

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 353/08
5124333

BETWEEN CHRISTINA SCOTT and LEE
 FOWLER
 Applicants

AND SKIN & STEEL LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: C Scott and L Fowler, in person
 D Law, advocate for Respondent

Investigation Meeting: 1 September 2008

Submissions received: 8 September 2008 from Applicants
 3 September 2008 from Respondents

Determination: 13 October 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Christina Scott and Lee Fowler say they were dismissed unjustifiably by their former employer, Skin & Steel Limited (“S & S”). They seek remedies in respect of their unjustified dismissals, as well as payment in respect of unpaid wages and the reimbursement of employment-related expenses.

[2] S & S says Ms Scott and Mr Fowler were not employees. Further, it denies that either of them is owed any money.

Preliminary matter - the identity of the respondent

[3] Erika Armstrong is the sole director and shareholder of S & S, and the sole director and shareholder of another company, Kustom Tattoo Limited (“Kustom

Tattoo”). Kustom Tattoo is in business as a tattoo and body art studio. S & S was incorporated for the purpose of organising an annual expo-type event, to be named Skin & Steel. The event was to include tattoo and airbrush competitions, a hot rod and bike show, exhibitions by vendors and performances by bands.

[4] Both companies were cited as respondents in the statement of problem. However there was no suggestion that Ms Scott and Mr Fowler were employed or engaged to work at Kustom Tattoo, and nothing to suggest that for any other reason, Kustom Tattoo could be regarded as the other party to any agreement with either of them. Any agreement between Ms Scott and Mr Fowler, separately and in their individual capacities, was with S & S. Both directed their activities to the planning and preparation of the Skin & Steel event.

[5] Kustom Tattoo was therefore struck out as a respondent.

Was there an employment relationship

1. The background facts

[6] Ms Scott and Mr Fowler are a couple, but became involved with S & S at different times. I address their circumstances separately.

A. Ms Scott’s association with S & S

[7] Ms Scott and Ms Armstrong were friends. Ms Scott had been on a period of unpaid leave from her previous employment when, on or about 26 February 2008, she decided to terminate that employment. She visited the Kustom Tattoo premises from time to time, and did so again on or about that day to discuss ‘opportunities’ with Ms Armstrong.

[8] Ms Armstrong was busy with her studio work, but also hoped to organise the Skin & Steel event, to be held in late August 2008. She needed help with this, and in early 2008 was seeking prospective vendors to participate in Skin & Steel. Indeed at the time the event was in a very embryonic stage, as Skin & Steel Limited had only recently been incorporated, the company had no funding and no budget, and Ms

Armstrong had relatively little idea of what would be required to organise the event. Profits were to come from ticket sales, later.

[9] It was common ground that Ms Scott and Ms Armstrong discussed Ms Armstrong's concept, that Ms Scott had ideas about possible vendors and that the two discussed the possibility of Ms Scott visiting potential vendors and sponsors. It was also common ground that Ms Armstrong told Ms Scott S & S could not pay her.

[10] As to what might be done about payment, Ms Scott said Ms Armstrong advised she was about to obtain a sponsor and would be able to pay in about two or three weeks when the arrangement was finalised. Ms Scott would be required to provide timesheets and invoices in respect of hours worked and any expenses claimed. She would be paid at \$25 per hour. If the Skin & Steel event did not go ahead, she would still be paid for expenses incurred and hours worked.

[11] Ms Armstrong's evidence was that she told Ms Scott to keep records of her expenses, and she would be paid at the end of the Skin & Steel event if it made money. There was also talk of the possibility of reimbursing Ms Scott from funds held by Kustom Tattoo, which would then be reimbursed by Skin & Steel.

[12] It was also common ground that Ms Armstrong said she was prepared to commit to paying a percentage of the profit from the Skin & Steel event, after part of that profit had been set aside for a further event in 2009. She told Ms Scott she would draw up a contract.

[13] Finally, it was common ground that there was an arrangement for both women to meet with Jonathan Hedges, another friend of Ms Armstrong's, on 1 March. The meeting went ahead as arranged, in a bar. Ms Armstrong said Mr Hedges had project management skills and was assisting on a quid pro quo basis. Ms Scott said Mr Hedges was introduced as the project manager of Skin & Steel. Discussion then turned to tasks Ms Scott could carry out, including vendors to contact and sponsors to approach.

[14] While it is likely that Mr Hedges' intended role was discussed, I do not accept he was introduced to Ms Scott in terms indicative of anything more than the fact that

he was also a friend of Ms Armstrong's and that his skills would be utilised to assist planning and preparation for Skin & Steel. I do not accept, either, that it is accurate to suggest that any list of tasks generated as a result of the meeting amounted to a list of instructions for Ms Scott. I prefer Ms Armstrong's description of the discussion as a 'brainstorming' session, with any resulting list of tasks arising out of that process.

[15] Ms Scott gave a detailed account of her activities over the next 2-3 weeks. To the extent that the account was intended to identify an element of control and direction over her activities indicative of an employment relationship, I do not believe matters were as clear-cut as that.

[16] In general anyone assisting a principal event organiser would be expected, for example, to: ensure that the contacts exercised and approaches made were suitable in the context of the event; communicate about these matters, including accepting leads and suggestions from the principal organiser; and account for any payments claimed. Ms Scott's activities were of that kind. This does not itself mean that the relationship in question is one of employer and employee.

[17] Secondly, with reference to Ms Armstrong's conduct, it was common ground that there came a point where Ms Armstrong acknowledged she could be 'bolshie', and suggested that Ms Scott indicate to her when she was going too far in that respect. I accept that Ms Armstrong had such a characteristic and she displayed it, but as her friend Ms Scott must have been aware of the characteristic. Accordingly I do not consider that displays of it during the parties' business association are necessarily indicative of an employment relationship.

[18] Thirdly I would accept that the apparent looseness of the business arrangements between the parties, the inexperience in event management of Ms Scott and Ms Armstrong although possibly not of Mr Hedges, and the influence of the various personal friendships and personalities, caused confusion in a number of respects including lines of authority. However I do not believe the difficulties arising out of this state of affairs necessarily points to an employment relationship.

B. Mr Fowler's association with S & S

[19] Mr Fowler said that, at a meeting on 17 March 2008, Ms Armstrong offered to employ him on the same terms and conditions as Ms Scott.

[20] The conversation came about in part because, following an altercation with Ms Armstrong, Mr Hedges' involvement ended. However there could be no suggestion Mr Fowler was engaged directly as a replacement for Mr Hedges. He had no background in project or event management. Otherwise it was common ground that Mr Fowler advised Ms Armstrong he had already been assisting Ms Scott. He offered to continue to assist free of charge, but Ms Armstrong told him she did not expect him to work for nothing. There was an agreement that Mr Fowler would work under the same arrangement as Ms Scott.

[21] It was less than a week before the relationship ended, and the Easter break had occurred during that period. Accordingly there was relatively little Mr Fowler could say about the operation of his relationship with S & S in practice. Such information as was available was consistent with his assisting or accompanying Ms Scott in the activities she carried out.

C. The written agreements

[22] It was common ground that Ms Scott and Mr Fowler signed written agreements with S & S, but Ms Armstrong had destroyed the documents in anger during the dispute that led to the termination of the parties' association. Accordingly the original versions could not be produced.

[23] Nevertheless at the investigation meeting Ms Armstrong produced a document headed 'Contractor Service Agreement', saying the document was the template for the documents Ms Scott and Mr Fowler had signed.

[24] The template purported to be a contract for services. Ms Scott recognised some of the clauses in it, but did not recall seeing others and denied that the word 'contractor' was used anywhere in the document she signed. She also said she signed a 3-page document, while the document produced to the Authority was 6 pages long.

[25] The clauses Ms Scott recognised included:

- a. various undertakings regarding confidentiality and fitness to work, and an agreement to pay fines such as traffic fines incurred while working for S & S;
- b. an agreement to abide by company policies regarding behaviour towards customers, clients and colleagues;
- c. a requirement that timesheets be submitted in respect of hours worked;
- d. a provision identifying the agreed hourly rate as \$25;
- e. provision for a share in profits of 30%, payable one month after the Skin & Steel event, after the setting aside of part of the profit for reinvestment in the following year's event;
- f. reference to the observance of obligations under the Health and Safety in Employment Act 1993;
- g. an agreement not to set up in direct or indirect competition with S & S during the term of the agreement;
- h. a non-disclosure and confidentiality provision;
- i. provision that intellectual property would remain the property of S & S; and
- j. provision for the termination of the agreement on one week's notice.

[26] Ms Armstrong must take the consequences of her action in destroying the original agreements. I accept Ms Scott's account of the contents of the document she signed. I adopt the same conclusions in respect of the agreement Mr Fowler signed, since there was no suggestion he signed a different agreement.

[27] At the same time, I do not find anything in the contents of the agreement as Ms Scott described them is any more than a neutral indicator of the true nature of the relationship.

2. Determination

[28] Section 6 of the Employment Relations Act 2000 provides that, to determine whether a person is in an employment relationship, the Authority must determine the real nature of the relationship. In doing so it must consider all relevant matters, including matters indicating the intention of the people concerned. It must also

consider the application of the common law tests for the existence of an employment relationship, including matters such as the control one party has over the activities of the other.

[29] Here, although Ms Scott's and Mr Fowler's respective relationships with S & S were intended to be more formal than simply arrangements between friends, I am not persuaded there was a mutual intention to enter into employment relationships. In particular Ms Armstrong and S & S were in no position to enter into commitments of that kind, and did not purport to do so.

[30] Secondly, although Ms Scott and Mr Fowler now assert that their respective relationships were employment relationships, I am not persuaded that the discussions at the time of entry into the relationships were capable of being construed as offers of employment. They were no more than discussions about how Ms Scott, and later Mr Fowler, would assist in the preparations for Skin & Steel, and how they would be paid. There was no discussion about key terms of employment such as leave, or hours of work. Further no constraints or requirements were placed on either Ms Scott or Mr Fowler regarding their hours of work. Finally in respect of the parties' intentions, as I have said there is nothing in the contents of the signed agreements which weighs in favour of the relationships being, in reality, employment relationships.

[31] Further, for the reasons indicated above, I do not accept that there was an element of control indicative of an employment relationship, or that any of the other indicia of such a relationship were present to any meaningful extent.

[32] In conclusion, neither Ms Scott nor Mr Fowler was in an employment relationship with S & S.

The personal grievances

[33] The personal grievance procedure is available to the parties to an employment relationship. Since I have found they were not in employment relationships with S & S, the procedure is not available to Ms Scott and Mr Fowler.

The claims for monies owed

[34] Similarly, the Authority cannot make any orders for the payment of money where there is no employment relationship. Accordingly, while Ms Scott and Mr Fowler may be entitled to certain payments, they will have to pursue their claims in another jurisdiction.

Costs

[35] Costs are reserved. If either party seeks a determination for the Authority the party shall have 28 days from the date of this determination in which to file in the Authority, and copy to the other party, a written statement confirming the request and providing details in support. The other party shall have a further 14 days from the date of receipt of the statement in which to file and copy a statement in response.

R A Monaghan

Member of the Employment Relations Authority