

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 325
5331406

BETWEEN BELA NIRAV PATHAK
Applicant

AND NIRAV J. PATHAK
Respondent

Member of Authority: K J Anderson
Representatives: Bela Pathak, In person
Nirav Pathak, In person
Investigation Meeting: 27 May 2011 at Hamilton
Determination: 22 July 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mrs Pathak, claims that she is owed arrears of wages for the period 15th January 2007 to 24th September 2010 in the sum of approximately \$57,000. Mrs Pathak also claims compensation for “damage and hardships.” But the respondent, Mr Nirav Pathak, says that he and Mrs Pathak jointly operated a family business and as Mrs Pathak worked in the business with him, she was not an employee and she was not paid wages hence the claim for arrears is not valid

Background

[2] Mr and Mrs Pathak are husband and wife but are currently separated. There is some obvious animosity. In November 2006, they purchased a business; Hillcrest Fish Supplies, effectively what is commonly known as a fish and chip shop. While it appears that Mr Pathak operated the shop more or less on a full-time basis initially, upon a house being purchased by Mr Pathak, there was not enough income being

generated from the business to cover the commitments for the family and Mr Pathak worked elsewhere in order to bring in an alternative income. This resulted in Mrs Pathak working more time in the shop, albeit she had some part-time work elsewhere also. It also appears that their son worked in the shop on a part-time basis and some other employees were employed from time to time on a part-time or casual basis. The evidence of Mr Pathak is that Mrs Pathak was paid \$20 per week “pocket money” from the proceeds of the business. Mrs Pathak says that she should have been paid wages; not pocket money, and that she was “used” as “*an unpaid bonded labourer.*” The business has since been sold and it seems that Mrs Pathak believes that she should be paid the alleged wage arrears from the proceeds of the business.

[3] There are two issues for the Authority to determine. Firstly, was Mrs Pathak employed by Mr Pathak and if so, is the claim for arrears of wages proven?

Was Mrs Pathak employed by Mr Pathak?

[4] Mr Pathak denies that Mrs Pathak was ever employed by him and while there is no tangible evidence of an employment agreement or similar, or indeed any oral evidence about any employment arrangement, there is one element of the evidence that does suggest an employment relationship. This is a *WAGES / TIME RECORD* for Mrs Pathak for the period January 2007 to May 2008. It records Mrs Pathak’s name, IRD number and an ordinary hourly rate of \$10.10 with a time and a half rate of \$11.50 per hour. There are also Inland Revenue *SUMMARY OF EARNINGS* documents for the years 2006/2007, 2007/2008 and 2008/2009 showing the earnings of Mrs Pathak at the Hillcrest Fish Supply for those periods.

[5] However, the evidence of Mr Pathak is that the wages and time record (including the forgery of Mrs Pathak’s signature), and the income details forwarded to Inland Revenue along with PAYE deductions, was really a fabrication for the purpose of creating the illusion that Mrs Pathak was employed, in order to satisfy immigration requirements. Mr and Mrs Pathak emigrated from India. While Mr Pathak has New Zealand residency status, Mrs Pathak does not. The evidence of Mr Pathak is that in order to ensure that Mrs Pathak could remain in New Zealand, artificial income records were created, albeit, Mr Pathak says, Mrs Pathak did not receive any wages from the business, apart from the aforementioned “pocket money.” Mr Pathak says that it was his wish that Mrs Pathak could obtain New Zealand residency.

[6] I have to say that I found this confessional evidence from Mr Pathak to be quite astonishing, particularly as it has the potential to compromise Mr and Mrs Pathak in regard to the two government departments involved and I cautioned them both accordingly. However, Mr Pathak is adamant that his evidence is correct. I am satisfied that Mr Pathak understands the potential impact of his actions regarding the wage records, yet he did not resile from his evidence and I found the candidness of that evidence to be credible and acceptable accordingly. I also accept Mr Pathak's evidence that if the business had been profitable enough to have paid the wages that Mrs Pathak says that she is owed; he would not have gone to work elsewhere.

[7] Mrs Pathak has produced a number of statements from various people pertaining to their observations of Mrs Pathak working in the shop. But the fact that she worked in the shop is not disputed by Mr Pathak, hence the statements provided by Mrs Pathak have no real evidential value, except to confirm the presence of Mrs Pathak in the shop serving customers.

[8] In summary, I find that it is unlikely that Mrs Pathak was an employee and it is more probable than not that she worked in the family business in order to try and maintain a viable business while Mr Pathak went to work elsewhere. Indeed, my observations are that Mr and Mrs Pathak have worked extremely hard to try and get ahead since arriving in New Zealand but most unfortunately, their martial disharmony has had, and continues to have, a detrimental effect on their overall financial and physical wellbeing.

[9] Given that I have concluded that Mrs Pathak was not employed by Mr Pathak, it is not necessary for me to investigate further the validity of Mrs Pathak's wage arrears claim. But even if I had found that an employment relationship existed, Mrs Pathak has not produced any tangible evidence regarding how the sum claimed (\$57,000) has been calculated. This is despite Mrs Pathak being given some time, following the investigation meeting, to produce such evidence. Therefore, I have no option but to dismiss the wage arrears claim for want of proof.

Determination

[10] For the reasons set out above, I find that there was not an employment relationship between Mr and Mrs Pathak. In legal terms, this finding effectively means that, pursuant to section 161 of the Employment Relations Act 2000, the Authority does not have jurisdiction to investigate the wage arrears claim presented by Mrs Pathak. Nonetheless, given the estranged circumstances of Mr and Mrs Pathak, I have attempted to give some finality for them on this matter with the hope that they can both move forward with their lives.

Costs are not applicable.

K J Anderson
Member of the Employment Relations Authority