New Zealand Employment Relations Authority Decisions

Hamilton-Redmond v Clifford (Christchurch) [2018] NZERA 1128; [2018] NZERA Christchurch 128 (3 September 2018)

Last Updated: 14 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2018] NZERA Christchurch 128
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BETWEEN TINEILL HAMILTON- REDMOND

First Applicant

AND JESSICA CLIFFORD Second Applicant

AND CASINO BAR LIMITED Respondent

Member of Authority: David Appleton

Representatives: Michael McDonald and Robert Thompson, Co- Advocates for Applicants

Erin Anderson and Emma Thompson, Co-Counsel for

Respondent

Investigation Meeting: 29 August 2018 at Christchurch

Submissions Received: 29 August 2018 from Applicant

29 August 2018 from Respondent

Date of Determination: 3 September 2018

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

A. The applicants were not employees of the respondent at the material time and so cannot pursue personal grievances before the Authority.

B. Costs are reserved.

Employment relationship problem

[1] Both applicants seek to raise personal grievances against the respondent, Ms Hamilton-Redmond for unjustified constructive dismissal on 1 December 2017

and Ms Clifford for unjustified dismissal on 24 November 2017. The respondent denies that either applicant was employed by it, asserting that they were both independent contractors. This determination solely addresses the issue of the status of the relationship between the two applicants on the one hand and the respondent on the other.

[2] The prohibition from publication order that I made by way of a Notice of Direction dated 21 May 2018 was lifted in its entirety at the start of the investigation meeting as it was agreed by the parties that there was no information that needed

protection from publication any longer. However, I do anonymise below details of other businesses from which the respondent produced copy contracts to demonstrate industry practice.

Brief account of the relevant events

[3] The respondent company owns and operates the 'gentlemen's clubs' known as Calendar Girls. Ms Hamilton-Redmond and Ms Clifford both worked at Calendar Girls in Christchurch as exotic dancers, otherwise known as lap dancers or strippers. Ms Clifford commenced work for Calendar Girls in or around March 2017 and Ms Hamilton-Redmond around October 2017.

[4] Both applicants say that they were not given any contractual documentation when they started, but disclosed with their statements of problem a document called "Calendar Girls dancer profit share arrangement – polices and procedure", dated 1

January 2018 (the policies document). The two applicants say that they had never seen this document while they were working at Calendar Girls although Mr McCormick, General Manager of the respondent, says that he gave to both of them copies of the previous version around October 2017, some months after they had started working.

[5] The two applicants shared a flat together. In September 2017 the two applicants experienced attempted break-ins of their property, as well as threats made by unknown persons, and so attended a police station to make a complaint. This caused them to miss a night's work. As a consequence, Ms Clifford had deductions made from her pay and, on 25 November 2017, was told by Mr James Samson, who has a financial stake in Calendar Girls, that she should not return to work as she had been "fired" the previous night.

[6] Ms Hamilton-Redmond was taken off the roster after the night of

23 November 2017, and so she also made enquiries about that to Mr Samson, as well as about the non-payment of moneys she believed were owed to her. He replied asking her what night she wanted to work and she replied that she would decide once she was paid in full. She received no reply and the following night resigned as she had not been on the roster, and had not been paid.

[7] Mr McDonald, the applicants' advocate, wrote letters to the respondent to raise personal grievances on behalf of Ms Clifford on 20 December and on behalf of Ms Hamilton-Redmond on 21 December 2017. The respondent replied to say that neither Ms Clifford nor Ms Hamilton-Redmond were employees, but were independent contractors. If the applicants were not employees, the Authority has no jurisdiction to investigate their personal grievances.

Assessing the employment status of a worker

[8] The concept of "employee" is defined in s 6 of the Employment Relations Act

2000 (the Act). Relevant parts for this definition are as follows:

6 Meaning of employee

(1) In this Act, unless the context otherwise requires, **employee**—

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service;

...

(2) In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the court or the Authority (as the case may be) must determine the real nature of the relationship between them.

(3) For the purposes of subsection (2), the court or the Authority—

(a) must consider all relevant matters, including any matters that indicate the intention of the persons; and

(b) is not to treat as a determining matter any statement by the persons that describes the nature of their relationship.

[9] In deciding for the purposes of s 6(1)(a) of the Act whether the applicants were employed by the respondent company on a contract of service or were freelancers or independent contractors working in accordance with contracts for services, it is helpful to take into account the factors and principles identified by the

Supreme Court in *Bryson v Three Foot Six Limited (No. 2)*[1], namely:

1 [2005] NZSC 34

a. Section 6 defines an employee as a person employed by an employer to do any work for hire or reward under a contract of service, a definition which reflects the common law.

b. The Authority or the Court, in deciding whether a person is employed under a contract of service, is to determine "the real nature of the relationship between them": s 6(2).

c. The Authority or the Court must consider “all relevant matters”

including any matters that indicate the intention of the persons: s

6(3)(a).

d. The Authority or the Court is not to treat as a determining matter any statement by the persons that describes the nature of their relationships

6(3)(b).

e. “All relevant matters” include the written and oral terms of the contract between the parties, which will usually contain indications of their common intention concerning the status of their relationship.

f. “All relevant matters” will also include divergences from, or supplementations of, those terms and conditions which are apparent in the way in which the relationship has operated in practice.

g. “All relevant matters” include features of control and integration and whether the contracted person has been effectively working on his or her own account (the fundamental test).

h. Until the Authority or the Court examines the terms and conditions of the contract and the way in which it actually operated in practice, it will not usually be possible to examine the relationship in the light of the control, integration and fundamental tests.

i. Industry or sector practice, while not determinative of the question, is nevertheless a relevant factor.

j. Common intention as to the nature of the relationship, if ascertainable, is a relevant factor.

k. Taxation arrangements, both generally and in particular, are a relevant consideration but care must be taken to consider whether these may be a consequence of the contractual labelling of a person as an independent contractor.2

The written and oral terms of the contract

[10] The applicants say that no written agreement was given to either of them at the commencement of their relationship with the respondent, and the respondent cannot prove the contrary. However, at the material time a previous version of the policies document was in use. This is a reasonably detailed document and contains a number of rules. It is instructive to examine the contents of this document and, although the version that has been provided to the Authority postdates the date when the applicants worked for the respondent, Mr McCormick says that this version is unlikely to be very different from the version that was in place when the applicants worked at Calendar Girls. I understand that the respondent treated it as binding all of the dancers working at Calendar Girls from time to time.

[11] The policies document describes the job position as “dancer” and the main purpose of the position as “to entertain, perform, tantalise and tease. To perform erotic lap dancers [sic]. To dance/pole dance on stage till nude.”

[12] The introduction includes the following:

This document details all aspects of your arrangement to work in a profit sharing relationship with Calendar Girls New Zealand, and all entities trading as Calendar Girls.

This document outlines the expectations you must fulfil to maintain this agreement, and receive the agreed profit share, as per Schedule 1 (attached)3.

This arrangement not [sic] an Employment Agreement and Calendar

Girls does not confirm Employment to you by way of this document.

In agreeing to uphold this arrangement, you accept Calendar Girls conditions and use of their premises (stage, floor area, lap dance booths and penthouses), and in return will share a portion of your profit from the use of their premises.

2 This summary of principles is taken from the former Chief Judge Colgan’s judgement in *Narinder Pal*

Singh v Eric James & Associates Limited [2010] NZEmpC 1, at [17].

3 This schedule was not attached to the policies document, but the fee split details were provided to the

Authority by the respondent separately.

Calendar Premises [sic] are available to you only under the conditions of this agreement, and any other use of the premises is expressly forbidden, including entrance after hours, also solicitation outside this agreement.

[13] The remainder of the document, running to seven pages, contains a mixture of rules and guidance to the dancers. The rules

stated in the document include the following (paraphrased):

• Personal hygiene and makeup should be immaculate at all times.

• Lingerie should match, clothes should imply sexiness and sensuality.

• While on stage the dancers are required to wear costumes, two piece outfits or lingerie.

• The dancers are required to work Friday and Saturday nights at a minimum of four shifts per week. They have to be at work 20 minutes prior to the commencement of the shift and they are required to work a mixture of afternoon/nights and weekend and public holidays.

• Lockers are provided but dancers must provide their own padlock and lockers must be emptied and unlocked at the end of each shift.

• The dancing order is displayed on a whiteboard in the dressing room.

• After spending time on the stages, the dancers are required to head out to the crowd to collect tips.

• The dancers must have their top off by the end of the first song and their G-string off by the end of the second song, and tips must be collected in the nude.

• The dancers must not approach customers for tips whilst they are at the bars.

• The dancers are required to end their lap dances fully nude.

• It is prohibited for the dancers to give their phone numbers out to customers and go home with them. A breach of that rule incurs a fine

of $2,500 and a reward of $500 is given to dancers who tell the club of another dancer breaking this rule.

• Dancers are prohibited from working at any other strip club or agency and are subject to a $2,500 fine for doing so. Again, there is mention of a reward of $500 to any dancer who tells the club about dancers breaking this rule.

• Drinking is permitted but drunkenness and the use of drugs are not.

• Dancers are forbidden to discuss their income and are responsible for their own tax.

• Dancers are forbidden to enter into any form of sexual or romantic relationship with any of the staff.

• If a dancer is caught stealing they will be “suspended” until the

situation can be investigated.

• Dancers are required to give notice in writing, whether it be for holidays or to end the contract. It must be two weeks prior to the date or as soon as possible beforehand.

• Dancers must work either Christmas Eve or New Year’s Eve.

• The dancers are “under no circumstances” permitted to speak to the public or media about the running of Calendar Girls Christchurch, Auckland or Wellington, or about the respondent company, Alan Samson Limited, or Casino Bar (No. 2) Limited. A breach of that prohibition will be “treated as serious misconduct and legal action will be taken”. This prohibition is stated to be in place during “your course at this establishment” and “once finished”.

[14] The policies document also sets out a number of fines for various infractions. These were as follows:

(a) $50 for a missed stage spot; (b) $100 for showing up late;

(c) $75 for “inappropriate dress”;

(d) $500 for intoxication;

(e) $250 for a no show to work; (f) $500 for a “walk out”;

(g) $50 for “hanging around in changing rooms for an unacceptable

amount of time”

(h) $200 and 50% tax on tips for rudeness to patrons or management; (i) 50% tax on all dancers if there are multiple club complaints;

(j) $100 for “no G-string” (all dancers must be completely naked for

whole of second song and entire duration of tip round); and

(k) $50 for misuse of cell phone.

[15] The policies document also stipulates that dancers must give a minimum of four hours' notice if they are unable to attend a shift and a medical certificate must be provided.

[16] At the end of the document was a space to be signed by "Calendar Girls

Management" and "Employee". Neither applicant had signed the document.

[17] The Applicants say that they saw no contracts or rules posted up while they were working at Calendar Girls, but were told about various rules by the venue manager and the other dancers.

Industry practice

[18] The respondent argues that it is well-known industry practice for exotic dancers to be treated as independent contractors. The respondent called Ms Jacqui LeProu to give evidence in support of this contention. Ms LeProu used to be a director of the respondent company between 2000 and 2014, and says that she has been involved in the adult entertainment industry for 27 years, and directly in the industry for 14 years. She has had experience in many roles, including as an owner operator, director, manager, consultant adviser, and a teacher and choreographer.

[19] Ms LeProu has also sat on the advisory board for the Prostitution Reform Act and worked closely with the New Zealand Prostitute Collective. I am satisfied that

Ms LeProu has extensive knowledge and experience of the industry in New Zealand and overseas.

[20] Ms LeProu says that, in over 20 years, she has never heard of an exotic dancer being an employee. She says that, historically, in the 1980s, dancers were paid a retainer of around $50 per shift and shared their profit 50-50 with the club. Even then, however, the dancers were never treated as employees.

[21] The general practice now is for there to be no retainer, but for the profit share to be more favourable to the dancer. She says that the club carries all the overhead costs and she likens the arrangement to a "rent-a-chair" arrangement that hairdressers often use. She says that, although Calendar Girls does not operate as a brothel (although it is registered as one) there are some similarities as Calendar Girls technically provides sexual services (due to the ability of customers to touch the nude dancers) and that prostitutes also always operate as independent contractors.

[22] Ms LeProu says that clubs such as Calendar Girls (and brothels) set the prices for the services offered without exception, and that there are two reasons for this. The first is that the prices are set to reflect the quality and standard of the services being sold. Secondly, if the dancers were able to set their own prices, and undercut each other, it would result in "complete chaos and in-fighting". There would also be the risk of clients pressurising individuals to give discounts. It is much safer for them if the prices for the services are already set, she says.

[23] Ms LeProu says that the fines system implemented at Calendar Girls is also very common, although they come in different forms and to varying degrees. She says that it is a deterrent for bad behaviour and, in her experience, is only used as an absolute last resort. In her view, as there is so little regulation around the exotic dancing industry, clubs are forced to create rules and enforce them as best they can. Without these rules the club would not run well, and the dancers would not keep up standards.

[24] The respondent also produced in evidence contracts from other establishments in New Zealand which offer the same or similar services as Calendar Girls. It is not clear to me that these establishments have given permission for the details of their contracts to be disclosed and so I shall not name them. It is instructive to consider these contracts as further evidence of industry practice.

A review bar

[25] This review bar has an "independent contractor's agreement" which states that it engages contractors to work as entertainers who are not employees. The entertainer agrees to provide adult entertainment for a period of one month and the contract automatically renews every month unless a party cancels by giving three weeks' notice in writing.

[26] The entertainers are required to be present to provide contracted services between core hours and no entertainer is allowed to perform work classified as adult entertainment for another club without the consent of the entertainment manager. It does, however, allow the entertainer to provide services for another bar so long as it does not conflict with rostered work under the agreement.

[27] Absences must be requested in advance from the entertainment manager by giving the minimum of two weeks' notice and entertainers may be asked to assist in promotional work to promote the review bar and themselves, with no guarantee of compensation.

[28] The review bar sets down rules with respect to dress code, nudity, and health and safety and entertainers must participate in scheduled training sessions. In the case of pregnancy, the contract will be put on hold awaiting the entertainer's return if she wishes.

[29] The entertainers must pay "inconvenience" fees (the equivalent of Calendar Girls' fines) for a range of different infractions although these are significantly less in amount than the Calendar Girls fines set out in its policies document.

[30] The agreement states that the entertainers are responsible for their own tax and they pay a shift fee on all their earnings at the rate of 20%.

[31] The agreement can be terminated for a range of different reasons which roughly correspond to serious misconduct in an employment relationship. The agreement also has a dispute resolution clause and the right to appoint an arbitrator.

Brothel/Massage Parlour/Striptease and Lap Dance Venue

[32] This venue has a "Contract for Entertainer engaged as Independent

Contractor" under which the principal agrees to permit the entertainer to have the use

of the principal's venues to undertake entertainment in consideration of the entertainer agreeing to be bound by the contract. The agreement makes the entertainer solely responsible for any tax obligations and imposes obligations on the entertainer to work a minimum of three shifts per week. If she is unable to complete those shifts she is required to find a suitable replacement subject to the principal's approval.

[33] The entertainer charges the principal's customers in accordance with a payment schedule and the entertainer is responsible for ensuring that the customer pays the fee to the principal to hold as their trustee for the benefit of the entertainer. The fees are subject to deduction by the principal for administration fees, service charges, penalties and other charges.

[34] The service charges relate to the provision of a room, security, water/coffee and tea and advertising expenses and an initial fee of $400 is payable by the entertainer to cover costs of training, photo shoot, and other promotional activities.

[35] The contract gives the principal the right to charge fees to the entertainer for having to reschedule appointments or for the overuse of a room.

[36] The contract states that the entertainer is not entitled to sick leave or holiday leave but the entertainer must provide at least fourteen days' notice if the entertainer is unavailable to cover the normal shifts the entertainer is contracted to undertake.

[37] The contract also requires the entertainer to comply with the provisions of "The Accident Insurers Act 1998" and makes the entertainer subject to confidentiality obligations. The entertainer is also prohibited from working for any other licensed sex premises without the principal's prior consent in writing. The contract also contains a restraint of trade clause prohibiting solicitation of customers.

[38] Either party can terminate the contract by giving two weeks' notice but if the entertainer fails to do so she is liable to a "non-refundable administration fee" when the entertainer is contracted by the principal again.

Sexual services "lounge"

[39] The documentation for this organisation is not a full contract but it does state that the dancer/performer is an independent contractor who is responsible for covering their own tax and ACC levies. It required the paying of a $40 shift fee which

increases to $50 if the performer does not submit fortnightly rosters. The entertainer is also required to pay a $40 advertising fee once a week.

[40] The agreement also refers to a $600 bond which is returnable upon completion of the contract and out of which debts can be taken. "Serious misconduct" and breach of company policies and procedures result in the loss of the bond.

[41] The agreement requires the entertainer to consent to management doing random bag and locker searches without notice. The agreement also requires the entertainer to keep all information of clients and the company confidential.

Talent agency

[42] The final document provided by the respondent was that of a talent agency which provides "artistes" to an overseas cabaret. I do not regard this arrangement to be sufficiently close to that of Calendar Girls to be of particular assistance and so I shall not take this arrangement as evidenced by the contract into account.

Overseas examples

[43] It is also worth mentioning briefly three overseas judgments that have examined the employment status of exotic dancers, as they also give some information about the common practices of the industry, albeit overseas. The first is a Canadian case of

the Ontario Labour Relations Board from 1981 *Canadian Labour Congress, Chartered Local Union Number 1689 (Canadian Association of Burlesque*

Entertainers) v Algonquin Tavern & Others.4 The facts of this Canadian case are

significantly different from those of the current proceedings because the dancers in question operated on a circuit of taverns in the Toronto area, often being placed there by agencies. However, it is noteworthy that the judgment recorded that it was common practice to fine the dancers or dock their pay if they missed a show, or did not perform a show for the required length, and that the dancers worked in accordance with a generally understood set of "house rules". They were also expected to keep to schedules and not put unreasonable demands upon the bar tenders or other employees who ran the lights or tape equipment. It is recognised, however, that this case refers

to practices from 37 years ago.

4 [1981] OLRB Rep. August 1057

[44] A much more recent case from the UK is *Stringfellow Restaurants Limited v Nadine Quashie.5* This 2012 judgment shows that the dancers in question (who were lap dancers) were subject to fines and that the dancers were paid by the customers in "heavenly money" which is a form of voucher purchased from the club which they used for tipping staff. The same system operates in Calendar Girls where "Calendar Girl Dollars" can be purchased by clients to tip the dancers.

[45] Ms Quashie was not required to work a set number of nights per week but was required, if rostered, to work one Saturday and one Monday every two weeks in the month and one night a week at another establishment. Stringfellow Restaurant was not required to pay the dancer anything at all although, unlike in the current case, Ms Quashie had to pay a fee to the "House Mother" (who looked after the dancers' needs) as well as a fixed house fee. This meant that she could sometimes end up out of pocket after a night's work.

[46] The Court of Appeal in *Stringfellow Restaurants* found an important factor was that the dancer took the economic risk and it overturned the UK Employment Appeal Tribunal's finding that Ms Quashie was an employee.

[47] Mr McDonald referred me to a 2009 case from the United States of America, *Sabrina Hart and Reka Furedi v Rick's Cabaret International, Inc., RCI Entertainment (New York), Inc., and Peregrine Enterprises, Inc.,6* in which the plaintiffs alleged violations of the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL) during their work as exotic dancers for a strip club in midtown Manhattan.

[48] The judgement explains that the test for determining the status of a worker under the FLSA adopted by the United States Court of Appeals for the Second Circuit7 is called an 'economic realities' test, which includes the degree of control over workers, the workers' opportunity for profit or loss and their investment in the business, the degree of skill and independent initiative required to perform the work, the permanence or duration of the working relationship, and the extent to which the

work is an integral part of the employer's business.

5 [2012] EWCA Civ 1735 (UK Court of Appeal).

6 United States District Court Southern District of New York, 09 Civ. 3043 (PAE)

7 Whose territory comprises the states of Connecticut, New York and Vermont.

[49] The judgement in *Rick's Cabaret* records that "nearly without exception, these courts have found an employment relationship and required the nightclub to pay its dancers a minimum wage" under the FLSA.

[50] The judgement describes the amount of control over the dancers in Rick's Cabaret, and whilst it had many similar rules to those imposed by Calendar Girls, its rules were far more restrictive than those in place in Calendar Girls, such as having to get a 'check out slip' before exiting the dance cage, clocking in and out, and having to pay a 'tip out fee' to the 'housemom', DJ and management. There was also far greater control over the way the dancers dressed, and looked, including in relation to their weight, and a prohibition on tattoos.

[51] In addition, Rick's Cabaret imposed great control over the way the dancers danced, dictating prohibited moves, and the way they interacted with guests. It also required attendance at monthly meetings. The Court found that the amount of control exercised by Rick's Cabaret strongly reflected an employment relationship.

[52] The judgement also considered the financial investment made by Rick's Cabaret compared to that of the dancers, and found that the former's was far greater than the latter's and, as such, indicated an employment relationship.

[53] The court also rejected the argument that any particular skill or independent initiative is required to be an exotic dancer or to "hustle" for tips and sales. Regarding permanency and duration, the court said that the factor favoured the defendant's argument modestly. The last factor was how integrated the dancers were to Rick's Cabaret, and it found they were integral to the success of the business, as they were the "main attraction".

[54] The court also considered whether the dancers were employees under the NYLL, applying a common law test which is similar to the "economic realities" test, but which focusses more on the degree of control exercised by the purported employer as opposed to the economic reality of the situation. The NYLL test appears to be narrower than the test applied in New Zealand, and I will therefore not set out the detail of the Court's analysis, although it found that the plaintiffs were employees under the NYLL too.

New Zealand case law

[55] There appears to be no New Zealand case law about the employment status of exotic dancers, lap dancers or strippers. One New Zealand case that has been unearthed by the Authority's legal research team is from the Employment Tribunal, dated 16 March 2001, in which a singer was found to be employee but, although an entertainer, I do not believe that her working arrangements were sufficiently close to the current circumstances under investigation for this case to be of much help.

[56] It is also the case that each situation will have its own unique set of circumstances, and so these examples of exotic dancers working in other clubs, and in other countries can do no more than provide a broad indication of how the industry operates. Nevertheless, the examples are instructive.

The day-to-day operation of Calendar Girls in relation to the applicants work in

Christchurch

[57] The Calendar Girls venue in Christchurch consists of a reception area, a bar, seating area and a raised platform in the centre of the room for dancing and stripping. There are two poles in the raised area and three other dancing poles on the floor. On the upper floor is a penthouse with a spa bath and other amenities. There are also booths in the venue where private lap dances take place.

[58] The dancers agree with management what days they were to be rostered on, the dancers selecting the days of the week they wanted to work. This is arranged by a private Facebook page. If the dancers perform on a Saturday and Sunday they only have to work another day, which they could choose. If they did not work on a Saturday or Sunday, they had to work during the five weekdays. They were told when to turn up, but could start at 8pm if they had worked more days that week; otherwise they had to start at 6pm. The applicants were not obliged to work any given week if they did not want to.

[59] The manager determines which dancers will dance on stage, and in what order, although that order can be subject to change if a dancer is engaged in a lap dance or the penthouse upstairs. A dancer is required to be topless during the first song and then fully nude by the close of the second song. The dancers do not choose the music, for practical reasons, but they do choreograph their own routines. The applicants said

that they could also style themselves anyway they like, although there are rules about what they can wear.

[60] The applicants say that they had to provide their own outfits but, as high heels are expensive and they were required to wear them, Calendar Girls had a small selection of them that the dancers could use. They were also provided with towels to use in the penthouse. The respondent denied that they had high heels available for the dancers to use, for hygiene reasons, but said that they had some available to buy.

[61] After the second song is finished the dancer moves down on to the floor and circulates amongst the seated customers asking for tips. While that is happening, the next dancer goes on stage and starts dancing and stripping herself. The dancers do not receive any pay for their routine on stage, but they are hoping to impress the customers with their routines so as to get tips from them.

[62] The dancers are required to be nude while receiving tips, which would either be in Calendar Girls Dollars or real cash. The dancers have to redeem the Calendar Girls Dollars at the bar, at the end of the night, and get 80% of their face value in cash. They can keep 100% of all cash tips and are not required to tell the respondent about any cash they were given.

[63] The dancers would also talk to the customers to try to persuade them to buy a lap dance or a session in the penthouse suite. Sometimes the customers directly choose a dancer to do a lap dance, and sometimes the dancers manage to persuade a customer to buy one. The dancers may decline to perform a lap dance with a given customer if they feel uncomfortable. Again, the dancers are required to be nude whilst trying to sell these additional services. The dancers are also not allowed to dance on the floor as that is a distraction to those performing on the stage. Lap dances take place in private booths or in the penthouse suite.

[64] The dancers are allowed to do their own hair and makeup and are required to wear underwear while moving around the club, and also wear a gown provided it is undone at all times. When the dancers are talking to customers, management can approach them at any time and require them to go back on the stage to dance and strip, often because the dancer who was scheduled to dance at that point has been called to do a lap dance, or if there is a shortage of dancers.

[65] Lap dances are purchased in 15, 30 or 60 minute slots, the prices being set by the respondent. The dancers are not allowed to provide sexual services during a lap dance (and the respondent says that a dancer was removed from the roster after having

had sex with a customer in a booth) but they may decide the extent of the touching that the customer can do to them, although the respondent forbids the touching of the dancers' genitalia by the customer.

[66] In the penthouse the dancers can dance to the music that is provided, go in the spa bath with the customer, provide a lap dance, watch TV with the customer or just talk to them. Again, no sexual services are supposed to be given but, as there are no cameras in the penthouse, the respondent has licensed the penthouse as a brothel as it recognises that a dancer may negotiate her own deal with the client. The respondent says it has no control over that.

[67] The applicants say that they had no control over when they would be required to dance on stage and had no control over when they took breaks even though they may have had sore legs from having done lap dancing. The applicants also say that they were unable to arrange replacements for their shifts and that, when they both had to take time off because their flat had been broken into, they were told that they still had to attend their shifts by the manager. This was once they had committed to a roster, I understand.

[68] The dancers are also able to do outcall work through Calendar Girls during which they may accompany the client to dinner, a movie or to their home, although the applicants never did this work themselves. Management always negotiate the fee, although there was a minimum price. Calendar Girls also provides a security guard and travel for the dancers during outcall work if the dancers request it. If they do, the customer pays the respondent the cost of that directly. The respondent says that it recognises that some dancers make their own arrangements with customers, but that is discouraged for safety and security reasons. For example, women have been assaulted in the past, and also accused of theft or damage by customers.

[69] The applicants say that they were told "at all times" they had no freedom to do escorting, prostitution, stripping, dancing or any other activity that would conflict with the Calendar Girls activities. The respondent says that this was not relevant in Christchurch because there is no competitor to Calendar Girls.

[70] Calendar Girls also has regular meetings with its dancers, but Ms Clifford said that she did not regard them as compulsory, and only attended one out of three. Mr McCormick said that these were for the benefit of the dancers, as well as the club. The Authority saw some notes of a meeting that had been conducted at an unknown date, but it was possibly from the meeting that Ms Clifford attended. This note was expressed in robust terms, and was essentially an informal set of instructions, emphasising various rules and fines or other consequences associated with their breaches. Many of the rules related to safety or appropriate behaviour, although one said that a medical certificate had to be provided for sickness, and others related to customer service.

Payment arrangements

[71] There are two main ways that the dancers get paid. One is via tipping after they have been dancing on stage when they could receive cash or Calendar Girl Dollars directly from the customers, or the customers could add tips to Eftpos payments.

[72] The second way to be paid is by selling a lap dance, a session in the penthouse or an outcall, all of which are always paid for by Eftpos through the Calendar Girls till. The share of the fee payable to the dancer is recorded as an addition of points to her account in the Calendar Girls computer system8, Different fee rates apply depending on the service being sold so that, for example, a dancer selling a $100 lap dance would receive 60 points and a one hour $650 penthouse session entitles the dancer to 325 points.

[73] The dancers can purchase drinks and food against their account and that is accounted for in the system by deducting the points.

[74] At the end of the night the dancer would approach the bar manager for payment out of her Calendar Girls tip dollars, and if there was sufficient cash in the till, then some or all of the money would be paid to her, less 20%. A pay out of tips has no effect on the dancer's points accrual. Redemption of accrued points occurred

once a week, if the dancer's points are in credit.

8 Each dancer accrued points as they made sales of lap dances, and other services, which would be redeemed every week or so for cash.

[75] The respondent disclosed in the proceedings copies of various receipts relating to the applicants' work at Calendar Girls, some of which had been signed by the applicants and some not. Each piece of paper is described as a tax invoice, and bears the respondent's GST number. It also shows the date and time of the transaction. These chits fall into various categories as follows:

(a) A tips pay-out;

(b) A fine for a no show; (c) A sale;

(d) A points pay-out.

[76] A no show was typically fined by the deduction of 250 points from the

applicant's points balances. Mr McCormick says that, whilst the no show fine of

$250 was regularly imposed by way of a deduction from the dancers' points it is less likely that the other fines were. In addition, at the time he gave the applicants the copy of the policy document, he refunded to both applicants all the points that had been deducted for several no shows (totalling a value of over $1,000 each) because he was satisfied they had had genuine reasons for the absences.

[77] All payments to the dancers included the GST element, so that a $100 pay out of tips from $125 worth of Calendar Girls dollars, for example, showed that $13.04 of it was attributable to GST.

[78] The applicants say that they had never registered for GST and have never run their own businesses. They say that they have not provided the Inland Revenue Department with any information as they thought that their tax was being paid for by deductions made by Calendar Girls. The respondent says that it left it to the dancers to account to the IRD for their income tax and any GST, if they wished, and it accounts to the IRD for GST on its own share of the fees from tips, lap dances, penthouse sessions and out calls, as well as on other goods and services.

[79] The respondent says that the tax receipts that the dancers are given enable the dancers to keep a track of their earnings, and their tax liability. The respondent says that it is not aware of any strip club where the dancers invoice the club.

Profit share arrangement

[80] According to the respondent, it is providing the use of its venue and services, such as security, advertising and so forth, to the dancers in return for a share of their profit that they make from dancing and stripping. The respondent sees the dancers as entertainers and salespeople. The applicants did not disagree that they were salespeople, although Ms LeProu said that they were also entertainers.

[81] It is worth noting that Calendar Girls treats its bar staff, and some other non- dancer staff as employees.

[82] The respondent says that the profit share split, which varies according to the service provided, broadly reflects the amount of value that the venue has in each of the activities. The provision of the spa, lounge and privacy comes at a significantly greater cost to Calendar Girls than the dancing stages and public areas. There are security cameras and alarm buttons in all of the lap dance booths, alarm buttons in the penthouse suite, and security guards on hand.

The fines system

[83] The respondent says that, because of the nature of its business, it has to strive to maintain standards and uses the fine system as a way of ensuring that the dancers conduct themselves professionally, are well groomed and turn up when they say they are going to. Mr McCormick gave evidence that the management have a certain amount of discretion and the fines are, in practice, rarely used. He says that the dancer is usually given several opportunities to rectify her behaviour before the fines are used and they are usually the last resort. The fine system is the mechanism under the contract for enforcing compliance with the contract terms and making sure that the other dancers are not negatively impacted by the behaviour of others. He said that it is not uncommon for him to meet with the dancer, discuss the issues and then credit back the points fined.

Analysis

[84] I acknowledge the helpful submissions from both Mr McDonald and Ms

Anderson.

[85] It is common when analysing the reality of a relationship between an individual and the putative employer to find that there are some factors which point in the direction of an employment relationship, and others in the direction of an independent contractor relationship. This case is no different. It is important to recognise, however, that the exercise to be carried out is not a mechanistic one. The vast majority of the factors to be considered are indicative only, and it is necessary to step back and view the relationship in the round, to ascertain its 'reality'.

[86] Nor is it the case that any one of the three tests (control, integration and economic reality) significantly prevails over the others, although I believe that the control test is nowadays more of a neutral factor than the other two. The reasons why a particular factor or set of factors may be manifested also have to be considered.

The common intention of the parties

[87] Whilst it is clear both from the contractual documentation in use at Calendar Girls, and the payment system, that the intention of the respondents was that the applicants were not to be employees, but contractors, the same level of certainty cannot be applied to the applicants' intentions. Both Ms Clifford and Ms Hamilton- Redmond said that they had only ever been employees in previous jobs, and had never

'run their own business'.

[88] I believe that neither applicant directly addressed her mind to her employment status, and the applicants may not have been sure of the key differences between an employee and an independent contractor at the time they started working at

Calendar Girls. In short, it is not possible to say that the parties' intentions were the same (ad idem) in terms of the status of the relationship, and so the intentions of the parties cannot assist in determining the true nature of their relationship.

Control test

[89] It is clear that the respondent exercises a fair amount of control over the applicants, enforced in part by a fining system. However, when I analyse these rules that are imposed upon the dancers, they largely fall into two main types:

a. To ensure the safety and comfort of dancers, staff and customers; and b. To protect the 'brand' of both Calendar Girls and the dancers.

Safety and comfort

[90] The first category of rules is essentially no different than a set of rules that may be imposed upon contractors working on a building site, for example, where a host of hazards exist inherent to the construction industry. The Calendar Girls rules recognise the hazards inherent in its industry, and are intended to prevent sexual assault, drunkenness and drug abuse, in-fighting amongst the dancers, theft and so forth. The nature of the industry, where male customers are drinking alcohol and being "tantalised and teased" to spend fairly large sums of money, inevitably means that the behaviour of both the customers and of the dancers has to be contained. In some cases, the controls will be to ensure compliance with the law.

[91] In addition, the dancers are to a large degree in competition with one another and, although open competitive behaviour is not encouraged, for obvious reasons, there are only so many customers and so much money available to go round between the dancers on any given night. Therefore, rules controlling how the dancers approach and interact with customers are to be expected.

[92] The respondent says that, despite the statement in the policies document that a medical certificate is required in cases of sickness, the respondent does not require a medical certificate to be provided by a dancer if she is away unless management has concerns about the health or wellbeing of the dancer. However, this is not in accordance with the notes of the meeting referred to above, in which it was stated "SICK - med cert required", and I find that there was an expectation to provide a medical certificate at least at some stage. Whilst this requirement is more conventionally indicative of an employment relationship, it is not inconceivable that a medical certificate is required for health, safety and welfare reasons, given the fact that dancers are often in close and sometimes intimate contact with customers.

[93] In conclusion, I find that this category of control does not definitively demonstrate an employment relationship, and is neutral.

Protecting the brand

[94] Calendar Girls is a strip club, and the (largely male) customers go there to see

(and to a degree, touch) naked women. It is selling sensuality, titillation and sexual

excitement in a safe and comfortable environment. Therefore, Calendar Girls

promotes a brand which is predicated on that 'product'.

[95] The rules imposed on the dancers in relation to their attendance, their look and their behaviour are designed, I believe, to ensure that their overall performance fulfils the promise that Calendar Girls is selling. For example, the dancers are expected to be there when they say they will be so that there are actually performers for the paying customers to see. They are expected to dress in a certain way which promotes the sensuality being sold. They are required to be in the nude at a certain stage of the performance because female nudity is being sold.

[96] However, whilst these rules all help to protect and promote the Calendar Girls' brand, they directly benefit the dancers as well. Presumably, a dancer who dances fully nude by the second song is more likely to get a generous tip than one who does not. A dancer who approaches a customer in the nude is presumably more likely to successfully sell a lap dance or penthouse session than one who is not.

[97] Therefore, whilst this category of control does have clear benefits for the respondent, it also has clear benefits for the dancers as well, and can be seen as a way of helping them to promote and protect their own individual brands. If one regards the business model operated by the respondent as the provision of an attractive and safe venue in which dancers can ply their profession, as the respondent argues, this category of rules can be seen as a mutually beneficial system. The rules are of particular help to new and inexperienced dancers, who need to learn quickly the best way to operate so as to enhance their chances to earn money.

[98] Therefore, I see this second category of rules as, again, not being clearly and definitively an indication of an employment relationship, but of being a neutral factor.

The fining system

[99] The imposition of fines acts as a mechanism for enforcing both categories of rules. Indeed, I view it as indicative of an independent contractor relationship rather than an employment relationship. Such a system would be highly problematic and highly unusual in an employment relationship. Indeed, it is more like the sorts of fee penalties one sees in commercial relationships. Mr McDonald said in his submissions that the fines may be unlawful penalties as they were not genuine pre-estimations of

loss. That may be the case, but even if it is, that does not point to the system being indicative of an employment relationship.

Restraint of trade

[100] Mr McDonald said that the dancers were subject to a restraint of trade in that they were not allowed to work for a competitor, nor give private sessions to customers. This is made clear in the policies document, and hefty fines were threatened for a breach of these rules. This, Mr McDonald says, suggests an employment relationship.

[101] Mr McCormick said that the dancers were not prevented in practice from working for competitors, and many did actually do so. In addition, different clubs allowed their regular dancers to perform at other clubs, although that does not undermine Mr McDonald's argument if the club gives permission. Ms LeProu suggested that a club will often have a "tight crew' which the clubs wanted to keep, although she was not giving evidence about Calendar Girls specifically.

[102] Whilst it is tempting to regard a restraint of trade prohibition as an indication of an employment relationship, they are not exclusive to such relationships, and can be found in independent contractor situations too. For example, I note in the Employment Court case of *Narinder Pal Singh v Eric James & Associates Limited,* referred to in note 2 above, that Mr Singh was not permitted to engage in additional or alternative work in the same field, and that did not prevent former Chief Judge Colgan

from finding that Mr Singh was an independent contractor*9*.

Limits to the control over the dancers

[103] A dancer may choose to refuse to give a lap dance to a customer, or go with him to the penthouse, or on an outcall. She can also refuse to allow a customer to touch her, and can stipulate where he can and cannot touch her10. It is her personal choice with no interference from management. By contrast, no employed shop assistant, say, could choose not to serve a customer without the permission of

management.

9 At [23] - [25].

10 Save for the respondent's prohibition on allowing the men to touch the dancers intimately, although I

infer that is because of licensing restrictions, and for reasons of safety.

[104] The applicants could also choose not to work any given week, and were only committed to work once they had indicated that they were available to be put on the roster for a given week. This is no different from an independent contractor, like a plumber, who decides when he or she will attend a job, but once committed to attend, is expected to do so. I do acknowledge, however, that such an arrangement can be indicative of certain types of employment relationship; most typically casual employment.

[105] The respondent says that regular meetings are held with the dancers as well as occasional ad hoc meetings when issues need to be dealt with. However, attendance at meetings is not the sole preserve of an employment relationship. In any event, Ms Clifford said that, whilst meetings were held which she was asked to attend, she only attended one out of three. She was not subject to any sanction for missing these other two meetings.

Conclusion

[106] Overall, whist there are some clear elements of control exercised over the dancer, these are not inconsistent with an independent contractor relationship when one takes into account the nature of the industry. I believe that one can characterise the relationship between the dancers and the respondent as a "dependent contractor relationship", as described by the former Chief Judge Colgan in *Singh11.*

[107] I conclude that the control test does not indicate definitively that the applicants were employees of the respondent.

Integration

[108] In the *Rick's Cabaret* case referred to above, the United States District Court was strongly influenced by the fact that the dancers were integral to the business. This was another factor which persuaded it that the dancers were employees. There is no doubt that the dancers in the current case are integral to Calendar Girls. Mr McCormick said that stripping accounts for 88% of Calendar Girls' revenue. This is not surprising given it is a strip club. In that sense, the dancers are deeply integral to the respondent's business. Without the dancers, the business would not exist, or

would be totally different.

11 At [25].

[109] However, I do not accept that being integral to a business is exactly the same as being integrated into it in terms of the New Zealand test, which examines the extent to which a worker participates in the processes and systems of the putative employer, as well as being part and parcel of it.

[110] The dancers provide their own costumes, makeup and can choose their own style, provided that it is alluring. The dancers do not wear “Calendar Girls” branded clothing or use its props, apart from the physical aspects of the venue, like the stages, booths and penthouse. Dancers often travel themselves to outcall jobs, and make their way back alone, although they may also use Calendar Girls transport if they choose.

[111] The respondent says that promotional work is carried out by employed staff members who wear Calendar Girls branded clothing and visit bars and clubs to hand out flyers, and occasionally dancers may choose to join them if they are not busy, but that is to promote themselves.

[112] In addition, it is clear that the dancers are selling themselves, rather than a Calendar Girls product of service, in the sense that they are using their choreographic skills and inherent sensuality to attract tips and the purchase of private lap dances and penthouse sessions. Every dancer has her own set of unique charms which will attract some customers and not others. This is the nature of entertainment and is quite unlike a shop assistant, or a member of restaurant waiting staff, whose job is to sell the goods or services of their employer.

[113] There is one non-alcoholic drink which the club sells in respect of which the dancer gets a cut of the price if she has persuaded the customer to buy it, but the dancers do not get any commission on any other drink or product sold.

[114] The dancers are not subject to formal disciplinary processes, and are not eligible for holiday pay, sick pay or bereavement pay.

[115] On balance, whilst the applicants were integral to the business of Calendar Girls, they were not deeply integrated into it to the same degree as their employed staff are. I do not believe that the integration test shows definitively that they were employees.

The economic reality test

[116] The respondent does not pay the applicants anything directly but essentially acts as a trustee of the money received from a customer which is intended for a specific dancer. The fact that the profit share that is taken by the respondent varies depending on the type of service that the applicants have provided, varying from 20% to 57% depending upon the cost to the respondent of facilitating that service, tends to indicate that this is a business relationship rather than an employment relationship. For example, it will cost the respondent more to maintain the cleanliness and attractiveness of the penthouse suite than the stage area. No doubt the spa has to be regularly cleaned and the suite cleaned and tidied after each session.

[117] In addition, the applicants’ share of the fee for each service is provided to them without any deductions being made for tax. They are, however, given a receipt which shows the GST element of the fee share, so they can account to the IRD if required.

[118] The fact that the applicants did not invoice the respondent does not indicate an employment relationship. Invoicing is just one means of recovering a fee.

[119] It is also quite clear that the applicants do take on an economic risk by working at Calendar Girls. It is perfectly possible that they may receive no tips and that no lap dances or penthouse sessions might be bought from them during the entire night. Whilst they may not be financially out of pocket, in such a case they would have earned nothing, and would have lost the opportunity to have earned money elsewhere. This is quite unlike a shop assistant, say, who gets paid whether he or she makes any sales or not.

Tax treatment

[120] The applicants say they did not know anything about how their payments were treated from a tax perspective. However, the respondent did not operate any withholding tax or schedular payment system in relation to the applicants’ share of the fees. I find it unlikely that the applicants simply assumed that PAYE payments were being taken off their share of the fees.

[121] The applicants were not GST registered, but there is no requirement to be registered if one anticipates earning less than $60,000 a year, so an absence of GST registration does not mean they could not be independent contractors.

[122] On balance I believe that the application of the economic reality test indicates an independent contractor relationship, and not an employment relationship.

Industry Practice

[123] The evidence suggests predominately that the exotic dance industry in New Zealand, and in other jurisdictions, save in the USA where the opposite is true, is one of independent contractors rather than employees. However, the American approach, as evidenced in *Rick's Cabaret*, appears to be to apply the common law tests in a way which is more rigid, or mechanistic than the way it is applied in New Zealand. The English approach as demonstrated in *Stringfellow Restaurants* appears to be more akin to the New Zealand approach.

[124] Mr McDonald submits that strippers are often vulnerable young women who are taken advantage of by the adult entertainment industry. He says that poor practice does not make good law. Ms LeProu also stated in her evidence that she feels "strongly that the laws and regulations in New Zealand still have a long way to go and that she has several projects on foot to try to connect industry players and establish a more uniform approach to standards, operations and ethical issues".

[125] I acknowledge that some aspects of the adult entertainment industry are inherently risky for some young women and, also, that an employment relationship would be more likely to provide protection for them due to the legislative framework that is in place for employees in New Zealand. However, first, I am reviewing the particular circumstances of the two applicants only, and not the stripper industry as a whole. Second, it is not the role of the Authority to opine what the status of exotic dancers *should* be. Regulation of the adult entertainment industry must come from lawmakers, not the Authority.

Conclusion

[126] I acknowledge that the nature of the business in which the applicants and the respondent are engaged does potentially create risks and lack of security for the applicants and their co-workers, many of whom are young women, and some of

whom will have limited alternative options open to them. However, that cannot be the driver for finding that the applicants are employees. The status of the relationship between the applicants and the respondent can only be determined by an examination of the "real nature of the relationship" and the application of the applicable tests.

[127] On standing back, it is striking that the dancers will earn nothing if they are not favoured by a customer with a tip or a sale. The dancers have to decide what kind of look and performance are likely to earn them the most money. The dancers have purchased their own make up, hair products, gowns and lingerie, all of which are integral and essential to their performance.

[128] All of these factors are notable for demonstrating that the dancers are their own 'product', which they own and have control over, and utilise to earn their living. This is not enough, of course, to determine that they are independent contractors. Non partner lawyers, for example, sell their expertise which they hone and market, but are commonly employed by law firms.

[129] However, unlike employed lawyers, or many other employed professionals selling their knowledge and skills within a firm, the dancers only get paid when they sell a service. This arrangement is not one that has been put in place by the respondent as a sham in order to avoid its employment law obligations, I find, but is one that prevails throughout the industry, both in New Zealand and overseas. This arrangement is, however, antithetical to an employment relationship.

[130] Similarly, the fining system is antithetical to an employment relationship, but again is commonly applied within the stripping industry, both at home and overseas.

[131] There is no doubt that the dancers are integral to the business. However, that model is not incompatible with a dependant contracting relationship, nor with the business model of a provider of a venue to enable the dancers to perform in a safe and comfortable environment. The arrangement can be seen as a co-dependent commercial relationship, albeit one where the dancers are junior partners in terms of their financial investment and reward. I do take note, though, the evidence of the respondent that some dancers may make a relatively good living out of stripping. Certainly, there is no shortage of women applying to Calendar Girls to be exotic dancers according to Mr McCormick.

[132] Standing back and viewing these factors in the round leads me to conclude that, despite some factors pointing towards an employment relationship, the real nature of the relationship is one of independent contractors. I acknowledge that the applicants did not regard themselves as being in business on their own account, or as

'business people'. However, there is a binary division in operation in the world of work in New Zealand12 (unlike in the UK, say, where there is a third, statutory category, called 'worker' who enjoys certain, but not the full range of employment rights). The applicants, I find, do not fall on the employee side of the binary division.

[133] Therefore, the Authority does not have the jurisdiction to determine their claims that they were unjustifiably dismissed.

Costs

[134] Costs are reserved. I direct the parties to seek to agree how costs are to be dealt with between the parties. If they are unable to do so within 14 days of the date of this determination then, if the respondent seeks a contribution towards its costs, it is to serve and lodge a memorandum within a further 14 days which sets out the amount of that contribution and the basis for it. The applicants will then have a further 14 days within which to respond.

David Appleton

Member of the Employment Relations Authority

12 Putting aside exceptional categories, such as statutory officers.
