Employment Standards TRIBUNAL

An appeal

- by -

Elizabeth L. McKay and Ken McKay
("McKays")

- 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: Ian Lawson

FILE No.: 2005A/61

DATE OF DECISION: September 21, 2005

DECISION

SUBMISSIONS

Marcia McNeil	on behalf of the appellants
Ruth Atterton	on behalf of the Director of Employment Standards
Thomas Harding	on behalf of the respondents

OVERVIEW

1. This is an appeal by Elizabeth McKay and Ken McKay ("the McKays") pursuant to section 112 of the *Act*. The appeal is from Determination ER#064084 issued by Ruth Atterton, a delegate of the Director of Employment Standards on March 18, 2005. The Determination dismissed part the McKays's complaint that they were owed a total of $3,745.00 in wages, annual vacation pay and a yearly bonus by Campagnolo Holdings Ltd. operating as the Aleeda Hotel ("Campagnolo"). The McKays had also complained of a number of other violations of the *Act*, all of which were dismissed save for a finding that Campagnolo had failed to keep payroll records, respecting which an administrative penalty of $500.00 was imposed on Campagnolo.

2. The McKays filed their appeal on April 5, 2005. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

3. Campagnolo operates a motel in Prince Rupert, and employed the McKays as managers between August 15, 2001 and August 10, 2003. The Determination records that on August 8, 2001, a written agreement was entered into between Campagnolo and the McKays which is described as follows:

> The agreement was for Acamac Resources or the McKays to manage the Aleeda plus cover the desk from 8:00 AM to 12:00 PM (16 hours) – 7 days a week, for $3,500.00 a month. Other staff members were hired to cover the night shift that was from 12:00 PM until 8:00 AM, 7 days a week. The McKays were responsible to supervise the staff that covered the night shift.
>
> The agreement also included an apartment with all utilities, telephone, cable, and sundry supplies paid for by the Aleeda.
>
> The McKay's [*sic*] formed a partnership called "Acamac Resources" and obtained a business number for GST purposes.

4. The "other staff members" were apparently hired by Campagnolo and paid directly by Campagnolo. The delegate does not appear to have taken a copy of the agreement, as the document is not in the record supplied to the Tribunal by the delegate. The McKays, however, admit the accuracy of the above recital of fact by the delegate and attached a copy of the agreement to their written submission. I now reproduce the agreement in its entirety, which was printed on "Aleeda Motel" letterhead:

August 8, 2001

General overview of the manager's agreed upon duties and responsibilities:

1. Responsible for the desk (including the night shift), plus coverage of two shifts per day.

2. Responsible for the running of the business.

3. Responsible for maintenance of the motel, interior and exterior.

4. Approval by owners, for any expenditure over $500.00.

5. Standard one-month's notice of termination required.

Compensation: $3,500 monthly, to be increased after a period of one year.
Apartment on premises and all utilities.
Yearly bonus of 1% of gross income.
Two weeks' paid vacation yearly, to be taken in "off season".

5. On July 29, 2002, Elizabeth McKay became ill and was not able to continue working. Ken McKay was absent as well for several months in 2002 and 2003 to accompany her for treatment in Vancouver. Campagnolo did not pay the McKays for the periods they were both absent. Between November 16, 2002 and January 31, 2003, Ken McKay managed the motel alone at the same monthly rate, and Campagnolo paid for four extra eight-hour shifts each week to cover the front desk in order that Ken McKay could attend the hospital. Upon returning from his second leave of absence with Elizabeth McKay on April 10, 2003, Ken McKay advised Campagnolo he could no longer manage the motel alone (which by the original agreement, required the McKays to work two shifts per day). While there is some dispute on the following facts, it appears Campagnolo informed the McKays on July 1, 2003 that it would no longer pay for the four extra eight-hour shifts and wages for same would be deducted from the monthly contract amount paid to the McKays (the McKays submit they were so informed in April, 2003). Ken McKay contacted the Employment Standards Branch on July 3, 2003 and discovered that he and Elizabeth McKay may in fact be employees instead of independent contractors. Ken McKay then sent a self-help kit from the Branch to Campagnolo, and advised he thought Campagnolo should continue paying for the extra shifts. Campagnolo advised the McKays it did not agree with the contents of the self-help kit and that the McKays would be terminated.

6. The Determination records that the McKays received a letter from Campagnolo's counsel on July 31, 2003, but again, a copy of that letter was not taken by the delegate, as it is not in the record provided to the Tribunal. This omission is of interest as the McKays submitted to the delegate that this letter was their notice of termination, that it contained a "form of threat and intimidation" and that it requested they sign a waiver. Counsel for the McKays attached to the notice of appeal a letter from counsel for Campagnolo dated July 31, 2003, which I presume is the same letter to which the delegate referred. Campagnolo, on the other hand, submitted to the delegate that this letter merely demanded that the McKays comply with their original contract or they would be terminated. The Determination finds that the McKays were terminated on August 10, 2003, when Linda Campagnolo arrived at the motel on August 10, 2003 and took over the McKays's duties. The letter from Campagnolo's counsel, however, states the McKays were terminated effective August 31, 2003. The McKays filed their complaint with the Employment Standards Branch on September 29, 2003.

7. On October 13, 2003, the Canada Customs and Revenue Agency ("CCRA") ruled that the McKays were employees of Campagnolo and not independent contractors. Campagnolo remitted $1,931.86 to CCRA and claims set-off against wages payable to the McKays in August, 2003. On February 21, 2005, Campagnolo deposited $1,811.07 with the Director as the net amount owing to the McKays on account of annual vacation pay.

8. The delegate found the McKays to have been employees and not independent contractors. The McKays's complaint regarding regular wages was that they were not paid between August 1, 2003 and August 31, 2003 – the delegate found no wages owing on account of the remittance of $1,931.86 to CCRA made on behalf of Ken McKay, which exceeded the wages otherwise payable to McKay for that period. Respecting annual vacation pay, the delegate found that Campagnolo owed a total of $1,293.55 to the McKays, but found no further monies were owing to them as a result of Campagnolo's voluntary payment of $1,811.07. Respecting the annual bonus, the delegate held that no bonus was payable because the McKays did not work a full year before their dismissal (the bonus for 2002 having been paid for the period August 15, 2001 to "August", 2002; and the McKays having been dismissed on August 10, 2003). Respecting the McKays's complaint through counsel that they were not paid even the minimum wage for the hours they worked, that they did not have 32 consecutive hours free from work and that they were owed statutory holiday pay, the delegate found section 1(2) of the *Act* excluded them from being deemed to be at work while on call, because the designated location of their employment was their residence. The delegate found in the alternative that the McKays were "managers" and so were excluded from the overtime and statutory holiday provisions of the *Act.* The delegate found no evidence to support the McKays's complaint that Campagnolo had withheld wages to pay its business costs. Finally, with regard to the McKays's complaint they had been dismissed solely as a result of their contacting the Employment Standards Branch, the delegate found they had been dismissed because they "had changed the conditions of employment."

SUBMISSIONS

9. The McKays's notice of appeal alleges the Director erred in law and failed to observe the principles of natural justice in making the Determination. Counsel for the McKays elucidates the grounds of appeal as follows:

1. The Director's delegate incorrectly interpreted the employment contract between the McKays and Campagnolo Holdings Ltd. in determining the number of hours per week that the McKays worked.

2. The Director's delegate erred in law in finding that section 1(2) of the *Employment Standards Act* applied to Mr. and Mrs. McKay.

3. The Director's delegate erred in law in finding that the McKays were not entitled to a bonus because they had not worked a full year.

4. The Director's delegate erred in law in finding that there was no evidence that the employer withheld wages from Mr. McKay.

5. The Director's delegate erred in law in finding that the decision to terminate Mr. and Mrs. McKay was unrelated to their complaint to the Employment Standards Tribunal.

6. The Director's delegate failed to observe the principles of natural justice in making her Determination in the following manners [*sic*]:

   a. the Director's delegate made findings of credibility without the benefit of an oral hearing; and

   b. the Director's delegate failed to take into account relevant facts.

10. The McKays submit that Campagnolo wrongly deducted wages paid for the extra shifts from their own wages, after April 15, 2003. The McKays submit section 1(2) of the *Act* does not apply to them, and rely on this Tribunal's decision in *Re Harrison*, BCEST No. D224/96, in support. It is further submitted the delegate erred by finding the McKays had not worked a "year" and the delegate should not have interpreted the contract as requiring deduction for the times the McKays were on leave during the year. The McKays also submit the delegate failed to determine their complaint that they were paid only $1,959.70 per month between April and July, 2003, and that the remainder of their wage of $3,500.00 per month was deducted and paid to other staff. It is further submitted that the delegate erred in dismissing the McKays's complaint they had been terminated because they delivered an Employment Standards Branch self-help kit, and that step was clearly one of Campagnolo's reasons for termination. Finally, the McKays submit the delegate breached the principles of natural justice by making findings of credibility in relation to the reason for termination without the benefit of an oral hearing, and by relying on information provided to her by Campagnolo which was not shared with the McKays.

11. Campagnolo responds by submitting the contract entered into by the parties was typical in the motel industry and the delegate correctly deemed a 40-hour work week for each of the McKays. Regarding section 1(2) of the *Act*, counsel for Campagnolo submits it was within the delegate's discretion to find the McKays lived at the designated location at which they were to be on call. Regarding the bonus, Campagnolo submits the contract required the McKays to work a full year as a necessary pre-condition to receiving the bonus, and argues by analogy to the *Act's* provisions regarding compensation for length of service, which it says are based on "so many weeks for so many full years of service – not portions of a year." Regarding whether regular wages were withheld, Campagnolo says Ken McKay agreed he worked only 40 hours per week for the period April to July, 2003, and accordingly the $1,959.70 he received per month amounted to more than minimum wage. Regarding termination, Campagnolo says the McKays fundamentally breached the employment contract by asserting they were employees instead of independent contractors, and by seeking to reduce the hours they contracted to work, which justified termination. Finally, regarding breach of the principles of natural justice, Campagnolo submits, *inter alia*, that any findings of credibility made by the delegate favoured the McKays, and that the delegate spoke to each side to seek further information and committed no mischief or unfairness in so doing.

ISSUES

1. Whether the delegate made any error in calculating the McKays's hours of work and rate of pay, and specifically, to what extent section 1(2) of the *Act* exempted them from the definition of "work."

2. Whether the delegate made any error in finding Campagnolo had withheld wages from the McKays.

3. Whether the delegate made any error in finding the McKays were not entitled to a bonus.

4. Whether the delegate made any error in finding the McKays's dealings with the Employment Standards Branch was a reason for termination of their employment, contrary to section 83 of the *Act*.

5. Whether the delegate failed to observe the principles of natural justice in making the Determination.

ANALYSIS

12. As in any appeal, the appellant bears the burden of demonstrating errors in the Determination – appeals before this Tribunal are not re-hearings of the matters before the Director (*Re World Project Management Inc.*, BCEST #D134/97). To re-hear every complaint would be contrary to section 2(d) of the *Act*, which states one of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of its provisions. As a result, appellants before this Tribunal bear the "risk of non-persuasion" and must first demonstrate there was some error or unfairness in the Determination on at least a *prima facie* or threshold basis in order to move the Tribunal to decide whether to exercise its authority under section 115 of the *Act* to vary or cancel the Determination. If an appellant fails to persuade the Tribunal at the threshold level that an error or unfairness has occurred, the Tribunal will not proceed to review the Determination under section 115.

13. At the threshold level, I find the McKays have failed to persuade me that any error or unfairness has occurred respecting the fifth issue identified above. While a finding of credibility in the absence of an oral hearing might raise a fairness issue, the McKays have not identified any such finding that adversely affected them in the Determination, apart from the delegate's rejection of their contention they had been terminated as a result of delivering the self-help kit. I do not see that as an issue of credibility. The McKays allege the delegate relied on information provided by Campagnolo which was not shared with the McKays, but no such information is identified or linked to an adverse finding in the Determination. In the absence of any clearly identifiable error, I decline to review any part of the Determination for breach of the principles of natural justice. I now address the remaining issues, respecting which I have been satisfied some question as to correctness arises on at least a *prima facie* basis.

Hours of Work and Rate of Pay

14. As the delegate notes, Ken McKay informed Campagnolo on April 10, 2003 that he could no longer work "80 hours" per week. The *Act* places a six-month limitation on the Director's power to order payment of wages and so the delegate could not have made any finding respecting the legality of Ken McKay's having worked 80 hours per week by himself prior to taking his second leave in February, 2003. The McKays argue, however, that the contract of employment required them to work much more than 80 hours per week – they performed duties and were on call 24 hours per day, seven days per week. The contract merely specifies that at a minimum, the McKays were to cover two day shifts in addition to being "responsible for the desk (including the night shift)." Indeed, I find the notion of an 80-hour week as used by the parties and the delegate to be misleading: the employment contract required the McKays to work at least two shifts during each day, but those two shifts were not limited to week-days but continued 7 days each week. The delegate notes this in her summary of the background facts, which I quoted in the Facts section of this decision. Accordingly, the McKays were actually working a minimum of 112 hours each week, pursuant to the employment contract.

15. Counsel for the McKays argues the delegate erred in finding the McKays were not on call 24 hours day, by operation of section 1(2) of the *Act*, which reads: "An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence." In support of this submission, I was referred to *Re Harrison*, BCEST No. D224/96 (reconsideration refused in D334/96). While that case dealt with resident caretakers in apartment buildings and so it is not directly applicable, the Tribunal considered section 1(2) and commented that any activity relating to employment which was performed by caretakers in their residences would nevertheless constitute "work." In addressing this issue in the present case the delegate stated, after quoting section 1(2), as follows:

> The qualifier here is the phrase "unless the designated location is the employee's residence", employees who are 'on call' and who are expected to remain at home (at their residence) while on call are not considered to be at work unless they actually respond to demands for services.
>
> Based on the evidence provided and on the balance of probabilities I am unable to conclude that the demands for service required 16 hours of work a day everyday as the McKays allege.

16. The McKays have not persuaded me that the delegate made any error in the applicability of section 1(2) to their work generally – like any worker who completes a shift but remains on call, if the designated location at which they are on call is their residence, they do not perform "work" unless required to perform a work activity during the time they are on call. I find, however, that the delegate fell into error when she believed the on-call issue arose during the McKays's 16-hour shifts on the desk. The on-call issue arises, instead, outside their 16-hour shifts – their contract of employment required them to be responsible for the desk, including the night-shift, 24 hours a day and 7 days per week. It is the latter period that is relevant for the purposes of section 1(2). This error indicates to me that the delegate did not inquire into the amount of "work" Ken McKay actually performed during those hours he was in his residence but not working a shift on the desk. It is the employer's responsibility to keep records of the hours worked by employees; the approach taken by Adjudicator Stevenson in *Re Harrison* to address the problem of record-keeping for after-hour work is helpful here. Accordingly, I intend to refer this question back to the Director for further investigation.

17. In referring this matter back, however, I am aware that the *Employment Standards Regulation* excludes "managers" from Parts 4 and 5 of the *Act*, which deal with minimum protections for hours of work, overtime and statutory holiday pay. The delegate found the McKays to have been managers as defined in section 1 of the *Regulation* and counsel for the McKays has wisely elected not to argue the delegate made any error in that respect. As a result, the 32-hour rest period under section 36 of the *Act* does not apply. The only issue that could arise as a result of the hours worked by the McKays is whether Ken McKay was paid the statutory minimum wage. It is clear from the Determination that the delegate did not inquire into the extent Ken McKay performed any work beyond the front desk shift he was required to perform each day, and so she did not fully investigate the minimum wage issue.

18. Assuming Ken McKay's proper monthly wage during the period in question was $1,959.70 (as I conclude in the next section), it seems by my rough calculation that he would have had to work more than 56 hours in a week in order to fall below the minimum wage. Even if that might have been the case, it strikes me that the compensation that might be payable to him as a result may be slight, in comparison with the effort that must be expended to investigate and determine the number of hours in which he was not paid minimum wage. I urge the parties to have a practical discussion with the delegate about this, before she embarks on the referral-back investigation. Perhaps, as a result of that discussion, her investigation could be narrowed by consent to those periods of time in which the appellants feel the minimum wage issue seems most likely to arise.

Withheld Wages

19. The McKays argue that the delegate did not resolve this issue, which they raised before her: whether Campagnolo had wrongly withheld from Ken McKay the balance of his $3,500.00 monthly salary when that balance was directed to other staff who were hired to take shifts he could no longer cover. As I understand the argument, the McKays's monthly salary was $3,500.00 and they were entitled to receive it even if Ken McKay ceased performing the minimum two shifts per day as set out in the employment contract. The argument is based on the premise that the McKays were on call 24 hours per day, 7 days per week. To the extent Campagnolo paid part of the McKays's salary to other staff, it is argued that Campagnolo had illegally required the McKays to pay its own business expense, contrary to section 21(2) of the *Act.* The delegate did address this issue in the Determination, stating simply that "[t]here was no evidence presented that indicated that the McKay's [*sic*] wages had been withheld to pay for the Aleeda [*sic*] business costs." Those reasons might indicate the delegate did not fully grasp the argument, but I have no difficulty concluding she came nevertheless to the correct result. If the McKays did not perform the work they contracted to do (specifically, a minimum of two shifts daily), I cannot see how the employer would still be obliged to pay their full monthly salary, regardless how many hours they might have been on call. This ground of appeal must therefore be dismissed.

20. However, as some issue arose respecting Ken McKay's entitlement to wages during the month of August, 2003, I note the delegate ruled the McKays were terminated on August 10, 2003 even though it seems clear the termination was accomplished by letter from Campagnolo's counsel on July 31, 2003 (which letter did not find its way into the record of proceedings). I further note that the employment contract provided that the parties were to receive the "standard" one month's notice of termination. The July 31 letter begins with the following words:

> "I am counsel for Campagnolo Holdings Ltd.
>
> "In accordance with the 08 July 2001 contract, this is notice of your termination. Your last day of duties will be 31 August at 12:00 noon. All of your belongings must be removed from the manager's suite by then. If you chose to leave earlier (and cease performing your duties) please so advise us. We will cooperate with you in your transition, and will make the appropriate adjustment of your management fee payment."

21. While Campagnolo does not seem to dispute that Ken McKay is entitled to his salary for the month of August (albeit reduced to $1,959.70), it is my view that he would be entitled to receive that amount for the month in any event as contractual notice of termination, even though Linda Campagnolo arrived (apparently unannounced) to take over his work responsibilities on August 10, 2005. I therefore find the delegate erred in concluding the McKays's termination date was August 10, 2005. They were given one month's notice of termination on July 31, 2005.

The Annual Bonus

22. As indicated in the brief written contract of employment, the McKays were entitled to a "[y]early bonus of 1% of gross income." The delegate ruled as follows:

> In this case, the only condition stated is yearly. The McKay's [*sic*] did not work between the period of July 29, 2002 and November 16, 2002, and February 3, 2003 and April 10, 2003. The McKays were terminated on August 10, 2003.

> I find that the bonus is related to the McKay's "working a year."
>
> As the McKay's did not work a full year between August of 2002 and August of 2003, they would not be entitled to the bonus.

23. The McKays argue they remained employees throughout the year in question, even though they were on leave for portions of it. Campagnolo argues the "year" ought to be calculated in the same way it says compensation for length of service is calculated under the *Act*: "so many weeks for so many full years of service – not portions of a year." I am not sure this argument assists Campagnolo, because it is indeed the fact of continued employment (not necessarily daily attendance at work) that supports the calculation of compensation for length of service.

24. The employment contract is clearly wanting in detail, and was not written in contemplation of leaves of absence. Nothing is said about how the bonus is calculated, and in particular, whether completion of a full year of service is a prerequisite to its payment. Like all bonuses, I find this one to have been part of the wage the McKays expected to earn from their employment, as an incentive for good performance. Although incentives or bonuses fall under the definition of "wages" in section 1 of the *Act*, the *Act* does not say anything about when bonuses are earned. This Tribunal has held that unless the employment contract specifies otherwise, bonuses are earned as work is performed and are payable as wages (*Re Teletar*, BCEST #D044/04; *Re Shell Canada Products Ltd.*, BCEST #RD488/01; *Re Bell*, BCEST #D408/98). Further, even bonuses not clearly connected to work or performance (such as a percentage of the employer's annual profits) fall under the definition of wages and are payable when earned (*Re Kamloops Ford Lincoln Ltd.*, BCEST #D392/01). While some bonus schemes do make it a condition of payment that a full year of service be performed, and parties are free to agree to such a condition, the McKays's contract contains no such condition. Instead, it states in the briefest possible words that part of the McKays's wage will be 1% of the motel's gross earnings each year. In the absence of language prescribing exactly what they must do to earn it, the McKays are entitled to receive their bonus.

25. It would be contrary to principles of contract interpretation, particularly of employment contracts, to read into this contract a provision which nullifies the McKays's entitlement if they had not worked a full "year." Common sense dictates that the bonus would be payable, for example, even when the McKays took holidays and when the motel was closed for a period each Christmas. In any event, I find the debate about whether the McKays had completed a year of service to be a small one: they commenced their employment on August 8, 2001 and so the first bonus would have been payable August 9, 2002. The second bonus would then be payable August 10, 2003, which happens to be the day the delegate found the McKays to have been dismissed (which in my view is an erroneous finding). Any way you look at it, when the McKays's employment came to an end, they had worked a year since August 9, 2002 and were entitled to receive their bonus.

26. In her written submissions, counsel for the McKays refers to the bonus as being calculated on the basis of 1% of the McKays's annual salary. It is my view (and I believe one shared by the delegate) that the bonus as set out in the employment contract could only refer to 1% of the motel's gross income for the year in question. As I do not know the motel's gross income for the year, I will refer the calculation of the bonus back to the delegate. The best indication of the parties' intentions in this respect can be found in how the bonus was calculated in the previous year.

Retributory Termination Contrary to Section 83 of the Act

27. Section 83 reads as follows:

> **83** (1) An employer must not
>
> (a) refuse to employ or refuse to continue to employ a person,
>
> (b) threaten to dismiss or otherwise threaten a person,
>
> (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment
>
> (d) intimidate or coerce or impose a monetary or other penalty on a person,
>
> because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under the Act.

28. The entirety of the delegate's reasons for Determination on this issue is as follows:

> The McKays are claiming that the Aleeda violated Section 83 of the Act when they terminated their employment due to the McKays filing of a self-help kit obtained from the Employment Standards Branch.
>
> The information I have received indicates that the McKays were requesting a change in the contract they had signed in 2002. These changes would have resulted in a fundamental change in the way the Aleeda did business. The Aleeda argues that they did not need another 40-hour employee, that would not work evenings or weekends, they required a manager and that was why the McKays had been hired.
>
> The Aleeda argues and I agree that these changes would have resulted in a large increase in the cost of running the Aleeda. The Employment Standards Act should not be interpreted to limit or otherwise affect the right of an employer to terminate an employee. The employer also has to be able to make reasonable business-related changes in the operation of the business.
>
> I find that the Aleeda terminated the McKay's [*sic*] as the McKays had changed the conditions of employment and the Agreement that they had signed in 2002, and not because they had filed a complaint with the Employment Standards Act.

29. The letter of termination issued by Campagnolo states the following, in part:

> My client asserts you were independent contractors. However, if you actually were employees of my client (as opposed to your company) then my client must make federal and provincial remittances on your behalf: Income Tax, Employment Insurance premiums and Canada Pension Plan premiums. We can assume that the payments for 2001 and 2002 were paid. But, for 2003 the amounts due come to: $1,931.86 [*emphasis in original]*. That amount will be deducted from your July and August pay. …If you wish this spread out over the three pay periods remaining ($304.05 each pay period), please so advise us.
>
> If, on the other hand, you concede you are NOT employees, then Campagnolo Holdings Ltd. will not be forced to make these deductions. You would then receive your full pay, without deductions for Income Tax, CPP and EI. But, you must acknowledge in writing that you are not employees, and agree to indemnify Campagnolo Holdings Ltd. for any claim against it for your remittances of

> Income Tax, CPP and EI premiums. Please sign the attached Release and Acknowledgement, if that is your wish….

30. While the McKays may have perceived the above portions of the termination letter as a threat, in my view, Campagnolo is managing its exposure to liability for unpaid remittances before the McKays employment came to an end on August 31. Specifically, Campagnolo made no suggestion that the McKays would continue working if they agreed that they were not employees. In my view, the letter is first and foremost a termination letter, without qualification or inducement. Counsel for the McKays makes the following submission:

> As noted above, the Director's delegate fails to note in her chronology of events the significant fact that the McKays completed and provided to their employer on July 17, 2003 a self-help kit, obtained from the Employment Standards Branch.
>
> The Director's delegate also failed to understand the significance of the fact that, within two weeks, the McKays were advised that their employment was terminated and were told that their employer did not agree with "the self-help kit."
>
> Further, the Director's delegate incorrectly suggests that the written notice of termination received by the McKays on July 31, 2003 takes issue with Mr. McKay's request to reduce his hours. When reviewed in its entirety, it is clear that the written notice of termination provided by counsel for Campagnolo Holdings Ltd. to the McKays addresses their claim with the Employment Standards Branch that they were employees and not independent contractors....
>
> The Director's delegate failed to acknowledge the McKays' submission that at no time was their performance ever put at issue and that, despite their suggestions to the contrary, the employer was not able to produce written documents that suggest that any time they questioned the performance of the McKays. Further, the written notice of termination does not suggest that there is any cause for the termination of Mr. and Mrs. McKay. Finally, the April 15, 2003 correspondence from Ms. Campagnolo to Mr. McKay acknowledges that Mr. McKay may have staff perform services for him, at his expense. This completely contradicts the suggestion that the employer terminated the McKays because of their wish to reduce their hours.
>
> Based on this information, there can be absolutely no doubt that the decision to terminate the McKays was entirely linked to their Employment Standards complaint and therefore contrary to the *Employment Standards Act*….

31. While I do agree that the termination letter is capable of being construed as a response to the self-help kit, it is equally capable of being construed as it was by the delegate. I do not read the Determination as finding the decision to terminate was based on a request by Mr. McKay to reduce his hours. A fundamental change had arisen to the initial arrangement, in that Mrs. McKay was no longer able to work. Campagnolo was free to terminate the contractual relationship the parties struck in 2001, and it is obvious from the written contract that neither party believed their relationship was as employer-employee. Regardless whether that contract was correct respecting the nature of the relationship, and regardless whether the McKays were excellent managers in every respect, Campagnolo was able to elect to terminate the relationship at any time, upon one month's notice.

32. I do not read section 83 as preventing an employer from dismissing an employee if the employee happens to deliver a self-help kit first. What matters is whether the employer's conduct amounts to some form of threat, discrimination or intimidation with the objective of thwarting a complaint or investigation under

the *Act*. In reviewing this aspect of the McKays's appeal, it is my view that they have failed to point out an error in how the delegate approached this issue. The McKays hope I might come to a different result, but I could only do so if I am persuaded the delegate committed some error or unfairness in arriving at that part of the Determination, and I am not so persuaded.

ORDER

33. I therefore allow the McKays's appeal in part. Before setting out the appropriate order, however, I must note Campagnolo's good fortune respecting the imposition of administrative penalties, which are imposed mandatorily on all employers who have been found to have violated the *Act*'s provisions. The delegate found Campagnolo had failed to pay vacation pay to the McKays, and yet no penalty was imposed for this violation, presumably in error. I will leave it to the Director to decide whether the penalty issue ought to be revisited as a result of my decision to refer the hours of work issue back.

34. Having allowed the appeal in part and found that further investigation is required, I hereby refer the following matters back to the Director, pursuant to section 115(1)(b) of the *Act*:

1. Did Ken McKay perform any work (any activity relating to the performance of his job as manager of the motel) outside of the shift he was required to perform on the desk each day between April 10, 2003 and August 10, 2003?

2. If so, was Ken McKay paid at least the minimum wage during his employment?

3. What is the bonus payable to the McKays for the 2002-2003 year?

Ian Lawson
Member
Employment Standards Tribunal