Employment Standards TRIBUNAL

An appeal

- by -

GF North Restaurants Ltd operating as Good Fellas II
("Good Fellas")

- 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

ADJUDICATOR: April D. Katz

FILE No.: 2001/20

DATE OF DECISION: March 27, 2001

DECISION

SUBMISSIONS:

R. Constabaris	on behalf GF North Restaurants Ltd.
Dmitri Gritsaenko	on his own behalf
Victor Lee	on behalf of the Director

OVERVIEW

The Appellant, GF North Restaurants Ltd., ("Good Fellas"), a restaurant, has appealed a Determination which found that it owed a pianist, Dmitri Gritsaenko ("Dmitri") $2110.66 in wages, vacation pay and compensation for length of service. Good Fellas' appeal is based on the position that a pianist is an independent contractor and not an employee.

ISSUE

1. Did the Director err in concluding that Dmitri was Good Fellas' employee within the meaning of the *Employment Standards Act (*the *"Act")*?

2. Did the Director err in concluding that Dmitri was entitled to compensation for length of service?

3. Did the Director err in finding Dmitri was owed wages and vacation pay?

ARGUMENT

Good Fellas' disputes the finding in the Determination that Dmitri was an employee on the basis that no restaurants pay pianists as employees. To support the argument Good Fellas' provided a copy of their ledger, which showed that Dmitri had no deductions at source.

FACTS AND ANALYSIS

Good Fellas' hired Dmitri as a pianist and singer for $100 per night on August 23, 1999 plus one meal per shift. Dmitri worked until December 31, 1999. Dmitri worked six days a week. From Monday to Thursday he worked from 6:30 pm until closing and on Fridays and Saturdays he worked from 7:30 pm until closing. Good Fellas' told Dmitri what music to play and how loud to perform. Good Fellas' provided the piano and sound equipment. Dmitri was paid weekly.

In October Dmitri's was told not to come in on Mondays because business was slow. Later he was told not to come in on Mondays or Tuesdays. In late December he was told that December 31, 1999 would be his last day of work. Good Fellas' did not pay Dmitri regularly in November and December and acknowledged that wages were owed at the end of his employment.

EMPLOYEE OR CONTRACTOR

This appeal is based on Good Fellas' assertion that Dmitri was an independent contractor. If Dmitri was an independent contractor and not an employee, then the *Act* has no application and the Tribunal has no jurisdiction.

The Tribunal has had many appeals where the issue is whether the claimant is an employee. The Tribunal has reviewed many court decisions to develop criteria for analyzing this question.

The first place to look is the definitions the *Act*. Section 1 of the *Act* defines the terms "employee", "employer", and "work". Those definitions are 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 the work normally performed by an employee, ...
>
> "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.
>
> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

Section 8 of the British Columbia *Interpretation Act* requires that the definitions be given a broad and liberal interpretation which was confirmed in the B. C. Court of Appeal in *Fenton v.Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170];

> "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 *Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341, the B.C. Supreme Court noted:

> "The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship."

Section 4 of the *Act* specifically prohibits any attempt to waive the minimum requirements of the *Act* through or by agreement.

> "4. The requirements of this *Act* or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

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.

Applying these criteria to the facts in this situation it appears that Dmitri was employed on a regular basis in the restaurant to perform unique services of providing musical entertainment for the patrons. There is no written contract for services although there is no dispute about the terms of employment. Good Fellas' controlled the time of work, place of work and type of music performed. Dmitri was guaranteed compensation of $100 per night and had no risk of gain or loss in his position. Dmitri could not delegate his work to someone else. Dmitri had not hiring or firing power. Without the restaurant Dmitri had no audience. His role in the restaurant was an integral part of the evening out.

I conclude that Dmitri was an employee within the meaning of the *Act* and confirm the Determination is this respect. There is no evidence to consider that would disturb the Delegates findings in the Determination.

Good Fellas' did not dispute any of the findings in relation to the amount of wages, vacation pay or compensation for length of service. Having found that Dmitri was an employee I therefore confirm the conclusions in the Determination.

CONCLUSION

Based on the evidence before me I find that Dmitri was properly characterized as an "employee" and there is no evidence to support an error in the Determination. I deny the appeal and confirm the Determination.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination in this matter, dated December 1, 2000 be confirmed.

APRIL D. KATZ

April D. Katz
Adjudicator
Employment Standards Tribunal