

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 -

Adrian Barre
(" Barre ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: David B. Stevenson

FILE No.: 1999/779

DATE OF HEARING: February 15, 2000

DATE OF DECISION: April 14, 2000

DECISION

APPEARANCES

for the Appellant	Adrian Barre Margaret Craig
for the Respondent	Megan Rokeby-Thomas Dave Rokeby-Thomas
for the Director	Ed Wall

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) by Adrian Barre (“Barre”) of a Determination which was issued on December 6, 1999 by a delegate of the Director of Employment Standards (the “Director”). Barre had alleged in his complaint to the Director that he had been an employee of 577072 B.C. Ltd. operating as the Royal (the “Royal”) for the purposes of the *Act* and the Royal had contravened several provisions of the *Act*. The Determination concluded that Barre was not an employee of the Royal and, consequently, the *Act* had not been contravened.

Barre says that the Director was wrong to conclude that he was not an employee. He contends that the arrangement between himself and Megan Rokeby-Thomas (“Rokeby-Thomas”), one of the owners of the Royal, was a scheme contrived by her to avoid labour costs. He asserts that his position with the Royal was consistent with the duties and responsibilities of a person in the position of manager.

ISSUES TO BE DETERMINED

The issue is whether Barre has shown that the Director was wrong, in law or in fact, in concluding he was not an employee for the purposes of the *Act*.

FACTS

The complaint arose in the context of the following facts:

1. The Royal operates a licenced establishment in the Royal Hotel in Nelson. The Royal is a lessee in the Royal Hotel. Part of its lease includes a kitchen.
2. While not entirely clear on the material, it appears that Rokeby-Thomas and some other investors had purchased the Royal Hotel and Rokeby-Thomas had taken over the operation of

the Royal. She was not interested in operating the kitchen and in March, 1999, approached Barre to determine whether he was interested in operating the kitchen. Barre was interested.

3. Rokeby-Thomas and Barre discussed the arrangement under which Barre would operate the kitchen and reached a verbal agreement on very general terms: Barre would take complete control of the kitchen and be responsible for its operation; the Royal would be responsible for providing and paying for utilities and, as “rent”, would receive 20% of the gross income of the kitchen.
4. While Barre was agreeable, he had no start up money and Rokeby-Thomas agreed to lend him one thousand dollars for supplies. The initial supply purchase was more than that amount and Rokeby-Thomas increased the amount of the loan.
5. Barre named the kitchen operation “Barreos”; at the outset, he set up a bank account in that name; obtained lines of credit from two key suppliers under that name, had a separate telephone line installed to the kitchen, registered in his name, dba Barreos and contracted with a graphic designer to produce the menu. He never consulted with Rokeby-Thomas in respect of any of these matters.
6. For the first month of operation, Barre, officially, had no employees. He did, however, receive help from other people in running the kitchen. He did not consult with Rokeby-Thomas when making the decision to operate in this way.
7. In April, Barre hired some employees. He set the wage rate and the hours of work for these employees without any input from Rokeby-Thomas. He terminated one of these employees. While there was some evidence about discussion between him and Rokeby-Thomas about the employee, there is no indication that the decision to terminate was not made by him.
8. Barre also set the hours of operation for the kitchen. At one point, Barre decided to close the kitchen between the hours of 2 and 4 pm. Rokeby-Thomas objected to this decision, but the kitchen remained closed. Occasionally, Barre would decide to close the kitchen earlier than normal. Rokeby-Thomas had no input into this decision.
9. All of the food purchases were processed through the cash register in the Royal. Those purchases were separated from the bar purchases by Rokeby-Thomas and an accounting of the gross income of the kitchen was provided to Barre on a fairly regular basis. The Royal took 20% of the gross income, as agreed, and paid the balance to Barre.
10. From time to time Barre would receive advice from Rokeby-Thomas on the operation of the kitchen. There is no evidence that Barre was required or felt compelled to follow that advice. In fact, the evidence shows the advice was frequently ignored.
11. Rokeby-Thomas offered to assist Barre in setting up and maintaining his payroll, but it is clear that Barre had the responsibility for maintaining the payroll records for those persons working in the kitchen for the period of time he ran the kitchen.

In addition to the above facts, I heard about several isolated events that occurred during the 5½ months that Barre ran the kitchen, including the food donation to the Artwalk, the discussion in July when Barre informed Rokeby-Thomas he had no money and could not open the kitchen, the repossession of the dishwasher, Rokeby-Thomas' assistance to Barre in revising the menus, free meals and lost keys.

The Director considered a number of factors to be important to the conclusion that Barre was not an employee of the Royal. The Determination included the following statement:

The complainant employed at least three employees under him and controlled and directed their activities. This is the single most important factor to be considered. The complainant was in a position to offer the employees any wage he wanted, while he received a fixed 20 per cent of gross sales. This clearly indicates that he alone bore the burden of remunerating his employees. The complainant also had the power to hire and fire these employees which he in fact did. The employees of the complainant perceived the complainant, not Thomas, to be their employer. And finally, it is clear that the parties did not intend to create an employer/employee relationship at all. The evidence indicates that the complainant negotiated with suppliers on his own behalf in the name of Barreos and that he considered himself the employer of the employees.

Nothing that was provided by either party during the hearing affected the above statement.

Barre says, however, the Director failed to appreciate that the arrangement he entered into with Rokeby-Thomas was simply a fabrication designed to give the appearance of an arms' length business arrangement. He notes the following matters:

12. There was no written contract or other documentation identifying any "business arrangement" between him and the Royal;
13. He was never registered as a business entity during the time he "rented" the kitchen from the Royal;
14. He had no experience operating a business at the time Rokeby-Thomas proposed he take over the kitchen;
15. He never owned or leased any of the equipment in the kitchen (and perceived he was not responsible for its repair or maintenance under the agreement he had with the Royal); and
16. The employees he hired had been employed at the Royal and there was never any real change in the day to day operations of the Royal following Rokeby-Thomas taking over the Royal.

In my opinion, none of the above matters have any significant impact on whether Barre was an employee of the Royal for the purposes of the *Act*.

ANALYSIS

The Determination addressed the question in the context of the definitions of employee, employer and work in the *Act*:

“employee” includes

- (a) *a person, including a deceased person, receiving or entitled to wages for work performed for another,*
- (b) *a person an 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;*

“work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

The Director made the following comments about the above definitions:

The definition of “employee” states that the worker must be performing work on behalf of someone else, and not be in business for him or herself. Was the complainant in business for himself? An “employer” is someone who has control and direction of an employee or someone who has responsibility for the employment of an employee. Was Thomas “responsible” for the employment of the complainant? The term “work” refers to the labour or services an employee performs for an employer. Again, the central question is: was the complainant working on behalf of Thomas or himself?

I agree with the conclusion of the Director in this case. There is no doubt from the evidence that Barre operated the kitchen as his business. I accept that there was a degree of interdependence between the Royal and the kitchen and that some assistance was provided to Barre by Rokeby-Thomas, but neither of those matters are inconsistent with a conclusion that there were two separate businesses. I also accept that Rokeby-Thomas was anxious to ensure that Barre’s business succeed and went some considerable distance in that regard, but that assistance was a product of the interdependence between the two businesses, not an indication that the kitchen was part of the Royal’s business. More importantly, Barre made all of the key decisions relating to the operation of Barreos Grill: what product to order, when to order it, how much to order; he set the menu; he set, and changed, the hours of operation of the grill; he decided whether to hire employees; he hired and fired employees; he set their wages and work schedules; he decided how the net income of the business would be used, without accounting to any other person for that; he

decided what creditors would be paid; he negotiated with his creditors relating to his indebtedness to some of them; and, he decided to close the business.

In a similar context, the Tribunal has indicated that taking into account the scope, purposes and objectives of the *Act*, it is not a reasonable interpretation of the definition of employee to conclude that it was intended to embrace the controlling minds of the business (see *Barry McPhee*, BC EST#D183/97 and *Nicole O'Brien*, BC EST#D412/98).

ORDER

I order, pursuant to Section 115 of the *Act* that the Determination dated December 6, 1999 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal