

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 283
5519344

BETWEEN SHIVANAND JOSHI
Applicant
A N D PUNJABI BY NATURE
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon
Representatives: Mayank Kumar, Advocate for the Applicant
Greg Bennett, Advocate for the Respondent
Investigation Meeting: 2 September 2015 at Auckland
Submissions Received: 4 September 2015 from the Applicant
3 September 2015 from the Respondent
Date of Determination: 17 September 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Shivanand Joshi has not established a claim for arrears of wages against Punjabi By Nature Limited.**
- B. Punjabi By Nature Limited is to pay Mr Joshi holiday pay in accordance with the Holidays Act 2003 within 21 days of the date of this determination.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Nishant Sood is the sole director and shareholder of Punjabi By Nature Limited (the company), a company which was incorporated on 3 April 2014. The company operated an Indian restaurant and takeaway business in Richmond Road, Grey Lynn. The restaurant opened in mid May 2014.

[2] The applicant, Mr Shivanand Joshi, says he began working at the restaurant as a chef on 6 May 2014 until 16 September 2014. Mr Joshi says he is owed wages of approximately \$5-6,000 for work performed by him but not paid by the company. The company denies Mr Joshi's claim.

[3] In investigating Mr Joshi's application, I considered written and oral evidence, given under oath or affirmation, from Mr Joshi and Mr Sood along with relevant documents. Documents included payroll records, business documents in relation to the incorporation of the company, bank statements, emails along with other relevant documents.

[4] The parties had the opportunity to provide written submissions on the issues for resolution by this determination and did so following the conclusion of the investigation meeting.

[5] As permitted by s.174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all evidence and submissions received but has made findings of fact and law, expressed conclusions on matters requiring determination and specified orders made.

Issues

[6] The sole issue for determination by the Authority is whether Mr Joshi is owed wages for work performed by him at the company's restaurant.

Credibility

[7] In addressing the issue that I am to determine, I had to weigh evidence from Mr Joshi and Mr Sood about what happened, much of which was about what they had said to each other in various conversations and meetings and much of which was contradictory. The documentary evidence provided, including bank statements was of assistance to me in determining issues of credibility and in determining what I believe to have occurred.

[8] It is for Mr Joshi to establish his claim for wages on the balance of probabilities.

Was Mr Joshi owed wages for work performed?

[9] Mr Joshi was employed until early May 2014, as a chef at Shahi Dawat, an Indian Restaurant in Henderson. Mr Joshi applied for the position of chef at the company's Indian restaurant in Grey Lynn after seeing the position advertised on the internet. Mr Sood and Mr Joshi met at Mr Sood's home to talk about the role.

[10] Mr Joshi was offered and accepted the chef's position. Mr Joshi says that, at Mr Sood's request, he began work at the restaurant on 6 May 2014, before it opened. Mr Joshi spent much of his time cleaning and preparing the kitchen. There is a conflict in the evidence about the amount of time Mr Joshi worked in the week of 6 May 2014 and during the period of employment. Mr Joshi says he worked about 70 hours in the week of 6 May. Mr Sood says the restaurant had not opened and that Mr Joshi worked no more than 15 to 20 hours in the week before the restaurant opened. I prefer Mr Sood's evidence. Mr Joshi was still working for Shahi Dawat, the company's restaurant had not opened and it was not necessary for Mr Joshi to work for 70 hours.

[11] Mr Sood and Mr Joshi each signed an individual employment agreement on 15 May 2014. According to the employment agreement, Mr Joshi was employed by the company:

- from 15 May 2014,
- in the role of Chef,
- for a minimum of 40 hours a week,
- at the rate of \$16.75 gross an hour, paid weekly.

[12] Mr Sood acknowledged at the Authority's investigation meeting that the individual employment agreement which he and Mr Joshi signed, stated the hourly rate to be \$16.75, not \$16.25. However, Mr Sood says Mr Joshi asked for \$650 net a week based on 48 hours work. This amounted to an hourly rate of \$16.25 gross and that was his reason for paying that rate.

[13] Mr Joshi says that he is owed approximately \$5-6,000 for work performed at the restaurant and not paid to him. Mr Joshi says that he worked 70 hours a week normally starting at 10am each day and working to 7pm or 8pm each night.

[14] Mr Sood says that Mr Joshi did not work 70 hours a week. Mr Sood says the restaurant opened each day for lunch and dinner but was closed in between those times. Mr Joshi normally worked from 11am until 2.30pm and then from approximately 5pm until 9pm, except on Saturdays when the restaurant reopened at 4.30pm for dinner. Mr Joshi almost always left the restaurant just before 9pm to catch the bus home.

[15] I was not convinced at all by Mr Joshi's evidence as to when he worked. His evidence was less than straightforward. The Authority heard for the first time during the investigation meeting that Mr Joshi owned a fish and chip shop with his son Mr Rahul Joshi, called *BayView Fish&Chips* in Glenfield. Mr Joshi says he travelled to the fish and chip shop during the break from the company's restaurant. This is hard to believe as Mr Joshi travelled by bus. A trip from Grey Lynn by bus requires 2 buses and takes well over an hour. Mr Joshi's evidence is inconsistent with his evidence that he worked 70 hours a week.

[16] From the payroll records provided to the Authority by the company, Mr Joshi regularly worked 48 hours a week but from time to time worked up to 60 hours per week.

[17] I have considered ANZ bank statements provided by Mr Joshi and have reconciled those with the payroll register report and the company's Westpac bank statements provided by Mr Sood.

[18] The following payments were made by the company and received by Mr Joshi into his ANZ bank account.

Week Ending	Payment Date	Net Amount Paid	
		\$	
01.06.14	04.06.14	570.00	
08.06.14 and 15.06.14	15.06.14	788.26	
22.06.14	26.06.14	651.04	
29.06.14	03.07.14	802.69	
06.07.14	09.07.14	780.32	
13.07.14	16.07.14	651.04	
20.07.14	23.07.14	651.04	
27.07.14	30.07.14	703.72	
03.08.14	06.08.14	651.04	
10.08.14	13.08.14	651.04	
Datacom payment service ends			

Week Ending	Payment Date	Net Amount Paid	
		\$	
Payments made to different bank account			
17.08.14	22.08.14	651.00	
24.08.14	29.09.14	651.00	
31.08.14	04.09.14	651.00	
07.09.14	08.09.14	345.00	
Final pay	12.09.14	400.00	

[19] In addition to these payments, Mr Sood says he made a cash advance of \$1800 to Mr Joshi, which included payment of wages for work performed by him during May 2014. Mr Sood says this cash advance was agreed to in writing by Mr Joshi. A document dated 6 June 2014 was produced to the Authority signed by Mr Sood and apparently signed by Mr Joshi confirming the advance of \$1,800. Mr Joshi denies the signature on the document is his.

[20] In addition, Mr Sood says he paid outstanding rent to Auckland Rentals for Mr Joshi of \$1,260 on 22 May 2014 and for \$350 on 19 August 2014. Mr Joshi accepted that the outstanding rental was paid by Mr Sood but says he repaid Mr Sood from cash received from a friend.

[21] It is clear from the payroll records and from the bank records provided by the company and by Mr Joshi that regular weekly payments of wages were made by the company to Mr Joshi into his bank account, from 18 June 2014 until 6 August 2014. Thereafter, payments were made by the company on 22 August 2014 up to 12 September 2014 into an ANZ bank account in the name of Mr Rahul Joshi.

[22] Mr Joshi claimed that his son also worked at the restaurant and that is why salary was being paid into a different bank account. Mr Joshi says the wage payments were not in respect of his own wages rather in respect of his son's wages. Mr Sood says that Mr Rahul Joshi never worked in the restaurant and was not on the payroll. There is no reference to Rahul Joshi in the payroll register provided to the Authority.

[23] Mr Sood explained that when the company started to experience financial difficulty in mid-August 2014, he stopped using Datacom payment services for the payment of wages and paid wages to his employees directly in to their bank accounts. Mr Sood says Mr Joshi approached him at that time and asked that his wages be paid

into his son's bank account because he was in overdraft and any funds going into his own bank account were being applied to the overdraft.

[24] Mr Sood says the company's Westpac bank statements confirm that payments were made into Rahul Joshi's bank account for Mr Joshi's wages on 22 and 29 August 2014 and on 4 September 2014 of \$651 each. Thereafter a payment of \$345 was made on 8 September 2014 with a final payment of \$400 on 12 September 2014. These entries in the company's Westpac bank statements identify the recipient of these wages as Rahul Joshi.

[25] From the evidence, it is my view that the payments made into Mr Rahul Joshi's bank account were wages for Mr Joshi. The amounts received in most cases were the same amounts that Mr Joshi had been receiving into his own bank account amounting to \$651.04, the equivalent of 48 hours' wages at \$16.25 gross. Further, Mr Rahul Joshi was the coowner with his father, Mr Joshi of a fish and chip shop and worked there each day at times which were not consistent with him working as a bar tender at the company's restaurant.

[26] Mr Joshi's evidence was not consistent or reliable and I am not able to accept it. Mr Joshi has failed to establish on the balance of probabilities that he is owed wages by the company. In fact it appears Mr Joshi may owe the company money in respect of the initial cash advance for wages and overdue rental payments. However, no claim was brought on that basis and has not been considered by me.

Holiday pay

[27] Mr Joshi was not paid holiday pay when he finished in September 2014 and is entitled to payment. I order Punjabi By Nature Limited to calculate holiday pay owing to Mr Joshi in accordance with the Holidays Act 2003. Holiday pay is to be paid to Mr Joshi within 21 days of the date of this determination. Leave is reserved for either party to seek further directions from the Authority on this matter.

[28] Even though I have found Mr Joshi has not made out his claim for wages, I do note with concern the failures of the company to discharge its obligations properly as an employer.

[29] It is for the employer to retain wage and time records in accordance with the Act. The payroll records recorded some basic information but not all the information

required by the Act. Similarly, even though it seemed Mr Joshi and Mr Sood had a verbal agreement as to payment of wages, the employment agreement should have been amended to record this agreement. Holiday pay should have been calculated and paid to Mr Joshi in accordance with the Holidays Act 2003.

[30] Even if the business was new and unfamiliar, as an employer the company is obliged to comply with its legal obligations. Mr Joshi has not sought penalties and none are ordered on this occasion.

Costs

[31] The parties are encouraged to resolve costs between themselves. This is a case in which it may be appropriate for costs to lie where they fall. However, if the parties are unable to agree that costs lie where they fall or an amount of costs, the company has 14 days from the date of this determination to file a memorandum as to costs which is to include copies of invoices for attendances. Mr Joshi has 14 days from receipt of the company's memorandum in which to reply.

Anna Fitzgibbon
Member of the Employment Relations Authority