

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Randhir Sen (Applicant)
AND	Robert Wishart and Meg Gaddum (Respondents)
REPRESENTATIVES	Michael Meyrick, Advocate for Applicant John O’Leary, Counsel for Respondents
MEMBER OF AUTHORITY	Ken Anderson
ON CONSIDERATION OF THE PAPERS RECEIVED	13 December 2005 15 December 2005
DATE OF DETERMINATION	28 March 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] This matter first came to the Authority on 12 August 2005, as an action for recovery of wages for Mr Randhir Sen, his wife, Vijay Sen, and daughter, Raksha Sen. The latter two parties subsequently withdrew from the proceedings via a memorandum from their advocate, received by the Authority on 19 September 2005.
- [2] The *Statement of Problem* seeks the resolution of two matters:
Was there an employment relationship; and if so, what is the Applicant entitled to recover by way of unpaid wages?
- [3] However, following a conference call with the parties, in order to minimise expenses for both parties, it was agreed that the threshold question of whether an employment relationship was in existence, would be determined by the Authority on the papers.

Background Facts and Evidence

- [4] Mr Sen and his family came to Auckland from Fiji in the year 2000. They moved to Gisborne sometime in 2003. A company, “*RANDHIR AND VIJAY SEN LIMITED*” was registered with the Companies Office on 22 May 2003. While the evidence is inconclusive, it appears that the company was registered in order to allow Mr and Mrs Sen to operate the Huxley Road Dairy in Gisborne, apparently owned by a gentleman only known to the Authority as “Raj.”
- [5] At this point in time the Sens had not obtained resident status in New Zealand and were not able to legally work as employees and it appears that that the arrangement that they were operating under may also have been illegal. The evidence of Mr Sen is that the arrangement was that the Sens agreed to operate the dairy and pay “Raj” the sum of \$800 per week. Any

takings over that sum went to the Sens.

- [6] The Sens are of the Ba’hai Faith and were involved with the Ba’hai community in Gisborne and through that community, they met up with the Respondents, Robert Wishart and Meg Gaddum, and they became friends. Following an armed hold up at the dairy, the Sens decided to move back to Auckland but were persuaded by the Respondents to stay in Gisborne.
- [7] The evidence of the Respondents is that the Sens approached them and advised that they wanted to get out of the Huxley Road Dairy and wanted to acquire legal ownership of their own business. The Respondents subsequently put a proposal to the Sens – it is undated but it was to apply to the operation of another disused dairy. This shop was called the Hospital Store.
- [8] There is a conflict in the evidence as to how the availability of the Hospital Store came to the knowledge of the Sens. Mr Sen says that the Respondents drew his attention to its availability and that Ms Gaddum contacted the Gisborne City Council to find out what would be required to reopen the store. Mr Sen also says that Ms Gaddum arranged for Council staff to inspect the building for health and safety purposes and also the Respondents met with the owner of the building. Mr Sen says that he did not meet with the owner of the shop building until after it had been decided to open the shop and the renovations were under way. Mr Sen also says that all the arrangements for the use of the shop were conducted by the Respondents.
- [9] However Mr Sen’s evidence is in conflict with what he and his wife conveyed to the Secretary of the Local Spiritual Assembly of the Bahai’s of Gisborne, in a letter dated 22 September 2002 [it seems that the date should be 22 September 2004.] In that letter Mr Sen makes it quite clear that he and a friend located the store and contacted the owner and then advised the Respondents who then; [“agreed to help us out.”]
- [10] The Respondents also say that the Sens located the landlord of the Hospital Shop and arranged a one year lease for the Respondents to complete. They also say that the Sens subsequently signed a five year lease without their knowledge. While this matter has been determined on the papers and the Authority has not had the advantage of viewing the respective parties in order to assess their overall credibility, generally speaking, where there is a conflict in the evidence, the evidence of the Respondents appears to have a higher degree of probability.
- [11] In regard to the first proposal prepared by the Respondents it appears that there was a common intention that the Respondents would employ the Sens to operate the Hospital Store. However, the evidence of the Respondents is that this was an “*Initial Proposal*” and was drafted before they became aware of issues pertaining to the Sens obtaining a residency permit, in that the Sens were precluded from being employed in the business until their residency application had been granted. The Respondents say that when they became aware that they could not legally employ the Sens, an alternative arrangement was agreed to whereby the Sens would not receive any income and would live on their savings and money from family connections and hence, another document was drafted - the “*Final Proposal*.”
- [12] The evidence of the Respondents is that the Sens would run the Hospital Store as a business and then buy it at cost when they were granted permanent residency. This is confirmed by the content of both proposals. The content of the *Initial Proposal* and the *Final Proposal*¹ are identical apart from one exception, that is, the opening paragraph. The *Initial Proposal* states:

¹ Apart from the use of those terms by the Respondents, the terms in italics are a convenient format adopted by the Authority to identify the two documents. The documents are simply headed “Proposal”.

“Hospital Store – business owned by Meg and Bob with all ownership rights.
Randhir and Vijay – employed to manage dairy. Wage:”

There is no entry after the word “Wage.”

The *Final Proposal* states:

“Hospital Store – business owned by Meg and Bob with all ownership rights.
Randhir and Vijay – employed to manage dairy. Wage: nil until residency approved”

[13] The content of both documents is then identical, being:

“Intention: To sell dairy business to Randhir and Vijay as soon as is possible.

Managers [sic] job requirements

Shopkeeping [sic]
Keeping cash records
Daily banking
GST records provided to Meg
Restocking shop
Staff hireage [sic]
Bill payments
Etc

Operational details

Set up business bank account: “Hospital Store”
Cheque signing rights Meg and Randhir

Account OD maximum \$10,000 (set up by Meg and Bob)

Business bank account

- will take all shop daily takings
- will pay all shop expenses including
 - any OD interest on Meg and Bob’s deposit (as will be OD in their own account)
 - wages if required
 - shop rent (not house)
 - power, phone
 - stock insurance, security fees
 - restocking bills
 - all business related exp eg council compliance, accountancy, stationary
- other than interest as outlined above no money will be transferred from this account to Meg and Bob’s.

Sale to Sens:

Sale price = setup costs, initial stocking costs & float to be identified and totalled **plus** \$500 and to increase in \$500 increments each month after opening

eg Total costs = \$40,000 plus \$500 in 1st month = sale price \$40500
“ “ “ plus 2 x \$500 in 2nd month = \$41000 etc

Sale of business includes business cheque account and all money (debit or credit) in it.

Initially Sens will deposit to Wisharts (or to Craig Jones) to be held separately as security and, at sale date, be used by Sens to help purchase business.

If Sens receive permanent residency status and decide not to purchase the shop, the Hospital Store

business will be put up for sale and the Sens must continue to work in the shop in good faith until take over. The Sens will receive their deposit back, but have no further claim on business other than wages owed if applicable.”

[14] The evidence of Mr Sen is that he knew before the shop opened he would never own it but that is quite at odds with the proposal put by the Respondents and which I conclude he accepted. It is also my conclusion that it is more probable than not that it was the *Final Proposal* that the parties were in agreement on and were working under, albeit it is extremely uncertain, un-businesslike and unsatisfactory in its presentation and application.

[15] The evidence of the Respondents is that:

“The Sens made an informed decision to run the business without remuneration until a decision had been made regarding their permanent residency application. They were well aware of the consequences of being employed without the correct work permit and the consequences of running a business without the correct business permit. Therefore the Sens entered into an arrangement which did not breach the conditions of their visitor permit.

The risk to the Sens was that they knew the agreement to purchase the business was conditional on them obtaining residency. The risk to us involved allowing the Sens to use our capital and rely on our credit rating. If the dairy had been unsuccessful, the Sens would have just walked away and we would have been responsible for all the debts. Against our better judgement we took on this risk. We did so because of the Sens reputation as fellow Baha’i Faith members and our wish to assist them.”

[16] It appears that because there was no initial stock for the Hospital Store, the Sens brought with them the stock from the Huxley Road Dairy, valued at \$10,000 (including GST), according to the invoice dated 15 October 2004 in the name of *Randhir and Vijay Sen Limited* and presented to the Respondents for payment (presumably).

[17] From all accounts the Sens worked hard and long at trying to make a success of the business but it appears that it was not a viable proposition. While the overall evidence is inconclusive, it seems probable that the Sens had some problems in obtaining residency. The Respondent’s evidence is that the Immigration Service “signposted” that the Sens were to be refused residency, perhaps due to the absence of further supporting evidence. The Respondents say that they did everything they could to assist the Sens with their residency application, including writing letters of support and as a “last ditch effort” supplied the Immigration Service with a “job offer” letter, apparently indicating the Sens would be paid a salary of \$38,000, albeit the store could not possibly support the payment of this salary. This letter has not been produced to the Authority – but in any event, its legitimacy appears to be questionable.

[18] The evidence of the Respondents is that when the Immigration Service “signalled” that the Sens would be refused residency,² the Sens suggested, and the Respondents agreed, that the dairy should be sold. A sale took place in late October 2004 and as far as I can gather, the Sens only received payment for the stock that they brought into the business.

The Applicant’s Claims

[19] Mr Sen says that he was employed by the Respondents from 1 November 2003, when the Hospital Store opened, until 23 October 2004, when the business was sold. Mr Sen claims that he is owed wages in the sum of \$34,272.00 but also acknowledges that he and his family obtained certain benefits from the business that should be off-set against his claim.

² The Sens were granted residency on 29 October 2004.

[20] The calculations may be arguable, at best, but at this stage in the proceedings the Authority is not required to come to any conclusions about the monetary claims of Mr Sen. The matter for determination is whether there was an employment relationship in existence between Mr Sen and the Respondents.

Analysis and Conclusions

[21] The factual scenario applying to this case is highly unusual and fraught with some doubts as to the legitimacy of the actions of both the Sens and the Respondents. However, any questions about the legitimacy of the respective actions of the parties, pale into insignificance in comparison with the sheer audacity of Mr Sen in bringing this matter to the Authority.

[22] At the material times relating to the claims of Mr Sen, he was not legally entitled to be employed as he was in this country without a work permit. Mr Sen obviously was aware of this and conveyed such to the Respondents. [There is also some evidence of a history of dubious activity in his prior activities.] But even apart from that established fact, I have no doubts that Mr Sen could not, and did not, enter into an employment relationship and was happy to have the assistance of the Respondents in regard to the establishment of a prospective business opportunity with little or no risk involved for him.

[23] It also appears that while Mr Sen and his family worked hard in order to ensure that the business would be successful, unfortunately it was to no avail. During the time that the business was in existence, Mr Sen appears to have held himself out as the proprietor of the business, albeit he had no legal right to do so, given his immigration status at the time, and he took drawings and goods for personal use from the business.

[24] While the two proposals in question have some content that points to a possible employment relationship, the substance of the evidence available to the Authority, is that when it was established that Mr Sen was not legally able to be employed by the Respondents, then the parties activated a business relationship, also probably illegal, with the hope that Mr Sen and his family would gain residency and then move on to take over the business on the terms set out in the written proposals. Unfortunately, while Mr Sen and his family did eventually gain residency, the business appears not to have been a viable proposition and was sold, as the Respondents were not prepared to carry it any further.

[25] One can only imagine how the Respondents must be feeling given that they gave Mr Sen and his family considerable assistance in many ways, perhaps even putting themselves at some risk both in a business and personal sense, and now find themselves in the circumstances that have arisen. Perhaps Mr Sen may have some further entitlement in regard to the proceeds of the sale of the business, but that is not within the jurisdiction of the Authority.

Determination

[26] I find that there was not an employment relationship between the Respondents and Mr Sen. Hence, the Authority has no jurisdiction in this matter under the Employment Relations Act 2000.

Costs

[27] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

Ken Anderson
Member
Employment Relations Authority