Employment Standards TRIBUNAL

An appeal

- by -

434123 B.C. Ltd., operating as Chianti Café & Restaurant
(the "appellant")

and

347570 B.C. Ltd., operating as Chianti Café & Restaurant
(the "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.: 2002/036 and 2002/037

DATE OF DECISION: June 6, 2002

DECISION

APPEARANCES:

Mr. E. Ajit Saran	counsel, on behalf of the companies
Ms. Marianna Scott	on behalf of herself
Ms. Debbie Sigurdson	on behalf of the Director

OVERVIEW

This is an appeal by the two Appellants, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of two Determinations issued by a Delegate of the Director of Employment Standards on January 9, 2002 (the "Determinations"). In one Determination, dealing with 434123 B.C. Ltd., operating the Chianti restaurant in West Vancouver, the Delegate concluded that Ms. Scott, who had worked as a bookkeeper from May 1996 to March 21, 2001, was an employee, not an independent contractor, and was owed $2,416.33 on account of compensation for length of services and vacation pay. Ms. Scott was paid $800 per month. In the other Determination, the Delegate concluded that Ms. Scott had been an employee of 347570 B.C. Ltd., operating the Chianti restaurant in Vancouver, from May 1, 1991 to March 21, 2001. For that restaurant, Ms Scott was paid $1,400 per month and the Delegate concluded that Ms. Scott was entitled to $7,101.80 on account of vacation pay and compensation for length of service.

ISSUE

The basic issue to be resolved is whether Ms. Scott was an independent contractor, as asserted by Appellants, or an employee as the Delegate had concluded.

FACTS AND ANALYSIS

The Appellants have the burden to persuade me that the Determinations are wrong. For the reasons that follow, I am of the view that they have not met that burden.

The Delegate considered the statutory definitions of "employee" and various common law tests. The analysis of the facts are relatively similar with respect to both Appellants, though, obviously, some dates, times, hours of work and compensation are different. Substantially, Ms. Scott had the same relationship with both Appellants.

The Delegate's analysis included the following:

- Ms. Scott was hired in May 1996 as an employee at the West Vancouver location. She was hired as an employee at the other location in 1991. She was hired and trained.
- In 1997, the parties agreed to remove her form the payroll. In the Delegate's view, this does not change her status as an employee.

- The work performed by Ms. Scott was integral to the operation of the restaurants: payroll, filing, cash deposits, accounts payable and receivable, invoicing and monthly financial reports.
- She performed general bookkeeping and administrative duties. The services were not for a specific term or project.
- The relationship between Ms. Scott and the Appellants was ongoing and continuous, and had been in place for between ten and six years.
- Although some work was performed at Ms. Scott's home, the bulk of the work was done at the restaurants.
- Ms. Scott had a regular schedule of days at the restaurants. On Sundays, Tuesdays and Thursdays, she worked, according to the Employer's own evidence, at the Vancouver restaurant. On Mondays and Wednesdays, she worked at the West Vancouver restaurant. She came to work mid-morning and left mid-afternoon. Again this is the Employer's own evidence.
- Ms. Scott received a monthly salary and did not have a chance of profit or risk of loss.
- Ms. Scott used her own computer--using the restaurants' software--when she worked at home. At the restaurants she used their offices and computers.
- Ms. Scott performed bookkeeping services for another restaurant for a period of time.
- The Appellants had control and direction over the work and the method by which it was done.

The Delegate considered the statutory definition of "employee" in light of the common law tests often applied in these type of case.

The Employers, as mentioned, are of the view that Ms. Scott was an independent contractor and, as such, not entitled to vacation pay or compensation for length of service. The Employers are concerned about the liability arising from what they consider different test under different statutory regimes, in this case, differences between the Income Tax Act and the Employment Standards Act. The nub of the appeals is that Ms. Scott intended that type of relationship with the Appellants, that she agreed to it (or, in fact, initiated it), and that she did not complain about it--or vacation pay--until after the termination of her relationship with the Appellants. They point to her role in the company, namely payroll and that she misled the appellants. Ms. Scott provided payroll services to "other companies of her choice and picking." The Appellants state that Ms. Scott invoiced them and it is relevant how she treated the income from them from a tax perspective. The Appellants want a hearing to deal with issues of credibility.

The appeal is, not surprisingly, opposed by both the Delegate and Ms. Scott. Both argue that a hearing is not necessary. Ms. Scott states that there is no credibility issue. She point out that the witnesses interviewed and referred to in the Determination are the Employer's witnesses (managing partners) and that they gave evidence to the Delegate favourable to her. The only person who disagreed is the controller, who had been with the Appellants for a relatively short time. She also denies that she invoiced the Appellants. Ms. Scott argues that the common law tests favour a finding that she was an employee.

The Delegate is seeking to uphold the Determination and refers to the facts and law stated there. In a addition, she argues that the Employer did not provide copies of invoices, or provide evidence of those, during the investigation, and states that the controller told her that Ms. Scott did not submit invoices to her. The Delegate argues that Ms. Scott's status for the purposes of the Income Tax Act is irrelevant.

The application of the statutory definitions of "employee" and "employer" is not as easy or simple as one might have expected. I my view, 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"."

The following observations from that case is also relevant in the case at hand:

> "I accept that the intent of the parties was that Johnson was an independent contractor. As well, I accept that the relationship was established in good faith. The Employer relies on a decision of the Supreme Court of British Columbia, Straume v. Point Grey Holdings Ltd., <1990> B.C.J. No. 365, for the proposition that weight should be given to the parties' intentions. In that case the court found that a farm manager was an independent contractor (contract for service) and not an employee (contract of service). The decision, which arose out of a claim for wrongful dismissal, i.e., an action in common law, appears to be based to a large extent on the degree of control exercised by the alleged employee: he had great flexibility in his hours of work, when he took vacations, and he successfully resisted control over reporting weekly hours. In my view the decision does not reflect the law applicable to this case. If I am wrong in that respect, I find that the facts of that case can nevertheless be distinguished from those in the case at hand. Moreover, this case concerns employee status under the Act. In Straume the court noted, at page 3, that "the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature". As noted in Christie et al., above, at page 2.1-2.2 with respect to the common law tests of "employee" status:
>
> > "In each of these contexts the purpose of characterizing a relationship as employment is quite different from the purpose of the characterization in the action for wrongful dismissal, the traditional common law action in which the two-party relationship that is the subject of this service is elaborated, to say nothing of the purpose of particular statutes in which the term may appear. ... It follows that precedents arising under common law or under a particular statute can be legitimately rejected or modified when the question of "employee" status is asked for a different purpose."
>
> While the parties intent is relevant in an action for wrongful dismissal, i.e., an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor. 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 (see, for example, Machtinger v. HOJ Industries Ltd., <1992> 1 S.C.R. 986). As well, Section 4 of the Act specifically provides that an agreement to waive any of the requirements is of no effect.

Ms. Scott relies on *Straume*, above, in her submission. Ms. Scott may well have intended an independent contractor relationship with the Appellants, she may even, as suggested by them, have initiated the change. There is no doubt that she started as an employee. As the same, in the circumstances of this case, I am not prepared to accept that intent is determinative. I agree it is a factor to be considered in light of the statutory definitions, the purposes of the statute, and the traditional common law tests applied to give meaning to the definitions. As noted by the court in Straume, "*the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature*".

The Appellants assert that Ms. Scott invoiced them for her services. Even if I accept this as true, and she denied this, this is a fact that must be assessed in the context of the entirety of the relationship between the parties and, to reiterate, in light of the statutory definitions, the purposes of the statute, and the traditional common law tests applied to give meaning to the definitions. In itself, the rendering of invoices does no make her an independent contractor.

Before leaving that point, I note that the Appellants--curiously, as this is an important aspect of their case--have not seen fit to provide any copies of these invoices with the appeal. Nor is there any explanation of why the controller told the Delegate during the investigation that Ms. Scott did not invoice the Appellants.

Two other matters require comment. The Appellants assert that Ms. Scott provided her services to other companies. According to the Determination, Ms. Scott denied operating a "book-keeping" business. She admitted that she prepared a 10-12 income tax returns per year during the tax season and that she provided book-keeping services to another restaurant on a flat fee basis. In light of the evidence, set out in the Determination, and largely not in dispute, I do not believe that fundamentally alters the relationship between the parties. This includes that Ms. Scott worked at the Appellants' restaurants, she worked with their computers and equipment, and she had regular working hours there.

The Appellants also state that Ms. Scott never complained about the relationship and the lack of vacation pay until after the relationship came to an end. While I can appreciate the Appellants' perspective, the task before me, from my standpoint, is whether or not the relationship was an employment relationship for the purposes of the *Act*. In practice, these determinations are often made after the fact, when the relationship between the parties have broken down. All the same, if Ms. Scott is found to be an employee, she is entitled to the protections provided by the *Act*. In any event, the *Act* specifically contemplates this situation. Section 4 provides expressly that the requirements of the *Act* and Regulations are minimum and "an agreement to waive any of those requirements is of no effect." In short, the parties are not capable of contracting out of the statutory requirements.

It is regrettable if a person is found to be an employee for the purposes of the *Income Tax Act* and not under the *Employment Standards Act*. It may well be that Revenue Canada and the Tribunal have "a different manner of classifying the employer-employee relationship." All the same, my jurisdiction is the *Act*. From a practical standpoint, a proper determination under the *Income Tax Act* will probably have some persuasive value. The tests applied are very similar--both rely on the traditional common law tests--although the statutes serve different purposes. I note that the Appellants, in this case, do not even have a ruling from the Revenue Canada. In fact, the Appellants do not address the definition, the statutory purposes, and the common law tests. They simply express regret that they may face certain liabilities under the *Income Tax Act*. In the circumstances, I am not persuaded that the Delegate erred in her conclusions.

On my view of the statute, the common law tests and all of the evidence, I agree the Delegate and Ms. Scott's submissions that she was not an independent contractor, she was an employee.

In light of the evidence, I see no need for a hearing.

In my view, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated January 9, 2002 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal