Employment Standards TRIBUNAL

An appeal

- by -

CYOP Systems International Incorporated
("CYOP")

- 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: David B. Stevenson

FILE No.: 2003A/230, 2003A/231 & 2003A/232

DATE OF DECISION: November 17, 2003

DECISION

SUBMISSIONS

Gordon Samson	on behalf of CYOP Systems International Incorporated
Amrik Gill	on behalf of himself
David White	on behalf of himself
Joanne Kembel	on behalf of the Director of Employment Standards

OVERVIEW

This decision addresses appeals brought under Section 112 of the *Employment Standards Act* (the *"Act"*) by CYOP Systems International Incorporated ("CYOP") of a Determination that was issued on July 14, 2003 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that CYOP had contravened Part 3, Section 17, Part 7, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of Neil Brideau ("Brideau"), Amrik Gill ("Gill") and Dave White ("White") (collectively, the "complainants") and ordered CYOP to pay Brideau an amount of $10,931.86, to pay Gill and amount of $4,719.04 and to pay White an amount of $7,227.40.

The Director also imposed an administrative penalty on CYOP under Section 29(1) of the *Employment Standards Regulation* (the *"Regulations"*) in the amount of $1500.00.

CYOP says the Director erred and has raised the following matters in the appeal:

- The Director has incorrectly identified "facts not in dispute" which "certainly are in dispute";
- The Determination is entirely subjective and is the product of little or no investigation by the Director;
- The Director erred in applying Section 4 of the *Act*;
- The Director erred in finding the complainants were employees and not independent contractors;
- The Director ignored relevant evidence;
- The Director, uncritically and without investigation, accepted statements made by the complainants; and
- The calculations of the amounts owed are wrong.

After considering the Determination, the appeal and the material on file, the Tribunal has decided an oral hearing is not necessary in order to adjudicate the appeal.

ISSUE

The issue in this appeal is whether CYOP has demonstrated any error in the Determination that would justify the intervention of the Tribunal to cancel or vary it, or refer matters back to the Director for further investigation.

THE FACTS

The Determination sets out the following background, indicating the facts set out are not in dispute:

> Moshpit Entertainment Inc. ("Moshpit") was a wholly owned subsidiary of CYOP. Moshpit was building a tournament system for a multi-player role-playing game on a wide area of independent owned servers. CYOP is designing a similar system but based on a server-operated system (i.e. one company-owned server). Moshpit hired two of the three complainants, Mr. Brideau and Mr. White for software design. CYOP president, Patrick Smyth, agrees that when they were working for Moshpit, the two were considered to be employees. Mr. Brideau started with Moshpit approximately October 2000 and Mr. White in March 2000, In April 2002, Moshpit's name was removed and CYOP took over the business. Both Mr. Brideau and Mr. White continued to work for CYOP. Mr Gill also worked as an employee for Moshpit, in the accounting department, but was laid off when CYOP took over. CYOP offered him work some months later.
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> On January 29, 2003, the three complainants each signed a "Contract For Personal Services Rendered by a Consultant/Independent Contractor". On approximately February 28, 2003, the business closed at the Homer Street location where the three were working. According to Patrick Smyth, it continues some operations at a location on Carrall Street. Mr. Gill last worked for the company on or about February 27, 2003. Mr. Brideau and Mr. White continued to work until March 14, 2003.
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> Mr. Brideau and Mr. White worked in computer design. Specifically, Mr. Brideau was a "Software Engineer" and Mr. White was a "Web Applications Developer". Mr. Gill was a bookkeeper, and worked in Accounts Payable and Accounts Receivable.
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> On May 2, 2003, CCRA issued a written decision that David C. White was an employee and, thus, entitled to Employment Insurance and status in Canada Pension Plan pensionable employment. CYOP intends to appeal that decision.

The Determination identified the issue in dispute as whether the complainants were employees under the *Act* and, if so, whether they were entitled to the wages each claimed.

The record indicates the Director processed the complaint by way of investigation and oral hearing. The oral hearing was held on June 4, 2003.

The Determination sets out the evidence and arguments of the parties and concludes, following an analysis of the facts applied to the definition of employee in the *Act* and elements of the common law tests used to examine working relationships, that the complainants were employees for the purposes of the *Act*. The Determination also notes that each of the complainants submitted summaries of their wage claims at the oral hearing.

ARGUMENT AND ANALYSIS

The burden is on CYOP, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
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> *(a) the director erred in law:*
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> *(b) the director failed to observe the principles of natural justice in making the determination;*
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> *(c) evidence has become available that was not available at the time the determination was made.*

CYOP has shown no reviewable error in the conclusion that the complainants were employees for the purposes of the *Act*. The Determination lists several criteria that pointed to the existence of an employment relationship:

(a) CYOP had control over the complainants at all times;

(b) CYOP took over their employment [from Moshpit] with no significant change to their work, their status or their reporting relationships;

(c) The complainants were paid a regular salary set by CYOP;

(d) The complainants worked in CYOP's office unless their supervisor authorized a work-at-home day;

(e) The projects worked on were identified, and quality standards set, by CYOP;

(f) CYOP set the business plan, identified the work to be performed and made the decision to terminate the relationship;

(g) CYOP owned all the computers and the complainants were not required to purchase any hardware or software needed to complete the tasks set by CYOP;

(h) The complainants received a salary regardless of the quality or quantity of their work; the only risk they assumed was the same risk as any other employee assumes – the risk of losing one's job if the business does not succeed;

(i) For Brideau and White, the work being performed by them was integral to the business of CYOP; their work was typical of work normally performed by an employee; third parties would perceive Brideau and White to be employees of CYOP;

(j) Gill worked full time for CYOP performing tasks, including preparing payroll, which were integral to CYOP's business; he did not work for himself; he was required to attend the office to

perform his work; he had no independent authority respecting payments without authorization from CYOP signing authorities; his work was typical of work normally performed by an employee;

(k) Prior to answering CYOP's advertisement, none of the complainants was running his own company; Moshpit had employed them all; each complainant was dependent for his income on the job with CYOP.

The above adequately supports the conclusion reached. I agree with the finding of the Director that the so-called independent contractor agreements cannot determine the status of an individual under the *Act*. This is not the first occasion on which the Director and the Tribunal have rejected the argument being made by CYOP in this appeal. In *CYOP Systems International Incorporated; Moshpit Entertainment Inc.; Nextlevel.com Inc.; Nextlevel.com Internet Productions Inc.; Wiremix Media Inc. associated corporations under section 95 Employment Standards Act*, BC EST #D020/03, the Tribunal rejected the identical argument in respect of an employee of an associated company of CYOP in the following terms:

> As the Tribunal has noted in several decisions, the definitions of employee and employer in the *Act* are inclusive, not exclusive. The *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). The Tribunal has endorsed the following comment from *Machtinger v. HOJ Industries Ltd.*, *supra*, that:
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> > . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.
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> The fact that Ms. Seidman signed an "Independent Contractor Agreement" with NextLevel Canada is not determinative of her status under the *Act*. Section 4 of the *Act* prohibits agreements that seek to 'contract out' of its provisions. The associated corporations has not satisfied the burden of showing the Determination is wrong in its conclusion that Ms. Seidman was an employee for the purposes of the *Act*.

In the appeal, CYOP says the Director erred when outlining the background information. In reply, the Director says the information set out was provided by Mr. Smyth, representing CYOP, at the oral hearing. The Director also wonders what impact an error in setting out the background information has to the validity of the decision.

CYOP says that while the Director notes in the Determination that "there is no continuation of these two enterprises [Moshpit and CYOP], findings are applied as if there was." How that concern bears on the correctness of the Determination or the merits of the appeal is unclear. If this aspect of the appeal is intended to convey there was some difference between Moshpit and CYOP that is significant to the Determination, it is not apparent. In fact, for the purposes of the *Act*, it has already been determined that Moshpit and CYOP should be treated as one person (see *CYOP Systems International Incorporated; Moshpit Entertainment Inc.; Nextlevel.com Inc.; Nextlevel.com Internet Productions Inc.; Wiremix Media Inc. associated corporations under section 95 Employment Standards Act*, *supra*), making it more difficult to perceive how differences in their respective businesses could have relevance to proceedings under the *Act*.

Finally, CYOP takes issue with the amounts ordered to be paid to the complainants, arguing, it appears, that the independent contractor agreement should, at least, be given the effect of employment agreements which do not entitle any of the complainants to more than what is contained in them. In reply to this aspect of the appeal, the Director also notes that this argument was not raised at the oral hearing nor were any of the complainants examined or challenged when each presented the amount he claimed and that CYOP has provided no explanation for their calculation of the amount owing to each complainant.

This argument is simply an extension of the argument that the complainants were not employees of CYOP. That argument has been rejected. As employees, the complainants are entitled to the minimum standards and protections found in the *Act*, including compensation for length of service, annual vacation on unpaid wages and interest on unpaid wages. Even if I accepted the invitation to treat the independent contractor agreements as employment agreements, those agreements would have no effect to the extent they provided less than the standards set out in the *Act*. Also, I agree with the position of the Director that it is not appropriate to raise this matter on appeal. If CYOP had any issue with the amounts claimed by any of the complainants, it was incumbent on them to raise that issue with the Director and provide any documents which supported their position. As well, if CYOP is alleging an error, part of their burden is to identify the alleged error and demonstrate why the Tribunal should agree there is an error and take steps to have it corrected. CYOP has done none of that.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 14, 2003 be confirmed in the amounts of $10,931.86 payable to Brideau, $4,719.04 payable to Gill and $7,227.40 payable to White, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal