New Zealand Employment Relations Authority Decisions

Khan v Harun Ali t/a Mod Fab AA 278/02 (Auckland) [2002] NZERA 480 (16 September 2002)

Last Updated: 13 December 2021

Determination Number: AA 278/02 File Number: AEA 773/01

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND OFFICE

BETWEEN Yakub Mohammed Khan

AND Harun Ali t/a Mod Fab

REPRESENTATIVES David Ryken for Applicant

Alan Roberts for Respondent **MEMBER OF AUTHORITY** Tom Woods **INVESTIGATION MEETING** 19 August 2002

DATE OF DETERMINATION 16 September 2002

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Mr Harun Ali is the Managing Director of a company, which trades as Mod Fab Wholesalers. The company manufactures lounge suites. He employed Mr Khan as a sewing machinist. The nature of Mr Khan's employment problem while Mr Ali employed him is twofold. First, he says that he was disadvantaged in his work by the unjustified actions of Mr Ali. Mr Khan claims that Mr Ali took advantage of his severe poverty and immigration status by making him work in sweat shop conditions at piece rates. Under this heading, Mr Khan claims $20,000 compensation. Second, Mr Khan claims unpaid wages and holiday pay for the period of his employment, which he says commenced in February 1997 and finishing in December 2000.

Mr Ali accepts that he did employ Mr Khan in February 1997 but says that he terminated his employment in December 1999 on account of him establishing that Mr Khan did not have the necessary visas and permits to work in New Zealand. Mr Ali rejects that he coerced Mr Khan to work for him under oppressive circumstances and that he was properly paid (including holiday pay) for his work.

Factual circumstances

Mr Khan presented to me as a humble and religious man of relative unsophistication. His is from an improverished background, especially by New Zealand standards. He originates from the village of Ba in Fiji where his wife and three children reside. Mr Khan holds a Fiji passport. He is skilled as a tailor. In 1987, Mr Khan's business suffered as a result of the coup. Then in 1993 flooding damaged his shop. As a result he was left destitute and very poor. In 1997 he sought to improve the situation of his family by seeking work in New Zealand. He was granted on 2 January 1997 a visitor's visa for 5 weeks expiring on 31 January 1997. Special conditions attached to his visa prohibited Mr

Khan from working or study whilst in New Zealand. Leaving his wife and children behind, he nevertheless left Fiji and

arrived in Auckland on the 5 January 1997 to look for work.

Shortly after his arrival to New Zealand a friend, Mohammed Fayaz, introduced Mr Khan to Mr Ali. According to Mr Khan's version of events, when Mr Ali learnt of Mr Ali's situation of wanting to work he offered to help him out. Several attempts he said were made to extend his visa in this initial period but was declined. According to Mr Khan, Mr Ali received a facsimile to that effect at his work place on 11 February 1997. It was at that point according to Mr Khan's version of events, that Mr Ali assured him not to worry and that he would attend to the matter on the condition that he would work for him.

At this juncture, I need to set out Mr Ali's explanation of what happened. His interpretation of events is different. From the very outset Mr Ali said he was prepared to offer Mr Khan a job on the condition that he was able to provide documentary evidence (Passport) of his capacity to undertake work in New Zealand. Mr Khan said he could not provide his Passport as he sent it to Fiji to be renewed. Mr Ali said he was advised that once the Passport had been returned it would be sent to an Immigration consultant to make application for permanent residence. Mr Ali said he requested that Mr Khan put that in writing. According to Mr Ali, he did so in a letter signed by him dated 6 May 1997. The letter read:

I, Mohammed Yakub Khan give written undertaking that I hold a work permit and I am legally allowed to work in New Zealand. Because my Passport is sent to Fiji for renewal I will show it to you when I get back. I will take liability for this and wish to thank you for understanding and giving me a job.

Mr Khan acknowledged that he signed that letter but says that he did so in 2000. He said he did not write that letter or that he understood its contents. By his recollection Mr Khan said it was undated when he signed it.

Whatever version is correct, it is common ground that Mr Ali employed Mr Khan in February 1997 on an agreed hourly rate of $8.00. The wage book was produced which on its face indicates that Mr Khan consistently worked 40 hours per week and was paid a net weekly wage of $255.80. Holiday and leave pay is on the record accounted for. Mr Ali says that after two weeks of employing Mr Khan he decided to employ him full time.

Mr Khan's version is that after two weeks employment he was told by Mr Ali that he would be paid piecework instead of an hourly rate. Mr Khan said he agreed to that but says he did so under circumstances that he had no choice but to accept piecework. Initially, the piecework rate was acceptable. He was paid for example $9.00 to complete a job that took one hour. However, Mr Khan testified that things changed. He was required to do other piecework that took longer to complete at rates that varied. None of the changes were agreed to. In the end, he said he had to work long hours, up to 100 hours a week, often he said up to 18 hours a day in order to earn enough money to send back to his family in Fiji. Mr Khan testified that there were periods when there was no work during which time he would sleep. He said he was allowed to attend the Mosque on Fridays. He admitted that he signed the wages book but did so at the end of the year. Payments were made in cash. He denies that he ever took leave or received holiday pay.

Mr Khan said he initially recorded his piece work payments in an exercise book. He alleges that Mr Ali took that book off him in June 1998. He then said he continued to independently record his earnings in another book, which he says Mr Ali again took away from him in middle 2000 due to IRD concerns. Mr Ali denied such allegations. Mr Khan did however produce a rather tatty 3B1note book. Given its state of repair it is obviously important and contains phone numbers and other

pieces of personal information. The second to last page however records payments that Mr Ali says were owed to him for piece work undertaken over an 11 week period from 5 July 1998 to 19 September 1999. The payments vary from $98 one week to $408 in another.

Mr Khan did produce evidence of making payments to his wife in Fiji. In evidence he indicated that 50% of his funds were sent back to his family. Such transactions were well documented during 1999. In that period Mr Ali was able to use a family contact in Wellington to remit an exchange of favours (by payment of cash) effected at both ends between family members. This preferred way was not available to Mr Ali by the end of 1999 as his Fiji contact migrated to New Zealand. Mr Ali evidenced his year 2000 transactions, which he conducted through the Singapore Exchange. Just two transactions were evidenced in 2000. The first was made on or about 30 June 2000 and the second on or about 5 December 2000. The amounts were $515 and $450 respectively. Mr Khan said he is unable to produce further evidence of payment receipts due to a burglary of his premises last year.

It is common ground that Mr Khan never worked in Mr Ali's factory. Mr Khan said he worked and lived on premises dictated by Mr Ali and away from public scrutiny. Mr Khan said that from the commencement of employment until July 1998 he worked and lived in premises that was used by Mr Ali for storage. From July 1998 he moved into a garage located on Mr Ali's residential premises. Mr Ali said he lived, cooked, slept and worked in the same room. He said he initially worked and lived in a basement under Mr Ali house. He moved to the garage after complaining about water and dampness. The garage was renovated in late 1999 to provide for separate work and accommodation areas. Mr Vevers a Labour Inspector witnessed the garage premises in December 2000. He was of the opinion that the provisions for accommodation and working were those of sweatshop conditions.

Mr Ali said that throughout the period of employment Mr Khan was doing other work as the hours provided by him was not

enough. Mr Ali's wife also testified that Mr Khan did casual work. She recalled him doing painting work and picking onions. Mr Ali said that Mr Khan was free to chose the hours he worked in order to accommodate other work but was required to work exclusively for him 8 hours a day. He said it was an arrangement of convenience.

Mr Khan denied that he willingly chose to live and work in the garage in order to suit his convenience of work. No evidence of other work other than allegations was provided. Evidence was given of a discussion involving a building project but nothing eventuated from that.

Mr Khan alleges that Mr Ali denied him freedom of movement and association and that he was to keep his presence and work a secret. The restrictions were essentially to maintain that secrecy. He said that Mr Ali forbade him from discussing with anyone the fact that he was working and that he was an overstayer. Apart from two distant relatives, he said no one was allowed to visit him. Mr Ali denied this allegation. Two witnesses who were acquaintances of Mr Ali and who knew Mr Khan both testified that on the occasions they saw him there was no constraint on his freedom. It is common ground that Mr Khan was provided a cellular phone and that a phone (with a separate line) was installed in the garage. Mr Ali said that Mr Khan was free to call who he liked although Mr Khan disputed that. In fact Mr Khan says it was an issue over him making a phone call that resulted in him leaving.

There is a dispute as to when Mr Khan's employment ended. Mr Khan says it ended 10 December 2000. Mr Ali says he terminated Mr Khan's employment on 22 December 1999.

Mr Khan's version of the facts is as follows. He contends that he continued to work under the conditions as he described throughout 2000. Mr Khan could only rely on Mr Fayaz, one of few

friends that he says was allowed to visit him, to support the allegation that he worked throughout 2000. Mr Fayaz could only confirm that he regularly dropped Mr Khan off at Mr Ali's residence and to say that he never stopped living or working there until December 2000. Mr Fayaz said that he went into the garage only on two or three occasions and said in one instance Mr Khan was working. Mr Vevers could not provide any further assistance. He said when he observed the premises in December 2000, there were bits of material about and two sewing machines. He was unable to make judgement whether the machines were working. He said actual pieces of work were not evident, only off cuts. Mr Vevers said he was present when Mr Khan telephoned the IRD to establish whether his employer had been declaring earnings. Mr Khan was told that for the year ending March 2000, the respondent had paid $2992.98 in PAYE tax.

Mr Khan also referred to various phone calls that were made from the premises in this period. The pattern of the calls and times that they were made (frequently in the evening) suggest that Mr Khan was regularly on the premises. Mr Khan says that the calls are consistent of him living there.

In November 2000 Mr Khan says a dispute arose between him and Mr Ali. The dispute according to Mr Khan was over the use of his phone. The details are not important. Mr Khan said the situation was very unpleasant and caused him to walk away and go somewhere else. That happened on or about 10 November 2000.

In early December 2000, Mr Khan contacted a voluntary social worker, Mr Mohammed Aslam Khan ("Aslam"). Aslam often speaks on the radio advocating workers rights especially about the exploitation of workers. Mr Khan knew Aslam through the radio. Aslam assisted the investigation. He said that he received a phone call in November 2000 from a person who he identifies as Mr Khan. He said he eventually met Mr Khan on 11 December 2000. He said Mr Khan appeared frightened and contacted him under a false name seeking help. Aslam said that Mr Khan told him that he was an overstayer held as "a prisoner" by his employer and having to work long hours for very low piece rates. Aslam said he assisted Mr Khan to contact the Employment Relations Service. Mr Khan met Mr Vevers a Labour Inspector on 12 December 2000. He filed a complaint with the Labour Inspectorate claiming non-payment of wages and holiday pay. In the course of that investigation, Mr Vevers reported that Mr Khan left the garage on Sunday 10 November 2000 to seek assistance. He said he packed most of his belongings but was locked out. Mr Ali said he did not respond to his calls.

On the 12 December 2000, Mr Vevers said he arranged to recover Mr Khan's possessions. Mr Ali told Mr Vevers that Mr Khan was dismissed in December 1999 as an overstayer and was adamant that he did not work for him since then. Mr Ali confirmed that Mr Khan was offered accommodation, as he had nowhere else to go.

On 7 December 2000, Mr Khan through his lawyer wrote to the Minister of Immigration seeking residence in New Zealand based on policy at the time relating to overstayers. The Minister declined his application for residence. Mr Khan received that advice on 12 December 2000.

Mr Ali's version is as follows. Mr Ali said that it became apparent that Mr Khan did not have the necessary documentation to work in New Zealand. He said that had become known within the Indian community. On 22 December 1999 Mr Khan was handed a letter terminating his employment. The company advertised and appointed a replacement machinist. Apparently Mr Khan vacated the garage at this time.

Mr Ali said that following his departure Mr Khan would on occasions visit him to use the telephone and shower. In 12 July

2000, Mr Khan requested their help. He said he was lodging an application for permanent residency and asked to stay with them for a short period. According to Mrs Ali she

told her daughter to help Mr Khan compose in writing what he wanted. She did so with his help. The letter read:

To Harun and Nadira

I make a special request to you both to help me.

I am lodging an application for residency consideration under the new policy.

I know you have a spare room/caravan. If only you could let me stay for a short period for free.

I have a family to look after and by working in gardens and other casual work I only manage to earn enough to send to Fiji for my wife and children.

While staying I will help doing your lawns or any other house work. Please help me as this is my last chance as I have nothing in Fiji.

The letter was signed by Mr Khan and witnessed by Frances Malcolm who is a Justice of the Peace. Mr Malcolm said that Mr Khan assured him that he understood the content of the letter before he signed. He then witnessed Mr Khan's signature. According to Mr Ali, Mr Khan stayed with them until December 2000.

In September 2000 Mr Khan did contact a solicitor to make application for residency. His solicitor did fill out an application to the Removal Review Authority but there is no indication whether it was filed. The application did note Mr Khan declaring that he "worked" for Mod Fab Limited at the time he signed the application on 29 September 2000. What is significant, is that his solicitor decided to make application for special direction to the Minister of Immigration after September 2000 and that the Ali's assisted him in preparing a report to accompany that application. A letter to Mr Khan's lawyer signed by Mrs Ali dated 20 November clearly confirms that. The lawyer sent that application to the Minister on 7 December 2000. It was declined on 12 December 2000.

It was then that according to Mr Ali that Mr Khan informed him that he would return to Fiji. Mr Khan packed his bags and said he was going to see friends and would be making arrangements to fly back home. It was within the next few days that Mr Vevers contacted them.

Mr Khan withdrew his claim with the Labour Inspectorate on 2 May 2001.

Evaluation

The main thrust of the applicant's employment problem centres around the alleged sweatshop circumstances he was kept in and in the allegations of having to accept piece rate work which required him to work long hours in order to make ends meet. Mr Ryken submitted that the essential issue in that regard is whether or not the employer used the applicant's immigration status to coerce the conditions of employment. That issue concerns the applicant's disadvantage claim. I will deal with that matter first before attending to the other aspect of the employment problem concerning a claim for recovery of wages.

The particulars of disadvantage alleged by the applicant arise from the claim that he was forced to work in oppressive circumstances due to his immigration status. Central to that is the applicant's claim that his employer forced him to work at piecemeal rates rather than at the hourly rate he says was the agreement between the parties. The argument is that the respondent unilaterally changed his employment contract to be paid a wage in relation to output rather than an hourly rate.

To start with, the applicant says that he initially accepted piecework as the rate at $9.00 a piece, for the furniture he was then working on. He said that was a good rate given the time he could complete the job. But then he says the rates were varied without agreement to an extent he was required to

work long hours in order to maintain parity with the initial rate of $9.00. Given that testimony, I would have no hesitation in finding that the applicant agreed to piecework but that his grievance is in relation to the piece rates that he says the respondent imposed on him. However, the applicant's case is that the agreement was given under circumstances that he could not reject. It is an allegation raised to support his claim that he was required to work under oppressive conditions. Whether the applicant performed piecework or not is relevant in regard to the wage claim. I find that there is nothing to support the claim that piece rates were paid. The evidence points in all probability that the applicant was paid a wage consistent to that noted in the wage book. The reason for that can shortly be stated.

The applicant says he was paid all monies that were earned for the piecework that he undertook. In fact he said he would have likely earned more doing piece work than he would have earned otherwise except that he was required to work

significantly longer hours. In the statement of problem the applicant claims that he earned approximately $60,800 gross wages in the employment period ending December 2000. That is no more than an estimate and a very rough one at that. The applicant conceded that the figure would need to be revised downwards due to an error in the hourly rate applied to the calculation. No documentation including IRD documentation could be evidenced to corroborate what in fact was his income.

The difficulty is that the applicant was unable to produce evidence of piecework. He did however produce a booklet showing weekly calculations, which he says was money that the respondent owed him. The payments he said represented piecework completed over an 11 week period. Mr Ryken submitted that despite a dearth of core evidence the booklet calculations do provide nonetheless a "window" into the situation that corroborates his claims.

The respondent denies that the applicant was paid piecework. All the documentation before me suggests that to be the case. Proof of the applicant's income would have greatly assisted me in determining the piecework issue. All that assists me are wage book records and PAYE payments to the IRD. Normally such evidence would be sufficient proof except that the applicant says that those records are fabrications designed to conceal the real circumstances of his employment. In responding to the notebook weekly calculations, the respondent say that it is problematical that such payments or sums relate to work income. If they do then the respondent says it is problematical that such sums relate to his employment and if they do relate to work income, then they relate to other work the respondent undertook.

Moving to more solid ground, there was evidence noted in documentation supplied by Mr Vevers of PAYE tax the respondent paid in the employment period ending March 1999. These figures are the only proof of payments actually made in relation to the applicant's employment. The IRD was able to confirm PAYE payments were made in respect to the applicant's employment. I was able to reconcile those figures with the net PAYE deductions recorded in the wage book. There is variation but the variation is not substantial. In other words, the IRD figures are generally consistent with the deductions noted in the wage book.

I was able to reconcile payments the applicant made to his wife with the wage book. In the period from April 1999 until December 1999, the applicant paid his wife $7,100. Apart from small variation, payments of $500 were paid at the start and the end of each month. The applicant said he retained only $100 to $200 out of his pay packet. According to the wage book, the applicant was paid in that period $10,943. As with the PAYE deductions, the evidence in this regard is consistent with the calculations recorded in the wage book. As the applicant was provided free board and meals the sum retained was in my opinion substantially in accord with his evidence.

In all the circumstances, I am led to the conclusion that on the balance of probability the applicant was paid the net wage consistent with that recorded in the wage book. Having come to that conclusion does not resolve the claim that the applicant worked under oppressive circumstances and that he worked more hours than he was paid for. It is this aspect of the disadvantage claim I will now address.

In order to have a personal grievance that raises allegations that an employees work is affected by some disadvantage, the conduct complained of must in accordance with s.103(1)(b) of the Employment Relations Act 2000 relate to some unjustifiable action by the employer. The word "unjustifiable" is to be read according to its ordinary accepted meaning. It is not confined to matters of legal justification. The Court of Appeal in *Auckland City Council v Hennessey [1982] ACJ 699:703* found that the integral feature of the word "unjustifiable" is the word unjust. That is to say not in accordance with justice or fairness. Therefore, a course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness. Whether such circumstances exist will depend upon the facts of the particular case including such matters as the nature of the employment and the occurrence that gives rise to the allegation of disadvantage.

It is common ground that the applicant arrived into New Zealand without qualification to work or study. Nevertheless, the applicant sought work. He found work with Mr Ali who was willing to employ him. It is common ground that Mr Khan worked and lived in a garage at Mr Ali's residential address. In all probability, the letter Mr Khan signed on 6 May 1997 claiming he had a work permit was drafted for Mr Ali's convenience. Mr Khan's status to undertake work was clearly problematical and the letter is designed to protect Mr Ali. Notwithstanding that, Mr Ali went ahead and employed Mr Khan for a period of almost three years. He did so knowing that he could terminate Mr Khan's employment with immediate effect at anytime on account of him not providing proof of his ability to undertake work in New Zealand. That is exactly what happened on 22 December 1999. For a period of three years the Sword of Damocles hung over Mr Khan knowing that his employment and ability to help his family was entirely at the sufferance of Mr Ali.

I must also take into account Mr Khan's circumstances. He was no doubt anxious to obtain work in New Zealand in order to earn income to send back to his family. I accept that when he arrived in New Zealand he sought to extend his visa, which was declined. In the circumstances he saw Mr Ali as the only realistic hope of obtaining stable employment. Mr Ali provided Mr Khan free accommodation which by all accounts was marginally suitable if at all. Moreover, the accommodation and place of work was secluded from public scrutiny. That must have appeared to Mr Khan an attractive proposition given the acute sense of vulnerability he must have laboured under throughout the whole ordeal.

Taking into account the evidence, as difficult a task it was, I accept overall Mr Khan's version of the facts to the extent that Mr

Ali took advantage of Mr Khan's situation in order for him to work in the circumstances that he did. The working environment that Mr Khan was subjected to might be the norm in other jurisdictions where workers rights are less valued. It was Mr Khan's vulnerability and sense of real urgency to earn income that Mr Ali took advantage of. That is evident on the facts without having to address the immigration issues. It is simply not acceptable in New Zealand for any worker despite their personal circumstances to put up with the working conditions that Mr Khan was subject to. I accept Mr Vevers observations as well as photographs that I have observed, that the working conditions give the impression of a sweat shop environment. I also accept the evidence that Mr Ali assumed significant control and a domineering influence over Mr Khan's personal affairs and work. I will not go as far to say as Mr Ryken submitted that Mr Khan was required to work in virtual slave conditions but accept that in order to keep his job, Mr Khan was required to keep the circumstances of his employment and private affairs a secret. Only a few friends ever visited Mr Khan. His public appearances were confined in the main to attending the

Mosque and shopping. Mr Khan was free to liase with Mr Ali's friends and persons who were familiar to him. Such was the case regarding a trip to Whanganui, as well as the fishing trip and wedding Mr Khan attended. Mr Khan's possession of a cell phone and personal access to a mainline phone and general behaviour suggests to me that there was a level of understanding and trust between Mr Khan and Mr Ali regarding his situation.

I will now address the allegation that Mr Khan had to work significantly more than 40 hours. This claim raises issue regarding the use of the garage to undertake the work. Mr Ali said it was an arrangement insisted by Mr Khan in order to suit his convenience. He said the hours he offered Mr Khan were not sufficient and that Mr Khan desired a flexible working arrangement that would enable him undertake casual day time work. Mr Ali said he agreed to that provided he worked for him 8 hours per day five days per week. He said the arrangement invariably meant that he had to undertake night work in order to complete his work. The evidence in regard to this issue was very conflicting. Mr Khan simply denied he performed other work and was required to work exclusively for Mr Ali and for long hours.

I do not accept in the circumstances that an arrangement such as explained by Mr Ali existed. I do accept that perhaps Mr Khan might have at times performed other work but he would have done so under Mr Ali's control. That would be consistent with the way the relationship existed having regard to Mr Khan's circumstances. Overall, I accept on the balance of probability that Mr Khan did at times work beyond that standard 80 hours per week as shown in the wage book. Having said that, Mr Khan might have also worked less than the 80 hours. At times he said there was no work. But the distinct impression was that he more often than not worked more than 80 hours per week including statutory holidays. He was I believe required to work whenever the demand was present.

As I have earlier found the evidence falls short on the balance of probability that Mr Khan was paid piecework in relation to output. I think the real nature of Mr Khan's grievance under this heading is that he was not paid the hours he worked. For the purposes of proving a disadvantage the unjustified action would be him having no option but to work the longer hours which would include holidays. That I am satisfied happened.

I will now address the circumstances that resulted in the termination of Mr Khan's employment. Mr Ali said he terminated Mr Khan's employment on account of him not providing evidence that he was qualified to work in New Zealand. I do not accept that as the reason that motivated the decision to terminate the contract. I believe that the primary reason was when Mr Khan's immigration circumstances became public knowledge within the Indian community. That was in all probability the event that triggered Mr Ali to respond to Mr Khan's situation in the way he did. Mr Ali testified that the public awareness of Mr Khan's circumstances was a concern at that time. At that point I believe that the continuation of Mr Khan's employment had become too problematical. Having come to that conclusion, I accept that Mr Khan's employment did terminate on 22 December 1999.

With regard to the factual issues that follow termination, I accept the respondent's evidence. However, I am of the opinion that in all probability Mr Khan following the 22 December 1999 did the odd job for Mr Ali until a replacement worker was appointed and trained by Mr Khan. Otherwise he survived by other casual work. The circumstances that Mr Khan found himself in following the termination forced him I believe to take steps to rectify his situation. The evidence clearly presents that picture. There is no evidence to suggest that for the previous three years, apart for a very short period at the very beginning of his arrival in New Zealand, that he took any steps to resolve his immigration situation. The termination of his job with Mr Ali was undoubtedly distressing for him. Unless he could rectify his situation with the immigration authorities he would have little option but to face the real prospect of returning to Fiji. It was a matter of coincidence that in 2000 new immigration rules concerning removal came into force as provided by the Immigration

Amendment Act 1999. Mr Khan took advantage of the new rules to address his situation. In doing so, he sought the help of Mr Ali and his wife. Notwithstanding the difficulties Mr Khan says he had with the Ali's in this period, the plain fact is that they did assist him in his immigration applications and provided him lodgings. Mr Khan endeavoured to present evidence that they did so for reasons other than on compassionate grounds. The point is that if the Ali's desired to protect their interests they would have completely disassociated themselves from Mr Khan. They did not do so. Instead they helped him in putting together documentation to support his applications to the Immigration Authorities and in particular to the Minister of Immigration. The Ali's were actively assisting Mr Khan as late as 20 November 2000. According to the evidence, Mr Khan's

relationship with the Ali's had broken down before that date.

Although Mr Khan was never qualified under Immigration legislation to work, it is not illegal for him to obtain work. Neither should I add are his rights as an employee affected in the matter before me. It is however illegal for an employer to employ a person not having the qualification to work in New Zealand. Section 39 of the Immigration Act 1987 states that an employer commits an offence who allows or continues to allow any person to undertake employment knowing that the person is not entitled to undertake employment. Similarly, s.142(f) of the Immigration Act 1987 makes it an offence to aid, abet, incite, counsel or procure any person to remain in New Zealand unlawfully or to breach any condition of a permit.

In obtaining work, Mr Khan despite his status is entitled in my opinion as a matter of public policy to the protections that the law provides. That is reinforced by the enactment of s.39A of the Immigration Amendment Act 2002 which makes it an offence for employers to exploit workers who otherwise are not entitled to work. The issue of employment status interesting enough might be relevant under the Human Rights Act 1993, notably s.22 as the employment protections contained in that section only apply where an employee is "qualified" for work. That may well cover an employee's work status under immigration law. However, as interesting that may be, Mr Khan is entitled to the protection of the Employment Relations Act and related employment legislation.

In dealing with this aspect of Mr Khan's grievance, the question that I am required to address is whether he was disadvantaged by actions of the respondent that are not in accord with justice and fairness. If not, then the actions are unjustifiable. I accept as indicated that Mr Khan was not treated in all respects fairly and justly in the circumstances of his employment. Mr Khan was employed under conditions that one should not expect to find in New Zealand. I find that in all probability Mr Khan carried out his job in circumstances that were akin to sweatshop conditions. Sweatshop systems are operated by means of oppression in which the dignity of workers are denigrated and basic rights abused. I will not go so far to say that Mr Ali by nature is a sweatshop operator. He and his wife did not give me that impression. But in the special circumstances of this case, I am satisfied that Mr Ali took advantage of Mr Khan's employment status and personal circumstances in order to gain a benefit out of the employment relationship that he otherwise could not have obtained. The actions of Mr Ali were unjustified and disadvantaged Mr Khan in his employment.

I accordingly find that Mr Khan has a personal grievance.

Remedies

Mr Khan seeks compensation of $20,000 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000. Taking into account the employment circumstances and circumstances on which disadvantage is founded an award of $9,000 is warranted. I am required to consider if that award should be reduced in accordance with s. 124 of the Act. Section 124 of the Act provides:

Remedies reduced if contributing behaviour by employee

Where the Authority or the Court determines that an employee has a personal grievance, the Authority or Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,-

> *(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
> *(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

Under that section, it is mandatory requirement that the Authority consider the extent to which the actions of the employee contributed to the situation that gave rise to the personal grievance. The Authority is also obliged (in a remedies setting) to reduce the remedies that would otherwise have been awarded "if those actions require".

In *Paykel v Ahlfeld [1993] 1 ERNZ 334;336* the Court identified that the application of s.40(2) Employment Contracts Act 1991 (now s.124 ERA) required a three-stage process. As noted in Brookers Employment Law ER123,09 the stages are:

> (a) There must be a personal grievance. I point out that under the Employment Relations Act 2000,

s.124 applies to all heads of personal grievance and not just to personal grievances by reason of unjustifiable dismissal as was the case under the ECA.

> (b) The extent to which the employee's actions contributed to the situation, giving rise to the grievance has to be determined. Causation issues are determined at this stage, not blameworthiness of actions. Actions include actions or omissions.
> (c) If there is a casual connection, the Authority "shall" determine whether those actions require a reduction in remedies. Actions requiring a reduction would loosely be blameworthy actions.

In *Macadam v Port Nelson Ltd (No2)* *[1993] NZEmpC 38*; *[1993] 1 ERNZ 300*;*304-306,* held that fault is a matter of causation (considering conduct bearing on the situation giving rise to the grievance), and proportionality (in relation to the situation and not punitive), and is to be determined by the application of common sense.

As to the meaning of the term "the situation that gave rise to the personal grievance", Palmer J in

County Fare (Christchurch Ltd) v Dixey *[1995] NZEmpC 78*; *[1995] 2 ERNZ 372* held that the phrase means:

...obviously the entire situation and not simply that part of it which is concerned with the process and manner in which the dismissal was carried out.

Mr Khan was never qualified to work in New Zealand. Nevertheless he obtained work. His employer was in my opinion aware of his employment situation. Parliament has taken steps in the Immigration Amendment Act 2002 to protect the exploitation of workers not entitled to undertake employment by imposing very strict penalties that range up to 7 years imprisonment and a fine not exceeding $100,000. The vulnerability of this type of employee is recognised and it is a matter of public policy that they not be exploited. That would in terms of s.103(b) of the Act extend to employers not to disadvantage such workers employment by some unjustifiable action.

I will now apply the 3 staged process as set out in *Paykel* to assess contribution. I have found that Mr Khan has a personal grievance. In applying stage 2, it could readily be said as advocated by Mr Roberts that Mr Khan's own actions contributed to the situation he found himself in. In this case there is casual connection. Therefore I must now consider the 3rd step and ask whether his action requires a reduction in remedies. Blameworthiness is relevant at this point. It is evident that Mr

Khan only took steps to address his situation after Mr Ali terminated his employment. It was also evident that Mr Khan was prepared to suffer the consequences of employment in order to send money back to his family, which was his priority. Obviously Mr Khan's employment would have terminated as soon as he disclosed his situation. Overall, Mr Khan must accept some responsibility, which I put at 40%. The $9,000 nominal award is reduced by 30% to $6,300. I thereby order that Mr Harun Ali is to pay Mr Khan the sum of $5,400.00 compensation, without reduction, pursuant to section 123(c)(i) of the Employment Relations Act 2000.

Wage claim

I am satisfied that Mr Khan was not paid piece rates as he contended. The evidence points in all probability that he was paid as the respondent claimed a standard hourly wage of 8.00 per hour for a 40 hour week. The respondent said that no overtime was paid. I am satisfied on the balance of probability that Mr Khan did work on occasions, perhaps more often than not, in excess of the ordinary time rate of 40 hours. The Labour Inspectorate's initial investigation of the wage book revealed that Mr Khan did not receive payment for 4 public holidays. The days identified were Christmas Day and Boxing Day of the 25 and 26 December 1997 and New Years Day and the 2nd day of January 1998. The gross amount for those days come to $256.00. I have perused the wage book and accept that figure. The Inspectorate was able to confirm after inspection of the respondents PAYE tax returns that the tax portion of the gross payments as holiday pay, have been made to the IRD. In all other respects claims for unpaid annual holiday pay for the period February 1997 to December 1999 were not established. My perusal of the wage books would not question that.

Mr Ryken submitted that the primary focus of Mr Khan's claim for wages concern the allegation that he was not paid the minimum wage. I am unable to come to that conclusion. What I have determined is that Mr Khan in all probability worked more hours than what he in fact was paid. Having come to that conclusion, the evidence is such that I am unable establish how many extra hours Mr Khan worked. Mr Ryken submitted that Mr Khan is prejudiced in his ability to bring an accurate claim due to a failure of the respondent to keep accurate wages and time records. Section 132(2) of the Act provides that where this deficiency is shown to be contributed to by the employer's failure to keep a proper wage and time record, the Authority may accept the employee's claims as true unless the respondent proves that they are not. The records to do not show any additional hours or the hours between which Mr Khan allegedly worked each day if as claimed by the respondent he worked odd hours.

The Authority has discretion under s.132 of the Act. The Authority can either accept Mr Khan's claim if the conditions set out in that section is met. It is not obligated to do so. In this case, Mr Khan in the statement of problem quantified his loss as $58,900 gross based on a 70 hour week at

$9.00 per hour and as an alternative claim, at the minimum wage rate at $33,724.60. This is a situation where the Authority's "equity and good conscience" jurisdiction is most deserving. It is often the practice of the Court in such cases when faced with confused or inconclusive evidence to make an arbitrary assessment by employing concepts of equity in order to achieve a practical result. In *Bell v Broadley Downs Ltd* *[1987] NZILR 959* the Court of Appeal endorsed that approach. In that case the Court of Appeal suggested obiter that:

Without attempting any exhaustive statement of when [the equity and good conscience clause] can appropriately be used, one can say that they include cases where...there are some deficiencies or lack of precision in the evidence..

Looking at the case overall I would assess that Mr Khan worked on average an additional 4 hours each week. According to the wage book, Mr Khan worked in total 138 weeks. Overall Mr Khan is owed 552 hours which at 8.00 per hour comes to $4416.00 gross. Including the sum of $256.00 as arrears in holiday pay, I order that Mr Harun Ali is to pay Mr Khan the sum of $4672.00 gross as arrears in remuneration pursuant to section 131 of the Employment Relations Act 2000.

Costs

Costs are reserved. The general rule is that a successful party is entitled to costs. I understand that Mr Khan is in receipt of legal aid. Ordinarily if an award of costs is made against an aided party the amount is confined to that parties contribution to the legal aid, although any order for costs may specify the amount that the person would otherwise have been ordered to pay unless there are exceptional circumstances. I am not in a position to reach any conclusion as to whether costs award in excess of such contribution is warranted and I urge the parties to resolve the issue of costs in the first instance amongst themselves. In the event that that is not possible then counsel should file and exchange submissions and I or another Member will sort it out for them.

Tom Woods Member

Employment Relations Authority
