Employment Standards TRIBUNAL

An appeal

- by -

888 Express Ventures Ltd., operating as Houston Motor Inn
or Houston Motor Inn 2002

- 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

TRIBUNAL MEMBER: John Savage

FILE No.: 2004A/71

DATE OF DECISION: June 29, 2004

DECISION

SUBMISSIONS

Jaswant Kainth	On behalf of 888 Express Ventures Ltd.
Donna Zimmerman	On her own behalf
Barbara Eigeard	On behalf of the Director

OVERVIEW

888 Express Ventures Ltd. ("Express Ventures") operates the Houston Motor Inn. Donna Zimmerman ("Zimmerman") made a complaint to the Director of Employment Standards ("Director") claiming unpaid wages from Express Ventures.

After receiving submissions, the Director's delegate, John Dafoe, issued a determination dated April 16, 2004. The determination concluded that wages in the amount of $7,022.99 were payable by Express Ventures to Zimmerman.

Express Ventures appeals the determination of the Director. Written submissions were received from the Director and the parties, together with the record that was before the Director.

ISSUES

The issues before the Director were (1) whether Zimmerman was an employee of Express Ventures or an independent contractor, (2) if Zimmerman was an employee whether she was a manager, (3) what was Zimmerman's rate of pay, (4) what were Zimmerman's hours worked, and (5) whether overtime wages, statutory holiday pay, vacation pay, and compensation for length of service was payable to Zimmerman.

The burden of establishing that the Determination is incorrect rests with the Appellant.

FACTS

Zimmerman commenced work with Jassi Management Ltd. ("Jassi") on November 25, 2001 at the Houston Motor Inn. That work continued with Jassi until July 15, 2002 when Jassi went out of business. Express Ventures took over the motel that day and Zimmerman continued in her work until November 30, 2002.

A dispute arose between Zimmerman and Express Ventures concerning monies owed. Zimmerman filed a complaint with the BC Employment Standards Branch November 27, 2002 concerning unpaid wages. She also filed a complaint with CCRA concerning a failure to make deductions for CPP, income tax, etc. Just before she was terminated she received a demand for payment of $31,998.75 for accommodation at the motel as she resided at the motel while being its resident manager or host. There is no evidence of any request for payment for accommodation prior to this demand.

Zimmerman's duties are set out in a contract for services with the predecessor employer.

EMPLOYEE OR INDEPENDENT CONTRACTOR

The parties submitted evidence before the Director concerning the engagement of Zimmerman by Express Ventures. Express Ventures submitted that Zimmerman was an independent contractor and not an employee. Zimmerman submitted that she was an employee and not an independent contractor.

The Director found that this issue had been resolved by a determination dated December 17, 2002 by Canada Customs and Revenue Agency ("CCRA"). CCRA found that Zimmerman was an employee under a contract of service with the predecessor operator of the Houston Motor Inn, Jassi. The CCRA determination was upheld on appeal by reasons dated March 18, 2003.

A contract of service was entered in evidence between Jassi and "Donna Office Management Services". Under that contract Zimmerman was required to perform a variety of services at the Houston Motor Inn including recording guest attendance, completing a daily cash report, preparing housekeeping records for chambermaids, monthly reports, billings, mail services, checking rooms, locks, heat, and electricity, completing purchase orders with the owner, booking rooms, removing snow, cutting grass, etc. For these services Zimmerman was paid $2100 per month for the first four months and $2500 per month thereafter. In July or August 2002 Express Ventures took over operation of the Houston Motor Inn.

Zimmerman worked every day at the Houston Motor Inn. Zimmerman submitted records that she worked 14-15 hours a day every day during her engagement. She was the "host" or "resident manager". The Director found that, after meal breaks had been accounted for, Zimmerman worked 11-12 hours a day.

Zimmerman submitted and CCRA determined that until mid-July 2002 Jassi was the employer who exercised control over Zimmerman and her work. Zimmerman was not allowed to work for others during her work for Jassi. She had to take direction about the work to accomplish as well as direction about the methods used to complete the work. Jassi provided any equipment necessary to complete the work, and there was no chance of profit or risk of loss to Zimmerman. After mid-July 2002 Zimmerman continued with Express Ventures doing the same work.

Section 1 of the *Employment Standards Act* defines the terms "employee", "employer", and "work". Those definitions, despite recent amendments, make it clear that the employment relationship includes a wide variety of circumstances. The B.C. Court of Appeal in *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170] noted:

> "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.

In *Bay Technology Corporation* BC EST # D143/01 adjudicator Katz discussed the issue as follows:

> Various tests have been developed as an aid to deciding whether a person is or is not an independent contractor. 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.

> "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). *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, said that it will consider any factor, which is relevant. In *Cove Yachts* (1979) Ltd., BCEST D421/99 the Tribunal set out the following factors.

- 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 *Kelsy Trigg* BC EST # D040/03 adjudicator Roberts stated the following:

> Although the fourfold test, as well as other traditional tests, such as the organizational (or integration) test, and economic reality test are traditionally used to analyze relationships between parties, they are becoming less helpful in determining the role of master and servant in modern workplaces. Non standard employment is becoming more common, due in part to the "globalization of trade, the volatility of international and domestic markets, and workers' desire

> for autonomy and independence" (see Public Service Commission: *The Future of Work: Non-Standard Employment in the Public Service of Canada*, March, 1999*)*
>
> The inadequacies of the traditional tests have been noted by the Supreme Court of Canada (*671122 Ontario Ltd. V. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 (S.C.C.) and by the Federal Court of Appeal (*Wolf v. Canada* (2002 F.C.A. 96).
>
> In *Sagaz*, the Court noted that the control test: "…has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct" (at para. 38, citing Mr. Justice MacGuigan in *Weibe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553) In *Wolf*, the court notes that the test is difficulty to apply in practice, as both the employer and employee hold some measure of control over the work that is performed, and is often inadequate because of the increased specialization of the workforce.
>
> The Supreme Court suggested that the test is inadequate in situations where, because the skills and expertise of the worker exceeds those of the employer, little control or supervision can be exercised over the manner in which the work is performed.
>
> In *Sagaz*, the Court concluded that there is no one conclusive test that can be universally applied to determine whether a person is an employee or an independent contractor. Rather,
>
> > ..the central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
> >
> > It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstance of the case. (at paras. 47 and 48)
>
> In determining the nature of a relationship, courts, and this Tribunal, have typically assessed the nature of the relationship, looking beyond the language used by the parties. While there is no magic test, the total relationship of the contracting parties must be examined, with a view to determining "whose business is it?"

Whichever of these tests is employed I am satisfied that, on the evidence, Zimmerman in her role as the resident manager of the Houston Motor Inn was an employee and not an independent contractor.

The business at the place of work was that of the Houston Motor Inn, not Zimmerman. Zimmerman worked long hours utilizing the tools and resources of the Houston Motor Inn, had no chance of profit, and had no control over the method of doing the work. Although her husband might assist her from time to time in performing the services, that would not, in my opinion, overshadow the real nature of the relationship, and convert the engagement of Zimmerman from that of an employee to an independent contractor.

MANAGER

Part 4 of the Act, "Hours of Work and Overtime", establishes standards for the payment of overtime for employees. By section 34 of the *Employment Standards Regulation*, B.C. Regulation 396/95, as amended, Part 4 of the Act does not apply to a manager.

Express Ventures argues that Zimmerman was a manager and therefore Part 4 of the Act does not apply.

The term "manager" is defined in the *Employment Standards Regulation* as follows:

> (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or
> (b) a person employed in an executive capacity;

The definition of manager was considered by the Tribunal in *429485 B.C. Limited operating Amelia Street Bistro* [1997] BCEST #D479/97. The three person panel discussed a number of previous cases and concluded as follows.

> "The task of determining if a person is a manager must address the definition of manager in the Regulation. . . .
>
> Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person."

As resident manager Zimmerman performed a variety of tasks most of which involved applying her own labour to the required work. She had none of the authority typical of the responsibility and discretion accorded a manager.

Zimmerman did not make decisions about hiring, firing, discipline, altering work processes or schedules, lay-offs, time off, leaves, or other significant management functions. She was instructed to take a "hands off" approach to the other employees (chambermaids). Zimmerman was not engaged in an "executive capacity".

In the circumstances I find that although Zimmerman was the "resident manager" she did not perform the functions of a manager as that term is defined in the *Employment Standards Act*. Zimmerman was an employee.

HOURS WORKED AND OVERTIME

Zimmerman submitted a calendar and made other submissions to the Director that she worked 14 hours each and every day of her employment. Records were submitted by Express Ventures that the Director did not find to be credible.

With respect to the records submitted by Express Ventures the Director noted that "original records provided included no daily records of hours worked" and when other records were submitted found "it is suspiciously convenient that the hours work out to precisely $2500.00 per month". The new records showed working days of 12 hours, but also showed various days off. No evidence was submitted to show that other persons were employed on the days the new records purported show Zimmerman did not work.

The Director found it probable that Zimmerman took at least two meal breaks during her working day. The Director held that she worked 11 hours on Sundays and 12 hours on each other day for a normal work week of 83 hours, with the exception of the last few days of employment, which both parties acknowledged were 6 hour days. Given the number of hours worked, the Director found that "…her regular wage for the purpose of calculating any entitlement to overtime wages is $8.00/hour", or the statutory minimum. Given the hours worked the Directors finding here is incontrovertible.

The Director attached to the determination a copy of the calculation made for the amount owing.

I have reviewed the records submitted to the Director and find that they support the findings made. The original time records do not record any specific hours worked. Records submitted thereafter show hours and days off but the hours worked were submitted after these issues arose, and duplicate time periods covered by the earlier records that do not contain information on the hours worked. The new records that were submitted are not persuasive. Zimmerman's evidence of the hours worked is credible, discounted for the meal times, and I agree with the findings of the Director with respect to hours worked.

In my opinion the determination by the Director of the hours worked and overtime due is supported by the evidence and the overtime wages are due as found by the Director.

OTHER UNPAID WAGES

As Express Ventures failed to pay overtime, it likewise failed to pay the appropriate statutory holiday pay as required by section 45 of the Act and vacation pay as required by section 58 of the Act. Accordingly, these statutorily required payments are due as determined by the Director.

With respect to compensation for length of service, it was agreed that Zimmerman was terminated, received no notice of termination, and no evidence of just cause was submitted. In the circumstances, compensation for length of service is required by section 63 of the Act.

CONCLUSION

In addition to unpaid overtime, statutory holiday pay, vacation pay, and compensation for length of service, the Director added interest. Section 88 of the Act requires an Employer to pay interest on unpaid wages.

In the circumstances I find that the unpaid wages were due in the amount of $7,022.99 as determined by the Director.

ORDER

The appeal is dismissed. The Determination of the Director is confirmed.

John Savage
Member
Employment Standards Tribunal