Employment Standards TRIBUNAL

An appeal

- by -

Superior City Services Ltd.
("Superior" or the "Appellant")

- 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.: 2002/253

DATE OF HEARING: August 7, 2002

DATE OF DECISION: August 15, 2002

DECISION

APPEARANCES:

Mr. Paul McLean	counsel, on behalf of the Appellant
Mr. Lawrence I. Daigneault	on behalf of himself

OVERVIEW

This is an appeal by Superior, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director's Delegate issued on April 10, 2002 (the "Determination"). In the Determination, the Delegate concluded that the Appellant, which operates a sanitation service, was the employer of Mr. Daigneault from March 14, 2002 to October 18, 2002. Mr. Daigneault was an employee and not an independent contractor, as argued by the Appellant. Mr. Daigneault, according to the Determination, worked as a mechanic at the rate of $15.00 per hour. No deductions--CPP, EI and income tax--were taken from his wages. The Delegate concluded that he was owed $3,613.26 on account of overtime, statutory holiday pay, vacation pay and compensation for length of services.

ISSUE

The basic issue to be resolved is whether Mr. Daigneault was an independent contractor, as asserted by Appellant, or an employee, as the Delegate concluded. There is no dispute with respect to quantum, should I decide against the Appellant.

ARGUMENTS

The Appellant takes the position that Mr. Daigneault was an independent contractor and says that the Delegate erred in her determination in that respect. In my view, the argument largely boils down to this. At the commencement of the relationship the Appellant had offered Mr. Daigneault the options of either being an employee or an independent contractor--and he chose the latter. He was a sophisticated person, who had operated his own businesses in the past, and was aware that no deductions were taken from his flat hourly rate of $15.00. He was free to come and go and set his own hours--some days he worked, some not. He worked without "serious direction" and brought his own tools to the Appellant's shop. With respect to factual issues, the Appellant argues that I ought to accept its evidence over Mr. Daigneault's. The Appellant also argues that the Delegate erred in law and failed to conduct a proper investigation.

The appeal is, not surprisingly, opposed by both the Delegate and Mr. Daigneault. The delegate did not attend the hearing. Mr. Daigneault argued that he was an employee.

FACTS AND ANALYSIS

The Appellant has the burden to persuade me that the Determination is wrong. For the reasons that follow, I am of the view that they have not met that burden.

The Appellant produced two witnesses, Ms. Ng, a dispatcher and the sister of the principal, Mr. Raymond Ng, and Mr. James Daigneault, Mr. Daigneault's brother, an contractor with the Appellant. I did not find Ms. Ng to be a credible witness--she was evasive. Mr. James Daigneault'e evidence did not add anything of substance. I am curious that the Appellant did not produce Mr. Allan Ng, the mechanic, who worked with Mr. Daigneault and, on Mr. Daigneault's testimony supervised him. On the other hand, I found that Mr. Daigneault gave his testimony in a credible and straightforward manner, and I accept it where a conflict exist in the evidence. He said that he never asked for overtime etc. because his agreement with the company was a straight flat hourly rate. He was simply looking for a week's pay when he was terminated.

The application of the statutory definitions of "employee" and "employer" is not as easy or simple as one might have expected. In my view, a useful summary is set out in my decision in *Knight Piesold Ltd.*, BCEST #D093/99:

> "Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

The following observations from that case are also relevant in the instant case:

> "I accept that the intent of the parties was that Johnson was an independent contractor. As well, I accept that the relationship was established in good faith. The Employer relies on a decision of the Supreme Court of British Columbia, *Straume v. Point Grey Holdings Ltd.*, [1990] B.C.J. No. 365, for the proposition that weight should be given to the parties' intentions. In that case the court found that a farm manager was an independent contractor (contract for service) and not an employee (contract of service). The decision, which arose out of a claim for wrongful dismissal, *i.e.*, an action in common law, appears to be based to a large extent on the degree of control exercised by the alleged employee: he had great flexibility in his hours of work, when he took vacations, and he successfully resisted control over reporting weekly hours. In my view the decision does not reflect the law applicable to this case. If I am wrong in that respect, I find that the facts of that case can nevertheless be distinguished from those in the case at hand. Moreover, this case concerns employee status under the *Act*. In *Straume* the court noted, at page 3, that "the declared intention and classification of the contract parties may not bind statutory or third parties not party to the contract as against its true nature". As noted in *Christie et al.*, *above*, at page 2.1-2.2 with respect to the common law tests of "employee" status:
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> > "In each of these contexts the purpose of characterizing a relationship as employment is quite different from the purpose of the characterization in the action for wrongful dismissal, the traditional common law action in which the two-party relationship that is the subject of this service is elaborated, to say nothing of the purpose of particular statutes in which the term may appear. ... It follows that precedents arising under common law or under a particular statute can be legitimately rejected or modified when the question of "employee" status is asked for a different purpose."

> While the parties intent is relevant in an action for wrongful dismissal, *i.e.*, an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor. 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.

Even if I accept Ms. Ng's testimony that there was an agreement that he was to be an independent contractor, and that such a relationship was intended between the parties, I would still conclude that he was an employee. While I consider intent a relevant factor in the overall assessment of the relationship between the parties, it is far from determinative in view of the statutory language, even if, as suggested by the Appellant, the relationship was entered into in good faith and not to avoid the obligations under the *Act*. The issue before me is whether the relationship was an employment relationship for the purposes of the *Act*. Section 4 provides expressly that the requirements of the *Act* and *Regulations* are minimum and "an agreement to waive any of those requirements is of no effect." In short, the parties are not capable of contracting out of the statutory requirements. I appreciate the Appellant's position that Mr. Daigneault did not complain about overtime etc. until after the relationship had come to an end. I also appreciate Mr. Daigneault's testimony that he was not seeking overtime etc. when he initially filed a complaint. All he was seeking was a week's pay in lieu of notice. Regrettably, from the standpoint of the party who, to its detriment apparently has relied on a certain arrangement, these determinations are often made after the fact. If he is an employee--as he, in my view, was at the material time--he is entitled to the protections provided by the *Act*, including overtime wages, statutory holiday pay and vacation pay.

The Appellant relies on a recent decision of the Supreme Court of Canada, *671122 Ontario Ltd. v. Sagaz Industries Canada Ltd.*, [2001] 2 S.C.R. 983 and say that the Delegate applied the common law tests in a restrictive manner. This case arose in the context of vicarious liability and not employment standards legislation. All the same, the case contains a useful review of the relevant case law.

The Appellant points to what it considers too much emphasis on time sheets and the so-called "integration test." With respect, I do not agree that the Delegate erred. From my reading of the Determination, the Delegate considered facts of the case and the relevant common law tests in light of the statutory language. The Delegate did not simply consider the facts from the standpoint of the integration test but applied other relevant tests as well. I agree with the Appellant that the there is no set formula and that the relative weight of such factors as control, provision of equipment or tools, hiring of helpers, responsibility for investment and management, opportunity for profit and risk of loss depends on the particular facts and circumstances of the case. This list is not exhaustive. I note that the Supreme Court stated in *Sagaz Industries*--and that is in line with *Knight Piesold Ltd.*, *supra*: "The central question is whether the person who has been engaged to perform the services perform them as a person in business on his own account."

I accept Mr. Daigneault's testimony that there was no discussion of his relationship being on an independent contractor basis when he was hired. He testified that he assumed that he was an employee, hired on a flat rate without (statutory) deductions and overtime entitlement. He handed in time sheets. On my review of the payroll summaries, while there were days where he worked only a few hours, generally he worked regular hours, 6-9 hour days, or more, Monday through Friday. I do not accept that Mr. Daigneault set his own hours. He denied that the Appellant called him in for work--when work was available. The gist of his testimony was that he generally just came to work the next work day. He was supervised to some degree by Mr. Allan Ng. In that regard, I note that Ms. Ng in her testimony told the

Tribunal that Mr. Daigneault was hired as the "mechanics *helper*" (emphasis added)." She explained, in direct, when asked about his duties, that he "helped Allan, doing general repair and maintenance." The fact that he brought his own tools is not determinative--many tradesmen do just that. The work was done in the Appellant's shop. While there was evidence that the Appellant contracted out some mechanical repair, maintenance and inspection work to outside firms (TNL and Dams Ford) when there was "too much work" or the work could not be done in-house, that does not, in the circumstances, support the Appellant's case that Mr. Daigneault was an independent contractor. Considering all the facts, there is little doubt in my mind that Mr. Daigneault was an employee. He was not "in business on his own account."

On my view of the statute, the common law tests and all of the evidence, I am of the view that the Appellant has failed to discharge the burden to show that the Delegate erred. In my view, the appeal must fail.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated April 10, 2002 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal