

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 126
5540321

BETWEEN AMIT KUMAR SHARMA
 Applicant

AND CHETANBHAI PATEL
 First Respondent

 MOHNAKSHI ENTERPRISES
 LIMITED Trading as TRINITY
 CRESCENT FOUR SQUARE
 Second respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person
 Jaswin Ghandhi and Yashveen Singh, Counsel for
 Respondents

Investigation Meeting: 10 September 2015 and 19 November 2015 in Napier

Submissions, affidavits From the applicant on 5 October and 19 November 2015
and additional information From the respondents on 18 September, 19 October, 17
 November and 26 November

Determination: 22 December 2015

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Mr Chetanbhai Patel is sole director of ‘Mohnakshi Enterprises Limited’ (MEL), a company which trades as ‘Four Square Trinity Crescent’, (“the Four Square”) in Napier.

[2] Mr Amit Sharma came to New Zealand to study. In 2012 and 2013 he worked intermittently at the Four Square on a part-time casual basis.

[3] In mid-October 2013 Mr Sharma signed an employment agreement and began working in a full-time position as Manager at the Four Square. He alleges he was paid below the rate contractually agreed and beneath the minimum wage. Mr Sharma says he was required to work additional hours beyond those recorded in his employment agreement so as to reimburse his employer the PAYE component of his wages. He says he put up with the arrangement because his work visa limited him to working at the Four Square and he wanted to remain in New Zealand.

[4] In the second half of 2014 Mr Sharma says he asked Mr Patel to endorse his application for permanent residency. Another employment agreement recording an increase in wages¹ was signed and forwarded to Immigration New Zealand (“INZ”). Mr Sharma says his conditions of employment became more onerous; his hours of work increased to average 65 per week; and he was required to give almost half his wages back to Mr Patel. Towards the end of his employment he withheld payments to Mr Patel and his wages were then halted.

[5] Mr Sharma’s employment ended on 19 January 2015. He seeks \$27,344.78 in arrears of wages including payment of holiday and sick leave, and interest.

[6] Mr Patel and MEL deny Mr Sharma was required to return a portion of his wages. They say wages were paid in accordance with the law, although it is accepted that payment for annual leave and some public holidays is owed. Mr Patel says he made a personal loan to Mr Sharma and Mr Sharma’s preference was to repay the loan by way of reimbursement of PAYE.

[7] The statement in reply asserts Mr Sharma was dismissed for theft and that his dismissal was justifiable. Mr Sharma did not make a claim of an unjustified dismissal and that event does not require investigation.

The Authority’s investigation

[8] Mr Sharma lodged his application with the Authority on 5 February 2015. He remained unrepresented throughout the Authority’s investigation. Mr Patel and MEL were legally represented.

[9] In the lead up to the Authority’s investigation four case management calls were convened. The respondents were directed to produce wage and time records.

¹ \$17.80 per hour

Timetabling an investigation meeting was delayed to allow the parties to attend mediation. At the third conference call an investigation meeting was scheduled for 10 September 2015.

[10] Two days before the scheduled investigation meeting the respondents applied for an adjournment to obtain alternative counsel. That application was declined at a conference call the following day. By this stage the respondents had furnished copies of timesheets which were said to record Mr Sharma's days and hours of work, however these did not satisfy wage and time record requirements.² Mr Sharma's statement of problem had attached a large number of copied photographs which he said reflected his hours of work as written in the respondents' diaries (the diaries). I asked the respondents to produce the original dairies. Mr Sharma indicated he also wished to proffer a recording of a discussion held with Mr Patel. Given the Authority's meeting was set to begin in less than 24 hours he was asked to bring two copies of the recording to the scheduled meeting.

[11] At the beginning of the first day of investigation I noted both employment agreements cite Mr Patel as the employer. MEL was joined as a second respondent on grounds that it was likely MEL was Mr Sharma's employer. Counsel for the respondents sought to have the diary photographs and the audio recording declared inadmissible. The respondents say the diaries were stolen by Mr Sharma and interfered with. It was alleged the telephone recording was unfairly obtained.

[12] The Authority has a wide discretion to consider evidence relevant to its investigation and to determine what weight, if any, should be given to information obtained. I considered the diary photos were relevant particularly where the respondents sought to disprove Mr Sharma's claim but were unable to produce wage and time records. It was open for the respondents to cross examine on the location of the original diaries and the content of the photographs. I became aware the audio recording was in Hindi and was unable to assess its relevance.³ The parties were informed that the recording would be translated⁴ and transcribed and if it contained matters relevant to my investigation I would reconvene the meeting.

² Pursuant to s 130 of the Employment Relations Act

³ The respondents were given an opportunity at the meeting to listen to the recording

⁴ By the New Zealand Translation Service

[13] It is not unlawful for a person to record a conversation they are a participant in without the other party's knowledge.⁵ However the fairness of doing so will depend on the circumstances.⁶ There is no evidence that the parties agreed at the outset of their conversation that it would be confidential or without prejudice.

[14] On receipt of the transcription, arrangements were made to reconvene another investigation meeting to allow the respondents a full opportunity to comment on that material.⁷ The respondents complain that the content of the conversation between the parties was manipulated by Mr Sharma. I accept that there is an element of deception as to how Mr Sharma recorded the discussion and have approached the material with caution.

[15] As permitted under the Act this determination does not set out all information provided and is limited to stating the necessary relevant facts and reasons for findings on legal issues in order to dispose of Mr Sharma's claims.

[16] Issues of credibility emerged as critical in this case. The evidence of Mr Sharma and Mr Patel is so disparate there is no way of reconciling their differing accounts. This is a civil claim so the required level of proof is balance of probability as opposed to the criminal standard of beyond reasonable doubt.

The issues

[17] The Authority is required to determine whether wages are owed to Mr Sharma⁸. The following matters will need to be examined:

- (a) when did Mr Sharma commence working in the Manager's position?
- (b) which of the records purporting to reflect Mr Sharma's hours of work should be preferred?
- (c) was Mr Sharma required to repay Mr Patel and/or MEL a portion of his nett wages?

⁵ Crimes Act 1961 s 216B(2)

⁶ *Talbot v Air New Zealand*

⁷ The parties were each provided with a transcription of the recorded conversation

⁸ Including holiday pay (comprising annual holidays, public holidays and alternative holidays) and sick leave payments

When did Mr Sharma commence working in the Manager’s position?

[18] Mr Sharma says he started working in the role of Manager on 15 October 2013 and wages were paid in cash until 9 December 2013 when wages were transferred directly to his account. In contrast Mr Patel says Mr Sharma did not start working until 2 December 2013. He points to an absence of timesheets prior to 2 December 2013, and to direct credit wage payments first occurring on 9 December 2013. His testimony was undermined by the following evidence:

- (i) The first employment agreement records (partly in handwriting) that Mr Sharma commenced his position on 15/10/2013 at 10.00am.
- (ii) A letter dated 12 November 2013, signed by Mr Patel, informs Mr Sharma that his rate of pay will increase from \$13.75 to \$15.30 following an inquiry from INZ about the suitability of the hourly rate set down in the employment agreement. The letter states Mr Patel is “quite satisfied with [Mr Sharma’s] hard work and dedication”.

[19] I find it unlikely that Mr Patel would refer to Mr Sharma’s working style if he had not already commenced in the position at the time the letter was drafted. Mr Sharma’s claim begins on 15 October 2013.

Which of the records purporting to reflect Mr Sharma’s hours of work should be preferred?

[20] Both of Mr Sharma’s employment agreements contain the following provision at cl 9.4 respectively:

On each pay day (Thursday) the employee shall be supplied with a statement showing the calculation of wages paid for that week and any deductions made. Any errors in the calculation report to payroll staffs attention shall be corrected no later than the next pay day.

[21] Mr Patel accepts that Mr Sharma was not given statements (wage slips) calculating weekly wages as required under the employment agreements.

[22] Section 132 of the Employment Relations Act states that where any claim is brought before the Authority for the recovery of wages (or other money payable to the employee), in the absence of clear records, the Authority may, unless the employer proves the claims are incorrect, accept the claims as proved. Despite the absence of

wage and time records, the respondents seek to prove Mr Sharma's claims are incorrect.

[23] As noted, the respondents provided weekly timesheets.⁹ Each timesheet contains a signatory area for the employee and the employer to evidence agreement on the hours recorded. Mr Patel accepts the timesheets were compiled solely by him. He says Mr Sharma refused to sign the timesheets. Mr Sharma rejects that statement. He says the timesheets did not exist during his employment and believes they were constructed after the respondents received his statement of problem.

[24] Mr Sharma produced 34 photographs of pages corresponding to the weeks 12-18 November 2012 and 8 July 2013 to 31 August 2014 (inclusive). Each photograph appears to record (amongst other things) the hours worked by Mr Sharma over the course of a fortnight. He says he took the respondents' notebooks home on 23 December 2014 to photograph because he had not been paid wages due the day before (which was not denied by the respondents) and that he had no other means of establishing his hours of work. He says he returned the notebooks the following day. Mr Sharma also produced a personal notebook which he says he used to record his hours of work from 1 September 2014 onwards when he began working pursuant to the second employment agreement.

[25] The diaries reflect a much higher weekly average of hours worked than the weekly timesheets. Given that the success or failure of the respondents' defence depends largely on determining which of the two competing sets of documents reflect Mr Sharma's hours of work, a significant portion of evidence was centred on these documents.

[26] Mr Patel says the diaries were used only by himself and his wife to record their personal hours of work. The respondents say Mr Sharma has inserted his name above their records and now falsely claims these hours as his own. I observed that the handwriting contained in Mr Sharma's personal notebook bore a remarkable similarity to portions of the diaries where Mr or Mrs Patel had purportedly recorded their time.¹⁰ Mr Patel conceded some (but not all) of Mr Sharma's hours of work may have been recorded in the diaries. When asked to point to any entry that related to Mr Sharma, Mr Patel referred to the week 4-10 November 2013 but prevaricated when I

⁹ for the period 2 December 2013 to 24 August 2014, and 6 October 2014 to 18 January 2015

¹⁰ Mr Sharma has a distinctive handwriting style – particularly noticeable with the number 8

noted Mr Sharma was recorded as working 63 hours that week. Mr Patel had previously stated Mr Sharma worked no more than 32 hours per week. His evidence also contradicts prior assertions that Mr Sharma did not begin his employment until 2 December 2013. Mr Patel then declined to identify which of the weekly records related to Mr Sharma and said he was unsure on the matter.

[27] Mr Patel's wife, Mrs Mohnakshi Patel was interviewed at the second investigation meeting. She initially agreed that some of the weekly entries in the diaries set out Mr Sharma's hours of work but became increasingly reluctant to identify which entries corresponded to him and remained silent when further questioned about the diaries.

[28] Of note, the diary photographs capture information about a person called "Zayne" whom Mr Sharma says worked at the Four Square. The name Zayne occurs in the diaries on over 40 occasions, each above a designated 7 day working week, and appears to record daily and weekly hours of work and, on occasion, a corresponding monetary value.

[29] At the first investigation meeting Mr Patel denied Zayne was employed by the respondents but was unable to clarify why his name featured in the diaries.

[30] Mr Zayne Pullen is a young man who gave evidence at the Authority's reconvened meeting.¹¹ He also initially denied working for the respondents but reluctantly conceded the fact when the diary photographs were placed in front of him, and accepted that the entries in the diaries were filled out by him and reflected his hours of work. He further acknowledged he had not seen or filled in weekly timesheets and was unaware these existed.

[31] I have given close scrutiny to the evidence as regards Mr Sharma's hours of work. The respondents' testimony as to the legitimacy of the weekly timesheets was unconvincing, particularly where neither of the respondents' employees was aware of them. I note also that the weekly timesheets were remarkably pristine. There was no evidence of these documents being regularly handled, or of additional markings, crossings out, mistaken and corrected recordings and calculations, that are common to timesheet documents, even if only contributed to by one person. On balance I do not regard the timesheets as an authentic record of Mr Sharma's hours of work.

¹¹ He also provided a sworn affidavit

[32] In contrast the (photographed) diaries appear genuine. They reflect the usual hallmarks of how individuals record time in the workplace. The Patel's were unable to identify where it was that Mr Sharma was said to have tampered with the content of the diaries and I do not accept those allegations. I am however confident that the diaries were used to record working hours and I accept the content of those documents accurately when Mr Sharma worked. The respondents have not disproved Mr Sharma's claim as regards days, hours and time worked.

Was Mr Sharma required to repay Mr Patel a portion of his nett wages?

[33] This aspect of Mr Sharma's claim concerns two separate timeframes. The first pertains to the duration of the original employment agreement.

[34] Mr Sharma says Mr Patel calculated his gross income per week as \$489.60 (gross)¹² based on 32 hours of work per week at \$15.30 per hour. Of that sum \$414.45 was paid by direct credit to Mr Sharma as nett wages and \$75.15 forwarded to IRD as PAYE. Mr Sharma says in reality he was paid \$10.00 per hour. He says he needed to work 49 hours per week to cover PAYE. He says he was required to repay the respondents \$10.00 for each hour under 49 hours per week if he did not work to that level of hours.

[35] The diaries suggest some sort of weekly reconciliation system against the number 49, which tends to support Mr Sharma's allegation. By way of example: for the week beginning 17 February 2014 Mr Sharma worked 45 hours. Next to that number is a circle with "-40". He says at 45 hours a week he earned \$450 but owed \$40 to meet the total amount of wages, (nett and PAYE), of \$489.60. There are numerous similar recordings in the diaries but not all weeks where hours of work fall below 49 record this methodology.

[36] Given Mr Patel denied that the contents of diaries concerned Mr Sharma's hours of work he flatly rejected any suggestion that these indicated reimbursement of PAYE by Mr Sharma.

[37] The second alleged arrangement relates to the later employment agreement dated 1 October 2014 which records Mr Sharma's hourly rate increased to \$17.80.

¹² The employment agreement records Mr Sharma was to work 35 hours per week. However I note the weekly timesheets largely recorded Mr Sharma as working 32 hours per week.

The timesheets ostensibly record Mr Sharma's hours of work increased to 40 per week from 6 October 2014 onwards.

[38] Mr Sharma says a new arrangement commenced on 1 September 2014 and his hours increased to approximately 65 hours per week. Bank statements reveal \$595.63 (nett) was credited weekly to Mr Sharma's bank account from 13 October 2014 onwards. Mr Sharma says from that sum he was required to return \$295 to Mr Patel and required to reimburse him the PAYE component of his wages at the end of the month. He says in mid to late November 2014 he stopped complying with the arrangement as evidenced by the contents of the discussion held between him and Mr Patel on 23 December 2014.

[39] The recorded conversation between Mr Sharma and Mr Patel lasts for approximately 20 minutes. At times the parties speak simultaneously which caused difficulty for the translator, and at other times the recording was muffled and it is uncertain as to what exactly was conveyed. It is clear the following points were traversed as follows:

- Mr Sharma advises Mr Patel that he has brought \$300 but not the full amount owed;
- Mr Sharma concedes he has not given money to Mr Patel for 6 weeks and the parties discuss how much money is owed;
- There is a debate as to whether payment of tax by Mr Sharma is a separate payment or whether it is included in the sum that is owed;
- Mr Patel records his dissatisfaction with both Mr Sharma's failure to pay him as agreed and receiving payments by instalment. He states payments need to be made "*week to week now*". He advises he has stopped paying Mr Sharma by direct bank payments;
- Mr Sharma says he has difficulty getting to the bank and/or making ATM cash withdrawals. He asks Mr Patel to provide his bank account number and proposes to transfer money from his account to Mr Patel's;
- Mr Patel states "*you are talking about something that will entrap me*". Mr Patel repeats several times that he wants the money in cash and that he does not want it from the bank. He advises that if the monies are not paid in two weeks Mr Sharma will not receive wages into his bank account;
- The issue of tax payments are further discussed, Mr Patel appears to initially propose that "*tax back*" needs to be paid by the 10th of the month, and later says by the 20th of each month; and

- Mr Sharma requests a wage increase and to have full Sundays off. Mr Patel queries why Mr Sharma is now complaining about these matters when he [Mr Sharma] had previously agreed to these;

[40] There is no reference in the conversation about the basis for the debt although Mr Patel does not dispute that the conversation centres on a debt Mr Sharma owes him. In sworn affidavits and oral evidence Mr Patel and Mrs Patel each allege Mr Sharma has misrepresented the reason for the debt. They each say, despite their own financial difficulties, that they used their children's savings to finance a loan of \$5,700 to enable Mr Sharma's wife to return to India to assist her terminally ill mother.

[41] At the first investigation a portion of Mr Patel's evidence focussed on discrediting Mr Sharma's honesty. By way of example: Mr Patel advised the Authority that Mr Sharma's wife had returned to India because Mr Sharma (and his family) had not honoured a dowry payment. No mention was made by Mr Patel that Mr Sharma's wife had returned to India because of her mother's ill health. I consider the Patel's explanation as to the reason for the loan, (framed as an act of generosity), is not credible when viewed again against how Mr Patel portrayed Mr Sharma at the first investigation.

[42] Nor do I accept the Patel's response to aspects of the conversation recorded in the transcript. Mr Patel was not able to credibly explain why he so strongly opposed repayment of the debt by bank transfer, why that methodology would "*entrap*" him, or why repayments needed to be in cash only. Initially he said he did not want to have the debt repaid through the business as this may have tax implications for him. When asked why the money could not be repaid into a personal account, Mr Sharma stated that his wife and children required cash for their daily needs. Mr Patel later stated that the word "*trap*" in Hindi is interchangeable with the phrase "*playing games*" It remained unclear why he considered Mr Sharma's proposal to repay the loan by means of bank transfer amounted to "*playing games*".

[43] Mrs Patel was equally evasive as to why, if the money was for her and the children, it could not be deposited into a personal bank account. She stated that "*too many questions could be asked*" if Mr Sharma deposited repayments into a bank account she would not elaborate on who would ask questions and why that was of concern.

[44] I have not found the explanations, as to the cause of the debt or why the preference was for cash repayments, at all believable. I find it is more likely the Patel's did not want a paper trail evidencing Mr Sharma depositing sums of money to them because the repayments were a consequence of the employment arrangement as opposed to a personal loan.

[45] Finally, I do not accept that it was Mr Sharma's preference to repay the loan by reimbursing Mr Patel the PAYE portion of his wages and I do not accept his evidence that this is why PAYE formed part of the discussion between them. It is simply not plausible.

Summary

[46] Having given careful consideration to the evidence, I am persuaded that this matter is exactly as described by Mr Sharma.

[47] There is an outward appearance of an orthodox employment relationship such as written employment agreements, weekly deposits of wages into Mr Sharma's bank account and evidence of PAYE payments being made to IRD. However, sitting behind that indicia was an entirely different scheme. Written terms and conditions of employment, particularly hours of work and remuneration, were dispensed with. An alternative system was adopted whereby Mr Sharma worked longer hours at a lower rate and reimbursed the cost of PAYE to Mr Patel. In addition Mr Patel was compelled to pay a premium to remain in his employment in return for assistance with INZ. I accept there is no independent witnesses or direct evidence of Mr Sharma returning wages to Mr Patel but on the balance of probabilities I am confident the practice occurred. Mr Sharma's claims are accepted.

What wages including holiday pay and sick leave entitlement is Mr Sharma owed?

Unpaid wages

[48] Mr Sharma claimed \$18,441.65¹³ (nett) in unpaid wages. I accept his calculations¹⁴ with the following exception: the claim for \$590¹⁵ for the two week of 10-16 & 17-23 November 2014 does not accord with the information contained in his

¹³ Including wages that were returned to Mr Patel

¹⁴ Pursuant to s 132(2)

¹⁵ This sum appears to be relate to alleged repayments to Mr Patel. The diary records Mr Sharma withheld these payments.

personal diary. I have subtracted that sum from Mr Sharma's calculations. Mr Sharma is owed \$17,851.65 (nett) for unpaid wages.

Annual holiday pay

[49] There is no dispute that Mr Sharma did not take, nor was he paid, his entitlement to annual leave. Based on calculations that Mr Sharma's gross earnings (if paid according to the contractually agreed rates) equals \$52,249.10 he is owed \$4,179.92 (gross) in holiday pay.¹⁶

Public holidays and alternative holidays

[50] Section 50(1)(a) of the Holidays Act 2003 requires an employer to pay the employee's relevant daily pay that relates to the time actually worked on a public holiday plus half that amount again. Section 60(1)(b) of the Holidays Act 2003 provides that if the employee has not taken the alternative holiday before the date on which his or her employment ends, payment for the alternative day must be at relevant daily pay on the last day of employment.

[51] Payment of outstanding wages for days worked has already been calculated in this determination and forms part of the reimbursement for unpaid wages. What has not been calculated is payment of an additional 0.5 payment for each hour worked on a statutory holiday. Mr Sharma worked 71 hours at \$15.30 per hour and 33.5 hours on \$17.80 on public holidays over the duration of his employment.¹⁷ He is entitled to \$841.30 (gross) to make up the shortfall in public holiday payments.

[52] Mr Sharma is owed \$1860.10 (gross) in alternative holiday pay.¹⁸

Sick leave

[53] Mr Sharma claimed 10 days sick leave on the basis that he was entitled to 5 sick days every six months. He is mistaken in that view. His employment agreement states he is entitled to payment of 5 sick leave days a year after six months of continuous service. I have identified 2 days in which Mr Sharma was sick.¹⁹ He is owed \$275.40 (gross) to reimburse his entitlement to paid sick leave for those two days.

¹⁶ 8% of gross earnings

¹⁷ as identified in the diary photographs

¹⁸ 71 hours x \$17.80

¹⁹ 17 & 18 September 2014

Orders

[54] Mr Chetanbhai Patel and Mohnakshi Enterprises Limited are jointly and severally liable to pay Mr Amit Sharma:

- (a) \$17,851.65 (nett) in unpaid wages; and
- (b) \$4,179.92 (gross) in annual holiday pay; and
- (c) \$841.30 (gross) as reimbursement for short paid public holiday entitlements; and
- (d) \$1,860.10 (gross) in alternative holiday pay; and
- (e) \$275.40 (gross) to reimburse unpaid sick leave entitlements; and
- (f) Interest at 5% per annum on the above sums commencing 19 January 2015 until paid.²⁰

Costs

[55] Mr Sharma was self-represented. There is no order for costs.

Michele Ryan
Member of the Employment Relations Authority

²⁰ Schedule 2, clause 11 of the Act gives the Authority power to award interest in matters involving the recovery of money at the rate prescribed under section 87(3) of the [Judicature Act 1908](#). The prescribed rate is currently 5% per annum