

Issues

[5] The issue for this preliminary determination is whether or not Mr and Mrs Craw should be joined to Ms Roberts's application as Respondents.

Background Facts

[6] The Matua is a public house in Tauranga (The Matua). The Matua Limited is a registered company of which Mrs Veronica Craw (stated as 'Dempsey' on the Companies Office documents) is the sole director and shareholder.

[7] Mr Craw is the husband of Mrs Craw and Mrs Craw stated that he had full control of the operations of The Matua, submitting that he was the venue manager, operator and owner.

[8] Ms Roberts applied for a position in respect of a full-time, permanent, Bartender/Duty Manager for The Matua which was advertised on TradeMe on or about 26 July 2016. Mrs Craw stated that she had drafted the advertisement which stated that applicants should contact Mr Andrew Craw and provided his telephone number.

[9] Ms Roberts contacted Mr Craw by telephone and they met on 23 July 2016. They discussed the position and the terms of employment which Mr Craw told Ms Roberts were four shifts a week totalling 30 hours, at an hourly rate of pay of \$18.00.

[10] Ms Roberts stated that at no time did Mr Craw mention Mrs Veronica Craw or that the employer was a company. Ms Roberts said she understood that Mr Craw was the owner of The Matua and her employer.

[11] Ms Roberts telephoned Mr Craw to accept the position offered on the terms discussed at the meeting on 25 July 2016. Mr Craw telephoned her on 26 July 2016 confirming that she was appointed as Bartender/Duty Manager on the terms and conditions as discussed and the start date was the following day, 27 July 2016.

[12] Ms Roberts commenced work at The Matua on 27 July 2016 at approximately 4.30 p.m. and she provided Mr Craw with her bank details and IRD number. Mr Craw showed her the premises and aspects of the business operation.

[13] Ms Roberts was not provided with a written individual employment agreement.

[14] Ms Roberts worked until 11.30 p.m. on 27 July 2016, and the following day, 28 July 2016, from 3.00 p.m. until approximately 11.30 p.m. During the period of Ms Roberts's employment Mrs Craw visited The Matua and met Ms Roberts who understood from the conversation she heard between Mr and Mrs Craw that they were separated, but that Mrs Craw continued to have a joint interest in The Matua as joint owner.

[15] Ms Roberts was due to commence work at 3.00 p.m. on 30 July 2016. On checking her telephone that morning she realised she had two missed calls from Mr Craw and a message to call him. When she returned Mr Craw's call at approximately 12.55 p.m., he told her that he had discussed matters with Mrs Craw and concluded that she was: "*just not right for the job*".

[16] Mr Craw asked Ms Roberts to go into The Matua and collect the payment due to her. When Ms Roberts collected her payment, Mr Craw gave her \$250.00 in cash in respect of wages for the two days she had worked and advised her that he would tell customers that she no longer wanted to work there.

[17] Mrs Craw stated that she not been advised by Mr Craw that he had terminated Ms Roberts employment until sometime after the event. As The Matua was relationship property she had contacted Ms Roberts on 4 August 2016 to try to resolve the situation.

[18] Ms Roberts received a text message from Mrs Craw asking if they could meet: "*to resolve the situation between the Matua Pub and yourself to the mutual benefit of both parties*". A meeting between them was arranged for 5 August 2016.

[19] During the meeting on 5 August 2016 Ms Roberts stated that Mrs Craw offered to pay her two weeks' wages to resolve matters. However Mrs Craw stated that during the meeting she had offered to maintain Ms Roberts's employment, but Ms Roberts had instead asked for two weeks pay.

[20] During the meeting, Mrs Craw asked Ms Roberts to sign a document she had prepared on unheaded paper which stated:

Meeting with Liz Roberts at The Matua Pub, Warrington Road, Matua.

This meeting was called to resolve the employment status with Liz Roberts.

Liz Roberts has accepted our two weeks' notice for terminating her employment. May I add that it has nothing to do with her abilities or performance; it was an unfortunate circumstance on our behalf.

[Signed by Mrs Craw]

I, Liz Roberts has received \$200 cash in advance today. The balance will be automatically credited into my account.

[21] The note was signed by Ms Roberts.

[22] Mrs Craw stated that following the meeting she had reached agreement with Mr Craw that one weeks' payment was sufficient, and accordingly paid that amount into Ms Roberts's bank account on 9 August 2016.

Determination

Who was Ms Roberts's employer?

[23] It is submitted on behalf of Ms Roberts that this is case in which the doctrine of undisclosed principle applies. The doctrine is recognised in the case of *Cuttance (t/a Olympus Fitness Centres) v Purkis*¹ and arises in circumstances in which a person, having authority to contract on behalf of another person, makes the contract in their own name, which then allows an applicant to choose whether or not to proceed against a person personally notwithstanding that he or she was only acting as an agent for another.

[24] In this case Ms Roberts responded to an advertisement offering employment as Bartender/Duty Manager. The advertisement had been drafted by Mrs Craw and gave Mr Craw as the contact person.

[25] An employment agreement is subject to the normal rules of contractual formulation: there must be offer, acceptance, certainty of terms, intention to create legal relations, and consideration.

[26] When Ms Roberts met with Mr Craw he discussed the terms of employment with her and she confirmed by telephone on 25 July 2016 that she would accept the position on the terms discussed, which was accepted by Mr Craw and a start date agreed.

¹ [1994] 2 ERNZ 321

[27] Ms Roberts provided Mr Craw with her bank details and IRD number on her first day of work, 27 July 2016, and Mr Craw showed her the premises and aspects of the business operation which she required in the performance of her duties.

[28] Ms Roberts worked two days on 27 and 28 July 2016 during which time she met Mrs Craw. During those two days neither Mr Craw nor Mrs Craw told her that her employer was The Matua Limited, and Ms Roberts's understanding was that they were joint owners.

[29] In examining whether or not that belief was reasonable I note the following:

- It was Mrs Craw who drafted the job advertisement, and it was Mr Craw who was identified as the contact person for applications;
- It was Mr Craw who interviewed Ms Roberts, discussed the terms of employment, and confirmed the job appointment;
- It was Mr Craw who showed Ms Roberts the business operation;
- It was Mr Craw who telephoned Ms Roberts to advise her of the termination of her employment on 30 July 2016;
- It was Mr Craw who paid Ms Roberts in cash in recompense for the hours she had worked;
- It was Mrs Craw who contacted Ms Roberts following the receipt of payment for the hours she had worked for Mr Craw, and who discussed and agreed a payment of two weeks' notice in respect of the termination of her employment;
- The document signed by Ms Roberts and Mrs Craw during the meeting on 5 August 2016 was not headed The Matua Limited, nor did it identify The Matua Limited as Ms Roberts' employer;
- It was Mrs Craw who had signed the document in her personal capacity rather than as a director of The Matua Limited;
- Mrs Craw stated that she and Mr Craw had subsequently agreed that the termination payment of one weeks' notice would be sufficient.

[30] In consideration of all these factors I find Ms Roberts's belief that Mr and Mrs Craw were her employers to have been a reasonable one. I find all the contractual elements of offer, acceptance, and certainty of terms, intention to create legal relations and consideration exist in the interactions between Ms Roberts and Mr Craw and Mrs Craw, such as to create an employment relationship.

[31] Whilst the bank transactions regarding the payments to Ms Roberts at the conclusion of her employment may have been actioned from accounts held in the name of The Matua Limited, these payments occurred after the employment terminated and therefore could not address Ms Roberts understanding as to the identity of her employer during the period of employment.

[32] I note moreover that Ms Roberts was not provided with an offer letter or a contract of employment. Failure to provide an employment agreement pursuant to s 65 of the Employment Relations Act 2000 is a serious omission. I observe that had one been provided, this issue may not have arisen.

[33] Even were my finding to be mistaken, and Mr and/or Mrs Craw were only acting as agents for The Matua Limited, I find that the doctrine of undisclosed principal would apply such that Ms Roberts may choose against whom to proceed in the substantive claim that she was unjustifiably dismissed.

[34] I determine that Mr and Mrs Craw should be joined as respondents in this matter.

Next Steps

[35] The Authority will contact the parties shortly to progress this matter.

Costs

[36] Costs are reserved and will be resolved following the finalisation of this matter.

Eleanor Robinson
Member of the Employment Relations Authority