

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Tracey Crawford
AND M Torok Holdings Ltd t/a The Sharing Shed
REPRESENTATIVES Rowland Ingram, Advocate for Applicant
Tony Beach, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 11 September 2006
SUBMISSIONS RECEIVED 14 September from Applicant
22 September from Respondent
DATE OF DETERMINATION 03 October 2006

DETERMINATION OF THE AUTHORITY

The applicant, Ms Tracey Crawford, worked as a hairdresser for M Torok Holdings Ltd. The issue for determination is whether she was employed on a contract of service or a contract for services.

The Agreement

Ms Crawford signed an agreement called the Sharing Shed Trading Agreement on 3 January 2003. This stated that the parties were in the business of providing a professional hairdressing service together with the retailing of hair care and other products and that they would trade under the trading name "The Sharing Shed".

Products were provided by M Torok Holdings Ltd and Ms Crawford was told provide the retailing service. Ms Crawford was liable for any loss or damage she caused and it was her responsibility to make good any defects or omissions. Ms Crawford was to provide her tools of trade which were to be of a professional standard and to be kept in good order.

There was provision for the respondent to hold review meetings to discuss Ms Crawford's performance although this does not seem to have happened in practice.

Any expenses incurred were Ms Crawford's responsibility. She was able to contract with anyone else provided her ability to provide the hairdressing services was affected.

Clause 11.1 states:

Nothing in this Agreement shall constitute Party B [Ms Crawford] as agent, partner, joint venturer, sub-contractor or employee of Party A.

Clause 12.1 prohibited Ms Crawford from assigning her rights.

Duties

Ms Crawford's duties included providing a hairdressing service, retail services by selling the respondent's products on behalf of the respondent, answering the phone, keeping the premises in a clean and tidy condition, keeping such records as were deemed necessary for the running of the business and "full compliance with Party A's policies and procedures of the premises as determined by Party A from time to time".

Income

Income was stated to be paid on a commission basis with Ms Crawford receiving 45% of her takings. All income from sale of products was to go to M Torok Holdings. Despite this, Ms Crawford was paid on a daily rate for some of the time she worked for the respondent. Mr Torok said he often paid hairdressers a daily rate if the premises were new and had not attracted sufficient customers to enable hairdressers to make a reasonable income on a commission basis.

The nature of the relationship

Mark Torok wrote to staff:

There has been poor punctuality displayed by some staff across all shops recently. No excuses will be accepted for CONSISTENT lateness. This includes "bad Traffic", "I have children" or "I work hard". Upon signing a contract with M Torok Holdings, you agree to the hours of trade. This is part of your obligations to your contract.
Mark

Mr Torok said this arose from complaints from staff about some people not turning up and then telling him he had to sort it out.

Ms Ruth Nicolson said she did the rosters and she had to negotiate with people to get them to agree to fill in as required. She did not have the authority to direct anyone to work particular hours at particular hairdressing outlets.

A newsletter entitled "Hair Today" and dated October/November 2003 says:

Christmas is just around, with less than 10 weeks now til another year has passed us by. Most people have asked for holidays already, I'm sorry to say that there will be very slim chances for the rest of the staff asking for time off around Christmas and January period.

Ms Nicolson said that if everyone had taken holidays over Christmas the business would not have been able to function. This instruction runs counter to the concept of a contractor who is able to set her own hours and days of work.

The same newsletter contained the following instruction:

Staff off Sick: *Please can all managers or acting managers on that day make sure that Ruth is informed of any staff ringing in sick as soon as possible. This way she can assess how busy the shop is likely to be and organise someone else to work. Staff calling in sick should always ring Ruth first.*

Please all take note. *I have informed Ruth to pass on the following request. If the day you are working goes quiet and one of you feels like leaving early, please make a phone call to Ruth or myself. Do not just pack up and leave. This is not because we would like you to check in like a little child. There are many reasons for us to hear from you. As I have obligations to you, you as a contractor also have obligations, to*

communicate with management and keep regular hours. For consistency and for your clients sake. In most cases I'm happy for someone to leave, say an hour early, if things go a bit quiet. I get unhappy if I don't hear anything.

The November 2004 issue of "Hair Today" reminded staff that there should be at least one staff member in the shop to greet customers at all times, that personal phone calls were to be kept to a minimum, staff were not to answer mobiles while working and telling staff that conversations of a personal and negative nature between staff should not take place while they were working on clients.

There were also instructions about what pricing information could be displayed and an instruction that "The price **must** stay consistent for the customer". Staff were instructed to ensure that the Herald and magazines were available for clients (the business paid for these). Notice was given to staff that:

A slight change has been made to the trading hours signs. There is now reference made to the last haircut 15 minutes before closing. This is to try and avoid any misunderstanding between yourself and the customers.

Staff were also told about a new product they could offer clients. The company provided the shampoos, conditioners.

Although Ms Crawford was not engaged as a manager (she had been offered a manager's role but declined) she carried out some tasks that were defined as managerial. She would check the stock on the shelves and let Ms Nicolson know if it was running low and she would do cash ups.

The respondent paid withholding tax on behalf of Ms Crawford. Neither party paid ACC levies. Ms Crawford did not submit invoices. Her earnings were calculated by assessing her log on/log off times on the till. The daily rate that was paid Ms Crawford for some of the time can be seen as a salary by another name.

Although the trading agreement specified that tools of the trade were to be supplied by Ms Crawford it appears that she supplied some and that the company supplied others, for example, mirrors, capes, neck strips and that the company also paid for scissors to be sharpened. Tea, coffee, magazines, newspapers were paid for by the company. Ms Crawford had no opportunity to benefit from the sale of any product – all proceeds went to the company.

Some hairdressing businesses operate a "rent a chair" arrangement. There was no evidence here of any rental paid to the company by Ms Crawford. She was allowed the use of the company's premises and advertising and the company took 65% of her earnings.

There was some evidence of fluctuating hours over a particular period but the evidence suggests that staff were not free to come and go as they pleased, they could not take leave as they pleased and were reprimanded for lateness or failure to ring in sick. This is indicative of a significant amount of control. Also indicative of control is the price setting that was practised. Although Mr Torok said he had told hairdressers that if they wished to charge more than the advertised price they should tell the client before doing the work Ms Crawford said that was the first time she had heard about that. It is clear that Mr Torok wanted uniformity of pricing.

The shops had to be open for set hours on set days and there was a roster to ensure that there were sufficient hairdressers at each shop.

Ms Crawford had to comply with the respondent's policies and procedures and attend review meetings if the respondent wanted to have them.

In Bryson v Three Foot Six (No 2) [2005] 1 ERNZ 372 the Supreme Court held that the real nature of the relationship can be ascertained by using the following tests:

- Control
- Integration
- The “fundamental” test of whether a person performing the services is doing so on his or her own account.

Mr Beach noted that the Employment Court in Bryson had found that it was not possible to establish whether the parties had had any common intention regarding their working relationship. Here, however, there was an agreement that attested to the intention being a relationship of contactor.

It is the real nature of the relationship that is determinative, not the contract, although that is a factor to be taken into account.

The measure of control in terms of hours was significant. Ms Crawford could not assign her rights and although Mr Torok said she could have arranged for another hairdresser to fill in for her I am doubtful that he would in fact have permitted this without first checking whether the person was suitable. Ms Crawford could not set her own prices so she could not control her income by that method.

Ms Crawford was an employee.

If the parties are unable to resolve the issues of costs leave is reserved for the applicant to file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant’s memorandum.

Dzintra King
Member of Employment Relations Authority