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 -

Clayton Layton Michael Vanier and Jennifer Arlene Nelson operating as
Silverback Fishing Adventures
("Silverback")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson

FILE NO.: 1999/124

DATE OF DECISION: July 7, 1999

DECISION

APPEARANCES

For the Appellant:	Jennifer Nelson Clayton Vanier
The Respondent:	Marc Lavoie, via telephone
For the Director of Employment Standards:	Kevin Molnar

OVERVIEW

This is an appeal by Clayton Vanier and Jennifer Nelson doing business as Silverback Fishing Adventures ("Silverback") pursuant to s. 112 of the *Employment Standards Act* (the "*Act*"). The appeal is from a Determination issued by Kevin Molnar as a delegate of the Director of Employment Standards on February 15, 1999.

The Determination required Silverback to pay to its former employee Marc Lavoie ("Lavoie") $2,045.43 in wages and in repayment of an improper deduction made from wages. Silverback filed an appeal on March 3, 1999. An oral hearing was held at Prince Rupert, B.C. on June 4, 1999.

FACTS

Silverback operates a fishing lodge at Dundas Island, an isolated location near Prince Rupert which is accessible only by float plane or boat. Lavoie worked for Silverback as a chef between June 4, 1997 and July 18, 1997. It is not disputed that Lavoie remained at the fishing lodge continuously during the term of his employment, but there is dispute as to his hours of work each day. Lavoie says he worked between 12 and 18 hours each day, whereas Silverback says he was required to work no more than 6 to 9 hours each day. Silverback alleges Lavoie was an independent contractor, paid a flat rate of $115.00 per day; Lavoie says he was an employee and was to have been paid a wage of $135.00 per day. It is not disputed that Silverback deducted $364.44 from Lavoie's pay on account of Lavoie's air fare to arrive for work, which Silverback says he agreed to pay.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Lavoie was an employee of Silverback, and if so, whether Silverback owes him wages. A second issue is whether the deduction of air fare by Silverback was lawful.

ANALYSIS

The Director's delegate applied two tests for deciding whether Lavoie was an employee or an independent contractor. The Determination sets out the tests and resultant findings as follows:

> The four fold test looks at Control, Ownership of Tools, Chance of Profit and Risk of Loss as determining factors. Lavoie had no control over the time or location where the work was done. His activities were directed by the employer and his services were monitored by and ultimately terminated by the employer. Lavoie provide [*sic*] his trade tools such as a knife and uniform while the employer provided the fishing lodge, kitchen facilities and supplies necessary for the work to be performed. As a person working on a flat day rate, Lavoie has no chance for profit other than the sale of his own labour. Lavoie assumes no risk of loss or chance of profit as the investment, risk and dividends of a successful fishing lodge operation are the sole purview of the employer. All of these factors are hallmarks of an employee not an independent contractor.
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> The other test considered is the integration test which assesses the level of integration between the service provided and the nature of the employer's business. Under a contract of service, a person is employed as part of the business and his work is done as an integral part of that business. Conversely, a contract for services or work, although done for the business, is not integral to the business but only an accessory to the business. In my opinion the task of cook is an integral and key part of a full service fishing lodge which caters to the tourist market. Based on the factors outlined I find that Lavoie was an employee not an independent contractor.

At the appeal, Silverback did not take issue with the specific findings of fact made on this point by the Director's delegate. Instead, Silverback argued that Lavoie had agreed to be an independent contractor at the time of his interview, and further that Silverback found they had more success filling the chef position when it was presented as a contracted service as opposed to employment. Silverback stressed that the isolation of the workplace, and the need for a self-directed individual in the chef position, required that the chef be a contractor as opposed to an employee. Silverback acknowledged that at least one previous chef had been hired and paid as an employee. Lavoie contends that he did not agree to be an independent contractor, and that he was to be paid a daily wage as an employee.

The Act is designed to set minimum standards for the protection of workers. Its provisions may not be avoided by agreement between employer and employee, particularly where the effect of the agreement is to remove basic protections regarding wages and hours of work. Regardless whether there was an agreement between Silverback and Lavoie, the facts of Lavoie's work indicate clearly that he was an employee. I find that the independent contractor issue was raised solely by Silverback, which saw some advantage to that arrangement in comparison with an employment arrangement. The reasons for Silverback seeking a contracted chef, however, are not connected to the work being performed or the circumstances in which the work is done. Lavoie's work is no different than the work performed by a chef at any remote workplace; the only difference is that Silverback seeks to have the work governed by terms that fall outside the Act's minimum standards.

Regarding Lavoie's hours of work, there is a considerable distance between the parties' positions. The Director's delegate concluded that Lavoie's account of his hours of work was exaggerated, and that Silverback's version underestimated the time required to prepare three meals per day for the lodge's guests. When Silverback was asked to produce records relating to Lavoie's work, no information was produced to support its claim that Lavoie could only have worked between 6 and 9 hours each day. I heard evidence from the employer that Lavoie was expected to prepare meals that approach *haute cuisine*, although Silverback did express some dismay that Lavoie became too creative and exotic in his work for the more simpler tastes of its guests. Lavoie stated that Silverback instructed him to prepare "exquisite" meals, and that he frequently prepared five-course dinners for the guests. I have no doubt that Silverback expected a high standard of cuisine which accordingly required greater time to prepare. Lavoie had no assistant and was responsible for all aspects of meal preparation, including clean-up. In the circumstances, I am comfortable accepting that he worked a 10 hour day and find the employer has been unable to show any error made by the Director's delegate in this regard.

Regarding Lavoie's wages, Lavoie states he was to be paid $135.00 per day and indeed had prepared an invoice (at Silverback's request) in that amount. Silverback alleges the wage was agreed to be $115.00 per day, and that $135.00 was mentioned only as a possibility at a later date, should Lavoie return to work for them a second season. I note, however, that in its appeal letter Silverback makes the following statement:

> As for profit or loss, Mr. Lavoie's company was hired to perform the duties at a base rate of $115.00 per day which included all room and board and transportation from Prince Rupert to Dundas Island. At the end of the contract if we were satisfied with the job he performed we would pay him $135.00/day retroactive to the first day of the contract, this was the verbal agreement between us.

At the appeal hearing, Silverback maintained that it had never mentioned $135.00 per day in any of its negotiations with Lavoie, but I find that the above letter casts some doubt on that assertion. The Director's delegate, however, has sided with the employer and made his Determination on the basis that Lavoie's wage was $115.00 per day. Lavoie has not appealed that decision, and I find the Director's delegate was quite lenient toward the employer in limiting Lavoie's claim to the lower rate.

The second issue, regarding the deduction of Lavoie's air fare, may be disposed of expeditiously. Section 21 of the Act prohibits the deduction of any amounts from employee wages except as expressly allowed in the Act. The only possible way for Silverback to have properly deducted amounts from Lavoie's pay would have been by way of a written assignment of wages under section 22, and there is no evidence or suggestion of such an assignment in this case.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Mr. Molnar is correct and the appeal should be dismissed. Pursuant to s. 115 of the *Act*, I order that the Determination made on February 15, 1999 be confirmed, together with interest pursuant to section 88 of the *Act.*

Ian Lawson
Adjudicator
Employment Standards Tribunal