

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Manuela Drew (First Applicant)
AND Johanna Esztl (Second Applicant)
AND Anne & Harvey Stell (Respondents)
REPRESENTATIVES Glenn Drew for the applicants
Anne & Harvey Stell in person
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 21 January 2004, Napier
MEETING
DATE OF 26 January 2004
DETERMINATION

DETERMINATION OF THE AUTHORITY

THE EMPLOYMENT RELATIONSHIP PROBLEM

1. Ms Esztl and Mrs Drew seek payment at the minimum wage rate for the four days they claim they worked at the Stells' organic vineyard. The Stells claim that they were volunteers who did not expect payment for having a "mother-daughter experience" on their vineyard.

THE FACTS

2. Johanna Esztl knew Anne Stell because she had recently been her teacher at a Rudolph Steiner School. Mrs Stell's children also attended the Rudolph Steiner kindergarten where Ms Esztl later worked during the kindergarten term.
3. Ms Esztl was looking for work over the Christmas period 2002/2003, while the kindergarten was closed. She wanted to work with her mother, Mrs Drew, particularly as her mother had a driver's licence, which she herself did not hold.

When she discovered that Mrs Stell owned a vineyard she approached her for work in the Christmas school holidays.

4. Ms Esztl knew that work had been done on the orchard through the Rudolph Steiner School by school students (Ms Esztl had only recently left school herself) for fundraising purposes, which did not constitute employment for those students. However, she approached Mrs Stell for work in the holidays for her and her mother, as she told Mrs Stell. Mrs Stell asked her to ring back after Christmas.
5. She did so and was told by Mrs Stell that she could make some work available to the pair. Mrs Stell did this more out of a desire to help the two than from a pressing need to have work done on the vineyard. The Stells were often available to do work themselves. Furthermore they had the Rudolf Steiner school students to call on as well as an independent contractor who had been referred to them by another vineyard owner.
6. Matters were left fairly informal, particularly as Ms Esztl and Mrs Drew had no experience at vineyard work. At Ms Esztl's suggestion it was agreed that she and Mrs Drew would attend the vineyard from 8am the next day, being Wednesday, 15 January. No arrangements were made in respect of the duration of work, hours of work or even the rate of pay that would apply.
7. As planned, Ms Esztl and Mrs Drew turned up at the vineyard at 8am the next day. They were trained on vine wrapping and proceeded to do that work for the rest of the day. They were asked to write on a piece of paper their hours of work and leave it in the shed. Instead Ms Esztl put the sheet, when completed, somewhere around the house where it would be noticed. They finished work when the tasks they had been allocated were completed.
8. They continued work the next day until the work was completed at lunch time. No contact had been made with Mrs Stell at the end of that day so Ms Esztl rang her to ask about continued work. Mrs Stell said that they, the Stells, would be away until the Tuesday and that she would ring then to tell them if there would be any work the next Wednesday.

9. Having not heard from Mrs Stell, Ms Esztl rang the next Tuesday and was told that she could come back the next day, namely Wednesday. Ms Esztl and Mrs Drew worked that morning and then returned the next day, when they were shown a slightly different task. The work they did that day was not done to the satisfaction of Mr Stell, who checked it at the end of the day. He was very angry at the fact that damage had been done to the vines. He arranged for Mrs Stell to ring Mrs Drew and Ms Esztl to tell them that the work they had done had caused damage and that there would be no more work available.
10. Ms Esztl, Mrs Drew and her husband, Mr Drew, attended the vineyard the next day to ascertain why the damage had been caused. Mrs Drew was very upset and offered to forego payment for the last day because of the damage caused. Ms Esztl, on the other hand, was not prepared to forego any payment she believed due to her. Mrs Stell indicated that her husband was very angry about the matter but that she would discuss it with him.
11. No further contact was received from the Stells until Mrs Drew wrote a letter seeking payment of the sums now claimed. Mrs Stell responded by denying that Ms Esztl and Mrs Drew were ever employed by them. Mrs Stell interpreted the relationship as being one of a mother and daughter obtaining vineyard experience as volunteers.
12. The matter has been to mediation but the parties' positions in the matter remain diametrically opposed. It therefore follows that the Authority must determine the matter between them.

CREDIBILITY

13. I have determined the facts as set out above by preferring the evidence of the applicants over that of the respondents where there is conflict. In doing so I note that there were no obvious discrepancies in the evidence presented by any of the parties, nor that of the other witness. However, the evidence of Mrs Stell is inconsistent in a number of matters with that of Ms Esztl and Mrs Drew, so credibility findings must be made.

14. These matters have to be determined on the balance of probabilities, i.e. what is more likely than not. There can be no certainty in situations like this. One can only rely on the background circumstances and any internal inconsistencies in a witness's evidence.
15. In making my determination on credibility I am certainly not concluding that Mrs Stell is lying. Events which occur in a relatively informal environment are often not well recalled later and in particular witnesses may often genuinely remember events as they wish they had occurred, rather than as they actually did. This is even more likely to occur when people, such as here, are operating from different assumptions. Thus, for instance, where Ms Esztl indicated that she wanted to work with her mother, Mrs Stell took that to mean (wrongly, in my determination) that the work they wanted to do on the orchard was in a voluntary capacity only.
16. There are in fact a number of factors which point towards an acceptance by the parties, as the Stells would have it, of a volunteer work situation. Ms Esztl was the initiator of almost all the contacts between the parties and no specific terms of agreement such as pay rate, the duration of work, and the hours of work were agreed. However, I accept that such matters are often left to be dealt with fairly informally in the horticultural sector. The Stells have had an ongoing arrangement, particularly through the Rudolph Steiner School, with "fundraising volunteers". The Stells also have a history of helping people out in a voluntary capacity, and I accept that voluntary work on farms and organic vineyards in particular is widespread, and the work is keenly sought out. Furthermore, the Stells have an independent contractor they can and do call on if extra work needs to be carried out on the vineyard.
17. However, these factors are merely pointers. An employment relationship can arise without the formality that the law requires such as the provision of written agreements, for instance. No doubt many people would welcome the opportunity to do volunteer work on an organic vineyard (particularly to gain experience in the industry) and such work is consistent with a "mother-daughter experience". However, when assessing the overall course of events, I consider it unlikely that Mr and Mrs Stell would have expected, and indeed, on at least one occasion, asked Ms Esztl and Mrs Drew to come back to work on the vineyard, and yet not expected to

pay them for that work. In addition, the request by Mrs Stell for Ms Esztl and Mrs Drew to note down their hours, which was done in writing, is more consistent with employment than volunteer work, notwithstanding the desirability of the Stells knowing when others were present on their vineyard. Furthermore, I determine that it is more likely than not that it was Mr Stell's anger over the damage done to the vines by the work done by Ms Esztl and Mrs Drew on the last day that ensured that no payment was going to be made to Ms Esztl and Mrs Drew.

18. It is because of these factors that I determine the facts as set out above, as they clearly outweigh the factors pointing to the opposite conclusion.

THE LAW

19. Section 6 of the Employment Relations Act defines an employee as any person of any age employed by an employer to do any work for hire or reward under a contract of service. It excludes a volunteer who does not expect to be rewarded for work to be performed as a volunteer and receives no reward for work performed as a volunteer.

DETERMINATION

20. Clearly this case turns on the matter of whether or not the parties acted on the understanding that Ms Esztl and Mrs Drew did not expect to be rewarded for work to be performed because they were volunteers. For the reasons set out in the section on credibility, I determine that this was not the case in the particular circumstances of this relationship. The Stells knew that Ms Esztl was not fundraising for the Rudolph Steiner School, and they certainly could not have envisaged that Mrs Drew was doing so. They expected to be paid although no agreement had been reached as to the amount. I find that they would have been rewarded for their efforts by payment in cash but for the fact that they damaged the vines on their last day of work. As a result, Mr Stell in particular, determined that they would not be paid. To a disinterested observer, this relationship had more the substance and appearance of an employment situation, rather than a volunteer situation, I conclude. Whatever Mrs Stell's intention may have been at the time, if the Stells wanted to ensure that no employment relationship arose then they needed to take more steps than they did to ensure that the situation was clear to all parties.

21. Given my acceptance of the hours worked by Ms Esztl and Mrs Drew, then in the absence of an agreed rate of pay the Minimum Wage Act rates should apply as claimed, I determine, to calculate the total sums owing to Ms Ezstl and Mrs Drew. I therefore order the respondents; Harvey and Anne Stell, to pay to the applicants, Johanna Esztl and Manuela Drew the sum of \$424.00 gross between them.

COSTS

22. Costs are reserved.

G J Wood
Member of Employment Relations Authority