

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 200  
3059616

BETWEEN HARSHKUMAR  
NARESHKUMAR NAIK AKA  
NAYAK  
Applicant

A N D TUSHARKUMAR  
LIMBACHIYA AND MANSI  
LIMBACHIYA TRADING AS  
TP & MT LIMBACHIYA  
PARTNERSHIP  
Respondent

Member of Authority: Philip Cheyne  
Representatives: Applicant in Person  
Bernie Chow, advocate the Respondent  
Investigation Meeting: 2 and 3 March 2020 at Christchurch  
Date of Determination: 18 May 2020

---

**DETERMINATION OF THE AUTHORITY**

---

- A. Tusharkumar Limbachiya and Mansi Limbachiya trading as TP & MT Limbachiya Partnership are to pay Harshkumar Nareshkumar Naik AKA Nayak \$3,226.95 by Tuesday 16 June 2020.**
- B. Costs are reserved.**

**Employment relationship problem**

[1] Tusharkumar Limbachiya and Mansi Limbachiya in partnership owned and operated a business called Matipo Street Food Market before it was sold at the end of

2018. Mr & Mrs Limbachiya employed Harshkumar Naik in that business from 2017 until December 2018. Mr Naik says he was not paid at all during the time he worked in the business. His claim is for the wages and holiday pay due for all the time that he worked there.

[2] In the statement in reply, Mr & Mrs Limbachiya say that they paid Mr Naik in cash for all the time he worked at the rate in the employment agreement and as later increased under the Minimum Wages Act 1983. They also say they paid holiday pay at the same time as the regular wages. The statement in reply refers to \$10,000.00 they lent to Mr Naik and his wife (Krupa Naik).

[3] The issues are:

- (a) Did Mr Naik sign the employment agreement?
- (b) What hours did Mr Naik work?
- (c) What if anything was Mr Naik paid?
- (d) Are there any arrears?
- (e) Are there arrears of Holiday pay due to Mr Naik?
- (f) Can Mr Naik be ordered to repay the loan?

#### **Did Mr Naik sign the employment agreement?**

[4] In evidence is a signed written employment agreement dated 3 January 2017. However, Mr Naik says he was never given a signed agreement. He says in November 2018 he was forced to sign a blank piece of paper, which he says must have been copied onto the employment agreement and onto two other documents in evidence which bear his signature (the loan agreement and the resignation letter). In an email to the Authority, Mr Naik says that the signature on all three documents is exactly the same, which he says is impossible. Mr Naik provided a copy of his passport and his New Zealand diver licence containing his signature for comparisons.

[5] Mr Naik gave evidence that he was made to sign a letter of resignation in order for his and Mrs Naik's passports to be returned to them to leave New Zealand once his job had ended. It is common ground that the resignation was not until December 2018. Mr Naik's evidence about being forced to sign the resignation letter in

December when he resigned is not consistent with his claim that it was in November that he was forced to sign a blank piece of paper which was copied onto the resignation letter. Mr Naik then said he signed a blank page and the resignation letter. However, that is not consistent with his earlier assertion that his signature on a blank page must have been copied onto the other two documents, the loan agreement and the resignation letter.

[6] When questioned, Mr Naik also said that when he signed the blank piece of paper, he did it in a slightly different manner to his normal signature as he was aware that he should not sign a blank piece of paper. In evidence are photocopies of Mr Naik's genuine signature on his licence and his passport. His signature also appears on the statement of problem and a statement of evidence. The disputed signatures on the employment agreement, the loan agreement and the resignation letter are not exact copies of any of these genuine signatures. The disputed signatures are not facsimiles of each other. The originals of the three documents in dispute were produced during the investigation meeting. They impress as genuinely original documents.

[7] Given the inconsistencies in Mr Naik's evidence, the variations in signatures and the appearance of the documents in evidence, I do not accept Mr Naik's evidence that his signature on the employment agreement was copied from his signature on a blank piece of paper.

[8] Mr Limbachiya's evidence is that he provided two originals of the employment agreement to Mr Naik at the start of the employment agreement, both were signed by Mr Naik and each party retained an original. There is no reason to doubt this evidence, which I accept. I find that the employment agreement was signed by Mr Naik at the start of the employment and that the terms in the agreement applied to Mr Naik's employment by Mr & Mrs Limbachiya.

