Employment Standards TRIBUNAL

An appeal

\- by -

Kelsy Trigg

\- 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: Carol L. Roberts

FILE No.: 2002/546

DATE OF HEARING: January 29, 2003

DATE OF DECISION: February 6, 2003

DECISION

APPEARANCES:

On her own behalf:	Kelsy Trigg
On behalf of PaySpaces Inc.:	Louise Taylor, A. Mertens
On behalf of the Director:	Written submissions only

OVERVIEW

This is an appeal by Kelsy Trigg, pursuant to Section 112 of the Employment Standards Act ("the Act"), against a Determination issued by the Director of Employment Standards ("the Director") on October 16, 2002.

Ms. Trigg filed a complaint with the Employment Standards Branch, alleging that PaySpaces Inc. ("PaySpaces") had failed to pay her wages, vacation pay, and compensation for length of service. Following an investigation, the Director's delegate concluded that Ms. Trigg was an independent contractor, and not entitled to the protection of the *Act*.

ISSUE TO BE DECIDED

Whether the Director erred in determining that Ms. Trigg was an independent contractor.

FACTS

PaySpaces is a software development company, originally incorporated under the name I-Nvite Communications Inc.

Ms. Trigg worked for PaySpaces as a vice president and project manager pursuant to two separate service agreements; the first for the period February 1, 2001 until April 30, 2001, the second for the period May 1, 2001 to August 31, 2001. According to these agreements, Ms. Trigg was to be paid the sum of $25,000 plus a bonus of $6000 upon completion of the contract. The second agreement was for a sum of $48,000. Ms. Trigg was also allocated stock options with a multi-year vesting period.

Roger Mutimer, the co-founder and CEO of PaySpaces, signed the service agreements on behalf of PaySpaces. Mr. Mutimer was a director of the company, along with Ms. Taylor and Mr. Mertens.

PaySpaces terminated Ms. Trigg's services on July 25, 2001, effective immediately. Mr. Mutimer was dismissed shortly thereafter, and was divested of his directorship by the remaining two directors.

Ms. Trigg invoiced PaySpaces under the name "Goard Consulting", and described her services as "project management consulting". GST was charged on the amounts billed. PaySpaces issued cheques to both Goard Consulting and Ms. Trigg. No employee deductions were made.

Ms. Trigg worked at PaySpaces offices during regular office hours, reporting to Mr. Mutimer. PaySpaces provided her with a desk, telephone, business cards, computers and other supplies.

Ms. Trigg provided the delegate with a letter from Mr. Mutimer in support of her complaint. Mr. Mutimer stated that Ms. Trigg was initially hired as a contractor, since the financing for the company had not been secured. He further stated that "The intent was that the contractors, Kelsy included, become (sic) employees as soon as we received financing…" Mr. Mutimer also wrote that Ms. Trigg could not have subcontracted her work, as she was hired on the understanding that she would do the work personally.

The delegate concluded that Ms. Trigg was an independent contractor, as she was not persuaded that the relationship between the parties was one of a traditional master-servant.

ARGUMENT

Ms. Trigg says that she was hired as project manager, a critical and integral position with PaySpaces, in response to an advertisement. She says she was interviewed by the three directors of PaySpaces, and left a full time position to work for PaySpaces.

Ms. Trigg contends that she understood the position to be a long term, ongoing position, as evidenced by the multi-year stock option vesting periods. She says that, because the company was a start up company, in an effort to assist it financially, she agreed to enter into a services agreement. She invoiced the company twice a month, which corresponded with salary pay periods.

Ms. Trigg argued that, despite the express terms of the service agreement, she was not able to perform work for any other company while working for PaySpaces, she was unable to sub-contract her work to a third person during the period covered by the agreement, and had no opportunity to recognize a profit or loss. She contends that she was at PaySpaces office during regular business hours on a daily basis, used company equipment and supplies, and received specific direction on the work she was to perform. She also contends that she was assigned individual tasks, was supervised on how those tasks were carried out, set the standards to be met, and decided whether the work had to be redone.

Ms. Trigg says that she was paid the same amount through her employment period, but that she deferred part of her payment to a later period, as PaySpaces anticipated additional funding by that time. As I understand her argument, she contends the $6000 was not a bonus, as characterized by the delegate, but a deferral of wages. Ms. Trigg also contends that she had a vacation scheduled for the first two weeks of March before she was hired, and the service agreement merely reflected that, as she was not entitled to paid vacation for that period of time.

Ms. Trigg also contends that Mr. Mertens "micromanaged" her work, and submitted an email from him as support for her argument that she was given a significant level of direction and control. That email provided as follows:

> Today I want the existing code ready for a full build, in line with the parameters I have given to (name)… After a successful build is completed, I want all code writing to stop…. I want all this completed by EOD Tuesday. Starting Wednesday afternoon,… I want a full architectural review, based on the supplied documentation… This will involve… and you and me. We will take however long we need to complete this….There will be two parts to this review. Part A will examine the current design to date, as implemented in the code. We will determine if there are any

> deficiencies, and decide how to correct them…..From this you and I can proceed to develop the necessary documentation:…
>
> (from an email of March 23, 2001)

The delegate argues that the evidence provided by Ms. Trigg was inconclusive on the issue of whether she was an employee or contractor, despite several opportunities to provide relevant information. The delegate argues that the email ought not be considered, as it was not provided during the investigation. I have considered the email, as I am satisfied Ms. Trigg was not aware of the test applied by the delegate regarding direction and control.

PaySpaces agrees with the Determination, and argues that it should be upheld. Ms. Taylor submits that Ms. Trigg was promised a bonus by Mr. Mutimer if the project was finished on time and on budget. She contends that, on April 30, 2001, she advised all the contractors that PaySpaces had run out of cash, and would be unable to meet its obligations to them. She says that she advised the contractors that if they wished to stay, it would be at their own risk, and that Ms. Trigg stayed on, despite her knowledge of these risks.

ANALYSIS

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the delegate erred in concluding that Ms. Trigg was an independent contractor.

The delegate applied the traditional fourfold test, being that of control, ownership of tools, chance of profit and risk of loss, in arriving at her conclusion. Ms. Trigg addressed each aspect of this test in some detail in her submission.

Although the fourfold test, as well as other traditional tests, such as the organizational (or integration) test, and economic reality test are traditionally used to analyze relationships between parties, they are becoming less helpful in determining the role of master and servant in modern workplaces. Non standard employment is becoming more common, due in part to the "globalization of trade, the volatility of international and domestic markets, and workers' desire for autonomy and independence" (see Public Service Commission: *The Future of Work: Non-Standard Employment in the Public Service of Canada*, March, 1999*)*

The inadequacies of the traditional tests have been noted by the Supreme Court of Canada (*671122 Ontario Ltd. V. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 (S.C.C.) and by the Federal Court of Appeal (*Wolf v. Canada* (2002 F.C.A. 96).

In *Sagaz*, the Court noted that the control test: "…has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct" (at para. 38, citing Mr. Justice MacGuigan in *Weibe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553) In *Wolf*, the court notes that the test is difficulty to apply in practice, as both the employer and employee hold some measure of control over the work that is performed, and is often inadequate because of the increased specialization of the workforce.

The Supreme Court suggested that the test is inadequate in situations where, because the skills and expertise of the worker exceeds those of the employer, little control or supervision can be exercised over the manner in which the work is performed.

In *Sagaz*, the Court concluded that there is no one conclusive test that can be universally applied to determine whether a person is an employee or an independent contractor. Rather,

> ..the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstance of the case. (at paras. 47 and 48)

In determining the nature of a relationship, courts, and this Tribunal, have typically assessed the nature of the relationship, looking beyond the language used by the parties. While there is no magic test, the total relationship of the contracting parties must be examined, with a view to determining "whose business is it?"

Level of control

Although the level of control in this industry is not an entirely adequate indicator of the nature of the parties' relationship, the evidence suggests that Ms. Trigg was the master of how her tasks were carried out. Ms. Trigg was hired to provide a product, the parameters of which were set by PaySpaces, and the clients of PaySpaces. Ms. Trigg was part of a team, members of which were individually responsible for developing a portion of the final product. There is no evidence Ms. Trigg was constrained in developing ideas as she saw fit, within those broad parameters. Although Mr. Merten's emails suggest that he set specific deadlines for completion of certain work, it appears he did so more as a team manager. There is no evidence that he supervised Ms. Trigg's work, or told her how to do it.

The evidence is that, on at least 6 or 7 occasions, Ms. Trigg advised staff in the office that she would not be coming in to work, identifying a level of independence not normally exercisable by employees.

I accept that Ms. Trigg could not delegate, or sub-contract her work. Indeed, the service agreement was for her services alone. The fact that Ms. Trigg could not delegate, or sub-contract, her work to someone else, is, while relevant, not a conclusive factor.

Ownership of tools

It was not unusual for Ms. Trigg to work at PaySpaces' offices and use its tools given the type of work she was doing. As a project manager, she would be expected to interface with other team members at that location, and share its computers, so the product could be accessed by others, and after her work had been completed. Furthermore, the product, which was confidential, could only be accessed on PaySpaces' computers for security reasons.

Written agreement

While it is instructive to have regard to the intention of the parties, as reflected in a written contract, particularly where the parties are sophisticated, and or represented by counsel, the written agreement will only be given weight provided that it properly reflects the relationship between the parties. I note, in this case, although PaySpaces consulted a lawyer to assist it in drafting the services agreement, Ms. Trigg did not.

The agreement expressly provided that Ms. Trigg had the right to provide services to other parties during the term of the contract, that she would, in general, have the discretion to determine how to perform those services, and that she would be an independent contractor. The first agreement provided that Ms. Trigg would be entitled to the total sum of $25,000, plus a bonus of "at least $6000" upon completion of the contract. Although there is nothing in the agreement which indicates the bonus was conditional, it further provides that "additional payment will be paid providing certain reasonable performance criteria are met, those criteria to be determined February 15, 2001." The second agreement provided that Ms. Trigg was entitled to $48,000 paid bi-monthly. There is nothing in the agreement to support Ms. Triggs' argument that the $6000 was a wage deferral.

I find that the delegate, while appropriately questioning the *bona fides* of Mr. Mortimer, gave too little weight to the evidence he gave with respect to the parties' intent. His statement was that the parties intended that Ms. Trigg was to be a consultant, at least until the enterprise was financially successful. The only evidence that Ms. Trigg was to be an employee is that of Ms. Trigg herself.

Degree of financial risk and profit

I find that Ms. Trigg took a degree of financial risk in PaySpaces.

PaySpaces did not provide Ms. Trigg with any employee benefits, such as health insurance, dental benefits, vacation pay or a pension plan. She had no job security, union protection, educational opportunities or hope for promotion.

The service agreement also provided that Ms. Trigg was eligible for a bonus if the company was financially successful. There is no evidence the bonus was a deferral of wages. Ms. Trigg also took stock options that vested over a number of years. She stood to gain financially if the company was successful. Ms. Trigg assumed financial benefits and risks.

In light of all the factors, given that Ms. Trigg had no job security, no employee benefits, freedom of choice in how to perform her work, and assumed risk of profit and loss, I conclude that she was an independent contractor.

Legislative provisions

Section 1 of the *Act* defines employee to include

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

An employer is defined as including 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.

Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

The delegate did not consider the legislation in arriving at her conclusion.

Remedial and benefits conferring legislation is, in general, to be given broad and liberal interpretation, as are definitions contained within legislation itself. (see s. 8, *Interpretation Act,* R.S.B.C. , *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2nd) 170, and *Machtinger v. HOJ Industries Ltd.* , [1992] 1 S.C.R. 986)

Thus, 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).

Although Ms. Trigg was an integral part of PaySpaces' project, that does not imply integration into its operations in general. Her work was for a specific time period. Although she attended meetings with other members of the team, the nature of the work she was contracted to perform required interaction with other team members. Although Ms. Trigg was subjected to control in the timing of her work, there is no evidence how she did that work was subject to direction from the directors. In short, the evidence shows, on balance, that the work Ms. Trigg performed was not that of an employee.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated October 16, 2002 be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal