Employment Standards TRIBUNAL

An appeal

\- by -

Paul Hockridge and Susan Hockridge operating as Valley Connect
(“Appellants”)

\- 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.:	2002/071
DATE OF HEARING:	May 13, 2002
DATE OF DECISION:	June 25, 2002

DECISION

APPEARANCES:

Mr. Paul Hockridge	on his own behalf
Ms. Susan Hockridge	on her own behalf
Mr. Calvin Bowering	on his own behalf

OVERVIEW

This decision arises out of an appeal by the Appellants pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director issued on January 30, 2002.

The Delegate found that Mr. Bowering worked for the Appellants between June 1999 and March 15, 2001. At that time he was laid off. Approximately one year prior to his lay-off, Mr. Bowering was stopped by the police while driving (a company vehicle) without a valid licence and the vehicle was impounded. Mr. Hockridge paid Mr. Bowering's outstanding fines, approximately $3,600. After his employment came to an end, Mr. Bowering filed a complaint with the Employment Standards Branch. While the Delegate rejected his complaint for overtime wages, he concluded that Mr. and Ms. Hockridge were joint proprietors of the business and that Mr. Bowering was owed vacation pay and compensation for length of service, in the amount of $2,180.19. As well, he concluded that the Hockridges were not entitled to offset amounts of vacation pay advances, which he found that Mr. Bowering did not receive, and the amount of the fine.

FACTS AND ANALYSIS

Mr. and Ms. Hockridge appeal the determination. As the Appellants, they have the burden to persuade me that the Determination is wrong is wrong on the balance of probabilities. For the reasons set out below I am persuaded that the appeal succeeds in part.

At the hearing, Mr. and Ms. Hockridge and Ms. Lynn Morgan testified on the Employer's behalf. Mr. Bowering testified on his own behalf.

Mr. Bowering participated via telephone conference. Mr. Hockridge asked it be noted for the record that he found it unfair that Mr. Bowering did not participate in person. He indicated that one of the reasons he had wanted an oral hearing was so he could confront Mr. Bowering face-to-face. At the hearing, I indicated to the parties that the Tribunal in the appropriate circumstances permits parties and witnesses to participate via telephone conference. I appreciate that this method is, perhaps, less than ideal. All the same, I am of the view that the parties were able to fully participate.

The issues before me at the hearing were, briefly put:

1. Whether Ms. Hockridge was properly named as an "owner" together with her husband?

2. Whether the Employer paid some $1,660 in advances to Mr. Bowering and whether these were re-paid?

3. Whether the Employer is entitled to off-set the approximately $3,600 paid on behalf of Mr. Bowering?

The parties agreed that these were the issues.

I turn first to the issue of whether Ms. Hockridge was properly named as an "owner" together with her husband. There is no issue that the form of the business organization is that of a "proprietorship." The Determination states that the "evidence indicates that Valley Connect was a proprietorship of both Susan Hockridge and Paul Hockridge." The Determination goes on to state that she "signed all paycheques, supervised Bowering, and represented the company in its affairs." In the Delegate's view, Ms. Hockridge "owned" the business jointly with her husband and is, therefore, liable with her husband.

The Appellants take issue with these conclusions. The evidence on this issue--and this was largely not in dispute--was that the business was in Mr. Hockridge's name, including for the purposes of PST and GST. Mr. Hockridge also pointed out that the Demand for Employer Records was addressed to him. He agreed that his wife had signing authority and worked in the office. Mr. Hockridge indicated that the Delegate added his wife after he spoke with the Delegate about possibly declaring bankruptcy.

In my view the Delegate erred. The Delegate cannot reasonably conclude that Ms. Hockridge "owned" the business based on the sketchy information referred to in the Determination. In any event, the focus of his inquiries is the Act and, for the present purposes, whether a "person," in this case Ms. Hockridge, is an employer. The Act defines an employer broadly:

> "Employer" includes a person
>
> (a) who has or had control or direction of an employee,
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;

The evidence before me was that Mr. Hockridge was the "proprietor" of the business. He "owned" and directed business. Even if I accept that Ms. Hockridge "signed all paycheques, supervised Bowering, and represented the company in its affairs," those facts do not, in themselves, make her an "owner" or, even if I accept that was what the Delegate meant, an "employer." There are many employees who perform those duties and who cannot reasonably be characterized as "owners" or "employers." There is little or no reasoned analysis of the issue of whether Ms. Hockridge was an "employer" for the purposes of the Act. In any event, as I have indicated above, the question of "ownership" is the wrong question. The evidence was that Ms. Hockridge looked after the business from time to time when her husband was hospitalized. In brief, I am upholding this ground of appeal and the Determination is, therefore, varied to reflect that Paul Hockridge operating as Valley Connect is the employer (the "Employer").

The second issue before me concerns advances received by Mr. Bowering. From the evidence of both parties, and their submissions, it is clear that the Employer advanced funds to Mr. Bowering. These funds were advanced by cheque (endorsed by Mr. Bowering)--issued between August 1999 and January 2000. The Employer says that the amount advanced is $1660. Mr. Bowering agrees with this amount, except for a cheque in the amount of $300 (dated September 24, 1999), which he says he never endorsed. Mr. Bowering says that he repaid these advances in cash. This, in turn, is denied by the Employer. I am not particularly concerned with the formal classification of these payments, i.e, are they for vacation pay or regular wages. The point, in this case, is whether these amounts were repaid.

To an extent, the resolution of this case turns on questions of fact and the parties different positions on those facts.

The B.C. Court of Appeal noted 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."

Regrettably, those comments are apposite in the case at hand.

First, the cheques, and this was not in dispute, have been altered. The Hockridges explained that the Employer's bookkeeper had to classify the payments and wrote "vacation pay" on the face of the cancelled cheques. The Delegate did not accept this explanation and neither do I. The bookkeeper did not testify. I am concerned about the alteration of the cheques after they have been given to, and cashed by, Mr. Bowering. It is clear from the evidence at the hearing that the advances were not, in fact, on account of "vacation pay."

Second, with respect to the September 24, 1999 cheque--a particularly acrimonious matter between the parties--Mr. Bowering denies that the signature on the back of the cheque is his. Comparing the signature with those on the other cheques, I find it unlikely that it is Mr. Bowering's signature, as claimed by Ms. Hockridge. The cheque is also signed by another person over what is said to be Mr. Bowering's signature. That signature would appear to be Ms. Hockridge's. There was little credible evidence of why she would endorse a cheque written to Mr. Bowering. In one of the submissions, it is stated that this was done to enable Mr. Bowering to cash the cheque. In view of the fact that he was able to cash cheques before and after the September 1999 cheque, I do not accept this explanation. As well, there is little reason for Mr. Bowering to lie about this. He agreed that he received all the cheques except this one.

The alteration of the cheques and evidence surrounding the September 24, 1999 cheque raises some serious questions in my mind with respect to credibility of the testimony given by the Hockridges. In al of the circumstances, I prefer the evidence of Mr. Bowering on this point, namely that he repaid the advances. In the circumstances, I am not persuaded that the Delegate erred when he found that the Employer offset the $1660. The Employer has not met the burden on appeal with respect to this issue.

The final issue relates the payment of some $3,600 to ICBC on account of Mr. Bowering's fines about one year prior to the layoff. Mr. Hockridge says that he received a call to the effect that the company vehicle driven by Mr. Bowering had been impounded because Mr. Bowering was driving without a valid license due to unpaid fines. One way to get the vehicle released was to pay the fines. There is no dispute that the amount was ultimately paid for Mr. Bowering's benefit: Mr. Hockridge paid half the amount on his credit card, and the other half by post-dated cheques. The Employer says this was a loan. In fact, in one of the submissions to the Tribunal, Mr. Hockridge says that there was an agreement that Mr. Bowering agreed to use his vacation pay entitlement to pay the amount of the fine. Mr. Bowering says that the Employer paid the amount because he was needed in the business as the only Lexmark certified technician. The Employer, not surprisingly, disagrees with that.

The Employer says that I must take this amount into consideration if I find that Mr. Bowering was entitled to vacation pay and compensation for length of service. In the circumstances, I disagree. The is no written assignment of wages in this case. Section 21(1) of the *Act* is quite unequivocal:

> 21.(1) except as permitted or required by this *Act* or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.

The amount paid, on the evidence, may be more consistent with a loan--that is not for me to decide. In my view, the Employer cannot seek to offset the amount paid for Mr. Bowering's fine for the purposes of Mr. Bowering's entitlement to vacation pay and compensation for length of service under the Act. If the Employer is of the view that it is entitled to re-payment, it has recourse to the courts. The Employer has not met the burden on appeal with respect to this issue.

Other than the style of cause, the Determination is upheld.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated January 30, 2002 be confirmed except that the style of cause is varied to reflect that the Employer is Paul Hockridge operating as Valley Connect.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal