

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 137
5273065

BETWEEN

LAXMAN SINGH
Applicant

AND

GOLDEN INDIAN
ENTERPRISES LIMITED
Respondent

Member of Authority: K J Anderson
Representatives: L Singh, In Person
G Saraswat, Advocate for Respondent
Investigation Meeting: 4 November 2010 at Hamilton
Further Evidence: 2 December 2010
Determination: 7 April 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Singh claims that he was unjustifiably dismissed from his employment as a chef at the Golden Punjab Indian Restaurant (the restaurant) on 29th December 2008. Mr Singh also says that he is owed holiday pay and wages for eight weeks. But Mr Gaurav Saraswat, the sole Director of Golden Indian Enterprises Limited (the Company) and the owner of the restaurant at the time, says that there was never an employment relationship with Mr Singh and hence there is no validity to the claims. While I have heard evidence (of varying reliability) from Mr Singh and Mr Saraswat pertaining to the Mr Singh's claims, there is a preliminary issue that requires the determination of the Authority before those claims can be considered further. The issue is: Was there employment relationship in existence between Mr Singh and the Company?

The Evidence of Mr Singh

[2] The oral evidence of Mr Singh is that he and Mr Saraswat were friends and have known each other for some time, having both lived in Wellington and then in 2007, in Whakatane. Mr Singh moved to Te Puke in March 2008 and he was working in a kiwifruit orchard. Mr Singh says that Mr Saraswat bought the Golden Punjab Indian Restaurant located at Te Puke. It was opened on 15th September 2008 and he was employed as a chef. Mr Singh says that he reached an agreement with Mr Saraswat that he would be paid \$600 per week. Mr Singh told the Authority that the restaurant closed for the Christmas/New Year break and reopened again on 9th January 2009. However, Mr Singh says that on 29th December 2008, Mr Saraswat came to the Mr Singh's Te Puke flat¹ and told him that his pay rate was going to be reduced from \$600 to \$400 per week. Mr Singh says that he told Mr Saraswat that if he wasn't prepared to continue to pay \$600 per week he would "see him in Court." The further evidence of Mr Singh is that Mr Saraswat "got angry and said bad things." The evidence of Mr Singh from this point becomes rather cloudy but he says that he never returned to the restaurant and he alleges that he was dismissed. Mr Singh also says that the last payment he received from Mr Saraswat was on 28th October 2008 and he has provided an extract from a bank statement which shows that \$1,000 was paid to his bank account on that date. The statement also shows that Mr Saraswat made four other payments of \$600 on 24th September, 1st October, 8th October and 15th October 2009. There are other deposits within the same time frame that have been redacted. Mr Singh says that he is owed wages for eight weeks for the months of November and December 2008.

[3] Mr Singh also provided a written statement to the Authority dated 1st July 2009. Some of the content of this is at variance with Mr Singh's oral evidence. In particular, his written statement records that:

Mr Saraswat then visited my flat & informed me that I no longer had a job & that he was hiring another chef. When I asked about my last 8 weeks unpaid wages he informed me that he wasn't going to or had no intention of paying them. An argument then started between myself & Mr Saraswat at my flat and I called the police. The police then escorted me safely off the premises after I had collected my belongings.

[4] Mr Singh says that after he left the flat, he stayed a backpackers facility, and from 9th January 2009, he had employment at the Te Puke Hotel.

¹ Mr Singh says that the flat was provided as accommodation that went with the job at the restaurant.

The evidence of Mr Saraswat

[5] Mr Saraswat accepts that he has known Mr Singh for some time. But he says that Mr Singh never worked at the restaurant rather he was just working at a kiwifruit orchard. Mr Saraswat says that Mr Singh often used to visit the restaurant “just as a friend.” The evidence of Mr Saraswat is that he resided in Auckland and had employed a chef. Mr Saraswat produced evidence of making payments via the business accounts for this person and also the wage and time records for the chef (Mr Kumar), and other people that he had employed. There is nothing to record that Mr Singh was an employee. I gathered that Mr Singh may have done some work at the restaurant and that Mr Saraswat had considered employing him. However, upon making enquiries from a Wellington restaurant owner, who had employed Mr Singh, Me Saraswat decided not to employ him.

[6] In regard to the flat where Mr Singh was living, Mr Saraswat says that he rented the flat for \$260 per week and that Mr Singh and Mr Tarun Sharma, who was the restaurant manager,² were each supposed to pay \$130 per week but had not done so. It appears that Mr Saraswat may have confronted Mr Singh about payment of the rent and an argument arose, with Mr Singh departing from the flat.³

[7] Turning to the bank statement extract that Mr Singh provided, Mr Saraswat says that in late 2007 or early 2008, he borrowed the sum of \$3,400 from Mr Singh and then repaid it on the basis of four payments of \$600 and one final payment of \$1,000. Mr Saraswat points to the payments/deposits being from his personal bank account and not that of the business, which is a different and separate account. I found this to be more probable than Mr Singh’s version of the basis of the payments.

Determination

[8] I have to say that I found the evidence pertaining to this matter to be confusing and uncertain. However, on the whole, I found the evidence of Mr Saraswat to be more credible and consistent particularly given that he could collaborate much of

2. Mr Sharma also claimed that he was unjustifiably dismissed and activated proceedings in the Authority, but the evidence was inconclusive and that claimed failed. (*Tarun Sharma v Golden Indian Enterprises Limited*, 7 April 2010, Member, Y Oldfield, AA 110/10).

what he was attesting to with business records. Conversely, the evidence of Mr Singh was inconsistent and his memory of various matters was selective. I also asked him to provide Inland Revenue records pertaining to his income for the period 1 April 2008 to 31 March 2009. He has done this and the records show that during this period he worked for four different employers, the first three of those I believe to be associated with the kiwifruit industry. Then from 7th January to 31st March 2009, he was working at the Te Puke Hotel. But particularly relevant is that there is no record of him being employed by the respondent company. In itself that may not be conclusive, but given that Mr Saraswat was able to produce wage and time records for other employees (including Mr Kumar), I find his version of events to be more probable than that of Mr Singh, albeit I suspect that there may have more to all of this than has been revealed.

[9] However, the onus of proving that there was an employment relationship in existence between him and the respondent company falls upon Mr Singh. On the balance of the evidence before the Authority, he has not been able to satisfy me that such a relationship existed, hence the Authority does not have jurisdiction under the Employment Relations Act 2000 to investigate the claims he has made.

Costs: Mr Saraswat acted as the lay advocate for the Company (which has since been sold) and hence the matter of costs does not arise.

K J Anderson
Member of the Employment Relations Authority