

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 427/09
5165317, 5165304

BETWEEN ALPESHKUMAR
 ASHWINBHAI PATEL AND
 PINALBEN ALPHESHBHAI
 PATEL
 Applicant

AND DARPAN PATEL AND
 PRAGNA PATEL
 First Respondent
 DEVAL ENTERPRISES
 LIMITED
 Second Respondent

Member of Authority: Marija Urlich

Representatives: Vijay Naidu, Counsel for Applicant
 Victor Raman, Counsel for Respondent

Investigation Meeting: 2 and 3 September 2009

Submissions Received: 27 August, 9, 16, 23 September 2009

Determination: 30 November 2009

DETERMINATION OF THE AUTHORITY AS TO PRELIMINARY ISSUES

[1] Alpeshkumar Patel and Pinalben Patel say they were unjustifiably dismissed from their employment at Super Liquor stores operated by the respondents. They say they have not been paid for hours worked between 20 April 2008 and 15 January 2009. They seek payment of wage arrears, holiday pay and remedies relating to their personal grievances.

[2] By way of defence the respondents' say *The Applicant[s] could not have any employment relationship with the Respondent as the Applicant[s] [were] not entitled*

*to work in this country and did not have an IRD number at that time*¹. This is a flawed defence – the existence of an employment agreement cannot be defeated by failure to comply with immigration or taxation requirements.

[3] In the alternative the respondents raise the following challenges to jurisdiction:

- (i) Alpeshkumar and Pinalben Patel were volunteers and not employees; and
- (ii) If the Authority finds they were employees that they did not raise their personal grievances within the statutory 90-day time limit.

[4] This determination deals with these preliminary issues.

[5] I record the investigation of this employment relationship problem was assisted by a translator of the Gujarati language.

Were Alpeshkumar Patel and Pinalben Patel volunteers?

[6] Alpeshkumar and Pinalben Patel are recent immigrants to New Zealand from India. They arrived in New Zealand on 3 April 2008 with their two children (then aged 5 and 9). Shortly after their arrival Alpeshkumar Patel contacted Pragna Patel whose details he had received from a relative (the two families come from the same village in India). Within days of this initial contact Alpeshkumar Patel, Pinalben Patel and their children had moved into Darpan and Pragna Patel's home and gave them a large sum of money².

[7] Alpeshkumar and Pinalben Patel say that on 5 April 2008 they entered an agreement to work as shop assistants in Darpan and Pragna Patel's Super Liquor Store in Parakai. They say the terms of that agreement were that they would be paid \$11.50 per hour, receive free accommodation and all other terms and conditions in accordance with the laws of New Zealand. They say this agreement was reached with Darpan and Pragna Patel in their home.

¹ Statement in Reply dated 29 June 2009

² Currently the subject of a claim before the District Court

[8] Darpan and Pragna Patel say no such agreement exists. They say they offered accommodation to Alpeshkumar and Pinalben Patel as a courtesy and out of good will until they could find alternative accommodation. They say Alpeshkumar and Pinalben Patel never worked in either their Parakai or Helensville Super Liquor stores (the Helensville store was opened later in 2008). They say Alpeshkumar and Pinalben Patel attended their businesses on a handful of occasions and solely on a voluntary basis.

[9] Section 6(1)(c) of the Employment Relations Act sets out the meaning of volunteer:

- (1) In this Act, unless the context otherwise requires, **employee-**
- (c) excludes a volunteer who –
 - (i) does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) received no reward for work as a volunteer.

[10] In considering whether Alpeshkumar and Pinalben Patel were volunteers the Authority must consider whether there was a contract between the parties and whether that contact was one of employment for hire or reward³.

[11] I find, without hesitation, that Alpeshkumar and Pinalben Patel were not volunteers and that they were employees ie, that a contract of employment for hire or reward existed. I make this finding on the following grounds:

- (i) The evidence shows a recurring pattern – from April until January 2009 Alpeshkumar and Pinalben Patel travelled to Parakai from South Auckland with Pragna or Darpan Patel having dropped all their children at the school they attended in Kumeu, for two semesters in the early afternoon Alpeshkumar Patel caught the bus from Parakai into Auckland City to attend lectures, Pragna Patel picked the children up from school and returned with them to the Parakai store where the children waited until the store closed;
- (ii) Alpeshkumar and Pinalben Patel were provided with name badges and uniforms in accordance with the Super Liquor franchise agreement;

³ *MacGillivray v Jones (t/a Tahuna Camp Store)* ERNZ [1992] 382, 394

- (iii) Darpan Patel provided Pinalben Patel with a letter on Deval Enterprises Limited letter head confirming her status as *appointed for customer-service full time job*;
- (iv) The customer statements filed by way of evidence by both parties establish Alpeshkumar Pinalben Patel were well known to the customers who were able to identify them from photographs and recall their names;
- (v) The Parakai Super Liquor diary records cash payments made to Alpeshkumar Patel in October and December 2008 and January 2008 totalling \$1960;
- (vi) Darpan and Pragna Patel provided accommodation to Alpeshkumar and Pinalben Patel during the period of employment. There was no evidence they had required payment for that accommodation during the period of employment.

