Employment Standards TRIBUNAL

An appeal

- by -

Raif Holdings Ltd. operating as Airport Inn Lakeside
("Airport Inn")

- 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: Ian Lawson

FILE No.: 2004A/89

DATE OF DECISION: August 4, 2004

DECISION

SUBMISSIONS

Robert A Tonsoo	on behalf of the Appellant
Amanda Clark Welder	on behalf of the Director

OVERVIEW

On April 19, 2004, Determination ER#121-929 was issued by Amanda Clark Welder as a delegate of the Director, ordering Raif Holdings Ltd., carrying on business as Airport Inn Lakeside ("Airport Inn") to pay wages, vacation pay and interest in the amount of $1,837.71 to its former employee, Gwen Oliver ("Oliver"). Airport Inn was also assessed an administrative penalty in the amount of $500.00 for violating the *Act*. The delegate had initially scheduled a complaint hearing into the matter, but this was converted to a formal investigation after the hearing had been adjourned twice at Airport Inn's request. On May 20, 2004, Airport Inn filed an appeal from this Determination pursuant to section 112 of the Act. The appeal is now decided without an oral hearing, on the basis of written submissions.

FACTS

Airport Inn operated a new motel in Winfield, B.C., and its sole director/officer was Raif Fleihan ("Fleihan"). Oliver acted as Airport Inn's manager between July 8, 2003 and August 9, 2003, when the motel first opened for business. She entered into an unwritten agreement with Airport Inn whereby she and Fleihan's nephew Michael Danaf ("Danaf") would be paid a commission from the motel's gross revenue for an initial period of three months. It was arranged that Oliver and Danaf would become a partnership for the purpose of managing the motel, and the partnership would then contract with Airport Inn for the payment of commission. Oliver and Danaf called their partnership MG Consulting, and the partnership registered with WCB and CCRA as a business. Oliver was experienced in the accommodations industry and was responsible for establishing management procedures, setting up the front desk, contacting suppliers and interviewing and hiring housekeeping staff. When the motel opened, she managed the front desk, supervised the housekeepers and provided daily revenue reports to Fleihan. She was required to obtain Fleihan's approval before making any expenditures, and Fleihan was at the motel most of the time to oversee the business.

Oliver and Danaf set their own hours of work, but in accordance with Fleihan's requirement that at least one of them be on site at all times. Oliver kept track of her hours of work, but Danaf did not, and Fleihan had no employment records at all. On August 8, 2004, after the motel had been open for 8 days, Fleihan gave MG Consulting an advance of $3,000.00, from which the housekeepers' wages were to be paid. When Danaf and Oliver split the amount remaining, they each had $925.00. Oliver quit the next day, as she was not happy with the number of hours she had been working (there were forest fires happening in the area, and the motel had been quite busy). Oliver had been living in a room at the motel, but she did not pay rent and had not signed any authorizations allowing rent to be deducted from her income. Oliver filed a complaint with the Director that she was owed wages, and that she had not been paid even minimum wage for the hours she worked. Fleihan alleged Oliver was not an employee, that she owed

rent and that she had damaged and removed items from the motel. Fleihan also alleged he was not satisfied with several aspects of Oliver's work, including the daily financial reports and registration cards.

The Delegate determined that Oliver was not an independent contractor but was Airport Inn's employee. The Delegate found Oliver had worked a total of 325.25 hours during the period of her employment, and computed wages and vacation pay owing at the minimum wage rate of $8.00 per hour. The Delegate dismissed Fleihan's claims for reimbursement on the basis she had no jurisdiction to allow any deductions from Oliver's pay without her written authorization.

Airport Inn's notice of appeal alleges the Delegate erred in law, and that new evidence has become available that was not available at the time the Determination was being made. The errors of law are alleged to have been made in how the Delegate arrived at her conclusion that Oliver was an employee. The new evidence consists of a ruling by the Canada Customs and Revenue Agency dated April 30, 2004, respecting the insurability of Oliver's employment for the period in question at the request of the Department of Human Resources and Skills Development Canada for the purpose of employment insurance. That ruling is addressed to Airport Inn and is based on information provided by Danaf. The relevant portion of the ruling is as follows:

> It has been determined that she was not an employee for the following reasons:
>
> You did not exercise control over her and her work because:
> - You did not control her hours of work.
> - She did not have to perform the services personally.
> - She could hire others to complete the work.
>
> The terms of her engagement allowed her the chance to profit and exposed her to a risk of loss because:
> - She was required to provide a crew of staff members to complete the terms of her contract.
>
> The services she rendered to you were performed as an independent contractor for her own business.

ISSUE

Is Oliver an employee or an independent contractor?

ANALYSIS

The word "employee" is defined in the *Act* 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 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.

The word "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.

These definitions, admittedly circular, must be given a broad and liberal interpretation, reflecting the remedial nature of this legislation (see *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 B.C.L.R. (2d) 170 (C.A.), and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986).

The Delegate applied a number of tests for determining whether an individual is an employee, derived from decisions at common law: the Control Test (whether the individual was under the direction or control of another regarding the way in which work was done); the Economic Reality Test (whether the individual had a chance of making a profit in doing the work or whether the individual had a risk of loss if the cost of doing the work is more than the price charged for it); the "organizational or integration test" regarding whether the work performed by the individual is integral to, or contributes to, the operation of the other party's business (the more integrated the work is with the business, the more likely the individual is an employee); and the Specific Result Test (whether the contract in question is to provide for a single service leading to a specific result, or whether the individual is simply required to provide general efforts on behalf of the other party). Although the Delegate found Oliver did have a chance of profit by reason of commission-based pay, the Delegate noted that many employees receive commission-based remuneration. Further, although the Delegate found there was a theoretical chance of loss because Oliver was in turn responsible for paying housekeeping wages from the 17% commission, Airport Inn's payment of an advance to cover these wages "dramatically mitigated any risk of loss for Ms. Oliver and is not indicative of a self-employed contractual relationship." All the other tests indicated Oliver was an employee.

Airport Inn submits Oliver was an independent contractor for the following reasons:

1. Oliver and Danaf formed a partnership which contracted with Airport Inn; a partnership cannot be an employee.

2. Employees would not open a bank account in the name of MG Consulting, obtain a WCB number, and register as a business with CCRA.

3. The contractor relationship is proven by the nature of the partnership's unwritten agreement with Airport Inn: if the partnership was not successful in the initial three-month period, the contract would be terminated.

4. The method of payment (17% of gross revenue) is more consistent with a contractor relationship than with an employment relationship.

5. The partnership hired and paid the housekeeping staff, and remitted source deductions from staff wages, which is something a contractor would do.

6. Oliver had the opportunity to profit from this venture, as well as the risk of suffering a loss, depending on the motel's gross revenues. Nothing should be implied from the "advance" given to the partnership by Airport Inn after the first week.

This Tribunal has consistently treated with caution the traditional "common law" tests for determining whether an individual is an employee. This is because in making that determination, the Director must

apply the statutory definition set out above. This Tribunal made the following comment in *Project Headstart Marketing Ltd.*, BC EST #D164/98:

> I need not concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee."

In *Re Kelsey Trigg*, BC EST #D040/03, the Tribunal stated:

> The fourfold test and the other traditional common law tests are becoming less helpful in determining the role of master and servant in modern workplaces. Courts and the 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 parties must be examined, with a view of determining "whose business is it?" Thus, the overriding test is whether the complainant "performed work for another". The definition of "employee" is to be broadly interpreted and the common law tests of employment are subordinate to the statutory definition.

The common law tests originated chiefly for the purpose of determining whether an employer could be held vicariously liable for wrongs done by its employee, and not for the purpose of determining whether an employee is entitled to the minimum protections of the *Act*. The inadequacies of the common law tests have been noted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, and by the Federal Court of Appeal in *Wolf v. Canada*, 2002 F.C.A. 96. The Supreme Court held there is no one conclusive test that can be universally applied at common law 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 circumstances of the case. (paras. 47 and 48)

I am not persuaded by Airport Inn that the Delegate made any error of law in her analysis. Stepping back from the common law tests and referring to the *dictum* in *Sagaz Industries*, above, it seems clear that Oliver was not engaged in business on her own account. As the Delegate noted, many employees stand to profit if they succeed in their work for the employer. The fact Oliver and Danaf entered into a partnership and the fact they paid housekeepers' wages from their commission are only two of a multitude of factors that must be considered, and are to be assigned such weight as the facts and circumstances of the case dictate. The work done by Oliver appears no different from the work performed by anyone employed to manage a motel. Fleihan was constantly present at the worksite, and exercised the type of direction and control over Oliver that any owner of a business would exercise over its manager. Oliver apparently could not make any expenditure without Fleihan's approval. The partnership notion appears to have arisen because of Fleihan's desire to employ his nephew, who apparently had no previous experience in

the accommodations industry. The Delegate found it was Danaf's lack of experience that led to the posting of a position for motel manager at the local job bank, containing the following information:

Terms of Employment: Permanent, Full-Time

Salary: To be negotiated

Anticipated Start Date: As soon as possible

Employer: RAIF Holdings

How to Apply: Contact Name: Raif Fleihan

The independent contractor notion may have appealed to Airport Inn because it seemed to absolve the company from the normal responsibilities (and liabilities) of an employer. The apparent tax advantages of being a contractor as opposed to an employee may have lulled Oliver into acquiescing to the partnership-contractor idea, after she initially approached the affair as an employee. I find there is nothing about a partnership that precludes any of its members from also being employees. The fact the parties called themselves contractors, and entered into an agreement as such, cannot defeat the minimum protections for employees set out in the *Act* -- section 4 of the *Act* renders of no effect any agreement purporting to waive these minimum protections.

The CCRA ruling is of no assistance to Airport Inn, and I do not consider that ruling to be "new evidence" capable of supporting its appeal. Not only is that ruling restricted to insurability of wages under the applicable federal legislation, but caution should be exercised in transposing it into proceedings under the *Act*, in the same way that caution is exercised in transposing decisions at common law in considering the definition of "employee" in the *Act.* The ruling lacks on its face any persuasive analysis, and appears to have been made solely on the basis of representations made by Danaf.

Airport Inn's appeal should therefore be dismissed.

ORDER

Pursuant to section 115(1) of the Act, the appeal is dismissed and Determination ER #121-929 issued on April 19, 2004 is confirmed, with interest pursuant to section 88 of the Act.

Ian Lawson
Member
Employment Standards Tribunal