

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 114/07
5050438

BETWEEN RAYLENE TAYLOR
 Applicant

AND AFU FINANCE LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Karina Coulston, Counsel for Applicant
 Murray Withers, Counsel for Respondent

Investigation Meeting: 29 May 2007 at Christchurch

Determination: 19 September 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Raylene Taylor (Ms Taylor) worked as a hairdresser in one of the hair cutting bars in Christchurch operated by the respondent, AFU Finance Limited (AFU). Ms Taylor says that she was employed for a period of around 10 months by AFU until she was unjustifiably dismissed on 30 August 2006.

[2] AFU, by contrast, says that Ms Taylor was never employed and that she was in fact an independent contractor to AFU and thus the jurisdiction of the Authority to even consider Ms Taylor's claim is contested.

[3] AFU operates a number of \$10 hair cutting bars in Christchurch city and have always maintained that the persons working in those hair cutting bars were independent contractors and not employees.

[4] It is common ground that AFU advertised in a local suburban newspaper which circulates in parts of Christchurch seeking hairdressers for the AFU hair cutting

bars. AFU says that these advertisements do not offer employment; Ms Taylor points out that the advertisement appears in the Situations Vacant column in the newspaper.

[5] Ms Taylor responded to one of these advertisements and spoke with Mr Brian Soper who gave evidence at the investigation meeting as the managing director of AFU.

[6] Mr Soper told Ms Taylor to attend at one of the hair cutting bars and complete an application form. Ms Taylor did that and filled in a form at the Papanui Bar. The form which was put into evidence during the investigation meeting is clearly labelled *application for contractors*. The form is extensive and, amongst other things, seeks responses to a significant number of questions in relation to the applicant's health, previous work history and extensive general information.

[7] It was agreed between Mr Soper and Ms Taylor that Ms Taylor should complete a trial and, having successfully negotiated that, she would be offered a position.

[8] Mr Soper's evidence is that he told Ms Taylor of the basis of payment which is that she would receive \$100 per day and a commission of half the fee on every haircut she did in any day in excess of 20 for the day but Ms Taylor denies this.

[9] Ms Taylor commenced her employment on 28 October 2005. On that day, AFU alleges she signed an agreement between herself and AFU which is drafted as a principal to contractor agreement rather than an employment agreement. It attaches a schedule which sets out the basis of the payment structure, the hours and days that the Bar is open and emphasises that *contractors* may be required to work at any location operated by AFU. Ms Taylor denies she signed this agreement at the time of commencing work.

[10] There were apparently difficulties with Ms Taylor's performance at the Bar where she commenced. Mr Soper says that he spoke to Ms Taylor about this; she has no recollection of that conversation. In any event, Ms Taylor was directed to work at the Aranui Bar which, according to Mr Soper, had clientele that were *easier to please*.

[11] Before Ms Taylor moved to the Aranui salon, she says that she had a conversation with a co-worker who explained to her the basis of the remuneration and

the fact that workers had to pay their own income tax and GST. She says she thought this was *very strange*.

[12] Early in March 2006, Ms Taylor's hours of work were reduced from five days a week to three days a week and Ms Taylor's evidence is that from that point until her role came to an end in August 2006, she was troubled by the emergence of other hairdressers at the salon she was working in, who were joining the enterprise and working for a longer span of hours than she was being offered.

[13] On 23 August 2006, Ms Taylor was given a two line letter from AFU terminating her engagement and giving her seven days' notice of its cancellation.

[14] Ms Taylor took the matter up with Mr Soper and amongst other things offered to now work Saturdays which had earlier been a difficulty for her. She says Mr Soper told her he would think about it but in the result he confirmed his original decision and the termination of the *contract* stood.

Issues

[15] There are only two issues in this matter. The first is whether Ms Taylor is in truth a contractor or an employee and the second is whether, assuming Ms Taylor is found to be an employee, she has in truth been unjustifiably dismissed and is therefore entitled to remedies.

Was Ms Taylor a contractor?

[16] I am satisfied on the balance of probabilities that Ms Taylor was an employee and not a contractor. I reach this conclusion for a number of reasons. First, I accept Ms Taylor's evidence that the first agreement, the one dated 28 October 2005, was not signed by her at that time and that the only agreement she actually signed was the agreement dated 1 June 2006. This subsequent agreement seems to be in exactly similar terms to the earlier document save for the date. Ms Taylor draws my attention to the commencement date at clause 3 of the agreement which in each agreement, the one dated 28 October 2005 and the one dated 1 June 2006, the commencement date is expressed to be 1 June 2006.

[17] That being the position, the only documentary basis on which Ms Taylor worked for the period from 28 October 2005 down to 1 June 2006 was on the basis of

her application which, while clearly labelled *application for contractors*, is not in my opinion definitive of the actual nature of the relationship between the parties.

[18] Ms Taylor presented as a slightly innocent young woman who readily conceded that she did not have good reading or comprehension skills and she simply said that she did not understand the nature of the document that she was signing when she completed the application. I believe her and think it unreasonable and unfair for her to be taken advantage of in such a situation.

[19] I also prefer her evidence to Mr Soper's about the nature of the discussion that the two of them had when Ms Taylor applied in response to the advertisement in the suburban newspaper. Ms Taylor says that there was no discussion about the nature of the relationship; Mr Soper says that there was. I prefer Ms Taylor's recollection of events, in part because she seemed so perplexed when she was told some considerable time later, after having commenced work, that she needed to pay her own tax and her own GST. If she had understood the nature of the relationship in any way as a consequence of talking to Mr Soper, she would not have been as transfixed by the subsequent conversation with a colleague.

[20] I am also not satisfied that the parties behaved strictly in accordance with what one would imagine was required of a principal contractor relationship. By common consent, notwithstanding the fact that the agreement required the furnishing of invoices by Ms Taylor to AFU, no such invoices were ever provided. Indeed, Mr Soper's evidence was that none of his *contractors* provided invoices and that the Inland Revenue Department had approved this practice.

[21] It is not for the Authority to express views about income tax law and practice, but it does seem to me that, from an employment law standpoint, a failure to behave in the way usually expected in a contractual relationship is one of the factors that will be taken into account in assessing whether the relationship is, in truth, a contractual relationship or an employment relationship.

[22] A further reason for my conclusion that this is not a contractual relationship is the measure of direction apparently available to AFU in relation to Ms Taylor. This is not a situation where Ms Taylor can work the hours that she wishes and derive income from those hours. Rather it is a situation where Ms Taylor seems to be being directed

as to the days she will work and indeed the places she will work at and that speaks more to me of an employment relationship than it does of a contractual relationship.

[23] Having failed to be persuaded by AFU that this is indeed a contractual relationship, it now falls for me to consider whether Ms Taylor has sustained a personal grievance by reason of an unjustified dismissal from her employment.

Has there been an unjustified dismissal?

[24] I am satisfied on the balance of probabilities that there has been an unjustified dismissal. It is clear to me that Ms Taylor was in an employment relationship with AFU when that relationship is properly analysed. It follows that the notice given to her and the process adopted by AFU are grossly unfair and abrogate all of Ms Taylor's employment rights.

[25] I am satisfied Ms Taylor has a personal grievance by reason of an unjustified dismissal, that dismissal being flawed both on procedural and substantive grounds and it follows that Ms Taylor is entitled to remedies which I now turn to consider.

Determination

[26] Ms Taylor has a personal grievance by reason of an unjustified dismissal and she is entitled to remedies. I award her the sum of \$4,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 for the hurt, humiliation and injury to feelings which she has suffered as a consequence of the dismissal.

[27] There is abundant evidence from Ms Taylor of the negative and damaging effects of the termination of her employment on herself, her self-esteem, her emotional wellbeing and even on the wellbeing of her young son.

[28] Ms Taylor has lost wages as a consequence of the dismissal and she seeks:

- (a) \$600 gross representing two weeks' at \$300 per week;
- (b) Unpaid annual leave;
- (c) The sum of \$5,000 gross being the loss of the income from the two days a week of work that she was denied from early March 2006 down to the dismissal at the end of August 2006.

[29] Looking at the matter in the round, I direct that AFU is to pay to Ms Taylor the sum of \$6,500 gross in lost wages.

[30] Costs are reserved.

James Crichton
Member of the Employment Relations Authority