

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, S.B.C. 1995, c. 38

-by-

Duncan Ritchie

(“Ritchie”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/700

DATE OF DECISION: January 27th, 1997

DECISION

OVERVIEW

This is an appeal filed by Duncan Ritchie (“Ritchie”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 004580 issued by the Director of Employment Standards (the “Director”) on November 5th, 1996.

The Director determined that 482634 B.C. Ltd. owed its former employee, Sat Narayan (“Narayan”), the sum of \$2,555.71 on account of unpaid wages and interest. The Director also determined that Silcorp Limited Silcorp Limitee (“Silcorp”) and 482634 B.C. Ltd. were associated corporations within section 95 of the *Act*.

PRELIMINARY ISSUE

This appeal has been filed by Duncan Ritchie, who I understand is the District Manager for Mac’s Convenience stores (he is employed by Silcorp). As Ritchie is not a named party in the Determination (nor was he served in any personal capacity), Ritchie has no status to appeal the Determination. However, I assume that Ritchie is acting as an agent on behalf of Silcorp and I, therefore, propose to treat this matter as an appeal by Silcorp.

FACTS

Narayan was hired by Jawad Aini, the principal of 482634 B.C. Ltd. (which is a Mac’s convenience store franchisee), on or about February 15th, 1995 and commenced work as the “graveyard shift clerk” on February 23rd, 1995. Narayan quit on April 16th, 1995 alleging that his employer had failed to pay him his full wages. During the investigation by the Director’s delegate, Aini initially denied knowing Narayan but then changed his story to say that although he met with Narayan on February 15th, Narayan was never hired.

The Director determined that Narayan was telling the truth, and that Aini was lying, about Narayan’s employment claim. There is ample evidence to support the

Director's conclusion--*e.g.*, Aini's changing of his story about whether he even knew Narayan; two independent witnesses stated that Narayan was employed at the store; Aini's refusal to meet with the Director's delegate to discuss the inconsistencies in his evidence; and Silcorp's' acknowledgement that Narayan was an employee of 482634 B.C. Ltd. (see the Appeal form in this matter).

Silcorp does not challenge the Director's findings insofar as they relate to Narayan and 482634 B.C. Ltd. However, Silcorp says that the Director erred in finding that it and 482634 B.C. Ltd. were "associated corporations" under section 95 of the *Act*.

ISSUE TO BE DECIDED

Did the Director err in finding that Silcorp and 482634 B.C. Ltd. were associated corporations?

ANALYSIS

Section 95 of the Act provides as follows:

95. If the director considers that business, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and

(b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

In my view there is ample evidence to support the section 95 designation. The Reason Schedule appended to the Determination states that:

Except for the hiring and firing of personnel, all other store functions, banking, stocking, store policy and procedures are governed by an

agreement between Aini and Silcorp. Wages for employees hired by Aini are deposited in an account by Silcorp.

These latter findings of fact have not been challenged by Silcorp.

In his appeal form, Ritchie refers to a Mac's Convenience Stores "Dealer Fact Sheet", presumably on the assumption that this form would support his contention that the two corporations were not associated. However, having reviewed the document, it appears to me that it only strengthens the argument in favour of a section 95 designation. In particular, the "Dealer Fact Sheet" states, *inter alia*:

- "Mac's owns the store inventory and fixtures and negotiates the store leases";
- the franchisee will operate "according to the Mac's system";
- "Your contract will require you to sell goods at prices not exceeding those in the Mac's Price Book";
- "You will be required to make at least one bank deposit to the Mac's account every day";
- "You will pay a user fee instead of rent for the use of the premises and fixtures";
- "Mac's will pay for basic telephone services"; and
- "Mac's will provide 4 uniforms free-of charge".

In my view, it is clear that the franchisor and the franchisee jointly administer and manage the convenience store in question and thus, the section 95 designation was entirely appropriate in this case. I might add that this particular franchise agreement appears to be more in the nature of an "employment agreement" than a true independent contractor agreement. For example, while the franchisee is obliged to incorporate a company of which he or she is the president, the franchisor pays the franchisee a fixed base sum (for each of thirteen 4-week periods) and further sums depending on the store's sales volume.

Given the facts of this case, it may be that Silcorp is Narayan's "employer", as defined in section 1 of the *Act*, in that it was "indirectly" responsible (through the

actions of its agent, 482634 B.C. Ltd.) for the employment of Narayan. In such circumstances, the issue with respect to the section 95 designation is moot. Further, Silcorp may also be Aini's employer--in which case, Silcorp would be the *only* employer. If one applies the classic common law four-factor test, one can reasonably conclude that Aini was an employee of Silcorp--Silcorp is the lessor of the premises, it owns the inventory and fixtures, it asserts substantial direction and control over the operation of the store and, lastly, given the fixed base sum compensation to which the franchisee is entitled, although there is some opportunity to gain, there is effectively little, if any, risk of loss for the franchisee.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 004580 be confirmed as issued in the amount of \$2,555.71 together with whatever further interest may have accrued pursuant to section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal