

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

Head Office Financial Group Inc.
("Head Office")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Alfred Kempf

FILE NO: 96/169

DATE OF HEARING: April 24, 1996

DATE OF DECISION: May 6, 1996

DECISION

OVERVIEW

This an appeal by Head Office pursuant to Section 112 of the *Employment Standards Act* (the "Act") of Determination #001215 issued by the Director of Employment Standards on February 29, 1996. In this appeal Head Office says that it is not obligated to pay wages including overtime to Rodney and Gloria Lozinski..

A hearing was held in Kelowna British Columbia on April 24, 1996.

Patrick J. McBride ("McBride") attended and gave evidence on behalf of Head Office. Rodney Lozinski ("R. Lozinski") gave evidence via tele-conference from the Vancouver office of the Tribunal. Also in attendance at the hearing was Graham Jickling on behalf of the Director.

FACTS

Head Office owns the Crystal Sands Resort on Mara Lake (the "Resort") which it is developing and selling. Its' principal, McBride, is also involved through a related company ("Land Rover") in other forms of real estate sales and development. It was in respect to Land Rover that he became introduced to the Lozinskis in late 1994 or early 1995.

The Lozinskis were business people who owned flower shops when they became interested in selling debentures convertible into real estate (or units) for Land Rover. While there is some dispute in the evidence as to whether Mrs. Lozinski signed an agreement with Land Rover it is clear that R. Lozinski did. This agreement provided for a commission sales arrangement and set out that he would be an "independent contractor". Neither of the Lozinskis had a real estate license.

The Lozinskis were unsuccessful in selling the debentures. They gave up.

They were, however, interested in performing sales and other associated duties for Head Office at the Resort. They deny signing any written agreements with Head Office. McBride says that they signed agreements that had been used with all previous salespeople which were substantially similar to the contract with Land Rover. McBride was unable to produce any such agreement signed by either of the Lozinskis. He speculated that the agreements must have been improperly removed from his office. I am unable to find that any such agreements were signed.

The Lozinskis commenced work at the Resort on April 19, 1995. They were not given precise titles although they were introduced by McBride as the people "running things" for him. They lived at the Resort in accommodations provided by Head Office. They clearly had sales responsibilities. For this they were to be paid a commission of 10%. While there is some dispute as to their extent I am satisfied that the Lozinskis had other duties including:

- checking campers into and out of the facility;
- accepting reservations;
- assisting the campers and owners with a wide variety of matters including dealing with complaints;
- maintaining a "presence" on the property;
- protecting the property and performing minor maintenance;
- minor amounts of supervision of other employees or contractors; and
- relaying information and directions from McBride to other employees.

The Lozinskis were directed in their work by McBride via telephone and weekend visits to the Resort. They were not free to come and go as they chose. When Gloria Lozinski took several days off to attend to the flower shop business Mr. McBride complained and advised her that her more or less constant presence was expected.

Head Office did not keep a record of the Lozinskis' hours. While R. Lozinski testified that they did record "some" of their hours he was not able to produce a calendar he said had been used as a record. During the course of the hearing I advised him that I would not start on this decision for one week to allow him an opportunity to produce his original record. He said that one week would be more than enough time for him to try and locate the calendar. He did not provide it to me.

R. Lozinski's evidence of the number of hours worked was vague. It is summarized as follows:

- work started at 8 or 9 in the morning and terminated at 5:30 in the evening although often he and his wife were called upon later to deal with problems or deal with inquiries;
- lunch breaks were one half to one hour;
- there was often nothing to do and he and his wife would often "sit around and read books";
- they worked seven days a week although they did not normally start until noon on Sundays;
- he did not concern himself with formal record keeping because it was his impression from speaking to an office employee at Head Office that he and his wife would be "treated fairly".

McBride testified that during the time the Lozinski's were at the Resort there were very few prospective purchasers (or campers) dropping by or using the Resort. This evidence would suggest that the Lozinskis' chances of making a sale would not be good.

R. Lozinski confirmed that he and his wife did not make any sales but they were quite busy at times dealing with their other duties. He also gave evidence that he assisted in fighting a forest fire and performed life-saving duties.

McBride testified that during the off season people are hired to care take the Resort for a nominal salary and free room and board. R. Lozinski testified that someone was hired after he and wife left to run the bookings for the Resort.

Neither the Lozinskis or McBride at the outset or during their relationship seemed to be knowledgeable of the provisions of the Act regarding minimum wages.

ISSUES TO BE DECIDED

There are two issues:

- Were the Lozinskis employees for the purposes of the Act; and
- If so, are the hours submitted by the Lozinskis and accepted by the Branch accurate.

ANALYSIS

The Act does not contain a full definition of the term Employee. It is clear however from the definition that an employee *includes* " a person an employer *allows, directly or indirectly*, to perform work normally performed by an employee". The work carried out by the Lozinskis is the type of work normally carried out by an employee. The definition section of the Act also provides that " an employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence". The Lozinskis were on call when they were not actively performing duties for the employer.

Even if they had signed contracts (I find they did not) saying they were independent contractors that would not have changed their legal status. The Act provides in section 4 that in these circumstances the minimum provisions of the Act cannot be contracted out of.

The primary factors that I considered in making this decision are as follows:

- The Lozinskis were not free to set their own hours - McBride required more or less a regular presence at the Resort;
- Even though the employer maintains that their primary function was sales it is clear that there was much more involved;
- While they had some discretion as to the arrangement of their work they performed their services on the direction of McBride.

I should add that, even if their only function was sales, in the circumstances of this case they would likely still be employees for the purposes of the Act.

I am not satisfied by the evidence of R. Lozinski on the issue of the number of hours worked. He did not keep other than a partial record of the hours. The original record was not produced. It is remarkable that on the days that both Lozinskis worked their hours were identical. R. Lozinski's evidence at the hearing was to the effect that the records reflected what he and wife must have worked - not necessarily what they did work. Since neither the employer and employee have accurate records it is difficult to determine an entitlement, however, I am satisfied on all the evidence that the working day from Monday to Saturday was from 8 a.m. to 5.30 p.m. with one hour for lunch. This totals eight and one half hours per day. Their hours on Sundays were from noon to 5.30 p.m. for a total of five and one half hours. The exception to the foregoing is May 27 and 28. On these two days both parties claim 15 and 12 hours respectively. They were engaged in fighting a fire near the Resort. I accept their claim for these days. The hours as aforesaid should exclude those days where the determination by the Branch indicated the Lozinski's did not work or April 19 on which day they worked 3 hours.

ORDER

Pursuant to Section 115 of the Act, I order that Determination #001215 be varied as set out above.

“Alfred Kempf”

Alfred Kempf
Adjudicator
Employment Standards Tribunal

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BC EST #D085/96