Employment Standards TRIBUNAL

An appeal

- by -

Harold Becker operating as Virtual BC Internet Services and Cowichan Valley Net

("Appellant")

- 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: Ib S. Petersen

FILE No.: 2003A/138

DATE OF DECISION: June 27, 2003

DECISION

APPEARANCES:

Mr. Harold Backer	on behalf of the Appellant
Mr. John Jespersen	on behalf of himself
Mr. Ian MacNeil	on behalf of the Director

OVERVIEW

This is an appeal, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director's Delegate issued on April 4, 2003 (the "Determination"). In the Determination, the Delegate concluded that Mr. Jespersen was an employee of the Appellant and not, as asserted, an independent contractor. The Delegate accepted Mr. Jespersen's claim for compensation for length of service, regular wages and vacation pay. He rejected a claim for commissions. The delegate awarded a total of $1,465.74 including interest.

The background facts may briefly be stated as follows. Mr. Jespersen was retained as a manager of a computer sales and service business in late July 2001, at a salary of $1,600 per month. Originally the parties contemplated a written agreement, which expressly provided that Mr. Jespersen was an independent contractor. This agreement was never executed. He worked until February 10, 2002, when the Appellant decided to terminate the arrangement because he did "not fit in the function of managing my business on my behalf."

FACTS AND ANALYSIS

The Appellant is seeking to set aside the Determination on the ground that the Delegate erred in law and the basic issue is whether the Delegate erred in concluding that Mr. Jespersen was an employee. The Appellant has the burden to persuade me on that the Determination is wrong and, briefly put, I am of the view that he has not met that burden.

As often stated, the application of the statutory definitions of "employee" and "employer" is not as easy as one might expect. A useful summary is set out in my decision in *Knight Piesold Ltd.*, BC EST # D093/99:

> "Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, Wiebe Door Services Ltd. v. Minister of National Revenue (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. Employment Law in Canada (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in Montreal v. Montreal Locomotive Works, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties.

> In some cases it is possible to decide the issue by considering the question of "whose business is it"."

It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986).

The Determination notes that the Tribunal has "always looked to the Four Fold test and other indicators" to determine status. Principally relying on the factors of control, ownership of tools, chance of profit, and risk of loss, the Delegate concluded that Mr. Jespersen was an employee, he was "not in business for himself."

I am of the view that the appeal has no merit. The Appellant says that the Delegate was wrong. I disagree. The Delegate's analysis, while brief, is based on the relevant facts and law. Management is an integral part of the operation of a business. He was paid a salary and, therefore, had no opportunity for profit or risk of loss. It does not matter that the amount was proposed by Mr. Jespersen. Even if Mr. Jespersen's pay would increase if the business became profitable, that does not, per se, point to an independent contractor relationship. There is nothing to suggest any investment by Mr. Jespersen in the business. The premises, equipment etc. were owned by the Appellant. He was engaged to manage the Appellant's, not Mr. Jespersen's, business, and its employees, and was terminated because he did "not fit in the function of managing my business on my behalf." Often, as noted above, the question of status may be answered by the question "whose business is it."

In short, the appeal fails.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated April 4, 2003 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal