PHILLIPA V CARMEL, WI 2523 of 1995
Before: RITTER
Place: Perth
Dat: 10 September, 1996
IN THE INDUSTRIAL COURT OF AUSTRALIA
WESTERN AUSTRALIA DISTRICT REGISTRY

WI 2523

(Applicant) Phillipa, a sex worker in Kalgoorlie, made an application to the Industrial Relations Court of Australia form compensation for unfair termination.

The Judicial Registrar – Mark Ritter, hearing the case had to determine a number of legal questions about the nature of the employment relationship and the so called "illegality" of the sex industry before he could determine whether or not Phillipa had been unfairly dismissed.

This is a very detailed judgment because Ritter examined a lot of relevant cases on the various questions. While it is an important precedent, it is also the case that each judgment would be made based on the particular circumstances of the case. In this case the fact that the sex worker was working in a brothel in an area subject to the containment policy assisted the case. The fact that (the respondent) Carmel, the madam, applied certain rules and policies also strengthened Phillipa's case that she was an employee.

The outcome –

Ritter found that Phillipa was an employee, even though the relationship between a madam and a sex worker does not neatly fit into standard definitions. However, based on the total picture of evidence before him, Ritter concluded that in this case Phillipa was an employee.

Ritter had to determine whether the fact that the industry was "illegal" or "immoral" had the effect of denying Phillipa the right to compensation under the law. Ritter determined that previous judgments, and the fact that the Taxation Office was prepared to tax so called "illegal" earnings, meant that Phillipa should not be denied compensation.

Ritter finally looked at the particular reasons that led to Phillipa's dismissal – alleged drunkenness and disruptive behavior. Ritter determined that evidence by another sex worker that everyone had to drink to deal with the work, was reasonable and not a valid reason to dismiss a sex worker and that Phillipa was not unreasonably disruptive. Ritter took the view that these particular circumstances were probably just excuses for what was really a power struggle between the two. He awarded Phillipa compensation of 8 weeks pay.

Article for Phoenix, 24/09/98 Sue Ellery (LHMWU)

Understanding the employment relationship in the sex industry.

Generally, there are two types of employment relationships recognised by the law. There is the employee / employer relationship and the employer/staff employee relationship, which is also referred to as the relationship between an employer and an independent contractor.

In most employment relationships the nature of the employment is set out in writing between the two parties. Generally there will be some form of written contract or letter of appointment which details the conditions of the offer of employment and obligations of the person who accepts the offer. This contract may refer to an industrial award or agreement. This is not generally the case in the sex industry. (Although in Victoria, there is an industrial award).

So what do sex workers do when there is no written agreement which clearly sets out whether they are an employee or an independent contractor? The law distinguishes between the two types of relationships based on a number of factors and in each case the particular circumstances of the arrangements will be what is taken into account. Generally the law says that it is the degree of control exercised by the employer which determines whether or not the person providing a service is doing that as an employee or as an independent contractor.

The factors that are taken into account to sort out the relationship include:

1. How is the person paid
2. How are hours worked out, eg rosters etc
3. Where the work is carried out
4. Who provides the equipment:clothing; and any other resources used to do the work.
5. Whether holidays or other forms of leave apply.
6. Whether tax is deducted and who deducts it.
7. How work is allocated and supervised.
8. Superannuation
9. Insurance cover

In the sex industry in this state. [WA] The question of the so called ‘legality’ or otherwise of the industry also pops up in case’s looking at this question. The case of Phillipa vs Carmel (both from Kalgoorlie) in 1995 examined this question in great detail and in those particular circumstances found that Phillipa was an employee, regardless of the ‘legality’ of the industry.

If a sex worker is dismissed and wanted to take a claim to the industrial commission for unfair dismissal; the first issue to be sorted out would be what is the employment relationship. To work that out; documentation of all the sorts of factors listed above is the best evidence. So the message is keep copies of everything.

Even if there are no written arrangements about any of the above factors, if a sex worker kept a notebook or diary of work arrangements and verbal arrangements over the period of employment, that could be valuable in any case.

This information is really just an overview of what can be very complicated legal relationships in each case the particular arrangements would need to be taken into account to work out whether a case was likely to succeed in the industrial commission.