EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act

-by-

Lynn Swetnam

("Swetnam")

-of a Determination issued by-

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/431

DATE OF DECISION: September 5, 1996

DECISION

OVERVIEW

This is an appeal brought by Lynn Swetnam ("Swetnam") pursuant to section 112 of the Employment Standards Act (the "Act") from Determination No. CDET 003061 issued by the Director of Employment Standards (the "Director") on June 27, 1996. The Director determined that Cordova Cafe Ltd. ("Cordova") did not owe any wages to Swetnam and, therefore, had not contravened section 17(1) of the Act. While the Director acknowledged that services were performed by Swetnam at the cafe owned by Cordova, it was determined that such services were not rendered pursuant to a contract of employment.

FACTS

Many of the important background facts, and in particular, the arrangements negotiated between Ms. Swetnam and Mr. Andrew Jordan, the sole director of Cordova, are set out in a related decision numbered D229/96 (*Swetnam and Polukoshko*). In short, negotiations with respect to a share purchase agreement were conducted between Ms. Swetnam and Mr. Jordan throughout the latter part of 1995. Ms. Swetnam was to acquire all of the issued shares of Cordova by way of a purchase from Mr. Jordan (who I understand was the sole shareholder, director and officer of Cordova). In the end result, the share purchase did not proceed and both Ms. Swetnam and Mr. Jordan maintain that the other has breached contractual obligations arising from the abortive share purchase agreement. Ultimately, the shares were sold to another purchaser in an unrelated transaction.

Ms. Swetnam's claim was denied by the Director on the ground that she was an employer and not an employee. I have, however, found in the *Swetnam and Polukoshko* decision (issued concurrently with this decision) that Cordova was the only employer throughout the period encompassed by the present claim. However, it does not inevitably follow from that decision that Ms. Swetnam was also an employee of Cordova during the period May 1 to October 1, 1995. Indeed, while I am of the view that Cordova was the employer of Polukoshko, I am not of a similar view with respect to Swetnam.

After a careful review of the documents filed in this matter, and in particular the handwritten "agreement" dated May 1st, 1995, signed by both Swetnam and Jordan, I am of the opinion that the parties did not intend, and did not in fact, enter into a contract of employment with Cordova as the employer and Swetnam as the employee. By the terms of the agreement of May 1st, Swetnam entered into a form of joint-venture, possibly a legal partnership (I say possibly because while the parties may have intended to enter into a partnership, the agreement itself may be too vague to be legally enforceable), with Mr. Jordan whereby the parties were to share profits and both were obliged to contribute to capital expenditures.

While it seems clear that Swetnam did provide services at the cafe (primarily, as a manager of the operation), I am of the opinion that such services were provided in the expectation of reward pursuant to the parties' joint-venture or partnership agreement which contemplated, in due course, a share transfer from Jordan to Swetnam.

In order for Swetnam to be an employee, Cordova must be characterized as the employer. However, in looking to the nature of the agreement between the parties and the measure of independence given to Swetnam, especially in terms of managing the enterprise, I cannot conclude that Cordova was Swetnam's employer during the relevant period. The parties were co-venturers, intending to share profits and capital expenditures.

In my opinion, whatever claims Swetnam may have against Cordova lie outside the ambit of the Act. Swetnam may have a claim against Cordova for breach of the joint-venture or partnership contract, or, if the contract itself is too vague (and therefore void), then possibly a claim under the doctrine of *quantum meruit,* but such claims cannot be pursued under the Act as there was no employment relationship between the parties.

Although I am of the view that Swetnam's claim ought to have been dismissed for somewhat different reasons than set out in the Reason Schedule appended to the Determination, the net result is the same.

ORDER

Accordingly, pursuant to section 115 of the *Act,* I order that Determination No. CDET 003061 be confirmed.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal