Employment Standards TRIBUNAL

An appeal

- by -

T.Z.F. International Herbs Investments Inc.
("TZF" or the "Employer")

- 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.: 2001/60

DATE OF DECISION: May 25, 2001

DECISION

APPEARANCES

Mr. Wei Shao	counsel for the Employer
Mr. Ben Hou Liu	on behalf of himself

OVERVIEW

This is an appeal by TZF pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on December 19, 2000 which determined that Liu was an employee of TZF and that he was owed $10,081.12 on account of wages and vacation pay.

TZF argues that the Determination is wrong because Liu was, in fact, an independent contractor akin to a partner in the business and not an employee and, therefore, is not entitled to the amount awarded. TZF indicated at the hearing that there is also a dispute with respect to the amount owed should I find that Liu was an employee.

FACTS AND ANALYSIS

The appellant, in this case TZF, has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am not satisfied that TZF has met that burden.

The basic background facts may be gleamed from the Determination. TZF operates a business selling herbal remedies. Liu worked for TZF for a relatively short period of time between September 1, 1999 and November 15, 1999. According to the Determination Liu was engaged as the general manager for the business and he was entitled to be paid a salary of $6,000 per month.

The main issue before me is whether Liu was an employee or an independent contractor and that the relationship between Liu and TZF was akin to a partnership. The Employer had put that proposition to the delegate. The delegate, after setting out the Employer's and Liu's positions in some detail, applied a number of the common law tests in making his determination that Liu was an employee and not an independent contractor. The delegate did mention that there was no evidence of an "equity stake" but did not consider the "partnership" aspect of the relationship in any great detail. It is fair to say that the main point of the Employer's submissions to the delegate was that Liu was simply an independent contractor.

The *Act* defines an "employee" broadly (Section 1).

> "employees" includes
>
> (a) a 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,
>
> An "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;

The application of these definitions is not as easy or simple as one might have expected, given the primary target group of the *Act*. The definitions have a tautological quality to them. However, as noted an a relatively recent decision of the Tribunal (*Knight Piesold Ltd.*, BCEST #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"."

In my view, the true nature of the relationship considering all the factors must be considered (see *Walden v. Danger Bay Productions Ltd.*, April 7, 1994, BCCA No. CA 016174 and CA 016176, unreported). However, there are important *caveats* to the reliance on the common law tests. First, it is well established that the definitions in the *Act* are to be given a broad and liberal interpretation. Second, my interpretation must take into account the purposes of the *Act*.

Even if I accept that the parties had intended the relationship to be an independent contractor relationship, in *Straume v. Point Grey Holdings Ltd.,* <1990> B.C.J. No. 365 (B.C.S.C.), 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". 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. 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."

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. The Tribunal has on many occasions confirmed the remedial nature of the *Act*.

Section 2 provides:

2. The purposes of this Act are as follows:

   (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

   (b) to promote the fair treatment of employees and employers;

   (c) to encourage open communication between employers and employees;

   (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

   (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;

   (f) to contribute in assisting employees to meet work and family responsibilities.

TZF says that Liu agreed, when he was hired, to perform services as a consultant or an independent contractor, *i.e.*, not as an employee for the purposes of the *Act*. Liu does not agree with that assertion. He does not dispute, and, in fact, it is common ground, that he was engaged as a consultant prior to September 1999 to prepare a market analysis for TZF's products and was paid a total of $2,000 for this work. There is no dispute between the parties that Liu was not an employee at this initial stage: he was engaged to prepare the market analysis, though it appears that he over time became involved in other aspects of the business, such as the development of a label for the product.

Eric Quing, who testified for the Employer, explained that he first met Liu after his arrival in Vancouver from China. Liu at that time ran a health food store and was in a position to provide suggestions about the business and TZF's product, Snow Lotus Tea. Liu also started selling the product in his store. The principals of TZF agreed to have Liu prepare a market analysis for Snow Lotus Tea. Quing explained that Liu would be paid $2-3,000 for this work. Initially, TZF paid Liu $1,000 of this amount and, when Liu was not satisfied, paid another $1,000. The three principals of TZF, none of whom were English speaking or had Canadian business experience, were of the view that Liu's experience would be assistance and engaged him as the general manager when the business was established in September 1999.

Quing testified that there was a verbal agreement that Liu "promised" to "cooperate" with the principals and was to become partner in the company and, when the company went public, was going to receive " a certain amount of shares" for his work. TZF says that there was no agreement that Liu was going to be paid a salary. There is no dispute that TZF paid Liu $6,000 in early October 1999. Quing's evidence was that this amount was paid to compensate Liu for the losses he had suffered in his own business and would suffer in the future because of his involvement with TZF. Quing explained that after Liu left his own business, his wife took over but most customers preferred to deal with Liu. Quing explained that "Liu thought if he stayed until the company got listed [on the stock exchange] it would be too long time" and his business would suffer. According to Quing, that was the reason TZF agreed to pay Liu the $6,000. Liu agreed in cross examination that his business decreased because he was not there.

TZF says that Liu did not have fixed hours of work. He would come and go as necessary. He could, and did, in fact, use his time at TZF to run his own business. Liu did have an office at TZF though not for his exclusive use. It was also used by the president of the company. Quing stated that TZF did not have any employees until December 1999 when it received its business licence. TZF never told Liu that he was an employee. Liu does not agree with many of the Employer's assertions.

In addition, TZF takes issue with the amount claimed by Liu as salary, $6,000. In that regard, TZF says that it pays Liu's successor $3,000 per month. There is no reason why, it would pay Liu more. Not surprisingly, Liu takes issue with that. He points to his extensive experience in the health food business. He also says that TZF agreed to pay him $6,000 per month. To the extent that there was a contract of employment, I would agree with Liu on this point. The

contract between TZF and Liu's successor is not relevant. What I must have regard to is the contract between TZF and Liu. In other words, if I accept Liu's argument that he was an employee, the compensation he is entitled to flows from his contractual arrangement with TZF. In the circumstances, I agree with the delegate that the agreement was for $6,000 per month.

There are, as noted, conflicts between Liu's and Quing's evidence on material points. He explained that TZF provided him with business cards stating his title to be "general manager." He explained that from September 1, 1999, when the business premises were established, TZF provided him with an office and office equipment. As well, he interviewed and hired employees for TZF. It was Liu's evidence that his wife operated the business, in which he was the sole director and shareholder, while he worked for TZF. He agreed that he took telephone calls from TZF's office relating to the business. He explained that those call tapered off with the passing of time. In the beginning, he conceded in cross examination, he received "lots of calls from his wife and customers [of the business]." However, after the first week he "didn't think he got a lot of calls." He described himself as "temporary help" building the sales team. However, he conceded that he attempted to sell his business, or at least had two offers for the business. In cross examination, he agreed with the suggestion from TZF's counsel that he joined up with TZF because he, as a businessman, was interested in the growth of the company and not immediate gain. He agreed with the suggestion put to him that he was interested in participating in the growth of the company. In my view, this, however, does not translate into a partnership. All the same, Liu says that he received $6,000 as salary on October 6, 1999. He says that Michael Zhou, another employee, who took over from him after he left TZF, was paid $2,000 at the same time. In cross examination, Liu explained the $6,000 paid to him in October was that he had to have [this amount] to cover his expenses on that one occasion." I am troubled by this comment which, at least on its face, tends to contradict his testimony that there was an agreement to pay him a salary of $6,000 per month and supports the Employer's argument that there was no agreement regarding a monthly salary. On the other hand, on balance and in the context of the evidence as a whole, the comment is equivocal. Overall, Liu was consistent that there was an agreement that he receive a $6,000 salary. As well, Liu explained he worked for TZF until mid November. At that time, he said, "he could not hang in there any longer and handed the keys over to Quing." If the parties had indicated an employment relationship, why would Liu terminate his relationship at that time? Why could he "not hang in there any longer"? If he was, as he said, a salaried employee, entitled to $6,000 per month, why could he "not hang in there." This aspect was not pursued at any length in cross examination and, therefore, the question was not settled to my satisfaction.

The ground of appeal is whether Liu was an employee or an independent contractor akin to a partner. The delegate, after setting out the Employer's and Liu's positions on the matter, applied the common law tests in making his determination that the latter was an employee. It is clear from the Determination that the delegate considered these tests in making his determination that Liu was an employee and not an independent contractor. Overall, I agree with his conclusions. The key issue was whether Liu was a partner in the business. The substance of TZF's independent contractor argument on appeal is that Liu was a "partner" in the business. The

delegate did not, in any great detail, consider this aspect though this issue, and the supporting facts, were raised in correspondence to him from TZF. Perhaps the issue was not as clearly framed in the correspondence as might be desired. In any event, I intend to address this argument.

Under the *Partnership Act*, a partnership is the relation that subsists between persons carrying on business with a view to profit (Section 2). The question, in my view, is whether there was such a relationship. In my view, the *Act* is not to be used as an instrument by one partner against the others when business relations sour. Thus, if he became a partner in the business, he would generally not be entitled to the protection of the *Act*.

It is clear from the evidence of both parties that the details of the relationship had yet to be worked out. Quing explained that this was a "handshake" arrangement based essentially on mutual trust. Initially, on the facts, the relationship was more akin to that of an independent contractor. There was no real dispute about that. The relationship developed: Liu was furnished with an office and equipment, engaged salespeople (there is dispute whether he engaged these for TZF), and given the title of general manager (there is no dispute about that). With respect to the issue of hiring of people, there was evidence of at least one payment of $2,000 to Michael Zhou in October, at the same time as the payment to Liu was made. Liu stated that he hired Zhou for the Employer, and it was the position of TZF did not hire Zhou. There is no question, however, that Zhou was Liu's successor as manager. I do not place any weight on a letter by Zhou submitted by TZF. I am somewhat surprised that Zhou did not testify at the hearing and draw an adverse inference from that.

From the standpoint of the principals of TZF, the nature of relationship did not change to make Liu an employee, rather he became more like a partner in the business. Liu did not at any time become a shareholder or a director of TZF. Quing explained that Liu was going to get a equity position in the company once it got listed on the NASDEQ exchange. He was also going to receive commissions on sales. Liu denied that he asked for equity in the company. He first denied that it was ever discussed. He then agreed that it was mentioned. He stated that the agreement was that he was going to receive $6,000 every month and agreed that the [the principals of TZF] had mentioned shares but that he was not interested and "didn't discuss it--that's for the future." I have some doubts about Liu's version of the fact. However, and in any event, Quing's evidence was not clear on the amount or number of shares Liu was going to receive; and Liu's evidence was that they [the principals] "didn't mention how many percent."

Unfortunately, this case ultimately boils down to which of the two versions of the events I prefer. I adopt the often quoted words of the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

Overall, on that basis of the test in *Faryna v. Chorny*, and considering all of the evidence, I prefer the evidence of Liu. I find it unlikely that an experienced businessman, such as Liu, if, in fact he became a partner in the business, would fail to clarify a key aspect of his relationship with TZF, *i.e.*, what equity position was he going to get in TZF once it had been taken public. In short, I would have expected some agreement as to the number or amount of shares he would receive in return for his efforts and involvement in the business. I find it improbable that this would not have been discussed and settled. Quing's evidence did not go further than to state that Liu would get a "certain amount" of shares. Essentially Liu could potentially have been working for nothing or with no reasonable certainty of remuneration for his efforts, even if the company was ultimately successful. I infer from the failure to clarify the amount of shares that there was never an agreement that Liu be remunerated in that fashion. As well, if, as an independent contractor-partner, Lie was to be compensated through commissions, I would have expected some sort of agreement as to the commissions: how much, based on what etc. are common questions dealt with by business people (or sales representatives). I find it difficult to accept that Liu would not have clarified these questions. After all, it is improbable that he would have participated in the business simply to see it grow, as the Employer seems to be suggesting. As well, when Quing was asked in his direct evidence, it Liu agreed to become a partner, he answer went no further than "he [Liu] promised to cooperate with us." In other words, the Employer's direct evidence on this crucial point is less than unequivocal. On balance, in all of the circumstances, I am of the view that no partnership was created between the parties.

In short, I agree with the delegate's conclusions and I am not persuaded to set aside and cancel the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated December 19, 2000 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal