

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 234  
5320617

BETWEEN	ALI MUSTAFA RATHORE Applicant
AND	KIWITAX CONSULTANTS LIMITED First Respondent
	BASIT ACCOUNTS AND TAX CONSULTANTS LIMITED Second Respondent

Member of Authority: R A Monaghan

Representatives: Ali Mustafa Rathore in person  
Mir Ikram Ul Haq and Kishwar Ikram, advocates for  
respondents

Investigation Meeting: 8 April and 3 May 2011

Determination: 2 June 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ali Mustafa Rathore says Kiwitax Consultants Limited (Kiwitax) and Basit Accounts and Tax Consultants Limited (Basit) were his employers, and dismissed him unjustifiably. Mr Rathore also says he is owed unpaid wages.

[2] Kiwitax says it was or was to be the employer. Mr Rathore never commenced carrying out his duties under the parties' employment agreement, and any termination of the agreement was justified.

[3] For similar reasons Kiwitax denies that Mr Rathore is owed unpaid wages.

## **Background**

[4] Mr Rathore is a citizen of Pakistan and has a qualification in law which he obtained in Pakistan. He had recently completed a business management course in New Zealand when, in April 2009, he obtained an open work permit which was to expire on 30 April 2010.

[5] Mr Rathore's goal was to obtain permanent residence status in New Zealand. Meanwhile he worked as a taxi driver while he sought suitable permanent employment. In or about August 2009 a friend of his suggested he contact Mrs Keshwar Ikram at Basit. Mrs Ikram is a qualified accountant, as well as a director and shareholder and the principal practitioner in Basit. Mir Ikram Ul Haq acted as an office manager for Basit.

[6] In or about September 2009 Mr Rathore and his friend visited the Basit offices to speak to Mrs Ikram about the possibility of employment. Mr Rathore explained his wish to obtain permanent residence, and advised that a formal expression of interest (EOI) was to be prepared as a first step in that process. To that end he sought a job offer that would assist an application in the skilled migrants category. Mr Rathore also indicated he could work elsewhere pending a grant of permanent residence, but that on obtaining residence Basit could employ him. Mrs Ikram replied that Basit did not need another employee, and Mr Ikram and his friend left.

[7] According to Mrs Ikram, Mr Rathore made further visits to discuss his wish for a job offer so he could commence the process for seeking permanent residence. There was a conflict in the evidence as to whether Mrs Ikram committed herself to an offer of employment, and whether she informed Mr Rathore that he could begin coming into work for one or two days a week.

[8] There was an opportunity to create a position for Mr Rathore in that Mr and Mrs Ikram are also the directors and shareholders in Kiwitax. Kiwitax had been registered under another name and used as an investment vehicle, but at the relevant time it was not operating. Mr and Mrs Ikram were considering using it again, as a vehicle for providing management services. Their continued discussions with Mr Rathore proceeded on that basis.

[9] For his part Mr Rathore said that in September 2009 he started working for Basit for 2 – 3 days a week. He said that in November 2009 was offered a job but told that he would not be paid. Then later in November Mr and Mrs Ikram agreed to pay him a minimum wage, commencing when the open work permit expired.

[10] In addition to denying Mr Rathore's account, Mr and Mrs Ikram's account of Mr Rathore's presence in the Basit offices in the latter part of 2009 was that he was variously: discussing the possibility of employment; using their telephone to contact the New Zealand Immigration Service (NZIS); and conveying documents from his friend's taxi business as his friend was a client of Basit. He did not perform any work for Basit or Kiwitax. The visits were relatively brief and periodic, and did not for example amount to full days spent in the offices.

[11] Although Mr Rathore accepted his activities included those Mr and Mrs Ikram recounted, with some exceptions he was otherwise vague about what duties he carried out and when. I did not find credible his description of the employment-related duties he was able to say he carried out or the statements regarding payment he said were made in November. Not only that, in the light of Basit's staffing levels and workflow at the time, and because Kiwitax had yet to re-start trading, the picture Mr Rathore sought to paint was unlikely. Taking into account my overall view of Mr Rathore's credibility, I consider it more likely than not that his attendances were as Mr and Mrs Ikram described them and were intended primarily to advance and secure a written offer of employment for the purposes of his EOI.

[12] By email message dated 18 November 2009 Mrs Ikram forwarded a draft employment agreement to Mr Rathore. A further draft employment agreement was forwarded by message dated 10 December 2009. That draft agreement was signed by both parties, and the signatures were dated 15 December 2009. Mr Ikram said the draft was prepared for filing in the NZIS as part of Mr Rathore's EOI. In the circumstances I consider that likely.

[13] To the extent that it was relied on in support of an existing employment relationship, the agreement specified a commencement date of 1 April 2010. The mere signing of it in December is not evidence of the commencement of an employment relationship before April. At the same time a feature of the draft

agreements to which I do attach weight is that they identified Kiwitax as the employer party, and there was no evidence of any discussion to the effect that Basit was to be the employer. This is consistent with the intended function of Kiwitax as a provider of management services, Mr Rathore's role as the individual who would deliver those services, and the proposed job description.

[14] Mr Rathore's EOI in permanent residence was filed with the NZIS in January 2010. In February 2010 the NZIS invited Mr Rathore to apply for residence.

[15] Continuing discussions between Mr Rathore and Mr and Mrs Ikram regarding a position that would satisfy the criteria for the skilled migrant category led to amendments to the position description in the earlier draft agreements, although the amendments did not materially change the nature of the position. By letter dated 6 April 2010 Mr Ikram offered Mr Rathore a position as practice manager with Kiwitax. He attached a further employment agreement which both parties signed. The duties were to: oversee daily financial activities; maintain records; market the business; and undertake special assignments as directed. The commencement date was to be 10 April 2010. The hours of work were to be 35 per week. These documents were later filed with the NZIS in support of the application for residence.

[16] Mr Rathore did not begin carrying out his duties on 10 April. There was no satisfactory explanation as to why. His open work permit had not expired, and he had just filed an application for a further work permit, pending a decision on the application for permanent residence.

[17] One explanation Mr Rathore proffered amounted to an assertion that he continued to carry out duties on, in effect, the part time basis he had already described. In further support he referred to activities which I find were the provision of services in his capacity as the taxi driver he continued to be, and not the provision of services as an employee of Kiwitax or Basit.

[18] Mr Rathore also made the very serious allegation that Mr and Mrs Ikram required a payment from him in return for their continuing support in his application for permanent residence. He was unable to specify when this occurred, but when

pressed said it may have been in April 2010. He did not provide any other details and did not allege that he made a payment. Mr and Mrs Ikram denied the allegation.

[19] If the allegation was intended as an explanation of the failure to commence full time duties I reject the explanation. If it was intended to impugn the credibility of Mr and Mrs Ikram, Mr Rathore's own credibility has suffered because I do not accept the allegation. It is inconsistent with the assistance Mr and Mrs Ikram had already provided, extending to the completion and execution of a written job offer and employment agreement. It is also inconsistent with the fact that the process for seeking permanent residence continued after April without any interference from Mr and Mrs Ikram. They did not, for example, seek to retract the offer of employment.

[20] Mr Rathore further harmed his credibility by accusing Mr and Mrs Ikram of engaging in similar conduct before. An allegation concerning a former Basit employee, Z, was based entirely on speculation and was denied by Mr and Mrs Ikram and by Z. Since Z left Basit in April 2010 he can be regarded as a reasonably independent witness. He also gave an acceptable explanation of the conduct which had led to Mr Rathore's speculation, and an acceptable account of why he was not reliant himself on Mr and Mrs Ikram's support in order to live and work legally in New Zealand. I do not accept the allegation regarding Z.

[21] A more likely reason for Mr Rathore's failure to commence full time employment in April was that he was occupied elsewhere assisting his friend in a significant and high profile legal proceeding. He filed a letter from the solicitors acting on behalf of the friend, and dated 24 June 2010, which recorded the solicitors' appreciation for his efforts in assisting with the preparation of briefs of evidence and his attendance at a five-day trial in the District Court. The trial was held in May 2010. The letter recorded: *I have not known Mustafa for very long but have had regular contact with him over the past six months in relation to a commercial/litigation matter ...he volunteered his time to help a business friend with complicated licensing issues ....* Other exchanges between Mr Rathore and the solicitors in May indicated Mr Rathore was actively engaged in assisting with the litigation at that time, including assisting with the preparation of the evidence, and Mr Rathore even forwarded his CV to the solicitors.

[22] Mr Rathore did, nevertheless, attend the Basit offices for brief periods from time to time. One such attendance was on or about 22 April. Mrs Ikram prepared a 'performance evaluation form' dated 22 April 2010. It recorded that Mr Rathore was 'hired' on 10 April 2010, was to start work on 13 April, and had not attended the office at all. It also recorded that Mr Rathore had not completed the listed tasks required of him. Finally, it stated that a verbal warning was given and that Mr Rathore was to start work immediately. Mrs Ikram signed it, and noted that Mr Rathore refused to sign.

[23] Mr Rathore's open work permit expired at the end of April without a new permit having been issued. This had occurred because of an error on Mr Rathore's part. In or about early May he explained to Mr and Mrs Ikram that he could not report for work because his work permit had expired and he did not wish to work illegally. Nevertheless he continued to drive taxis and to assist with his friend's litigation.

[24] A second performance evaluation form was dated 13 May 2010. Again the form recorded Mr Rathore's failures to attend the office or carry out the listed tasks. It also recorded that Mr Rathore was informed that his employment agreement might be terminated if he did not change his approach. Again Mrs Ikram signed it and noted that Mr Rathore refused to sign. A letter of the same date recorded Mr Rathore's failure to attend a tax agent's seminar for which he was registered, and warned of the possibility of termination of employment.

[25] Mr Rathore's full application for permanent residence was filed in May 2010. Meanwhile he had also corrected the error in his application for a work permit and re-applied. A work permit was issued to him on 15 May 2010, allowing him to work as a practice manager for Kiwitax. It was to expire on 1 March 2012. Notably, despite the alleged demand for a payment from him, Mr Rathore was able to obtain this permit without any suggestion of interference from Mr and Mrs Ikram.

[26] Even on receipt of the work permit, Mr Rathore still continued to fail to report for work. A third communication to Mr Rathore dated 20 May 2010 repeated the concerns about his failure to perform his duties or show any interest in his job. It said any further violations would result in immediate termination without further warning.

[27] The application for permanent residence was filed on 26 May 2010. According to the evidence of Mr Rathore's immigration consultant, the reason for the relatively late filing was that the preparation of the application was a time consuming process requiring the collection of a number of documents. There was no suggestion of interference by Mr and Mrs Ikram in his preparation – indeed the employment-related documents had been available since early April.

[28] Mr Rathore still continued to fail to report for work. By letter dated 3 June 2010 Kiwitax purported to terminate his employment in reliance on clause 5.1 of the employment agreement. Clause 5.1 read:

*Employment is subject to a trial period of twelve weeks during which time the Employee's performance will be reviewed in weeks 4, 7 and 11 of the trial period. The Employee will be entitled to whatever training, supervision, support and resources during this period as may be deemed necessary by the Employer, and will be advised at the performance review meetings of their work performance in relation to the standards required of them. The Employer will clarify the standards required with reference to the Employee's position description.*

[29] The letter then listed the activities Mr Rathore had failed to fulfil. The NZIS was informed in July 2010 that the offer of employment was withdrawn.

### **Whether there was an unjustified dismissal**

[30] On the facts as I have found them, the parties had agreed to commence an employment relationship. They had agreed on terms and conditions of employment, including a commencement date. The employer party was to be Kiwitax.

[31] This was sufficient to make Mr Rathore an 'employee' in that he was a 'person intending to work' under s 6 (1)(b)(ii) of the Employment Relations Act 2000. However a fundamental feature of an employment relationship is that the employee goes on to perform work in return for payment. Mr Rathore never performed any work for Kiwitax (or Basit), so in that respect the employment relationship did not commence.

[32] At the same time Mr and Mrs Ikram did not move directly to address Mr Rathore's failure to report for work as a repudiation or termination of the agreement of the agreement at Mr Rathore's initiative. Instead they embarked on a performance

review process in terms of clause 5.1 of the agreement. At the end of the process they issued a letter of dismissal. In the circumstances I doubt that approach was necessary.

[33] Nevertheless if I address this problem as one of a dismissal by the employer, rather than a repudiation by the employee which was accepted, I have no difficulty in finding Mr Rathore's ongoing failures to report for work to be inexcusable and his explanations unconvincing.

[34] Mr Rathore was in possession of a valid work permit in April, and had no reason to believe that status could not continue. He had no good reason for failing to report to work in April, and he should have reported for work. When his work permit expired at the end of April - without a replacement being in force because of his own omission - he could have made an appropriate arrangement with Kiwitax pending a resolution of the matter. Instead he claimed he did not wish to work illegally and continued to pursue his own interests, notably his involvement in his friend's litigation. When a new work permit was issued in mid-May Mr Rathore did not report to work at Kiwitax, rather he maintained his pursuit of his own interests.

[35] I find that Mr and Mrs Ikram acted fairly in warning of the view they were taking of the failures to report for work. Their decision that the relationship could not continue was one a fair and reasonable employer would make in all of the circumstances.

[36] Accordingly on the basis that there was a dismissal, I find the dismissal was justified.

### **The claim for unpaid wages**

[37] Mr Rathore claimed unpaid wages commencing in September 2009. The claim was not supported in more than the vaguest of terms, but in any event on the facts set out above I find neither Basit nor Kiwitax entered into a binding and enforceable employment agreement with him in respect of the period September 2009 to April 2010.

[38] Had I found there was such an agreement, I would not accept that Mr Rathore performed the work he said he did, and would not have made an order for the payment of wages.

[39] Regarding the period from April 2010 onwards, I have found that Mr Rathore and Kiwitax were parties to an employment agreement which was to commence on 10 April. However Mr Rathore did not perform work under the agreement, and he is not entitled to any payment.

[40] For these reasons I dismiss the claim for unpaid wages.

### **Costs**

[41] Costs are reserved.

[42] Any party seeking costs shall have 28 days from the date of this determination in which to file in the Authority and copy to the other party a written statement of the amount sought and why. The party receiving the request shall have a further 14 days from the date of receipt of it in which to file and copy a reply.

R A Monaghan

Member of the Employment Relations Authority