

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 204/09
5089856**

BETWEEN KELLIE LOUISE MCDOWELL
 Applicant

AND GRAFFITI SECURITY SYSTEMS
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Applicant In Person
 No appearance for Respondent

Investigation Meeting: 16 June 2009

Determination: 24 June 2009

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Ms Kellie Louise McDowell (“Ms McDowell”) claims she was unjustifiably dismissed from her employment with the respondent Graffiti Security Systems Limited (“GSSL”). Ms McDowell also claims expenses and reimbursement of lost income from the time of her alleged dismissal to the present date. GSSL says Ms McDowell was not its employee.

[2] The parties were unable to resolve the problem between them by mediation.

[3] GSSL lodged a statement in reply denying Ms McDowell was its employee and protesting the jurisdiction. In advice to the Authority of 4 June 2009, a representative informed the Authority GSSL would not attend the investigation meeting, that it has ceased trading and is impecunious, and further that it had paid the monetary remedies sought by Ms McDowell.

[4] GSSR did not attend the investigation meeting. Ms McDowell's sworn evidence is unchallenged.

Employee or contractor?

[5] Ms McDowell claims she was dismissed by text message on 15 May 2007. It must first be determined whether Ms McDowell was an employee.

[6] GSSL markets and installs a patented anti-graffiti wet wall system.

[7] Ms McDowell says that she commenced employment on 23 January 2007. Prior to her commencement she says she met with GSSL shareholder and managing director Mr Anthony George Bicknell ("Mr Bicknell") to discuss the terms of her engagement with GSSL. Ms McDowell says that she and Mr Bicknell agreed that she would be "employed full-time" in the role of "Auckland Area Sales". She says it was agreed she would be paid an annual salary of \$70,000.00, receive a company vehicle, 10% commission on sales, and a mobile phone. Ms McDowell tells the Authority it was expressly acknowledged that she was to be engaged as an employee.

[8] Ms McDowell says she accepted employment on the terms agreed and asked for an employment agreement. She says she was told a written agreement would be forthcoming but no document was ever provided to her.

[9] Ms McDowell says that while she was entitled to it, she was never paid the salary she says was agreed. She says she wrote to GSSL's directors asking for payment but was never paid. Ms McDowell is unable to produce this correspondence to the Authority and says a computer holding such correspondence is no longer available to her.

[10] Ms McDowell provides copies of three invoices she tendered to GSSL in respect of expenses incurred by her in the performance of her role including petrol, mobile phone calls, stamps, envelopes and miscellaneous items. These invoices are issued by "TK Trading Limited" a company incorporated by Ms McDowell's former partner in June 2001 and which she was a director of from September 2005.

[11] Ms McDowell tells the Authority Mr Bicknell informed her in response to her requests for her salary, that her salary would be forthcoming but in the interim, he could “get her money” if she submitted an invoice for reimbursement of expenses, and further, if she did so on a company invoice. Ms McDowell says she duly complied and rendered invoices in TK Trading Limited’s name directing payment to her own personal bank account for the months of February, March and April 2007. The final invoice was not paid until recently and included an additional \$100 said by GSSL in accompanying advice to constitute a gratuity in respect of one sale by Ms McDowell and noting no specific commission rate had been agreed.

The merits

[12] I accept that Ms McDowell performed certain marketing and sales activities for GSSL. It is apparent that Ms McDowell remained committed and dedicated to GSSL and was excited by its future prospects.

[13] The Authority is provided with an email Ms McDowell wrote to Mr Bicknell dated 14 May 2007. That advice leads me to conclude that in May 2007 the relationship between Ms McDowell and GSSL was by no means certain. Ms McDowell wrote “*I would also like to clarify my role with GSS Ltd and your expectations of me*” and “*I would like some direction as to where I stand and my role with GSS Ltd*”. Those statements are not consistent with Ms McDowell’s evidence that an employment and terms of employment had been agreed in January 2007. Consequently, I do not accept Ms McDowell’s evidence that an employment and terms of employment were agreed with her.

[14] I note too that while Ms McDowell expressly asks that her expenses be paid, she makes no mention of the salary she now tells the Authority was agreed. Mr Bicknell must have asked Ms McDowell for a client list because she advises she would provide one to him if “*[he] could process [her] expenses immediately*”.

[15] I consider that Ms McDowell’s submission of invoices by TK Trading Limited for payment of her expenses is not consistent with an employment relationship. I

incline to the view that Ms McDowell was an agent of the limited liability company and it was the limited liability company that had a contractual relationship with GSSL. I infer there were financial advantages for Ms McDowell in receiving payment through her limited liability company and she chose to order her affairs that way.

The determination

[16] I am not persuaded that terms of an employment were agreed with Ms McDowell. I am also not persuaded that this relationship in practice was an employment relationship because I am not convinced there was sufficient control and integration within the business. I also conclude that fundamentally Ms McDowell was a person in business on her own account. For these reasons, **I determine that the real nature of this relationship was not an employment and Ms McDowell was not an employee. There is no case for intervention by the Authority and there will be no formal orders.**

Leon Robinson
Member of Employment Relations Authority