

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 157
5361082

BETWEEN	ERIKA HESCHL Applicant
AND	LISA KIM LEWIS First respondent
AND	JENNIFER MOLLOY Second respondent
AND	HAIR REVOLUTION LIMITED Third respondent

Member of Authority:	M B Loftus
Representatives:	Erika Heschl and Daan Dehn for the applicant Lisa Lewis and Jennifer Molloy for the Respondent
Investigation Meeting:	27 February 2012 at Takaka
Submissions Received:	At the investigation
Determination:	31 July 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Erika Heschl, claims she was unjustifiably dismissed by the respondent(s) on 6 September 2011.

[2] Ms Heschl also claims that she was unjustifiably disadvantaged in her employment as a result of the *demeaning manner and actions* of her employer which made her *working environment difficult and uncomfortable* and there is a further claim regarding the lack of a written employment agreement.

[3] The respondents accept they terminated their relationship(s) with Ms Heschl but deny the cessation amounted to a dismissal given she was a self employed

contractor. They say the decision was justified by a business environment which prevented retention of all those engaged therein.

[4] The respondents deny acting in a way that would have made Ms Heschl's working environment difficult and uncomfortable and contend a written employment agreement was unnecessary given her status as a contractor.

Background

[5] The first and second respondents (Mesdames Lewis and Molloy) own and operate a hair dressing salon in Takaka. The business was initially operated as a partnership but this changed on 22 March 2011 when Hair Revolution Limited was incorporated.

[6] Having responded to an advertisement in the *Nelson Mail* Ms Heschl was interviewed by the two owners. As a result, she commenced working as a senior hairdresser from the salon's premises on 3 February 2011. Ms Heschl says she did so as an employee. Both Ms Lewis and Ms Molloy say Ms Heschl was a self employed contractor.

[7] As already said, Hair Revolution was incorporated on 22 March. In her statement of problem Ms Heschl says an employment contract was promised around that time but never produced. The respondents deny that claim and Ms Heschl did not repeat or support it when giving oral evidence.

[8] It was around this time Ms Heschl claims some tensions started to develop as clients began asking for her. She concludes this made the owners feel inferior. On 28 June she found an error in respect to the calculation of GST in payments made to her and claims that having raised it, she was shunned thereafter. Ms Heschl took three weeks leave commencing 7 July and upon her return noted further tensions and a reduction in clientele.

[9] Mesdames Lewis and Molloy express surprise at these claims and say they had no inkling of disharmony within the business. They were, however, having concerns about the business given challenging economic times and sought the input of a business mentor. There were also ancillary issues such as Ms Lewis's husband ceasing work, which required her to increase her earnings. On 29 August they advised Ms Heschl they were considering a new structure. The proposal advises *If we*

decide to implement this proposed restructuring we will no longer require your services and your contractor relationship with us will end. The letter then asks that Ms Heschl provide any response or feedback within two days.

[10] Ms Heschl responded the following day. She says she was unsure how to respond as, in her view, it looked as if the owner's minds were already made up. That said, she sought an extension on the provision of feedback to 5 September. She did not challenge the assertion she was contractor.

[11] On 5 September Ms Heschl wrote advising she needed at least four days work per week in order to support herself. Whilst not directly contesting the earlier assertion she as a contractor, she does say she had considered a *rent a chair* approach (a form of self employed contracting used in the industry) but contends her immigration status precluded her from being self employed. Her letter finishes by advising *It seems clear that your proposed restructuring really has no room for me. Please let me know your plans as soon as possible. I cannot continue with this uncertainty and, as you know, my bookings are off dramatically in the last few weeks.*

[12] The following day, 6 September, Mesdames Lewis and Molloy responded. They advised they were adopting the proposed structure and *as such, we no longer require your services and your contractor relationship ends as of today ...*

[13] That said, the letter does offer Ms Heschl the opportunity to remain until 20 September if she so wishes.

[14] There then followed an increasingly antagonistic chain of correspondence which led to Ms Heschl raising her personal grievance and the issuing of a trespass order against Mr Dehn.

Issues

[15] There are, potentially, three issues to be determined. The first is whether or not Ms Heschl is an employee or a contractor. The second and third need only be addressed if it is found she was an employee. They are which of the respondents was the employer and can that employer justify the decision to dismiss.

Determination

[16] The first question is whether or not Ms Heschl was an employee or a contractor. This must be determined first as the right to take a personal grievance is bestowed upon an employee and is not available to a contractor (see s.5 of the Act).

[17] It is Ms Heschl's position that the arrangement, as entered into, was one of employment. She bases that on three main points:

- a. The fact of employment was expressly stated;
- b. There are few, if any, contractor relationships in the industry and their rarity was such she would have been instantly altered had such an arrangement been suggested; and
- c. Had she understood she was a contractor she could not have accepted the appointment, as her immigration status precluded her from being self employed.

[18] Unfortunately Ms Heschl was unable to sustain any of the above points when giving oral evidence. She resiled from the assertion employment has been expressly mentioned. Instead she said the nature of arrangement was not discussed and she *assumed* she was an employee. She also accepts she did not question her status until after termination, even though it was enunciated in the letter of 29 August.

[19] The contention her immigration status precluded self employment is simply incorrect and Ms Heschl conceded this, though she maintains she only became aware of that after termination. Finally and given earlier investigations involving this industry and evidence from senior industry participants (see for example *Court v Loose Ends Ltd* [2011] NZERA Christchurch 13) I note self employed *rent a chair* arrangements are common.

[20] There is a fourth point, though not one argued by Ms Heschl. It involves the letter of 29 August which, it could be argued, looks like an attempt to consult over a potential redundancy situation as one would with an employee. The respondents say they took this approach as *industry gossip* had warned them Ms Heschl was a serial litigant and they should be cautious. This I disregard. The explanation was not challenged and I accept it but note, in any event, that consultation over the

discontinuation of an arrangement is not precluded simply because it involves a contractor as opposed to an employee. I also note the letter was drafted by an employment consultant whose practice would be influenced by normally dealing with employees.

[21] As is already evident, the respondents consider Ms Heschl was a contractor and claim that was made clear at the time of the interview. They say the nature of the arrangement was confirmed by a multiplicity of factors including:

- (i) Ms Heschl chose the days and hours she would work. She came and went from the salon as she pleased and made no record of her start and finish times;
- (ii) She set her own prices and invoiced Hair Revolution Limited weekly on the basis of work performed and clients seen;
- (iii) She was responsible for her own tax and ACC levies;
- (iv) Ms Heschl provided her own tools;
- (v) She began offering a range of services not previously offered from the salon and for these she again provided her own tools;
- (vi) Ms Heschl was throughout the period of her relationship with the respondents a director and 50% shareholder of a mobile hairdressing company (anywHAIR). She used a sign written vehicle advertising anywHAIR and was, as far as the respondents were concerned, free to trade under that name as she so wished. She frequently removed her tools from the salon when she left and, it was assumed, used them to operate the anywHAIR business; and
- (vii) Hair Revolution and its predecessor partnership had consistently engaged seniors as contractors. There have been no exceptions. The only employees, including one engaged in April 2011, were juniors.

[22] This evidence withstood enquiry during the investigation.

[23] I note the advert was did not identify the nature of the relationship and could be open to interpretation either way but accept the situation was explained at

interview. The respondents say that while they never used technical terms such as contractor or specifically said *rent a chair*, sufficient detail was given that it should have been clear. Their answers to questions would support that but for one point. English is, to Ms Heschl, a second language and the way in which she answered questions during the investigation made it clear that she often failed to comprehend what was being said, but was reluctant to seek clarification. It is easy to see how a misunderstanding could have occurred, but that does not mean the situation was not explained.

[24] I turn to the issue of pricing and invoicing. Ms Heschl disputes the claim she *invoiced* and contends the documents in question were simply a record of work performed as she was paid on a piece rate basis – the arrangement was that she be paid 50% of income after deduction of GST (this is perhaps the one point upon which the parties agree). It is possible there is some validity to Ms Heschl's point but not when considered in light of the next two points.

[25] Ms Heschl denies setting her own prices but claims she was clearly to adhere to the Hair Revolutions price list. However, she then undermined that by accepting that she often could not find the list, considered it dated and had charged other rates. That is not the behaviour of an employee.

[26] The respondents claim Ms Heschl was responsible for her own tax and ACC payments as they understood would be expected of a self-employed contractor. Ms Heschl states she was aware neither was being deducted but thought nothing of it and made no attempt to remedy the situation. The most significant evidence comes in respect to the GST issue (see 8 above). Mr Dehn (Ms Heschl's partner) did an analysis of the payments being made to Ms Heschl and discovered an error in respect to the way GST was being calculated which meant she was being paid less than she should. It was raised and rectified but Mr Dehn accepts the analysis also confirmed tax was not being deducted. That was not challenged with both Ms Heschl and Mr Dehn putting that down to omission. I do not accept that – the evidence is that Mr Dehn is an experienced businessman who knew taxation rules and obligations. His is not a reaction to be expected from someone advising another who, according to his evidence, he thought to be an employee. It is incomprehensible that the GST situation be challenged and the tax ignored if they considered her an employee.

[27] There is then the issue of Ms Heschl being capable of choosing her hours of work. She disagreed and argued they were set, but had to concede each example posed as illustrating the respondent's contention in this regard.

[28] There is no argument with the contention Ms Heschl provided her own tools and introduced a range of services not previously offered, though she does attempt to suggest that these were performed so infrequently as to render them de-minimis.

[29] There is also the issue of anywHAIR. Ms Heschl tries to nullify her involvement by contending the business was a shell and not trading. Again inaction was the reason tendered for maintaining the business on the company's register, as well as its website and mobile advertising (the car). That position was undermined when she was challenged with a couple of examples of work she had performed under the anywHAIR banner whilst working from Hair Revolutions premises and which she accepted she had performed. Operating your own competing business, albeit on an apparently ad-hoc and not overly intensive way, is not the normal behaviour of an employee. It is, however, consistent with that of a self employed person.

[30] Finally, the evidence regarding employment of seniors as contractors was supported by the respondent's accountant and an ex-contractor. The ex-contractor also made it clear that while technical terms such as contractor were not used in her case, it was, at least to her, patently obvious what was being proposed.

[31] I have considered:

- a. the law as it applies to determining the status of an arrangement;
- b. the parties positions;
- c. that each of the contentions proffered by Ms Heschl as confirming she was an employee was undermined by answers subsequently given; and
- d. the factors the respondents refer to as indicative that Ms Heschl was a contractor remained undisturbed by questioning.

[32] Having done so, I conclude Ms Heschl was, as claimed by the respondents, a contractor. All the behaviours cited by the respondents in 21 (ii) to (vi) are those of a contractor and, to me, reflect the nature of the relationship. For these reasons, Ms Heschl's claim fails.

Costs

[33] It is normal that costs follow the event but both parties were unrepresented at the investigation meeting and both reside locally. That means recoverable costs are limited, indeed they are probably non-existent. In order to avoid additional effort or expense for the parties, and given that a costs award can be reviewed, I choose to dispose of the issue and order that costs lie where they fall.

M B Loftus
Member of the Employment Relations Authority