Employment Standards TRIBUNAL

An appeal

- by -

Rod Kenny
("Kenny")

- 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

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/800

DATE OF HEARING: February 19, 2001

DATE OF DECISION: February 27, 2001

DECISION

APPEARANCES:

On behalf of Rod Kenny: Elyssa Lockhart, Articled Student, Owen Bird, Barristers & Solicitors

On behalf of Peter Croft: Neelu Chauhan, Schiller Coutts Weiler & Gibson, Barristers & Solicitors

On behalf of the Director: Written submissions only

OVERVIEW

This is an appeal by Rod Kenny ("Kenny"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued October 30, 2000. Mr. Kenny complained that Peter Croft operating as Planet Dogs ("Croft") owed him regular wages, overtime wages, vacation pay, statutory holiday pay and compensation for length of service in the amount of $12,130.98.

The Director's delegate concluded that there was no contravention of the *Act* and that no wages were owing to Mr. Kenny.

ISSUE TO BE DECIDED

At issue is whether the delegate erred in fact and in law. Specifically at issue is whether the delegate erred in concluding that Mr. Kenny was not Mr. Croft's employee until November 1, 1999.

FACTS

On February 9, 1999, Mr. Croft and Mr. Kenny entered into a partnership agreement, under the name Planet Dogs, to operate a dog day care. Each party invested an equal amount of money into the business.

Although the delegate found as a fact that the partnership agreement was drafted by a lawyer on behalf of both of the parties, I find that he erred in this conclusion. In his appeal submissions, the delegate acknowledged that he did not have a copy of the agreement, and, in the absence of any contrary submissions, accepted Mr. Croft's assertion that it was prepared by the same lawyer who assisted Mr. Kenny in dissolving the partnership. The fact is that the agreement was a Self Counsel Press publication that Mr. Croft purchased in an attempt to save legal fees.

In February, the parties, as a partnership, approached Martin MacLachlan, a lawyer with Swinton & Company, to assist them in reviewing a lease agreement for space for the business. Mr. MacLachlan reviewed the agreement, and discussed it with the parties on February 15. The business took possession of the premises on February 16.

Within a matter of weeks, Mr. Kenny became disenchanted with Mr. Croft's management style and decided that he wanted to dissolve the partnership. Mr. Kenny and Mr. Croft discussed their situation, and decided to end their relationship. Mr. Croft agreed to buy out Mr. Kenny's share of the business. However, since Mr. Croft was not in a financial position to buy Mr. Kenny out immediately, the parties agreed to spread the payments out over a period of time.

The evidence is that, at the end of March, Mr. Kenny's name was removed as one of the signing authorities on the business' bank account, and Mr. Croft agreed to release him from any future liabilities of the partnership.

At the same time the parties agreed to end their relationship, Mr. Kenny approached Mr. MacLachlan for legal advice about ending the partnership. Mr. MacLachlan provided that advice, suggesting that Mr. Kenny add additional terms to the agreement, and on April 6, drafted a letter from Mr. Kenny to Mr. Croft containing the terms of the dissolution. Mr. Kenny's evidence is that Mr. Croft made suggestions to the agreement, which Mr. Kenny had Mr. MacLachlan incorporate into a letter. Mr. Croft agreed that he discussed with Mr. Kenny whether interest would be paid on the amount owed, and the fact that payments would have to be made over time.

Mr. Kenny presented the final letter to Mr. Croft on April 12.

The pertinent points of the dissolution letter are as follows:

> I hereby give notice in accordance with subsection 9.01 of the Partnership Agreement of my intention to dissolve the Partnership agreement immediately.
>
> I confirm that I have agreed to sell to you all my interest in the assets of the Partnership for $7,005 and you have agreed to buy that interest and to assume all of the liabilities of the Partnership on the following terms:
>
> 1. The purchase price of $7005 will be payable in 12 monthly instalments of $583.75 each starting on July 1, 1999, and continuing on the first day of each of the 11 months thereafter. There will be no interest payable on the outstanding balance.
>
> 2. I will work as your employee in the Planet Dogs business at a reasonable salary agreed by the two of us. So long as you continue to pay my salary and make payments in accordance with the promissory note, I will work in that capacity

> until at least May 31, 1999. After that date, I will give you at least two week's notice if I decide to terminate my employment.
>
> 3. While I am working at Planet Dogs, my dog Georgia may use all of the facilities free of charge.
>
> 4. I release you from all claims I may have against you or the Partnership, that exist as of today and that are not set out in this letter.
>
> 5. You release me from all claims in any way relating to the Partnership and the Planet Dogs business that you may have against me, that exist as of today and that are not set out in this letter.
>
> 6. You assume all liabilities of the Partnership as of March 31, 1999.

Clause 7 was a general release from liabilities of the business.

Mr. Kenny signed the letter, and below his signature, Mr. Croft acknowledged the agreement:

> By signing this letter, I agree to the terms of this letter including the release in section 5, the assumption of liabilities in section 6 and the indemnity in section 7.
>
> *"Peter Croft"*
>
> _____
> Peter Croft

Mr. Croft also signed a promissory note in the amount of $7,005.00.

Mr. Croft testified that he told Mr. Kenny not to use Mr. MacLachlan as his lawyer because Mr. MacLachlan had drafted the lease agreement. However, he conceded that he knew Mr. MacLachlan had drafted the dissolution letter since his initials were on bottom of the document, and did nothing about it. Mr. Kenny's evidence is that Mr. Croft did not want to get his own lawyer. He told Mr. Kenny that because he was leaving, it was up to him to "take care of it", and that he didn't want to spend any money on a lawyer for himself.

Mr. Croft testified he was "too busy" to look at the agreement when it was first presented to him, and several days later, at Mr. Kenny's insistence, "whizzed through it without reading it" and signed it. He testified that although he "understood the basics of what we were going to do", Mr. Kenny reviewed the clauses with him and told him that "it was just a formality", that "it wouldn't cost him anything". He said that he "trusted Rod and [Mr. MacLachlan]" to act in his interest.

Mr. Kenny testified that Mr. Croft told him that he couldn't afford to pay him wages right away, and that he wanted Mr. Kenny to defer wages until the business was making money, which he concluded would be within 4 months.

Mr. Croft's evidence is that he had no intention of paying Mr. Kenny wages, because they agreed that he would not become an employee until all the payments had been made. Mr. Croft asserted that he and Mr. Kenny had verbally agreed to change the terms of the agreement in this respect.

Mr. Kenny continued to show up at the premises daily, performing operational tasks such as opening the shop, greeting customers, taking their dogs from them, washing floors, taking dogs for a walk, feeding and watering the dogs, and cleaning up dog waste. Mr. Croft screened the dogs, advertised the business, and did the purchasing. Both Mr. Kenny and Mr. Croft had keys to the premises, and knew the alarm code. Although Mr. Kenny also had access to the computer, he did not use it because he did not know how.

Due to Planet Dog's financial situation, Mr. Kenny received none of his monthly instalments in April, May or June, 1999. Mr. Croft persuaded Mr. Kenny to stay on for an additional 4 months and told him that he would pay him the money in 4 instalments instead of 12. Mr. Croft borrowed money and paid Mr. Kenny monthly instalments from July to November, 1999. The final payment was made to Mr. Croft on November 1, the day his employment was terminated.

In June 1999, Mr. Croft gave Mr. Kenny a cheque in the amount of $545. Although the cheque stub indicated that the sum was an "advance", Mr. Croft told the delegate that it was to assist Mr. Kenny with his rent, and that he forgot to deduct the amount from Mr. Kenny's instalment payments. The evidence is that Mr. Kenny's portion of the rent was $450.

Mr. Croft argued that the lawyer who drafted the partnership agreement and the dissolution agreement could not act for both parties, and complained to the Law Society about his conflict of interest. Although the delegate did not have access to Mr. MacLachlan's submission to the Law Society on this complaint, the Law Society ultimately found him in a conflict of interest in acting only for Mr. Kenny in the dissolution of the partnership when he had previously acted for the partnership in reviewing the lease agreement.

After analyzing the evidence, the delegate concluded that Mr. Kenny was not an employee under the partnership agreement. He stated

> There is no evidence at all that a reasonable salary was ever negotiated or agreed upon by the parties. The employment clause is worded such that the complainant would only work "so long as you continue to pay my salary" In my view, the complainant's employment is conditional upon the payment of "a reasonable salary agreed by the two of us". Since no had been agreed upon or paid, it seems to me that the complainant was never employed by Croft at all. That clause is vague and not conclusive as to the employment of the complainant.
>
> Moreover, there is doubt about the validity of the agreement since it was tainted with the conflict of interest issue. I feel that it was not a transaction at arm's length, and I give Croft the benefit of the doubt that he never fully understood the

> effects an implications of the employment clause. I accept his contention that there was no intention to create a legal employee/employer relationship.

The delegate concluded that Mr. Kenny remained at the business for six months following the dissolution of the partnership, not as an employee, but only "to safeguard his own interest". The delegate further concluded that the parties intended that Mr. Kenny would only be employed after he had fully recovered his investment, in part based on Mr. Croft's opening of an account with Revenue Canada on November 30. The delegate found that the employment relationship began and ended on November 1, and that Mr. Croft had "correctly paid [Mr. Kenny] for 3 hours at $7.50 an hour for that day".

I note here that Mr. Croft opened the Revenue Canada account one full month after he argued that the employer/employee relationship began, which is not at all consistent with his argument.

The Tribunal has held on many occasions that it will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see *Kaiser Stables* BCESTD# 058/98, and *Tri West Tractor Ltd.* BDESTC#268/96). However, I am not satisfied that the delegate obtained the evidence necessary to make a proper determination, and I allowed new evidence on appeal, specifically, the Self Counsel Press partnership agreement. Although I also heard evidence from Mr. Blue, Mr. Kenny's partner, I do not find it necessary to refer to his evidence, for the reasons that follow.

I also determined that I would not hear evidence about, or arguments regarding, the Canada Customs and Revenue Agency's determination that Mr. Kenny was an employee of Planet Dogs. Not only is that determination under appeal, but it is not binding on the Employment Standards Tribunal.(see *Hill (Re* BCEST #D219/99 and *B.J. Heatsavers Glass and Sunrooms Inc. (Re* BCEST #D 137/97*)* In any event, however, CCRA applied several common law tests in arriving at that conclusion, tests which have been incorporated into this Tribunal's jurisprudence, and would be of no assistance to Mr. Kenny.

ARGUMENT

Mr. Kenny's counsel argues that the delegate erred in both applying the law and interpreting the law.

She argues that the delegate erred in

1) determining that Mr. Kenny was not an employee until November 1,

2) misinterpreting the legal implications of Clause 2 of the dissolution agreement; and

3) concluding that there was no employee/employer relationship solely because the parties did not decide on what a "reasonable salary" was.

She also argued that the delegate erred in failing to apply the *Act*, and specifically, failed to consider the definitions of "employee" and "work" in section 1. She contended that, on a preponderance of evidence, Mr. Kenny should be found to be an employee.

Counsel for Mr. Kenny argued that there is no evidence that Mr. Croft and Mr. Kenny agreed that Mr. Kenny would become an employee of Mr. Croft only after Mr. Croft had completely paid the agreed upon cost of dissolution.

Mr. Croft's counsel argues that the partnership dissolution agreement should be void, or given little weight, due to the conflict of interest Mr. MacLachlan was in when he drafted it, and the fact that Mr. Croft did not obtain independent legal advice. Further, she argues that the parties had agreed to orally vary the partnership dissolution agreement so that Mr. Kenny did not become an employee until the final buyout payment was made on November 1.

ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I find that burden has been met.

I accept that the Partnership Agreement entered into between Mr. Kenny and Mr. Croft was not drafted by Mr. MacLachlan. However, Mr. MacLachlan did represent the partnership in respect of a lease agreement. He then subsequently advised Mr. Kenny alone in his effort to dissolve the partnership.

I find it unnecessary to determine whether Mr. MacLachlan's conflict in drafting the terms of the dissolution letter should either lead me to place little weight on it, or to conclude that it is void. There is no dispute that the parties agreed to dissolve the partnership about the end of March. The fact is that the parties took the necessary steps to have Mr. Kenny's name removed as one of the authorized signatories from the business' bank account, and Mr. Croft agreed to indemnify Mr .Kenny from any future liabilities. That agreement was made independent of the letter of April 12. Therefore, I find that the parties had agreed to end the partnership at the end of March.

However, even if I am incorrect in this conclusion, Mr. Croft's actions belie his argument that the partnership did not in fact end until the last buyout payment was made. I find Mr. Croft's evidence that he did not understand or appreciate the nature of the dissolution letter to be disingenuous. Although Mr. Croft appreciated the importance of putting the partnership agreement in writing, he felt he did not need legal advice on dissolving it. Mr. Croft testified that he knew "the basics of what they were doing". He negotiated terms with Mr. Kenny, and complied with all other clauses of the dissolution agreement but for clause 2. He indemnified Mr. Kenny and made all the buyout payments pursuant to the promissory note, albeit on a different schedule than what had originally been agreed to. I conclude that Mr. Croft would likely not have obtained independent legal advice even had Mr. MacLachlan suggested that to

him. I find his evidence that he and Mr. Kenny orally varied clause 2 of the agreement to be self-serving, and an attempt to avoid paying Mr. Kenny what he is due.

I conclude that the partnership was dissolved effective April 12. The next issue is what Mr. Kenny's status with Planet Dogs was from that date until November 1.

Section 1 of the *Act* defines employee to include

(a) a person....receiving or entitled to wages for work performed for another, and

(b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee....

Wages are defined to include salaries, commissions or money paid or payable by an employer to an employee for work.

An employer is defined as including 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 is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

The existence of an employment relationship is no dependent on the intention of one or both of the parties. The *Act* defines what an employee is, and if the relationship if found to fall within that definition, the parties will be bound by the requirements of the *Act.* I conclude that Mr. Kenny was an employee of Planet Dogs from April 12 to November 1.

The evidence is that Mr. Kenny came to work regularly, performing work normally performed by an employee. The tasks he performed such as feeding, watering and walking the dogs, are currently performed by other employees of Planet Dogs. Even though Mr. Kenny had a key in order to open the doors of the business at 6:45 a.m. and was provided with the alarm code, that is not conclusive of whether an employee/employer relationship is formed. Trusted employees will often have those responsibilities.

Mr. Kenny assumed no risk of loss in the business, nor shared in any profits. He had no authority to sign cheques, to place advertisements in newspapers, or to enter into any contracts on behalf of Planet Dogs. Mr. Croft did not ask him to leave, and received the benefit of his work for 6 months. The fact that the parties had not reached an agreement on what a "reasonable wage" was is not relevant to the finding of an employment relationship. That is not one of the indicia of an employer/employee relationship.

I accept that Mr. Kenny stayed on to work for Mr. Croft because Mr. Croft asked him to. It is entirely irrelevant whether or not Mr. Kenny performed work for Planet Dogs in an attempt to "protect his investment". It would not unreasonable for Mr. Kenny to want to ensure the ongoing viability of the business so that Mr. Croft would be able to make the payments he promised to make. His motive for staying has no impact on his employment status.

I accept that Mr. Kenny regularly asked Mr. Croft for his wages. However, even if Mr. Kenny did not ask for his wages does not disentitle him to the benefits of the *Act.* Parties cannot agree to waive the protection of the *Act* (section 4). Mr. Kenny is entitled to wages and other money for work performed, including vacation pay, statutory holiday pay, compensation for length of service and interest.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination dated March 15, 2000 be sent back to the delegate to calculate Mr. Kenny's statutory entitlement based on minimum wages from April 12 to November 1.

C. L. ROBERTS

C. L. Roberts
Adjudicator
Employment Standards Tribunal