

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Ursula Mary Culley (Applicant)
AND Dennis J Martin trading as Starlight Funeral Services (Respondent)
REPRESENTATIVES William McMenamin, Counsel for Applicant
Michael Chilton, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 21 October 2005
DATE OF DETERMINATION 31 January 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Culley) alleges that she is owed unpaid salary amounting to \$1,995.00 while the respondent (Mr Martin) denies that there was ever an employment relationship between the parties (alleging instead that the relationship was between Ms Culley and a limited liability company Starlight Funeral Services (Australasia Limited) but also denies on behalf of the company that any wages are due because it is contended that Ms Culley agreed to work for nothing during a trial period of employment.

[2] Mr Martin's business (Starlight) operated from shop premises in the New Brighton Mall in Christchurch. Ms Culley was walking in the Mall, saw the business and went in and spoke to Mr David Tweddell at Starlight about the possibility of her working there.

[3] Both Mr Tweddell and Ms Culley gave evidence that a deal was struck between them but the basis on which each claim that arrangement was made could not be more different.

[4] Ms Culley says that she worked a total of 113 hours commencing on 5 January 2005 and concluding on 22 February 2005. The arrangement was always to be paid time, she said, and she claimed that Mr Tweddell had agreed to pay her \$15 per hour "under the counter". Although Ms Culley was on a benefit, she claims that she had an arrangement with Work and Income New Zealand, the effect of which was that the money that she earned on this "under the counter" basis would be returned in its entirety to Work and Income New Zealand.

[5] For his part, Mr Martin says that while it was agreed that Ms Culley would work in the business it was not agreed that she be paid until 1 April 2005 from which date it was agreed that payment would be forthcoming. Mr Martin says the reason for this was that the business was in a start up phase and cash flow was tight.

[6] The relationship between the parties (whatever its terms) came to an end suddenly on 23 February when after an extraordinary altercation between all of the staff of Starlight and their employer, the staff were issued with trespass notices and effectively precluded from continuing in their employment.

[7] There are claims and counterclaims of “industrial espionage” by staff against Starlight and claims by staff that Starlight was refusing them payment of wages.

[8] Partly it seems for reasons associated with this quite extraordinary dispute, the business failed and although the limited liability company which Mr Martin claims was Ms Culley’s employer remains registered, the business is no longer trading. Mr Martin says that he has had to sell his home in order to meet the business’s obligations.

Issues

[9] The first issue is whether there was in truth an employment relationship between Ms Culley and either Mr Martin or the limited liability company Starlight Funeral Services (Australasia) Limited (Starlight Limited) which entitled Ms Culley to receive the wages that she claims.

[10] The second issue is whether Ms Culley’s employer is in fact Mr Martin or Starlight Limited. Plainly, I need not proceed to investigate this second question in detail if I find that Ms Culley has not proved to my satisfaction that she has an entitlement to the income that she claims from one or other of those potential employers.

Are there wages due?

[11] Ms Culley is adamant that she was told by Mr Tweddell that she would be paid “under the table”. Her evidence before me was that she was originally told by Mr Tweddell that he would pay her \$10.66 per hour but that she had asked for \$12 per hour and that he had agreed. She told me that she did not remember precisely when this discussion would have taken place although we can assume that it would have been before early January 2005 when she appears to have started attending at Starlight.

[12] Notwithstanding the figures that I have just referred to, when Ms Culley wrote to Mr Martin on 25 February 2005 (immediately after the terminating of the relationship) she asked for \$15 per hour. In this letter dated 25 February 2005 she sets out her claim for the first time and as I have already mentioned, she identifies \$15 per hour as the agreed rate.

[13] It is conceivable that Ms Culley was mistaken. \$15 per hour was an hourly rate mentioned by both parties during the investigation meeting as being a rate of pay which might apply after 1 April 2005 assuming that Ms Culley had proved her worth. The other alternative explanation for the difference between Ms Culley’s evidence to the Authority and her letter of 25 February 2005 is that her evidence is unreliable.

[14] It is clear that Ms Culley had this significant conversation about starting with Starlight not with Mr Martin but with Mr Tweddell. Mr Martin’s evidence is that he had very little to do with Ms Culley on a day to day basis and certainly was not responsible for any of the initial discussions with her because he was not physically present at the time that she approached the business.

[15] Accordingly we have to consider Mr Tweddell’s evidence and his evidence on this point anyway was plain and straight forward. He said that the conversation that he had with Ms Culley revolved around her working for nothing but he agrees they discussed a starting wage although he says that the starting wage they discussed was \$11.66 per hour not \$10.66 per hour, as Ms Culley had alleged in her evidence.

[16] However critically, Mr Tweddell said that that starting wage was only to come into play on and from 1 April 2005. He says that if Ms Culley proved to be *industrious* then the hourly rate was to be \$15 per hour but again there was to be no payment until 1 April 2005.

[17] Mr Tweddell went on in his evidence to say that Starlight were prepared to help out Ms Culley from time to time as they were doing in small ways for the three other staff members. He noted that Starlight were paying the fuel running costs for other staff and that Ms Culley knew that that was the position. He said that had Ms Culley indicated her wish to have such an arrangement it would have been considered. He was adamant that there was no discussion between him and Ms Culley about wages being paid under the table, that she neither asked for such an arrangement nor did he offer such an arrangement.

[18] There is also dispute about whether there was or was not a written employment agreement. Both Mr Tweddell and Mr Martin say that such an agreement was prepared although Mr Tweddell is uncertain whether it was ever signed. Mr Martin's evidence was that he saw a signed employment agreement. No copy of the employment agreement was produced to me although a copy of another employment agreement relating to another staff member was, and the evidence from Starlight was that the agreement with Ms Culley was in similar terms.

[19] A further area of dispute was the understanding that Ms Culley had about the employer's financial position. The employer's witnesses both make clear that at this early stage in the piece, Starlight had cash flow problems. Mr Tweddell's evidence was very straight forward on this point. When I was questioning him about the conversation he had with Ms Culley concerning her starting arrangements, he simply said that until 1 April 2005, Ms Culley could not be paid because (Starlight) *had no money*.

[20] It is unchallenged evidence that Ms Culley lent Starlight the sum of \$2,350.00 on 23 January 2005 and was fully repaid on 24 February 2005.

[21] Starlight's evidence is that that loan became necessary because of the cash flow problem that it was experiencing. Ms Culley's evidence was that she did not understand the business had financial problems until 23 February 2005 when the relationship came to an end. She said later in her evidence *when I lent them the money, I had no idea they were in financial difficulty*.

[22] In summary then Ms Culley says that she had a private arrangement with Starlight the effect of which was that she would be paid "under the table", that there was no employment agreement and that the loan that she made to her employer did not signify that the employer was in financial difficulty.

[23] Starlight witnesses on the other hand say that no commitment was made to pay any wages at all to Ms Culley during the relevant period, that she was there exclusively for work experience purposes, that the reason that no wages were to be paid over that period was because the company had no money and that the evidence for that was in part the loan that Starlight was forced to take out with Ms Culley during the relevant period.

[24] I have reached the conclusion that the evidence supports the view that no arrangement to pay Ms Culley during the period in question was made and accordingly she had no claim against either Mr Martin or Starlight Limited. I am influenced to reach that decision by Ms Culley's own apparent confusion about the rate of pay which she says was agreed (her letter of 25 February versus her sworn testimony) and by my preference for the logical consistency of Starlight's witnesses, particularly the clarity of the evidence around the financial difficulties that Starlight was experiencing at the relevant time.

[25] Further, it seems frankly disingenuous of Ms Culley to claim that she had no idea that her employer was in financial difficulty when on her evidence, she is asked to make a significant loan to her employer within not much more than two weeks of commencement.

[26] In the end, Starlight says Ms Culley was not paid because there was no agreement to pay her and the fact that they had to seek a loan from her was evidence of their financial predicament. Her confusion about what rate of pay she was immediately expecting to receive for the hours that she claims to have worked further supports my conclusion that the evidence of the Starlight witnesses is, on this significant point, to be preferred.

Who was the employer?

[27] The question of who Ms Culley's employer was, is of course, now academic as I have found that she has no claim against anyone on the facts as they were presented to me at the investigation meeting. However, I do observe that were I to have been satisfied that Ms Culley had a viable claim, I would have considered making orders against both Mr Martin and Starlight Limited leaving it to Ms Culley to choose her enforcement mechanism.

[28] The question which seemed to most trouble the parties was whether Ms Culley was employed by Mr Martin trading as Starlight Funeral Services or whether conversely Ms Culley was employed by the limited liability company Starlight Funeral Services (Australasia) Limited.

[29] Without having to decide the issue for reasons I have just traversed, I do observe that I think it more rather than less likely that Ms Culley was employed by Starlight Limited although I take Mr McMenamin's point that there is evidence of undisclosed agency.

[30] Much of the businesses paper, including for instance its letterhead, omits the word limited and some documentation is simply headed "Dennis Martin Starlight Funeral Service".

[31] Conversely, the employment agreement that was produced at the hearing while on its cover page referred only to "Starlight Funeral Services", on the execution page referred to the full limited liability name of the company.

[32] As I say however, all this discussion is somewhat academic as I have found that, on the balance of probabilities Ms Culley does not have a viable claim for unpaid wages due to her.

Determination

[33] I have decided that Ms Culley has not satisfied me that there was ever an agreement to pay her until after 1 April 2005 and as the relationship between her and Starlight terminated on 23 February 2005, no wages are due her.

[34] It follows that Ms Culley's claim fails in its entirety.

Costs

[35] Costs are reserved.