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 -

Flash Courier Services Inc.
(" Flash ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No: 1999/680

DATE OF HEARING: February 4, 2000

DATE OF DECISION: March 10, 2000

DECISION

APPEARANCES:

Victor P. Leginsky	Counsel for Flash Courier
Erik Bjorklund	An owner of Flash Courier
Fenton R. Paul	On his own behalf

OVERVIEW

Flash Courier Services Inc. ("Flash"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), has appealed a Determination by a delegate of the Director of Employment Standards (the "Director"). The Determination is dated October 28, 1999 and it orders Flash to pay Fenton R. Paul $1,941.47 in compensation for length of service compensation and interest.

Underlying the Determination is the conclusion that Paul was an employee of Flash insofar as the *Act* is concerned. Flash had claimed that it is not liable to pay length of service compensation for the reason that Paul is an independent contractor. It makes that claim again on appeal. The Determination is said to contain several errors, both in fact and in law. According to Flash, it had a business arrangement with Paul: Flash, through its dispatching business, brokered courier opportunities for Paul, while Paul owned and operated a transportation business.

ISSUE TO BE DECIDED

It is only the matter of whether Paul is or is not an employee that is at issue. The appellant, in that regard, claims that the Determination should be cancelled for reason of what are said to be both errors of fact and law.

FACTS

Flash Courier provides same-day courier services throughout the lower mainland.

Fenton Paul was a driver for Flash from January 14, 1997 to June 26, 1998. Paul refused to accept an overnight delivery to Chilliwack on the 26th of June. That was the last straw for Flash. By that point, it had had quite enough of Paul. To the delegate, it complained of poor service, an abusive attitude and a failure to pick-up envelopes or parcels after saying that he would do so.

According to the delegate, "Flash, through Erik Bjorklund, terminated Paul". Flash claims that it did not terminate Paul, only his contract. What I find is that the delegate's statement is correct in this sense, it was Flash that acted to sever the relationship, whatever that may be, not Paul.

Paul has alleged that Flash had him fill out an application for employment. The delegate accepts as fact that "Flash offered Paul employment". All that I am shown is that Flash has a form called "Application for Employment". While the form is for recording information about couriers and their vehicles, I am not shown either that Paul filled out such a form or that Flash in fact said anything about it being employment that it was offering Paul.

On engaging Paul, Flash had the driver sign an agreement dated January 14, 1997. In the agreement, Paul acknowledges that he understood that he was being engaged as an "independent contractor" and "self-employed". The agreement is open ended but calls for Paul to give two weeks' notice of termination. It warns that, should Paul fail to give such notice, Flash might charge him for its radio and dolly, for each day that he kept them, and that it might also charge for other equipment and supplies, radio insurance, and "set up costs", verbal and on job training included. The agreement calls for Flash to pay Paul 65 percent of what Flash charged its customers for pick-ups and deliveries. It requires that Paul pay Flash an "office fee" of $90 a month which is for dispatching. The agreement prohibits Paul from using or revealing Flash's client list in an attempt to establish his own business or another business. It goes on to say that Paul is prohibited from competing against Flash, "by starting his own courier service", for 2 years from termination of the contract and within a 6 mile radius of company headquarters.

In a June 9, 1999 letter to the delegate, Flash stated that "Paul was reminded on several occasions that his conduct would not be tolerated". According to Flash, that was to indicate "that his continued employment was in jeopardy".

Paul used a cargo van for pick-ups and deliveries. He owned the van. Paul paid for its fuel, insurance, maintenance and repairs. The van was not painted in Flash's company colours. For reason of B.C. Motor Vehicle Commission and municipal government requirements, the van must carry signs which identify the delivery service and be marked with the letters "o/o" in the case of an owner/operator. Paul's van displayed signs which identified it as delivering for Flash, not himself or some business owned by him.

As the agreement between Flash and Paul suggests, it was Flash that supplied the dolly and two-way radio which Paul used for the purpose of communicating with dispatchers. The value of the radio when new is $1,000. Flash supplied Paul with uniforms and an ID card which identified him as a Flash courier. Paul paid for the radio and other items through the office fee that he paid Flash. That fee was $90 at the start but it was later reduced to $55.

Paul had his own Workers' Compensation Board account.

Flash paid for Paul's bonding and it paid the cost of cargo insurance.

According to Flash, Paul was free to develop his own business opportunities, as long as that did not interfere with Flash's business. It is not shown that Paul conducted any business outside of what is the alleged business of making pick-ups and deliveries for Flash. And Paul did not make pick-ups and deliveries for other couriers or delivery services, only Flash.

According to Flash, Paul was free to set his own hours of work and pick his delivery route. Paul has a different view. I accept that he could ask for a certain delivery route and that the driver, as any driver, could choose one traffic artery over another as he went about making pick-ups and deliveries. And I accept that Flash tried to provide its driver with the route that he wanted. But I find that it was Flash that had final say over the delivery routes. The drivers could not all travel the same route or just work where they wanted to. Flash had to have a driver for each and every one of its routes if it was to satisfy its customers.

Paul did not have to report for work at a specific time and his work day ended with the last of his deliveries, not at some pre-set time. And it was up to Paul, to some extent, when he would leave on his delivery route. But I find that Paul really had to be at work early each morning if he wanted to receive pick-ups and rush jobs from the dispatcher, and the commissions that went with them. I also find that Paul was unable to start his delivery route whenever he pleased. Paul had to wait for Flash to assign him all of his deliveries, yet not wait so long as to miss delivery deadlines.

If for any reason Paul was not able to work for reason of illness, or simply wanted time off, he was expected to notify Flash of that. That was so Flash could arrange to have another driver take over his delivery route.

Paul did all of his own driving. Flash tells me that he was allowed to use a replacement driver just so long as the driver could obtain bonding and he or she met Flash's standards in respect to safety and qualifications.

Flash controlled the dispatching. The dispatcher controls the amount of work that any one driver gets, the more lucrative rush deliveries included. As such, I find that Flash had considerable control over Paul.

Paul could decline a pick-up or delivery but I find that there were limits to that. If one driver refused a pick-up or delivery, Flash had then to find another for that job if it was to keep customers happy, which is to say, meet their expectation of same day, if not rush, delivery. I am satisfied that it is in part because Paul refused too many of Flash's jobs that he came to be seen as uncooperative and providing poor service.

Flash had the customers. It was Flash that decided what the customers would be charged. It could unilaterally alter what it paid Paul in that he was paid a percentage of what the customer was charged.

Paul's only source of income was Flash. He was paid twice monthly by Flash. Paul could earn more, or less, by driving faster or slower, by being more efficient or less efficient and, Flash's dispatcher willing, by taking on a greater or reduced number of pick-ups and/or deliveries.

It is alleged but not shown that Paul earned more than other drivers because he had more experience and had a larger vehicle at his disposal.

ANALYSIS

Length of service compensation is owed if Paul is an employee under the *Act* but it is not if the relationship between Flash and Paul is a business arrangement between two independent contractors.

Section 1 of the *Act* defines the terms "employee", "employer", and "work". Those definitions are as follows,

> "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 the work normally performed by an employee, … .
>
> "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.

Those definitions are to be given a liberal interpretation. That is the view of British Columbia's Court of Appeal [*Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170];

> "the definitions in the statute of "employee" and "employer" use the word "includes" rather than "means". The word "includes" connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances."

Paul, in the contract dated January 14, 1997, is described as a self-employed and as an independent contractor, but nothing turns on that alone. In *Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341, the B.C. Supreme Court noted:

> "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."

And section 4 of the *Act* specifically prohibits any attempt to waive the minimum requirements of the *Act* through or by agreement.

> **4** The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

If Paul is an "employee" insofar as the *Act* is concerned, he is entitled to receive the basic, minimum working conditions of the *Act*. An agreement which provides for anything less than that is null and void. That in my view includes a person's agreement that he or she is not an employee but self-employed or an independent contractor. (Sections 43, 49, 61 and 69 are provisions relating to collective agreements and they have no application in this case.)

The primary purpose of the *Act* is to ensure that employees receive at least basic standards of compensation and working conditions (the *Act*, section 2). The Tribunal must act to ensure that any person that is an employee receives the protection and benefit of the *Act* without the absurd result that calls for an employer to pay wages (vacation pay, statutory holiday pay, length of service compensation and the like) to a person who, while paid wages and/or performed work normally performed by an employee, is genuinely and quite obviously self-employed. In *Castlegar*, cited above, Mr. Justice Josephson made note of that very point in quoting Paul Weiler, then Chair of the Labour Relations Board [*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. LRBR. 42 at 50]

> "The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee ... But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer."

Various tests have been developed as an aid to deciding whether a person is or is not an employee. There is "control test", the "Four-fold" test (also known as the "four-in-one test") applied by Lord Wright in *Montreal Locomotive Works Ltd*., (1947) 1 D.L.R. 161 (P.C.), the "organizational test" (also known as the "integration test") of Lord Denning, as he later became, the "economic reality test" and the "specific result test", to name some of the more important ones. They have their limitations and there are many factors to consider, two points made years ago.

> "The observations of Lord Wright, of Denning, L.J., and of the judges of the Supreme Court of the U.S.A. suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative

> weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man (or woman) performing the services provides his (or her) own equipment, whether he (or she) hires his (or her) own helpers, what degree of financial risk he (or she) takes, what degree of responsibility for investment and management he (or she) has, and whether and how far he (or she) has an opportunity of profiting from sound management in the performance of his (or her) task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself (or herself) to perform services for another may well be an independent contractor even though he (or she) has not entered into the contract in the course of an existing business carried on by him (or her).
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> [See Market Investigations Ltd. v. Minister of Social Security, (1968) 3 All E.R. 732 (Q.B.D.) at 737 –738]

The Tribunal has through *Larry Leuven*, (1996) BCEST No. D136/96, and other decisions, has said that it will consider any factor which is relevant. The factors which I have decided to consider in this case are in essence those which have been set out in a recent decision of the Tribunal, *Cove Yachts(1979) Ltd.*, BCEST D421/99. Flash has not suggested that there is another factor or factors to add to that list. I would list the factors as follows:

- The actual language of the contract;
- control by the employer over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- remuneration of staff;
- right to delegate;
- the power to discipline, dismiss, and hire;
- the parties' perception of their relationship;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is a specific task or term.

In this case, there are facts which suggest that the relationship between Flash and Paul is not that of employee/employer but purely a business arrangement. There is first and foremost, the fact that the contract refers to Paul as self-employed and an independent contractor. Paul owned the most important and most expensive piece of equipment used for pick-ups and deliveries, his van. He paid for its gas, insurance, maintenance and repairs. He did not have set work hours as employees often do. He had is own WCB account. And he could profit through sound management of his time and vehicle and his knowledge of the city's roads and streets.

Yet I will not cancel the Determination. While I have found that the delegate has erred in setting out facts, she had not made an error which is fatal to the Determination. And she has concluded that Paul is an employee. I agree with that decision. While elements of the relationship between Flash and Paul point to a business arrangement between two independent contractors, others reveal an employment relationship. The open ended nature of the contract. Flash through its dispatcher controlled what work Paul did. It had effective if not complete control over how and when Paul went about pick-ups and deliveries. Paul provided the truck but Flash had the clients and provided the radio. It paid for the cargo insurance. It gave him signs, Id cards and uniforms so that he would appear as its driver. Paul could profit through working harder, faster and smarter but as commission salespersons and piece rate workers do. He was paid commissions, a form of wages, not a fee equal to some fixed amount of money. The commission paid is merely a percentage of a price which was unilaterally set by Flash. Paul did not have business on the side. He did not have an established business at the point when he was engaged by Flash. He worked entirely for Flash. His only income source was Flash. He had no staff. He was not free to hire any driver that he pleased, nor was he at liberty to delegate the job of driving: He had to meet qualifications set by Flash and gain its approval. Flash treated Paul as an employee in that it took the disciplinary step of warning him about his behaviour and lack of co-operation, indeed it claims to have warned him "that his employment was in jeopardy". Flash contracts with its customers to deliver envelopes and parcels and Paul's work was a necessary, integral part of carrying out that business. On the other hand, the transportation business which Paul is alleged to have run is not a functional, business whole but an appendage which is entirely dependent on dispatching owned, operated and controlled by Flash. Paul was not engaged for a specific task or period but as a driver on an ongoing basis.

Paul fits the definition of employee. He was not obviously running his own transportation business. He was working just for Flash and for wages. The contract is one of service. From what I can see, Paul just wanted a paying job and if getting that job meant that he had to agree to being an independent contractor, then that was okay by him.

Flash was not merely a dispatching service which brokered courier opportunities. The business which is Flash is a courier service. From what I can see of what Flash has done, it is to act so that Paul might believe he was "self-employed" and an "independent contractor", and so as to make him appear a self-employed independent contractor, for the purpose of avoiding what are the obligations of an employer while still maintaining effective control over him.

In deciding that Paul is an employee it follows that he is owed compensation for length of service.

In deciding that Paul is an employee, I reach a conclusion which is somewhat different than that reached in *Greyhound Canada Transportation Corp. v. Lefler and Kummer*, (1999), file Ym2727-605, unreported so far as I know, and *Innis and Diacom express Inc.*, (1998) C.L.A.D. No. 109, two decisions on which counsel for Flash would have me rely. The facts in those two cases are not the same as here. I am, moreover, not bound by those decisions as they are concerned with the application of the *Canada Labour Code*. My concern must be lie with the

Act, a purpose of which is to ensure that all employees in British Columbia receive at least basic working conditions.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination dated October 28, 1999 be confirmed in the amount of $1,941.47 and to that amount I add whatever further interest has accrued pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal