

An appeal

- by -

Three Star International Services Corp.  
(“Three Star”)

- 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:** Carol Roberts

**FILE No.:** 2002/168

**DATE OF HEARING:** June 11, 2002

**DATE OF DECISION:** July 18, 2002

## DECISION

### APPEARANCES:

William H. Lim, Barrister & Solicitor	On behalf of Three Star International Services Corp.
Qing Biao Zeng	On his own behalf
Written submissions only	On behalf of the Director

### OVERVIEW

This is an appeal by Three Star International Services Corp. ("Three Star"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued March 8, 2002. The Director found that Three Star had contravened section 18 of the *Act* in failing to pay Qing Biao Zeng wages, and Ordered that Three Star pay \$1,199.82 to the Director on Mr. Zeng's behalf.

### ISSUE TO BE DECIDED

Whether the Director erred in determining that Mr. Zeng was an employee. Three Star contends that Mr. Zeng was an independent contractor, and is not entitled to any wages.

### FACTS

Mr. Zeng began working for Three Star on December 6, 2000, in response to a newspaper advertisement placed by Three Star, an internet business. A copy of that advertisement was not produced as evidence. On December 6, 2000, the parties entered into a written agreement, drafted by Three Star. That document is drafted in the Chinese language, and the parties disagree on the correct translation of key provisions of that agreement.

There is no dispute that, according to the document, Mr. Zeng was to "promote TSIS's business in the market". In order to do that, Mr. Zeng was

1. To extend the business market and promote the business
2. To train and manage the staff in the marketing department (cancelled by Chris)
3. To follow all related rules under the company's management
4. To bring in new clients and increases the business revenue
5. To declare his income tax to the government

According to the delegate, Three Star was, in turn,

1. To pay the gross (commission) before tax to the employee after the first day of every month;
2. To pay commission based on the performance of the employee: the First three month's probation: (from Dec 7, 2000 to March 6, 2001) the basic salary of every month is Canadian dollars 1,000.

Three Star did not provide Mr. Zeng with an office, a desk or a telephone, and did not pay him for his gas or parking expenses on a regular basis. It made no income tax, UIC, CPP or WCB deductions. Mr. Zeng used his own cellular telephone to conduct his business, for which he was not reimbursed.

On March 1, 2001, Mr. Zeng filed a complaint with the Branch, contending that he had not been paid his wages. The relationship between the parties ended on March 6.

After analyzing the evidence, including the employment agreement, the delegate concluded that Mr. Zeng was an employee, and entitled to wages. The delegate determined that, for the last two months of his employment, Mr. Zeng was being paid on a commission basis. The delegate further determined that, although Three Star kept no records of hours work, Mr. Zeng was entitled to wages for the daily minimum pay. Mr. Zeng was in fact paid \$200. The delegate calculated wages owing over that amount, as determined above.

## ARGUMENT

Three Star argues that Mr. Zeng was an independent contractor. It says that Mr. Zeng was free to choose when to do his work, he was provided with no tools or equipment, he was not supervised, and that he was free to engage in other employment. It kept no record of Mr. Zeng's hours for these reasons.

It contends that Mr. Zeng's only obligation was to bring in business for the employer, and that his pay was based on his performance, or ability to bring in that business. Three Star argues that the proper interpretation of clause 2 is as follows:

To pay the commission based on the business quota of the agent: The first three months' probation...the *basic advanced payment* based on the quota which is the requirement target is CAD \$1000/month. (my emphasis)

Three Star also contends that the delegate erred in concluding that it changed Mr. Zeng's salary. It says that there was never any agreement to pay Mr. Zeng a salary, but that it gave Mr. Zeng a \$1000 advance on the condition that he would bring in business. It contends that Mr. Zeng's payment in February was directly related to the actual amount Mr. Zeng brought into the company.

Mr. Zeng argued that he was provided with a list of duties to complete, that he worked exclusively for Three Star, and that he was provided with a desk. I accept that the desk was a vacant desk not specifically assigned to Mr. Zeng, but which he used because it was convenient for him to do so.

The delegate argues that Three Star customers perceived Mr. Zeng as representing Three Star. She contends that all of the forms used in the transactions contained Three Star's name, and Mr. Zeng's signature as its agent. She also submitted that clause 3 suggested Mr. Zeng was under Three Star's direction and control. She contended that the correct interpretation of the clause was that Mr. Zeng was paid a salary, rather than an advance, as Three Star suggested.

## ANALYSIS

The burden of establishing that a Determination is incorrect rests with an Appellant. On the evidence presented, I am unable to find that burden has been met.

Section 1 of the *Act* defines employee to include

- (a) a person....receiving or entitled to wages for work performed for another, and
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee....

An employer is defined as including a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee.

Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

How parties define their relationship is only marginally relevant to determining whether the relationship is one of employer - employee. The *Act* defines what an employee is, and if the relationship is found to fall within that definition, the parties will be bound by the requirements of the *Act*.

Although it is important to have regard to a number of indicia in determining whether an employment relationship exists, how the parties themselves characterize the relationship at its start, particularly when it has been of relatively short duration, is of some importance. Thus, the correct interpretation of the document carries some weight.

Because the parties disagreed on the proper interpretation of the agreement, an independent translation was obtained, which was provided to the parties for their response.

According to the independent translators, Party A (Mr. Zeng) was

1. To be responsible for the development of market and the task of publicity and promotion for the company;
- ...
3. To adhere to every item of the management system and relevant rules laid down by the company;
4. Party A shall continue to bring in new clients for the company and to achieve results for the company...

Party B (Three Star) was to, in turn,

1. on the first working day after the 1st of every month, pay Party A a sum of commission before tax (gross)
2. Party B shall, based on Party A's performance results, pay commissions in the following manner:  
The first three months being a probation period: from Dec 7, 2000 to Mar 6, 2001, with a *basic salary* of 1,000 Canadian dollars per month. (*my emphasis*)

Counsel for Three Star took issue with this interpretation. He argued that the Chinese word that had been translated as "salary" was, based on the Modern Chinese-English dictionary, "base pay".

The specific phrase in dispute consists of three characters. According to the Chinese-English-French Kuaisu Dictionary (Sainte-Foy: Les Presses de l'Universite Laval, 1997), those three characters are translated as "month" or "monthly", "base" or "basic", and "salary" or, alternatively, "pay".

Even if the correct translation is "base pay", rather than "basic salary", in my view, the effect is that Mr. Zeng was to be paid a certain amount of money per month for the probationary period. That payment was not conditional on Mr. Zeng bringing any business into the company for that period of time. Because Three Star drafted the agreement, any ambiguous terms are resolved in Mr. Zeng's favour.

In my view, the parties had an employer/employee relationship in mind when they negotiated the agreement. The agreement was specific to this relationship. The terms were reached through negotiation. Three Star clearly considered that Mr. Zeng would train and supervise staff. The evidence of Mr. Deng, the other signatory to the agreement, was that, although Three Star wanted Mr. Zeng to perform this task, it was agreed that he would have to acquire some experience prior to doing so. Independent contractors do not train and hire staff.

Clause 3 states that Mr. Zeng was to follow company rules and policies, which also suggests that Mr. Zeng was to be an employee.

Several common law tests have evolved to determine whether a person is an employee or an independent contractor. However, as this Tribunal has previously concluded (*Christopher Sin* BC EST # D015/96), the common law tests of employment are subordinate to the statutory definition. The statutory definition of employee contained in the *Act* is inclusive, not exhaustive.

Thus, the overriding test is whether Mr. Zeng "performed work normally performed by an employee," or "performed work for another." The Tribunal has held that the definition is to be broadly interpreted: (*On Line Film Services Ltd v Director of Employment Standards* BC EST # D319/97)

I find that Mr. Zeng performed work for Three Star, and that work was normally performed by an employee. Three Star initially intended that Mr. Zeng would train and supervise staff, his work was integrated into the Three Star's business, he worked with other staff, and sold its products using corporate letterhead. Three Star used the term "basic monthly salary" in its contract with Mr. Zeng, and indeed paid Mr. Zeng that amount for the first month, showing compliance with its agreement.

On balance, I conclude that Mr. Zeng was not a contractor, and deny the appeal.

## **ORDER**

I Order, pursuant to Section 115 of the *Act*, that the Determination dated March 8, 2002 be confirmed, together with whatever interest may have accrued since the date of issuance.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**