Employment Standards TRIBUNAL

An appeal

- by -

Russ Hartley
("Hartley")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2003A/204

DATE OF DECISION: October 15, 2003

DECISION

SUBMISSIONS BY

Craig T. Munroe	Counsel for the appellant
Rajen Mahal	for himself
J. R. Dunne	for the Director of Employment Standards
Michelle Alman	Counsel for the Director of Employment Standards

OVERVIEW

This is an appeal filed by legal counsel on behalf of Russ Hartley ("Hartley") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Mr. Hartley appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on June 2nd, 2003 (the "Determination") pursuant to which Mr. Hartley was ordered to pay his former employee, Rajen Mahal ("Mahal"), the sum of $4,758.77 on account of unpaid wages (including compensation for length of service) and section 88 interest. The Determination followed an oral hearing conducted by the delegate on April 11th, 2003.

By way of a letter dated September 16th, 2003 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). Although counsel for the appellant requested an oral appeal hearing, in my view, this appeal can be readily adjudicated based on the extensive written record before me. The material facts are not seriously contested (although some minor factual matters are disputed). In my assessment, this case turns on the proper legal inferences that are to be drawn from the uncontestested material facts.

ISSUES ON APPEAL

Mr. Hartley appeals the Determination on the grounds that:

- the Director's delegate erred in law [section 112(1)(a) of the *Act*]; and
- the Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b) of the *Act*].

In particular, Mr. Hartley says that the delegate erred in law in finding that Mr. Mahal was employed by Mr. Hartley; Mr. Hartley says that Mr. Mahal was an independent contractor. Further, even if Mr. Mahal was an employee, he ought not to have been awarded any compensation for length of service since Mahal was dismissed for just cause [see section 63(3)(c) of the *Act*].

The basis for the second ground of appeal, namely, the delegate's alleged failure to observe the principles of natural justice, is not clearly articulated in the appeal documents before me. So far as I can gather, counsel appears to be asserting that the delegate breached the principles of natural justice by arriving at a

Determination that was not well-founded in law or that the delegate otherwise erred in finding certain facts. Certainly, there is no suggestion that the delegate conducted a procedurally unfair hearing or was predisposed in favour of Mahal.

BACKGROUND FACTS

Many of the relevant facts do not appear to be seriously in dispute. Mr. Hartley is the Head Tennis Professional at the Vancouver Lawn and Badminton Club (the "Club"). By way of an agreement between Hartley and the Club (the formal agreement is not in evidence before me), Hartley was contracted to provide tennis lessons to Club members; Hartley is paid a fee by the Club for each instructional hour. The Club provides the facilities and tennis balls and, in turn, charges Hartley a rental fee for use of the Club's facilities. Further, under his agreement, Hartley was entitled to engage other instructors to provide lessons for Club members. This latter activity was a separate source of income for Hartley since he paid the instructors directly and then charged the Club for the instructional hours provided by these instructors. The difference between what Hartley paid the instructors and what he received from the Club for the latter's instructional hours constituted Hartley's gross profit on these transactions.

Mr. Mahal was engaged by Mr. Hartley, in September 2000, to be an "Assistant Tennis Professional" at the Club. At the time of Mahal's engagement, Mr. Hartley wrote a "To whom it may concern" letter, dated September 3rd, 2000 and on the Club's letterhead, which states:

> I am writing you this letter to confirm the full-time employment and level of income for Rajen Mahal. Raj has just recently been hired as a fulltime Assistant Teaching Professional at Vancouver Lawn Tennis and Badminton club. He will be coaching between 30 and 40 hours per week...

Mahal worked at the Club an Assistant Tennis Professional from October 13th, 2000 until October 9th, 2002. At the time of his engagement, Hartley gave Mahal a "Job Description" setting out the latter's responsibilities and Hartley's expectations. Among other things, Mahal was to be available to teach for 30 to 40 hours each week, was "directly accountable to Russ Hartley", and was to be paid on the 15th and at the end of each month.

By way of a letter dated October 9th, 2002 Hartley terminated Mahal's position. Hartley's October 9th letter reads, in part:

> ...Through periodic personal evaluations and performance reviews, we have set goals for your development as a club professional, along with numerous personal meetings and discussions, unfortunately bearing no fruit. I have a responsibility to the club and to the general membership to assure a high level of professionalism is provided by our tennis Pro staff...
>
> On September 25th, 2002 you expressed your dissatisfaction with having too many hours scheduled in your coaching week...We met again on September 27th and you did not come up with any suggestions and wished to submit your notice...You mentioned on September 27th that you currently had a couple of other job offers, perhaps Vancouver Lawn isn't the right type of club for you, being that we are so busy year round and perhaps a quieter club would best serve your needs. So at this time I feel it would be best for both of us, that I accept your notice to move on.
>
> This letter is to act as official notification to you that, effective October 9th, 2002, your position as Assistant Tennis Professional at the Vancouver Lawn Tennis and Badminton Club is terminated. I

> am accepting your notice because I no longer have the confidence in your ability to work in a satisfactory manner at Vancouver Lawn under my direction...

I now turn to the issues raised in this appeal.

FINDINGS AND ANALYSIS

Employee or Independent Contractor?

Although I do not necessarily adopt each and every aspect of the delegate's analysis, I am nonetheless satisfied that the delegate correctly concluded that Mr. Mahal was an employee (employed by Hartley) and not an independent contractor. Mahal was paid a "wage" by Hartley for the "work" that he undertook which in turn, at least in some measure, provided a direct pecuniary benefit to Hartley. Although some aspects of Mahal's relationship with Hartley suggest an independent contractor relationship, it must be remembered that the *Act* is to be interpreted in a large and liberal fashion so that the *Act's* benefits are broadly extended--see e.g., *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986 and *Re Rizzo & Rizzo Shoes Ltd.,* [1998] 1 S.C.R. 27. In other words, "close cases" ought to be resolved in the favour of finding an employment relationship.

Further, in my view, this is not really a "close case". Hartley exercised significant direction and control over Mahal (see the definition of "employer" in section 1 of the *Act*) as evidenced by, among other things, the job description which indicated that Mahal was "directly accountable" to Hartley and by the "periodic personal evaluations and performance reviews" that Hartley conducted with Mahal [see Hartley's October 9th, 2002 letter]. Hartley, in his own words, "set goals for [Mahal's] development" and Mahal was economically dependent on Hartley for his livelihood. Hartley was Mahal's paymaster. At least at the outset of their relationship, Hartley considered Mahal to be a "full-time" employee [see Hartley's September 3rd, 2002 letter]. In my view, and based on the totality of the parties' relationship (see *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* [2001] 2 S.C.R. 983), Mahal was not so much in business for himself as he was an integral part of Hartley's business enterprise (namely, providing tennis instruction to the Club's membership).

Just Cause and Compensation for Length of Service

If an employer has just cause for terminating an employee, the employer is not obliged to pay that employee any compensation for length of service or to give written notice in lieu of paying compensation [section 63(3)(c) of the *Act*]. Counsel for the appellant says that the delegate erred in law in finding that Hartley did not have just cause to terminate Mahal's employment.

It is clear that Hartley never paid Mahal compensation for length of service nor did he provide Mahal proper written notice in lieu of paying compensation. Before the delegate, Hartley apparently took the principal position that Mahal voluntarily resigned his employment but, on appeal, counsel limited his argument to the alternative assertion that was advanced before the delegate, namely, that there was just cause for termination.

Hartley's October 9th letter to Mahal is somewhat inconsistent. Hartley purports to accept Mahal's earlier proffered notice to resign but, at the same time, also states that he is terminating Mahal's employment because "I no longer have the confidence in your ability to work in a satisfactory manner at [the Club]".

As noted above, Hartley does not now claim that Mahal voluntarily resigned. Rather, the issue before me is just cause.

Mahal attended work on October 8th, 2002 but left shortly thereafter to seek emergency medical attention at a local hospital for a nagging shoulder injury. Mahal did not teach his first lesson, or any other lessons, scheduled for that day. A doctor at the hospital, and later on his own personal physician, apparently advised Mahal to take several weeks off work. Around noon, Mahal contacted Hartley and advised that he would not be working for the next short while and that he intended to file a WCB claim. Hartley told Mahal to report for work the next day and, on that day, Mahal was given the termination letter.

Even assuming that Mahal did not reschedule his tennis lessons with another club pro (or make any attempt to do so), I do not consider that this omission, by itself, justifies summary termination. There is no credible evidence before me of a prior disciplinary history and I do not consider this single act--coupled as it is with the evidence of a real medical problem--to be so egregious as to fundamentally undermine the entire employment relationship. I do not consider that the delegate misstated or otherwise misapplied the governing legal principles with respect to cause.

The delegate's calculations are not disputed and thus the Determination ought to be confirmed as issued.

The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act,* I order that the Determination be confirmed as issued in the amount of **$4,758.77** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal