

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

-by-

Geoffrey Phillips
(the Appellant)

-of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR:	Hugh R. Jamieson
FILE NO:	1999/305
DATE OF DECISION:	September 2, 1999

DECISION

OVERVIEW

This appeal dated May 19, 1999, is brought against a Determination issued on April 27, 1999, wherein the Director found that the Appellant was not an employee within the meaning of the Employment Standards Act (the Act). The Director also found a complaint filed by the Appellant to be vexatious. The complaint referred to, dated February 24, 1999, alleged that Mills Paint Sales Ltd. (the Respondent), had unlawfully deducted certain monies from his wages. The Appellant also complained that he had not been paid vacation pay and statutory holiday pay.

ISSUES TO BE DECIDED

The primary issue here is whether the Director erred in finding that the Appellant was not an employee under the Act.

FACTS

The Appellant was employed by the Respondent as a Store Manager from June 1979 to July 1995. Effective July 31, 1995, the Appellant entered into a franchise agreement with the Respondent under the corporate name of Ashcourt Holdings Ltd. (Ashcourt). The Appellant is the sole principal of Ashcourt and he was also the sole Guarantor under the franchise agreement.

The store that the Appellant had previously managed in Abbotsford, was then operated by Ashcourt under the terms of the franchise agreement until May 1997. Apparently, Ashcourt was in serious financial trouble by that time and had accumulated substantial debts, mainly to the Respondent, but also to other creditors. Ashcourt's problems, which nearly caused its demise, is attributed to poor inventory control.

Consequently, the franchise agreement was terminated and the Respondent took over the management of the inventory in June 1997, and paid off the store's creditors. Ashcourt was then retained to operate the store on a commission basis. There was an agreement setting out the conditions of this arrangement but it was never signed. The parties did however live with this arrangement until November 1998, when the Appellant terminated his relationship with the Respondent.

During this period, from June 1997, to November 1998, the Respondent periodically deducted monies from the commissions payable to Ashcourt to recoup the indebtedness incurred by Ashcourt between 1995 and 1997. These deductions totalled about \$16,000.00 over the period in question. It is this money that the Appellant claims was unlawfully deducted from his wages.

In his complaint, the Appellant took the position that he was hired to manage the store when the franchise agreement was terminated in 1997. In this regard, the Appellant says he was treated as a store manager and points out that he paid into the “employee” benefit fund and received an automobile allowance that was paid to him personally. In the circumstances, he claims employee status and protection under the Act against unauthorized deductions.

In reply to the complaint, the Respondent denied that the Appellant was rehired as a store manager in 1997, when the franchise agreement was terminated. In support of this, the Respondent relied on documentation showing that during the relevant period all of its financial dealings were with Ashcourt as a corporate entity, not with the Appellant personally. The Respondent also claimed that other than for inventory control, Ashcourt continued to operate the store with its own staff as it had done since 1995. All commissions earned during this period were paid to Ashcourt which in turn paid its own employees, including the Appellant. As for the Appellant paying into the “employee” benefit fund, the Respondent explained that for economic reasons, all franchise store employees are covered by its benefit plan. Apparently, it would be too costly for each store to maintain its own benefit plan. Accordingly, any deductions made for employee benefits from Ashcourt’s commission income reflected the total amount due for all Ashcourt’s employees, not just the Appellant. In short, the Respondent basically argued that the Appellant had not been an employee since 1995.

In arriving at the conclusion that the Appellant was not an employee within the meaning of the Act, the Director obviously accepted the Respondent’s version of the nature of the relationship between the Appellant and the Respondent. The Director then went that one step further to find that the Appellant’s complaint was vexatious.

Before dealing with the substance of the appeal, it should be recorded that the Tribunal initially decided that this appeal required an oral hearing. The matter was assigned to me as an Adjudicator and set down to be heard on August 13, 1999. However, following an exchange of correspondence between the parties regarding prehearing disclosure, the Respondent asked that the whole matter be reviewed to ascertain if a *prima facie* case existed for the Tribunal to consider. This was done and, after looking at all of the material on file, I concluded that nothing worthwhile could be added by viva voce evidence. Everything that was before the Director was now before me and the documentation spoke for itself. In the circumstances I decided to exercise the Tribunal’s powers under Section 107 of the Act to dispose of this matter without an oral hearing. The parties were so advised and they were given an opportunity to present their final submissions.

The main focus of the appeal is the Appellant’s insistence that the deductions made after he says he was rehired to manage the store in 1997, were never authorized, that this money was taken unjustly and, that it should be returned to him with interest. Almost as an aside, the Appellant suggests that the issue of his employee status under the Act is merely a technicality that has come about by the Respondent’s manipulation of the situation and its insistence that Ashcourt remain as the payee while he managed the store.

In his final submission made after the hearing was cancelled, the Appellant filed statements from his father, Mr. Matt Phillips, who was present at a meeting where deductions were discussed with the Respondent. The gist of this letter was that the Respondent allegedly promised that no further monies would be withheld from Ashcourt without discussions with the Appellant. Statements were also filed from two other parties, Mr. Isham deBeer and Mr. & Mrs. Vern and Monika Claridge, who also apparently entered into franchise agreements with the Respondent and had found themselves in a similar financial situation as the Appellant.

The Appellant also filed a statement from a Mr. Kevin Pidduck, who claims to have been demoted from District Manager to a Store Manager when the franchise experience ran into trouble. As a Store Manager, Mr. Pidduck apparently ran a store in a manner similar to the Respondent's relationship with Ashcourt. The Appellant's point here being, that if this person was considered to be an employee then so should he.

For its part, the Respondent raises the question about the timeliness of the appeal, pointing out that it was filed after the expiry of the fifteen (15) day time limit provided for in Section 112 of the Act. In addition to this preliminary issue, the Respondent goes on to reiterate the sequence of events and circumstances upon which it relied upon in its submissions to the Director.

In its final submission, the Respondent stressed that the Appellant was an employer under the Act rather than an employee and that the Tribunal has no jurisdiction to issue an order related to the funds that were withheld from Ashcourt. The Respondent also submitted that at the very best, the Appellant was an independent contractor and as such was still not an employee within the meaning of the Act.

ANALYSIS

For the Appellant to be successful with this appeal, it is necessary for him to satisfy the Tribunal that the Director had somehow erred in finding that his relationship with the Respondent falls outside the ambit of the Act. However, other than expanding a little on what he had already given the Director, by providing names and written statements, the Appellant provides little or nothing in his appeal to support his contention that he was an employee rather than a business person.

At no time during this whole process has the franchise agreement been characterized as being a contract designed to circumvent the minimum standards set by the Act, which could of course have sparked a more intensive investigation by the Director. Nor has there been any doubt cast upon the Respondent's version of its working arrangement with Ashcourt during the relevant time period after the franchise agreement ended. The information supplied by the Respondent to the Director regarding its dealings with and, payments to Ashcourt as a corporate entity have not really been disputed. Moreover, the fact that the Appellant's source of income derived from his role as a principle of Ashcourt rather than from wages from the Respondent remains unchallenged. In fact,

most of the Appellant's efforts have been directed at attempting to show how bad the deal was that he entered into with the Respondent, how unfairly he has been treated and, how much debt had been accumulated since he "bought the store" in 1995. None of which really does much to found a successful appeal or to discharge the onus carried by the Appellant.

All of that notwithstanding and, taking into account that the Appellant is a layperson who is obviously having difficulty grasping the legal implications of the process, the appeal will not be dismissed out of hand without a close look at the basis for the Director's findings.

This is particularly important here, because the question of employee status is obviously much more than a technicality as the Appellant suggests. The very jurisdiction of the Director and of the Tribunal lies in this finding and it almost goes without saying that in these situations, where jurisdiction is involved, there is no room for error.

Looking at all of the evidence, it is readily apparent that the Respondent was indeed dealing with Ashcourt as a corporate entity, rather than with the Appellant on an employer/employee basis. The evidence is clear that during the relevant period when the Appellant claims employee status, all monies earned as commission from sales at the store in question were paid to Ashcourt and that this was not a situation where wages were being paid to the Appellant by the Respondent. The Appellant did in fact receive his income from Ashcourt. It can also be noted that these commissions were not based solely on the Appellant's personal sales efforts, they were a percentage basis for all of the product sold at the store to both the walk in public as well as to contractors. Moreover, there was GST paid to Ashcourt on top of these commissions which is another indication of a commercial relationship.

The amount of the monies being paid by the Respondent to Ashcourt are also of some significance in determining whether the Appellant was treated as a Store Manager as he alleges. For example, looking at the commissions earned during July, August and September 1997, it can be seen that they were \$10,229.15, \$9,349.68 and, \$10,577.20 respectively. These amounts are obviously substantially more than a Store Manager would earn, which is indicated in the material to be in the range of about \$2,400.00 a month plus 1% commission. As a Store Manager, the Appellant would have been paid about \$3,000.00 for those months, not \$10,000.00 or so. In this same vein, the evidence also shows that Ashcourt's income varied from month to month depending on the volume of business conducted at the store. This of course indicates an element of risk and the opportunity for profit or loss, which would not be present if the Appellant was merely managing the store as an employee.

Taking all of the foregoing into consideration, it is clear that the information relied upon by the Director overwhelmingly supports the finding that the Appellant's relationship with the Respondent was of a commercial nature rather than that of an employer/employee within the meaning of the Act. Consequently, there is no jurisdiction in the Director or in the Tribunal to deal with this dispute between two commercial entities.

ORDER

Pursuant to Section 115 of the Act, the Determination dated April 27, 1999, is hereby confirmed insofar as the finding that the Appellant was not an employee within the meaning of the Act. Without jurisdiction under the Act to deal with the complaint, there was no jurisdiction in the Director to label the complaint as vexatious. The Determination is varied accordingly.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal