

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 80/10
5159956

BETWEEN

NAUMAI WHIU
Applicant

A N D

GERALD YOUNG
First Respondent

WAKATIPU NATURALLY
LIMITED (In Liquidation)
Second Respondent

Member of Authority: Helen Doyle

Representatives: Tony Oxnevad, Counsel for Applicant

Investigation: Telephone conference 26 March 2010 and on the papers

Determination: 30 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Naumai Whiu says that she was unjustifiably dismissed from her employment. She also seeks an accounting from her employer so that she can determine whether she is owed holiday pay and/or other entitlements.

[2] The statement of problem named Gerald Young (Wakatipu Naturally) as the respondent. When the statement of problem was lodged Ms Whiu was unrepresented.

[3] In the statement in reply lodged with the Authority Mr Young stated that the respondent was Wakatipu Naturally Limited and that Mr Young was a director of that company. The respondent did not accept Ms Whiu was unjustifiably dismissed.

[4] Mediation was to have taken place in October 2009. Ms Whiu attended mediation but there was no appearance at that mediation by or on behalf of the respondents.

[5] Following mediation Ms Whiu was represented by Mr Oxnevad.

[6] The Authority held a conference call with Mr Oxnevad on 18 January 2010. The respondents' legal representative advised that he had not received instructions from his client and therefore would not participate during the telephone conference. The Authority did to have an address for service from Mr Young at that time.

[7] During the telephone conference the matter was set down for an investigation meeting in Queenstown on Tuesday 30 March 2010. In the notice of direction that was prepared following the telephone conference the Authority indicated that the issue as to the identity of the respondent would be dealt with on the day as part of the investigation meeting. The Authority also timetabled for the lodging and serving of statements of evidence from both the applicant and the respondent.

[8] The Authority received a statement of evidence from Ms Whiu and from one other witness but no statements of evidence were received from Mr Young or on behalf of the Wakatipu Naturally Limited (in liquidation).

[9] On 23 March 2010 the Authority received an email from Iain Nellies who advised that he and Gus Jenkins had been appointed liquidators of Wakatipu Naturally Limited (in liquidation). The company had been placed into liquidation by order of the High Court at Invercargill on 10 March 2010. Mr Nellies advised in his email that he was aware that there was an Authority investigation meeting on 30 March 2010 but stated that the liquidators were not in a position to be able to form a view on the claim and therefore did not agree to the proceeding continuing. Mr Nellies requested copies of statements and other information that may be of assistance to be provided and a Support Officer of the Authority duly forwarded to Mr Nellies by email copies of the statement of evidence, statement of problem and statement in reply. Hardcopies of the said documents followed by post.

[10] The Authority advised Mr Oxnevad of the email and a further telephone conference was held on Friday 26 March 2010 with Mr Oxnevad. Mr Nellies also kindly agreed to participate in that telephone call. The Authority advised Mr Oxnevad and Mr Nellies that no steps could be taken against Wakatipu Naturally

Limited (in liquidation) at that point in time but that there was still an issue as to the identity of the respondent.

[11] There was some discussion about whether the Authority should still proceed to travel to and hold an investigation meeting in Queenstown to establish the identity of the respondent. Mr Oxnevad considered that this was a matter that the Authority could determine on the statement of evidence lodged by Ms Whiu that referred to this matter. Mr Nellies was able to give an indication that to the extent that there had been PAYE accounted for to Inland Revenue Department on wages paid to Ms Whiu, early indications had been that it was the Wakatipu Naturally Limited (in liquidation) that had paid that tax.

[12] The Authority agreed to determine the preliminary matter as to the identity of Ms Whiu's employer on the papers and information it had.

Analysis and discussion

[13] Wakatipu Naturally Limited (in liquidation) was incorporated on 22 March 2004. Its directors are Helen Lewis and Gerald Young. The company carried on a commercial cleaning business before its liquidation.

[14] Ms Whiu commenced her employment on or about 17 January 2006 as a cleaner and was interviewed for that position by Mr Young.

[15] Ms Whiu in her written statement of evidence says *I expect I was employed by the company* although she went on to state that there was no written employment agreement provided and said in her written statement that when she raised this she was told *we don't worry about those*. There is a dispute about the employment agreement which obviously I cannot resolve on the papers because in the statement in reply the respondent says that Ms Whiu was offered a written employment agreement but declined to *execute or even review the document*.

[16] Ms Whiu accepts that she was paid by the company by automatic payments into her bank account. It is very likely that when PAYE was accounted for from Ms Whiu's earnings to IRD it was on the basis that she was an employee of Wakatipu Naturally Limited (in liquidation).

[17] Ms Whiu in her statement of evidence said that she was provided with uniform that had Wakatipu Naturally on it and a van which also had Wakatipu Naturally signage.

[18] In the Employment Court judgment of *Colosimo v. Parker* [2007] 8 NZELC [98], 622, Perkins J, it was held that the onus of proving the identity of the employer rested with the employee. In para[30] of that judgment it was stated:

Much has been made in this case of the fact that Mr Parker was never made aware that Taffy's Bar Limited was the employer. However, the real issue is whether Mr Colosimo ever held himself out to be the employer and if so, the circumstances which would entitle the Court to say he personally entered into binding and legal relations with Mr Parker. Whilst it is desirable that the true identity of the employer should be made known to the employee at the outset, that unfortunately is not always the case.

That is so in the present case. The Court is then placed in the position of having to make an objective assessment .

[19] Making an objective assessment is somewhat more difficult on the papers but I have placed in these circumstances some weight on Ms Whiu's careful statement that she expects she was employed by the company. The wages were paid in this particular case by the company which was incorporated well before Ms Whiu was employed. To the extent that the PAYE was accounted for, and this may not have been consistently, it was accounted for as though Ms Whiu was a company employee. Mr Young's name was not on any of the staff uniform clothing or on the side of the van.

[20] There was nothing in Ms Whiu's statement to satisfy me that indicate that Mr Young held himself up personally to be her employer. In saying that because the company has to act through the mind and will of its directors there can be some confusion caused because an employee in the absence of an employment agreement can identify with the director as their employer.

[21] Standing back however and considering the information in front of me I am not satisfied from it that Mr Young held himself out to Ms Whiu when she was employed as her employer. I find that it was more likely that Wakatipu Naturally Limited (in liquidation) employed Ms Whiu.

Determination

[23] On the information in front of me I conclude that Wakatipu Naturally Limited (in liquidation) was in all likelihood the employer of Ms Whiu and her claim is therefore against that company.

[22] Mr Nellies forwarded to the Authority with Mr Oxnevad's consent a copy of an email exchange he had had with Mr Oxnevad with respect to reviewing the status of Ms Whiu's claim and advising of the financial situation as best he could in relation to the company in liquidation. Mr Oxnevad and Mr Nellies will no doubt continue to discuss this matter and as necessary the Authority can hold a further telephone conference with respect to advancing this matter.

Costs

[23] Costs are reserved.

Helen Doyle
Member of the Employment Relations Authority