

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Hard Rock Gymnasium Inc.
("Hard Rock")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 96/682

DATE OF DECISION: February 28, 1997

DECISION

OVERVIEW

This is an appeal by Hard Rock Gymnasium Inc. ("Hard Rock") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against Determination CDET 004461 issued by the Director of Employment Standards ("Director") on October 25, 1996. A delegate of the Director determined that Martin Pearce was an employee of Hard Rock and is owed \$775.97 in back wages, severance pay and vacation pay.

ISSUE TO BE DECIDED

The issue is whether Pearce is an employee of Hard Rock.

FACTS

On December 4, 1995, Pearce was hired by Hard Rock as a fitness consultant. His duties included assisting Marc Tasse to operate the gymnasium and selling memberships to the gym. He was responsible for opening and closing the gym and keeping it clean; caring for the equipment; selling memberships; and generally assisting clients with their programs. Administrative work was shared by Marc Tasse and Peter Wyatt. Hard Rock says that Pearce requested that deductions not be taken from his paycheque; Pearce denies this. "Staff Time Sheet" records Pearce's hours at the gym. It is agreed that he was to be paid \$8.00 per hour. There was also an agreement with respect to commissions, with Hard Rock maintaining that it agreed to pay a 10% commission after Pearce reached a \$200 per day sales average. Pearce was dismissed on March 8, 1996. According to Hard Rock, Pearce was not selling sufficient memberships to justify his continuing association with the gym; Pearce has no idea why he was fired. There was a separate agreement between Pearce and Hardrock that allowed Pearce and Tasse to operate the juice bar; its details are not relevant to the issue being considered here.

The Director's delegate concluded that Pearce was performing work normally done by an employee. This, together with "the information on file", convinced the delegate that Pearce was an employee and not an independent contractor. He also confirmed that Pearce worked a total of 30 hours between March 4-7 and was scheduled to work an additional 6 hours on March 8, 1996 but was fired one half hour into his shift. He was not satisfied that Pearce was owed any commissions.

ANALYSIS

Section 1 of the *Act* which defines "employee" incorporates the common law definition of "employee". Based on the test in *Montreal v. Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161 (P.C.), affg [1945] S.C.R. 621, revg in part [1945] 2 D.L.R. 373 (Que. C.A.), affg [1944] 1 D.L.R. 173 (S.C.), the following factors determine whether a contract of service (i.e. employment) or a contract for services (i.e. an independent contractor) exists:

1. control;
2. ownership of tools;
3. chance of profit;
4. risk of loss.

More recently, the courts have also looked at the integration of the worker into the employer's business. Where the worker is economically dependent on one company or the work activities are an essential component of the business, an employment relationship is more likely to exist. Any one factor is not decisive. All of the elements of the relationship must be examined to determine if a contract of service rather than a contract for exists.

In this case, Pearce performed the same work, in the same manner as other employees. Although he apparently was able to set his own hours, his hours were logged on a time sheet along with those of other employees. The services which he performed for Hard Rock , such as opening and locking up the facility and dealing with customers or clients were performed on the employers premises. He was guaranteed \$8.00 per hour. The fact that the parties had agreed to a commission structure for certain sales does not change the fact that Pearce had no risk of loss. There is no doubt that he is an employee. Thus, I confirm that aspect of the determination.

Hard Rock says that Pearce asked that deductions not be taken from his paycheque and that he agreed to be a contractor; Pearce denies this. Even if such an agreement existed, this is only one of many factors to be examined and I find that it is outweighed by the factors discussed above. Moreover, this is a question of status under the *Act* as determined by this tribunal; the parties may not contract out of the *Act*, except as provided in its provisions.

ORDER

I order, pursuant to Section 115 of the *Act*, that Determination No. CDET 004461 be confirmed.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal