Employment Standards TRIBUNAL

An appeal

- by -

Alabon Country Kennels Ltd. operating as Alabon Country Kennels and Alabon Enterprises Ltd. operating as SPCA Thrift Store

(the "Alabon Companies")

- 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: John E. D. Savage

FILE No.: 2005A/167

DATE OF DECISION: November 8, 2005

DECISION

SUBMISSIONS

Gordon Sanders	on behalf of Alabon Country Kennels Ltd. and Alabon Enterprises Ltd.
Len Goosen, CGA,	on behalf of Alabon Country Kennels Ltd. and Alabon Enterprises Ltd.
Ivy Hallam	on behalf of the Director of Employment Standards

OVERVIEW

1. The Appellant, Alabon Country Kennels Ltd., operating as Alabon Country Kennels, and Alabon Enterprises Ltd., operating as the SPCA Thrift Store (collectively referred to as the "Alabon Companies"), appeal the Determination of the Director dated August 12, 2005.

2. The Reasons for Determination concluded that (1) the Alabon Companies employed Liane LeFebvre ("LeFebvre"), (2) the Alabon Companies were associated companies, (3) the Alabon Companies owed $4,899.48 to LeFebvre in wages and (4) the Alabon Companies breached four provisions of the *Employment Standards Act* (the "*Act*") resulting in administrative penalties in the amount of $2000.

3. Alabon Country Kennels Ltd. operates a dog kennel known as Alabon Country Kennels. Alabon Enterprises Ltd. operates a store known as the SPCA Thrift Store. Gordon Sanders is the sole director and officer of both Alabon Companies.

4. LeFebvre was engaged by the Alabon Companies from May 29, 2003 until March 24, 2004. LeFebvre was initially paid $9.00 per hour and later paid $10.00 per hour.

5. According to the Delegate "…LeFebvre was employed basically as a labourer attending pets and cleaning in the kennel..." and was involved in the "the selling of pet food …incidental to her overall job".

6. During the course of the investigation the Alabon Companies were requested to provide payroll records. The Delegate found that "Sanders acknowledged no 2003 daily time records were kept for LeFebvre when she worked at SPCA".

7. The Delegate found that there was a common direction or control exercised by Sanders over both of the Alabon Companies, there was an interchange of staff between the two companies and that work performed for one company was sometimes paid for by the other company. The Delegate concluded that there was an employment standards purpose to associate the companies and then concluded that the Alabon companies should be associated for the purposes of the *Act*.

8. The Alabon Companies appeal on several grounds. The Companies say that new evidence has become available that was not available at the hearing of the complaint by the Delegate concerning lost payroll records. The Companies also argue that LeFebvre was not an employee and the two companies should not have been found to be associated corporations.

ISSUES

9. Is LeFebvre an employee of Alabon? Should the Tribunal receive as evidence the evidence Alabon proposes to submit concerning lost payroll records? Should the Delegate have determined the two companies to be associated corporations under the *Act*?

STANDARD OF REVIEW

10. An appeal of the Director's Determination is not a new hearing of the complaint, but a limited appeal that must be founded on an error of law, a breach of natural justice, or the finding of evidence that was not available at the time the determination was made: subsection 112(1) the *Act*. The burden of establishing that a Determination is incorrect rests with an Appellant: *Natalie Garbuzova* BC EST # D684/01.

11. With respect to appeals alleging an error of law, this Tribunal has a jurisdiction similar to that of an appellate court. In a number of decisions of the Tribunal, panels have adopted the definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:

1. a misinterpretation or misapplication of a section of a statute;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a methodology that is wrong in principle.

DISCUSSION AND ANALYSIS

A. Employee or Independent Contractor

12. The first issue in this appeal is whether LeFebvre was an employee of the Alabon Companies. If LeFebvre was not an employee then wages did not owe and there were no breaches of the *Act*.

13. Mr. Len Gossen, CGA, on behalf of the Alabon Companies points out that LeFebvre was issued a T5018 in February 2004 and did not complain about that treatment. Further, LeFebvre was advised himself and Mr. Gordon Sanders that she would be "self-employed".

14. A T5018 is a Canada Customs and Revenue Agency form titled "Statement of Contractors Payments". It is issued to report subcontractor payments and is not suitable to report wages.

15. A contract of employment is unlike an ordinary commercial contract. As noted by Mr. Justice Iacobucci speaking for the majority in the Supreme Court of Canada in *Wallace v. United Grain Growers*, [1997] 3 S.C.R. 701:

> 91 The contract of employment has many characteristics that set it apart from the ordinary commercial contract. Some of the views on this subject that have already been approved of in previous decisions of this Court (see e.g. *Machtinger, supra*) bear repeating. As K. Swinton noted in "Contract Law and the Employment Relationship: The Proper Forum for Reform", in B. J. Reiter and J. Swan, eds., *Studies in Contract Law* (1980), 357, at p. 363:

> . . . the terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.
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> 92 This power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship. In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, Dickson C.J., writing for the majority of the Court, had occasion to comment on the nature of this relationship. At pp. 1051-52 he quoted with approval from P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 18:
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> [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination. . . .
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> 93 This unequal balance of power led the majority of the Court in *Slaight Communications, supra*, to describe employees as a vulnerable group in society: see p. 1051. The vulnerability of employees is underscored by the level of importance which our society attaches to employment….

16. This Tribunal, the Director and the courts will look behind the language used to establish a relationship to determine the true nature and legal consequences of the agreement: *Re North Crescent Cranberries Ltd. BC EST D#236/96, Doyle v. London Life Insurance Co.* (1984), 68 B.C.L.R. 285 (C.A.).

17. The fact that a person is advised that they will be self-employed and documents are issued consistent with that assertion is not determinative of whether a person is an employee or independent contractor. The intention of the party or parties seeking to establish a relationship does not determine the nature of the relationship in an employment context: *Re Hantula (c.o.b. Cambie Country Garden)* BC EST D #277/97.

18. Moreover, it is not the formalities of the contract of engagement that determines whether a person is an employee or independent contractor, notwithstanding that a document describing the relationship may carry some weight: *Re Three Star International Services Corp., BC EST D#333/02.*

19. The fact that an income tax form, is issued by one party, and accepted by the recipient does not establish the nature of the relationship. Indeed, it has been held that an income tax return that indicates than an individual is incorporated into a business, on his own behalf, and is not employed by another, does not resolve the issue of whether the person is in fact an employee: *Jaremko v. A.E. LePage Real Estate Services Ltd.* (1987), 39 D.L.R. (4th) 252, affirmed 60 D.L.R. (4th) 762.

20. In this case the Delegate in determining whether LeFebvre was an employee or independent contractor considered the definition of "employee" found in the *Act*. The Delegate also considered various common law tests including the "Four-fold Test", the Organization or Integration Test, the Permanency Test, the Specific Result Test, and the Economic Reality Test. The Delegate considered but rejected the notion that the income tax form or the intention of the parties determined the issue. The Reasons for Determination on this issue are thorough and logical.

21. The Delegate did not err in law in analyzing the *Act* or considering and applying the common law tests regarding whether LeFebvre was an employee.

B. Receipt of New Evidence

22. In the Notice of Appeal and in subsequent submissions the Alabon Companies assert that Ms. LeFebvre, when she left the company, "left with pay-roll book, and pay roll schedule". Mr. Sanders elaborated that it "… was brought up at hearing that Alabon Country Kennels did not have correct pay roll records". He states that information from another person indicates that person had given Ms. LeFebvre the pay roll book to do her commissions. This is the reason these records were not provided to the Director.

Mr. Len Gossen in his submission on behalf of the Alabon Companies says "…Alabon could not provide proper payroll records as their book was 'lost' and somehow recovered at the former workers premises".

23. The Appellant asks that this new evidence be considered in determining whether there has been a breach of section 28 of the *Act*.

24. The Delegate in her Reasons for Determination noted that certain payroll records were not produced. The records that were not produced were those concerning LeFebvre's work in 2003 at the SPCA thrift store. In the Reasons for Determination the Delegate found that "Sanders acknowledged no daily time records were kept for LeFebvre when she worked at SPCA".

25. The payroll records are reported by Mr. Gossen to have been "somehow recovered at the former workers premises". LeFebvre left the employment of the Alabon Companies in March 2004. The hearing of the complaint was a year later in March 2005. At the hearing on March 29, 2005, not attended by LeFebvre, Mr. Sanders asserted that LeFebvre was terminated because she stole money and merchandise from Alabon. He gave evidence that no payroll records were kept for the relevant period by SPCA.

26. The appellant, if permitted, will be adducing evidence that a recent discovery at a former employee's premises, who left under a suspicion of theft a year earlier, produced missing payroll records that were not believed to have been kept at the time of the hearing.

27. With respect to the admission of new evidence, subsection 112(1)(c) of the *Act* requires that the evidence not have been "available" at the hearing. For example, if the exercise of due diligence would have revealed the evidence then such evidence would have been available in the requisite sense: *Triple S Transmission Inc.*, [2003] BC EST # D141/03.

28. Subsection 112(1)(c) is not intended to allow an appellant dissatisfied with a Determination to simply supplement the evidence led at the original hearing: *Re Merilus Technologies Inc.*, [2003] BC EST # D171/03.

29. In deciding whether the Tribunal should receive new evidence the Tribunal noted in *Re Merilus Technologies Inc.*, [2003] BC EST # D171/03 that it has been guided by the test applied in civil courts for admitting fresh evidence on appeal: (1) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing, (2) the evidence must be relevant to a material issue in the appeal, (3) the evidence must be credible in the sense that it is reasonably capable of belief, and (4) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on a material issue.

30. In my opinion the circumstances presented here fail to satisfy the test to allow new evidence to be admitted. First, I am not persuaded that due diligence was exercised to recover the evidence in a timely matter. Indeed, the Appellant has given no explanation of what diligence was exercised to recover the new evidence prior to the hearing of the appeal. Due diligence at very least would involve determining whether payroll records had been kept.

31. Moreover, if records were missing then this information should have been presented to the Director at the hearing. Instead, the Director was informed that the records were not kept. If such records were not kept, how could they be discovered many months later? The Appellant has given no explanation of why apparently wrong evidence was given at the hearing to the Director. In the absence of such explanation, the credibility and probative value of the evidence is in doubt.

32. In my opinion the new evidence should not be received as the threshold tests for the reception of that evidence have not been met.

C. Associated Corporations

33. In considering whether two companies should be associated, pursuant to section 95 of the Act, decisions of this tribunal have identified four separate requirements: (1) there must be more than one corporation, individual, firm, syndicate or association, (2) each corporation or entity must be carrying on a business, trade or undertaking, (3) there must be common direction or control, and (4) there must be some statutory purpose in treating the entities as one employer: Re Monchelsea Investments Ltd., BC EST #D315/97, reconsideration dismissed BC EST # RD513/97.

34. With respect to this issue the Delegate made the following findings:

> "Common control or direction is established where the same person is the guiding force or managing authority for both businesses. In this case, Sanders is the sole director/officer of Alabon and SPCA, and he is the only one who controls and directs the two entities. He has the sole control of financial and legal arrangements, which govern how the entities operate. Sanders set LeFebvre's rate of pay. He is the only person who signs employees' pay cheques for both Alabon and SPCA. When LeFebvre was working at Alabon and wanted to work more hours, Sanders sent her to work at SPCA. Sanders is in control of all the employment documents relating to both entities: he represented both Alabon and SPCA to CCRA when he sent documentation regarding LeFebvre's work status. When Sanders terminated LeFebvre due to an incident at SPCA, her employment at Alabon was also terminated.
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> With respect to the direction of employees, Sanders was the one who terminated LeFebvre at both Alabon and SPCA. Sanders hired Philip, the manager for both SPCA and Alabon, who acknowledged Sanders as his employer. Philip scheduled employees' work and supervised them at both businesses, and it is obvious that Sanders delegated this duty to him. From the evidence, some employees, including LeFebvre, also worked for both entities.
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> The foregoing illustrates not only that the treatment of LeFebvre is an example of the interchange of staff between the two entities, but also that despite Sanders claims the staff were paid with separate cheques, the payroll records show this was not always the case. For example, time sheets show LeFebvre worked at Alabon in August and September of 2003, but records show she was paid by SPCA not Alabon. Since Sanders did not keep or produce any time records for LeFebvre at SPCA in 2003, I find that the records submitted are incomplete and not totally separate which is not indicative of a situation of two distinct employers that operate independently."

35. It is apparent from these findings that the companies, while separate legal entities, were nevertheless under common direction and control. The operations of the companies involved complimentary aspects of a business or enterprise. The companies had some common employees and had common officers. Decisions regarding hours, employment, and payment involved both companies and occasionally LeFebvre was paid for work done for one company by the other company.

36. The Delegate found an employment standards purpose to associate the companies under section 95 and, in my opinion, did not err in so finding.

ORDER

37. The appeal is dismissed. Pursuant to Section 115 of the Act, the Determination dated August 12, 2005 is confirmed.

John E. D. Savage
Member
Employment Standards Tribunal