

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Pauline Khan (Applicant)
AND Uno Design Limited (Respondent)
REPRESENTATIVES Harry Jordaan, Counsel for Applicant
Stephen Tee, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 28 October 2005
DATE OF DETERMINATION 23 December 2005

DETERMINATION OF THE AUTHORITY

The problem

[1] Ms Pauline (Polly) Khan (“Ms Khan”) says that Uno Design Limited (“Uno”) owes her salary for the period from 1 August 2002 until 31 July 2003. She also claims various expenses.

The facts

[2] Ms Khan initially worked part-time for Uno during 2001 but eventually worked full-time at \$12.00 per hour. Ms Khan was not provided with a written employment agreement during her time of service with Uno.

[3] In July 2002, Uno’s directors Ms Kathleen Robyn Haines (“Ms Haines”) and Ms Nina Greenwood (“Ms Greenwood”) agreed that in exchange for Ms Khan working one year without remuneration, they would each transfer to Ms Khan five per cent of the shares in Uno. Ms Khan in addition to having a ten per cent shareholding in Uno, would also become a director. The agreement was proposed by Ms Khan and accepted by Ms Haines and Ms Greenwood.

[4] As agreed, Ms Khan worked from 1 August 2002 until 31 July 2003 without remuneration.

[5] In August 2003 Ms Khan enquired about the shares she was entitled to have transferred to her. She was told by the directors that Uno’s accountant would attend to the transfer. I am satisfied that no such instructions were ever given to Uno’s accountant. The shares were never transferred to Ms Khan.

[6] Ms Khan was paid wages of \$15.00 per hour for her service from August 2003 until her eventual resignation.

[7] Produced to the Authority are time sheets for each month from August 2002 until July 2003 showing the hours “worked” by Ms Khan for each week of the month. Each of those times sheets is signed by either Ms Haines or Ms Greenwood.

[8] In late 2003, Ms Greenwood ceased to be involved in Uno.

[9] Ms Khan resigned from her employment with Uno in March 2004.

[10] Ms Khan made formal demand for wages when she wrote to Ms Haines by letter dated 9 June 2005. That letter materially stated:-

I refer to outstanding salary due to me from 01 August 2002 through to 31 July 2003.

The net amount due totals \$24,780.00 of which are validated with a full audited and signed timesheets.

Given the lengthy time it has taken to settle this outstanding amount, I request that it be made in full within 14 days of this letter, whereupon I have no option to seek recovery through legal channels.

[11] Ms Khan now pursues that formal demand in this investigation.

The issues

[12] Ms Khan says that she is entitled to wages in respect of the period she worked without remuneration from August 2002 until July 2003. From the said timesheets referred to earlier, that sum owing to her is \$24,780.00. That claim is pursued because the agreement to transfer shares to her was not honoured.

[13] In response to Ms Khan’s claim, Ms Haines tells the Authority:-

I confirm that there was no arrangement for Polly to be paid salary or wages as an alternative to taking up a shareholding. The Company was not in a financial position to make such a commitment and would not and could not have continued to employ Polly under those circumstances.

And further:

Polly was aware of the Company’s financial position and for that reason, I believe eventually chose not to become a Director or to take up a shareholding. Instead she continued to work for the Company on a full-time basis at an hourly rate for which she was paid in full. I believe all amounts owing to her have in fact been paid.

[14] Ms Haines also takes issue with Ms Khan’s delay in pursuing the matter. She says it would not be just to permit Ms Khan to bring her claim. It is agreed however, that Ms Khan’s claim for recovery is not barred by any applicable limitation.

[15] Two issues arise for determination:-

- (i) Was Ms Khan an employee for the period from August 2002 through to July 2003?
- (ii) Is Ms Khan owed wages?

Was Ms Khan an employee?

[16] The determination of this issue calls for an analysis of the real nature of the relationship between the parties for the period from 1 August 2002 until 31 July 2003. Ms Khan must be employed as an employee during that period to be entitled to wages.

[17] I have reached the view that the real nature of the relationship during that period was not that of an employment.

[18] Firstly, I find that the agreement to transfer shares to Ms Khan was not made with Uno. I find that it was Ms Haines and Ms Greenwood each acting personally, who agreed to transfer a part of their respective shares to Ms Khan. As such, the relationship did not involve Uno. I find no evidence that Ms Haines and Ms Greenwood acted as agents for Uno when they agreed to transfer part of their respective personal shareholdings to Ms Khan.

[19] Further, I find that the agreement to transfer shares did not create an employment relationship. It was a private commercial contract. During the period in question, Ms Khan was not employed as an employee, she was involved as a *de facto* director the consideration for which was executory in the form of shares to be transferred at the end of a one year period. Although Ms Khan prepared timesheets endorsed "Polly's wages" I do not regard those documents as decisive in themselves as evidencing an employment. I accept those documents as serving to evidence the fact of Ms Khan's continued contribution to the business rather than evidence of the nature of that involvement.

[20] I am also not persuaded that there was an agreement to pay Ms Khan wages in the event that the share transfer did not proceed. Neither Ms Haines nor Ms Greenwood gave that evidence and I am unable to cite any corroborative evidence in that regard. I find that there was no such agreement. I therefore reject Ms Khan's evidence in this respect. I incline to the view that none of these parties gave any thought to this situation arising. It is of course now trite to say, they ought to have.

[21] Nor do I accept that Ms Haines and Ms Greenwood could lawfully bind Uno to agree to employ Ms Khan without remunerating her for her service. Even if I accepted that Ms Haines and Ms Greenwood acted as agents for Uno in engaging her on that basis, I would not accept that such a bargain would be a lawful because it would most likely be contrary to the provisions of the minimum wage legislation.

[22] For all these reasons, I conclude that Ms Khan was not employed by Uno during the period from 1 August 2002 until 31 July 2003. The real nature of the relationship for the period was not an employment. I determine the first issue by concluding Ms Khan was not an employee from 1 August 2002 to 31 July 2003.

Is Ms Khan owed wages?

[23] I have concluded that during the period from 1 August 2002 to 31 July 2003 Ms Khan was not employed by Uno as an employee.

[24] It follows then that Ms Khan is not entitled to recover arrears of wages and her claim must fail. For the same reason, Ms Khan's claims for various other expenses must also fail. **There being no employment relationship problem, there will be no formal orders.**

[25] I am satisfied that Ms Khan met her obligations under the agreement. She continues to remain entitled to a shareholding. Her remedies lie elsewhere and I refrain from any further comment.

Costs

[26] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Tee is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Jordaan is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson

Member of Employment Relations Authority