



that (in terms set out elsewhere in the statement of problem) MSL failed to provide a written employment agreement, and failed to pay salary and holiday pay due to Ms Williams.

[4] It was said that Ms Williams was employed by Mount Shop Limited (“MSL”) on a gross salary of \$35,000 per annum, between 28 July 2005 and 21 March 2007. MSL is in the business of importing and distributing car parts and car mounts.

[5] During a similar period, as well as before it, Ms Williams was also in a personal relationship with one of the company’s two shareholders, James Toia. A ‘salary’ payment due on 31 January 2007 was stopped as was the payment for the following week, Ms Williams protested, and two further payments were made before another payment was stopped. Ms Williams left the family home on 1 March 2007. She admitted there had been difficulties in the personal relationship, but alleged that she left the family home because of the failures to pay. According to the papers, the company recorded her employment as having terminated on 21 March 2007.

[6] Rather than attempting to paraphrase what was said about the ‘employment’ arrangement in practice, I set out relevant passages in the statement of problem as follows:

“(c) In order to build up and develop the business to a point where it became profitable, James Toia was required to work long hours. Often those long hours were combined with 7 days a week. He was able to do that because of the assistance that he was provided by the applicant, his de facto partner. In order to free up James Toia to work the long hours he did, the applicant acted as the home-maker, stayed at home. She looked after the house and the children (there were 4 children to be looked after).

(d) In July 2005 James Toia handed to the Applicant an individual employment agreement for employment with the Respondent. It was going to result in her being paid a salary of \$35,000 per annum by the Respondent in lieu of the housekeeping allowance she had had previously.  
...

(g) Once the Respondent began to pay the Applicant a salary of \$35,000 per year, the housekeeping allowance previously provided by James Toia stopped. It was a requirement that, out of that salary payment, she was to feed all the family and to clothe the 4 children and

herself. She was also required to pay the house insurance and the Telecom accounts. She also had to pay such incidental household expenses as .... In short, ... the \$35,000 covered the balance of the weekly family living and housekeeping costs.”

[7] The individual employment agreement purported to be an agreement between Mount Shop Limited and Jaewyn Williams. It had the appearance of a professionally drafted document. It said in part:

“1.1 You are employed by MSL in the position of customer services.

1.2 ...

1.3 Purpose of position:

- . To represent the company to existing and potential customers and satisfy their requirements.
- . Develop and maintain customer relationships developing increasing turnover opportunities.
- . Record all competitor and crossover information obtained from time to time in computer system.

1.3a Specific tasks:

- . Attend to inbound customer phone calls and satisfy customer requirements.”
- . [and so on in that vein. I do not list the remainder of the tasks other than to say they are typical of a customer service position and make no mention of housekeeping duties or child care.]

[8] The statement of problem commented on these provisions as follows:

“[Ms Williams] did believe that she helped with customer services but only in the sense that the work she did in the home freed up James Toia to be on call to the customers at all hours. Other than that, she was not required to carry out any of the functions set out under the heading ‘Position and Location.’”

[9] The employment agreement also specified that the workplace was at one of the company’s business addresses. That is not where Ms Williams carried out her ‘work’. She ‘worked’ at the family home.

[10] The Employment Relations Act 2000 defines ‘employee’ as ‘any person of any age employed by an employer to do any work for hire or reward under a contract of service’ and includes a ‘homeworker’.<sup>1</sup>

[11] Since there have been no submissions I am unaware of whether the inclusion of a ‘homeworker’ in the definition was being relied on in this application, but if it was then ‘homeworker’ does not mean the same as ‘home-maker’. A ‘homeworker’ is a ‘person who is employed by another person (in the course of that other person’s trade or business) to do work for that person in a dwellinghouse’.<sup>2</sup> Ms Williams was a home-maker. I would not accept that her homemaking activities in her partnership with Mr Toia amounted to doing work for MSL at all, let alone would I accept that the work was done in the course of MSL’s trade or business as an importer and distributor of car parts and car mounts.

[12] The production of the individual employment agreement, signed or not, makes no difference to my conclusions. It is abundantly clear that the ‘employment’ to which the document purports to relate bears no resemblance to the reality of the parties’ arrangements. This is so much so that I could not accept any argument that the document embodied a valid employment agreement between the parties.

[13] Ms Williams did not carry out any of the activities set out in the ‘employment agreement’, and there was no allegation that she had ever done so. There was nothing to suggest the production of the agreement in 2005 reflected any change in Ms Williams’ activities, with the only changes being to purport to incorporate them in the company’s activities for accounting purposes and to transform her household allowance into a ‘salary’. The payments Ms Williams received subsequently were not payments for services provided to the company. She was not employed by MSL as a member of the customer services staff and did not carry out any work for the company. She was not working for ‘hire or reward’ for MSL.

[14] If the company has paid Ms Williams as if she were its employee, and reflected her ‘employment’ status in its accounts, that is not a matter for the

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<sup>1</sup> S 6(1)

<sup>2</sup> S 5

Employment Relations Authority. Against the background I have set out, the company's accounting and related arrangements do not by any means support the existence of a genuine employment relationship.

[15] Ms Williams was not an employee of MSL. Since there was no employment relationship between the parties, the Employment Relations Authority has no jurisdiction to address any of the matters raised.

### **Costs**

[16] Costs were sought, but in the circumstances compelling argument is necessary before I would consider making any order. If, however, an order is sought the parties shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. If any party wishes to reply to the memorandum of the other, there shall be a further 7 days from the date of receipt of the relevant memorandum in which to file and serve such reply.

R A Monaghan

Member of the Employment Relations Authority