Employment Standards TRIBUNAL

An appeal

- by -

NuCell-Comm Inc. op. as TAC Mobility
("TAC")

- 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 Katz

FILE No.: 2003A/64

DATE OF DECISION: May 27, 2003

DECISION

OVERVIEW

NuCell –Comm Inc operating as TAC Mobility, ("TAC"), is a cellular phone sales and service company. TAC has appealed a Determination from the Director of Employment Standards ("Director") which found that it owed a sales associate, Kelly Çromie ("Cromie"), $2266.47 in vacation pay on his commission sales plus interest at the end of his employment. TAC's appeal is based on its position that Cromie was an independent contractor and not an employee within the meaning of *the Employment Standards Act*.

ISSUE

Did the Director err in concluding that Cromie was TAC's employee within the meaning of the *Employment Standards Act ("Act")*?

ARGUMENT

TAC indicates the grounds for appeal are that the Director failed to observe the principles of natural justice in making the Determination. The Appeal document has the following note "I believe that the contract was misinterpreted and that Kelly Cromie was not an employee and not eligible for vacation pay or reimbursement of stolen product." TAC appealed the finding of CCRA that Cromie was an employee. The appeal was out of time.

Cromie argues that he was an employee as determined by the Canada Customs and Revenue Agency ("CCRA") and the Director. Cromie argued that TAC had not appealed the CCRA decision prior to the deadline for appeals. CCRA had determined that Cromie was not operating a business. In the Payor's Questionnaire submitted to CCRA

FACTS

TAC hired Cromie in October 2000. Cromie worked as an inside sales representative for the first two months exclusively. He was paid as a full time employee, 80 hours per two week period, with deductions at source for employment insurance and CPP for October 2000 only. He was paid vacation pay on his base salary but not on commission sales. After the first two months Cromie was paid a base salary of $738.46 every two weeks plus commissions and he worked both as an inside sales agent and an outside sales agent. He had a key to the store and was called on to open and close the store on occasion and had to work alternate Saturdays in the store.

TAC and Cromie signed an Out-side Sales Associate Agreement. Cromie signed on October 19, 2000. When he worked outside the store Cromie could set his own hours. He was required to submit time sheets showing 80 hours of work every two weeks. He was required to submit invoices showing the details of the sale so that the office could calculate his share of the commission. He was paid $250 per month as a car allowance. No details of his car use was required. TAC provided all the equipment for the job other than a vehicle.

TAC provided coverage for WCB, life insurance, dental and MSP. TAC maintains that it paid vacation pay on Cromie's base salary in error. TAC wrote to Cromie on March 29, 2002 imposing a quota system for payment of the base salary. Cromie resigned effective April 3, 2002.

Cromie worked in the store when staff were off sick. Cromie attended trade shows, training sessions and the Motorola promotions as a representative of TAC.

ANALYSIS

The onus is on the appellant in an appeal of a Determination to show on a balance of probabilities that there is an error in the Determination, which ought to be varied or cancelled. When an appeal comes before the Tribunal an adjudicator will not disturb a finding in the Determination unless there is new evidence that was not available at the time of the investigation, or there has been a fundamental error in law or a breach of the rules of procedural fairness.

TAC appealed on the basis that it was denied natural justice. The limited detail provided suggests the lack of natural justice was denied was the finding that Cromie was an employee. There is no evidence of denial of the right to be heard, the right to know the case against them or bias. There is no evidence of a denial of natural justice.

This appeal is based on TAC's assertion that Cromie was an independent contractor. If Cromie was an independent contractor and not an employee, then the *Employment Standards Act (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.

Section 1 th*e 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.

The courts adopted Lord Denning's test as seen set out by *Lord Wright in Montreal Locomotive Works Ltd*., (1947) 1 D.L.R. 161 (P.C.), to determine if a person was an employee or an independent contractor.

> "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 CCRA applied the tests of control, ownership of tools and equipment, chance of profit and risk of loss and integration and concluded that Cromie was an employee. CCRA concluded that Cromie had a contract of service. Cromie was expected to represent TAC for 80 hours every two weeks. His territory was assigned. His contracts had to be submitted for approval. The salary and commissions were set by TAC, not negotiated. TAC provided not only training on the product but how to sell the products. All the tools needed for the work were provided by TAC. The prices for all the products were set by TAC. In

answer to the question " Whose business is it" there is no doubt that Cromie represented TAC and was not in an independent business. In fact on the Saturdays he worked in the store, Cromie had to wear the company uniform at work.

Having reviewed the evidence presented in this appeal, that was before the Delegate and the decision of the CCRA I am satisfied that the Delegate applied the correct legal test and that the Delegate's findings and determinations are consistent with and well supported by the evidence and are rational.

CONCLUSION

Based on the evidence before me I find that Cromie 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 January 16, 2003 be confirmed.

April Katz
Adjudicator
Employment Standards Tribunal