

EMPLOYMENT STANDARDSTRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act

- by -

North Crescent Cranberries Ltd.
("North Crescent")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John McConchie

FILE N_{O.}: 96/305

DATE OF H_EARING: August 12, 1996

DATE OF D_ECISION: August 30, 1996

DECISION

OVERVIEW

This is an appeal by North Crescent Cranberries Ltd. pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against Determination No. CDET 3562 issued by the Director of the Employment Standards Branch (the “Director”) and dated April 16, 1996. The Determination found that Hans Linder, the complainant, was an employee of North Crescent at the time of his termination and was entitled to (3) three weeks compensation in view of his service. The Determination required North Crescent to pay the total sum of \$1,522.13 representing \$1470 in compensation pay and \$52.13 interest to April 16, 1996.

North Crescent has appealed the Determination alleging that the Director erred in finding the Linder was an employee and alleging, as well, that he had not been fired but had quit his employment.

A hearing was held on August 12, 1996 at which time I heard evidence under oath.

FACTS

The following facts are not disputed. The appellant is a cranberry farm in Delta. Linder began working for the company in 1993. He invoiced his work to the company through ‘H.L. Contracting’. H.L. Contracting is not an incorporated company – it is simply a name used by Linder for invoicing purposes.

Linder had not worked on a farm before although he was handy with appliances. As he put it in his testimony, “I had never sat on a tractor before [I started working for the company].” However, whenever necessary, Albert Weaver, the company’s owner and manager, showed Linder how to perform the various tasks required of him. Linder worked five days per week and sometimes more. While with the company, Linder did all manner of necessary work around the farm, much of what he described as “projects” including building roads along the cranberry fields, putting in sprinkler systems, planting fields, building dikes, and so forth. He did so working with the vehicles and equipment of the company. He worked between 7 and 12 hours per day. He was paid \$10.50 per hour to start. This went to \$14.00 per hour in 1996. Linder did odd jobs for others on the side fixing small appliances but only when he had time, usually in the evenings and on the odd weekend.

There were no benefits provided to him because Linder was invoicing the company as a contractor. He attempted to get WCB coverage but WCB refused to cover him because only the

employer can receive coverage. The company ended up having to pay the premiums to ensure that he was covered.

The parties have a different view of both how the relationship began and how it ended. Weaver testified that Linder asked him to permit him to work as a contractor so that he could write off expenses connected with his other work. Linder testified that Weaver asked him to invoice the company through a corporate vehicle, and did not want to pay him benefits. Turning to the concluding part of the relationship, in August 1995, Linder had just returned from a trip to Sweden. He worked several days in a row and then, one morning, was late arriving at work by some 15 minutes. In his testimony, he agreed he had no excuse – it just happened. According to Linder’s testimony, both he and Weaver were in a bad mood. Weaver confronted him about coming late. Linder told Weaver: “Albert, you never hired me, how can you fire me ?” Linder testified that Weaver then went to his truck and removed the keys to the shop which were on Linder’s key ring. He then asked Linder for a final invoice, which Linder prepared on the spot. Weaver paid the invoice and Linder left.

Weaver remembers the incident somewhat differently. He testified that the words used by Linder were “I’m an independent contractor, I can show up when I want to.” He then told Linder that if he felt that way, why didn’t he just go home. Linder replied that he would go home if he was paid up to date. The relationship was over.

Linder testified that this event was catastrophic for him. He needed the job and money badly. He was not even in a position to apply for UIC after having worked on the farm for some 3 years.

ISSUES

There are two issues in this case:

1. Was Linder an independent contractor or an employee ?
2. Did Linder quit his employment or was he fired ?

ANALYSIS

The evidence of Linder and Weaver conflict with one another in the areas I have identified. In these circumstances, it is my task to make a finding on fact based on a determination of the credibility of the witnesses in the circumstances of this case. An assessment of credibility is made not to determine merely whether one or more persons are lying to the Tribunal but rather to determine which story is more probably true in all of the circumstances. It is possible for

witnesses to testify with sincerity, and yet be mistaken or untruthful. The passage of time and the introduction of self-interest can have this effect. The following excerpt from the B.C. Court of Appeal decision in *Farnya v. Chorny* illustrates the manner in which a determination of credibility must be made:

*“The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. **In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities that a practical and informed person would readily recognize as reasonable in that place and in those conditions** . . .”* (Farnya v. Chorny (1952) 2 D.L.R. 354, B.C.C.A., my emphasis)

In this case, I have decided that I must prefer the testimony of Linder wherever it conflicts with that of Weaver. On these points, Linder’s testimony was consistent with the probabilities whereas the testimony of Weaver was not. I find it improbable that Linder would have asked Weaver to permit him to be an independent contractor so that he could write off expenses associated with other contracting work. Linder did very little other contracting work – he had few expenses. As far as the work with the company was concerned, Linder used the tools and equipment of the company. There was nothing to write off. As he testified, Linder would have been much better off as an employee with employee benefits.

Similarly, in the meeting which concluded their relationship, Linder’s testimony is more probable than that of Weaver. I find it improbable that, after several years in a job which occupied him on a daily basis, week-in and week-out, that Linder would make the statement that he could come to work when he wished as he was an independent contractor. There was nothing in the working relationship between Linder and the company which would suggest that he could come and go as he liked. It is more probable that Linder, still upset by the absence of employee benefits that he wished to have, would tell Weaver that he could not fire him because he had never hired him. However, as events proved, he was wrong about that.

These findings, taken together with the undisputed facts, have led me to the conclusions that (a) Linder was an employee; and (b) Linder was terminated by the company and did not quit his employment.

INDEPENDENT CONTRACTOR V. EMPLOYEE

The law with respect to when an individual is an independent contractor, as opposed to an employee, is set out in the following lengthy passage from the Tribunal’s recent decision in **Larry Leuven**, BCEST (1996) #D136/96:

Section 1 of the *Act* contains the following definitions:

"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 work normally performed by an employee,
- (c) a person being trained by an employer for the employer's business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall;

"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.

- (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

These definitions must be given a liberal interpretation according to the BC Court of Appeal [**Fenton v. Forensic Psychiatric Services Commission** (1991)56 BCLR (2d) 170].

It is these statutory definitions that I am required to interpret and apply to the facts of this appeal. [**Yellow Cab Ltd. v. Board of Industrial Relations** (1992) 114 DLR(3d) 427(SCC)]. However, there are several factors which have developed in the common law that assist the decision-making process. These factors include the following:

- Control by the employer over the work;

- ownership of tools;
- chance of profit/risk of loss;
- remuneration of staff;
- discipline/dismissal/hiring;
- perception of the relationship;
- intention of the parties; and
- integration into the employer's business.

The BC Supreme Court has noted that:

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

[Castlegar Taxi v. Director of Employment Standards (1988) 58 BCLR (2d) 341]

In the **Castlegar Taxi** case, Mr. Justice Josephson referred to the following passage from a decision of the BC Labour Relations Board:

The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee...But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer.

[Hospital Employee's Union v. Cranbrook and District Hospital (1975) 1 C.L.R.B.R. 42] “: (at pp. 5-7)

In this case, the fact that Linder invoiced the company through H.L. Contracting does not change the essential nature of the relationship from one of employment. An examination of the following factors makes this clear:

Control by the employer over the work: The company assigned Linder to work and controlled the way he did it. Linder was often personally instructed by Weaver in how to perform the tasks to which he had been assigned as he had not worked previously on a farm.

Ownership of tools: the company owned the tools. Linder worked with them.

Chance of profit/risk of loss: Linder was paid an hourly rate. There was no chance of profit or risk of loss.

Intention of the parties: the parties were not in agreement on the nature of the relationship.

Integration into the employer's business: Linder was fully integrated into the company's business – among others, he was the person who Weaver left in charge to make sure the work got done when Weaver was unable to be present.

TERMINATION V. QUIT

The issue was framed in the following way by adjudicator Stevenson in the recent Employment Standards Tribunal decision in *Burnaby Select Taxi Ltd. and Zoltan Kiss* [1996] BCEST #D091/96:

“The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment. The rationale for this approach has been stated as follows:

“ . . . the uttering of the words "I quit" may be part of an emotional outburst, something stated in anger, because of job frustration or other reasons, and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship.”

(Re University of Guelph, (1973) 2 L.A.C. (2d) 348)”

In this case, there are no *clear and unequivocal facts* to support a conclusion that Linder quit his employment with the company in his exchange with Weaver. Nothing that was said was unequivocal with respect to intent. Instead, the most significant action was that of Weaver in reaching into Linder's vehicle, picking up his key chain, and taking from it the keys to the company's shop. This was an action which meant that Linder would not be working there anymore. For his part, Linder felt devastated by these events, and had no intention of voluntarily withdrawing from the company.

The company has not discharged its onus of establishing that Linder quit his employment with the company.

ORDER

Pursuant to Section 115, I order that Determination No. CDET 3562 be confirmed.

John McConchie
Adjudicator
Employment Standards Tribunal

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