EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C.38

- by -

Thursday's Sports Plus Ltd.
Operating As Nautilus Sports Club
(the “Club”)

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 96/643

DATE OF HEARING: March 26, 1997

DATE OF DECISION: March 28, 1997

DECISION

OVERVIEW

This is an appeal by Thursday's Sports Plus Ltd. Operating As Nautilus Sports Club (the “Club”) pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination, number CDET 004258, issued on October 08, 1996 by the Director of Employment Standards (the "Director").

The Determination found that the Club had contravened sections 58(3) and 63(2) of the *Act* relating to the non-payment of termination and holiday pay. The determination found that the complainant, an aerobics instructor, was an employee, and not a contractor as alleged by the appellant, and that the Club was liable to pay to the complainant a total amount of $1301.78 including termination pay, adjusted holiday pay, and interest.

The Club appealed and alleged that the Director was in error in finding that the complainant was an employee and that in fact the complainant had agreed to change her status from employee to contractor approximately 12 months prior to termination of her services. The termination of the contract would not be covered by the *Act* and therefore no termination pay or holiday pay was payable.

APPEARANCES:

Dr Stephen Webb	Representing Thursday's Sports Plus Ltd.
Ron Corrigal	For the Director

HEARING:

At the commencement of the hearing Ms. Laural Strang was contacted by telephone in Florida and asked if she wished to participate in the hearing by telephone but she said that she did not and confirmed her agreement that the hearing could proceed in her absence.

Dr. Stephen Webb confirmed that he was the President and authorised representative of the appellant. He gave evidence under oath and called evidence from his office manager, Melanie Rozell. At the conclusion of the evidence and submissions by the appellant I also heard some further submission from Mr. Corrigal for the Director.

FACTS:

Ms. Laural Strang was employed as an aerobics instructor by the Club from May 29, 1994 until January 28, 1995. A separation form was completed on February 01, 1995 and submitted to Employment and Immigration Canada declaring that Ms. Strang had been employed as an "Aerobics Co-ordinator/Instructor" and that her employment had been terminated as she was now "being paid through consulting". The statements in the form were declared to be true by Melanie Rozell (nee Aitchison) at the time and confirmed under oath at this hearing.

Dr. Webb and Ms. Rozell both testified that Ms. Strang chose to move into contractor status at the end of January 1995 for tax purposes so that she could write off certain expenses associated with her activities. They testified that the position of aerobics co-ordinator had always been a contract position and that there was a clear understanding between the parties at the time that this was to be the nature of the relationship from February 01, 1995 onwards. In fact Ms. Rozell says that the complainant had come to her to confirm the contractual status when she received a payroll cheque for January.

I also received from the appellant a written statement sworn before a Notary Public from Ms. Michelle Shorter, the general manager of the Club, which in the circumstances of this hearing and because the facts are not significantly in issue, I am prepared to receive as evidence on the appeal. In her statement Ms. Shorter states that she has been the general manager for over 4 years and that during this time three different people had filled the position of aerobics co-ordinator. She states that it was always her understanding that the position was a contract position. She confirms that Ms. Strang initially worked as an employee and then in January 1995 the position of co-ordinator came available and that Ms. Strang took over the contract position.

Ms. Strang was paid a fixed fee of $500 per month (this was later increased to $800.00) for the co-ordinator portion of her activities and then paid the usual per session fee when she worked as a class instructor. No tax or other deductions were made at source and it was not until after she was terminated that Ms. Strang raised the issue of her employment status.

Ms. Strang chose not to appear or give sworn evidence at the hearing but in a written response, not sworn before a notary or lawyer, she does not deny the existence of an oral agreement but states that it was not valid because it was not in writing. The complainant refers extensively to Section 65 of the *Act* which sets out the exceptions to the requirement to pay termination pay to employees. Of course these exceptions only apply if the complainant was in fact an "employee" and are not definitional of "employee". I am willing for the purpose of this decision to accept Ms. Strang's written response as a submission but not as evidence where it differs from the sworn testimony before me.

The evidence which I heard and accept is that Ms. Strang's task was to co-ordinate the various aerobic classes offered by the Club with a large number of individual instructors who were paid on a per session basis. She could do this work on her own time, on site, or at home. She received a fixed fee of $500.00 (later increased to $800.00) per month for this task. In addition she could

choose to instruct some of the classes herself and would then be paid a per session fee in the same way as other instructors. She was not free, however to delegate any of her own responsibilities.

In performing her duties she reported to and was responsible to the general manager of the Club. However, she worked without supervision and she was free to perform her duties in her own way in her own time. There was no stipulation as to the hours she must work provided she adequately performed the job. She provided her own aerobic clothing and made-up and provided her own music tapes for the classes she instructed. She worked only for the appellant Company and was not at liberty to work elsewhere.

All the clients were solicited and enrolled by the Club. The Clients paid their "membership" fees to the Club. The complainant did not handle the financial aspect of the business in any way. The Club provided the facility, all the necessary equipment (such as mats, steps etc), the sound system, and the list of instructors. The program design, packaging, and marketing was done by the Club although there was much room for flexibility and for artistic interpretation within the set program. The Club set the standards and expectations for each program.

There is no doubt in my mind, and I find as a fact, that both parties and most particularly the complainant herself clearly intended, accepted and understood that the complainant's status was to be that of a contractor and not an employee. She simply chose when it suited her later to rely on the provisions of the *Act* to extract a termination payment from the Club.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the complainant was an employee of the appellant despite the mutual intention of the parties that she be an independent contractor.

ANALYSIS

The complainant's work for the Club began before the current *Act* came into force but her work was terminated after it came into force therefore pursuant to Section 128 (4) the provisions of the current Act apply.

The *Act* provides a definition of employee 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,*

> *"**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 4 of the *Act* provides that the requirements of the *Act* cannot be waived:

> ***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 (provisions relating to collective agreements)*

In my opinion Section 4 applies to the defining of the employer/employee relationship. If in fact the relationship is that of employer/employee then the parties can not agree to waive the provisions of the *Act* and treat the relationship as an independent contract. To allow such would defeat the very purpose of the *Act* to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment. Therefore the intentions of the parties, although they can be taken into consideration in considering the substantive nature of the relationship, are not decisive of the issue.

The Courts and this Tribunal have set out on many occasions the nature of the test that must be applied in arriving at a conclusion on a given set of facts. See for example *Larry Leuven* (1996) BCEST # D136/96; also BCEST # D338/96, BCEST # D364/96 and BCEST # D368/96.

The definitions in the *Act* are to be given a liberal interpretation according to our Court of Appeal. See *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170:

> "the definition 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."

The BC Supreme Court has noted that:

> "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"
> [*Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341]

Also in *Castlegar Taxi*, Mr. Justice Josephson referred to the following passage of a decision by Paul Weiler, then Chair of the Labour Relations Board:

> "The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart from the usual pattern and yet still remain an employee...But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect independent of the supposed employer."
> [*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*,(1975) 1 Can. LRBR.42]

Various tests set out by this Tribunal indicate that we will consider several factors including:

* 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 for profit / risk of loss
* remuneration of staff
* right to delegate
* discipline/ dismissal/ hiring
* right to work for more than one "employer"
* perception of the relationship
* integration into the business
* intention of the parties

Applying the above to the facts of this case, the elements which point toward an independent contractor relationship are firstly that it was clearly the mutual intention of the parties. Secondly there was little supervision of the worker and she could work her own hours which were not "tracked " by the Club. She had the authority to schedule staff. In addition she could work at home. She provided her own clothing and music tapes.

The elements which indicate an employer/employee relationship include that there was no written contract which could be looked to for assistance to indicate other than an employee/employer relationship. Other elements include the following:

* the Club controlled what work was to be done and, subject to artistic licence, the "how" of the work in that the programs were set-up and sold by the Club.
* the Club controlled the means for the worker to perform the work by providing the facility, the clients, the equipment and sound system.
* there was no opportunity for the worker to make any profit over and above the stipulated fixed monthly payment

* the worker would get paid whether clients were available or not and therefore there was no risk of loss by the worker. She was not an entrepreneur.
* all staff were paid by the Club
* the worker was not free to delegate her work
* she was not at liberty to hire and fire staff
* she was not at liberty to work for more than one person
* the work was an integral part of the business. The co-ordination and scheduling of instructors for the various classes offered by the Club was essential for the operation of the sports club. It was an internal part of the operation. The Club could not have operated without this function being done at all times.

I would add that all the fees paid for the services were paid to the Club and the clients were enrolled and provided by the Club. When Ms. Strang was not working in her position as co-ordinator she worked as an instructor which was work that she had always previously done as an employee and which was work normally done by employees.

It is an unfortunate situation, as in this case, where the worker insists upon, and benefits from, defining the relationship as a "contract" and then at the conclusion of the "contract" claims all the benefits of employment status for the term of the "contract". However, I am charged with the responsibility to apply the *Act* to the circumstances before me and, despite the intention of the parties, there is no doubt in my mind that the relationship was, in law, that of employer/employee.

ORDER

Pursuant to Section 115 of the *Act* I order that the Determination Number CDET 004258 be confirmed.

JOHN M. ORR
ADJUDICATOR
EMPLOYMENT STANDARDS TRIBUNAL