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 -

Aspen Educational and Social Services Ltd. and Tinder Enterprises Ltd. and The Wild McLeans Historical Interpretation Inc., operating the Historic Hat Creek Ranch
("Aspen")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE NO.: 1998/716

DATE OF DECISION: February 22, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) by Aspen Educational and Social Services Ltd. and Tinder Enterprises Ltd and The Wild McLeans Historical Interpretation Inc., operating the Historic Hat Creek Ranch, (collectively, "Aspen") of a Determination which was issued on September 25, 1998 by a delegate of the Director of Employment Standards (the "Director"). In the Determination, the Director found Aspen to be associated corporations under Section 95 of the *Act*, that Aspen had contravened Sections 17, 40(1), 40(2) and 58 of the *Act* in respect of the employment of Lee-Anne Bachand ("Bachand"), Daniel Boss ("Boss") and Larry Maki (Maki") and ordered Aspen to cease contravening the *Act* and to pay an amount $9930.12.

Aspen says the Determination is wrong because Bachand and Maki were independent contractors, not employees, and there should not be an overtime element as the employees had requested flexibility and he had only accommodated that request.

ISSUES TO BE DECIDED

There are two issues raised by this appeal. The first issue is whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* to extend the time limited for requesting the appeal. If so, the second issue is whether Aspen has met the burden of persuading the Tribunal that the Determination ought to be varied or canceled because the Director erred in fact or in law.

FACTS

The facts relating to the timeliness issue are as follows:

1. The Director issued the Determination on September 25, 1998 and delivered it to the associated corporation. The Determination clearly states on its face that a party served with a Determination may appeal to the Tribunal and that any appeal is required to delivered to the Tribunal within 23 days of the date of the Determination.

2. On October 21, 1998, Aspen notified the investigating officer of the Branch (not the Tribunal) by facsimile that the Determination was being appealed. The full text of the facsimile states:

> I am appealing your ruling of Sept. 25, 1998. The ruling involves Charter of Rights violations and many factual errors. Please have someone from the attorney-general's office call me to clean this up.

3. An appeal was delivered to the Tribunal on November 17, 1998.

4. The Tribunal received additional submissions from Aspen on December 8, 1998 and December 29, 1998. In the former submission, Aspen argued that the facsimile transmission of October 21, 1998 constituted the appeal and that it was timely. Dan Meakes ("Meakes"), who is a director/officer of Aspen and has made the submissions on Aspen's behalf, also indicated he had a learning disability that at times makes it difficult to express himself in writing. In the latter submission, there is no specific reference to the timeliness question.

5. A second Determination was issued against Aspen on November 6, 1998 and an appeal of that determination was also delivered to the Tribunal on November 17, 1998.

In the appeal, Aspen makes the following submissions in respect of the employment status of Bachand and Maki and in respect of the overtime issue:

> I contracted with Lee Anne Bachand and Larry Maki to provide services. They were contractors. They could come to work when they wanted for as little or as long as they wanted. We agreed to pay a rate for time used whenever they worked. They could use their own computers or the company computers. They could go on holidays, and they did, whenever they chose. The only requirements were they put in 950 hours between October 16/97 and March 31 1998.[1]
>
> The contracts were based on a 4% vacation pay to be payed [sic] out on completion.
>
> The agreement between staff and myself was a conforming contract. Mr. Maki and I attempted to meet with Ms. Burchnall. She refused Larry and my request. There should not be an overtime element in these claims. The employees requested the flexibility and I believed it was in all our interest. They moved from being employees to contractors.

The material on file contains the following facts relating to the substantive issues raised by the appeal:

1. Bachand was employed as office manager for Aspen. Maki worked in a bookkeeping function for Aspen.

2. Both persons were hired to work at an hourly rate and were paid regularly based on the number of hours worked. Aspen deducted and remitted Unemployment Insurance for both persons. Both persons performed Aspen's work, using, for the most part, facilities and equipment provided by Aspen.

3. Both persons worked only for Aspen during the relevant period. They normally worked Monday to Friday, and only occasionally worked less than 8 hours a day.

4. There was no written contract for services between either Bachand or Maki and Aspen.

5. When Aspen ceased operating , the business of Aspen in respect of which Bachand and Maki were employed was assumed by another person and Bachand and Maki continued as employees of the successor business doing the same work.

6. The employment status of Bachand and Maki is raised for the first time on appeal.

ANALYSIS

There is an obligation on a person served with a Determination to exercise reasonable diligence in filing an appeal. There is a discretion vested in the Tribunal to extend the time limited for requesting an appeal:

109. (1) In addition to its powers under section 108 and Part 13, the tribunal may

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[1] It should be noted that this amount of time equates almost exactly to a 40 hour work week over the period identified.

(b) extend the time period for requesting an appeal even though the period has run expired;

The Tribunal has been reluctant to exercise this area of discretion unless there is a compelling explanation for the delay and there is no actual prejudice to any of the other parties affected by the Determination. The policy reasons for this approach are founded on the purposes stated in Section 2 of the *Act*, most specifically paragraph (d) which states:

2. The purposes of this Act are to

(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,

I can find no compelling reason for extending the time limited for filing this appeal and it is dismissed.

For the benefit of Aspen, I will add that even had I extended the time limits, the appeal would have been dismissed on its merits without a hearing. There is nothing in the file or in the submissions of Aspen that indicate Aspen could have satisfied the burden on them to show that Bachand and Maki were independent contractors and not employees for the purposes of the *Act*. Even the CSAE document relied on by Aspen to support the argument that Bachand and Maki were independent contractors defines the essential elements of their employment as being consistent with a conclusion that they were employees:

> A person working on a regular basis providing their services to one organization for a fixed amount would likely be considered an employee.

That seems to very closely identify the circumstances of Bachand and Maki. The fact they were given some flexibility, if indeed they were, in respect of hours of work or time off or the fact they may have used their own computers on occasion to perform their work does not figure significantly in determining whether a person is an independent contractor. There was no written contract for services and no other objective indication Bachand and Maki were anything other than employees. The fact that Bachand and Maki continued to work as employees of the person that took over the business from Aspen is compelling. The fact that Aspen deducted and remitted unemployment insurance for Bachand and Maki is also compelling. The fact that neither Bachand or Maki have their own business is another factor pointing to an employment relationship. The regularity of their working schedule is compelling.

The *Act* defines employee and employer as follows:

***"employee"** includes*

(a) a person, including a deceased person, receiving or entitled to wages for work performed for another,

(b) a person the 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;*

Those definitions are broad and have been interpreted and applied in a manner consistent with the nature and objectives of the *Act*. Simply, the *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I agree with the following comment from *Machtinger v. HOJ Industries Ltd., supra*, that:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

There is no factual or legal basis that would allow the Tribunal to conclude Bachand and Maki were not employees under the *Act*.

Aspen says Bachand and Maki agreed to waive any right to claim overtime by requesting more flexible hours of work. This assertion is disputed, but that factual dispute is irrelevant to the question. Section 4 of the *Act* says an agreement that is not consistent with the minimum requirements of the *Act* has no effect. Accordingly, Aspen and its employees could not agree to avoid the overtime provisions of the *Act*. As employees, Bachand and Maki were entitled to receive at least basic standards of compensation and conditions of employment, including minimum overtime standards and there is no basis for arguing a different result.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 25, 1998 be confirmed in the amount of $9930.12, together with whatever interest has accrued since the date of issuance pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal