Employment Standards TRIBUNAL

An appeal

- by -

Darlene F. Grey, operating as Roadrunner Courier
("Grey")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2003A/310

DATE OF DECISION: February 17, 2004

DECISION

SUBMISSIONS

Darlene F. Grey	on her own behalf
Pat Douglas	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Darlene F. Grey operating as Roadrunner Courier ("Grey") of a Determination that was issued on October 30, 2003 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Grey had contravened Part 3, Sections 17 and 18 and Part 7, Section 58 of the *Act* in respect of the employment of Melanio Calara ("Calara") and ordered Grey to pay Calara an amount of $1152.79.

The Director also imposed an administrative penalty on Grey under Section 29(1) of the *Employment Standards Regulation* (the *"Regulations"*) in the amount of $1500.00. The total amount of the Determination is $2652.79.

The grounds of appeal are that the Director erred in law by finding Calara was an employee under the *Act* and that new evidence has come available that was not available at the time the Determination was made.

Grey has requested an oral hearing on the appeal, indicating she wishes to draw the attention of the Tribunal to "numerous cases which have determined, in circumstances virtually identical to the present, that courier drivers were independent contractors and not employees". Generally, the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.).

After considering the Determination, the appeal and the material on file, the Tribunal decided an oral hearing was not necessary in order to adjudicate the appeal. The parties were advised in correspondence from the Tribunal dated January 16, 2004 that the appeal would be adjudicated based on the written submissions. On January 20, 2004, James A. MacLean filed a submission on behalf of Grey indicating that Grey had assumed there would be an oral hearing on the appeal and as none would be held, requested the opportunity to file a written argument. The Tribunal acceded to that request and received a final submission from Grey on January 27, 2004. That submission was disclosed to the other parties, but no response was requested or required.

ISSUE

The issue in this appeal is whether the Director erred in law in concluding Calara was an employee for the purposes of the *Act*.

THE FACTS

The Determination sets out the following background information:

> Darlene F. Grey, operating as Roadrunner Courier operates a courier delivery service, which falls within the jurisdiction of the Act. Melanio Calera [sic] was employed as a driver from September 27, 2002 to December 9, 2002 and was paid via commission. The complaint was filed within the time period allowed under the Act.

The complaint was filed with the Director on March 19, 2003. The Determination and the record indicate the following sequence of events relating to the complaint:

- On June 24, 2003, the Director sent a Notice of Mediation to Grey by registered mail to two known addresses for her. Canada Post confirmed that both copies were delivered to the addressee.

- Neither Grey, nor anyone on her behalf, appeared at the mediation session.

- On July 23, 2003, the Director sent a Notice of Hearing and Demand for Employer Records to Grey by registered mail to the same two known addresses. Canada Post confirmed that delivery cards were left at both addresses to pick up the registered mail. The registered mail was not picked up.

- No employer records were ever delivered to the Director.

- The hearing was set for August 18, 2003, commencing at 9:00 am.

- Neither Grey, nor anyone on her behalf, appeared at the hearing.

- A delegate called Grey's office on August 18, 2003 and was told she had gone to the hospital that morning.

- The Director received information at the hearing from Calara relating to his claim.

- On August 21, 2003, the Director sent a letter to Grey by fax and by regular mail to both known addresses for her. The fax and the letters included a copy of Calara's records. Grey was asked to review the records, to provide her response to them and to provide her records, if any. A reply was required by August 29, 2003.

- On August 29, 2003, a fax communication was received by the Director over the signature of Grey. The communication acknowledged having received the August 21, 2003 letter from the Director by fax. The letter objected to the involvement of the Branch "with a contractor situation". Grey indicated she would not be able to attend any meetings, "due to current medical problems" and that the Director could contact her general manager, Michael Dault, if any further information was required.

- On October 9, 2003, the Director sent a letter by fax to Grey enclosing a Branch fact sheet and questionnaire used by the Director for cases where the issue was whether the complainant is an

employee or an independent contractor. A copy of the Calara's signed contract was also requested. A response was required by October 22, 2003.

- The Director received a faxed response, which consisted of the first page of the October 9, 2003 letter with the words, "NOT AT THIS # Number; please don't send or fax anything more to this number", printed on it.

- On October 10, 2003, the Director called the number shown on Roadrunner Courier letterhead and spoke with Mr. Dault, who said he knew nothing about the complainant or the complaint. He provided the Director with a post office box to which correspondence to Grey could be sent. He agreed to provide Grey with a copy of the letter "if he had the opportunity".

- On October 10, 2003, the Director sent the October 9, 2003 letter and attachment to Grey by registered mail to the post office box provided by Mr. Dault. Canada Post confirmed that a delivery cards was left in the box on October 14, 2003 to pick up the registered mail. The registered mail was not picked up as of the date of the Determination.

On October 30, 2003, the Determination was issued. The Determination sets out the following findings on question of whether Calara was an employee for the purposes of the *Act* or was an independent contractor:

> Part of the evidence provided by Melanio Calera [sic], a copy of which Darlene F. Grey acknowledged receiving, was a copy of his employment contract with Darlene F. Grey, operating as Roadrunner Courier. Under his contract, according to the evidence supplied by Melanio Calera [sic], he was required to be available for dispatch by Darlene F. Grey, operating as Roadrunner Courier, and he was required to provide her with 1 week's notice in advance of any proposed absence. He was dispatched through her dispatch service; he used her way bills when picking up from or delivering to her clients; clients paid Darlene F. Grey, operating as Roadrunner Courier, who then paid Melanio Calera [sic] a commission based on the charge to the client. Darlene F. Grey, operating as Roadrunner Courier set the rate of pay, the method of payment, and the timing of payment. There was no risk of loss or chance of profit as Melanio Calera [sic] was paid a set commission of his work. Therefore Melanio Calera's [sic] work was integrated into the business and the business totally relied on him and on other drivers to make pick-ups and deliveries.
>
> The employment contract shows that Darlene F. Grey, operating as Roadrunner Courier controlled and directed Melanio Calera [sic] when he worked for the employer.

The appeal is partly grounded on "new evidence coming available that was not available at the time the Determination was made. The "new evidence" appears to be no more than an explanation for Grey's failure to participate in the hearing. Grey says she was incapacitated due to serious illness and "did not become aware of the proceedings" until after the Determination was made. That assertion was later amended by Grey to say she did not become aware of the proceedings until "after the date of the hearing".

ARGUMENT AND ANALYSIS

The burden is on Grey, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

Grey says there is evidence available that was not available at the time the Determination was made. This evidence is essentially an explanation for her failure or refusal to participate in the complaint process. The Tribunal has said in a number of decisions that evidence or information which an appellant seeks to submit with an appeal and which purports to be new, or fresh, evidence will be tested against the following criteria:

(a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

Applying the above criteria, there is nothing in the appeal that the Tribunal would consider to be new, or fresh, evidence. The appeal raises a question of law. The substance of the appeal on that question is found in the following excerpt from Grey's appeal submission:

> The Appellant notes there have been numerous decisions from courts and tribunal across Canada, determining that courier drivers engaged under virtually identical terms and conditions to the present were independent contractors and not employees.
>
> For example, *Velocity Express Canada Ltd. v. Canada (MNR)* [2002] T.J.C. 136 and *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission),* [2001] N.B.J. 222 (NBCA).

An explanation for the failure to fully participate in the complaint process might affect the extent to which the Tribunal will allow an appellant to challenge a Determination, but does nothing to alter the basis upon which the Determination was made. In this appeal, Grey does not argue the Director erred in respect of the factual conclusions made about to the relationship between Grey and Calara, but that the Director

erred in law. There is no new, or fresh, evidence that is sought to be introduced by Grey on the relevant elements of the relationship. While the appeal submission does say that if Grey had been aware of the hearing she would have "drawn the attention of the Director to those aspects of Mr. Calera's [sic] engagement which are inconsistent with his being classified as an employee", she has not done that in the appeal in any way that would constitute "evidence".

There are some references in the final written argument about aspects of Calara's relationship with Grey, but I do not consider those references to be evidence. They would, in any event, not be allowed to be introduced on appeal as all of those "aspects" of Calara's engagement to which Grey might now point were available to her while the complaint was being investigated and could have been presented to the Director before the Determination was made.

On the primary issue raised by the appeal, whether the Director erred in law in determining Calara was an employee for the purposes of the *Act*, Grey has not addressed that issue from the perspective of the *Act*. The appeal says the Director erred by not referring to and following "numerous other Canadian decisions that have determined that courier drivers are independent contractors and not employees." None of those decisions, however, were shown to have considered the question in the context of the provisions of the *Act*.

The *Act* defines "employee" as including:

> *(a) a person . . . receiving or entitled to wages for work performed by another,*
>
> *(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee, . . .*

The definition of employee in the *Act* is given a broad and liberal interpretation, reflecting the remedial nature of the legislation (see s. 8, *Interpretation Act,* R.S.B.C., *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170, and *Machtinger v. HOJ Industries Ltd.* , [1992] 1 S.C.R. 986). As noted in the Determination, the traditional common law tests, the four-fold, organizational (or integration) and economic reality tests, are frequently used by the Director to analyze the relationship, but those tests do not direct the result and in practice are often applied at the expense of the statutory definition of employee.

In *Kelsey Trigg*, BC EST #D040/03, the Tribunal recognized the several recent court decisions, including *671122 Ontario Ltd. V. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 (S.C.C.) and *Wolf v. Canada*, (2002) F.C.A. 96, that have indicated the traditional common law tests are becoming less helpful in determining the relationship as non-standard employment becomes more common. In *Sagaz*, the Supreme Court has said at common law there is no one conclusive test that can be universally applied to determine whether a person is an employee or an independent contractor. The Tribunal confirmed, however, that the common law tests do not determine the relationship and, for the purposes of the *Act*:

> . . . the overriding test is whether Ms. Trigg "performed work normally performed by an employee," or "performed work for another." The Tribunal has held that the definition is to be broadly interpreted: (*On Line Film Services Ltd v Director of Employment Standards* BC EST #D 319/97), and the common law tests of employment are subordinate to the statutory definition (*Christopher Sin*, BC EST #D015/96).

Contrary to the suggestion made in the appeal, the Director was not compelled to refer to, or be governed by, decisions in other Canadian jurisdictions on the relationship between couriers and those who engage them. Rather, the Director was governed by the provisions of the *Act*, read in light its purposes and objectives. Grey has not argued the Director erred in interpreting and applying provisions of the *Act* to the facts as found. Consequently, Grey has not shown the Director erred in law in determining the Calara was an employee under the *Act*. The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 30, 2003 be confirmed in the amount of $2652.79, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal