EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Global Cogenix Industrial Corporation
("Global Cogenix")

-and-

RHM International Tech Inc.
("RHM")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/91

DATE OF DECISION: April 15th, 1999

DECISION

OVERVIEW

This is an appeal brought by Global Cogenix Industrial Corporation ("Global Cogenix") and RHM International Tech Inc. ("RHM") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 25th, 1999 under file number 088346 (the "Determination").

The Director's delegate determined that Global Cogenix and RHM were jointly liable to pay their former employee, Clive Boomer ("Boomer"), the sum of $5,702.75 on account of unpaid wages (including compensation for length of service) and interest. In addition, by way of the Determination, a $0 penalty was levied pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

The Director's delegate made the following findings of fact and law:

- Global Cogenix and RHM were "associated corporations" as defined by section 95 of the *Act;*

- Boomer was an employee, rather than an independent contractor, and thus his complaint could be determined under the *Act;*

- Boomer continued in Global Cogenix/RHM's employ during the period December 16th, 1997 to January 6th, 1998 and thus was entitled to be paid for that period;

- On or about January 6th, 1998, Boomer was "constructively dismissed" (see section 66 of the *Act*) thus triggering his entitlement to 1 week's wages as compensation for length of service pursuant to section 63 of the *Act.*

ISSUES TO BE DECIDED

Global Cogenix/RHM do not take issue with the delegate's determination that that the two companies are "associated corporations" as defined by section 95 of the *Act.* In a letter dated February 11th, 1999, appended to its notice of appeal, the appellants advanced three substantive grounds of appeal; in a subsequent letter to the Tribunal, dated February 17th, 1999, two further grounds were advanced. The appellants say that the Determination ought to be set aside because:

- "the delegate...failed to properly investigate [the appellants'] response to the complaint and as a result failed to consider relevant facts";

• "the delegate's finding that [Boomer] was an employee rather than a contractor is not supportable";

• "the delegate awarded compensation which exceeds the jurisdiction conferred upon her";

• "it clearly states in the contract between [Boomer] and [RHM] that any breach of the agreement is to be settled in accordance with the provisions of the Commercial Arbitration Act (British Columbia)"; and

• "the Labour Relations Code states that a person employed by an employer and includes a dependant [sic] contractor, but does not include a person who, in the boards [sic] opinion, performs the duties of a director level position."

I shall deal with each of these grounds in turn.

ANALYSIS

I presume that the first ground of appeal relates to section 77 of the *Act* which provides as follows:

> "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond."

I find this particular ground of appeal to be wholly without merit. The material before me discloses that the appellants were originally contacted by the delegate (by telephone) on June 23rd, 1998 which contact was followed by correspondence from the delegate dated June 25th, a telephone call on July 28th, and then a further letter dated July 28th, 1998. The appellants failed to respond to a demand for production of employment records issued by the delegate on June 25th, 1998--the appellants apparently taking the [fundamentally incorrect] position that they were not obliged to respond to the delegate's demand because the records sought were "privileged". In addition, the delegate received and considered written submissions from the appellants dated June 30th and August 20th 1998. The delegate did, in my view, adequately consider Global Cogenix/RHM's position but found it to unsupported by the evidence; I might add that there was overwhelming evidence--detailed in the Determination--before the delegate upon which she could conclude that Boomer was employed by Global Cogenix/RHM during the period in question and that he was constructively dismissed on January 6th, 1998.

I agree, for the reasons set out in the Determination, that the relationship between Boomer and the appellants was an employment relationship. Although RHM documented the relationship between it and Boomer such that Boomer was characterized as an independent "Sales and Marketing Consultant", the overwhelming weight of the evidence suggests that the *substance* of the relationship--rather than its apparent *form*--was that of employment.

I should add that an objective evaluation of the terms and conditions of the "Management and Professional Services Agreement" between Boomer and RHM suggests that Boomer was an employee and not, as suggested by the appellants, an independent contractor. For example,

pursuant to the agreement, Boomer was subject to the direction and control of RHM (Article 3); Boomer was expected to devote virtually all of his working hours to RHM (Article 2); Boomer purported to waive any rights to claim "overtime pay" (Article 2); Boomer was to carry out the duties normally associated with an employed position, namely, Director of Sales and Marketing (Article 4.1); Boomer's remuneration--which was to be paid bi-monthly--was described as a "salary" (Article 5) which could be increased annually as determined by the RHM's senior officers or directors (Article 6); Boomer was entitled to be reimbursed for approved out-of-pocket expenses (Article 7); all "office expenses" such as telephone, postage etc. including any expenses associated with Boomer's maintenance of a "home office" were recoverable from RHM (Article 7); and Boomer was entitled to 4 weeks' paid annual vacation after 1 year's service (Article 10). In my view, all of these provisions suggest that the essence of the relationship between the parties was one employer-employee.

The appellants have not particularized their assertion that the monetary order in Boomer's favour exceeds that which may be awarded under the *Act.* Certainly, so far as I can gather, the award appears to be entirely in keeping with the provisions of the *Act.*

Article 14 of the aforementioned "Management and Professional Services Agreement" provides that:

> "Any controversy or claim arising out of or relating to this agreement or any breach of this agreement will be finally settled by arbitration in accordance with the provisions of the Commercial Arbitration Act (British Columbia)."

The argument that Boomer's complaint was barred by contract was not advanced during the investigation of Boomer's complaint and thus, by reason of its failure to do so, the appellants could be taken to have waived the operation of Article 14 of the agreement. Second, and more fundamentally, in my view, this provision appears to be nothing more than an undisguised attempt to suspend Boomer's right to file a complaint under section 74 of the *Act,* something that is prohibited by section 4 of the *Act.* Third, and in any event, *Boomer's claim did not arise under the agreement*--Boomer claimed unpaid wages for the period December 16th, 1997 to January 6th, 1998; *i.e.,* for a period *after* the agreement had expired (the agreement expired on December 15th, 1997--see Article 1).

Finally, the *Labour Relations Code* has absolutely no application to the present circumstances. The so-called "managerial exclusion" contained in section 1 of the *Code* relates only to bargaining unit membership. Thus, for example, a group of "managers" cannot apply for certification under the *Code* nor may they be included in a collective bargaining unit. The fact that an individual may not be an "employee" for purposes of the *Labour Relations Code* is of no consequence in terms of that person's status as an "employee" as defined in section 1 of the *Act.*

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of **$5,702.75** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

_____

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal