

**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 -

Mark Hemming  
("Hemming")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 96/723

**DATE OF DECISION:** March 4, 1997

## DECISION

### OVERVIEW

This is an appeal by Mark Hemming pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against a Determination Letter dated November 14, 1996 of the Director of Employment Standards (the "*Director*"). The Director determined that under section 76(2) of the *Act*, the Branch should not proceed with the complaint filed by Hemming as the *Act* did not apply to Hemming who was not an "employee" of Grosvenor Square Business Capital Inc. ("Grosvenor Square").

### ISSUE TO BE DECIDED

The issue to be decided is whether Hemming was an employee of Grosvenor Square.

### FACTS

Hemming was hired as a project manager commencing July 15, 1994 and last worked for Grosvenor Square on February 29, 1996. His hourly rate was \$25.00 (plus shares) and he worked as a project manager for Grosvenor Square clients who were in the venture capital business. He began this work just as he was finishing work for the National Party of Canada. He ran his own maintenance and interior landscaping contracting company, "Marklyn Consultants", which had its own employees and subcontractors, concurrent to his involvement with Grosvenor Square.

On May 19, 1995, Hemming, on Marklyn Consultants letterhead, wrote to the Employment Standards Branch with reference to a complaint made against Grosvenor Square by Katherine Wunderlich. That letter details Hemming's arrangement with Grosvenor Square and says it is the same as that between Grosvenor Square and Katherine Wunderlich. He stated that his work was project based and that he was in the office only as required by his work. He noted that Grosvenor Square assists venture companies with their business activities and that the business was "highly insecure". He acknowledged the possibility that he would not get paid "if the venture companies do not come to fruition". Some of the work was payable through billable hours but other work which raised funds through commissionable work was not. He explained that he and Katherine were "well aware and perfectly clear on the contracted relationship that we had and wanted with the various companies" and that both had arranged their finances as if they were independent contractors. He also said that both worked for several companies at the same time over the past year. In another letter dated May 19, 1995, on Marklyn Consultants letter head, Hemming advised the Employment Standards Branch that his contract with Grosvenor Square differed from the contracts with Katherine Wunderlich and Willy Spat.

In a letter dated April 25, 1996, Hemming stated that Mr. Gill, president of Grosvenor, provided him business cards saying that he was a Project Manager for Grosvenor. Gill had told Hemming that the position was a senior managerial position and in the fall of 1995 hired a part-time assistant for Hemming. Hemming said that although he "did receive a draw" for January of 1996, he is still owed outstanding wages for January and February of 1996. He also claims that he was entitled to receive shares in various projects involving Grosvenor Square.

Hemming produced "Time Sheets" which detailed his activities, the project and the time spent as well as "invoices" for the months of June to December of 1995. "Grosvenor Square Business Capital Incorporated Monthly Billing Sheets" list him, Willy Spat and Kathy Wunderlich as sub contractors. They also show that Grosvenor Square paid all office and administrative costs as well as telephone and computer expenses. "Project Time Records" show Hemming's activity on certain other projects. Hemming says that Gill refused to pay Marklyn Consultants for services performed by Hemming, insisting instead to pay Hemming personally.

In an August 19, 1996 letter to the Employment Standards Branch, Hemming said that when he first came to work with Grosvenor Square he was involved in minor "administrative clean-up" for the National Party and that Gill wanted him to devote himself fully to Grosvenor Square as soon as possible. He pointed to the itemized time sheets and said that he had to be in the office "almost exclusively in order to do my work". He said that in the fall of 1994 he began to suffer from a chronic medical condition that made it difficult for him to commute to and from work. When he suggested that he would be able to carry on many of his functions at home, on his computer, Gill said that he needed his employees in the office as others were having difficulty covering the day to day office responsibilities. Gill said that he would have to review Hemming's employment if Hemming was unable to report to work regularly. He said that Gill wrote cheques to him as an individual and refused to pay him in the name of his company. He said that holidays had to be scheduled and that personal performance reviews "were to be drawn up and presented to Mr. Gill weekly."

Hemming said that following the Employment Standards Branch conclusion that Katherine Wunderlich was an employee, Gill permitted him more freedom to work at home and set his own hours, although he continued to receive payments personally and not through a company. After the ruling, Gill had told him that a written contract should formalize their relationship, this was never done. He and others, but not Wunderlich and Spat, were allotted shares in the company; initially there were no conditions attached to the shares but that changed. He stated that in February of 1996, Gill unilaterally reduced his pay to \$12.50 and no more common shares. Hemming repeated many of the other points he had made earlier about his status as an employee. New points made included the fact that there was no more risk involved in his "working for GSBC than working for other companies that have only one or two venture company contracts". He also denies any financial reward for success other than the remuneration he had contracted to receive.

The Employment Standards Officer concluded that Hemming was an independent contractor because of his own admission in a May 19, 1995 letter to the Employment Standards Branch in reference about complaints filed by Wunderlich. The officer noted that Hemming had identified himself as a contractor and admitted that he was not required to be in the office at a particular time, only as needed. Hemming also admitted that the business was insecure and that there was a "high level possibility" of not being paid for work done if the venture companies did not come to fruition. He also admitted to having spent time with an accountant to learn how to structure his financial affairs as a contractor rather than an employee. He disagreed that Hemming had written the May 19, 1995 letter under duress.

In his submissions to this Tribunal, Hemming argues that the Employment Standards Officer over-emphasized a letter he wrote on May 19, 1995 to the Employment Standards Branch. He argued that the letter was written under duress and in any event was only one factor which should have been weighed in making the determination.

On behalf of Grosvenor Square, Mr. Walker argued that Hemming is an independent contractor and not an employee. He operated a maintenance and landscaping business, Marklyn Consultants, concurrent with his involvement with Grosvenor Square. It was also argued that Hemming lacked credibility and that only his May 19, 1995 letter accurately sets out the nature of his relationship to Grosvenor Square. He points out that Hemming understood his relationship with Grosvenor Square and wanted to be an independent contractor. Mr. Walker argues that Grosvenor Square's arrangement with Wunderlich and Spat were "substantially and materially different" from that with Hemming: Spat and Wunderlich were not aware of their contractual status; did not operate a separate business; were required to work in the Grosvenor Square offices; did not accept the risk of not getting paid for work done; were not accustomed to independent contracting; and did not know that they were performing fund raising work that was commissionable only and not billable. Finally, Mr. Walker said that if either Ip or Johnston gave Hemming reassurances about his claim under the *Act* (and he doubted that they did) such reassurances are not binding on the Employment Standards Branch or this Tribunal.

## **ANALYSIS**

Before proceeding with the legal analysis in this case, I would like to make several comments about the conflicting factual evidence presented by Hemming. I do not necessarily agree with Mr. Walker's submissions about Hemming's credibility; nevertheless I find many of Hemming's later submissions about his employment status to be self-serving and therefore to be used with caution. I prefer the evidence in the letter of May 19, 1995 over the later letters written in support of this application and wherever they conflict, I will rely on the earlier correspondence. And like the Employment Standards Officer, I do not believe that the May 19, 1995 letter was written under duress.

Turning to the substantive question in this case, I begin by noting that Section 1 of the *Act* defines "employee" to include

- (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;

But the definition is inclusive and not exclusive, and thus does not displace the common law definition of "employee". Thus it is necessary to determine whether Hemming is an employee at common law.

The common law offers three tests to determine the existence of an employment relationship: the control test; the four-fold test and the organizational test. The control test sets out four factors to be examined: the employer's power of selection of the servant; payment of wages or other remuneration; the employer's right to control the method of doing the work; and the employer's right to suspend or dismiss the employee. This test focuses on the control exerted by the employer not just over what work must be done by the employee, but also how the work is to be performed. But the control test is inadequate where the employee is highly skilled or a professional. The four-fold test was first enunciated in *Montreal v. Montreal Locomotive Works Ltd.* [1947] 1 D.L.R. 161 (P.C.) and considers: control; ownership of tools; chance of profit; and risk of loss. While the four-fold test is more useful in complex cases, the courts have also looked to the integration or economic dependency test. Here, a worker who is economically dependent on one company or whose activities are integral to the business of the employer will be an employee rather than an independent contractor. Frequently, this test is combined with the factors from the other tests. Thus, to determine whether an employment relationship exists, the following factors may be examined: 1) control; 2) ownership of tools; 3) chance of profit; 4) risk of loss; and 5) integration into employer's business.

A number of features of Hemming's arrangement with Grosvenor Square point to an employment relationship. Hemming reported to a workplace controlled by Grosvenor Square; the latter paid for office support and associated costs such as long distance. This is equivalent to the "ownership of tools" factor cited above. Hemming argued that because Gill required him to work in the office rather than at home, he was an employee. I disagree: a contract for services could specify where the services were to be performed and that is what happened here. Grosvenor Square provided Hemming with business cards identifying him as a project manager with the company. (See *Sin v. British Columbia (Director of Employment Standards)* 015/96 (B.C.E.S.T.) where one of the factors suggesting an employment relationship was business cards supplied by the employer identifying the worker as a marketing director of the employer.) Grosvenor Square also

hired an assistant for Hemming in the later days of their association and Hemming was guaranteed \$25.00 per hour for certain work performed. Like many other professional or highly skilled employees, Hemming was not told by Grosvenor Square how to perform his duties.

Other factors indicate that Hemming was an independent contractor. Hemming's economic dependence on the employer's operation was limited by his continuing independent business activity. He operated an unrelated company with its own contracts, employees and subcontractors. He was free to come and go from the Grosvenor Square office, as he pleased, and reported only when there was work to do. While both parties were somewhat vague on the specifics of what Hemming did, he performed work, on a project basis, for a variety of Grosvenor Square clients. The fact that the work was project-based points to status as an independent contractor.

Also significant was the manner of payment. For his "commissionable" work, Hemming had a chance of profit or risk of loss, depending on whether Grosvenor Square clients were successful. As Hemming rightly points out, many employees "risk" not getting paid if their employer cannot collect for services rendered or goods sold. However, the risk encountered by Hemming was different. An employer is obligated to pay an employee regardless of whether business revenues are collected; in Hemming's case, the obligation to pay depended on the success of the Grosvenor Square client. Mr. Hemming says that payment to him directly rather than to his company points to an employment relationship, but I disagree, since an independent contractor can also be paid personally for services rendered. On the whole, I am satisfied that the weight of evidence points a contract for services and Hemming's status not as an employee but rather as an independent contractor.

I would like to make one final brief comment about the status of other Grosvenor Square "sub-contractors" who were found to be "employees" by the Employment Standards Branch. A finding of this nature by the Branch is not binding on this Tribunal; indeed, the purpose of this Tribunal is to review determinations of the Director who operates the Branch. Thus a finding by the Branch is not binding here. Moreover, Mr. Walker points out a number of significant differences between their contractual arrangement and that of Hemming.

**ORDER**

Pursuant to section 115 of the *Act*, I hereby confirm the Determination dated November 14, 1996.

**Lorna Pawluk  
Adjudicator  
Employment Standards Tribunal**