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Francis v Avalon Businesses Ltd AA 340/07 (Auckland) [2007] NZERA 698 (30 October 2007)

Last Updated: 19 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 340/07
File Number: 5082106

BETWEEN	RACHEL FRANCIS Applicant
AND	AVALON BUSINESSES LIMITED Respondent

Member of Authority: Janet Scott

Representatives: Kerry Single for Applicant David Small for Respondent

Investigation Meeting: 18 September 2007 in Tauranga Submissions 8 October 2007 for applicant

24 October 2007 for respondent

Determination: 30 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant alleges she was unjustifiably dismissed from her employment with the respondent. The applicant's statement of problem¹ states she seeks the following remedies to resolve her alleged grievance:

- (a) An apology for the respondent's actions;
- (b) Payment for the correct amount of holiday pay due and for the correct amount of wages due;
- (c) Confirmation that all PAYE deductions have been correctly made and paid to the IRD;

1. The remedies sought in the statement of problem differ from those requested by the applicant at the hearing. There the applicant sought the correct holiday pay and final pay, one month's pay in lieu of notice and costs.

- (d) Payment under s.123(1)(b) for a minimum of four weeks until such time as she can find another position;
- (e) Payment under s.123 (1)(c)(i) of \$10,000 for compensation for hurt, humiliation, loss of dignity and injury to feelings for the manner in which the respondent has terminated the applicant's employment;
- (f) Costs.

[2] The respondent denies the applicant was employed on a contract of service for the initial period of their

association and accepts the applicant was an employee for the period between 19 February and 12 March 2007.

[3] The respondent denies dismissing the applicant and denies the remedies sought.

Background

[4] The respondent owns and operates a Tantra2 Massage business in Hamilton. This story concerns her short-lived Tauranga operation of the same nature.

[5] The parties have very different stories in this matter. There is not one point (relevant to the findings I must make) on which they agree. For that reason, I set out the two versions of the relationship.

Applicant's version of the relationship

[6] It is the applicant's evidence that she learned the respondent was about to open a massage parlour in Tauranga. She says that on 2 February 2007, she called the respondent's owner and director (Patricia Shoemark) to have a chat. She visited the respondent at her home the same day and discussed the sex industry and her (Rachel Francis') extensive experience in the industry. There was no discussion at this time about the applicant taking a job in the new business being set up by the respondent.

[7] It is the applicant's evidence that the respondent telephoned her later that day and offered her a job as a madame (manager) of the business at a salary of

\$1,000 net per week. She also says that she met with Ms Shoemark on Sunday,

2 *Tantra massage* is carried out on a massage table. It involves full body-to-body contact in the nude with hand relief at the end. It differs from *full service* which involves sexual intercourse.

4 February at the premises Tender Touch where she was introduced to the massage technique practised at Tender Touch and familiarised herself with the business.

[8] Ms Francis' evidence was that she commenced work as a madame for the new business on 7 February 2007. Ms Francis accepts that she signed a contract for services in respect of the position that she commenced on 7 February. She submits she did this only to give an assurance to Ms Shoemark that she would not set up in business in competition with her.³

[9] Ms Francis says that in her role as manageress of Tender Touch, she did all of the following: opening and closing of the business premises; ensuring the rooms were ready for the ladies by turning on heaters if required; ensuring that towels for massages were warm; turning on music; and generally making sure the premises looked inviting for clients. She also arranged telephone appointments; she greeted clients; organised the rosters for the ladies providing the masseuse services; did the financial transactions recording the jobs for the day; and did the cashing up and banking.

[10] Ms Francis said she worked from 9am to 7pm daily from Monday to Friday.

[11] Ms Francis describes being paid \$600 in cash by Ms Shoemark on 9 February and says she was paid \$1,000 in cash on 16 February. It was her evidence that Ms Shoemark explained the cash payments by saying that she had not managed to get things sorted with her accountant to pay Ms Francis' wages into her bank account. It is also Ms Francis' evidence that from 25 February 2007 her wages were paid into her bank account. It is her evidence that \$1,000 was paid on 25 February but the wages that were due to be paid to her account on 5 March 2007 were not paid until 9 March and wages due on 12 March were not paid on time either.

[12] It is Ms Francis' evidence that she left work early on 12 March because Ms Shoemark advised her that she would look after the business that evening. She also says that she was phoned at home at 5.30pm by Ms Shoemark. Ms Shoemark raised concerns about the revenue of the business. She told

3. The contract for services signed by Ms Francis contained a restraint provision that she would not set up in business in an area within 25 kilometres of the respondent's business in *Hamilton*.

Ms Francis that she had been late in making her wage payments to her of late and that she found it hard to pay these wages.

She said that she was *going to let her go*. Ms Francis said she asked if she would be paid for that day and if she would receive her holiday pay. She was advised by Ms Shoemark that she would be paid for that day and her holiday pay would be paid. Ms Francis' evidence was that she also asked if she would receive redundancy compensation and the answer was *no*.

[13] In response to the respondent's evidence (see paras 14-31 below):

- Ms Francis accepts that she has worked in the industry under the names of Madame Daisy and Sarah but these names were only used in advertising for Tender Touch to let clients and gangs know where she was and to signal to gangs their women would be safe working at Tender Touch. It was never intended she said that she would provide masseuse services herself.
 - Ms Francis denied working as a masseuse at Tender Touch under the name of Zara. She accepted there was a woman working under the name Zara while she was managing the business. Ms Francis described Zara as a 23 year old redhead who resides in the Bay of Plenty and whose parents live in Ohope. She said she had not brought Zara to the investigation meeting because she is a gang affiliate who does not pay her taxes and she did not want to involve herself in an Employment Relations Authority investigation;
 - Ms Francis denies being paid by Ms Shoemark in cash at the end of each working day while she was working as a masseuse under the name of Zara;
 - Ms Francis denies reaching agreement with Ms Shoemark during the week ending 9 March (with effect from 12 March) to work part time from 10am to 4pm for a net wage of \$500 per week;
 - Ms Francis denies Ms Shoemark's evidence that she simply did not turn up for work on 13 February. It is her evidence that she was dismissed from her employment on the evening of 12 February.
- Ms Francis also denies texting the women who worked at Tender Touch and the clients to tell them that the business had closed.

Respondent's version of the relationship

[14] It was Ms Shoemark's evidence that she has and continues to run businesses operating under the name Tender Touch. Tender Touch offers tantra massage services.

[15] At present, Ms Shoemark has one business operating in Hamilton. Several years ago she had another business by the same name operating in Tauranga. It was her evidence that she sold that business and accepted a restraint of trade for two years. However, the new owners had subsequently closed the business and Ms Shoemark's former landlord rang and asked if she wished to lease the premises again. Ms Shoemark decided to do so and to set up a new operation trading under the name of Tender Touch in Tauranga.

[16] It was Ms Shoemark's evidence that she had three women who would provide services at her new business but she also advertised for new staff. It was her evidence that Ms Francis rang her two to three times on 2 February and later came to her home. Ms Francis was there for some time and boasted continually of her extensive experience in the industry in Rotorua and Tauranga. She said she wanted to manage a business. Ms Shoemark advised that she could not afford to appoint a manager and would be managing her business herself. Ms Francis also said that she could achieve earnings of \$3,000 per day and she offered to sell Ms Shoemark her cell phone chip for \$500.

[17] Ms Shoemark said she was worn out when Ms Francis left her home and she went to bed. She did not ring back that evening to offer Ms Francis a job as manageress of the new business and she did not meet Ms Francis at the business premises on Sunday, 4 February or give her a key to the business at that time. Ms Shoemark said she did not herself obtain a key to the business until Monday, 5 February and she and Katherine Korving worked at the premises on Monday and Tuesday (which was Waitangi Day) to set the place up for opening on 7 February.

[18] It is Ms Shoemark's evidence that Ms Francis turned up unannounced on 7 February and signed a contract for services to work as a masseuse. Ms Francis worked as a masseuse under the name of Zara between 7 and 19 February 2007.

[19] Ms Shoemark produced the day sheets recording client appointments (name, appointment time and duration of appointment), and the working names of the girls rostered to provide the services (am and pm).

[20] It is Ms Shoemark's evidence that clients are charged for a massage according to a scale (\$100 for one hour; \$90 for 45 minutes and \$80 for 30 minutes). The masseuse receives one half of that fee and the house receives the other half. If a woman provides full service, the client is charged a higher fee and a larger share goes to the woman

providing the service.

[21] Ms Shoemark pointed to records of the days' takings and distribution of those takings as being shown on the back of all the day sheets produced.

[22] It was Ms Shoemark's evidence that between 7 and 19 February she managed the business and at that time undertook all the tasks described by Ms Francis in para 9 above. It was her evidence that, in the main, all the handwriting on the job sheets for that period of time was hers.

[23] Ms Shoemark said that over the period of 7 to 19 February, Ms Francis constantly impressed upon her extensive experience in the industry and said she could build the business revenue to \$3,000 per week. She also wished to promote Tender Touch as a full service operation. It was Ms Shoemark's evidence that Ms Francis was so persuasive she agreed to employ her to manage the business and Ms Francis commenced as an employee managing the business from 19 February 2007. Ms Shoemark said she also purchased a bed for one of the working rooms so that full service could be provided to clients.

[24] It was Ms Shoemark's evidence that despite Ms Francis' promises the business's revenue did not increase and it was her evidence that in the week ending 9 March she spoke to Ms Francis about this and it was agreed between them that from the following week Ms Francis would work part time between 9am and 2pm for \$500 per week net.

[25] Ms Shoemark said she came to work on Monday, 12 March to take over from Ms Francis and found members of the media present.⁴

[26] When Ms Shoemark arrived at the premises on Monday, 12 March, there were discussions with the media and a representative of NZPC (NZ Prostitutes Collective) whom Ms Francis had called in.

[27] Following the departure of these persons, Ms Shoemark asked Ms Francis to do the banking which she did. Ms Francis then left for the day.

[28] Ms Shoemark said she reviewed the revenue figures after Ms Francis left. She felt greatly concerned at the poor figures and rang Ms Francis to talk to her about her concerns. It was her evidence that Ms Francis became upset and angry on the phone and hung up on her. Approximately 15 minutes later, Ms Francis rang back advising her that she should be careful as she might not know who was around. Ms Shoemark took this as an implied threat.

[29] It was her evidence that she did not advise Ms Francis at any time that the business would be closing and she did not terminate Ms Francis' employment.

[30] It was Ms Shoemark' evidence that on 13 March 2007 she went to open the business and found that none of the girls had arrived. Neither did Ms Francis turn up that day. Ms Shoemark said she rang Ms Francis asking for the numbers of the girls and Ms Francis refused to give them to her and said she would be offering them jobs. It was her evidence that she did manage to contact one of the girls and, after speaking to her, Ms Francis rang her and told her to stop ringing *my girls* and again made threats to Ms Shoemark.

[31] Ms Shoemark reiterated she did not dismiss Ms Francis. She is also aware that regular clients got texts that day advising them that the business had closed down. It was her evidence that the business closed because there were no girls and no clients and it was all due to Ms Francis' actions. She was not dismissed and nor was she advised that she was being made redundant.

4. An issue had arisen about the business being an illegal activity in the area in which it was located. Ms Shoemark had already made arrangements with a real estate agent to find new premises and her real estate agent had written to the Council which had granted her time to find new premises.

[32] Katherine Korving of Christchurch also appeared at the investigation meeting to provide evidence.

[33] It was her evidence that she had worked for Ms Shoemark for a long time in her Hamilton business. She worked as a tantra masseuse under the name of Alana.

[34] It was her evidence that she was very pleased with Ms Shoemark opened the business in Tauranga because it obviated the need for her to travel every day to Hamilton. She said she worked for the business at Tender Touch in Tauranga from 7 February until 14 February and during that time Ms Francis also worked there as a tantra masseuse under the working name of Zara.

[35] Ms Korving was concerned that Ms Francis lowered the standard of Tender Touch by treating it as a brothel. She was determined to create a business to provide full service and the reason behind this was her assurance to Ms Shoemark that she could increase the turnover and profit of the business.

[36] Ms Korving described in her oral evidence her annoyance about Ms Francis lowering the tone of the business and she was particularly concerned about the way Ms Francis described women on the telephone. She was also angry and upset that she had lost her job as a result of Ms Francis' actions. It was her evidence that Ms Francis had asked her for her telephone number and she had given it to her. Ms Francis had then told Ms Shoemark that Ms Korving had given her name to Ms Francis and was going to work for Ms Francis. As a result, Ms Shoemark had dismissed her.

[37] Ms Korving was extremely upset to have lost her job as a result of Ms Francis' actions and made that known to her at the investigation meeting.

Issues for Determination

- When did Ms Francis become an employee of Tender Touch?
- Was Ms Francis dismissed from her employment at Tender Touch or did she abandon her employment?
- If Ms Francis was unjustifiably dismissed what remedies are available to her?

Note: There is no dispute between the parties that Ms Francis was an employee of Tender Touch at the time of the events of 12-13 March 2007. That is the point of time that is the substantive focus of this Determination. However, in arriving at my determination in the matter it is necessary to determine when the employment relationship commenced. I have not, however, attempted to address "real nature of the relationship issues" that might be seen to be raised in respect of the earlier part of this relationship because this issue is not central to the determination and given the potential consequences for this industry it should not be addressed unless it is central to the question to be determined and following a much broader inquiry than has been conducted in this matter.

Discussion & Findings

Credibility

[38] I have no hesitation in finding that Ms intended to deceive the Authority when she denied working as a masseuse for Tender Touch under the working name "Zara". The documentation provided, which I accept as being genuine and original, is consistent with the contract for services that Ms Francis signed. I do not accept her evidence she signed that contract only to confirm the restraint of trade provision in it. I note too, that had this contract been required only to confirm the acceptance by Ms Francis of a restraint of trade then Ms Shoemark would surely have ensured the restraint referred to Tauranga not Hamilton.

[39] Given that Ms Francis has attempted to mislead the Authority on such a significant point none of the rest of her evidence can be trusted.

[40] I found the evidence of Patricia Shoemark and Katherine Korving to be, in any event the more credible and it was certainly more consistent with the documentary evidence than that of Ms Francis.

Findings

[41] As a result of these credibility findings I make the following findings of fact:

- Rachel Francis went to Tender Touch (Tauranga) on the first day of business there and signed up on a contract for services to provide tantra massage to clients.
- Ms Francis worked as a tantric massage masseuse (sometimes providing full service) until 19 February and she was paid cash for her services each day at the close of business.
- The person described by Ms Francis as "Zara" was in all probability another masseuse, Megan, who worked under the name of "Amber".
 - I find that Ms Francis provided some reception services for Tender Touch on 14 and 16 February.
 - By that mid – February Ms Francis had convinced Ms Shoemark that she could raise the takings of the business to \$3,000 per week if she was employed as Manager and if the business shifted its focus to full service as opposed to tantra massage.
 - Ms Francis was employed as Manager of the business (on an oral contract of service) from 19 February 2007. It was

agreed she would be paid remuneration of \$1,000 net per week.

- Ms Francis also provided masseuse services on 19 February and 1 March.
- I find there was a modest increase in earnings to the business over the next two weeks. However, the hoped for increase in earnings to \$3000 per week did not eventuate. 5 It did not even come close.
- I find that on or about 9 March Ms Shoemark discussed her concerns with Ms Francis that earnings had not improved as expected. The parties agreed that Ms Francis would (effective from 12 March) start working part – time from 9am-2pm for \$500 net per week.
- I find that after Ms Shoemark relieved Ms Francis in the business on the afternoon of 12 March she reflected on recent earnings (I note the earnings for that day were particularly low) and she phoned Ms Francis about her concerns.
- I find that Ms Francis adopted an unpleasant and aggressive stance in this discussion and advised she might not come to work the following day. I accept too that she rang Ms Shoemark later with veiled threats to her safety.

5 The booking sheets show that full service interactions increased but this led to a larger part of the income going to the masseuse. There was no increase in the number of clients to compensate for this loss of earnings

- I find that Ms Shoemark, who would not normally have gone to the business at that time, went to the business the next morning because she was not sure of Ms Francis' intentions. No 'girls' turned up and neither did any clients.
- Ms Shoemark could not find the telephone number of the 'girls' (kept in the safe). I find in all probability those numbers were in the possession of Rachel Francis. I also find that clients and 'girls' were texted by Ms Francis and told the business had closed.

Conclusion

[42] I conclude that Ms Francis was not dismissed from her employment with Tender Touch. She abandoned her employment and took steps that essentially destroyed this new business.

Determination

[43] Ms Francis' claim of unjustified dismissal is declined.

[44] I also determine that she has been paid all entitlements to wages and holiday pay.

Costs

[45] I have considered the cost submissions made for the parties.

[46] Costs must follow the event and I direct Ms Francis to pay the respondent the sum of \$1500 plus \$582 in expenses and disbursements

Janet Scott

Member of the Employment Authority