

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 120
5565264

BETWEEN AHREN
 HEMMINGSON
 Applicant

A N D MATTHEW RUSSELL ANDREW
 SWAN t/a BARKERS GROOM
 ROOM
 First Respondent

AND MEN'S GROOMING LIMITED
 Second Respondent

Member of Authority: Rachel Larmer

Representatives: Nathan Santesso, Advocate for Applicant
 Mark Colthart, Counsel for First and Second
 Respondents

Investigation Meeting: 05 April 2016 at Auckland

Submissions Received: 07 April 2016 from Respondent
 08 April 2016 from Applicant

Date of Determination: 21 April 2016

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Ahren (who wishes to be referred to as Dakota) Hemmingson worked as a hairdresser at Barkers Groom Room (BGR) which is a hairdressing salon situated in High Street Auckland from 04 March to 14 April 2015.

[2] Ms Hemmingson claims she was employed by Mr Swan who unjustifiably constructively dismissed her on 14 April 2015 after she disclosed that she wished to transition to a woman.

[3] Mr Swan denies employing and/or dismissing Ms Hemmingson. He says Ms Hemmingson was employed by Mens Grooming Limited (MGL) and that her employment ended when she decided to resign.

Issues

[4] The only issue for the Authority to determine is the issue of who was Ms Hemmingson's employer, Mr Swan personally or MGL? This issue has been dealt with by the Authority as a preliminary matter prior to the substantive investigation of Ms Hemmingson's dismissal grievance.

Who employed Ms Hemmingson?

[5] *Advertisement* - Ms Hemmingson says that the first she heard of MGL was when Mr Swan filed his witness statement on 23 March 2016. The advertisement Ms Hemmingson responded to referred only to BGR and Mr Swan was identified as the contact person with a BGR email address. No reference is made to MGL. This supports Mr Swan being the employer.

[6] *Termination letter* - The letter to Ms Hemmingson regarding the conversation the parties had on 14 April 2015 states "*it would be in the best interests for both yourself and the business to end your employment with Mensworks and Barkers Groom Room effective immediately.*" This letter was prepared by Mr Swan and is signed by him in his own name. There is no reference anywhere to MGL. This supports Mr Swan being the employer.

[7] *Personal grievance letter* - Ms Hemmingson's personal grievance letter was addressed to Mr Swan personally as "*Owner of BGR.*" The personal grievance letter stated that "*Mr Swan is a sole trader trading as Barker's Groom Room, carrying on business as a hair salon.*" Mr Swan did not respond to this. He never advised Ms Hemmingson that he (Mr Swan) was not personally trading as BGR or that MGL (and not him) had employed Ms Hemmingson. This supports Mr Swan being the employer.

[8] *Statement of Problem* - Ms Hemmingson's Statement of Problem states "*Matt Swan is a sole trader operating Barker's Groom Room which carries on business as a hair salon.*" Mr Swan did not take issue with that in the Statement in Reply he filed on 06 August 2015. This contrasts with the February Wellington Authority proceedings discussed later in which Mr Swan advised the incorrect employer had been named. It was the Authority in this case that identified that the identity of the employer was an issue in light of Mr Swan's witness statement of 23 March.

[9] *Statement in Reply* - The Statement in Reply (SiR) records the Respondent as "*Matt Swan t/a Barkers Groom Room*" and Mr Swan signed his own name (not MGL's) in the section of the form marked "*Respondent.*" Mr Swan also added his personal contact details not the MGL registered office to the part of the SiR that requires a party to identify the address for service. The email address recorded by Mr Swan says Mensworks not MGL. This supports Mr Swan being the employer.

[10] *MGL director* - Mr Swan became the sole director of MGL on 17 September 2015. Prior to that his father in law Mr Basil Rutherford was the sole director of MGL. Mr Swan was adjudicated bankrupt on 14 July 2011 by order of the High Court of New Zealand. He was automatically discharged from bankruptcy on 10 February 2015.

[11] *Mr Swan's bankruptcy* - During his bankruptcy Mr Swan was employed by MGL as the "*Salon Director*" of BGR and Mensworks, which is a hair salon based in the viaduct Auckland. BGR and Mensworks are trading names. Mr Swan says he has never personally traded as BCR or Mensworks or any other business. I do not accept that evidence for the reasons discussed below.

