BC EST D375/99

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 -

Kathleen Jashinski
("the "Employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/316

HEARING DATE: August 20, 1999

DECISION DATE: September 9, 1999

BC EST D375/99

DECISION

APPEARANCES

Ms. Kathleen Jashinski	on behalf of herself
Mr. Barbara Cornish	counsel, on behalf of Stevenson Security Ltd. ("Stevenson Security")

OVERVIEW

This decision concerns an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination of the Director of Employment Standards (the "Director") issued on April 30, 1999 which determined that:

> 1) Kathleen Jashinski (the "Kashinski") was not an employee of Stevenson Security. She was an independent contractor between October 1997 and May 15, 1998;
> 3) in the result, she was not entitled to vacation pay and statutory holiday pay; and
> 5) even if she was considered an employee, she not entitled to compensation for length of service as the Stevenson had just cause for termination and, in any event, she had worked out her notice period.

Jashinski appeals the Determination. She argues that she was an employee during her association with Stevenson Securities between October 1987 and May 1998 and entitled to vacation pay and statutory holiday pay. She also says that she is entitled to compensation for length of service.

FACTS AND ANALYSIS

It is trite law that the appellant bears the burden of proving that the Determination is wrong. She must establish that she, in fact, is an employee under the *Act.*

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;

It is well established that these definitions are to be given a broad and liberal interpretation. Moreover, the interpretation must take into account the purposes of the *Act.* The Tribunal has on many occasions confirmed the remedial nature of the *Act*: 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). With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. In that regard, I refer to my comments in *Knight Piesold Ltd.*, BCEST D093/99, at page 4

> "Deciding whether a person is an employee or not often involve complicated issues of fact. 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 Determination, which is not long on legal analysis, and does not expressly refer to the factual circumstances considered by the delegate, concluded that Jaskinski was an independent contractor because she had an employee working for her. The delegate reviewed the issue and stated that when "one looks at the points in determining whether you were an employee, or an employer (sic.), they could equally apply to either." I agree with the delegate that use of employees to perform duties under the agreement is factor which strongly points towards independent contractor status, as opposed to employee status.

In my view the appeal must fail for the following reasons.

First, Jashinski has failed to meet the burden to show that the Determination is wrong. Her evidence in direct examination was brief and, for the most part, did not relate to the requirements under the *Act* to establish employee status. At the hearing I asked her to address the common law tests--control, ownership of tools, chance of profit, risk of loss and "integration" etc.--to no avail. Her evidence basically came town to her view that there was an agreement that she was hired as an employee. She mentioned that she was trained by Stevenson Security and that it paid for her attendance at an out of town meeting. She explained that she owned the equipment used to carry on the business. Though clearly not determinative of the issue, ownership of tools would tend to point towards independent contractor status. The person found by the delegate to be her employee, Ms. Giles, did not attend the hearing.

One point raised by Jashinski was miscellaneous documentation with respect to the licence held by her under the *Private Investigators and Security Agencies Act* which characterized her as an employee of Stevenson Security. However, first, it is apparent that the definition of a "security employee" is different from an "employee" under the *Act.* Under the *Private Investigators and Security Agencies Act*, a "security employees" means a person employed or engaged in a security business. In other words, it includes both employees and those "engaged" in the business. Second, and in any event, I am not bound by any characterization or finding under that statute. The Tribunal is not bound by findings under other statutory regimes such as EI, CPP or income tax. My sole concern is the *Act.*

Second, and in any event, I agree with counsel for Stevenson Security that, applying the traditional common law tests to the evidence at hand, there is nothing to substantiate a relationship other than an independent contractor relationship.

In cross examination, Jashinski's evidence included:

- the telephone number used for the business was hers;
- the fax used for the business was similarly hers;
- the car used for the business was owned by her;
- she claimed business expenses against her income on her income tax return;
- Stevenson did not take any deductions for income tax or employment insurance;
- she admitted that she paid for her provincial security licence (although; she first claimed that Stevenson paid for it);
- she also paid the licence fees for the person found to be her employee;
- she could accept or decline business leads supplied by Stevenson Security;
- she could work as much or as little as she wanted;
- she was paid based on invoices submitted to Stevenson Security (for sales by her employee, as well);
- she was paid an amount per sale by Stevenson Security, $175.00 per installed system (she paid the person found to be her employee $125.00 of that amount. Apparently this amount was paid in cash to the employee who was also in receipt of social assistance);

In my view, Jashinski was not an employee of Stevenson Security and, therefore, she is not entitled to vacation pay, statutory holiday pay and compensation for length of service.

Subsequent to the hearing, but before the final draft of this decision was written, Jashinski sent a further submission to the Tribunal. I understand from the Tribunal's registry that the submission attached a document which--if accepted--might suggest that a statement made by the principal of Stevenson may not have been truthful. I have neither reviewed nor considered that submission or any document attached to it. A hearing was held on August 20, 1999. The parties had notice of the hearing, participated fully, and knew that a decision would be rendered based on the evidence provided under oath at the hearing. The appropriate time to tender such evidence was at the hearing. I am not inclined to allow the appellant to re-open her case at this stage.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated April 30, 1999 be confirmed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal