

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 531
5424919

BETWEEN NASRI MOHAMMED and
 KABILASHINE
 PRAGALATHAN
 Applicants

A N D PACIFIC ROSE MOTEL
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Applicants in person
 Dave Kapa, Counsel for Respondent

Investigation Meeting: 31 October 2013 at Auckland

Date of Determination: 18 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants (Mr Mohammed and/or Ms Pragalathan or the applicants), alleged they are owed wages from their employment with the respondent (Pacific Rose Motel) and that Pacific Rose Motel has failed to repay a loan advance made by the applicants to Pacific Rose Motel. The applicants allege that the total amount owing to them from the unpaid wages and the unpaid loan is \$9,460.

[2] Pacific Rose Motel denies there are wages owed, but accepts that the loan amount is outstanding.

[3] The principal of Pacific Rose Motel, Ms Patricia Rose Harris, gave evidence to the Authority that she had commenced trading on 15 March 2013 and that within a matter of days, she had received a curriculum vitae from one of the applicants,

Mr Mohammed, who was looking for work as a bookkeeper. It is common ground that there was a discussion between Mr Mohammed and Ms Harris which culminated in an offer of employment by Ms Harris to Mr Mohammed with a commencement date of 23 March 2013.

[4] Ms Harris says that her intention was to engage Mr Mohammed to set up the basic financial systems for her business and to that end, she had budgeted to spend a total sum of \$2,000. That amount was identified after discussion with her accountant.

[5] Whatever the discussions between Ms Harris and Mr Mohammed, it was plain on the evidence the Authority heard that Mr Mohammed did not have a clear understanding that there was a global sum budgeted for his work and that the extent of his remuneration in the business was limited to that sum. Indeed, Mr Mohammed's evidence was that he understood he was simply being engaged on an hourly rate basis to provide financial services to the new business and that he would work whatever hours were necessary in order to put the appropriate systems in place. To that end, some rudimentary records were maintained by both parties recording hours worked and payments made.

[6] Those rudimentary records aside, there is no other documentary evidence of the nature of the bargain between the parties. In particular, there is no written employment agreement as the law requires, nor any other documentary evidence to assist the Authority in identifying the nature of the understandings the parties reached.

[7] The employment relationship is further complicated by the involvement of Ms Pragalathan who, according to Mr Mohammed and Ms Pragalathan herself, was also employed by Pacific Rose Motel. Their evidence is that Mr Mohammed found there was so much work to do that he introduced his partner, Ms Pragalathan, to the employment and subsequently sought payment for her hours as well as his own.

[8] Conversely, Ms Harris was adamant in her evidence that while she understood that Ms Pragalathan was assisting Mr Mohammed in the performance of the latter's duties, she was not responsible for paying Ms Pragalathan as well as Mr Mohammed because she had a global sum in mind for the total cost of the engagement (\$2,000), and that was all she (and her accountant) believed she could afford at this early stage in the business's life. So the short point is that Ms Harris knew that Ms Pragalathan was in the business assisting Mr Mohammed, but she did not understand that she was

expected to pay Ms Pragalathan as well as Mr Mohammed and that she had never agreed to that.

[9] Contrary to the evidence of Ms Pragalathan, Ms Harris denied asking Ms Pragalathan to do anything other than assist Mr Mohammed with the accounting work. Ms Pragalathan's evidence was that she had also been asked to do reception duties at the motel and that she had been told by Ms Harris that she would be paid for that. Ms Harris denies that that was ever agreed.

[10] Mr Mohammed and Ms Pragalathan both said that they understood they were to be paid \$20 per hour. Mr Mohammed said that he initially worked four to five hours a day, three to four days a week and was paid by Ms Harris in cash. Ms Pragalathan said that she worked between one and five hours a day and a maximum of 18 hours a week with an average of perhaps 12 hours a week.

[11] Ms Pragalathan commenced working with her partner, Mr Mohammed, in early April and the evidence is that payment of wages ceased around 10 April.

[12] However, the evidence is that the applicants continued working beyond that date and indeed it was not until more than a month later that a claim was made for the allegedly unpaid wages. According to the applicants, over 100 hours of time was provided from the point at which wages ceased until work ceased on 12 May 2013.

[13] Then beginning on 20 May 2013, there is an extensive text exchange between the parties about what is owed with the applicants seeking to establish to Ms Harris' satisfaction the sums they claim are still owing to them for work done prior to their ceasing work. Because of the fundamental differences between the parties, no resolution of the amount owed was ever achieved in those exchanges.

[14] The Authority now needs to address the issue of the loan which by common consent was advanced by the applicants to Ms Harris on 19 April 2013. The context in which this happened is also agreed. The applicants and Ms Harris were meeting with the outgoing vendor of the business. That person indicated to Ms Harris that if he did not receive the balance of the settlement proceeds he would take steps to liquidate the new business. Ms Harris' evidence was that she was unable to find all of the money she owed. The applicants undertook to advance to her the sum of \$8,000. This became the largest portion of the \$13,000 which Ms Harris owed the outgoing vendor.

[15] The applicants say that Ms Harris promised to repay that money within one week through an investment she was expecting from an aunt in the business. Ms Harris denies making such a promise and indeed maintained in her evidence to the Authority that her initial understanding of the position was that Mr Mohammed and Ms Pragalathan were seeking to invest in her new business but that once it became clear that Mr Mohammed and Ms Pragalathan wanted their money back, she understood that the funds were simply a loan which she acknowledged and undertook to pay back as soon as she was able.

[16] When the applicants were unable to obtain the payment that they claimed in respect of unpaid wages and the repayment of their loan, a statement of problem was filed in the Authority and the matter proceeded in the usual way.

Issues

[17] The three issues the Authority needs to resolve are:

- (a) Was Mr Mohammed an employee;
- (b) Was Ms Pragalathan an employee; and
- (c) Is the disposition of the loan within the Authority's remit?

Was Mr Mohammed an employee?

[18] The Authority is satisfied on the evidence it heard that Mr Mohammed was an employee of Pacific Rose Motel. The suggestion is made in the statement in reply that Mr Mohammed was not employed but was a contractor. Certainly, Ms Harris was very clear that she had a global figure in mind (\$2,000) as the amount that she wanted to pay for the services that Mr Mohammed would provide. But that fact is not necessarily inconsistent with an employment relationship. For the avoidance of doubt, the Authority accepts Ms Harris' evidence that she had a capital sum in mind of \$2,000 for the services that she required and that she was not contemplating a continuing employment relationship once the basic accounting arrangements had been set up.

[19] It is common ground that Mr Mohammed was paid an hourly rate which was agreed between the parties; that hourly rate is referred to in the text exchange that took place on 20 May 2013 and there is no suggestion from Ms Harris that she

disagreed with that amount when it was referred to by the applicants in those text messages.

[20] While the question whether this was a relationship of employment or not does not feature in the evidence for Pacific Rose Motel, notwithstanding the claim made in the statement in reply and the Authority is satisfied that this was an employment relationship, albeit an informal one.

[21] Clearly, the applicants thought the relationship was one of employment. The engagement was periodical, paid on an hourly rate, involved the work being performed at Pacific Rose Motel with Pacific Rose Motel's equipment, as part of Pacific Rose Motel's business, under the control of Pacific Rose Motel and its financial advisers.

[22] Looked at in the round, the Authority is satisfied that all of the usual common law tests when applied to the facts allow the conclusion that the real nature of the relationship was one of employment: *Bryson v. Three Foot Six Ltd* [2005] ERNZ 372 applied.

[23] Having determined then, for the avoidance of doubt, that the Authority is satisfied there was an employment relationship between Mr Mohammed and Pacific Rose Motel, the next question is whether any wages are due and owing as a consequence of that employment relationship. The Authority answers that question in the negative. The Authority prefers the evidence of Ms Harris to the evidence of the applicants on this point. In effect, the Authority is satisfied that Ms Harris' evidence that she sought only to spend a total sum of \$2,000 on this work is to preferred over the open-ended claim made on behalf of the applicants.

[24] Ms Harris' evidence had the ring of truth about it. This was a new business with limited cashflow demonstrated amply enough by the inability of Ms Harris to complete the purchase without the assistance of the applicants.

[25] Ms Harris admitted to the Authority in her evidence that she was somewhat naïve in relation to business matters, but she was very clear that she wanted to limit the total cost of this financial work to \$2,000. She based that decision on the advice of her accountant and her other advisers. She put into evidence an email from her accountant which confirmed that advice.

[26] The Authority accepts a new business with reduced cashflow is unlikely to be able to afford a continuing role for a bookkeeper. Accordingly, notwithstanding the absence of documentation, the Authority is satisfied that it is more likely than not that Ms Harris intended to limit the total cost of the financial provisioning to \$2,000.

[27] That figure is referred to in the text exchanges between the parties in the context of the applicants seeking to be paid approximately twice that figure. Ms Harris' retort is to say that her intention was to spend \$2,000, not \$4,000.

[28] To conclude the point, the Authority also draws support for its conclusion from the fact that during the course of the text exchanges between the applicants and Ms Harris, the applicants withdrew the claim for additional wages and simply relied on their claim to have the \$8,000 loan repaid. That suggests to the Authority that, at best, the applicants were less sure of their ground in relation to the wages claim than their oral evidence suggested.

[29] Furthermore, the Authority has not derived the level of comfort the applicants suggested would be available, from the applicants' own record of the wages due and owing. It was suggested for the applicants that Ms Harris had initialled the applicants' wage record and thus accepted the amount owed. But the Authority does not accept that conclusion at all; the Authority's view is that what Ms Harris did was simply to annotate the little notebook with payments on account which she had made and that her initials simply record the fact that she had paid that money in, not that she necessarily accepted that all of the other annotations made by the applicants were due and owing.

[30] Of course, Pacific Rose Motel has an obligation to comply with the law. It has failed to provide a written employment agreement. The Authority made painfully clear to Ms Harris her obligations in this matter and feels sure that her legal advisers made the same point. Ms Harris told the Authority during the course of the investigation meeting that she had now remedied her default with all of her continuing staff who were now provided with employment agreements. It is of course axiomatic that these sorts of disputes can be ameliorated most easily by reference to written employment agreements and indeed, in many cases, avoided altogether.

Was Ms Pragalathan an employee?

[31] The Authority is satisfied that Ms Pragalathan was not an employee of Pacific Rose Motel. The Authority preferred the evidence of Ms Harris on this point to the effect that, while she understood that Ms Pragalathan was going to be assisting Mr Mohammed, she did not understand that that necessitated her paying Ms Pragalathan in addition to paying Mr Mohammed.

[32] The Authority is satisfied that Ms Harris intended to invest \$2,000 in the payment of wages for the financial set up for her new business and she understood that if Ms Pragalathan was going to assist Mr Mohammed, then that assistance came within the global sum that she had identified and the Authority has already accepted was the amount she was to pay for the services to be provided. In effect, the Authority is persuaded that Pacific Rose Motel entered into a fixed price engagement where a finite sum determined the extent of the work.

[33] It follows from that conclusion that the Authority is satisfied that there was no further money owing to Mr Mohammed or Ms Pragalathan in respect of wages. Again, the Authority draws comfort for that conclusion from the text exchange between the parties where it is apparent that the applicants sought to concentrate their influence on the return of their loan moneys and readily conceded in their text messages that no further wages need be payable. It seems inconceivable that they would have done that if they were certain of their ground.

Is the advance made within the Authority's remit?

[34] Counsel for Pacific Rose Motel was adamant that the Authority had no power to deal with any consideration of the advance made by the applicants to Pacific Rose Motel. Certainly that submission would be correct if there were no employment relationship between the parties. However, there is an argument for the view that, because the advance made by the applicants was made in the context of an employment relationship and, on the applicants' evidence, was made in order to attempt to ensure that the employer would remain solvent and thus could continue to provide ongoing employment, that the matter therefore falls within the terms of s.161 (1) (r) of the Employment Relations Act 2000 (the Act) being “ *any other action ...arising from or related to the employment relationship...*”

[35] Having reflected on the matter the Authority has concluded that the loan made by the applicants to Pacific Rose Motel was not an incident of the employment relationship at all and cannot be said to be “ a cause of action , the essential character of which is to be found entirely within the employment relationship itself “: *BDO Grange Ltd v. Parker* (High Court, Auckland, CIV-2005-404-993, 19 July 2005) applied. Indeed, all that can be said is that the parties to the loan were known to each other because of the pre existing employment relationship.

[36] However, notwithstanding their strongly held view that the Authority had no power to deal with the loan issue, Pacific Rose Motel, did concede during the Authority’s investigation meeting, that the amount tendered by the applicants was a loan rather than an investment in the business, as previously thought, and having now been apprised of the fact that the applicants wanted their money back, the money was due and owing.

[37] The Authority was satisfied on the evidence it heard that Pacific Rose Motel was not in a position to make a lump sum payment of the total amount owing but was ready, willing and able to agree a payment schedule, including an initial lump sum payment.

[38] That being the position, the Authority has encouraged the parties to agree the terms of the loan repayment between them and that that agreement be reduced to writing. For the avoidance of doubt, if enforcement action is required, such action will need to be undertaken in the Disputes Tribunal and not in the Authority.

Determination

[39] The Authority is satisfied that Mr Mohammed was employed by Pacific Rose Motel but is not owed wages from that employment and that Ms Pragalathan was not employed by Pacific Rose Motel.

[40] The loan made by the applicants to the respondent is outside the remit of the Authority for reasons earlier advanced.

Costs

[41] Costs are to lie where they fall.

James Crichton
Member of the Employment Relations Authority