BC EST #D275/99

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C. 113

- By -

Q2 Services Ltd.
("Q2" or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	1999/181
DATE OF HEARING:	June 24, 1999
DATE OF DECISION:	September 22, 1999

BC EST #D275/99

DECISION

APPEARANCES

Mr. Patrick Selinger	on behalf of the Employer
Mr. Parvinder Sing Basra	on behalf of himself
Mr. Dave McKinnon	on behalf of the Director

OVERVIEW

This is an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on March 1, 1999 which determined that an employer-employee relationship existed between Q2 and Pavinder Singh Basra. The delegate found that Q2 had contravened Sections 10, 17, 18, 27 and 58 of the *Act* and was liable for regular wages and statutory holiday pay to Basra in the amount of $10,303.46.

The issues before the delegate was whether Basra, who performed janitorial work at the "Elephant On Campus" (part of BCIT's campus in Burnaby), was an employee (or an independent contractor) and if he was an employee, what provisions of the Act applied. The background facts relied upon by the delegate may be summarized as follows:

- Q2 is in the business of arranging or offering janitorial cleaning and maintenance services to a variety of customers.

- Q2 seeks outcustomers and negotiates a specific monthly rate for a listed set of cleaning and maintenance services that the customer wishes to purchase.

- Q2 and the customer sign an agreement setting out the agreed rate, the notice of cancellation requirements, the list of duties, the method of payment, the notice of termination requirements and Q2's guarantee of quality of service. The agreement between Q2 and the customer may be terminated by 30 days notice.

- Q2 finds janitors through newspaper advertising or "word of mouth". The janitor has an opportunity to view the premisses and the customer needs and if he declines the opportunity offered, he is prohibited from soliciting that specific business for five years.

- The "purchase" agreement between the janitor and Q2 does not stipulate that the janitor must have a business license, GST number, or WCB coverage.

- Generally, the janitor purchases the necessary cleaning supplies. In some cases, the janitor will purchase equipment and supplies from Q2.

- Q2 requires the janitor to obtain proper insurance, prior to commencement of cleaning duties. However, Q2 does not check to verify this.

- Q2 "sells" to the janitor the opportunity to perform the duties agreed between Q2 and the customer. The "sale" from Q2 to the janitor requires up front payment from the janitor to Q2 at a rate set by Q2 that can range from a few hundred dollars to several thousand. On occasion Q2 permits the janitor to pay the purchase price through monthly installments.

- Once the janitor has "purchased" the opportunity to clean, and commences cleaning, the purchase price is not refundable.

- Q2 invoices and receives the monthly fee from the customer and, after deducting a 10% processing fee, turns over the balance to the janitor less GST and installments of purchase price.

- The customer deals directly with the janitor regarding the day to day cleaning needs.

- The customer deals with Q2 in relation to all major concerns having to do with quality of work or other matters including inquiries from the contract, billing increases, monthly billings etc.

- Q2 does not as a matter of course advise the customer that the opportunity to clean has been "sold" to the janitor, nor is Q2 required to advise the customer that the sale to the janitor has taken place.

- The customer rates the quality of the janitor's workmanship and reports any concerns to Q2.

Prior to the issuance of the Determination, the delegate submitted the summary to Q2. .

ISSUE

The Employer argues that the Determination is wrong and says that Basra was an independent contractor and that, in a nutshell, is the issue before me in this hearing. The Employer argues that the delegate erred in law and incorrectly determined that there was an employer-employee relationship between Basra and Q2, misapprehended the evidence before him, *i.e.*, erred in fact, and gave insufficient weight to the written agreement between Basra and Q2. Q2 is a broker, not an employer.

Basra argues that he is an employee as found in the Determination.

FACTS AND ANALYSIS

It is trite law that the appellant has the burden to persuade me that the Determination is wrong.

The *Act* define the terms "employee" and "employer" broadly (see 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 appellant argues that I must apply the common law tests to the definitions of "employee" and "employer". I agree to the extent that deciding the question of whether a person is a an employee or an independent contractor involve consideration of the common law tests (*Knight Piesold Ltd* , BCEST #D093/99, at page 4)

> "Deciding whether a person is an employee or not often involve complicated issues of fact. 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'."

I agree with the appellant that I must examine the true nature of the relationship considering all the factors (see *Walden v. Danger Bay Productions Ltd.*, April 7, 1994, No. CA 016174 and CA 016176, unreported (B.C.C.A). It appears from the Determination that the delegate, in fact, considered the definitions in Section 1 in light of the common law tests:

> "In analysing the facts of this case in relation to the above noted definition consideration must be given to a variety of factors including: ownership of tools, chance of profit, risk of loss, direction and control, degree of integration, and length of relationship. No one of the factors taken alone is determinative."

The delegate was satisfied that the relationship between Basra and Q2 met the traditional common law tests. 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.* As noted in *Christie et al.*, *above*, at page 2.1-2.2 with respect to the common law tests of "employee" status in different contexts:

> "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."

The delegate recognized the statutory definitions of "employee" and "employer" are broader than the common law tests. The cases relied upon by the appellant, with one exception, do not arise under employment standards legislation and, in my opinion, their precedential value in the circumstances at hand is limited. 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.

There is no evidence that the delegate, as argued by the Employer, failed to consider Section 2(e). In fact, the Determination states that the delegate considered the purposes of the *Act*. He also considered Section 2 in light of Section 4. Moreover, as noted initially, the appellant bears the onus to prove the Determination wrong. It is not clear from the appellant's argument how Section 2(e) relates to other provisions of Section 2 or, indeed, other provisions of the *Act*. Importantly, it is not clear how the arrangement proposed by the Employer "foster the development of a productive and efficient labour force ....". There is no merit to this argument and, accordingly, I reject it.

The appellant argues that the delegate did not give sufficient weight to the contractual arrangement between Basra and Q2. I do not agree. In fact, the delegate set out the parameters of the relationship between the parties. The appellant argues that the Tribunal should first look to the contract between the parties to determine the true relationship (*Salo v. Anglo British Packing Co.*, January 8, 1929, unreported (B.C.C.A.)). I do not agree that the written agreement between is determinative as suggested by the appellant. First, the Tribunal and the courts has considered the "whole of the relationship" in order to determine "employee" status. The relationship between the parties often transcend the written document. Second, while I agree that the written document is relevant, it is only one of the facets of the relationship to be considered. Section 4 of the *Act* (referred to above), and the remedial purpose of the statute, support that conclusion. In the circumstances, it is appropriate to consider the "whole of the relationship".

Turning to the traditional common law tests, the appellant Employer argues that every factor points to Basra being an independent contractor and not an employee.

At the hearing Chris Borse, the president of the Employer, explained its operations. Q2 says that it is in the business of brokering cleaning contracts. Q2 solicits such contracts by "knocking on doors" of restaurants and pubs and making "proposals" for the necessary cleaning work. Q2 does not have any employee on staff, except another sales person. It does not engage in the performance of cleaning work. When it has obtained a cleaning contract with a customer, Q2 turns around and sells this contract to a third party. Normally, Q2 advertises the contract for sale in the "business for sale" section of a newspaper. Borse testified that a typical, or standard, add would read like this:

> "CLEANING CONTRACTS for sale.
> Vanc. Sry & Bby. Income fr. $1000-
> $3000. Info. 532-2009."

On July 10, 1996, Q2 made a proposal to the Elephant on Campus. The proposal provides--in part--as follows:

> I am submitting the following Maintenance Contract including a cleaning outline required for your facility which will be completed five (5) times per week.
>
> My intention is to provide Elephant on Campus with the best possible quality of maintenance at a reasonable rate. While I stress efficiency, priority is given to a thorough and complete job. It is my goal to develop mutually beneficial business relations between our companies.
>
> Upon signature of this authorization our working contract will commence August 1, 1996, renewable annually. If during the coming year, you are dissatisfied with our services or if we wish to withdraw from our contract for any reason, a thirty day notice is required by the part electing to dissolve this contract.
>
> All maintenance responsibilities shall be met in accordance with the attached worksheets.
>
> <the proposal then set out the cleaning tasks to be performed>
> OUR GUARANTEE
>
> If after the first month of service you are not 100% satisfied with the quality and service provided, at your request, you will not be invoiced and our contract will be dissolved.
>
> AUTHORIZATION

> The maintenance duties listed in the worksheets above to be performed at a monthly rate of $1,025.00 (one thousand and twenty five dollars)
>
> Payment terms are due and payable within fifteen (15) days from monthly invoice date. Invoices are processed on the 15th of every month.
>
> All work guaranteed, if your not 100% satisfied you will not be charged. Q2 Services Ltd. reserves the right to reassign the contract.
> .....

According to Borse, this is Q2's standard proposal. The tasks specified in the contract are specified by the customer. They are set out in detail, according to Borse, "so there is a clear understanding of the obligations". Subsequently, following negotiations with the manager of the pub, the proposal was amended from five (5) to six (6) days of service. The rate remained the same, $1,025 per month.

It is clear from the "proposal", set out above, that the underlying business relationship is between Q2 and the customer, here, Elephant on Campus, and not Basra (or Grewal) and the pub. It is Q2's "intention to provide ... the best possible maintenance". Q2 guarantees all the work. Moreover, under the agreement both Q2 and the customer could cancel the relationship with thirty days notice, if the customer is dissatisfied or if Q2 wishes to withdraw "for any reason". Arguably, that is incorporated into the contractual relationship between Q2 and Basra. If the customer is not satisfied with the services, the monthly fee may not be charged. If the test is "whose business is it", the answer is, in my opinion, Q2's.

In my opinion, there is not much of an "asset" to be "sold". As mentioned above, Q2 can withdraw from the contract "for any reason". Leaving aside that possibility, the customer could, for bona fide business reasons, for example, getting the janitorial work done better or less expensively, and decide to give notice. I emphasize that I am not passing judgement on whether this was a "good business deal" or a "bad business deal", rather I am suggesting that the arrangement, while clothed in "business terms", was an arrangement whereby Q2 could carry on its janitorial business in a cost efficient manner. In my view, the business was Q2's.

It appears nevertheless, as argued by the Employer, that the "asset" was indeed sold. The contract with Elephant on Campus was originally sold to a Guninder "Bobby" Grewal for "roughly $6,000". Borse explained that the purchase price was normally 4-5 times the monthly billings, reflecting, as well, the 6-8 months of work it took to "land the contract". Borse believes that the actual work was performed by someone other than Grewal, by one his relatives. Q2 invoiced the Elephant on Campus for the services. The Invoice was headed "Q2 Services Ltd." and requests that cheques are made payable to it. Borse explained that Q2 took care of the monthly billings on behalf of Grewal, and others, for a "management fee". Basra complained that he did not get paid on time and, in fact, did not

get paid for some of the work done. The management fee was "optional", according to Borse. The advantages, according to Borse, was that the "purchaser" of the contract gained the credibility of being associated with Q2, "a professional image", received help with the billings and collection of cheques. Q2 was a "sounding board". Borse testified that most of the janitors--"99%"--preferred to engage Q2's management services. In other words, I am not satisfied that the Employer merely sells the cleaning contract or is merely a broker, as argued. The "professional image" and "credibility" associated with Q2 points to the business being Q2's and the janitors being an integral part of that business.

The appellant argues that Basra was not under the Employer's control: there was no "day to day control or direction" exercised by the appellant. With respect, I disagree. While I accept that the janitors operate with a measure of independence as far as the work is concerned, the scope of their duties and the number of days of service was negotiated between Q2 and the customer. Borse explained that Q2 did not perform janitorial work, one of the exhibits attached to the Determination is a Q2 "quality checklist" for the month of February 1998. The form, which was posted in the janitor room, rates the cleaning standard from "excellent" to "good" and, further, lists the various areas cleaned "OK". The form is signed by the manager of the pub and Rose Fenske, the other employee of the Employer. Under the heading "additional comments" the form states: "must come in Sat. morning to clean. Not Sunday. When you leave the garbage out the ... fruit flies are bad." In my view, this indicates that there is a significant measure of control exercised by the Employer with respect to the work of the janitor. Borse explained that the form was simply a manner of getting information to the janitor as to how the work was done. In cross examination, Borse explained that the information would allow the janitor to rectify the situation. That is probably true, however, it also indicates Q2's continued involvement in the janitorial work. It points to the business relations being between Q2 and the customer, rather than between the janitor and the customer. Basra also testified that on one occasion, he received a telephone call from Rose Fenske when work was required to be done over Christmas. The proposal to Elephant on Campus also included the following statement: "24 Hour On-Call Service in case of Emergency call 532-2009" (Q2's telephone number). In cross examination by the delegate, Borse explained the "work guarantee" as follows: "we stand behind our work". First, this points to the business being Q2's and, second, this points to Q2 exercising a significant degree of control over the janitors. The reason Q2 was involved was to protect its "reputation" and its credibility, which it traded on. After all, the customer would likely look to Q2, with which it has a contractual relationship, and which has guaranteed the services, if there were problems with work done. This supports the conclusion that Basra was an employee of Q2.

While the janitors would have their own keys and security codes (Q2 did not), Borse also explained that Q2 originally provided them with keys and security codes from the customer. The transfer--"showing the ropes"--was done by the previous "owner" of the contract, Bobby Grewal.

As mentioned, The agreement between Grewal and Q2 was eventually transferred--"sold"--to the complainant Basra. Apparently, Grewal requested that Q2 sell the contract. The selling price was $5,000 less a $500 fee to Q2. Borse says that he did not have any prior dealings with Basra. He says that he went to his home a couple of times and fully explained the contract to him. In his view, Basra

knew that he was buying a cleaning contract. He also had the "freedom to sell it". In Borse's view, Basra was buying an "asset". On or about April 26, 1997, Basra entered into an agreement with Q2. As mentioned, the purchase price was $5,000. Half was paid up front, plus GST, the other half payable over six months. The agreement provided--in part--as follows:

> The Purchaser has purchased a janitorial cleaning contract from Q2 Services Ltd. dated this 26 day of April 1997.
>
> It would be understood that all equipment and chemicals are supplied by the Purchaser. The Purchaser must obtain proper insurance prior to commencement of the contract, which is not included in the price of the contract. Q2 Services Ltd. Agrees to provide full support and training.
> .....
> The Purchaser agrees to refrain to retain Q2 Services Ltd. to manage the contract which includes all inquiries from the Contract, billing increases, monthly billings etc. The Purchaser understands that Q2 Services Ltd. will invoice the Contract every month and the invoice will be paid directly to Q2 Services. Upon payment Q2 Services Ltd. will issue a cheque less a 10% management fee. "Basra"
> If the Purchaser wishes to withdraw from the contract, Q2 has the sole right to sell the contract on behalf of the Purchaser for a fee.

While the agreement may be "re-sold", it is required to be sold through Q2.

There is no prohibition in the contract against having other persons perform the work required to be performed under the contract between Q2 and the customer. Borse testified that he believed that Basra hired staff to do the janitorial work and that he "may have met the person" (but he did not have any specific recall of that). In cross examination, Borse said that he "assumed that Basra put people to work for him". Basra explained that he and his wife did the work. He agreed in cross examination that he had another--similar--agreement with another company, though that was not in writing. He stated that he had a full time job as a glazier. He and his wife did the work after work hours, 2 and 1/2 hours during week nights, and 5 hours on weekends. I agree with the appellant that the requirement for personal service is one of the factors which strongly points towards employee status and, conversely, the lack of such a requirement, points towards independent contractor status. It is not, however, determinative.

The janitors have an opportunity for profit and loss, Borse explained, depending on "how much <they pay in> wages, cost of equipment and chemicals". Basra agreed that he purchased equipment, mops and buckets, and chemicals at Home Depot. He agreed that he deducted the cost as a business expense. It is well established that ownership of tools is not determinative of independent contractor status. Similarly, while Profit and loss are relevant considerations, in the circumstances, they are not determinative of the issue. Given the nature of the relationship there was not, in my

view, much of an opportunity for profit or loss. If the contract ran over the year, as contemplated by the contract between Q2 and the customer, the revenue is limited to the monthly payments from the customer. From those, the major expenses are the "purchase price" and the management fees.
I accept that the intent of the parties was that Basra was an independent contractor. However, while the parties' intent is relevant, for example, in an action for wrongful dismissal, 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. The basic purpose of the *Act* is the protection of employees through minimum standards of employment (*Machtinger*, *above*). As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

Considering the relationship between the parties as a whole, I conclude that Basra was an employee of Q2.

The delegate found that the Employer had contravened Sections 10 (no charge for hiring), 17, 18, 27 (payment of wages), 44, 45, 46 (statutory holiday pay), 58 (vacation pay) and 63 (compensation for length of service) and awarded $10,303.46 to Basra. The appellant's argument focussed on the issue of "employee" and "employer" and not the remedy should I find, as I have, that Basra was an employee. I assume that the appellant does not take issue with the amount and calculation of the Determination amount.

In short, I am not persuaded to interfere with the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 1, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal