

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Pink Dot Enterprises Inc. Operating as Pink Dot Delivery
("Pink Dot")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 97/750

DATE OF DECISION: January 28 1998

DECISION

OVERVIEW

This is an appeal under Section 112 of the *Employment Standards Act* (the “Act”), by Pink Dot Enterprises Inc. operating as Pink Dot Delivery (“Pink Dot”), against a Determination which was issued on September 18, 1997 by a delegate of the Director of Employment Standards. The Determination requires Pink Dot to pay \$1,123.34 to Alistar DeJonge (“DeJonge”) based on a finding by the Director’s delegate that DeJonge was an employee of Pink Dot and that he was owed regular wages, statutory holiday pay, vacation pay and compensation for length of service.

Pink Dot’s appeal is based on its submission that DeJonge was “engaged as an independent contractor” and was not an employee.

This decision has been made following a thorough review of the Determination and the parties’ written submissions.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are: Was DeJonge an employee of Pink Dot and, if so, is he owed wages and compensation as set out in the Determination ?

FACTUAL BACKGROUND

The Director’s delegate described the results of her investigation into DeJonge’s complaint in the following terms:

- DeJonge was employed at Pink Dot as a delivery from January 18 to November 4, 1996.
- DeJonge produced records detailing deliveries made on a daily basis.
- DeJonge maintains that Pink Dot told him what to do by means of a cellular phone which was provided by the company; he was given instructions on how and where to do the delivery.
- DeJonge states the rate of the delivery was set out by the company; when hired he was paid a flat rate of \$5.00 per delivery plus commission. Effective June 1, 1996 he was paid an hourly rate of \$10.00 plus commission.
- Marv Helfich (“Helfich”) of Pink Dot set out in a letter dated March 03, 1997, to the Employment Standards Branch, that “Alistar DeJonge (sic) was never an employee of PINK DOT DELIVERY. He was an independent contractor, who was paid on a piece work basis.” He goes on in that letter to say, “I would be pleased to sit down with you and

discuss in more detail Mr. DeJonge's complaint and our company's position."

- Pink Dot alleges that "there is an Agreement which spells out the parties business relationship." However, Pink Dot declined to produce a copy, signed or unsigned, of the aforementioned agreement.
- Helfrich failed to attend a fact finding meeting scheduled on June 10, 1997.
- A Demand for Records was sent by registered mail on July 15, 1997 to Pink Dot who failed to produce the records as requested by July 31, 1997 (copy attached).
- DeJonge states he was terminated without just cause. He received no notice r wages in Lieu of notice pursuant to Section 63 of the Act.
- Pink Dot made no comment regarding the issue of termination or DeJonge's entitlement to compensation for length of service.

The Determination shows that the Director's delegate considered the definition of "employee" in the *Act* as well as the various common law tests which have been developed to determine whether an employment relationship exists. Having applied those tests ("control test"; "four-fold test"; "organize test") to the findings which resulted from her investigation, the Director's delegate concluded that the relationship between DeJonge and Pink Dot was that of "employer" and "employee". She gave the following analysis of the various common law tests:

- **Control by the employer over the work:** The company assigns work to delivery driver(s) and controls the ways its delivered. This control can and usually does include the timing of the delivery -regular; priority; rush; hot et cetera. If the delivery is not made in a satisfactory manner, the company can discipline the delivery driver.
- **Ownership of tools:** The delivery driver owns the tool, the vehicle; however, the delivery bag, cellular phone (means of communication between company and delivery driver) and delivery order book are provided by the company.
- **Chance of profit/risk of loss:** Delivery driver(s) are paid a flat rate and/or an hourly wage. The company sets the price of the delivery. There is no chance of profit of risk or loss for the delivery driver.
- **Integration into the employer's business:** Delivery driver(s) are fully integrated into the company's business. It is the way the company does the business of delivering product from one place to another.

On the issue of compensation for length of service, the Determination contains the following reasons for concluding that DeJonge was entitled to compensation:

Based on DeJonge's statements, and Pink Dots failure to attend the scheduled fact finding meeting, I give credence to DeJonge's allegation surrounding his termination. In that Pink Dot claims DeJonge was an

independent contractor, it is reasonable to conclude that no notice of termination was given to DeJonge.

In a letter dated August 26, 1997 to Pink Dot (Attn. Mr. Helfrich), the Director's delegate explained her reasons for concluding that DeJonge was an employee and the methodology which she adopted to calculate the amounts owing to DeJonge in the absence of payroll records. She based her calculations on 4 hours per day (minimum daily pay) at the minimum hourly wage for each day on which DeJonge worked. The same methodology was captured in the Calculation Schedule which she appended to the Determination. That methodology was adopted because Pink Dot did not respond to a "Demand for Employer Records" which the Director's delegate sent via certified mail on June 15, 1997. Pink Dot did not send a representative to a fact-finding meeting which the Director's delegate scheduled for June 10, 1997. In short, Pink Dot did not participate in the delegate's investigation after its written response of April 10, 1997 to the Delegate's letter dated March 18, 1997.

The Tribunal disclosed to Pink Dot a copy of the Director's submission and DeJonge's submission with a requirement to make a reply no later than January 9, 1997. No reply was received.

Pink Dot's appeal was made by Marv Helfich, President of Pink Dot Enterprises Inc., and included the following two reasons for making its appeal:

- i) Pink Dot was never an employer of Alistar DeJonge;
and
- ii) The Director's delegate "... construed certain facts and misconstrued other facts of information in this matter and in attempting to mold this mix of information to the relevant statutory and common law ... has come to a conclusion which contradicts truth and fairness in this matter"

Pink Dot submitted an unsigned and undated document titled "Independent Courier Agreement" in support of its submission that DeJonge was engaged as an independent contractor. It also submitted that "Alistar DeJonge was privy to this agreement **and it is believed that he was signatory to such an agreement**" (emphasis added). Pink Dot did not submit a copy of a duly executed agreement between it and DeJonge.

Pink Dot acknowledges in its submission that it "routinely gave Alistar DeJonge delivery orders to be completed", but argues that "that the manner of performing each delivery" was at his discretion.

ANALYSIS

Was DeJonge an employee of Pink Dot?

The starting point for my analysis is the definition of “employee” and “employer” in Section 1 of the *Act*, which states:

employee" includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer's business,
- (d) a person on leave from an employer,
- and
- (e) a person who has a right of recall;

"employer" includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

I note that these definitions do not set out an exhaustive list of all of the circumstances under which a person is an “employee” or an “employer”. Thus, I agree with the Director’s delegate that the *Act* allows for the application of common law principles to determine whether or not a person is an “employee” or an “employer.”

When I review the Delegate’s description of the various common law tests and the way in which she applied those tests to the findings which her investigation yielded, I am satisfied that she was correct in concluding that DeJonge was an employee of Pink Dot. Conversely, I do not accept Pink Dot’s submission that the Determination “ ... contradicts truth and fairness in this matter.”

The principle reason for Pink Dot’s appeal is its submission that DeJonge was an “independent contractor.” However, I cannot attach any weight the evidence tendered by Pink Dot in support of that submission -- an unsigned and incomplete document (the “Independent Courier Agreement”) and to which “ ... it is believed” that DeJonge was a signatory. In addition, I decline to accept Pink Dot’s submissions concerning how DeJonge performed deliveries and the methods of compensation. As the Tribunal stated in *Tri-West Tractor Ltd.* (BC EST #D268/96):

This Tribunal will not allow appellants to “sit in the weeds”, failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies.

The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

Pink Dot declined to respond to or meet with the Director's delegate after April 10, 1997. It did not produce or deliver the records which it was required to disclose upon receipt of the "Demand for Employer Records" dated July 15, 1997. Furthermore, it made no reply to the other parties' submissions when given that opportunity by the Tribunal.

For all of these reasons I concur with the Determination that DeJonge was employed by Pink Dot as a delivery driver from January 18, 1996 to November 4, 1996.

Compensation for Length of Service

The Director's delegate determined that DeJonge was entitled to compensation for length of service in an amount equivalent to one week's wages. In making that determination she accepted the statements made to her by DeJonge during her investigation and noted Pink Dot's failure to send a representative to the fact-finding meeting which she scheduled for June 10, 1997.

Pin Dot's only submission on this point was that the "... termination of Alistar DeJonge's contract work ... was by mutual agreement." In my opinion, that submission does not constitute a ground which allows me to reach a conclusion that differs from the from the Determination made by the Director's delegate following her investigation of DeJonge's complaint. I conclude that Pink Dot's appeal is "frivolous" within the meaning of Section 114(1)(c) of the *Act* which allows the Tribunal to dismiss an appeal if it is "... frivolous, vexatious or trivial or is not brought in good faith." A recent decision of the Tribunal, *Sammy S. Ali operating as Roti Kabab House* (BC EST #D436/97), adopted the following definition of "frivolous" in denying an appeal:

Black's Law Dictionary (6th edition) defines "frivolous" as:

A pleading (which) is clearly insufficient on its face and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purpose of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence in law or support of that claim or defense.

Similarly, a frivolous appeal is "... one of no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed."

For all these reasons I concur with the Determination that DeJonge is entitled to one week's wages as compensation for length of service under Section 63 of the *Act*.

ORDER

I order under Section 115 of the Act, that the Determination dated September 18, 1997 be confirmed in all respects.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr