

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Nationwide Business Centre (1989) Ltd.
("Nationwide")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 460/96

DATE OF DECISION: December 9, 1996

DATE OF HEARING: November 26, 1996

DECISION

APPEARANCES

Sylvia McLeod	For Nationwide Business Centre (1989) Ltd., and Allen McLeod, Director/Officer of Nationwide Business Centre (1989) Ltd.
Philip Atizado	On his own behalf
Adele Adamic	For the Director of Employment Standards

OVERVIEW

This is an appeal brought by Nationwide Business Centre (1989) Ltd. and its Director/Officer, Allen McLeod (“Nationwide”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) from Determinations No. CDET 003349 and DDET 000342 issued by the Director of Employment Standards (the “Director”) on July 16, 1996. The Director determined that Nationwide owed Philip Atizado (“Atizado”) the sum of \$1,245.80 representing unpaid wages, vacation pay and interest.

ISSUES TO BE DECIDED

1. Is Atizado an employee within the meaning of the *Act*?
2. If Atizado is an employee, is he owed the sum listed on the Determinations?

FACTS

Atizado worked at Nationwide, an accounting business, as a bookkeeper/accounting clerk between September 9, 1994 and February 27, 1995. His rate of pay was \$1600.00 per month. No statutory deductions were taken off his cheques, which, initially, were made out to him personally.

On November 9, 1994, Atizado purchased a limited company named Golden Islands Yacht Charters Ltd. from Sylvia McLeod ("McLeod"), the General Manager of Nationwide. On January 10, 1995, the name of the company changed to Cyber Support Services, Inc. ("Cyber"). Atizado is the Director of Cyber. Commencing in November of 1994, Nationwide paid Atizado through these companies.

Atizado worked out of the offices of Nationwide. His hours and days of work were 8:30/9:00 a.m. to 5:00/5:30 p.m., Monday to Friday. With the exception of his last few days of work, he was not allowed to take any of his work home.

McLeod argues that Atizado was an independent contractor and, therefore, not covered by the *Act*. She stated that Atizado came to Nationwide on the understanding that he was an independent contractor. That is how the position was advertised, and Atizado agreed to work for Nationwide on that basis.

McLeod stated that she told Atizado that he should purchase her company for tax and liability reasons, and he was aware that she would give him clients only if he had a limited company. As it turned out, she gave him the majority of her subcontract work.

McLeod stated that the wages paid to Atizado were draws and she was to receive an invoice from him for \$1600.00 per month, or more, depending on performance. In turn, she invoiced her clients based on Atizado's billings. She did not submit any invoices prior to, or at the hearing. She said Atizado was aware that the draw arrangement, and the number of his clients, would come to an end on April 30, 1995. At that time, she intended to start paying him 30 days from his invoice date and to reduce his work. She expected that by the end of April, Atizado would have built-up his own client base.

According to McLeod, Atizado was expected to know and conform to the principles of accounting and bookkeeping and therefore, there was no need for him to be supervised by anyone at Nationwide. He was required to work at their offices because the books and records were not allowed off the premises. She also stated that she "insisted" he work at their offices because he told her he didn't have favorable references and he boasted that he had once overcharged a client. McLeod further stated that even if Atizado had to be at their offices, he still could have done work for others, and in fact, he used their offices to represent himself as a limited company to outside clients, and he received faxes and calls from other clients (Speedy Printing and a company in the U.S.). She stated that Atizado, for the most part, used all her equipment and supplies. Occasionally, he used his own computer programs, but she did not approve of this activity.

McLeod stated that Atizado had to drive his wife to and from work, and her hours dictated his specific hours of work. She said she didn't care when Atizado came in to work, as long as he let her know his hours, and what he was doing, with the expected completion dates, because she had to do follow-up on his files. She also stated that when she was off work for a month in December/January she asked him to be in the offices between 8:00/9:00 a.m. and 5:00 p.m. McLeod stated that she tracked Atizado's billable hours and attendance by monitoring his computer log in and log out records.

It is undisputed that Atizado was not paid the sum listed on the Determinations. McLeod said that she refuses to pay Atizado because he was not covered by the *Act*, and he refuses to pay her for the purchase of Cyber and the costs of the company name change, which he verbally agreed to do if he left Nationwide before completing one year of work. She said that the amount he owes her is in excess of what she owes him.

Atizado agrees that when he was hired he was told he would be working as an independent contractor. This is what he wanted, but in reality he worked as an employee. He said that McLeod set his hours and required him to be at the Nationwide offices from 8:30/9:00 a.m. to 5:00/5:30 p.m. McLeod supervised him and told him what to do and when, and she required him to use Nationwide equipment and programs. All supplies were provided by Nationwide. McLeod kept track of his time by way of his logging in and out on the computer. She limited his ability to receive calls or faxes from others. Further, most of his income came from Nationwide. His only other source of income was from small jobs he did for his relatives who own Speedy Printing and a U.S. company.

Atizado denies that he was paid on a draw basis. He states that he never billed McLeod at any time and he was guaranteed a salary of \$1600.00 per month. It suited him not to have any statutory deductions from his wages and consequently he never disputed the lack of deductions.

Atizado said McLeod insisted he buy her company. He believed that if he did not, he would not be allowed to continue working at Nationwide. He stated he was never asked to pay for the company or the name change. He said he intended to give the company back to McLeod after he quit his job, but then she refused to pay him, so he refused to pay her, or return the company.

ANALYSIS

Was Atizado an employee or an independent contractor?

The *Act* defines "employee," "employer" and "work" 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 work normally performed by an employee,
- c) a person being trained by an employer for the employer’s business,
- d) a person on leave from an employer, and
- e) a person who has a right of recall.

“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.

In addition to the above statutory definitions, various common law tests have been developed in order to determine whether a person is an employee. These include the “control test”, which determines whether a person is subject to the control and direction of the employer in respect of the manner in which the work is to be done, when it will be done and how the employee must do it; the “four-fold test” which looks at control, ownership of tools, the chance of profit and risk of loss; and the “organization” or “integration” test which suggests that if an individual’s work is an integral part of the business operations, that individual will be found to be an employee.

By applying the evidence presented at this hearing to the statutory definitions of ‘employer,’ ‘employee’ and ‘work’ and to the various tests, I am satisfied that, notwithstanding the intent of the parties, Atizado was an employee and Nationwide his employer.

I am satisfied that Atizado performed labour for Nationwide and that Nationwide was in ultimate control of Atizado and responsible for his employment. Atizado was hired and paid a salary by Nationwide. The evidence does not support the claim that Atizado was paid on a draw basis and he was to invoice Nationwide. There was no evidence that Atizado employed anyone, nor was there any evidence to challenge his claim that he was almost totally dependent on Nationwide for his income. I accept that he was expected to be on the job at the Nationwide offices on a regular basis. Although he may have occasionally used his own computer programs, Nationwide, for the most part, provided him with the necessary equipment to do the job. He also had no chance of profit or risk of loss given that he was paid a fixed salary. Finally, I find that the work performed by

Atizado was an essential aspect of Nationwide's business operations. All of these factors indicate an employee-employer relationship existed between Atizado and Nationwide.

It is conceded that the absence of statutory deductions and being paid through a limited company are factors which are suggestive of an independent contractor relationship, but on balance these factors do not create independent contractor status out of the parties' employer-employee relationship. When considering the whole of the Actual relationship between Nationwide and Atizado, Atizado was clearly an employee of Nationwide.

What, if any, wages are owed to Atizado?

It is undisputed that Atizado was not paid the sum listed on the Determinations. The wages were earned by Atizado. Can his former employer withhold these wages?

Section 21 of the *Act* prohibits an employer from requiring an employee to pay any of the employer's business costs by withholding the employee's wages. An employer is prohibited from withholding wages for any purpose, except for income tax, CPP, UIC or a court order to garnishee wages, or where permitted by the *Act*. Section 22 (4) of the *Act* permits an employer to deduct wages from an employee when an employee gives written authorization to deduct wages to meet a credit obligation. Atizado has given no written authorization for a deduction. Consequently, in light of Section 21, Nationwide cannot withhold his wages. If Nationwide wishes to pursue Atizado for monies he allegedly owes surrounding the purchase of Cyber, then it must do so by way of a separate civil Action.

ORDER

Pursuant to Section 115 of the *Act*, I order that Determinations No. CDET 003349 and DDET 000342 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

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