

An appeal

- by -

Scott Anderson operating as Blue Chip Employment Services
("Blue Chip")

- 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: Ib S. Petersen

FILE No.: 2001/294

DATE OF DECISION: July 5, 2001

DECISION

SUBMISSIONS:

Mr. Scott Anderson	on behalf of Blue Chip
Mr. Shirley Winfield	on behalf of herself
Mr. Ed Wall	on behalf of the Director

OVERVIEW

This is an appeal by Anderson pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on March 21, 2001 which determined that Winfield was an employee of Blue Chip and that she was owed \$952.67 on account of wages and vacation pay.

Anderson argues that the Determination is wrong because Winfield was, in fact, a partner in the business and not an employee.

FACTS AND ANALYSIS

The appellant, Anderson, has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am satisfied that he has met that burden.

The basic background facts may be gleaned from the Determination. Most of these facts are not in dispute. Blue Chip operated a business which assisted participants to find and maintain employment through volunteer placements. It came into existence as the result of a joint proposal from Anderson and Winfield. The joint proposal included rent, wages, costs, and the name. The funding came from the government, the Ministry of Social Development and Economic Security. When the ministry returned the agreement, Anderson’s name was the only name on it. However, both Winfield and Anderson performed the same work and reported directly to the ministry as co-directors.

The issue before me is whether Winfield was an employee or a partner. This boils down to the following proposition: because Winfield was not mentioned in the contract with the ministry, Anderson was her employer and, as such, liable for wages and vacation pay. It appears that the delegate agreed with her.

The *Act* defines an “employee” broadly (Section 1).

“employees” includes

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

An “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;

The application of these definitions is not as easy or simple as one might have expected and have a tautological quality to them. In my view, the true nature of the relationship considering all the factors must be considered. However, there are important *caveats*. First, it is well established that the definitions in the *Act* are to be given a broad and liberal interpretation. Second, my interpretation must take into account the purposes of the *Act*. It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (see, for example, *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986). As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect. The Tribunal has on many occasions confirmed the remedial nature of the *Act*.

In my view, the delegate did not properly consider this aspect even though the issue of whether Winfield and Anderson were partners in the business, and the supporting facts, were raised before him. Under the *Partnership Act*, a partnership is the relation that subsists between persons carrying on business with a view to profit (Section 2). The question, in my view, is whether there was such a relationship. In my view, the *Act* is not to be used as an instrument against by one partner against the others when business relations sour. Thus, if she became a partner in the business, she would generally not be entitled to the protection of the *Act*.

In the circumstances, I find that Winfield was Anderson’s partner and not his employee. The delegate states, under the heading “findings of fact”:

“The essential facts of this dispute are not in dispute. The complainant and Anderson together founded Blue Chip as a means of practising their education and providing themselves with a summer occupation. Anderson’s name appeared

on the contract, the complainant's did not. Anderson had access to the funding, the complainant did not. Both parties carried out the work, and neither supervised the other to any extent. Both agree that MSDES [the ministry] had more control over their activities than either of them had over the other."

Although the delegate is of the view that the case is unusual "in that none of the common indicia of an employment relationship are apparent," following a consideration of the statutory definitions referred to above, he concludes that Winfield was an employee of Anderson. The rationale for the decision, although it is not readily apparent, is that Anderson was named on the contract with the ministry. He considers that Anderson was the "dominant personality." With respect, I disagree with the delegate's conclusions. While the contract with the ministry is relevant to the delegate's inquiries and--to an extent--indicates control by one over the other, in the circumstances of this particular case, I am of the view that this was a partnership, not an employee-employer relationship. The business was established by both Winfield and Anderson. Both performed the same work and reported directly to the ministry as co-directors. The dispute between the parties is a dispute over their contractual relations. If either party is aggrieved, they have recourse to the civil courts.

In short, I do not agree with the delegate's conclusions and I am persuaded to set aside and cancel the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 21, 2001 be cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal