of service to undertake at least 60 credits a year of an industry training programme for the purposes of becoming qualified for the occupation to which the contract of service relates.'

[31] On 19 February 2010 Mr Henning wrote to the plaintiff and asked for a further response. Mr Vohora did not respond. On 9 March 2010 Mr Henning wrote a follow up letter as he had not received a reply. The plaintiff's evidence was that he was left "puzzled" and "dismayed" by Mr Henning's letter as he was not sure what else could reasonably be required of him. He replied in writing on 15 March 2010 raising concerns about what was being sought.

[32] Mr Henning replied on 17 March 2010 and set out, in bold, the precise information he required in order to complete his inquiry. Mr Vohora responded on 23 March 2010 providing the information sought, but omitting clarification of some

matters which Mr Henning was obliged to follow up by way of letter dated 24 March 2010. Mr Vohora replied on 1 April 2010.

[33] Mr Henning's determinations in relation to the complaints received from the three employees were set out in a letter dated 7 April 2010. He concluded that the company had breached the MWA in respect of payments made to Ms O'Sullivan, Ms Hughes and Ms Jordan. At this point Mr Vohora involved a lawyer, and matters developed from there. Mr Vohora raised concerns about Mr Henning's actions and sought a review.

[34] An audit at the pharmacy was undertaken by the Ministry of Health. The audit did not go well from the pharmacy's perspective. On 19 April 2010 the plaintiff received a "Declaration of Correction of Critical/High Risk Audit Findings". It noted that:

> Staff member Siraya O'Sullivan working as a pharmacy technician ... but she is not enrolled in an approved course.
>
> Action Required: Siraya to cease any dispensing functions until she has been enrolled in an approved training course for pharmacy technicians.

[35] On 26 April Mr Vohora gave Ms O'Sullivan a letter dated 23 April 2010. In the letter and in conversation Mr Vohora set out two stark options for Ms O'Sullivan to consider. He made it clear that he was not happy changing her contract to pay her the minimum adult rate until enrolment. He noted that:

> There is an urgent need to surmount the deadlock in your training created by this issue. Unless there is resolution your continued employment and training at the pharmacy does becomes problematic ….

[36] Ms O'Sullivan said that Mr Vohora told her that if she did not agree to the proposals set out in his letter he would need to advertise her position over the weekend. I accept her evidence, which is consistent with the tenor and content of the correspondence that Mr Vohora gave her. On 30 April 2010 Mr Vohora gave her another letter, dated 29 April, which reiterated the matters raised in his earlier correspondence. In the letter Mr Vohora accused Ms O'Sullivan of having misled him into believing that the dispute had been resolved. He said:

> There continues to be a pressing and urgent need to resolve the deadlock relating to your training. Failure to resolve this deadlock would make your continued employment at our pharmacy untenable.
>
> …
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> I also informed you (in discussion on 26 April 2010) that failure to surmount this deadlock would make it necessary to terminate your employment.

[37] Ms O'Sullivan did not take up Mr Vohora's invitation to abandon her claim for payment at more than the trainee rate but did write to him shortly afterwards (in a letter dated 2 May 2010). In that letter she advised that she was more than happy to work for $10 per hour provided she was given recognised training but that she was not prepared to drop the complaint with the Department of Labour regarding alleged underpayment of her wages because that was something Mr Henning would continue with. She reminded Mr Vohora that the reason why she took up the position at $10 per hour was because she thought that she would be getting recognised training, that she had been waiting over a year for it, and that she believed that this had only been brought up recently because the Ministry of Health had asked for it to be done.

[38] The following day Ms O'Sullivan handed Mr Vohora the letter. Ms O'Sullivan's evidence was that he responded by telling her that she was trying to take advantage of whatever she could and that the sensible thing to do was to give her four weeks' notice. He initially gave her a finishing date of 28 May 2010. He then said that he would think about it and that he would let her know the following day. Ms O'Sullivan asked Mr Vohora to clarify whether he was giving her four weeks' notice and he said he was not because he needed to get legal advice. However he went on to say to her that the sensible thing to do would be to resign. Mr Vohora accepted in evidence that a discussion relating to four weeks' notice took place and that some sort of timeframe had to be imposed because he could not let the situation continue indefinitely. He said that she was told that if it became necessary to give her notice it would be four weeks' notice. I preferred Ms O'Sullivan's evidence in relation to what was said at the meeting.

[39] Mr Vohora wrote to Ms O'Sullivan on 4 May 2010 advising that, to enable her to complete her training, she could continue with her employment at the pharmacy but that she had to accept the "agreed terms of employment" for the entire

duration since she started work. If this was unacceptable she was "free to tender [her] resignation." Ms O'Sullivan then took sick leave. She gave Mr Vohora a medical certificate on 5 May 2010. On 8 May 2010 she became aware of an advertisement in the local paper for what appeared to be her position.

[40] Ms O'Sullivan's father rang Mr Vohora on 10 May 2010 and asked him whether Ms O'Sullivan had a job to come back to. He said the matter was with the lawyers.

[41] On 25 May 2010 Ms O'Sullivan tendered her resignation through her lawyer. In the letter she raised a number of issues, including that she had been forced out of her employment by the plaintiff.

Unjustified dismissal

[42] It was submitted on Ms O'Sullivan's behalf that Mr Vohora had either actually dismissed her and that this was unjustified or, alternatively, that she had been unjustifiably constructively dismissed.

[43] Given the way in which events unfolded in the meeting on 3 May, and the content of her correspondence that followed, I am not satisfied that she was dismissed by Mr Vohora on 3 May or at a later date. I do however consider that Ms O'Sullivan was unjustifiably constructively dismissed.

[44] In *Auckland Shop Employees Union v Woolworths (NZ) Ltd*,[4] the Court of Appeal identified the following categories of constructive dismissal:

> (a) The employer gives the employee a choice between resigning or being dismissed;
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> (b) The employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign;

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[4] [1985] 2 NZLR 372 (CA) at 374-375.

(c) A breach of duty by the employer leads an employee to resign.

[45] A breach of the implied duty of trust and confidence may give rise to a constructive dismissal.[5]

[46] Mr Vohora made it abundantly plain that Ms O'Sullivan had to either drop her claim against the company in relation to the alleged shortfall in salary paid to her since the commencement of her employment or resign. As he knew, the Labour Inspector was pursuing the appropriateness or otherwise of Mr Vohora's approach to the rate of pay issue and it was, in this sense, out of Ms O'Sullivan's hands. Mr Vohora was well aware of the fact that Ms O'Sullivan's position was supported by the Labour Inspector. The Ministry of Health audit would have highlighted the issue for him. In any event, it was wholly unreasonable of him to insist that she forego her legal right to seek a review through the Labour Inspector of the rate at which she had been paid. Mr Vohora applied undue pressure on her, and placed her in an invidious situation. Nor was his approach consistent with the terms and conditions of her employment agreement. She accepted employment with the pharmacy on the basis that she would be enrolled in an approved programme. This did not occur, despite her efforts to progress the issue.

[47] Counsel for the plaintiff submitted that Ms O'Sullivan's resignation was causally connected to the process adopted by the Labour Inspector. I do not agree. It was Mr Vohora's trenchant position and the unreasonable approach he adopted to dealing with the pay issue with Ms O'Sullivan that provided the causal link, presenting her with the choice of two unpalatable options: accept his (erroneous) position or leave. These steps followed a period of belittling Ms O'Sullivan in front of other staff and of demonstrating aggressive behaviour on occasion. It was compounded by the fact that a job, which Ms O'Sullivan reasonably took to be her position, was advertised in the newspaper at the expiration of the time that Mr Vohora had given her to consider her position and while she was away from work on sick leave. Ms O'Sullivan said, and I accept, that she did not believe that she had a job to come back to. This was a reasonable inference to draw given the discussions

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[5] *Auckland Electric Power Board v Auckland Provincial District Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA) at 172.

that had taken place, and the advertisement that subsequently appeared while she was on sick leave.

[48] It was submitted that although Mr Vohora's correspondence "sailed close to the line" it did not cross it. I do not accept that submission. It would have been reasonably foreseeable to Mr Vohora that Ms O'Sullivan would resign. Ms O'Sullivan was young (19 at the time these events occurred) and it was her first job. She felt oppressed by the way in which Mr Vohora dealt with her, and the tone and content of his communications with her. I have no doubt, after having had the advantage of seeing and hearing Mr Vohora give evidence, that he would have made his position crystal clear to Ms O'Sullivan and I accept Ms O'Sullivan's evidence that she became increasingly unable to face going in to work.

[49] I am satisfied that Mr Vohora's actions constituted a breach of the implied duty of trust and confidence. It was reasonably foreseeable to the plaintiff that Ms O'Sullivan would not be prepared to work under the conditions prevailing, having regard to the seriousness of the company's breach. I am also satisfied, having regard to the way in which events unfolded and Mr Vohora conducted himself, and the pressure applied to Ms O'Sullivan, that he set out on a course of conduct designed to secure her departure from the pharmacy.

[50] I find that Ms O'Sullivan was constructively dismissed. I also find in terms of s 103A, as it then stood, that the plaintiff's actions were not what a fair and reasonable employer would have done in all the relevant circumstances at the time. Ms O'Sullivan was therefore unjustifiably constructively dismissed.

Remedies

Lost wages

[51] Ms O'Sullivan seeks $4,590 gross by way of lost wages (which is the equivalent of nine weeks' lost wages calculated at $12.75 per hour, the adult minimum wage at the time).

[52] Ms O'Sullivan found alternative employment on 31 July 2010. There was no other evidence before the Court that she took steps to mitigate her loss. There was however evidence that she was significantly affected by the circumstances surrounding her departure from the plaintiff company and that she could not face work for some time. I accept her evidence in this regard. The quantum of lost wages ought to be calculated on the basis of the wages properly owing to her. I accept (for the reasons that follow) that the rate of $12.75 (namely the prevailing minimum adult wage) applies. Accordingly, I award the defendant the sum of $4,590 gross by way of lost wages.

Back wages

[53] Ms O'Sullivan seeks back wages for the entire period that she worked at the company. I take this to be a sum equivalent to the differential between the minimum adult wage and the training rate she was paid at during this time. Given the orders I make in relation to the Labour Inspector's application, I do not make the additional order sought by Ms O'Sullivan (as to do so would involve a duplication of award).

Compensation for hurt and humiliation

[54] Ms O'Sullivan sought $7,500 by way of payment under s 123(1)(c)(i). The amount of compensatory payments under this provision varies, depending on the circumstances of the particular case.

[55] I accept that Ms O'Sullivan was negatively affected by the way in which her employment came to an end. She got to the point where she simply could not face returning to work, visited her doctor and obtained a medical certificate. While there was a comparatively brief period of employment involved, standing back and considering the circumstances leading to her departure from the plaintiff company, and the impact of her employer's conduct on her that led to her resignation, I am satisfied that a compensatory payment of $7,500 is warranted.

Other relief sought

[56] Ms O'Sullivan does not seek a penalty for breach of good faith or for breach of the employment agreement.[6] Rather she seeks a payment of $5,000. As I understood Ms O'Sullivan's case this was on the basis that she had been led to believe that she would be enrolled in an approved course, was not, and that she effectively lost a year of study and a year of career advancement. Counsel submitted that this was not a claim for loss of chance but was a claim for non-economic loss, and drew the Court's attention to s 123(1)(c)(ii).

[57] Section 123(1)(c)(ii) provides that, where the Court is satisfied that an employee has a personal grievance, it may award compensation for 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. It follows that any compensation awarded must causally relate to the unjustified action the Court has found to have occurred. I am not satisfied that there is a causal connection between Ms O'Sullivan's unjustified constructive dismissal and the loss pleaded. Accordingly, I decline to make any separate award in the circumstances.

[58] The plaintiff did not advance a submission that the quantum of any award ought to be reduced for contributory conduct on Ms O'Sullivan's behalf. In any event, I do not consider that she materially contributed to the situation in which she found herself.

Was the plaintiff entitled to pay the training rate?

[59] The MWA is a fundamental piece of employment legislation. It provides a floor beneath which employers are not entitled to go.[7] Section 6 of the Act reinforces its underlying purpose. It 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

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[6] And would appear to be outside the 12 month timeframe for doing so: s 135(5).
[7] *Faitala v Terranova Homes & Care Ltd* [2012] NZEmpC 199 at [39].

minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate.

[60] Section 4(1) of the Act provides that:

> (1) The Governor-General may, by Order in Council, prescribe the minimum rate of wages payable to-
>
> ...
>
> (c) 1 or more classes or workers-
>
> (i) defined in the order; and
>
> (ii) who are employed under contracts of service under which they are required to undergo training, instruction, or examination for the purpose of becoming qualified for the occupation to which their contract of service relates.

[61] The Governor-General has yearly prescribed in the same format minimum rates of pay in relation to adults, new entrants, and training rates. Under the Minimum Wage Order 2009 (the first wage order applicable to all three employees) the minimum hourly rate of pay for an adult worker was $12.50 (cl 4). The minimum hourly rate of pay for a trainee was $10.00 (cl 6). The plaintiff's argument is that the three workers came within s 4(1)(c), and that the applicable rate of pay was that prescribed at the time by the Governor-General for trainee workers.

[62] A "trainee" is defined within cl 3 of the Minimum Wage Order 2009 as:

> … a worker who is-
>
> (a) aged 16 years or more to whom the Act applies; and
>
> (b) required by his or her contract of service to undertake at least 60 credits a year of an industry training programme for the purposes of becoming qualified for the occupation to which the contract of service relates.

[63] "Industry training programme" is in turn defined as meaning:

> … an industry training programme that is registered on the National Qualifications Framework developed by the New Zealand Qualifications Authority pursuant to its functions under section 253 of the Education Act 1989.

[64] The Medicines Regulations 1984 (the Regulations) set out a number of restrictions on the handling of prescriptions. Regulation 42 provides that:

> (1) Except as provided in subclause (2), no person other than an authorised prescriber, veterinarian, pharmacist, pharmacy graduate, a pharmacy technician, a student, or dispensary technician may dispense a prescription medicine.
> (1A) The following persons may not dispense prescription medicines unless under the direct personal supervision of a pharmacist:
> (a) dispensary technicians:
> (b) pharmacy graduates:
> (c) pharmacy technicians:
> (d) students.

[65] The Regulations define a "pharmacy technician student" as meaning:

> …a person who is undertaking, but who has not yet completed, training and examinations leading to a National Certificate in Pharmacy (Technician).

[66] An employer who fails to make full payment of wages owing is liable to a penalty recoverable by a Labour Inspector, and imposed by the Authority.[8] Wages may also be recovered by the worker or a Labour Inspector.[9]

[67] Mr Vohora accepted that the term pharmacy technician trainee and pharmacy technician student were synonymous with one another. It is clear that for a person to fall within the definition of a pharmacy technician student he or she must be undertaking both training and examinations. It follows that that person must be enrolled in a programme of study leading to a National Certificate. It is equally clear that the restrictions on who can dispense prescriptions, and the circumstances in which this can occur, are underscored by public health and safety considerations.

[68] The plaintiff argued that the three employees fell within the definition of trainee for the purposes of the Minimum Wage Order and that accordingly they were paid the appropriate rate of pay. I do not accept that submission.

[69] Each of the three employees was over 16 years of age at the time she was employed by the company. None of the three employees received a copy of her employment agreement at the time they commenced employment. Written agreements, which were couched in pro forma terms, were signed by Ms O'Sullivan and Ms Jordan some time later, and only after each of them had pressed the issue

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[8] Minimum Wage Act 1983, s 10.
[9] Minimum Wage Act 1983, s 11.

with Mr Vohora. Ms Hughes gave evidence that she could not recall signing an agreement, did not think that she had been shown one, and recalled that all Mr Vohora had done was write down on a piece of paper the hourly rate she would be getting (which reflected the trainee rate).

[70] The agreement materially provided that:

> This document serves as the Employment Agreement for your position as Trainee Pharmacy Technician at our pharmacy.
>
> …
>
> Your duties will include all the functions defined by the Pharmaceutical Society of New Zealand as the role of pharmacy technicians. You will be required and expected to carry out your duties under the direction and supervision of a pharmacist.
>
> It should be noted that this is an industrial training position. Your weekly wages will be calculated by reference to the current Industrial Training Rate as set by the Department of Labour.

[71] The employment agreement does not contain any express reference to the requirement that at least 60 credits a year of an industry training programme be undertaken for the purposes of becoming qualified as a pharmacy technician. Nor do I consider that such a term can be read into the agreement by way of necessary implication. While each of the three employees was told by Mr Vohora at the initial interview that she would be paid at a trainee rate because she would be enrolled in the course for pharmacy technicians, there is no evidence that any mention was made of the need to undertake 60 credits a year or that it was otherwise understood that this was a requirement that the three employees had agreed to be bound by.

[72] I conclude that the three employees were not employed under an agreement that required them to undertake at least 60 credits a year of an industry training programme for the purposes of becoming qualified for the occupation to which the contract of service related.

[73] Even if the agreement could be interpreted in the manner contended for on behalf of the plaintiff, I do not accept that any of the three employees were "undertaking" an approved course of study because none had been enrolled in it. The term "undertaking", in the context of the particular statutory scheme, plainly

requires active involvement, enrolment and working towards the completion of an approved course of study. That is evident from the wording of the definition of pharmacy technician student, which refers to someone who is undertaking, but who has not yet completed, training and examinations. It does not allow for the possibility of intended future study. Rather, it is focussed on current engagement in the activity referred to.

[74] Even assuming that the employment agreements required each of the three employees to undertake a course of study, they were entitled to receive the minimum adult rate of pay until such time as they were enrolled on the relevant course. As none of them was ever enrolled, they were underpaid for the entire period of their employment.

[75] Mr Vohora pointed out that the three employees were employed on a particular basis and that if they could not or would not undertake the course of study their position would effectively be redundant. Even if that is correct, it does not alter the position in relation to the appropriate rate of pay for the time they were employed with the plaintiff company. Nor is it applicable here, where the three employees were more than willing to undertake training.

[76] There was no dispute as to the Labour Inspector's wage arrears calculations. Each of the three employees has been underpaid and is entitled to wage arrears in the following sums:

Ms Jordan - $854.17 gross

Ms Hughes - $2,171.19 gross

Ms O'Sullivan - $2,920.51 gross

Penalties

[77] In its substantive determination of 11 August 2011, the Authority directed that the wage and arrears payments be made to the Labour Inspector within 14 days, in lieu of which leave was reserved for the Labour Inspector to apply for the imposition of penalties. No such payment was made and the Inspector subsequently

pursued an application, noting that the plaintiff had indicated that it had no intention of making the payment awarded and that it would be challenging the determination.

[78] The Authority declined to award a penalty in relation to the plaintiff's record keeping (which it found to be deficient) but did award a penalty on the basis that the plaintiff failed in its obligations (as a good and fair employer) in the circumstances to pursue the enrolments of the three employees. The Authority awarded a penalty in the sum of $2,000 to each of the three employees.

[79] Employers are under a statutory obligation under both the MWA[10] and the Employment Relations Act[11] to keep a wages and time record showing, in relation to each worker, their specified details. This includes the hours and days worked and the wages paid each pay period and the method of calculation. The Labour Inspector is entitled to request production for inspection of wages and time records made under the MWA.[12] An employer who fails to make full payment of wages owing or fails to otherwise comply with the MWA is liable to a penalty recoverable by a Labour Inspector,[13] and imposed by the Authority. Wages may also be recovered under the MWA by the worker or a Labour Inspector.[14]

[80] Counsel for the plaintiff submitted that the plaintiff had, throughout, taken all reasonable steps to resolve matters and to deal with the Labour Inspector appropriately, but that unnecessary complications arose as a result of the approach Mr Henning adopted. It was submitted that it was not an appropriate case for penalties to be awarded, as Mr Vohora had a genuine and sincere belief that the training rate issue had to be properly determined by a judicial body. It was also submitted that it was inappropriate for the Authority to impose penalties before the challenge period had expired.

[81] In his closing submissions, Mr La Hood, on behalf of the Labour Inspector, requested that penalties be awarded for Mr Vohora's failure to keep accurate wage

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[10] Section 8A.
[11] Section 130.
[12] Section 8A(2).
[13] Section 10.
[14] Section 11.

records and in respect of the underpayments made to the three employees throughout their employment.

[82] In deciding whether to impose penalties it is appropriate to consider how much harm has been caused by the breach and how important it is to bring home to the party in default that such behaviour is unacceptable and/or deter others from it. Also relevant is the culpability of the defaulter and the extent to which the breach was deliberate or merely inadvertent.[15]

[83] While the plaintiff's record keeping left something to be desired, I am not satisfied that a penalty is appropriate in this regard. In relation to the claim for a penalty under s 10 of the MWA, I accept that Mr Vohora held strong views about whether the training rate was payable and the desirability of challenging Mr Henning's conclusions. While Mr Vohora referred to earlier advice he said he had received from the Department of Labour, there was no supporting evidence in relation to this aspect of his evidence and, when Mr Henning had sought clarification of the issue in earlier correspondence, Mr Vohora did not respond. That too was less than desirable conduct. However, standing back and considering all relevant factors, I am not persuaded that a penalty for breach of the MWA is appropriate in the circumstances.

Result

[84] The Authority's determinations are set aside under s 183(2), and the following orders are made.

[85] Ms O'Sullivan was unjustifiably constructively dismissed from her employment. She is to be paid:

- $4,590 by way of lost wages;
- $7,500 compensation by way of hurt and humiliation.

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[15] *Xu v McIntosh* [2004] 2 ERNZ 448 at [47]-[48].

[86] The plaintiff must also pay to the Labour Inspector for each of the three employees unpaid wages in the sum of:

Ms Jordan - $854.17 gross

Ms Hughes - $2,171.19 gross

Ms O'Sullivan - $2,920.51 gross

Costs

[87] If costs cannot otherwise be agreed they may be the subject of an exchange of memoranda, with the defendants filing and serving any memoranda and supporting material within 20 working days of the date of this judgment and the plaintiff to file and serve any memoranda and supporting material in reply within a further 20 working days.[16]

Christina Inglis
Judge

Judgment signed at 11.45am on 8 March 2013

[16] Counsels' attention is drawn to the approach taken in this Court in relation to costs, which has been summarised in a number of cases, such as *Hayllar v The Goodtime Food Company Ltd* [2012] NZEmpC 193 at [2].