

An appeal

- by -

Harrison Grill Inc.

- 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 (as amended)

TRIBUNAL MEMBER: John Savage

FILE No.: 2005A/118

DATE OF DECISION: September 9, 2005

DECISION

SUBMISSIONS

Surinder Singh Grover, for the Appellant, Harrison Grill Inc.

Ken White, for the Director of Employment Standards

OVERVIEW

1. This is an appeal by Harrison Grill Inc. (“Harrison Grill”) from a Determination of the Director dated June 3, 2005 (the “Determination”) that found Deanna Jones (“Jones”) to be an employee of Harrison Grill and not an independent contractor.
2. Jones was engaged as a waitress and subsequently as a manager of a restaurant operated by Harrison Grill. The Delegate found in his Determination that Jones was an employee of Harrison Grill. Harrison Grill took no position regarding the rate of pay other than stating that the *Employment Standards Act* did not apply because of a Contract for Hire Independent Agent Agreement (the “Agent Agreement”).
3. Consequent on the finding that Jones was an employee, Jones was awarded \$8120.28 in wages and Harrison Grill was found to have contravened sections 18, 21, 22, 40, 48, and 63 of the *Employment Standards Act*. With respect to these contraventions Harrison Grill received administrative penalties totaling \$3000.
4. The position of Harrison Grill is that Jones was not an employee, but was hired as an independent contractor under the Agent Agreement.
5. Under the Agent Agreement the relationship of the Agent “shall not be deemed to be an employee as defined in any federal or provincial statute, including but not limited to the B.C. Employment Standards Act”.
6. The Tribunal determined to hear this appeal by written submissions.

ISSUE

7. The issue in the appeal is whether the Delegate erred in law in finding that Jones was an employee of Harrison Grill subject to the provisions of the *Employment Standards Act* (the “Act”).

LEGISLATION

8. This appeal is brought pursuant to section 112 of the Act which provides for limited rights of appeal to the Employment Standards Tribunal as follows:

112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
(a) the director erred in law;

- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was being made.*

9. The issue in the appeal concerns whether Jones was an employee and Harrison Grill the employer. The terms “employee” and “employer” are defined in section 1 of 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;*

"employer" includes 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;...*

10. The purposes of the Act are, inter alia, to ensure that employees receive at least basic standards of compensation and conditions of employment:

2 The purposes of this Act are as follows:

- (a) *to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;*
 - (b) *to promote the fair treatment of employees and employers;*
 - (c) *to encourage open communication between employers and employees;*
 - (d) *to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;*
 - (e) *to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;*
 - (f) *to contribute in assisting employees to meet work and family responsibilities.*
- 1995, c. 38, s. 2.*

11. The provisions of the Act are minimum requirements and an agreement to waive those requirements is generally of no effect:

4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect. 1995, c. 38, s. 4; 2002, c. 42, s. 2, part.

FACTS FOUND BY THE DELEGATE

12. The Delegate found facts regarding Jones relationship to Harrison Grill which can be summarized as follows:

- Jones was employed as a waitress and subsequently the manager of Harrison Grill. Harrison Grill owns and operates a restaurant.

- Jones rate of pay as a waitress was \$8.00 per hour and then, as manager, \$2000 per month.
- Jones did the work normally done by an employee.
- Jones was not in business for herself and had no chance of profit or risk of loss.
- Jones did work of a general nature.
- Jones was disciplined for arriving at work late.
- Jones wore a uniform supplied by Harrison Grill.
- Jones presented herself to customers as an employee of Harrison Grill.
- Harrison Grill alleged that Jones signed the Agent Agreement but Jones denied signing such agreement. The Agent Agreement purported to exclude the application of the *Employment Standards Act*.

EMPLOYEE OR INDEPENDENT CONTRACTOR / AGENT

13. In finding Jones to be an employee the Delegate considered the Agent Agreement, and then considered whether the facts supported a finding that Jones was an employee.

The Agent Agreement

14. Before the Delegate Harrison Grill argued that Jones is an independent contractor or “agent” to which the Agent Agreement applies. The Agent Agreement purports to exclude provincial and federal legislation relating to employees. A true agent who is not an employee is not entitled to common law or statutory protections afforded employees: *Carter v. Bell & Sons (Canada) Ltd.*, [1936] 2 D.L.R. 438.
15. The preliminary issue that the Delegate left undecided in his Determination was whether Jones signed or otherwise agreed to be bound by the Agent Agreement. The evidence before the Director was that in 2002 the form of the Agent Agreement was explained to all employees with video tapes by a third party on behalf of Harrison Grill. Harrison Grill says that although Jones did not commence her employment until later, the Agent Agreement was explained to her and signed by Jones.
16. The Delegate noted certain deficiencies in the documentary evidence produced by Harrison Grill. No original agreement with Jones signature on it was produced. A copy that was produced had “white out” over the signatures and was otherwise altered. Jones denied having signed such an agreement.
17. As noted above, the Agent Agreement included provisions which purported to exclude provincial and federal legislation related to employees and specifically excluded the operation of the *Employment Standards Act*. Such an agreement, however, cannot serve to waive the statutory minimum requirements of the Act as they apply to employees: *Re 471976 BC Ltd.*, BCEST #D 013/97.
18. Section 4 of the *Act* expressly provides that the requirements of the *Act* and *Regulations* “are minimum requirements and an agreement to waive any of those requirements...has no effect”. The only exception to this provision is for certain provisions in collective agreements for unionized employees. As Jones was

not a unionized employee the exception cannot apply. Thus if Jones was an employee, as defined by the *Act*, Jones was entitled to the statutory minimum requirements of the *Act* regardless of what the Agent Agreement would otherwise provide.

19. In my opinion the Delegate did not err in finding it unnecessary to resolve the issue of whether Jones signed or otherwise agreed to be bound by the Agent Agreement. That is, even if Jones had agreed to be bound by the terms of the Agent Agreement, if Jones was an employee she could not be legally bound by that agreement insofar as it purported to exclude the provisions of the *Employment Standards Act: Re Jutt Motors Ltd.* BC EST #D 607/97, *Re Xinex Networks Inc.*, BC EST #D 068/99, *Re ABC Pipe Cleaning Services Ltd.*, BC EST #D 285/00, *Re Canadian Council of the Blind, British Columbia-Yukon Division*, BC EST #D 076/98.

Employee or Agent

20. After considering the Agent Agreement the Delegate then proceeded to analyze the relationship between Jones and Harrison Grill to determine if Jones was an employee, considering the factors of control, integration, economic reality and specific results. There are at least four common law tests of whether a person is an employee: (1) the control test, (2) the “four-fold” test, (3) the organization test, and (4) the permanency test.
21. The control test considers whether a person is subject to the control and direction of the employer with respect to the manner in which the work is done, when it is to be done, and how the employee must do. If a person is “...hired, supervised, paid wages, given directions and is subject to the disciplinary authority of the company, he or she is that company’s employee even if no set of specific directions about how to the work exists”: Levitt, Howard A., *The Law of Dismissal in Canada*, 2nd Ed., 1992, Canada Law Book, page 12,
22. The “four-fold” test examines “whose business is it” by looking at the factors of control, ownership of the tools, who bears the chance of profit and the risk of loss.
23. The organization test examines whether an individual’s work is an integral part of the business or is only accessory to it.
24. The permanency test evaluates the permanency of the relationship by considering, *inter alia*, the duties to be performed, supervision and training, with a view to determining whether the relationship is one that can be terminated at will: *Bird v. Warnock Hersey Professional Services Ltd.* (1980), 25 B.C.R. 95.
25. As can be seen from the definitions of “employer” and “employee” contained in the Act, the statutory definitions specifically incorporate some of the elements of these common law tests, while being inclusive, not exclusive, definitions. For example, the definition of “employer” includes the notion of someone who is responsible for the “direction and control” of an employee and is “responsible” for the employment. The definition of “employee” includes the notion of someone who does “work ... for another”, and who does work that is “normally done by an employee”.
26. As this Tribunal has noted, there is no one decisive test. The total relationship between the parties must be examined with a view to determining “whose business is it”, and whether the complainant “performed work normally performed by an employee” or “performed work for another”: *Re Trigg*, BC EST #D 040/03.

27. The Delegate summarized his findings regarding Jones as follows:

Based on Mr. Grover's own evidence I find that Jones was his employee. He owned the restaurant. He directed and controlled when and how often Jones would work. He paid Jones for the work she performed. Jones was involved in the operation of the restaurant. She was a waitress and then became the manager. An employee normally does such work. Jones was not in business for herself. She had no chance of profit or risk of loss. The work that Jones did was of a general nature. Jones was disciplined for arriving at work late. Employees are disciplined. If Jones was in business for herself she could not be disciplined. And Jones wore the uniform given to her by Mr. Grover and presented herself to the customer (sic) of the restaurant as an employee of the restaurant.

28. Based on these findings, the reasoning and conclusion of the Delegate that Jones was an employee to which the provisions of the *Employment Standards Act* applies discloses no error of law reviewable by this Tribunal. Indeed, based on these findings the conclusion that Jones was an employee seems inescapable.

ORDER

29. Pursuant to Section 115 of the *Act*, the appeal is dismissed and the Determination of the Delegate is confirmed.

John Savage
Member
Employment Standards Tribunal