#### **What hours did Mr Naik work?**

[9] The employment agreement says that the employee will work on a casual "as required". It does not set the days to be worked each week or the hours to be worked each day.

[10] It is common ground that Mr Naik usually worked seven days each week in the afternoon, closing the shop each day. However, there are no time records showing the number of hours worked each day. There is a printed spreadsheet showing total

hours and payments each week from January 2017 to December 2018. From October 2018, when Mr & Mrs Limbachiya engaged an accountant to assist with their payroll, there are also weekly payslips generated by a payroll programme. Neither of these records show the number of hours worked each day in the pay period. Mr Limbachiya said that some business records could not be found after Mr & Mrs Naik left, but he did not suggest that there was a comprehensive record of the hours each day. There is no penalty claim, so I only need to consider whether there is a default in money payable to Mr Naik. I take the approach that I may accept Mr Naik's claims about payments made and time worked unless Mr & Mrs Limbachiya prove the claims are incorrect.

[11] I consider first the hours and days of work.

[12] Mr Naik did not keep a diary or similar contemporaneous record of when he worked. His evidence is that he worked 7 days mostly to closing time starting at 4.00 or 4.30 pm. However, in an email to the Authority Mr Naik also claimed that he usually worked only after 5pm. The email was a response to the evidence of the owner of a nearby business open 8.00 am to 5.00 pm each week that Mr Naik was usually not at the dairy when he and his staff bought items at the dairy which they regularly patronised during their working day.

[13] Mr Naik provided supporting statements from two independent witnesses but neither of them gave detailed evidence about when Mr Naik started or finished work.

[14] Mr Naik produced printed till reports covering part of his employment. Each till report shows a date, a starting time and a finish time. Mr Naik says this evidence supports his contention about the hours the shop was open, which he says he staffed for at least 20 hours each week.

[15] As part of his work Mr Naik took pictures of till reports and balance details and sent them to Mr Limbachiya. Mr Naik therefore had this information to produce in support of his claim. There are till reports for most of November 2017, part of the first week of December 2017, all of October 2018 and the first few days of November 2018. While the reports cover a relatively small portion of the employment, it was not suggested that the recorded times were atypical or that there was a material change in hours of work over the time. I treat the till reports as a reasonable sample of what happened throughout the employment.

[16] These reports show that the till was generally turned on soon after 6.30 am on weekdays and generally turned on between about 7.30 am and 8.00 am at weekends. Mr & Mrs Limbachiya's evidence is that the dairy opened at 7.00 am weekdays and at 8.30 am at weekends. A witness in support of Mr Naik says that the dairy opened at 6.30 am but does not distinguish between weekdays and the weekend. Mr Naik was not at work to turn on the till in the morning, so the till reports recording when the till was turned on do not establish Mr Naik's regular starting time. Mr Naik's point is to prove the daily opening hours, which after deducting the time the dairy was staffed by Mrs Naik and other workers, leaves him to say he worked the remainder of the business opening hours. The evidence of some of the other staff does not support Mr Naik's contention about their employment and work hours. These witnesses cannot be regarded as independent of Mr & Mrs Limbachiya so I am persuaded by that evidence.

[17] I am left with Mr Naik's evidence that he started at 4.00 pm or 4.30 pm and his later statement that he usually worked after 5.00 pm. Mr Pearson impressed as a reliable witness. Based on his evidence, I find Mr Naik's regular starting time was sometime after 5.00 pm each day he worked. I do not accept Mr Naik's evidence that he started work at 4.00 pm or 4.30 pm each day.

[18] The till tapes in evidence do not show individual sales so do not show when the last customer sale took place each day. The till reports were generated between 7.54 pm and 8.48 pm on weekdays. All but one of these weekday reports was generated after 8.00 pm and mostly around 8.30 pm. The reports were generated between 7.45 pm and 8.51 pm on the weekend days, mostly shortly after 8.00 pm. Mr & Mrs Naik lived in premises on-site so the report time does not reliably establish that Mr Naik was at work continuously up to the recorded report time.

[19] Mr & Mrs Limbachiya say that the dairy closed at 7.30 pm every day and they allowed half an hour work time after that to cover cleaning and other close-up routines. A witness for Mr Naik says the dairy closed at 8.30 pm each night and Mr Naik's evidence is that he closed the dairy at 8.30 pm. Mr Naik says the till report was the last job he did each day, which I accept. Evidence of an 8.30 pm closing time is inconsistent with the weekend till reports which mostly were printed shortly after 8.00 pm. Most of the weekday till reports were generated before 8.45 pm. If the dairy closed at 8.30 pm there was only a short time for Mr Naik to complete the

cleaning and close-up routines before printing the till report. Overall, the till reports do not reliably support Mr Naik's contention that the diary closed at 8.30 pm each day.

[20] The argument for Mr Naik was focussed on the working hours of other staff (including Mrs Naik) and the business opening hours, leaving him to say he worked the hours each week not otherwise accounted for. Mr Naik also produced a file note which records Mrs Naik telling an official that the business opened about 92 hours per week. That approach is too broad, so it is unnecessary to closely analyse the disputed evidence. While the closing time is disputed, the real issue is whether Mr & Mrs Limbachiya have proven that Mr Naik's claim about his work hours is incorrect.

[21] Putting aside the disputed evidence over opening hours and the hours worked by other staff, the evidence about Mr Naik's work hours relied on by Mr & Mrs Limbachiya is the spreadsheet which shows the hours and payments each week throughout the employment. The spreadsheet figures match the information shown in Mr Naik's IRD report covering the same period, as would be expected. However, from October 2018, the spreadsheet figures for wages, holiday pay, PAYE and net pay are rounded to whole dollar totals. For this period there are also the payroll software payslips. The payroll figures are not rounded and match the figures shown in Mr Naik's IRD report. Over the period of employment, there is some fluctuation in hours recorded each week. The first month shows 18.5 hours per week. There is then a period where the weekly hours are either 14 or 13.5, followed by a period with greater variation of weekly hours of work. Sometimes the monthly hours recorded were as high as 74 but were commonly 55.5, particularly early in the employment.

[22] It is possible that the spreadsheet was written later in time to match the wages and PAYE deductions reported month by month to IRD, but it is not inherently likely. It is more likely that the IRD reports were generated from the employer's wage records in existence at the time of each IRD report. Given this, I accept that the weekly work hours recorded in the spreadsheet can be regarded as a record of work hours recorded before the present claim. I am reinforced in this view by the payroll records and payslips which were generated at the end of each payweek from the beginning of October 2018. Mr Naik produced the payslips when he lodged the claim so they were in his possession before he left New Zealand. Mr Naik did not dispute these payslips or the hours they record when he received them. These factors lead me

to conclude that Mr & Mrs Limbachiya have proven that Mr Naik's claims about his hours of work are not correct. I find that the spreadsheet and payslips correctly record Mr Naik's weekly hours of work throughout the employment.

**What if anything was Mr Naik paid?**

[23] Mr Naik says he received no wages for his work at the dairy. Mr & Mrs Limbachiya say they always paid Mr Naik in cash as he asked to be paid that way. Several witnesses support what Mr & Mrs Limbachiya say, but their family or other connections to Mr & Mrs Limbachiya mean that their evidence is not independent. Similarly, Mrs Naik's evidence on the point is not independent. It is not necessary to closely canvass the evidence of these supporting witnesses.

[24] Mr Naik drew attention to the payslips from October 2018 most of which list his bank account under the heading "Direct Credit Details". The bank statements show no deposits to match the payslips. The business accountant gave evidence that the payroll system requires this information as part of set-up. It does not mean that the wages were necessarily paid into the bank account through the payroll management system and it was open for the employer to pay the wages directly such as by cash. There is no reason to doubt this evidence about the operation of the payroll system, so reference to the bank account on the payslips from October 2018 does not support Mr Naik's claim that he was not paid.

[25] Mr Naik produced IRD information showing Mr & Mrs Limbachiya paid \$4,037.94 to IRD as a PAYE tax deduction in respect of Mr Naik between 2016 and 30 April 2019, covering the entire employment. This is not conclusive evidence that Mr & Mrs Limbachiya paid the net wages to Mr Naik but it does establish that they complied with tax obligations arising from the employment. Mr & Mrs Limbachiya similarly complied with tax obligations regarding Mrs Naik's employment.

[26] Mr Naik produced a copy of his bank statements which record regular payments from the dairy. It is common ground that these payments were wages paid to Mrs Naik for her work at the dairy. Mr Naik was an Uber driver while also employed by Mr & Mrs Limbachiya. The bank statements show regular Uber deposits but the IRD report does not show any Uber deductions. None of the income sources listed in the IRD report is shown in the bank statements as a regular depositor. In summary, the Uber income appears in the bank statements while Mr Naik's other

sources of taxed income were not paid into his bank account. Viewed overall, the bank statements do not support Mr Naik's contention that he was not paid, nor do they provide proof that Mr & Mrs Limbachiya paid wages in cash to Mr Naik.

[27] Mr Naik continued to work for nearly two years, despite his account of not being paid. He says he feared for himself and Mrs Naik, commenting that Mrs Naik's visa tied her to the employment. Mr & Mrs Naik say their passports and other original documents were held by Mr & Mrs Limbachiya. Mr & Mrs Limbachiya deny they had the passports in their possession. Mr & Mrs Naik had their passports in November 2018 when they travelled to India. Despite the claims about non-payment and forced possession of passports, they nonetheless returned to New Zealand and apparently relinquished possession of these documents to Mr & Mrs Limbachiya. The bank statement shows that Mr & Mrs Limbachiya deposited a total of \$10,000.00 in the bank account on 21 December 2018. Mr Naik asserts that he was not informed about this and that Mr Limbachiya made him withdraw cash from his account to take that money back, with his wife being held as a hostage. In evidence he described the cash return as happening the same day they left Christchurch to return to India. Mr Naik gave evidence that he had to leave Christchurch on 21 December 2018 but he did not document this by reference to airline tickets or other reliable evidence. In response to questions Mr Naik also said he left New Zealand on 23 or 24 December. Later, Mr Naik said that he left on 23 December 2018. Mr Naik says that he has a picture taken at the airport to prove 23 December 2018 as his departure date.

[28] Other documentary evidence establishes problems with Mr Naik's account. The bank statements provided with the statement of problem stopped on 7 December 2018. During the investigation meeting, Mr Naik provided a statement covering 17 December to 24 December 2018. There are two withdrawals each of \$2,000.00 on 24 December 2018, not withdrawals of \$10,000.00. Mr Naik then said that he added this \$4,000.00 to \$6,000.00 cash he already had to repay the \$10,000.00. He did not explain the source of the \$6,000.00 cash he held. Before this evidence, Mr Naik's claim had been that he was forced to withdraw and return the whole \$10,000.00. To summarise, the later-produced bank statement is not consistent with the initial assertions. Mr Naik changed his account in response.

[29] When asked how he could have left New Zealand on 23 December when the bank statement shows two automatic teller machine withdrawals each of \$2,000 at

two Christchurch locations on 24 December, Mr Naik said that the statement date does not represent the transaction date. Some of the other transactions dated 24 December in the statement include a line showing the “original date” of the transaction. I infer from this that other transactions occurred on the date recorded in the statement, not earlier. The statement includes an eftpos transaction at a Christchurch postshop dated 24 December following the two \$2,000 cash withdrawals. The Christchurch postshop EFTPOS transaction after the two withdrawals is also inconsistent with Mr Naik’s evidence that he left Christchurch on 23 December. Whether Mr Naik’s recollection of his departure date is correct is not particularly significant. What is significant is the implausible explanation given when it was put to Mr Naik that the 17 December – 24 December statement showed he was in Christchurch on 24 December.

[30] Given this, I treat with caution Mr Naik’s assertions which are not supported by independent evidence.

[31] There is no independent evidence to support the claim that Mr & Mrs Limbachiya held passports and other original documents against Mr Naik’s will. It is not inherently plausible that a person who retrieves their passports and documents held against their will to travel to India would soon after return to New Zealand to subject themselves to that same restraint. It is not inherently plausible that an employer would transfer \$10,000.00 to their employees’ bank account without the employees’ knowledge, only to demand that it be immediately repaid. It is not inherently plausible that an employee would work for nearly two years without being paid any wages but not protest that state of affairs. These points add to my caution about Mr Naik’s evidence.

[32] Given the above, I prefer the evidence of Mr & Mrs Limbachiya that wages were paid in cash to Mr Naik at his request, rather than Mr Naik’s assertion that he received no wages while employed by Mr & Mrs Limbachiya.

[33] Putting aside Mr Naik’s assertions, there is no reason to doubt the accuracy of the information Mr & Mrs Limbachiya reported to IRD that it calculated wages totalling \$22,841.96 were payable to Mr Naik.

**Are there any arrears?**

[34] I take Tuesday 3 January 2017 as the date when Mr Naik started work based on the employer's evidence. There is no reliable evidence to show an earlier start date. The payslips produced by Mr & Mrs Limbachiya show wages calculated for the period ended 23 December 2018. The signed resignation letter records that Mr Naik's last day of employment was 19 December 2018. There is no reliable evidence to establish that Mr Naik worked after 19 December 2018 so I find that his employment ended on that date.

[35] The statement in reply dated May 2019 includes a concession that some pay was due to Mr Naik at the date of his resignation. Reference is made to the period ending 23 December 2018. That payslip records \$231.66 was due for work on 14<sup>th</sup>, 17<sup>th</sup> and 18<sup>th</sup> December 2019. There is no evidence that Mr Naik actually performed any work on 19<sup>th</sup> December, despite that being referred to as his last day of employment. There is no evidence that Mr Naik was paid this amount after the statement in reply. I find that Mr & Mrs Limbachiya did not pay Mr Naik for his work for the 23 December 2018 pay period. There will be an order including \$231.66 to cover this payment.

[36] In summary, I find that there was a default in payment of wages of \$231.66 to Mr Naik.

**Are there arrears of Holiday pay due to Mr Naik?**

[37] I raised compliance with the Holidays Act 2003 with Mr & Mrs Limbachiya. Relevantly, the Holidays Act 2003 permits an employer to regularly pay annual holiday pay with the employee's wages if the employee works on a basis that is so intermittent or irregular that it is impracticable for the employer to provide 4 weeks annual holidays, that it is agreed in the employment agreement, it is paid as an identifiable component in the employee's pay and it is not less than 8% of the employee's gross earnings.

[38] The spreadsheet and payslips (provided for the later period) record that holiday pay at 8% of gross wages was included each week. The employment agreement includes the statement that holiday pay will be paid at the same time as regular pay at the rate of 8% of gross earnings. There is also a clause that the employee will work on a casual "as required" basis with no expectation of ongoing

employment, will be given reasonable notice when asked to work but may choose to accept or decline the work and that each offer of work is considered as a new period of employment but subject to the same terms and conditions.

[39] From the beginning of his employment, Mr Naik regularly worked from after 5.00 pm to the end of business trading each day, seven days nearly every week. In their statement in reply, Mr & Mrs Limbachiya say that Mr Naik was “always doing the closing hours because that was his allocated time slot of his weekly usual hours of work which was about 13 hours per week and as required”. The reply goes on to say “...he only worked the end of the evening closing shop shift of not more than 2 hours each day.” On any view of the evidence, Mr Naik did not work on a basis that was so intermittent or irregular that it was impracticable for him to be provided with four weeks holiday. I find that the exception permitted by s 28 of the Holidays Act 2003 does not apply to Mr Naik’s employment by Mr & Mrs Limbachiya as he did not work on an intermittent or irregular basis making it impracticable for him to be provided 4 week’s annual leave.

[40] I note also that annual holiday pay was not paid as an identifiable component of Mr Naik’s pay until near the end of his employment when payslips first were provided.

[41] The consequence of the above finding is provided by s 28(4) of the Act. Despite the weekly payments to Mr Naik including 8% more than his hourly rate multiplied by the hours of work, the Act declares that Mr Naik remained entitled to 4 weeks annual holidays each year in accordance with s 16 of the Act. Mr Naik’s employment ended just short of his second anniversary. I must apply both s 24 and s 25 of the Act to calculate holiday pay due to Mr Naik at the end of his employment.

[42] Mr Naik worked a few more hours in the initial phase of his employment but his pay rate was increased from 1 April 2017 then again from 1 April 2018. In the circumstances of Mr Naik’s employment, compliance with the Act is achieved by calculating holiday pay now due at 8% of his gross throughout the employment.

[43] Mr & Mrs Limbachiya calculated gross wages of \$22,841.96 were paid or payable to Mr Naik, as reported to IRD. Applying s 28(4) of the Act, I calculate holiday pay of \$1,827.36 is owed to Mr Naik.

[44] The employment agreement entitled Mr Naik to a paid day off for each public holiday falling on a day which would otherwise be a working day. If Mr Naik worked, he was entitled to half time extra and an alternative holiday. The employment agreement in substance applied the provisions of the Act. As Mr Naik worked seven days each week, every public holiday fell on a day which would otherwise be a working day for Mr Naik. Between 3 January 2017 and 19 December 2018, there were 18 public holidays. I find that Mr Naik worked on each of these days. This generates an entitlement to 18 alternative holiday paid at the end of the employment. Section 40 of the Act entitles Mr Naik to payment for a further 4 public holidays to cover the Christmas holidays during the period of deemed annual leave granted at the conclusion of the employment. There are then 22 extra days for which Mr Naik is entitled to be paid at the rate of relevant daily pay. In the latter part of the employment Mr Naik was paid for 13 hours per week at \$16.50 per hour. On the assumption Mr Naik worked the same hours each day, there was an entitlement to a payment of \$1,019.30 to cover the 22 days.

[45] There is a shortfall in the payment of half time extra provided by the employment agreement and required under the Act. Notes in the spreadsheet indicate that reduced hours were worked on a number of the public holidays. Weekly wage payments would then in effect incorporate half time extra for the reduced hours worked on the public holiday. There is no specific evidence to the contrary, so I accept that the Act was complied with on those dates. I am left with eight public holidays in 2017 and 2018 for which there is no evidence to support payment of half-time extra. There is insufficient evidence to fix what hours were probably worked on these days so I take the average daily hours each week, as per the spreadsheet but rounded up. There are 5 hours owed at half the rate of \$15.25, 10 hours owed at half the rate of \$15.75 and 4 hours owed at half the rate of \$16.50. These figures total \$148.63 due for half time extra payments due under the Act.

[46] In summary, I find that there was a default in payment of \$2,995.29 in holiday pay to Mr Naik.

### **Can Mr Naik be ordered to repay the loan?**

[47] In their statement of reply, Mr & Mrs Limbachiya included the line “Resolution ...That Harsh repays us the loan amount of NZD\$10,000.00 ... at Mediation.”

[48] Proceedings are commenced in the Authority in accordance with the Employment Relations Act 2000 which expressly requires lodging an application in the prescribed form. The Employment Relations Authority Regulations 2000, made under the Act, permit a person to commence proceedings by lodging an application in accordance with Form 1. An application to the Authority in Form 1 must be accompanied by the prescribed fee. The amount of the fee is set in the Regulations.

[49] Mr & Mrs Limbachiya have not complied with these requirements. They did not lodge an application and they did not pay a fee. They did no more than lodge a statement in reply as was needed to respond to Mr Naik's application. Mr & Mrs Limbachiya have not commenced proceedings in a way that engages the Authority's statutory role of resolving an employment relationship problem concerning the loan agreement.

[50] All the amounts due to Mr Naik are minimum entitlements under the Minimum Wages Act 1983 and the Holidays Act 2003. Payments received by Mr Naik for another purpose such as a loan from Mr & Mrs Limbachiya are not available to bring to account in defence of a default of the minimum standards.

[51] I make no order concerning the money advanced under the loan agreement.

### **Conclusion**

[52] Mr & Mrs Limbachiya trading as TP & MT Limbachiya Partnership owe Mr Naik \$3,226.95 in arrears of wages and holiday pay.

[53] Mr Naik was not represented so is unlikely to be entitled to costs, except to cover his lodgement fee. Mr & Mrs Limbachiya sought costs but as costs generally follow the event might not be entitled to an order. These observations might provide a basis for the parties to reach agreement about costs. However I will reserve costs, subject to the following timetable. If Mr Naik seeks costs, he should apply in writing with a copy to the respondent no later than Tuesday 2 June 2020 setting out his claim. Mr & Mrs Limbachiya may reply in writing, with a copy to Mr Naik, no later than Tuesday 16 June 2020. I will then determine any claim for costs.

Philip Cheyne

Member of the Employment Relations Authority