[12] I find Darpan and Pragna's explanations for the clear evidence that Alpeshkumar and Pinalben Patel were employees unconvincing. They are experienced business people. It is not credible that they would make false statements as to Pinalben Patel's employment status in order that she could apply for an IRD number. It is not credible that they would order uniforms and name badges from Super Liquor for Alpeshkumar and Pinalben Patel and allow Alpeshkumar Patel to photograph himself in their store wearing that uniform because they (Alpeshkumar and Pinalben Patel) insisted they do so. It is not credible that cash payments made to Alpeshkumar Patel from the Parakai Super Liquor cash register and recorded in that businesses' diary were not in exchange for work performed. It is not credible that Alpeshkumar and Pinalben Patel would enrol their young children in a school proximate to Darpan and Pragna's businesses (Parakai) and remote from their accommodation (South Auckland) if they were not employed in those businesses.

[13] Mr Raman put a series of questions to Alpeshkumar and Pinalben Patel to elicit their familiarity with the liquor industry and the operation of the Super Liquor stores in question. The questions bare little relevance to the questions before the Authority. How well they performed their duties or indeed the detail of those duties is not at issue. Notwithstanding I am satisfied the evidence demonstrated a level of familiarity with the business consistent with employment.

[14] I find Alpeshkumar Patel worked 20 hours per week consistent with the terms of his student visa. I find Pinalben Patel worked 40 hours per week consistent with the terms of the position status letter written by Darpan Patel. I find the terms of employment were those Alpeshkumar and Pinalben Patel say they entered with the respondents on 5 April 2008.

[15] The hourly rate agreed by the parties falls below the \$12 minimum wage level prescribed by Order in Council effective 1 April 2008. It is unlawful to pay a rate of pay less than the minimum rate⁴. There is no evidence the provision of board and lodging was to be calculated as a deduction from the agreed hourly rate.

Identity of the employer

[16] I find the employer is properly identified as Deval Enterprises Limited. This is the legal entity which owns the Super Liquor businesses where Alpeshkumar and Pinalben Patel were employed, from which cash payments were made to Alpeshkumar Patel and which held itself out as the employer in the Pinalben Patel's status letter.

Orders

[17] The following orders for wage arrears are made pursuant to section 131 of the Employment Relations Act 2000:

- (i) Deval Enterprises Limited is ordered to pay byway of wage arrears monies due and owing to Alpeshkumar Patel calculated at \$12 (gross) per hour at 20 hours per week from 20 April 2008 to 15 January 2009 less \$1960;
- (ii) Deval Enterprises Limited is ordered to pay byway of wage arrears monies owed to Pinalben Patel calculated at \$12 (gross) per hour at 40 hours per week from 20 April 2008 to 15 January 2009.
- (iii) Deval Enterprises Limited is ordered to pay holiday pay owed to Alpeshkumar Patel on the above wage arrears.

⁴ Section 6 Minimum Wage Act 1983

- (iv) Deval Enterprises Limited is ordered to pay holiday pay owed to Pinalben Patel on the above wage arrears.

[18] Interest is to be calculated on these sums at the rate of 4.79% from 15 January 2009 until date of payment. This order is made pursuant to schedule 2 clause 11(1) Employment Relations Act 2000.

90-day issue

[19] Alpeshkumar and Pinalben Patel raised their personal grievances for unjustified dismissal outside the statutory 90-day time limit. They say they were dismissed on 15 January 2009 and they raised their grievances by letter dated 28 April, beyond the statutory time limit.

[20] I have found Alpeshkumar and Pinalben Patel were employees of Deval Enterprises Limited. Deval Enterprises Limited has failed to maintain a number of significant obligations owed to them as employees including failing to provide a written employment agreement⁵ a statutory obligation ensuring parties to employment agreements are certain as to the terms of their agreements and that those agreements are recorded in writing. Section 65 requires that an employment agreement sets out a plain language process for resolving employment relationship problems including the 90-day time limit for the raising of personal grievances.

[21] No such agreement was provided. I am satisfied that in the circumstances of this matter the failure to provide a written agreement with a plain language explanation of the 90-day time limit amounts to an exceptional circumstance pursuant to section 115(c) of the Act and that it would be just to grant leave to Alpeshkumar and Pinalben Patel pursuant to section 114(4) of the Act to raise their personal grievance out of time.

[22] The parties should attend mediation on this issue and advise the Authority if the applicants wish to pursue this substantive grievance.

⁵ Section 65 Employment Relations Act 2000

Penalty

[23] Alpeshkumar and Pinalben Patel seek the award of penalties against Deval Enterprises Limited for failing to provide a written employment agreement, an opportunity to seek independent advice and failure to provide fair working conditions (section 63A(2)(a) – (d) of the Act) and the failure to maintain wage and time records (pursuant to section 130(4) of the Act).

[24] Penalties for breach of employment agreements and/or statutory obligations are warranted where deliberate and wilful conduct is established.

[25] Deval Enterprises offered no reasonable explanation for and continued to deny its employment obligations in the face of clear evidence of employment. I am satisfied Deval Enterprises Limited breached obligations owed to Alpeshkumar and Pinalben Patel and that those breaches were wilful and deliberate.

[26] **A penalty is warranted which I set at \$2000, half to be paid jointly to Alpeshkumar and Pinalben Patel and half to the Crown to be paid into the Authority⁶.**

Costs

[27] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to then application can be made for a timetable to be set. Such application should be made with 14 days of the date of this determination.

Marija Urlich

Member of the Employment Relations Authority

⁶ Section 135 Employment Relations Act 2000