

IN THE NUDE: FACTORS DETERMINING THE EMPLOYMENT STATUS OF SEX WORKERS

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ABSTRACT

This article analyses critically the 2018 Christchurch Employment Relations Authority's (the Authority) decision in Hamilton-Redmond and Clifford v Casino Bar Limited, which found that two strip dancers were independent contractors as opposed to employees. The article argues that this decision weakens sex workers' employment rights. It contends, therefore, that the Authority's decision diverges from the protective aims of the Prostitution Reform Act 2003. In addition, in relation to employment law more broadly, the article argues that the Authority's decision reinforces the growing vulnerability experienced by workers in precarious employment.

I. INTRODUCTION

In 2017, 14 years after the Prostitution Reform Act 2003 legalised sex work in New Zealand, exotic dancers Tineill Hamilton-Redmond and Jessica Clifford failed to appear for their scheduled shifts at the Christchurch adult entertainment venue Calendar Girls. As a consequence of their absence, Calendar Girls management removed Hamilton-Redmond and Clifford from shift rosters, effectively terminating their employment. As a preliminary step to raising a personal grievance against Calendar Girls, the two women appeared before the Christchurch Employment Relations Authority (the Authority) in August 2018 to determine their employment status with Calendar Girls.¹ In a decision by member David Appleton, the Authority found that the women were independent contractors and not employees of Calendar Girls under s 6(1)(a) of the Employment Relations Act 2000. Consequently, Hamilton-Redmond and Clifford could not establish a personal grievance claim against Calendar Girls.

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¹ *Hamilton-Redmond and Clifford v Casino Bar Limited (Christchurch)* [2018] NZERA 1128.

This article seeks to analyse critically the Authority's reasoning in finding that Hamilton-Redmond and Clifford were independent contractors and identify potential implications for sex workers' employment rights and employment law more broadly. To do this, this article consists of three main sections. Section II outlines the facts surrounding *Hamilton-Redmond and Clifford* and the Authority's findings. Section III discusses the application of the common law tests used for determining the "real nature" of an employment relationship in the unusual context of the work relationship between the claimants and Calendar Girls. Section IV critically assesses some of the potential implications of this decision on the employment rights of sex workers in connection with the Prostitution Reform Act 2003. It addresses the disconnect that exists between the aim of the Prostitution Reform Act 2003 to protect sex workers' employment rights and the vulnerability of independent contractors under New Zealand employment law. More broadly, in relation to employment law, it argues that the Authority's decision reinforces the vulnerability experienced by workers in precarious employment. The 2018 decision in *Hamilton-Redmond and Clifford* raises challenges for employment law in New Zealand and its effects deserve further scrutiny.

II. HAMILTON-REDMOND AND CLIFFORD: FACTS AND THE AUTHORITY'S FINDING

In late 2017, both Tineill Hamilton-Redmond and Jessica Clifford were working as exotic dancers (also known as strippers or lap dancers) at the Christchurch adult entertainment venue Calendar Girls. In September 2017, after threats and an attempted burglary of their shared flat, the women went to the police to file a complaint.² As a result, both dancers were absent from one night's rostered work at Calendar Girls.³ Calendar Girls management fined Ms Clifford for her absence and later told her that she was "fired".⁴ Calendar Girls management removed Ms Hamilton-Redmond from the shift roster in November 2017 without informing her of its decision not to offer further work to her.⁵ The claimants' lawyer corresponded with Calendar Girls in December 2017 regarding the end of the women's employment, but was informed that exotic dancers at Calendar Girls were independent contractors and not employees.⁶ As a consequence, Hamilton-Redmond and Clifford could not bring a personal grievance claim against Calendar Girls in respect of their dismissal through the Employment Relations Authority.⁷ In pursuit of personal grievances against Calendar Girls, Hamilton-Redmond

2 At [5].

3 At [5].

4 At [5].

5 At [6].

6 At [7].

7 At [7].

and Clifford sought a determination of their employment status before the Employment Relations Authority in August 2018.

In determining whether Hamilton-Redmond and Clifford were employees, the Authority referred to s 6(1)(a) of the Employment Relations Act 2000, which states that: "... employee ... means any person of any age employed by an employer to do any work for hire or reward under a contract of service". To determine whether an individual is an employee, ss 6(2) and (3) provide that the Court must consider the real nature of the work relationship, including all relevant factors.⁸ The leading case for determining the real nature of the relationship is *Bryson v Three Foot Six Ltd (No 2)*,⁹ where the Supreme Court identified a number of relevant matters that should be considered when determining the real nature of the relationship. These include the written and oral terms of the contract, how the contract operates in practice, and the control, integration, and economic reality (fundamental) tests.¹⁰ If an individual is found not to be an employee, they may instead be an independent contractor. The determination of the employment status is important because independent contractors lack many of the relevant employment rights granted under the Employment Relations Act 2000, including the ability to raise personal grievances against their employers.

In *Hamilton-Redmond and Clifford*, the Authority identified factors that both favoured and spoke against the existence of an employment relationship. However, on balance, it determined that Hamilton-Redmond and Clifford were independent contractors.¹¹ Although an assessment of the real nature of the relationship required the Authority to consider many different aspects of Hamilton-Redmond and Clifford's work, the conclusion of the Authority's judgment identifies two factors as being particularly significant. Firstly, the dancers at Calendar Girls did not receive a regular income from their position as dancers. Unless the dancers received tips from customers or sold additional services, such as lap dances, the dancers would not earn any money for their efforts.¹² This means that the dancers were their own "product".¹³ Secondly, the Authority found that industry practice favoured the finding that the claimants were independent contractors.¹⁴ It therefore concluded that, according to the tests set out in s 6(1)(a) of the Employment Relations Act 2000 and *Bryson v Three Foot Six Ltd (No 2)*, the real nature of the relationship

8 Employment Relations Act 2000, s 6(2) and s 6(3).

9 *Bryson v Three Foot Six Ltd (No 2)* [2005] 3 NZLR 721. Note that while the decision in *Bryson* has now been rendered largely inoperable on its facts following the passage of the "Hobbit Law", its discussion of the common law tests for determining employment status remain valid.

10 At [32]. The control test and the integration test will be examined in greater detail in Section III of this article.

11 *Hamilton-Redmond and Clifford*, above n 1, at [132].

12 At [127].

13 At [128].

14 At [129].

between Hamilton-Redmond and Clifford and Calendar Girls was that of an independent contractor and not an employee relationship.

This article focusses specifically on the Authority's application of two of the common-law tests used to determine the real nature of a relationship referred to in *Bryson v Three Foot Six Limited (No 2)*, namely the control and integration tests. It will evaluate the Authority's application of these tests to the context of Hamilton-Redmond and Clifford's work with Calendar Girls.

III. THE AUTHORITY'S APPLICATION OF THE CONTROL AND INTEGRATION TESTS

A. The Authority's Application of the Control Test

The Court of Appeal considered the control test in the leading case of *TNT Worldwide Express NZ Ltd v Cunningham*.¹⁵ The control test emphasises the degree of control exercised by the alleged employer over the alleged employee.¹⁶ It assumes that employees are subject to more stringent control than contractors. Aspects of control considered in applying this test include control over the hours of work, the processes used at work, and the location of work, amongst other factors.¹⁷ Accordingly, in *Hamilton-Redmond and Clifford*, the Authority identified several kinds of control as being relevant for this test, including control over health and safety issues, control over the dancers' physical appearance, control over the dancers' behaviour through a system of fines and control over the dancers' work through a restraint of trade agreement.¹⁸ Additionally, it considered the control exercised by the dancers over their work, such as their ability to refuse to provide additional services to customers, their ability to choose their own shifts and their ability to refuse to attend staff meetings.¹⁹

The Authority considered that some kinds of control were neutral, pointing neither towards an employment relationship nor an independent contractor relationship. Health and safety rules, such as the prohibitions on dancers' drunkenness and drug-taking, sexual or romantic relationships with staff members and theft,²⁰ were considered by the Authority to be common to both employment and independent contractor relationships.²¹ Consequently, the presence of such rules did not favour either the existence of an employment relationship or an independent contractor relationship.²²

15 *TNT Worldwide Express NZ Ltd v Cunningham* [1993] 3 NZLR 881 (CA).

16 *Ibid.*

17 *Ibid.*

18 *Hamilton-Redmond and Clifford*, above n 1, at [89]–[103].

19 At [103]–[105].

20 At [13].

21 At [90].

22 At [93].

Likewise, the Authority found that the restraint of trade placed on the dancers was not unique to employment relationships and could also be found in independent contractor relationships.²³ The Authority also considered the strict control exercised over the dancers' appearance. Dancers were required to wear matching lingerie and "immaculate" makeup.²⁴ Although this high degree of control might be seen to favour the existence of an employment relationship, the Authority again found that this kind of control was "neutral", favouring neither the existence of an employment relationship nor an independent contractor relationship.²⁵ It found that this control over appearance was mutually beneficial for Calendar Girls and the dancers, ensuring that Calendar Girls' brand was protected and providing guidance for newer and inexperienced dancers to help them maximise their profits.²⁶ This mutual benefit led the Authority to conclude that this degree of control was neutral.²⁷

Although the Authority considered some kinds of control as neutral, it found that others favoured the existence of an independent contractor relationship. The policies document provided by Calendar Girls allowed for a system of fines for dancers' misbehaviour. Fines ranged from \$50 to \$500 for behaviour varying from inappropriate dress to appearing intoxicated.²⁸ In considering the role of the fining system, the Authority commented that this system clearly privileged the existence of an independent contractor relationship as such a system would be: "highly problematic and highly unusual in an employment relationship".²⁹ Although the Authority noted that the claimants' representative had suggested that the fines were unlawful, it considered this irrelevant in determining the real nature of the relationship.³⁰ Since fines were "highly problematic" in an employment relationship, the existence of the fining system supported a finding that the claimants were independent contractors. The Authority likewise concluded that the dancers' control over some aspects of their employment backed the finding of an independent contractor relationship. The Authority found that dancers could refuse to provide additional services, such as lap dances, to customers who requested them,³¹ could choose when to work,³² and were not punished for failing to attend staff meetings.³³ Although the Authority does not explicitly state how these elements of control affected its determination of the control

23 At [102].

24 At [13].

25 At [98].

26 At [97].

27 At [98].

28 At [14].

29 At [99].

30 At [99].

31 At [103].

32 At [104].

33 At [105].

test, it seemingly uses these factors to support a finding that the claimants were independent contractors.

While it is likely that the Authority's findings in respect of the controls exercised over health and safety and restraint of trade were correct, its application of the control test to other aspects of control can be criticised. In particular, the Authority's consideration of the control over the dancers' appearance, the use of fines and the dancers' ability to refuse to provide additional services can be challenged.

Firstly, when finding that the control exercised by Calendar Girls over the dancers' appearance was "neutral", the Authority emphasised the mutual benefit of the control exercised by Calendar Girls. However, the emphasis on mutual benefit for the control test is incorrect. The control test simply seeks to determine the degree of control exercised over a worker, not the benefit of this control for the worker.³⁴ Considering whether or not a worker has benefited from control over their work is subjective and difficult to determine. For example, it could be argued that while fixed hours create stability for workers, this also reduces their flexibility. For this reason, the control test simply focusses on the objectively observable degree of control, rather than the subjective merits of this control. Additionally, it is patronising to imply that Calendar Girls' strict control over dancers' appearance was for the dancers' own benefit as independent contractors. As the name indicates, independent contractors are independent persons, independent from the business which contracted them. It is reductive and affronting to imply that the limits imposed on such people on the way they conduct their business is for their personal advantage. The Authority's appreciation of mutual benefit in considering Calendar Girls' control over the dancers' appearance is not only incorrect but demeaning and paternalistic.³⁵ Such interpretation runs contrary to the spirit of the Prostitution Reform Act 2003, which aims to make sex work equivalent to any other legitimate business.

Secondly, the Authority's emphasis on the existence of fines as supporting an independent contractor relationship is also incorrect. The Authority highlighted the mere existence of the fines as favouring the existence of an independent contractor relationship and refused to consider the actual lawfulness of such fines. In this way, the Authority precluded the possibility that the real nature of the relationship was an employment relationship, with fines being used in an unlawful way. The failure to consider that the fine might possibly be unlawful precluded a true consideration of the real nature of the relationship between Hamilton-Redmond and Clifford with Calendar Girls.

Finally, the Authority's emphasis on the dancers' ability to refuse to provide additional services to customers as supporting the existence of an independent

34 *TNT Worldwide Express NZ Ltd*, above n 15; *Curlew v Harvey Norman Stores (NZ) Pty Ltd* [2002] 1 ERNZ 114; *Koia v Carlyon Holdings Ltd* [2001] ERNZ 585.

35 See further on this in Section IV.

contractor relationship is misguided. The Authority implicitly suggested that the dancers' ability to refuse to provide lap dances or other additional services to clients backed a finding that the dancers were independent contractors. It underscored that the dancers' ability to refuse to provide such services distinguished them from other workers in areas such as retail, traditionally considered to be employees, who could not refuse clients.³⁶ Consequently, the dancers were considered to be independent contractors under the control test. However, focusing on the dancers' ability to refuse to provide additional services ignores the realities of such dancers' specific work. Firstly, dancers were not permitted to refuse to perform their basic role of dancing and stripping. The policies document on the code of conduct for dancers drafted by Calendar Girls included a fine for wearing a G-string after the conclusion of dancing, breaching the dancers' obligation to dance and remove their clothing.³⁷ The dancers' ability to refuse to perform existed only in respect of additional services which customers could request. The dancers' basic role of dancing and stripping remained compulsory. Secondly, legislation means that even if Calendar Girls had exercised power over the dancers by forcing them to perform additional sexual services, such act would likely be illegal. Section 17 of the Prostitution Reform Act 2003 states that workers providing commercial sexual services may refuse to provide such services at any time, even if a contract for such services exists. The focus on the dancers' control over the additional services that they may provide ignores the realities of the nature of the dancers' work.

In applying the control test, the Authority takes an abstract and artificial approach to considering many of the kinds of control exerted by Calendar Girls over the dancers. It does not arguably consider the real nature of the relationship and, instead, it concentrates on the surface appearance of freedom experienced by the dancers at Calendar Girls.

B. Authority's Application of the Integration Test

In addition to the control test and, as established in *Bryson v Three Foot Six Ltd (No. 2)*,³⁸ relevant matters to be considered to determine the real nature of the relationship include an assessment of the integration test.³⁹ Under that test, workers are considered to be employees if they are "integrated" into the business for which they work. This test, discussed in decisions such as *Challenge Realty Ltd v Commissioner of Inland Revenue*⁴⁰ and *Telecom South Ltd v Post Office Union (Inc)*,⁴¹ emphasises whether the individual is "part and parcel" of the business. It assumes that, while an employee is employed as part

36 *Hamilton-Redmond and Clifford*, above n 1, at [103].

37 At [14].

38 *Bryson v Three Foot Six Ltd (No. 2)*, above n 9.

39 At [32].

40 *Challenge Realty Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 42.

41 *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275.

of the business and the work is done as an integral part of the business, an independent contractor is only an accessory to the business. The test considers whether the worker forms a part of a bigger business, or whether the worker is genuinely in business on his or her own account. The integration test focusses on the contribution to a greater cause and involvement in a brand stretching beyond the worker's own individual work. In reality, this test is an extension of the control test beyond the way the work is carried out to the day-to-day management of the business. As such, it does not add much to the control test in the difficult borderline cases. The kinds of question assessed under the integration test include whether the worker attends staff meetings; whether they wear the same uniform as others; and whether they have to follow systems like everyone else, such as clocking in or filling in-house forms.⁴² This test recognises that while both employees and independent contractors work for a business, only employees are an integral part of the business of the employer.

In *Hamilton-Redmond and Clifford*, the integration test is assessed through the issue of branding. In its decision the Authority dedicated significant discussion to considering whether the applicants furthered the Calendar Girls' brand or whether the Calendar Girls venue simply provided a space for the claimants to market their own personal brands of sexual services. The Authority found that if the dancers furthered the Calendar Girls' brand of sexual services, they were arguably integrated in the Calendar Girls' brand and would likely be employees under the integration test. Furthering the Calendar Girls' brand, the dancers would clearly be "part and parcel" of Calendar Girls' business. In contrast, if Calendar Girls were simply an "umbrella" venue, providing a safe venue for sex workers to gather and sell their individual "brands" of sexual services, then the applicants would likely not be integrated into the Calendar Girls' brand and would therefore likely be considered independent contractors under the integration test. If the dancers were simply using the Calendar Girls venue to market their own individual brands, the dancers would be in business on their own account and would not be contributing towards the Calendar Girls' brand.

Applying the integration test to the facts, the Authority agreed with the respondent's assertion that Calendar Girls simply provided a venue for dancers such as Hamilton-Redmond and Clifford to promote their own individual brands of sexual services. The dancers were consequently not considered to be integrated into the Calendar Girls' brand. Although the Authority agreed that the dancers were clearly integral to Calendar Girls, the role of the dancers' own brands meant that the dancers were not integrated into the Calendar Girls' brand.

Branding was assessed by the Authority through two factors: the lack of uniform for dancers and the role of dancers' individual characteristics in attracting customers. The Authority emphasised that dancers at Calendar

42 Ibid.

Girls provided their own clothing and did not wear branded merchandise.⁴³ In contrast, the Authority noted that other staff, such as those tasked with promoting Calendar Girls, wore branded clothing.⁴⁴ Additionally, the Authority found that it was the individual characteristics of dancers which attracted customers, meaning that each dancer was furthering her own brand.⁴⁵ The Authority held in particular that:⁴⁶

It is clear that the dancers are selling themselves, rather than a Calendar Girls product of service, in the sense that they are using their choreographic skills and inherent sensuality to attract tips and the purchase of private lap dances and penthouse sessions. Every dancer has her own set of unique charms which will attract some customers and not others. This is the nature of entertainment and is quite unlike a shop assistant, or a member of restaurant waiting staff, whose job is to sell the goods or services of their employer.

As the dancers did not receive a salary, their income was dependent on the tips they received from their dancing and the sale of additional services (such as lap dances). According to the Authority, this marked dancers as distinctively different from other kinds of worker in more traditional employment positions.

The Authority's approach to merchandising takes arguably an incorrectly narrow approach to considering the Calendar Girls' "brand". Firstly, it is hard to imagine how, in any circumstances, the dancers could wear clothing to promote the Calendar Girls' brand. The dancers were expected to end their dancing nude and to collect tips in the nude.⁴⁷ The dancers' role required them to wear little clothing, meaning that the focus on the role of branded merchandise for the integration test is meaningless. In any case, it can be argued that whether nude or wearing lingerie, the dancers' appearance associated them with the Calendar Girls' brand as the logo of Calendar Girls includes a silhouette of a nude woman in heels.⁴⁸ Additionally, when not nude, the policy document produced by Calendar Girls required dancers to wear matching lingerie, which "[implies] sexiness and sensuality".⁴⁹ In the judgment, the Authority commented that this rule was designed to protect the Calendar Girls' brand of sensuality.⁵⁰ Whether naked or dressed in matching

43 *Hamilton-Redmond and Clifford*, above n 1, at [110].

44 At [111].

45 At [112].

46 At [112].

47 At [13].

48 This can be clearly seen on the venue's exterior in Christchurch.

49 *Hamilton-Redmond and Clifford*, above n 1, at [13].

50 At [95].

lingerie, the absence of the words “Calendar Girls” from the dancers’ clothing cannot lead to the conclusion that the dancers were simply promoting their own personal brands.

Additionally, the significant distinction that the Authority drew between the dancers and other services is overstated. The Authority distinguished dancers from other workers by arguing that each dancer received income on the basis of her own unique charms, in contrast to other workers which simply provide the services of their employer. However, while each dancer may use her unique skills to attract tips from some customers and not from others, all dancers are selling the same “product” of sexual gratification. Although the Authority suggests that each dancer is offering a unique “product”, the ultimately identical product of sexual gratification arguably creates some similarities between exotic dancing and other positions where a customer may prefer a particular individual to perform a specific service. An example could be a service provided by personal trainers. While personal trainers employed by a fitness centre all seek to provide fitness services, each trainer has his or her own unique personality that will attract some customers and not others. Customers may prefer a male or female trainer and may prefer some kinds of personalities over others. However, all personal trainers provide the same core product of fitness services. Other examples include beauticians or hairdressers. Likewise, while all dancers are selling a slightly different form of sexual gratification, all the services provided by the dancers are essentially the same. Although the Authority drew a strict distinction between the dancers’ individual sales and the Calendar Girls’ brand on the grounds that each dancer sold individual products, the goal of each dancer in selling sexual gratification calls into question this strict distinction.

Like the Authority’s application of the control test, its application of the integration test is artificial and ignores the realities of the dancers’ work. The Authority’s reliance on the wearing of merchandised clothing and the role of individual characteristics in selling goods was incorrect. The Authority’s application of the integration test failed to evaluate the real nature of the relationship between Hamilton-Redmond and Clifford with Calendar Girls.

IV. IMPLICATIONS OF *HAMILTON-REDMOND AND CLIFFORD*

Having outlined the Authority’s findings and reasoning in respect of Hamilton-Redmond and Clifford’s employment status as independent contractors of Calendar Girls, this article will now discuss some implications of this decision. As an Employment Relations Authority case, the *Hamilton-Redmond and Clifford* decision has, arguably, limited value as a legal precedent. The legal doctrine of precedent normally only starts at the Employment

Court level and above.⁵¹ Nevertheless, the Authority's decision has at the very least "persuasive relevance" in terms of any subsequent case with similar facts. The decision has, in any case, been appealed to the Employment Court. In addition, since the areas of law addressed in the *Hamilton-Redmond and Clifford* decision are rarely brought forward to higher courts, whether in New Zealand or abroad, the impact of the decision is potentially far-reaching. This article will focus on two key implications. It will firstly discuss the contribution of this decision to the law surrounding sex workers' employment rights, including the Prostitution Reform Act 2003. It will secondly discuss how this decision demonstrates the vulnerability experienced by workers in precarious employment agreements. The implications of this decision are significant both for sex workers' employment rights and employment law more broadly.

A. Effect of Hamilton-Redmond and Clifford on the Legislative Regime for Sex Workers' Employment Rights

The Prostitution Reform Act (PRA) was adopted in 2003, decriminalising prostitution in New Zealand and granting sex workers a number of new employment law protections. While the Act contains a number of provisions relating to criminal and health matters,⁵² the Act also has a strong focus on upholding the employment law rights of sex workers. Section 3 of the PRA lists a number of purposes of the Act, including creating:

- ... a framework that –
 - (a) safeguards the human rights of sex workers and protects them from exploitation:
 - (b) promotes the welfare and occupational health and safety of sex workers:
 - (c) is conducive to public health:
 - (d) prohibits the use in prostitution of persons under 18 years of age:
 - (e) implements certain other related reforms.

51 Gordon Anderson and others *Mazengarb's Employment Law New Zealand 2018* (online loose-leaf ed, LexisNexisNZ, accessed 1 December 2018), commentary on s 186 Employment Relations Act 2000.

52 For example, ss 8–10 that regulate the use of condoms and other mechanisms to reduce the transmission of sexually-transmitted infections and ss 20–23 that prohibit the use of minors in prostitution.

The PRA occurred in response to concerns about the exploitation of sex workers' health⁵³ as well as their employment rights.⁵⁴ Although historically the Massage Parlours Act 1978 regulated where indoor sex work could take place, it did not address the protection of sex workers' employment rights.⁵⁵ This meant that while sex workers were employed by brothel owners, they had few employment law rights that they could seek to enforce.⁵⁶ The PRA departed from this historical precedent by providing new recognition and support for sex workers' employment rights.

The PRA has generally been acknowledged to have a positive practical effect in granting greater recognition to sex workers' employment law rights in New Zealand.⁵⁷ Lynzi Armstrong, in particular, has argued that sex workers have gained increasing flexibility in their employment since the introduction of the PRA.⁵⁸ She also suggests that sex workers' awareness of their employment rights has increased significantly since 2003, with sex workers empowered and better able to assert their rights.⁵⁹ Today, New Zealand is held up by many sex work advocates as an example of a sex worker positive legislative model.⁶⁰

Judicial decisions on sex workers' employment rights have sought to uphold the policy goals of this legislative framework. In the 2014 decision of *DML v Montgomery*, the Human Rights Tribunal granted damages to a sex worker who complained of sexual harassment at work.⁶¹ The claimant alleged that the respondent, her brothel manager, had continually harassed her through asking a number of questions of a sexual nature. Throughout its decision, the Human Rights Review Tribunal affirmed the importance of sex workers' employment rights. While the respondent argued that questions of a sexual nature were *de rigeur* in a brothel, the Human Rights Review Tribunal found

53 See Gillian Abel, Lisa Fitzgerald and Catherine Healy (eds) *Taking the Crime Out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation* (Policy Press, Bristol, 2010); Laura Meriluoto and others "Safety in the New Zealand Sex Industry" (2014) 49 *New Zealand Economic Papers* 296; and Gillian Abel "Sex Workers' Utilisation of Health Services in a Decriminalised Environment" (2014) 127 *New Zealand Medical Journal*.

54 See Gillian Abel "Sex Work Is Here to Stay and Decriminalisation Improves Safety and Social Justice" (2018) *British Medical Journal* 361.

55 Joanna Schmidt "The Regulation of Sex Work in Aotearoa/New Zealand: An Overview" (2017) 31 *Women's Studies Journal* 35 at 40.

56 At 44.

57 See Gillian Abel "In Search of a Fair and Free Society: The Regulation of Sex Work in New Zealand" in E Ward and G Wylie (eds) *Feminism, Prostitution and the State: The Politics of Neo-Abolitionism* (Routledge, Abingdon, UK, 2017) 140.

58 Lynzi Armstrong "Out of the Shadows (and Into a Bit of Light): Decriminalization, Human Rights and Street-Based Sex Work in New Zealand" in Kate Hardy, Sarah Kingston and Teela Sanders (eds) *New Sociologies of Sex Work* (Ashgate Publishing, Farnham, UK, 2010) 39 at 41.

59 At 42.

60 Gillian Abel "A Decade of Decriminalization: Sex Work 'Down Under' but not Underground" (2014) 14 *Criminology and Criminal Justice* 580.

61 *DML v Montgomery* [2014] NZHRRT 6.

that sexual language did not always have a business purpose in a brothel and that sexual harassment could occur.⁶² The Tribunal commented that failing to recognise that sexual harassment could occur in a brothel would deprive sex workers' of their rights under the Human Rights Act 1993.⁶³ Additionally, the decision explicitly acknowledged that sex workers were entitled to the same protections against sexual harassment as other workers and identified that a policy goal of the PRA was to protect sex workers' employment rights.⁶⁴ The Tribunal concluded by identifying the vulnerability of sex workers and emphasising the need to uphold sex workers' rights.⁶⁵ *DML v Montgomery* is an example of a judicial body taking a rights-affirming approach to the employment rights of sex workers recognised in the PRA.

A number of decisions in New Zealand, as well as in Australia and South Africa, had previously upheld the employment rights of those in the adult entertainment industry. These cases demonstrate that there has been a move towards recognising that sex workers are in an employee-employer relationship. As a result of these decisions, the Courts have recognised and applied the relevant employment rights to such workers.

In the Australian decisions of *Phillipa v Carmel*,⁶⁶ for example, the applicant was engaged to provide sexual services for men by the respondent, the madam of a brothel in Kalgoorlie, Western Australia. The respondent terminated the applicant's contract in November 1995 resulting in the applicant claiming compensation for unfair dismissal under the Industrial Relations Act 1988 (Australia). The judicial registrar determined that the respondent had sufficient control over the applicant to establish an employee-employer relationship. Similarly, the Labour Appeals Court of South Africa in *'Kylie' v Commission for Conciliation, Mediation and Arbitration*⁶⁷ held that the right to fair labour practices exists for everyone, even if no formal contract of employment is concluded and even if the work is illegal. As a result, the sex worker who alleged that she had been unfairly terminated from her employment in a massage parlour could pursue her claim through the court system as she was to be considered as an employee for the purposes of the Labour Relations Act 1995 and the South African Constitution. In addition, a series of New Zealand decisions, none of which were cited in *Hamilton-Redmond and Clifford*, have recognised that brothel managers in the adult entertainment industry are employees.⁶⁸ Like *DML v Montgomery*,

62 At [106].

63 At [111].

64 At [146].

65 At [146].

66 *Phillipa v Carmel* (1996) AIRC Print 960433 433/96, 10 September 1996.

67 *'Kylie' v Commission for Conciliation, Mediation and Arbitration* (2010) 31 ILJ 1600 (LAC).

68 See *Le Prou v Tauripi Tavern (1996) Ltd* (ERA Christchurch CA 118A/04, 27); *Francis v Avalon Businesses Ltd* (ERA Auckland AA 340/07, 30 October 2007) and *Richards-Ratray v Willbank* (ERA Wellington WA 11/01, 26 March 2001).

these decisions demonstrate that the Courts are willing to uphold sex workers' employment rights.

However, *Hamilton-Redmond and Clifford* calls into question the Courts' true willingness to uphold sex workers' employment rights. In contrast to other decisions, *Hamilton-Redmond and Clifford* cannot be viewed as successful in upholding sex workers' employment rights. Failure to find *Hamilton-Redmond and Clifford* to be employees of Calendar Girls deprived the claimants of basic employment right protections, including holiday pay and sick leave, as well as the ability to raise a personal grievance against their employers. As independent contractors, *Hamilton-Redmond and Clifford* were unable to challenge the abrupt end to their employment at Calendar Girls. Additionally, as independent contractors while they were working at Calendar Girls, they would have had no recourse against the use of fines and other practices at Calendar Girls. This failure to protect the claimants' basic employment rights is arguably inconsistent with the PRA, which was designed to protect sex workers against exploitative practices. The decision of *Hamilton-Redmond and Clifford* suggests that protection for sex workers' employment rights may not be as secure as may have been believed to be before this decision.

Moreover, the industry practice identified in *Hamilton-Redmond and Clifford* may suggest that, despite the existence of the PRA and several previous supportive judicial decisions, sex workers' employment rights are not consistently upheld in the adult entertainment industry. A significant part of the Authority's decision is dedicated to considering industry practice.⁶⁹ The respondent produced a number of employment agreements from other adult entertainment employers to show that sex workers are usually considered to be independent contractors within the industry.⁷⁰ These agreements also show that sex workers are typically subject to significant control from management. Fines for misbehaviour were commonplace.⁷¹ Other documents provided that sex workers were not compensated for promotional work⁷² and were not entitled to sick or holiday leave although required to provide notice for absences.⁷³ In one agreement, sex workers were required to pay \$40 shift fees and \$40 advertising fees weekly.⁷⁴ These agreements present a bleak picture of sex workers' employment in New Zealand, suggesting that such workers are routinely subjected to stringent control over their work routines, even while being described as contractors.

Additionally, the industry practice outlined in *Hamilton-Redmond and Clifford* is consistent with some other studies. Michael Roguski's 2013 study for the New Zealand Prostitutes Collective found that 72 per cent of sex workers

69 See *Hamilton-Redmond and Clifford*, above n 1, at [18]–[42].

70 At [25], [32] and [39].

71 At [29] and [40].

72 At [27].

73 At [36].

74 At [39].

participating in the study did not have a written employment agreement with their employer.⁷⁵ Catherine Zangger's 2016 thesis commented that: "Despite sex workers being in favour of the legal change, and evidence of improvements in management practices, according to the sex workers I interviewed, unfair practices still persist."⁷⁶ Moreover, many of the practices she identifies as being common prior to the PRA, such as "arbitrary and unfair work rules", and fines and unfair dismissal,⁷⁷ can still be seen in the industry practice provided by the respondent in *Hamilton-Redmond and Clifford*. Despite the existence of the PRA and a number of decisions that have affirmed sex workers' employment rights, it seems likely that sex workers' employment rights are upheld inconsistently in the adult entertainment industry.

B. Vulnerability of precarious employment

In addition to its implications for sex workers' employment rights, the *Hamilton-Redmond and Clifford* decision has significant implications for employment law more generally. Over the last 20 years, increasing focus has been placed on the rise of the so-called "precariat". Such workers are in employment situations without what Guy Standing terms the seven securities: labour market security, employment security, job security, work security, skill reproduction security, income security and representation security.⁷⁸ Standing estimates that in many developed countries up to a quarter of adults represent this precariat.⁷⁹ The precariat is characterised by a level of vulnerability and a lack of basic employment rights.

Although the rise of the precariat manifests itself in many different ways, the increase in independent contractors, such as *Hamilton-Redmond and Clifford*, and their exclusion from employment law protections is an example of this phenomenon. While there is no official data, Statistics New Zealand has acknowledged that the number of contractors in New Zealand has likely grown since the 1980s.⁸⁰ Since contractors are considered to be professionals who are capable of being in business on their own account, they do not receive many of the basic protections of the Employment Relations Act 2000. However, while traditionally contractor relationships may have helped independent business people exercise their contractual freedom, there

75 Michael Roguski *Occupational Health and Safety of Migrant Sex Workers in New Zealand* (Kaitiaki Research and Evaluation, Wellington, 28 March 2013) at 46.

76 Catherine Zangger "For Better or Worse? Decriminalisation, Work Conditions, and Indoor Sex Work in Auckland, New Zealand/Aotearoa" (PhD Dissertation, University of British Columbia, December 2015) at 123.

77 At 123.

78 Guy Standing *The Precariat: The New Dangerous Class* (Bloomsbury Publishing, London, 2014) at 17.

79 At 41.

80 Statistics New Zealand *Flexibility and Security in Employment: Findings from the 2012 Survey of Working Life* (19 March 2014) at 9.

is evidence that contractor agreements are increasingly being used to avoid granting employees basic employment rights. A recent example occurred in August 2018, when a taxi company was ordered to pay drivers lost wages as compensation for their use of contractor agreements to avoid entitlements to holiday pay and other employment rights.⁸¹ While the Authority in *Hamilton-Redmond and Clifford* found that the use of contractor agreements on those facts was not to avoid legal responsibility,⁸² the Authority identified that finding the claimants to be contractors increased their vulnerability.⁸³ However, the Authority commented that it was bound by the narrow dichotomy between contractors and employees and, as the claimants could not be recognised as employees, their employment status was more akin to contractors. *Hamilton-Redmond and Clifford* demonstrates that, even if contractor agreements are not being used to ignore employment rights, the very finding that a worker is a contractor creates vulnerability from a legal perspective. The vulnerability of individuals such as Hamilton-Redmond and Clifford, who work under the control of a single manager or organisation and who do not benefit from the flexibility and freedom typically associated with independent contractors, is being increasingly identified as a concern and deserves further scrutiny.

V. CONCLUSION

The Christchurch Employment Relation Authority's finding in *Hamilton-Redmond and Clifford* that two exotic dancers at the adult entertainment venue Calendar Girls were independent contractors, and not employees, raises a number of essential legal issues for employment law in general and for sex workers in particular. This article has discussed the Authority's finding and some of its reasoning with regards to the determination of the employment status of sex workers. It has challenged the Authority's application of the control and integration tests to the facts of the decision. Additionally, this article has outlined the potential implications of this decision for sex workers' employment law rights and the growing vulnerability of workers in precarious employment. The significant issues raised by the *Hamilton-Redmond and Clifford* decision highlights the need for further research in this area in order to clarify the potential implications of this decision and answer the policy issues raised by this decision. Hamilton-Redmond and Clifford have appealed the decision of the Authority and, in the light of the above discussion, it will be interesting to see if the Employment Court considers the wider impact of determining the employment status of sex workers.

81 See John Anthony "Southern Taxis Ordered to Pay Drivers Nearly \$100,000 in Lost Wages, MBIE Says" *Stuff* (8 August 2018) <stuff.co.nz>.

82 *Hamilton-Redmond and Clifford*, above n 1, at [129].

83 At [126].