[12] *Business card* - Mr Swan's business card identifies him as being associated with BGR but makes no mention of MGL.

[13] *Enforceable undertaking* - Mr Swan personally also entered into an enforceable undertaking under s.223B of the Employment Relations Act 2000 (the Act) with Labour Inspector Josaine Ingham. Mr Swan signed the undertaking on 16 August 2014. This statutory undertaking identifies Mr Swan in the introduction section as "*trading as Mensworks ("the employer").*" Mr Swan was referred to throughout the undertaking as "*the employer*".

[14] *March 2015 determination* - The Authority (Member Fitzgibbon) issued a determination involving the Labour Inspector as Applicant and “*Mr Swan t/a Mensworks*” as Respondent dated 31 March 2015¹ which involved a claim that Mr Swan had failed to comply with the enforceable undertaking.

[15] *March 2015 investigation* - Mr Swan is noted in the determination as having appeared in person at the Authority’s investigation meeting held in March last year. There is no record in the determination of Mr Swan disputing that he was trading as Mensworks or that he had personally employed staff (who were the subject of the Labour Inspector’s investigation and undertaking).

[16] *February 2016 determination* - MGL appeared before the Authority (Member Loftus) in February this year in relation to a claim made by Ms Strang against Mr Rutherford (former MGL director) and MGL.² The Authority’s determination³ records that MGL via Mr Swan advised the Authority that it had employed Ms Strang, not Mr Rutherford personally. Ms Strang accepted that and the determination was issued against MGL.

[17] *Interview* - Ms Hemmingson was interviewed by Mr Swan. Mr Swan did not recall what if anything he said to Ms Hemmingson about who her employer would be. Ms Hemmingson was very clear that Mr Swan did not mention MGL. Ms Hemmingson says Mr Swan told her he was the owner of BGR and Menworks which he kept separate because they had “*very different vibes*”. Failure to disclose MGL’s involvement supports Mr Swan being the employer.

[18] *Intention* – Ms Hemmingson intended and believed there was a mutual intention that she was employed by Mr Swan. I find that Mr Swan did not provide any information to Ms Hemmingson either prior to her accepting employment or during her employment that contradicted that he was her employer. This supports him being the employer.

[19] *Employment agreement* – Contrary to the requirements of s.65 of the Act Ms Hemmingson was never provided with a written employment agreement. Mr Swan

¹ [2015] NZERA Auckland 101.

² [2016] NZERA Wellington 19.

³ *Supra*.

replied to Ms Hemmingson's multiple requests for an employment agreement by saying that BCL's head office was preparing it.

[20] *BCL's view* - Ms Hemmingson's representative sent an email to Ms Meggie Davison of BCL dated 26 May 2015 asking who Ms Hemmingson's employer was. Ms Davison's reply says that BCL's Head of Retail (Glen) had confirmed that "*Matt Swan is the employer of all Groom Room employees*". This supports Mr Swan being the employer.

[21] *Offer of employment* - Mr Swan made a verbal offer of employment to Ms Hemmingson that he subsequently followed up with a text message offering employment. There was no reference to MGL being the employer or to Mr Swan acting for, or as an agent of, or offering employment on behalf of MGL. Ms Hemmingson replied by text to Mr Swan saying "*I'd like to accept your offer of employment*". The offer and acceptance evidence I heard supports Mr Swan being the employer.

[22] *Mr Swan's view* - I do not accept Mr Swan's evidence that "*there is no possibility, in my mind, that [Dakota] would have thought that I was offering [her] employment in my personal capacity*". I find that there was nothing that Mr Swan said or did that would have put Ms Hemmingson on notice that Mr Swan was acting in any other capacity than personally as the employer. This supports Mr Swan being the employer.

[23] *Wages* - Ms Hemmingson's wages were paid by MGL which supports MGL being the employer. However I accept Ms Hemmingson's evidence that she was not aware that her wages were being paid by MGL until she reviewed her bank accounts after Mr Swan had filed his first witness statement on 23 March 2016.

[24] *Breach of s.65 of the Act* - The failure to provide a written employment agreement or to specify in writing the name of the employer, was a serious omission which has led to the current issue arising concerning the identity of Ms Hemmingson's employer. Had the employer complied with the legal obligation in the Act, then this issue could have been avoided.

[25] *IR345* - Every employer must file monthly IR345 returns with Inland Revenue Department (IRD). Mr Swan produced two IR345s which show MGL had identified to IRD that it employed Ms Hemmingson. Mr Swan could not tell the Authority when

these IR345s had been filed or if IR345s had been filed for all of Ms Hemmingson's employment because his accountant did that.

[26] *Further information* – Mr Swan was directed to inquire into why no PAYE appeared in Ms Hemmingson's IRD record and to remedy that with IRD if PAYE had indeed been paid for her. Mr Swan was asked to report back to the Authority about this but has not done so.

[27] *PAYE* – Ms Hemmingson produced her IRD print out to the Authority that showed PAYE had been paid for her employment with BGR. Mr Swan says that is because MGL did not record Ms Hemmingson's IRD number on the IR345. Ms Hemmingson says she provided her IRD number at the same time she supplied her bank account details so her wages could be paid.

[28] *MGL & BCL contract* - Mr Swan told the Authority that MGL and BCL had contracted to provide hairdressing services at Mensworks in the Viaduct and at BGR in High Street Auckland. He was directed to produce a copy of the said contract. The Authority was subsequently advised by Mr Swan's representative that no written contract existed for the Auckland hair salons (Mensworks and BGR).

[29] *Verbal Auckland contract* - Apparently the Auckland contract between MGL and BCL was a verbal one only which was based on the same terms as a written contract relating to BCL's and Mr Swan's agreement relating to a BGR hair salon based in Wellington. The Wellington contract was a "*Heads of Agreement*" document dated 14 February 2014 signed by BCL and Mr Swan personally. MGL was not a party to it nor is it referred to in the contract.

[30] *Change of MGL director* - The change of director form filed with the Companies Office shows that Mr Swan was appointed as a Director of Men's Grooming Limited on 17 September 2015. Mr Swan told the Authority that prior to that Men's Grooming Limited was operated by his father in law Mr Rutherford who was the sole director of MGL. Ms Hemmingson had no knowledge of or communication with Mr Rutherford.

[31] *Contract formation* - The normal contractual requirements of offer, acceptance, certainty of terms, intention to create legal relations, consideration and the like apply to employment relationships. I am satisfied that these elements exist in respect of a contractual relationship between Ms Hemmingson and Mr Swan but not

between MGL and Ms Hemmingson. Ms Hemmingson cannot have consented to be contractually bound to a legal entity (MGL) that she knew nothing about.

[32] *Standard of proof* - I am satisfied on the balance of probabilities that the evidence establishes that Mr Swan was Ms Hemmingson's employer. Although it was open to Mr Swan to have acted as an agent or principal for MGL I find that the facts do not establish that he actually did so.

[33] *Doctrine of undisclosed principal* - Even if I am wrong in finding that Mr Swan personally employed Ms Hemmingson and if he was in fact only acting as an agent for MGL (which I have consider was not established on the facts) then I find that the doctrine of undisclosed principal would apply as recognised by the Employment Court in *Cuttance (t/a Olympus Fitness Centres) v. Purkis*.⁴

[34] *Effect of doctrine* - The effect of the doctrine of the undisclosed principal allows Ms Hemmingson to choose whether to pursue Mr Swan personally notwithstanding he may have been acting as an agent only for MGL and not in a personal capacity as the employer.

[35] *Election* - Ms Hemmingson has elected to pursue Mr Swan, which I consider she is legally entitled to do given that Mr Swan, if he was acting for MGL (and I am not satisfied on the balance of probabilities that he was) acted as an undisclosed principal so he becomes personally liable as the employer for the employment relationship with Ms Hemmingson.

Outcome

[36] I am satisfied that Ms Hemmingson and Mr Swan were parties to an employment relationship. The Authority therefore has jurisdiction to determine Ms Hemmingson's dismissal grievance.

[37] I find that Ms Hemmingson and MGL were never in an employment relationship so the Authority does not have jurisdiction to investigate any claims involving MGL. Accordingly MGL is removed as a party to these proceedings

⁴ [1994] 2 ERNZ 321

Costs

[38] Ms Hemmingson as the successful party is entitled to a contribution towards her actual costs in respect of this matter. However I consider it appropriate to reserve costs until the substantive matter has been resolved.



Rachel Larmer
Member of the Employment Relations Authority

