Employment Standards TRIBUNAL

An appeal

- by -

Grab Bag Emporium Ltd. operating as The Grab Bag
("Grab Bag" or "Employer")

- 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

TRIBUNAL MEMBER: Paul E. Love

FILE No.: 2003A/282

DATE OF HEARING: January 27 and March 9, 2004

DATE OF DECISION: March 30, 2004

DECISION

APPEARANCES

Laima Pakstas	on behalf of Grab Bag Emporium Ltd.
Chris Bell	on behalf of himself
Esther Jack	on behalf of herself
Robert Krell	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Grab Bag Emporium Ltd. ("Grab Bag"), from a Determination dated October 29, 2003 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). Chris Bell was engaged by Grab Bag, pursuant to a management services agreement to operate a "mom and pop" convenience store. His common-law wife, Esther Jack, was to assist him in the operations. The store was operated seven days per week, 14 hours per day. The management services contract provided for payment to Bell by commission at the end of one year's operation. In the meantime, Bell was entitled to a food advance, to be credited against his commission, of $200 per month. In August of 2002, Bell suffered a serious injury, and in September of 2002 ceased working. Bell filed a WCB claim. Bell and Jack filed employment standards complaints. Bell made a claim against Grab Bag for the commission, and was given an accounting indicating that he owed money to Grab Bag.

Grab Bag argued that the Delegate failed to act in a fair and impartial basis in investigating the complaints. Grab Bag argued that the Delegate was without jurisdiction to investigate the complaints as Grab Bag was not correctly named as the employer on the complaint form, and thus the complaint was out of time, by virtue of section 76 of the *Act*. Grab Bag argued that neither Bell nor Jack were employees, or alternatively if Jack was an employee, she was Bell's employee. In the alternative, Grab Bag argued that Bell was a manager, and his entitlement under the *Act* should be reduced accordingly. Grab Bag disputed the calculations made by the Delegate.

It is apparent that the Delegate gave a reasonable opportunity to Grab Bag to participate in the investigation, however, the Delegate did not accept the position advanced by Grab Bag. There was no evidence of lack of fairness or bias in the investigation. Jack and Bell filed a complaint within six months, and there is no obligation in section 76 of the *Act* to "correctly name" the employer within six months of the date of the cessation of the employment relationship. On the application of section 1, despite the existence of the management services contract, Bell performed work ordinarily performed by an employee, and was entitled to be paid minimum wage as an employee. As one of the workers in a "mom and pop" convenience store, Bell was an employee and not a manager. Jack performed work as at the cash register dealing with customers, stocking shelves, and cleaner, and this was work ordinarily performed by an employee. She is an employee. Grab Bag knew and permitted Jack to work directly or indirectly, and therefore is the employer of Jack, under the definition of employer in section 1 of the *Act*.

The Delegate erred in failing to take into account an amendment to section 80 of the *Act*, which limits the claim of each employee to a period six months prior to the termination date. I therefore reduced the amounts of the entitlement of each employee in accordance with the updated calculations supplied by the Delegate. The Employer has not shown any error in the calculations which would necessitate an adjustment of Jack's entitlement.

ISSUES:

1. Did the Delegate fail to investigate this matter in a fair and impartial basis?

2. Did the Delegate err in investigating this matter, alleged to be filed outside of six months?

3. Did the Delegate err in finding that Chris Bell was an employee of Grab Bag?

4. Did the Delegate err in finding that Chris Bell was an employee and not a manager of Grab Bag?

5. Did the Delegate err in finding Esther Jack was an employee of Grab Bag?

6. Did the Delegate err in the calculation of the wage entitlement of Bell and Jack?

FACTS

Hearing Process:

This matter proceeded by an oral hearing, in Duncan, British Columbia on January 27, 2004 and March 9, 2004. Each party had the chance to make an opening statement, call evidence, question or cross examine the evidence of other witnesses and make a closing statement. Prior to making its closing argument, the Employer elected to call rebuttal evidence. In this hearing I heard from Kenneth Newcomb ("Newcomb"), Sonja Scammel ("Scammel") and Lisa Punnett (in rebuttal) on behalf of Grab Bag Emporium Ltd. ("Grab Bag"). I heard from Chris Bell ("Bell"), Esther Jack ("Jack") and Murray Farrup ("Farrup"). Prior to attending the hearing the Delegate supplied the record to the Tribunal. The Delegate attended, asked questions of the witnesses, and made an opening and closing statement, but did not give evidence.

I have reviewed the documents and written submissions of the parties submitted prior to the hearing, and the evidence submitted at the hearing. It is not my intention to recite the evidence tendered by the parties, but rather set out my reasons, and the facts in support of the reasons.

Grab Bag Emporium Ltd. ("Grab Bag") is a company incorporated pursuant to the laws of British Columbia. At all material times to this appeal, it operated a convenience store located at Lake Cowichan, British Columbia. The store was situated on lands owned by Grab Bag Holdings Ltd. Kenneth Newcomb, Barrister and Solicitor, ("Newcomb") was a director of both companies. Newcomb carries on his law practice at 122 Station Street in Duncan. This address is the address for the registered and records office of Grab Bag. This was the place where the parties had meetings concerning a management services contract. It is also the place where Bell or Jack dropped off or faxed documents concerning the operation of the store, and contacted Newcomb by telephone.

I wish to set out in a very abbreviated form how Newcomb came to his involvement in the convenience store. Newcomb became involved in the business of the convenience store, by making a loan to a former client, Marie Peters ("Peters"). Newcomb had made substantial loans, primarily from his wife's RRSP. The store was in debt, the business was failing, and was in risk of foreclosure by another creditor. Peters eventually advised Newcomb that she no longer wished to be involved in the operation of the store. She transferred the store to Grab Bag Holdings Ltd., a company controlled by Newcomb, and his wife.

Newcomb knew Chris Bell, who had done some work for Newcomb on his campaign for Duncan City Council. Bell and Jack also lived in an apartment which was in the same building as Newcomb's law practice. Bell was in receipt of disability payments from the Ministry of Social Services & Housing. He was permitted to keep some income that he earned. Prior to his dealings with Grab Bag, he worked on a part-time basis as a baker, and performed handyman services. Some of those handyman services were provided by Bell to Newcomb, prior to his work with the Grab Bag.

When it was apparent to Newcomb that Peters wished to get out of the operation of the Grab Bag, Newcomb jokingly asked Bell if he would like to run a store. Bell was very interested in changing his lifestyle and economic circumstances. Marie Peters trained Bell and Jack during December of 2001 at the store. Eventually, after some discussions, Chris Bell signed a Managerial Services Engagement Agreement ("agreement") made effective January 1, 2002. That agreement was drafted by Newcomb. The agreement was signed by Chris Bell. Newcomb made some changes to the agreement based on Bell's comments. Bell did not have any independent legal advice prior to the signing of the agreement. Newcomb, however, carefully explained the agreement, clause by clause, to Bell.

Despite Bell's oral evidence, I am satisfied that Bell understood that "he was entering into a business relationship" with the Grab Bag. I note that I do not accept the evidence of Bell that he signed the agreement without understanding the agreement, or his evidence that he believed he was entitled to minimum wage as well as the "bonus" set out in the agreement. Further, I do not accept Bell's testimony as to his limited reading skills. His reading of clauses of the agreement at the hearing suggests otherwise. In my view, this assertion that he did not read or understand the agreement, and that he was entitled to minimum wage and a bonus, does not accord with the probabilities which a practical and informed person would recognize as reasonable.

The leading case on credibility is *Faryna v. Chorny, [1952] 2 D.L.R. 354 (C.A.)*.:

> The credibility of interested witnesses, particularly in cases on conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of truth. The test must reasonably subject his story to the examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be truth, but he may be quite honestly mistaken. For a trial Judge to say, "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self direction of a dangerous kind.
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> The trial judge ought to go further and say that the evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command

> confidence, also state his reason for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based upon all the elements by which it can be tested in the particular case.

Bell was largely an unsatisfactory witness, however, this does not affect the basic facts in this case, and the application of the applicable law to the facts. In the application of the *Faryna* test, I found Jack to be a credible witness, however, her evidence was vague and uncertain on some of the points, immaterial to the determination of this case. Newcomb gave credible evidence. Much of the evidence given by Newcomb does not assist in the application of the definition of employee or employer to the facts of the case, or the application of sections 74, 76, and 77 of the *Act* in the investigation of a complaint.

It is apparent now, that the relationship has ended that both parties hold a considerable degree of animosity for the other. Newcomb, in particular feels that he extended a business opportunity to Bell, which Bell did not make a go of, and feels "violated" that Bell and Jack are now alleging an employment relationship. Newcomb gave evidence concerning a number of outstanding disputes between himself and Bell, which are the subject of a provincial court action. I do not propose to make findings of fact or comment on the disputes between the parties, unrelated to the issue of whether Bell and Jack were employees of the Grab Bag, or their entitlement to wages.

Newcomb wanted the store to be run on a cash flow basis. He did not want to inject any personal capital into the store. Bell had no capital to inject into the store. Newcomb didn't want the cheques for the Grab Bag to bounce. Newcomb, his law firm or the Grab Bag did the accounting. Bell was responsible to deal with suppliers, to ensure that the store was stocked. Newcomb wanted the shelves well stocked and attractive to customers, but did not want an endless supply of stock in the basement.

At the time of the relationship, Bell was in receipt of $1100 per month for disability benefits from social services. Of this amount $500 to 600 went to him to live off of, and $530 went to Newcomb or Grab Bag Holdings Ltd. for rent. Bell said the background to "the deal" was that three people ordinarily ran the store, and Newcomb didn't know how well the store would do. Newcomb would not have to pay any employees, and the Ministry would pay his "wage" until the end of the year. Bell said that he would have to disclose any monies paid to him by the Grab Bag, at the end of the year, to his "worker", who would make adjustments to his disability pension entitlement.

After signing the agreement, Bell then operated the store at Lake Cowichan from January of 2002 until September of 2002. Initially Bell and Jack commuted back and forth from Duncan to Lake Cowichan in a car supplied by Newcomb. Unfortunately, Bell did not have a driver's licence and did not disclose this fact to Newcomb. Newcomb and his wife provided Bell some furniture for the apartment at the store. There were Christmas gifts given to Bell and Jack by Newcomb and his wife.

Bell and Jack lived at the apartment in the store building, as did Peters, after Peters vacated the apartment. The apartment at the store had two bedrooms, one of which was used as an office by Peters, prior to Bell's involvement. After Bell's involvement Bell continued to use the second bedroom as an office. From the apartment, Bell and Jack could monitor customers entering the store by way of a video set up and a warning bell. Bell and Jack were able to remain in their residence when customers were not in the store.

Bell made some minor changes in the operations which included some product order, and construction and stocking of a candy display. He built shelving downstairs for the store. He also came up with an idea

for combining "popcorn and pop" with movie rentals. He made the outside of the store attractive to persons wishing to sit outside and drink coffee. His primary duties appear to have been handy-man work around the store, stock ordering, banking, paperwork, while Jack handled the cashier duties and worked with the customers on a day to day basis. He also performed some cashier work. Bell accepted delivery of products at the store, priced the items, and put the items on the shelves. Bell made bank deposits every second day. He dropped off paperwork and monthly receipt documents at Newcomb's law office. He had regular contact with Newcomb by telephone. Newcomb set the financial limit on what could be ordered. An independent witness, Murray Farrup, in cross-examination said that he didn't see Bell tell Jack what to do. He also said that 90 % of the time Bell was in the store, and Bell was doing "other things". Bell did some minor work outside of his duties at the Grab Bag, including replacing a coil in a car, and a repair to Sonja Scammel's motorcycle.

Jack generally opened the store at 8:00 a.m. every day. She dealt with customers and ran the cash register, stocked the shelves, and cleaned the store. She took some direction from Bell with regard to when to clean the store, and stock the shelves. She continued working each day until early September when she was burnt out with 12.5 to 13 hour days. After Bell's accident she ran the store by herself for a period of about two weeks. After Bell's injury on August 3, Jack would fax the balance sheets or the order sheets to Newcomb on a daily basis, or Newcomb would pickup these documents at the store. She filed the employment standards complaint because she worked a lot of hours. She says that she left Bell for three days in September of 2002, but that she didn't claim for those hours on her complaint form. Punnett says that she often dealt with Jack during the course of her dealings with Grab Bag business for Newcomb. Punnett assisted Jack on an occasion when she briefly "left" Bell.

In August of 2002, Bell was involved in an accident, falling from a ladder, as a result of an epileptic seizure. Bell suffered a serious injury, involving fracture of lumbar vertebras, and a sub-haematoma on the left side of his head. He was unable to do the work required at the store following his accident, although he made some attempts to carry on. In September of 2002, Bell contacted Scammel to work in his stead. He filed a WCB complaint. In September of 2002, Bell resigned from the store operations. Newcomb terminated the agreement. Newcomb continues to operate the store at Lake Cowichan using employees, including Scammel. Newcomb advised Bell he could not file a WCB claim, as he was not an employee. Newcomb resisted Bell's WCB claim by filing a submission with the WCB.

Bell and Jack did not receive payment of any wages for the operation of the store from the date of commencing training until the date that they left the operation in September of 2003. In submissions to the Worker's Compensation Board, Newcomb writing on behalf of the Grab Bag (January 22, 2003) stated that Bell was not entitled to any compensation under the terms of the contract as the gross sales had not reached $200,000 and Bell had quit.

Under the agreement, Grab Bag agreed to provide a food allowance of $200.00 per month from the stock at the store. Bell was to pay rent to Grab Bag Holdings Ltd. for the use of the premises attached to and part of the store. The rent payments were made directly by Social Services. Bell was to be paid remuneration as follows:

> 5 c. In respect of commission on retail sales, the Manager shall receive remuneration at the rate of 7.2 % on the gross sales for the business for the period of time from the commencement of his engagement as permanent Manager to December 31, 2002 inclusive. Such Commission shall be paid to him PROVIDED the overall annual sales for the business are at least $200,000 in total for the calendar year from January 1 to December 31, 2002. If such sales target figures are met, then he shall be eligible to receive a pro-rated amount of those annual sales as a commission for the

> balance of the year for that pro rated amount. The commission shall be paid to the Manger after January 1, 2003, (after making all proper adjustments including the value of the food allowance for the calendar year of $2,400.00), in respect of the remaining Five to Six (5 -6) Month period of the term of this agreement. In the event that the retail sales for the calendar year are in excess of the minimum, then in the sole discretion of the President a bonus may be paid to the Manger as warranted in recognition of his success in having successfully increased the retail sales above the expected minimum and for extra ordinary effort made by the Manger in rendering such services during that period of time.

It was contemplated by the agreement that the store would remain open 14 hours per day, seven days per week.

There is no serious issue that Bell and Jack worked in the business each day. Grab Bag did not keep records as to the hours worked by Bell and Jack. Newcomb knew that Bell and Jack were working at the store. Newcomb attempted to structure Jack's employment relationship, in the agreement, as a relationship between Bell and Jack:

> 2. The Manager shall have the responsibility for the general management of the operation of the Convenience Store and service of its customers in retail sales and shall perform associated tasks required in that regard working in partnership with Esther Jack as his Assistant. She shall be delegated the day to day in store responsibilities as directed by the Manager. ...

The Grab Bag paid for some training. Jack was put through the "Superhost" course, and Jack was going to be put through the "Foodsafe" course.

On occasion Bell appears to have "hired" Scammel's son to assist with odd chores, including bottles, and taking out the garbage. The son was "remunerated" with a "box of pop tarts" and a beverage. Scammel approached Bell to see if there was work to be had. Scammel testified that Bell said

> he would like to be able to bring on somebody, but he would have to get the approval of his boss first. it was kind of up in the air until he had further conversations. At one time he said I could start, later July, and I showed up, and he said it was not okayed and he didn't need me.

Scammel testified that the first time that she worked was September 4, 2002. As far as she knew, Bell was the manager of the store. She said that she was hired by Bell, and did not meet Newcomb until a couple of weeks later. She was paid minimum wage. By the time she received her pay cheque Bell had left the Grab Bag, and she was paid by the Grab Bag.

Events after Bell and Jack ceased working:

Since Bell left the store, the store operates with four employees. The sales have vastly improved.

Jack delivered a problem description form and a request for payment to Newcomb on September 23, 2002 in respect of her work at the store. Bell and Jack filed a complaint with the Employment Standards Branch ("Branch") for wages on November 4, 2002, and the Branch received the complaint forms on November 7, 2002. In about November of 2003, at the suggestion of a person from the Employment Standards Branch, Bell asked Newcomb for an accounting. Newcomb produced an accounting which showed that Bell owed Grab Bag money. It is unnecessary for me to comment on the Grab Bag's calculation set out in its accounting. Suffice it to say, that I have no jurisdiction to consider any of the claims made by Grab Bag, in the course of an appeal of a Determination. The Grab Bag has filed a small

claims action against Bell, and this will be a matter for determination by a provincial court judge. The Grab Bag has not paid any monies to Bell or Jack.

The Delegate wrote to Newcomb on April 3, 2003 indicating that the Branch had received a complaint from Bell and Jack for the period December 1, 2001 to September 2002. The letter also contained a demand for employer records. Newcomb's counsel responded on April 14, 2003 to the effect that Newcomb carried on business as a law firm, and that Bell and Jack were not employees of the law firm. The Delegate provided a demand for employer records to the Grab Bag Emporium at the address of Newcomb's law firm. Newcomb took the position that the complaints were made against the law firm, and that the Delegate was acting as advocate for the complainants. Newcomb took the position that the Delegate had not received a complaint within six months of the date of the cessation of work, because the complaint did not specifically name the Grab Bag Emporium Ltd. as the employer.

In considering whether Bell and Jack were employees, the Delegate considered the definition of employee set out in the *Act*, the effect of section 4 of the *Act*, and common law tests, particularly the control test, in finding that Bell and Jack were employees. In the Determination, the Delegate found that Bell was entitled to wages in the amount of $17,688, inclusive of statutory holiday pay, vacation pay, and interest. In the Determination, the Delegate found that Jack was entitled to wages in the amount of $18,712.43, inclusive of statutory holiday pay, vacation pay, and interest. The Delegate made the calculations on the basis of a seven hour work day for Bell and Jack from December 3, 2001. For the period of August 4, 2002 to August 18, 2002, the Delegate calculated Jack's hours at 14 hours per day, while Bell was disabled from working due to his accident. The Delegate then calculated Jack's hours at 7 hours per day, until September 1, 2002, when Newcomb directed that she no longer work in the store. The Delegate continued the calculation of Bell's entitlement at 7 hours per day from September 1, 2002 to September 16, 2002, when Bell ceased working for the Grab Bag.

The Delegate found that the Grab Bag contravened sections 18, 44 and 57 of the *Act*.

Grab Bag's Argument:

The Grab Bag says that the Delegate failed to act in a fair and impartial basis in conducting the investigation, and acted as an advocate for Bell and Jack. The Grab Bag says that Jack and Bell did not file a complaint, naming the Grab Bag as the employer, within six months of the date of the cessation of the employment relationship. Counsel argued to the Delegate (letter dated June 17, 2003):

> The fact is that Chris Bell and Esther Jack have not filed a complaint in writing against the Grab Bag Emporium Ltd. They did file a complaint against Kenneth Newcomb carrying on the business of a law firm at 122 Station Street in Duncan. Please direct your attention to the complaint forms, which specifically refer to the law firm as the employer.

The Grab Bag says therefore the Delegate lacked jurisdiction to investigate the wage complaint, pursuant to section 74(3) of the *Act*.

Grab Bag says that Bell was not an employee of the Grab Bag, as he signed the management services contract, and the facts showed that he was not an employee. Grab Bag says that Jack was Bell's employee, not an employee of the Grab Bag.

The Grab Bag submits that the Determination should be cancelled. In the alternative, the Grab Bag says that the wage claims ought to be reduced for the time both persons were absent from the workplace, if the

claim is accepted. Further, the Grab Bag says, that the Delegate failed to limit the wage complaint made to six months from the date of the Determination, and the claims ought to be reduced, in accordance with section 80 of the *Act*.

Bell and Jack's Argument:

Bell and Jack argue that they did not agree to work for free. They argue that they should be entitled to the minimum wages set out in the Determination.

Delegate's Argument:

The Delegate concedes that there has been an error in the calculation of the wages for Bell and Jack, in that the Delegate failed to apply section 80 of the *Act*, which limits the wage claim of each employee to six months wages accruing before the date of the termination. The Delegate says that the Determination should be otherwise confirmed. The Delegate says that a complaint was filed within six months. The Delegate submits that investigated that complaint, and gave the Grab Bag a reasonable opportunity to respond to the investigation. The Delegate says that despite the management services contract, Bell was an employee of Grab Bag, applying the definition of employee under section 1 of the Act, and common law tests. The Delegate further says, that Grab Bag permitted Jack to work, directly or indirectly, and therefore is liable to pay Jack's wages as Jack's employer. The Delegate says that any management services agreement is void pursuant to section 4 of the *Act*.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case Grab Bag, to demonstrate an error such that I should vary or cancel the Determination. I will turn to an analysis of each of the issues raised by Grab Bag, in support of its position that the Determination should be cancelled, or alternatively, varied to "reflect appropriate application of the *Act* and regulations".

Did the Delegate fail to act in a fair and impartial basis in conducting the investigation?

The Employer argues that the issuing of a Demand for Employer records against Newcomb, personally, and then re-issuing the Demand against the Grab Bag shows that the Delegate had already made a determination. Employer's counsel submitted during the course of the investigation, and continues to submit that the parties entered into a contract, and that by investigating the complaint, the Delegate had "made up her mind" that Bell and Jack were employees.

The simple answer to this argument, is that when a Delegate receives a complaint in writing, the Delegate has a duty to investigate the complaint under section 76(1) of the *Act*. The Delegate is empowered to make demands for production of documents. The decision to issue a demand for documents is not a determination. Determinations are generally issued by the Delegate after an investigation or a hearing, as set out in section 79 of the Act, after the Delegate is satisfied that a person has contravened a requirement in the *Act* or *Regulations*. A "determination" is defined in section 1 of the *Act*:

> Determination means any decision made by the director under sections 22(2), 30(2), 66, 68(3), 76(3), 79, 100, or 119;

The fact that a Delegate has demanded records does not yield an inference that the Delegate has concluded that the person making a complaint is an employee, or is entitled to wages. Incidental to her

obligation to investigate a filed complaint, the Director or Delegate has been given powers under the *Act*. The Delegate particularly has the power under section 85(1)(f) to:

> require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c)

In conducting an investigation, the Delegate is required to provide a person under investigation an opportunity to respond:

> 77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

In this case, there is no question that the Delegate permitted the Employer to provide documents and information. In reading the Determination, it is apparent that the Delegate considered Grab Bag's documents and information. The Delegate considered and analyzed the facts of the employment relationship, and the agreement, which was the basis for the Grab Bag's allegation that Bell was an independent contractor, and that Jack was not Grab Bag's employee. It is also apparent that the Delegate did not accept Grab Bag's submissions. The Delegate, apparently, preferred the information of Bell and Jack, over Grab Bag's information. The Delegate is entitled to come to her conclusion in an investigation and issue a Determination. The question on appeal is whether the Delegate erred in assessing the evidence or information.

There is no evidence before me that the Delegate was biased on her investigation of the complaints filed by Bell and Jack. There is no evidence in this case that the Delegate conducted her inquiry in a manner unfair to the Grab Bag. The Delegate is not required to accept, at face value and without an investigation, the position of any party. I dismiss Grab Bag's allegation that the Delegate failed to act in a fair and impartial manner in conducting the investigation and making the Determination.

Complaint within Six Months?

Grab Bag argues that the complaints of Bell and Jack are out of time because the complainants did not specifically identify Grab Bag as the employer on the complaint form, filed within six months of the date of the termination of the employment relationship. Grab Bag argues that Bell and Jack filed a complaint against Newcomb as a lawyer.

The complaint forms of both Bell and Jack identify Newcomb as the employer, with a street address of 122 Station Street in Duncan. The address of the place worked was identified in the complaint form, as 18 Cottonwood Street, Lake Cowichan, which is the store location in Lake Cowichan. The complaints for each person identified that they were seeking regular wages, overtime and compensation for length of service. Both complaints appear to be in respect of work at a store. Each complaint was signed on November 4, 2002 and received by the Branch on November 7, 2002.

The *Act* provides a six month filing period following cessation of an employment relationship in section 74 as follows:

> 74(1) An employee, former employee or other person may complain to the director that a person has contravened
>
> (a) a requirement of Parts 2 to 8 of this Act, or

> (b) a requirement of the regulations specified under section 127(2)(l).
>
> (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
>
> (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

Filing a complaint within six months is mandatory, and neither the Tribunal, nor the Delegate have any discretion to relieve against the failure to file a complaint within six months: *Akouri, BCEST #D 2002/33; Burnham, BCEST #D035/96*: *Lesiuk, BCEST #D 2003A/52*.

This section must be read in conjunction with section 76(1) of the *Act*, which provides that the Director must accept and investigate a complaint made under section 74, with certain exceptions set out in 76(3). The Director has broad powers to investigate a complaint received under the *Act*. There is nothing in the *Act*, which requires the Director to commence, or conclude, an investigation within six months of the date of termination of an employee. There is no requirement for the Director to make demands for document production from a person under investigation within six months of the date of the termination of an employee.

The *Act* does not require an employee to correctly name the employer, but only requires that the complaint must be in writing, and contain a complaint that "a person has contravened" the *Act*. I note that *Act* is remedial legislation which ought to be given a broad and liberal interpretation, in consonance with the purposes set out in section 2 of the *Act*.

Counsel has attempted to characterize this as a matter where Bell and Jack filed a complaint against Newcomb as a lawyer. The argument presented by Grab Bag is highly technical, and is not based on viewing the complaint form, as a whole. I do not agree that Bell and Jack raised the claim against Newcomb, as employees of Newcomb's law firm. I note that the complaint form does not raise a claim against the law firm of Newcomb & Company. The form raises a complaint against Newcomb, who had an address at Station Street, in respect of work performed in Lake Cowichan. The details of the complaint clearly indicate work at a store.

It is apparent that Newcomb wore many hats, and had a substantial connection to Bell, and Jack, and the Director's investigation. He practiced law from the Station Street address. Newcomb is an officer for both the operating and the holding company. The Station Street address is connected with the business of the Grab Bag, albeit the store was not located at the Station Street address. It is the registered and records office for the operating company, and the holding company. Newcomb approached Bell regarding taking over the store. Meetings related to "contract formation" took place at Newcomb's office. Newcomb had regular involvement in the Grab Bag's business, and documents, in connection with the operation of the convenience store, were delivered or faxed to his office. There is some suggestion in the Grab Bag's appeal book that Newcomb met on a weekly basis with Bell. The Station Street address is the place where Jack and Bell had contact with Newcomb for operational concerns for the Lake Cowichan store.

In my view, Bell and Jack did comply with the *Act* by filing a complaint against a person within six months of termination as required by the *Act*. In this case the complainants correctly identified the workplace in Lake Cowichan, and raised a complaint against Newcomb who was directly involved in the holding company which owned the land and buildings, and an operating company which operated the store. Newcomb is a person who had a substantial connection to the employment relationship of Bell and

Jack. While he has a separate legal identity from Grab Bag, he was not unconnected to the complaint which commenced the Delegate's inquiry.

The word "person" is broad enough to permit the Delegate to commence an inquiry as to "who" was the employer. I accept the policy argument made by the Delegate, that many employees are unsophisticated, cannot be expected to identify correctly the name of the employer, and the Director often spends a substantial effort ascertaining the identity of the true employer. After an initial demand made by the Delegate to Newcomb, for records, and a letter received from counsel for Newcomb dated April 14, 2003, the Delegate cancelled the demand, and issued a demand to Grab Bag Emporium Ltd. In my view, the Delegate could also have issued the demand to Newcomb, as a director, of Grab Bag. The language in section 85(1)(f) empowers the Director to require a person to produce, or deliver documents relevant to an investigation.

Clearly on the face of the complaints, the Delegate had received an allegation worthy of an investigation, within six months of the date of termination, as a person had apparently breached the *Act* by failing to pay wages from early December of 2001 to September of 2002. The statutory scheme requires the Delegate to investigate when it has received a written complaint, within six months of termination of work.

Grab Bag alleges that Bell and Jack knowingly complained against Newcomb's law practice, for some purpose, other than to advance their claim. Perhaps Bell and Jack did incorrectly name Newcomb rather than the Grab Bag as the employer. It is difficult to see how this affords Grab Bag any defence, as there is no requirement in the *Act* to correctly name the employer in the complaint. While Newcomb ultimately is not, in law, the Employer of either Bell or Jack, he does have a substantial connection to the facts in this case.

The assumption underlying the appellant's argument is that an employment standards complaint is like a pleading in a lawsuit. The appellant argues that the correct employer must be identified within the limitation period set out in the *Act*. I see no useful purpose in comparing an employment standards complaint to a legal pleading in a lawsuit. The process under the *Act*, is an administrative process, and is an investigatory process. There were sufficient details given by Bell and Jack to raise a complaint that the *Act* was violated by a person. Newcomb, as a director of Grab Bag, has certain obligations under section 96 of the *Act*, and can be held liable as a director under section 96 of the *Act*. Given that the complaint was filed within six months, the Delegate was obliged to investigate the complaint filed. One of the investigations made by the Delegate, in addition to other issues, was "who" violated the *Act*. Grab Bag ultimately was determined by the Delegate to be the "correctly named party", and a person liable to pay the Determination. That is precisely one of the facts for the Delegate, to determine, in the ordinary course, during any investigation under the *Act*. I dismiss the Employer's argument that the complaint was not filed in time. I find that the Delegate did have the "jurisdiction" to investigate the complaint filed by Bell and Jack.

Was Bell an Employee an employee of the Grab Bag?

I have analyzed the contract between Bell and Grab Bag. I do not propose to canvass in detail the clauses in the agreement. Some attempt at this type of analysis was contained within the Determination, and I generally accept the approach taken by the Delegate, in that analysis. I note that the intent of both Bell and Newcomb, gleaned from the agreement, was that the store was to be operated under a management services agreement, where Bell was not to be paid wages, and was to be paid on a commission basis. The agreement provided for a substantial degree of financial control over the business operations to Grab Bag.

This is entirely prudent because Bell made no financial investment in the business, had nothing at risk other than the amount of his remuneration, had no experience in working, managing or operating convenience stores, and had no business skills or acumen, that he brought to the business relationship.

I note that one can look at the agreement, and make arguments, as the Employer did, that the management services contract was a business relationship and Bell was an independent contractor, and not an employee entitled to wages under the *Act*.

The general approach of the Tribunal is to give a large and liberal interpretation to the definition of employee and employer in the *Act*, given the remedial purposes of the legislation: *Leuven, BCEST #D 96/133; Fenton v. Forensic Psychiatric Services Commission (1991), 56 B.C.L.R. (2d) 170 (C.A.)*. An instructive approach can be found in *Castlegar Taxi v. Director of Employment Standards (1988), 58 B.C.L.R. (2d) 341*:

> The courts in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship.

I note that before Bell came on the scene, the convenience store was operated with employees. Newcomb's company acquired the Grab Bag's business, and Newcomb obviously did not have the time (or interest) to work as a clerk or handyman in a convenience store, some distance from his law practice, and the place where he carried on his duties as a city councillor. Newcomb did however have a financial interest in the operations of the store, and particularly an interest in protecting his wife's RRSP which had been invested in the Grab Bag, prior to his acquisition of control of the Grab Bag's business. After Bell ceased working, the convenience store was operated with four employees, with the financial control resting with Newcomb. The question is whether Bell was an employee of the Grab Bag during the course of its operations, during 2001 and 2002.

Newcomb obviously intended the Grab Bag to be operated without the Grab Bag incurring any obligations arising from an employment relationship. It was important to Newcomb to have the Grab Bag's business self financing from the cash flow of the business. He prepared the agreement for the Grab Bag to ensure that these controls where in place. Bell freely signed onto the agreement. If Bell is not an employee, I have no concern with the "adequacy of the consideration" or the "business deal" in this matter. Newcomb has indicated that there was a potential for Bell to earn money. Bell has argued that it was unfair to expect anyone to work for free, which is what happened in his dealings with the Grab Bag. Whether the transaction was fair or unfair, is not my concern as an adjudicator of an employment standards appeal. If, however, Bell is an employee, he is entitled to minimum wage, because he was paid no wages by Newcomb during the course of the relationship.

A contract which denies an employee the basic entitlements of the *Act* has "no effect".

I note that section 4 of the *Act*, is a very powerful tool, which interferes substantially with "freedom of contract" in employment relationships. Section 4 of the *Act* provides that:

> The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4) has no effect.

The Grab Bag has argued that section 4 may not be applied unless there was an intent to avoid the operations of the *Act*. There are a number of "different intentions or motivations" behind the agreement

signed by Bell and the Grab Bag. This was apparent from the oral evidence of the parties. I have no hesitation in concluding that part of Newcomb's motivation was to provide an opportunity to Bell to improve his condition in life. One of Newcomb's motivations was to protect his wife's RRSP investment in the Grab Bag, at a time when he is nearing an age at which some people retire. In any event, in my view, Newcomb clearly did structure the relationship between Bell and Grab Bag, to attempt to avoid employment obligations of Grab Bag to Bell and to Jack.

I do not agree that Section 4 "only applies if there is an intent to avoid the *Act*", but here there was an intent to ensure that Grab Bag did not incur any employment obligations to Bell or Jack. Section 4 applies if Grab Bag is the employer of Bell and Jack, and Bell and Jack are employees. With any actions there may be a variety of intents, and a more productive focus is to consider whether Bell and Jack were employees. If they were employees, one must consider whether the terms and conditions in the agreement provide Bell and Jack with the minimum entitlements under the *Act*. If the agreement does not provide minimum entitlements Bell and Jack are entitled to minimum entitlements set out in the *Act*.

The Tribunal has dealt with many cases where employers and employees have made agreements contrary to the *Act*, and employees have raised no objection to the agreement until the cessation of the employment relationship. The Tribunal has dealt with many cases where the putative employer, or the parties, have agreed to structure a relationship as one of independent contractor. This agreement was drafted by Newcomb, a general legal practitioner who is not an employment law specialist. Nevertheless the *Act* places a burden on an employer to be knowledgeable about the *Act*. One has to look at the substance of the relationship, not just how the parties have "agreed" to structure that relationship. It is trite, but by virtue of section 4, neither an employee nor an employee can contract out of the minimum entitlements of the *Act*.

The starting point in the analysis is the definition of employee in the *Act*. Section 1 of the *Act* defines an employee as follows:

> "employee" includes
>
> > (a) a person , including a deceased person, receiving or entitled to receive wages for work performed for another,
> >
> > (b) a person an employee 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

An employer is defined in section 1 of the *Act* as:

> 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 in this case, Bell and Jack commenced training with Marie Peters in December of 2001, prior to Bell's signing of agreement. I note that a person being trained for a business is included in the definition of employee for the purposes of the *Act*. Wages is defined in the *Act* as including commissions. I have no hesitation in finding that the work ordinarily performed by Bell, was work that would normally be performed by an employee. The Grab Bag had control or direction of Bell, by the exercise of financial control over the Grab Bag's business. The Grab Bag set the hours of operation, and required Bell to have

its approval before making any major decisions. By keeping strict flow over the cash coming into and out of the business, the Grab Bag essential controlled the operations of the store in which Bell and Jack worked.

I note that the definition of "employee" under the *Act* is "inclusive", and therefore an Adjudicator might have regard to the common law tests for consideration of whether Bell is an employee. In this case, I do not have any doubt that Bell is an employee under the definition set out in section one, or on the application of any of the common law tests.

I note in this case Grab Bag relied upon the decision of the Tribunal in *Hemming, BCEST #D103/97* which refers to the existence of the control test, the four fold test and the organizational test:

> The control test sets out four factors to be examined: the employer's power of selection of the servant; payment of wages or other remuneration; the employer's right to control the method of doing the work; and the employer's right to suspend or dismiss the employee. This test focuses on the control exerted by the employer not just over what work must be done by the employee, but also how the work is to be performed. But the control test is inadequate where the employee is highly skilled or a professional. The four-fold test was first enunciated in *Montreal* v. *Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161 (P.C.) and considers: control; ownership of tools; chance of profit; and risk of loss. While the four-fold test is more useful in complex cases, the courts have also looked to the integration or economic dependency test. Here, a worker who is economically dependent on one company or whose activities are integral to the business of the employer will be an employee rather than an independent contractor. Frequently, this test is combined with the factors from the other tests. Thus, to determine whether an employment relationship exists, the following factors may be examined: 1) control; 2) ownership of tools; 3) chance of profit; 4) risk of loss; and 5) integration into employer's business.

I note that under any of the usual common law tests Bell is an employee. Bell brought no special skills, business experience or training to the relationship. He did not make any investment in the business. Bell was to be remunerated on a commission and bonus basis. While his remuneration was structured to depend on the sales of Grab Bag, he lost nothing other than compensation for work, if the business of the Grab Bag failed. He worked in the infrastructure supplied by the Grab Bag, or its associated company Grab Bag Holdings Ltd. He was integrated into the Grab Bag's business. Grab Bag maintained financial control over the business, in order to ensure that its principal, Newcomb, was not required to inject cash into Grab Bag's business operations. By controlling the finances of the store, and by requiring Bell to consult with Newcomb, Grab Bag maintained control over Bell and the operations of the store. Bell may have had some minor incidental work from the premises with small engine repairs, using his own tools, however, this does not detract from his integration into the Grab Bag's convenience store business, and his expectation of "earning something" from the Grab Bag. Bell saw Grab Bag as his major source of earnings. He was expecting a percentage of the sales, and a bonus at the end of the year.

In my view, the Delegate determined correctly that Grab Bag was the employer of Bell, and therefore I dismiss the Grab Bag's appeal of the determination that Bell was an employee.

Was Bell a manager?

The Delegate thoroughly analyzed this issue at pages 18 to 19 of the Determination. The concept of a manager is defined in section 1 of the *Employment Standards Regulation, B.C. Reg. 396/*95, as meaning:

> (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
>
> (b) a person employed in an executive capacity.

If an employee is a manager, the employee is not entitled to statutory holiday pay or overtime. The manager is still entitled to be paid at least minimum wage for the hours worked. I note that in this case, Bell was not awarded overtime by the Delegate.

On the facts of this case, Bell cannot be characterized as a person whose principle duties were supervising or directing human resources. The Grab Bag basically operated a "mom and pop" convenience store. Bell and Jack divided the work at the Grab Bag. Bell may have provided some degree of instruction to Jack, however such instruction was minor. The store required at least two employees to maintain the fourteen hour coverage. It makes little sense to characterize Bell as Jack's manager. He was not employed in an executive capacity, making key business decisions. In my view, the Delegate correctly determined that Bell was an employee, and not a manager, and therefore I dismiss Grab Bag's appeal on this point.

Was Jack an employee of the Grab Bag?:

There is no question that Esther Jack, in cleaning the store, stocking the shelves, and working the cash register, performed tasks that would ordinarily be performed by an employee. It is not necessary to go beyond an application of the definition of employee in section 1 of the *Act*, to find that Jack is an employee. Jack was not a party to any management services agreement, and it is not necessary for me to consider whether Jack was an independent contractor.

The Grab Bag argues, by virtue of the management services contract, that Jack was Bell's employee.

I note that Bell had no financial ability to pay employees directly. He was a recipient of income assistance for his disability and a large portion of that money was paid directly to Grab Bag Holdings Ltd., by the Ministry of Social Services, for rent. The practical reality is that Bell had no financial resources to pay employees directly. All the receipts taken in at the store were remitted to the Grab Bag by Bell or Jack, by depositing the monies to the Grab Bag's bank account. The only option open to Bell with regard to hiring employees was to arrange for Grab Bag to pay the employees out of his "share of the commission" to be paid if the store earned more than $200,000. This was a one year financial arrangement. It is difficult to see how Bell could hire employees if he would receive no remuneration himself, under the agreement, until the gross sales hit $200,000, and at the end of the year. The *Act* requires employees to be paid at least the minimum wage (section 16), at least semi monthly (section 17) and in currency, by cheque, draft or money order, or by deposit to the credit of the employee at a bank or other institutional account (section 20). In reality, Bell was in no position to hire employees to work for him, or comply with the *Act*, despite the language in the management services contract, which purports to make Jack an employee of Bell.

There was no oral or written contract directly between Grab Bag and Jack. The *Act*, however, does not require a direct contractual nexus between a person and an employee, in order to support a finding that a person is an employer of an employee. Employer is a defined, and inclusive term, in section 1 of the *Act*:

> "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;

The Grab Bag was aware, and the Grab Bag contemplated that Jack would be working in the store with Bell. This is apparent from the agreement between the Grab Bag and Bell, and the evidence of all parties. Grab Bag, had full knowledge and intended that Jack would work in the store. Grab Bag received the benefit of her labours. Jack's work facilitated the operation of the convenience store for 14 hours per day, seven days per week. There was both direct and indirect permission by Grab Bag for Jack to work in the store. I note that in September of 2002, Newcomb revoked his permission for Jack to be in, and work in the store. Grab Bag was responsible for Jack working in the store. I therefore reject Grab Bag's argument that it was not Jack's employer.

Entitlement to Compensation:

Neither Jack nor Bell were paid any wages by Grab Bag. It is apparent that the store was open 14 hours per day, seven days per week. This was a requirement of the agreement between Bell and the Grab Bag.

Section 16 of the *Act* provides that an employer must pay an employee at least minimum wage as prescribed by the *Regulations*. In my view, the food allowance provided to Bell cannot be considered a wage. Section 20 specifies how wages must be paid, and employers cannot require that an employee accept goods instead of the payment methods set out in the *Act*.

I note that the Delegate did not accept that each complainant worked 14 hours per day, as each complainant set out in the complaint form. The Delegate made the calculations on the basis that Bell and Jack each worked seven hours per day. The Employer cross-examined both Jack and Bell. There may well have been some portion of days when Jack took some time off. It is apparent, however, that the store was open 14 hours per day. The Employer has not shown, however, that it was incorrect to calculate wages on the basis of a seven hour work day, for each employee. I note that the approach taken by the Delegate was reasonable in light of the very clear oral testimony at this hearing that the store operated fourteen hours per day, and the fact that no party kept records as to the hours worked. It is my view, that if anything, the approach of the Delegate may tend to understate the wages due and owing to Jack. Jack, however, has not filed an appeal of the amounts found by the Delegate to be due and owing to her.

The Employer and the Director agree that the amounts calculated by the Delegate, and set out in the Determination, cannot stand. Section 80 of the *Act* was amended in 2002, and employees who file claims after May 30, 2002, may only claim wages for a six month time period, calculated from the date of termination or the date of the filing of the claim, whichever event occurs earliest. The proper claims of Bell and Jack must therefore be reduced to include wages for the period six months before the date of termination.

Bell's entitlement:

The Delegate filed calculations for a six month period from March 15, 2002 to September 16, 2002 for Bell. On the basis of those calculations Bell is entitled to a total of $10, 628.66 or total wages of $10, 016.80, statutory holiday pay of $203.07, annual vacation pay of $408.79. Bell is also entitled to interest pursuant to section 88 of the *Act*.

Jack's entitlement:

The Employer's counsel does not dispute the correctness of the calculations, but says that I should refer the issue back to the Delegate for a reduction of the amount for Jack, based on her absences from the workplace. Such absences are said to arise from times when Jack left Bell, or when Jack took time off during the work day.

I decline to refer this matter back for a re-calculation of Jack's entitlement. It is my view, based on the evidence, that Jack probably worked more than 7 hours per day. This is apparent from the oral evidence of Jack, Bell, and the evidence of Scammel and Farrup who saw Jack performing cashier duties, over an extended period of time, at the store. Further, the contract contemplated Jack's duties as cashier, and a cashier would have been required to be available for work for the entire time that the store was open. Jack did not, however, appeal the Determination. The evidence concerning Jack's absences from the work place was imprecise. Jack did not keep records, and the Grab Bag did not keep records. I am satisfied that those absences were relatively minor, in comparison, with liability which would have accrued if the Delegate calculated Jack's entitlement based on the overtime rates set out in the *Act*, for hours worked in excess of eight hours per day. The Delegate's approach was reasonable. I am not satisfied that the Employer has demonstrated any error in the calculation of Jack's entitlement.

On the basis of the calculations for the period of February 11, 2002 to September 1, 2002, Jack is entitled to the sum of $13,770.92, plus interest in accordance with section 88 of the *Act*. This amount consists of total wages of $13,037.80, statutory holiday pay of $203.47, and annual vacation pay of $529.65.

For all the above reasons, I find that Chris Bell and Esther Jack, are employees of Grab Bag Emporium Ltd., and entitled to wages, and interest in accordance with section 88 of the *Act*.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated October 29, 2003 is varied to provide that Chris Bell is entitled to the sum of $10, 628.66, with interest in accordance with section 88 of the *Act*, and Esther Jack is entitled to $13,770.92, with interest in accordance with section 88 of the *Act*.

Paul E. Love
Member
Employment Standards Tribunal