Employment Standards TRIBUNAL

An appeal

- by -

B.C. Dive Adventures Inc.
("B.C. Dive")

- 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: Lorne D. Collingwood

FILE No.: 2002/195

DATE OF HEARING: July 8, 2002

DATE OF DECISION: August 7, 2002

DECISION

OVERVIEW

B.C. Dive Adventures Inc. (I will use "B.C. Dive" and "the Appellant" for ease of reference.) has appealed, pursuant to section 112 of the *Employment Standards Act* ("the *Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 15, 2002. The Determination is that David Chen was B.C. Dive's employee, not an independent contractor, and that he is covered by the *Act*. The Determination goes on to order that B.C. Dive pay Chen $13,680.38 in wages, vacation pay and interest included.

In deciding that the relationship between B.C. Dive and Mr. Chen is that of an employer and an employee, the delegate considered the *Act*'s definitions of "employee" and "employer" and he applied some of the tests which have been developed as an aid in deciding whether a worker is an employee or an independent contractor. The Appellant is at this point prepared to accept that Chen did, eventually, become an employee but it argues that he was not an employee in the first few months of their relationship. The Appellant goes on to claim that the delegate has failed to consider important facts and that, in taking into account Chen's credit obligations, the delegate failed to deduct taxes and for handling and shipping charges. The Appellant also calls for another investigation.

The employee, in responding to the appeal, argues that it should be dismissed on the basis that it is frivolous, trivial, vexatious or not in good faith.

An oral hearing was set for July 8, 2002. B.C. Dive failed to attend the hearing. On the 10th of July the Appellant contacted the Tribunal and it asked for another hearing date. I have decided that the Tribunal should not hold a hearing for two reasons. One, the Appellant has failed to offer a satisfactory explanation for its absence on the 8th. Two, a hearing is not necessary: This is a case that can be decided on the basis of written submissions.

On reading the submissions, I conclude that this is not an appeal to dismiss on the basis that it is trivial, frivolous, vexatious or not in good faith. I find that the Determination should be confirmed in all respects but one, that being calculation of the amount owed. I am not shown that there is something fundamentally different about the first few months of the relationship between B.C. Dive and Mr. Chen. I am shown that the delegate, in deducting for credit obligations, overlooked handling and shipping charges and also the taxes that Mr. Chen should have paid. The Determination has accordingly been recalculated.

PRELIMINARY ISSUE

Is a hearing required?

B.C. Dive was sent written notice of its hearing. The design of the notice is such that the date, time and location of the hearing stands out from all other information. The information is highlighted both through use of a bold font, and a border. No other information is presented in that distinct way. B.C. Dive was clearly notified that its hearing was on July 8, 2002.

The notice of hearing does contain notice of the last day on which the Tribunal will accept written submissions and that date is also in a bold font. That date is not, however, surrounded by a border. It is in the text of the letter. And the date is June 24, 2002.

B.C. Dive failed to attend the hearing set for July 8. It subsequently contacted the Tribunal and it offered an explanation for its absence. According to B.C. Dive, it misread its notice and thought that the date of the hearing is July 24. The Appellant has asked for a new hearing date. I have decided that the Tribunal should not hold a hearing: The Appellant has not provided the Tribunal with a satisfactory explanation for its absence and a hearing is not, in any event, required.

A party may sometimes be prevented from attending a hearing by circumstances that are out of their control but that is not true of this case. The Appellant has in this case merely failed to pay sufficient attention to its notice of hearing. That is not, in my view, reason for the Tribunal to set another date for hearing. The Tribunal has limited resources. If the Tribunal were to accept such an excuse, it would leave the appeal process open to abuse. It would also be unfair to the other parties. In this case, Mr. Chen arranged his affairs so that he could attend a hearing on the 8th and he brought with him several witnesses. A second hearing would likely be quite inconvenient for Mr. Chen, and quite possibly expensive, in that he would have to do all of that again.

Aside from the above considerations, I must say that I am not at all inclined to believe that B.C. Dive misread its notice of hearing at all. Its claim involves an unlikely combination of errors. It is to mistake the notice of the final date for written submissions, June 24, as the date of the appeal hearing and then err a second time in concluding that the hearing is not June 24 but July 24. It is more likely that the Appellant simply forgot about the hearing or that it failed to arrange for anyone to attend the hearing.

I am satisfied, moreover, that this is not the sort of case that requires an oral hearing. Nothing turns on an assessment of credibility, nor are there any issues of great complexity. This is an appeal which can be decided on the basis of written submissions as the Tribunal may do pursuant to section 107 of the *Act*.

> **107** Subject to any rules made under section 109 (1) (c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.

REMAINING ISSUES

Is there reason to believe that Mr. Chen was not an employee in the first few months of his work?

Are the calculations in error?

The employee raises the issue of whether the appeal is or is not one to dismiss pursuant to section 114 (1) of the *Act* on the basis that it is frivolous, trivial, vexatious or not in good faith. Should I decide that this is not an appeal to dismiss pursuant to section 114, I must then decide the appeal. This particular appeal requires that I decide whether it is or is not shown by the Appellant that the Determination ought to be varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

FACTS

I have really had to hunt for the facts in this case. The parties' submissions are long and rambling. There is only the occasional reference to the facts. A great deal of what they have to say is unsupported and much of what they have to say is irrelevant, that to do with software ownership in particular.

My understanding of the facts is based on several readings of the parties' submissions, both submissions to the Tribunal and submissions made to delegates. (It appears that two were involved with this case.) I find that the important facts are as follows:

B.C. Dive purchased a dive centre in July of 1999 and it planned to have its grand opening on September 19, 1999. B.C. Dive offers scuba training and it also sells diving equipment and accessories.

David Chen went to B.C. Dive in late July or early August, 1999. He told B.C. Dive that he was seeking work and that he had a knowledge of diving and computer software. He also said that he wanted to train as a diving instructor and that he was looking for a sponsor so that he could obtain funding from an organization called "HRDC". The Appellant states "We hired him at that point on a contract basis at a wage of $8.00/hr. specifically to design our point of sale software" (1st paragraph, page 3, written submission of April 6, 2002).

I find that Chen was hired to work for an indefinite period. Brent Mayall, the President of B.C. Dive, has said that he (Mayall) "thought that he (Chen) would be a good addition because of our future development plans".

The Determination does not have Chen starting work in July or even August but September and the delegate has decided that Chen worked until September of 2000. Chen quit at that point.

When Chen started working for B.C. Dive he was working on a part-time basis for both Kocher's Diving Locker and Dr. Del Paulhus of U.B.C.. He continued to work for both of those employers.

Chen had for sometime been operating as a business called ATA International ("ATA"). That continued as well. As ATA, Chen offered scuba services and assistance with computers, web site design, Access databases, desktop publishing and home theatre installations.

There is a written contract of sorts and it is not between ATA and B.C. Dive but B.C. Dive and David Chen. There is not a written contract that sets out what it is that Chen was hired to do.

The Appellant states, as noted above, that Chen was hired specifically to design point-of-sale software but I find that he was not: It is obvious that Chen was to take on a wide range of jobs. B.C. Dive has itself outlined, at least to some extent, what these tasks are. It has said that Chen was hired for the purpose of producing a web page (letter to the delegate dated July 10, 2001, page 1), hired "to complete software development, etc." (page two of that same letter), hired for the development of a web page(s), an in-store computer network, point-of-sale software and also inventory control (retail and rental) software (February 5, 2002 letter to the delegate), and that he was hired to perform specific tasks based on his knowledge of computer systems and also his knowledge of diving instruction (page 2 of that same letter).

I am satisfied that Chen, in the first few months of the work relationship, performed all of the above noted tasks and more. It became his job to find and develop a record of the Appellant's equipment and

accessories and he also provided B.C. Dive with general help and assistance. It is the uncontradicted claim of Mr. Chen that he assisted with promotions on the day of B.C. Dive's grand opening and that he helped with a barbeque that followed a beach party and clean-up. And it is clear that he assisted customers to a certain extent.

Chen obtained certification as a scuba instructor and, on or about October 14, 1999, he began teaching a full scuba course and two introductory classes in the evening for B.C. Dive. As an instructor, he gave advice to students on purchasing dive equipment and he began to assist people with their purchases at this point. There is no record of the amount of time that Chen spent on the sales floor but, accepting the Appellant's description of matters, I can only conclude that it is significant. According to B.C. Dive, "several of our regular clients in fact complained about his unsolicited 'help' and we later lost clients who had been put off by him." That doesn't sound like a person who is rarely working on the sales floor. B.C. Dive also claims that a member of its sales staff, a Ms. Wallace, quit largely for reason of conflicts with Chen "while he was on the premises".

It is the Appellant's argument that the nature of Chen's work changed at some point in a fundamental way and he became an employee. I find that the Appellant is, however, quite unsure of when that happened. It is said that it was 3 ½ months into the relationship (April 6, 2002 submission, page 1), "in late December of 1999" (same submission, page 4), in January or February, 2000 (letter to delegate dated February 5, 2002) and "gradually … beginning in Feb. 2000 when our 1/3 partner, head instructor and manager, Sherri Rebstein (quit)" (that same letter). In the last of its submissions to the Tribunal (letter dated May 27, 2002), it is the Appellant's claim that Chen acted in every way as a contract employee for the first 3 ½ months of the relationship and that the relationship at that point began to change, gradually, until he was fully an employee by April, 2000.

According to the Appellant (April 6, 2002 submission, pages 4 & 5), Chen became an employee when and because he took on additional work. It is said but not shown that Chen spent more time on the sales floor when Wallace quit. His responsibilities and work hours are said to have increased when Rebstein quit but I am not shown that there was an important increase in responsibilities. In referring to the additional work and responsibilities, it is only said that Chen prepared a Christmas gift certificate, he completed tasks such as tagging items for our Boxing Day sale, and he began to assist with equipment repairs.

B.C. Dive did not keep a record of hours worked, never mind tasks performed. The employee did keep track of his hours and the Determination is based on that record.

Mayall told Chen that he would be paid on the basis of invoices and that B.C. Dive was not going to make CPP, EI or income tax deductions. On November 1, 1999, Chen signed a letter (the above noted contract) which states that he was working as a contractor, not an employee, and that he would be paid on the basis of invoices.

Chen did not submit invoices for quite some time. The first of the invoices which I am shown is dated August 3, 2000. It is on ATA letterhead. I am shown two other invoices and they are also on ATA letterhead.

Chen was free to choose his own hours of work. Chen worked long hours, primarily on the point-of-sale and inventory control software. He worked at home and at B.C. Dive.

Chen supplied some of the equipment that he used in his work. He used his own truck for moving training equipment to training sites. He provided B.C. Dive with two personal computers. He used his own dive equipment. He allowed B.C. Dive to rent out his scuba equipment.

Chen bought a substantial amount of scuba gear and accessories through B.C. Dive but he has not paid for his purchases. The delegate has decided that his purchases represent a credit obligation and he has reduced the amount of the Determination by $2,804.93. That total is not the total amount that Chen is to pay for his purchases, however. It does not include the Appellant's handling and shipping charges, nor taxes that are due and payable.

According to Chen, he was led to understand that he had to pay the cost to B.C. Dive plus 10 percent plus P.S.T. and G.S.T.. That is B.C. Dive's claim as well. But as Chen calculates the amount owed, it is $3,517.38 (10% for shipping and handling plus the taxes). And B.C. Dive has presented me with an entirely different set of figures and it claims to be owed $4,881.55.

I find that Chen owes $3,517.38. It is not shown that Chen owes anymore than that. B.C. Dive's figures are not supported by evidence of what it had to pay for the items that Chen purchased.

Chen, in filing his employment standards complaint, complained that he had not be reimbursed for use of his truck, computers, diving gear and other expenses but he dropped his claim for expenses during the course of the investigation.

ARGUMENTS

Mr. Chen argues that the appeal should be dismissed on the basis that it is frivolous, trivial, vexatious or not in good faith.

The Appellant argues that there are two distinct periods to the work relationship and that, in the first of the two periods, Chen is an independent contractor and, in the second, he is an employee. The Appellant argues that Chen should have been found to be an employee for at least the first few months of the relationship because he controlled the time, place and way in which the work was done. He was responsible for specific tasks and he worked out of his home for the most part. He was not under B.C. Dive's direct control, nor could he be disciplined. There were not deductions for income tax or CPP or EI premiums. He provided his own equipment. He provided B.C. Dive with invoices and he was not involved in the day-to-day operation of the business.

According to the employer, the defining difference between the two periods of work is that Chen was expected in the second period to perform more than just specific tasks. It is said that he started to spend more time on the sales floor at this point because Wallace quit. It is also said that his responsibilities and work hours increased at about this point because Rebstein quit and that he prepared a gift certificate, completed tasks such as tagging items for sales promotions, and assisted with equipment repairs.

Mr. Chen accepts, on appeal, that he owes $3,517.38 for purchases made through B.C. Dive, not $2,804.93, but he argues that he should not be made to pay more than $2,804.93 because he has not been paid anything for the use of his truck, tools, computer terminals and diving gear.

ANALYSIS

The Tribunal may dismiss an appeal without a hearing if it is satisfied that the appeal is frivolous, vexatious or trivial or is not in good faith.

> **114** (1) The tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that
>
> (c) the appeal is frivolous, vexatious or trivial or is not brought in good faith.

I will not dismiss the particular appeal on that basis. It is not frivolous. It is not trivial. The Appellant does attack Mr. Chen on a personal level but the appeal is not, in my view, one to dismiss on the basis that it is purely vexatious. I am prepared to accept that the appeal is in good faith. As matters are presented to me, I am led to believe that the appeal stems from a genuinely held, though largely mistaken, belief that the Determination is simply and plainly wrong.

The Appellant calls for more investigation. The Tribunal does not conduct investigations. The Tribunal is an appeal body. It is the role of the Tribunal's Adjudicators to decide whether it is or is not shown on appeal that a Determination(s) should be cancelled or varied or a matter(s) referred back to the Director for reason of an error or errors in fact or law.

I will not order that there be any further investigation. An investigation has been conducted by a delegate or delegates of the Director and I am not shown that it is wanting in any way.

The issue in this case is whether the delegate has or not erred in deciding that Mr. Chen was at all times B.C. Dive's employee insofar as the *Act* is concerned.

Section 1 of the *Act* defines the terms "employee", "employer", and "work". Those definitions are as follows,

> "**employee**" includes:
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform the work normally performed by an employee, … .
>
> "**employer**" includes 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**" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

Those definitions are to be given a liberal interpretation. That is the view of British Columbia's Court of Appeal [*Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170];

> "the definitions in the statute of "employee" and "employer" use the word "includes" rather than "means". The word "includes" connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances."

Chen, in the contract dated November 1, 1999, is said to be "working (in a) subcontract relationship" and not an employee of B.C. Dive but nothing turns on that alone. In *Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341, the B.C. Supreme Court noted:

> "The courts, in determining the nature of a labour relationship, have looked beyond the language used by the parties in the contract and have, instead, assessed the nature of their daily relationship."

And section 4 of the *Act* specifically prohibits any attempt to waive the minimum requirements of the *Act* through or by agreement.

> **4** The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

If Chen is an "employee" insofar as the *Act* is concerned, he is entitled to receive the basic, minimum working conditions of the *Act*. An agreement which provides for anything less than that is null and void. That in my view includes a person's agreement that he or she is not an employee but working as an independent contractor. (Sections 43, 49, 61 and 69 are provisions relating to collective agreements and they have no application in this case.)

The primary purpose of the *Act* is to ensure that employees receive at least basic standards of compensation and working conditions (the *Act*, section 2). The Tribunal must act to ensure that all workers receive the protection and benefits of the *Act* without the absurd result that an employer is forced to pay wages (vacation pay, statutory holiday pay, length of service compensation and the like) to a person who is genuinely and quite obviously self-employed. In *Castlegar*, cited above, Mr. Justice Josephson made note of that very point in quoting Paul Weiler, then Chair of the Labour Relations Board [*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. LRBR. 42 at 50]

> "The difficulty is that there is no single element in the normal makeup of an employee which is decisive, and which would tell us exactly what point of similarity is the one which counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee ... . But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer."

Various tests have been developed as an aid to deciding whether a person is or is not an employee. There is "control test", the "Four-fold" test (also known as the "four-in-one test") applied by Lord Wright in *Montreal Locomotive Works Ltd*., (1947) 1 D.L.R. 161 (P.C.), the "organizational test" (also known as the "integration test") of Lord Denning, as he later became, the "economic reality test" and the "specific result test", to name some of the more important ones. All have their limitations because there are in fact many factors to consider, a point made years ago.

> "The observations of Lord Wright, of Denning, L.J., and of the judges of the Supreme Court of the U.S.A. suggest that the fundamental test to be applied is this: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various

> considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man (or woman) performing the services provides his (or her) own equipment, whether he (or she) hires his (or her) own helpers, what degree of financial risk he (or she) takes, what degree of responsibility for investment and management he (or she) has, and whether and how far he (or she) has an opportunity of profiting from sound management in the performance of his (or her) task. The application of the general test may be easier in a case where the person who engages himself to perform the services does so in the course of an already established business of his own; but this factor is not decisive, and a person who engages himself (or herself) to perform services for another may well be an independent contractor even though he (or she) has not entered into the contract in the course of an existing business carried on by him (or her).
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> [*Market Investigations Ltd. v. Minister of Social Security*, (1968) 3 All E.R. 732 (Q.B.D.) at 737 –738]

The Tribunal has through *Larry Leuven*, (1996) BCEST No. D136/96, and other decisions, said that it will consider any factor which is relevant. The factors which I have decided to consider in this case are in essence those which were identified in a more recent decision of the Tribunal, *Cove Yachts(1979) Ltd.*, BCEST D421/99. B.C. Dive does not suggest that there is any other factor to consider. As I see, I must consider the following factors:

- The actual language of the contract;
- control by the employer over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- remuneration of staff;
- right to delegate;
- the power to discipline, dismiss, and hire;
- the parties' perception of their relationship;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is a specific task or term.

The Appellant accepts that its relationship with Chen changed over time and that he eventually became its employee. But it argues that he was an independent contractor in the first months of their relationship. Is there reason to believe that Chen was, in the first part of the relationship, working as an independent contractor for B.C. Dive.?

There are elements of the relationship between B.C. Dive and Mr. Chen that are consistent with a relationship between contractors. Chen had prior business as ATA. In November he agreed that he was a consultant. He submitted invoices as ATA. He was free to choose his hours of work. B.C. Dive did not deduct income tax or CPP and EI premiums from Chen's pay. And Chen provided some of the equipment that he used in his work. But that is true of the entire relationship, not just the first few months

of the relationship. And even the Appellant accepts that it does not follow from this alone that Chen is an independent contractor and not an employee.

According to the employer, there are two distinct periods of work and the defining difference between the two periods is that Chen was expected in the second period to perform more than just specific tasks. It is said that he spent more time on the sales floor and that he had increased responsibilities and work hours. It is pointed out that he prepared a gift certificate, that he completed tasks such as tagging items for our Boxing Day sale, and that he assisted with equipment repairs. I find, however, that what is said to have changed is not a fundamental change in duties, never mind reason to believe that Chen can be considered to be an independent contractor.

Even at the outset of the relationship between B.C. Dive and Chen, there is reason to believe that it can be considered to be one of employment. The contract is not between B.C. Dive and ATA but B.C. Dive and Chen. As matters are presented to me, I can see no reason to believe that Chen was hired to perform specific tasks and that, once completed, that would be the end of the relationship or at least that chapter in the relationship. Chen was hired for an indefinite period, not a specific term. I am led to believe that he was given the specific responsibility of developing software for the Appellant but that he was also expected to do whatever was required. Chen was not free to delegate his work. Chen had no staff. Yes Chen supplied some of the equipment that he used in his work but B.C. Dive supplied the equipment which was used by the students. There is not a contract to provide services for a set price. Chen did not stand to earn a profit or suffer loss. He worked for an hourly wage, and little more than the minimum wage at that.

I am satisfied that it is reasonable to conclude that Mr. Chen was at all times an employee.

As noted above, the delegate has decided that he should deduct, as a credit obligation, for the purchases that Chen made through B.C. Dive but he did not take into account the true amount of Mr. Chen's credit obligations. I am satisfied that the total amount that the employer owes Mr. Chen is not $12,908.77 plus interest but $12,196.32 ($12,908.77 + 2,804.93 - 3,517.38) plus interest.

Mr. Chen has asked that I consider he has not been paid anything for expenses and that I overlook his failure to pay taxes and handling and shipping charges. I will not. The alleged expenses, and they are just that, alleged, do not appear to be wages which may be collected under the *Act*.

It is section 18 of the *Act* which requires the payment of Chen's wages.

> **18** (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.
>
> (2) An employer must pay all wages owing to an employee within 6 days after the employee terminates the employment.

But the definition of the term "wages" does not include expenses.

> "**wages"** includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> but does not include
>
> (h) allowances or expenses, … .

In summary, I find that there is not reason to dismiss the appeal pursuant to section 114. I find that it is reasonable to conclude that the relationship between B.C. Dive and Mr. Chen was at all time one of employment. I find that the Determination should be varied for reason of the fact that it does not reflect the true amount of Mr. Chen's credit obligations.

ORDER

I order, pursuant to section 115 of the *Act*, that the Determination which is against B.C. Dive, in favour of David Chen and dated March 15, 2002, be varied. The amount which B.C. Dive is to pay is $12,196.32 plus interest pursuant to section 88 of the *Act*.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal