

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Aubrey Tennant Operating Anthony Robbins and Associates
(“Tennant”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/288

DATE OF HEARING: July 4, 1997

DATE OF DECISION: July 28, 1997

DECISION

APPEARANCES

Aubrey Tennant	For himself and Anthony Robbins and Associates
Dean W. Humphreys	For himself

OVERVIEW

This is an appeal by Aubrey Tennant operating Anthony Robbins and Associates ("Tennant" and "Anthony Robbins") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") issued on April 5, 1997. In this appeal, the employer claims that Dean Humphreys ("Humphreys") was an independent contractor and not an employee.

Before proceeding with the merits of this case, I would like to deal with one minor procedural point. Tennant pointed out that Humphreys brought a small dictation/tape recording machine into the hearing room. He also objected to its presence and asked me to seize it. I advised Humphreys that the presence of the machine was not appropriate as our proceedings were not tape recorded. I asked him to dispose of it and he agreed, placing the machine at the back of the room.

Finally, the parties agreed that the sole issue before me in this decision is Mr. Humphreys' status as an employee or an independent contractor. It was agreed that if he was found to be an employee, the hearing would be reconvened to deal with the question of quantum of wages owed.

ISSUE TO BE DECIDED

The issue is whether Humphreys is an employee or an independent contractor.

FACTS

In December of 1995, Tennant had purchased the rights to offer the Anthony Robbins programmes in the Vancouver region. He set up an office in Vancouver and hired an office manager and a receptionist. He also advertised for "consultants" to promote and solicit business. He received 130 responses and short-listed 30; and from those he selected 5. Humphreys was in the latter group and reported to Tennant's offices in January of 1996. His last day of work was April 25, 1996.

Humphreys filed a complaint with the Employment Standards Branch and following an investigation, the Director's delegate concluded that Humphreys was an employee and not an independent contractor:

After careful review of the complaint, I am satisfied that Mr. Humphreys is an employee and noted particularly the fact that he was paid a wage for a couple of months even though he generated no revenue. In addition, he was under a very strict contract that would be deemed to exercise considerable control over him. He also worked primarily out of the Employers (sic) business working with him, utilizing his equipment.

Tennant produced a series of documents which set out the specifics of Humphreys' relationship with the Anthony Robbins organization. These included a "Screening Form", "Pre-Session", "Post Session" and "Consultant Interview Evaluation". Humphreys' overall suitability for the job was assessed by "Nigel" as "8 1/2 out of 10".

Tennant says that the consultants were told they would not be an employee but rather a contractor and would not be eligible for unemployment insurance. It was a 3 month contract to begin with, with the consultants being hired to develop business by attracting and soliciting persons into programs. Tennant said that the contractor was to pay for his or her own expenses and that they were not supposed to use the offices or phone. The consultant, in fact, used the Anthony Robbins' offices, with Tennant's knowledge. I also note that Humphreys' business card listed Tennant's office telephone number. (Humphreys provided and paid for his own cellular phone.) Tennant testified that Humphreys was responsible for the cost of printing his business cards, although they were printed at the same print shop that prints other material for the Anthony Robbins business.

Tennant said that the consultants were not required to keep regular office hours, or to report to the office at all, except for certain meetings. Tennant did not require them to fill out time sheets, but Humphreys produced certain documents purporting to keep track of his hours in the office. Materials mailed out by Humphreys and other consultants were prepared in the Anthony Robbins offices. Anthony Robbins paid for the postage and arranged and paid for the cost of any faxed material.

Humphreys testified that he ultimately wanted to become a facilitator and would attend "breakthrough" events, which were promotional sessions designed to attract customers. (Tennant contested the former assertion, saying that Humphreys was not hired as a facilitator and I agree with him.) Humphreys also said that when he was not able to attend an event, Tennant would seek an explanation. (Tennant did not invoke any punishment, but Humphreys thought he would.) Humphreys said he decided to work for the organization, hoping to earn \$10,000 per month. He said that he was unable to break into the lucrative corporate market and that because of this, the income was not satisfactory. He said that the Anthony Robbins technique expected consultants to make 250 cold calls per day but that no other models or promotional techniques were provided. He said that he was given a list of former Anthony Robbins customers to contact.

Consultants were urged to take Anthony Robbins courses and were required to pay for these course but at a reduced rate. If they stayed with the organization for a year, Tennant would refund the amount paid for the course; consultants were formerly permitted to take the course free but Tennant found that many would take advantage of the offer and then quit. He said that another "perk" offered to consultants was a reduction in the cost of Anthony Robbins tapes and books.

Tennant said that business decisions were made by consensus and that he did not know of a more democratic environment. Nevertheless, he refused to support a business promotion idea proposed by Humphreys and one other consultant at least once in the three months Humphreys worked at the Anthony Robbins' office. He also said that he refused to pay for an advertisement ordered by Dean and Michael for a business promotion, as the expense was not authorized by him.

Tennant testified that in January and February, a consultant by the name of Michael was very successful while Humphreys was struggling. Tennant said that he met with Humphreys to discuss a solution. Tennant also entered into evidence material from the Anthony Robbins franchise on how to develop business and this information was shared with Humphreys and other consultants. The material would, for example, suggest what questions to ask to ascertain a person's potential as a customer and to assist the person in making a decision about the courses and program. He also noted that part of his contract with the parent company was to maintain consistency with the latter's guidelines and materials.

Tennant said that Humphreys failed to produce results for the company and had breached certain rules of conduct. He said it was not reasonable to assume that he would give consultants the opportunity to make as much as \$10,000 per month (a figure he thought was attainable with appropriate promotional skills and techniques) but that they would not also share in the chance of loss if business promotion did not bring in the anticipated work. Both Tennant and Humphreys characterize the three months of payments made to Humphreys as advances against future earnings. Tennant also said that he had been warned by a Revenue Canada auditor who was auditing his wife's income tax records that it might be necessary to withhold income tax and other deductions from the consultants' income. While he took this advice, he said he did so only out of an abundance of caution and not because he believed that Humphreys was an employee rather than a contractor.

Tennant entered as evidence a determination on the insurability for unemployment insurance purposes of Michael Bolduc's employment with his organization. Bolduc was found not to be an employee but rather an independent contractor. Tennant argued that since provisions in the Bolduc contract are identical to those in the Humphreys' contract with Anthony Robbins, Humphreys is an independent contractor. Humphreys submitted a Revenue Canada ruling which indicates that he was an employee of Anthony Robbins and Associates.

Humphreys said that he believed in the Anthony Robbins products and invested a lot of time and energy into the business. He criticized Tennant's managerial skills and said he felt stifled by Tennant's ideas.

Submitted as an exhibit in these proceedings by Tennant was a document, "Are You Self-Employed?" distributed by the Employment Standards Branch which outlines some factors to consider in determining whether a worker is self-employed. He says that Humphreys meets 10 out of the 12 criteria outlined in that document.

Also submitted is an "Agreement between Anthony Robbins & Associates (Aubrey Tennant: Franchisee) and Dean Humphreys". It outlines the relationship between the parties and covers such items as business development, sales strategies, commission structure. For example, clause 6 states:

Commissions for introducing business to Anthony Robbins & Associates will be paid as follows:

-30% of the total fee or purchase price paid by individual participants who are introduced and registered for programs, or who purchase product from the franchise. This amount will be increased to 40% where 10 or more individual participants are registered for the same program and attend at the same time. This increased commission does not apply to the first 9 registrations. *SUBJECT TO CHANGE AT THE DISCRETION OF THE FRANCHISEE. (italics indicates handwritten original)*

- introductory commissions for other services or specially-arranged seminars/programs will be negotiated as necessary.

-for 3 months from the date of this Agreement, the Consultant will be entitled to avail of a draw account of \$1,500.00 per month (\$750.00 payable on the 1st and the 15th day of each month). This draw account will be treated as an advance against future commission earnings. Payment from the draw account will no longer be available after the 3 months has elapsed, and earnings will be on a "commission only" basis after that time. In the event of a Consultant withdrawing his/her services before the 3 months has elapsed s/he will be called upon to refund all drawing monies paid up to the time of leaving, *FROM CURRENT MONTH. (italics indicates handwritten original)*

Commission payments will be credited to the Consultant upon receipt of the full program/product cost from the client. Commissions due will be paid to Consultants on the 1st and the 15th day of each month.

In the event of a client claiming a refund from Anthony Robbins & Associates, the Consultant will be called upon to refund to the Franchisee all the relevant commissions paid in respect of that client. To create a reserve fund to accommodate this eventuality, an amount of 2% will be withheld from all commission payments to the Consultant - this reserve fund will be cleared and paid to the Consultant at the end of each calendar year. In the event of there being no monies available in the Consultant's reserve fund to pay a client refund, the amount to be paid will be deducted from current commissions payable to the Consultant.

The agreement called for the Consultant to contribute towards the costs of office support services including photocopying, postage and stationary. The agreement was subject to cancellation without notice by either party in writing, but was otherwise without a specific duration. It also contains a clause by which Humphreys agreed to not use Anthony Robbins client lists for any other purpose.

Appended to the agreement was "Standards of Conduct" in which Humphreys agreed to be "an effective ambassador for Anthony Robbins & Associates". It details the expectations placed on a consultant by the Anthony Robbins organization. For example, the consultant agrees "to dress appropriate and professionally in accordance with the dress code as agreed from time to time" and "to develop business for BluePrint 2000 Consulting Group and other companies, as requested". He also signed a "Coachability Agreement" which, in essence, says that he agrees to listen to the suggestion and guidelines of the Anthony Robbins organization. It also states:

I also understand that the reason my coaches may ask me to change my approach is because they have my interests at heart and that they are motivated by a desire for me to succeed at the highest level possible.

He also signed a confidentiality agreement.

Exhibit 9 in the oral hearing was very lengthy submissions prepared by Humphreys, commenting on various provisions in the *Act*. Due to their lengthiness and tenuous relevance, they will not be outlined in detail here. It suffices to say that I have read them and find they add little to the evidence or argument necessary to resolve the outstanding issue between the parties. Written statements of Judy Lakos, Rizal Danyo and Michael Bolduc were not considered as they were not made available to the ESO who investigated this complaint and in any event were hearsay as those individuals did not attend testify at the hearing. Humphreys also admitted extensive documentary evidence concerning his hours of work; as noted above, that issue has been reserved for a future hearing.

ANALYSIS

After considering all of the evidence submitted by the parties before and at the hearing, I agree with the Determination under appeal here and find that Humphreys was not an independent contractor but rather an employee.

There are several tests which can be used to determine whether a worker is an employee or an independent contractor:

1. The Control Test:

Four indicia of employment status are considered: the employer's power of selection of the servant; payment of wages or other remuneration; employer's right to control the method of doing work; and employer's right to suspend or dismiss the employee.

2. The Four-fold Test:

First enunciated in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.), affg [1945] 2 S.C.R. 621, revg in part [1945] 2 D.L.R. 373, affd [1944] 1 D.L.R. 173 at 169, this test outlines four factors: control; ownership of tools; chance of profit; and risk of loss.

3. The Organizational Test

This test looks at the degree of integration of the worker into the employer's business.

Although he was called a consultant, Humphreys was basically a commission sales person. Determining whether a commission sales person is an employee presents a particular challenge since the independence of movement and flexible hours frequently give this worker the appearance of independent contractor, even though the substance of the relationship indicates employment status. On the unique aspects of this relationship, Butterworth's Wrongful Dismissal Manual at paragraph 1.66 states:

Where the work was exclusive, work hours were set and control was maintained over daily activities in the form of mandatory reports or meetings, salespersons have been found to be employees even though the actual sales were accomplished through their own direction and skills. Similarly, salespersons paid on commission with advance draws, who worked exclusively for the company and were provided with automobiles and uniforms, and who were the sole source of the company's income, were employees on both the four-fold and organizational tests. A sales manager who was employed under a sales agent's contract providing for immediate termination was nevertheless an employee in his capacity as sales manager, as he was subject to the company's control and was an integral part of the organization.

Under any of the tests outlined above, Humphreys is an employee. A key factor in my decision was the written agreement that was part of the Anthony Robbins franchise and signed by Humphreys and Tennant. It sets out what is essentially an employment relationship between the franchisee Tennant and consultant Humphreys. In his capacity as franchisee, Tennant could exert considerable control over Humphreys by virtue of the agreement. I note that even something as trivial as Humphreys' manner of dress was controlled by the document as were more significant aspects such as target markets to be pursued. The "Coachability Agreement", in particular, demonstrates the control of an employment relationship. The consultant promises to "implement a new procedure, or to do something in a different way" and to "commit fully to it, implement it and allow it the greatest possible chance of success". By the agreement, the consultant also acknowledges "that the reason my coaches may ask me to change my approach is because they have my interests at heart and that they are motivated by a desire for me to succeed at the highest level possible." This is not the hallmark of an independent contractor, but rather an employee who takes orders from a boss or supervisor. Tennant said he did not often exert that influence but I disagree. While he may not have dictated Humphreys daily activity, Tennant, by virtue of the written terms of the agreement, was able to control almost every aspect of Humphreys' business promotion activity.

Although Humphreys was to be paid by commission, he was given an "advance" against future earnings in the form of a bi-weekly draw of \$750.00. This part of the arrangement detracts considerably from the argument that he must bear the risk of loss as well as enjoy the chance of profit. I also note that Anthony Robbins made arrangements for a fund to cover commission refunds to unsatisfied customers; this is the type of action that would be expected from an employer rather than one of the parties to a contract of* service.

In *Jaremko v. A.E. LePage Real Estate Services Ltd.* (1987), 59 O.R. (2d) 757 (H.C.) affd 69 O.R. (2d) 323 (C.A.), the court found that a commission sales person was an employee even though his remuneration was based on commission (plus bonus and profit sharing) alone rather than salary and he enjoyed considerable freedom with few time constraints. The court found that nevertheless the employer exercised considerable control and the worker was subject to company policy and discipline. The court concluded that Jaremko was an employee even though he declared himself to be self-employed on his income tax returns. He was referred to in company literature as one of a group of salespersons "employed" by the company and applied for a promotion within the company. The facts in *Jaremko* are not unlike the facts of this case, except for the bonus and profit sharing plan and reference in company literature to Humphreys as an Anthony Robbins employee. Nevertheless, the essential features of that relationship are present here and strongly points to an employment relationship. The fact that Dean Humphreys described himself as "self employed" in an application for financing to Travelers Acceptance Corporation is of no consequence. As in *Jaremko*, the salespersons' belief about his own status is not determinative. Whether it an employment relationship or that of an independent contractor, a single factor is not determinative and the intention of the parties is only one factor to consider. (See *Odin v. Columbia Cellulose Co.* (1967), 66 D.L.R. (2d) 278 (B.C.S.C.)

Both parties submitted rulings from other administrative tribunals, purporting to determine the nature of the relationship between them. Each urged me to follow the precedent set in the decision he submitted for my consideration. However, that was not possible. To begin with, these rulings are contradictory. While Humphreys was found to be an employee by Revenue Canada, Bolduc (whose contract is the same as Humphreys') was found to be a contractor. However, there are a number of reasons I would not adopt them even if it was possible. While Tennant says that the Bolduc contract is identical, he did not submit detailed evidence to substantiate this assertion. And the Revenue Canada ruling submitted by Humphreys lacks detail so that it is impossible to determine what evidence was considered and what legal test was used to make their determination. Thus, both of them are of no assistance here. I can appreciate the frustration of the parties who are told one thing by one branch of government and another thing by another branch but nonetheless find that I am not bound by the conclusion of another tribunal.

Finally, Tennant submitted copies of a pamphlet handed out by the Employment Standards Branch which outlines factors to determine status as an employee (who is subject to the jurisdiction of the *Act*) and an independent contractor. Tennant said that 10 out of the 12 factors apply to Humphreys so that he must be an independent contractor. Humphreys takes issue with that. It is not necessary for me to deal with all of the factors outlined there and I will comment on only one, that is supervision. While Tennant may not have dictated Humphreys daily activity and in that way Humphreys was “unsupervised”, the Coachability Agreement made it clear that all aspects of Humphreys behavior was subject to very considerable control.

As noted above, the quantum of wages has been reserved for a subsequent hearing. Tribunal personnel will be contacting each of the parties to determine a suitable date.

ORDER

Pursuant to section 115 of the *Act*, I hereby confirm the Determination dated April 5, 1997.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal