

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 -

Nugget Family Restaurant Ltd.
Canyon Properties Ltd.
Greenwood Motor Inns Inc.
James A. Mitchell

- of a Determination issued by

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/511

DATE OF HEARING: December 16, 1996

DATE OF DECISION: December 20, 1996

APPEARANCES

James A. Mitchell on his own behalf and on behalf of Nugget Family Restaurant Ltd., Canyon Properties Ltd., Greenwood Motor Inns Inc. (“the Associated Companies”)
Ellen Mendonca on her own behalf
Connie Hedrick on her own behalf
Diane H. MacLean on behalf of the Director of Employment Standards

DECISION

OVERVIEW

This is a joint appeal by James A. Mitchell (“Mitchell”), Nugget Family Restaurant Ltd., Canyon Properties Ltd. and Greenwood Motor Inns Inc. (“the associated companies”) under Section 112 of the *Employment Standards Act* (“the Act”), against two Determinations which were issued by the Director of Employment Standards on August 7, 1996. Determination No. CDET 003610 shows the associated companies (associated corporations under Section 95 of the *Act*) as being liable to pay wages in the amount of \$7,963.88 to Ellen Mendonca (“Mendonca”) and Connie Hedrick (“Hedrick”) Determination No. DDET 000373 shows James A. Mitchell as a director/officer of the associated companies and, therefore, personally liable under Section 96 of the *Act* for wages which should have been paid to Mendonca and Hedrick.

FACTS

The Reason Schedules which were attached to Determination No. CDET 3610 and to Determination No. DDET 000373 set out the background and key facts in this appeal in the following manner:

I Background

The complainants (Mendonca and Hedrick) are claiming unpaid wages. One of the major issues in regard to Mendonca is whether she was an employee or an independent contractor.

II Facts

The companies named in the determinations own a motel, apartment building and cafe in Boston Bar. James A. Mitchell is the president, secretary and sole director of these companies. In addition to the three companies involved here, Mr. Mitchell is a

principal in at least 8 other companies. The complainant Ellen Mendonca worked at the premises from December 5, 1994, to April 4, 1995. She managed the cafe, cleaned the motel units, rented out these units and the apartment units, and collected rents. The complainant Connie Hedrick worked as a cook at the cafe from January 1, 1995 to April 4, 1995.

III Issues

Was Ellen Mendonca an employee or an independent contractor?

- 2 If Ellen Mendonca was an employee, then what were the wages earned?
- 3 What are the wages owing to Ellen Mendonca?
4. What are the wages owing to Connie Hedrick?

The Calculation Schedules show wages and interest (as of August 7, 1996) in the amount of \$7, 659.92 owing to Mendonca and \$303.96 owing to Hedrick. There is no real dispute about the amount of wages owed to Hedrick although Mitchell and the associated companies deny being her employer.

The Director's delegate determined that Mendonca worked at least 8 hours per day between December 5, 1994 and April 4, 1995 and based her calculations of wages owing on the minimum wage rate which was in effect at that time because ...“there (was) not sufficient information on the wage rate.”

The Reason Schedules attached to the Determinations set out, clearly and at length, the findings made by the Director's delegate as well as the arguments made by Mitchell (on his own behalf and on behalf of the associated companies), Mendonca and Hedrick. They also contain the analysis made by the Director's delegate in reaching her conclusion that Mendonca was an employee of all three associated companies and Hedrick was an employee of Nugget Family Restaurant Ltd. That analysis begins with the definition of “employee” and “employer” in the *Act* and includes a discussion of the four-fold test for an employment relationship (control; ownership of tools; chance of profit; risk of loss).

In addition to making a complaint under the *Employment Standards Act* on June 6, 1995, Mendonca filed a Statement of Claim under the *Builders' Lien Act* in the BC Supreme Court on September 26, 1995 in which Canyon Properties Ltd. was the named as the defendant (Exhibit #4). Mendonca filed a Notice of Discontinuance on February 6, 1996 (Exhibit #5).

The oral evidence given at the hearing by Mitchell concerning the "Offer to Lease" (Exhibit #1) differs dramatically from the evidence given by Mendonca. Mendonca testified that she had never seen Mitchell's letter dated November 25, 1994 (Exhibit #2) nor the "Offer to Lease" document (Exhibit #1) prior to disclosure of documents during the investigation of her complaint. Both Mitchell and Mendonca testified that they spoke several times on the telephone prior to their meeting at the Knight and Day restaurant at "the end of November 1994", but their recollection of their conversation at that meeting is different. Mitchell's recollection of the outcome of their conversation is set out in (Exhibit #2). Mendonca testified that while her main interest was for on-going employment (hence the discussion about a 5-year term), Mitchell replied to her concerns by stating that he "...could not guarantee her a job if he sold the business and I accepted that."

ANALYSIS

This is an appeal of two Determinations. It is not a re-hearing. The distinction between an appeal and a re-hearing is significant because the Determinations establish the parameters of the case and the appellants (Mitchell and the associated companies) bear the burden of proving that the Determinations are wrong.

Was Mendonca an employee?

Section 1 of 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 the 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.

The above definitions are to be given a liberal interpretation according to our Court of Appeal. See *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.”

The BC Supreme Court has noted that:

“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”

[*Castlegar Taxi v. Director of Employment Standards* (1988) 58 BCLR (2d) 341]

Also in *Castlegar Taxi*, Mr. Justice Josephson referred to the following passage of a decision by Paul Weiler, then Chair of the Labour Relations Board:

“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.”

[*Hospital Employees' Union, Local 180 v. Cranbrook & District Hospital*, (1975) 1 Can. LRBR. 42]

Mitchell and the associated companies give the following reasons for their joint appeal:

- Mendonca was an independent contractor, not an employee; and
- Hedrick was an employee of Mendonca.

Mitchell and the associated companies say that Mendonca was not an employee because there was a written agreement between Mendonca and one of the associated companies (Canyon Properties Ltd.) through which she was to lease the restaurant for a period of five years commencing December 1, 1994. There is no dispute that the “Offer to Lease” (Exhibit #1) made by Canyon Properties Ltd. was not signed by Mendonca. Mitchell also asserts that there was an oral agreement between him and Mendonca by which Mendonca would manage the motel units as an independent contractor.

Counsel for Mitchell and the associated companies makes the following argument in a letter dated June 26, 1995:

This arrangement is set out in a lease agreement which accompanied a letter dated November 15, 1994 sent by our client to Ms. Mendonca in

Chilliwack. The fact that she did not sign the lease agreement is, so far as we are concerned, irrelevant in that it is our client's position that she verbally accepted the terms and then actually accepted them by taking possession of the premises shortly after their receipt. She at no time conveyed to our client her disagreement with the terms and so far as we are concerned, by her actions, she is now estopped from doing so. In addition to this written agreement, our client had a verbal contract with Ms. Mendonca wherein she would operate the motel units on the property, cleaning them, renting them, etc., and in return for same she would receive a credit of 20% of the motel rentals against her lease payments.

I note that this written submission and Mitchell's oral evidence would lead me to the conclusion that there was a written agreement between Mendonca and Canyon Properties Ltd. concerning the operation of the restaurant as well as a verbal agreement between the same parties concerning the operation of the motel units. I would also have to conclude that these two separate agreements arose out of the one lunch-time conversation between Mendonca and Mitchell at the Knight and Day restaurant.

Where there is a conflict in evidence, the views of the late Mr. Justice O'Halloran of the Court of Appeal of British Columbia in *Faryna v. Chorny*, (1952) 2 DLR 354 (BCCA) have been widely accepted. He made the following comments at page 357, on how the issue of credibility ought to be assessed by an adjudicator:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject (the witness) story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the best test of the truth of the story of a witness in such a case must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions.

A Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all elements by which it can be tested in the particular case.

When I consider the analysis which the Director's delegate sets out on the question of whether Mendonca was an employee or an independent contractor, I find that the analysis is based on the "...preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions." Nothing in the written submissions made on behalf of Mitchell and the associated corporations nor any of the evidence given at the hearing leads me to conclude that the Determinations which were made by the Director's delegate were wrong. For these reasons I find that Medonca was an employee of the associated companies.

Was Mendonca a manager?

In a written submission dated October 18, 1996 counsel for Mitchell and the associated companies submits that if Mendonca was not a contractor, she was a manager for purposes of the *Act* and *Regulations*.

Section 1 of the *Employment Standards Regulation* defines a manager as:

- a) a person whose **primary** employment duties consist of supervising and directing other employees, or
- b) a person employed in an executive capacity. (emphasis added)

The real issue in dispute is whether Mendonca's **primary** responsibilities consisted of supervising and directing other employees. The title given to a position is not relevant in determining whether the incumbent is a "manager" or an "employee" for purposes of the *Act*. The actual duties and responsibilities determine whether an employee is a manager or not.

I am unable to conclude that supervising and directing other employees was Mendonca's primary employment duty. The evidence shows that she spent most, if not all of her time performing duties other than supervising and directing employees.

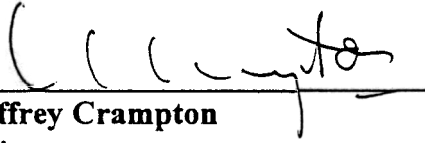
While I accept, in principle, the argument made by Mitchell that the phrase "executive capacity" must be interpreted in the context of a particular employment relationship, I am unable to conclude on the evidence that Mendonca was employed in an executive capacity. Therefore, I find that Mendonca was not a manager for the purposes of the *Act*.

Who was Hedrick's employer?

As noted above, there is no dispute about the amount of unpaid wages which are owed to Hedrick. The only dispute concerns who was her employer. At the hearing, the parties agreed that the question of who was Hedrick's employer depended entirely on the Tribunal's decision concerning whether Mendonca was an employee of the associated companies. As a result of my decision above that Mendonca was an employee of the associated companies, it follows that Hedrick was also their employee.

ORDER

I order, under Section 115 of the *Act*, that the Determinations be confirmed.

A handwritten signature in black ink, appearing to read "Geoffrey Crampton", written over a horizontal line.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sr