

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 86  
5440498

BETWEEN SAID KHALIL  
Applicant

A N D BEHZAD DARVISH, PAULINA  
DARVISH  
Respondents

Member of Authority: T G Tetitaha

Representatives: The Applicant in person  
B Darvish in person  
No appearance by Respondents

Date of Minute: 28 March 2017

---

**ORAL DETERMINATION  
OF THE EMPLOYMENT RELATIONS AUTHORITY**

---

- A. Said Khalil was employed by Behzad Darvish between 1 May 2011 to 1 March 2013**
- B. Behzad Darvish is to ordered to pay Said Khalil wage arrears totalling \$16,627.82 pursuant to s131 ERA comprising:**
- a) Underpayment of wages of \$3,358;**
  - b) Annual leave owed of \$7,834.32**
  - c) Underpayment for working 19 public holidays days of \$1,844.50;**
  - d) Alternate holidays of \$3,591**
- C. Behzad Darvish is to pay \$71.56 as a contribution towards Said Khalil's costs.**

## **Employment Relationship Problem**

[1] Said Khalil says he was employed by Behzad Darvish also known as Behzad Varchehzadeh and is owed wages and holidays.

### **Relevant Facts**

[2] Behzad Darvish owned and operated two restaurant businesses in Victoria Street and Beach Road known as Chargrill Burgers. Paulina Darvish is his wife. It is understood she owned the shop at Victoria St where Behzad operated his restaurant.

[3] Said Khalil is an Egyptian refugee immigrating to New Zealand in 2008. He married a Cook Islander, settled in Auckland and went looking for employment.

[4] On 1 May 2011 Said approached Behzad. Said could make traditional 'shisha' a flavoured tobacco known as hubbly bubbly vaporized and smoked in a hookah pipe. Behzad could charge \$22 pp for the shisha. Behzad offered Said a job preparing shisha, working as a kitchenhand and wait staff. He was paid in \$1,000 cash per week by Behzad.

[5] On 21 July 2011 Behzad incorporated a company known as Chargrill Burger Limited (CBL). Behzad was the sole shareholder and director of CBL.

[6] On or about 1 May 2012 Said and all other staff were asked by Behzad to sign an employment agreement. The agreement named CBL as his employer. Said is illiterate and cannot read or write. He acknowledges he signed the agreement but did not understand its effects at all. No one read or explained it to him before signing. He was not given any access to legal advice. He was asked to sign it on the day it was presented to him. He never had anything to do with CBL throughout his employment to his knowledge.

[7] From 1 March 2013 Said accepts Manpreet Kaur and her company Char Grill Burgers And Pizzas Limited (CBPL) took over his employment until it terminated on 9 November 2013.

[8] On 20 November 2013 filed a statement of problem with the Employment Relations Authority. The Statement of problem named CBPL, Manpreet, Behzad and Paulina as respondent employers. Said sought wage arrears.

[9] Following a two day hearing in 2013 Said settled his claims against CBPL and Manpreet on 29 May 2014. A consent determination was issued. The settlement relates to the period he was employed from 1 March to 9 November 2013.

[10] Said now seeks to recover wage arrears for unpaid wages and holiday pay from the period of his employment from 1 May 2011 until 30 April 2013. He alleges Behzad was his employer.

### **Determination**

[11] Behzad was directed to file Said's wage and leave record. He has filed no records for the period prior to 30 October 2011. He filed a PAYE Record for Said showing payment of wages by CBL from 30 October 2011.

[12] The documents filed do not comply with the wage and leave records an employer is required to keep at law.<sup>1</sup> The absence of a compliant wage and leave record has prevented Said from bringing an accurate wage arrears claim. Unless there is evidence to the contrary, I may prefer Said's evidence about his hours of work and wages owed.<sup>2</sup>

[13] I have heard evidence from Said alone. Behzad has failed to attend the meeting. He was aware the investigation meeting was happening today because it was set down during a telephone conference he attended on 2 February 2017. There is no good cause shown for his absence today. The Authority Officer emailed Behzad about the hearing this morning. Following the evidence and just prior to the issue of my decision, the Authority Officer brought in an email from Behzad seeking to attend by telephone. He is currently in Iran.

[14] Attempts to call Behzad by telephone were unsuccessful. Given the age of this file, the difficulties to date with contacting Behzad and the late request to be connected by telephone today, I intend proceeding in his absence.

---

<sup>1</sup> Section 130 Employment Relations Act 2000; s.81 Holidays Act 2003.

<sup>2</sup> Section 132 Employment Relations Act 2000; s.83 Holidays Act 2003.

## Identity of employer

[15] CBL and Behzad have been before the Authority on a number of occasions.<sup>3</sup> There are similar themes to those evident here - lack of accurate record keeping, changes in employers and unpaid wages. The Labour Inspectorate was awarded penalties against CBL on one occasion. Ironically this involved MK and her company CBPL.

[16] One Authority decision indicates Behzad was operating the same business using a company known as Chargrill Kebabs and Pizza Limited (CKBL).<sup>4</sup> There is no evidence CKBL was Said's employer. Similarly there is no evidence PD was involved in his employment at all.

[17] Two employment agreements between Said and CBL have been produced. Both seem to have been signed on different dates. Said is certain he signed one agreement not two. The PAYE records state CBL was deducting Said's taxes from 30 October 2011 yet there is no evidence of payment to IRD. I have concerns about the authenticity of the employment agreements and the PAYE records.

[18] Inland Revenue Department records showed CBL was his named employer/payer of taxes from 1 May 2012. This is not determinative of his employment status.

[19] Said is illiterate. This was evident during his evidence today. I am not convinced he was aware CBL was his employer even today. There is evidence Behzad continued to pay Said by way of cheque from his personal account throughout 2012.

[20] I am not required to accept any statement that describes the nature of the employment relationship. I must consider all relevant matters.<sup>5</sup> I decline to accept the employment agreement Said signed determined the identity of his employer in these circumstances. In my view Behzad remained his employer throughout the relationship irrespective.

---

<sup>3</sup> *Ingham (Labour Inspector) v Chargrill Burgers Ltd* [2013] NZERA Auckland 152; *Ingham (Labour Inspector) v Chargrill Burgers Ltd* [2013] NZERA Auckland 429; *Sharma v Chargrill Burgers Ltd* [2013] NZERA Auckland 527; *Ingham (Labour Inspector) v Chargrill Burgers Ltd* [2016] NZERA Auckland 19.

<sup>4</sup> *Sharma v Chargrill Burgers Ltd* [2013] NZERA Auckland 527.

<sup>5</sup> Section 6(3) Employment Relationship Act 2000.

## **Minimum wage claims**

[21] Said's evidence was he worked 78 hours per week in the period 1 May 2011 to 1 March 2013 paid at the rate of \$12 per hour.

[22] No record of hours kept. The hours he gave me in evidence added to substantially more than 78 hours. From his evidence I was convinced he did work 78 hours per week and was paid \$1,000 cash per week.

[23] The oral agreement between Behzad and Said did not provide for payment overtime at 1.5 times his hourly rate. Therefore he is only entitled to the minimum amounts prescribed at law.

[24] Between 1 May 2011 and 30 March 2012 the law provided for the payment of a minimum of \$13 per hour.<sup>6</sup> Between 1 April 2012 and 1 March 2013 the minimum wage rose to \$13.50 per hour.<sup>7</sup>

[25] Therefore Said is owed the difference between the amounts received and owed at law. Said worked for 95 weeks from 1 May 2011 to 30 March 2012 (43 weeks) and 1 April 2012 to 1 March 2013 (52 weeks). There are wage arrears of \$3,358.<sup>8</sup>

## **Annual Leave**

[26] I accept he took no annual leave. He has accrued 4 weeks leave for the period 1 May 2011 to 30 April 2012 totalling \$4,212.<sup>9</sup> He is also owed 8% annual leave on his gross earnings for the period from 1 May 2012 to 1 March 2013 totalling \$3,622.32.<sup>10</sup> He is therefore owed annual leave of \$7,834.32.

## **Public Holidays**

---

<sup>6</sup> Minimum Wage Order 2011.

<sup>7</sup> Minimum Wage Order 2012.

<sup>8</sup> \$43,602 (wages owed for 43 weeks @ 78 hours per week or 3354 hours @ 13 per hour).  
\$54,756 (wages owed for 52 weeks @ 78 hours per week or 4056 hours @ 13.50 per hour).  
\$98,358 (wages owed) less \$95,000 (wages received \$1,000 per week) leaves \$3,358.

<sup>9</sup> This is based upon his ordinary weekly pay being \$1,053 (78 hours @ 13.50 per hour).

<sup>10</sup> \$45,279 (gross earnings based upon 43 weeks @ \$1,053) 8% equals \$3,622.32.

[27] From 1 May 2011 and 1 March 2013 there were 19 public holidays.<sup>11</sup> An employer is required by law to pay time and half for each hour worked on a public holiday.<sup>12</sup> I accept Said's evidence he worked 14 hour days on all public holidays. He is entitled to an additional \$6.50 for each hour worked on a public holiday until 30 March 2012 and \$7.25 for each hour worked on a public holiday thereafter. He is owed a further \$1,844.50.<sup>13</sup>

[28] He is also owed 19 alternate holidays. His relevant daily pay was \$189. He is owed \$3,591 for his alternate holidays not taken or paid.

[29] The following orders are now made:

- A. Said Khalil was employed by Behzad Darvish between 1 May 2011 to 1 March 2013
- B. Behzad Darvish is to ordered to pay Said Khalil wage arrears totalling \$16,627.82 pursuant to s131 ERA comprising:
  - a) Underpayment of wages of \$3,358;
  - b) Annual leave owed of \$7,834.32
  - c) Underpayment for working 19 public holidays days of \$1,844.50;
  - d) Alternate holidays of \$3,591
- C. Behzad Darvish is to pay \$71.56 as a contribution towards Said Khalil's costs.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

---

<sup>11</sup> **2011** Queens Birthday (6 June); Labour Day (24 October); Christmas Day (27 December) Boxing Day (26 December); **2012** New Years Day (3 January); Day after New Years (2 January); Auckland Anniversary (30 January); Waitangi Day (6 February); Good Friday (6 April); Easter Monday (9April); ANZAC day (25April); Queens Birthday (Monday 4 June); Labour Day (22 October); Christmas Day (25 December) Boxing Day (26 December); **2013** New Years Day (1 January); Day after New Years (2 January); Auckland Anniversary (29 January); Waitangi Day (6 February).

<sup>12</sup> Section 50 Holidays Act 2003.

<sup>13</sup> 8 public holidays worked to 30 March 2012 x 14 hours x 6.50 per hour equals \$728; 11 public holidays worked to 1 March 2013 x 14 hours x 7.25 equals \$1,116.50. The total owed for working on public holidays is \$1,844.50.