

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 -

Inayat M. Anjum
("Anjum")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/439

DATE OF H_EARING: August 25, 1999

DATE OF D_ECISION: September 9, 1999

DECISION

APPEARANCES

for the appellant	Inayat M Anjum
for Collins Benjamin operating Carriage Lane Fine Homes Ltd. and New Destination Development Ltd.	no one appearing

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "Act") by Inayat M. Anjum ("Anjum") of a Determination which was issued on June 18, 1999 by a delegate of the Director of Employment Standards (the "Director"). The Determination closed the file on a complaint by Anjum that he had been employed by Collins Benjamin operating Carriage Lane Fine Homes Ltd. and New Destination Development Ltd. ("Benjamin") for a period commencing September 1, 1997 and ending January 6, 1998 and had not been paid during this period of employment. The Determination concluded that Anjum had not established an employment relationship between he and Benjamin and, in any event, did not establish there was any money owed by Collins to him.

ISSUES TO BE DECIDED

The issue in this case is whether Anjum has shown the Determination is wrong in fact, in law or in some combination of the two. The onus to demonstrate an error in the Determination is on Anjum.

FACTS

Notwithstanding Anjum introduced fifteen documents into evidence at the hearing, there is little, if anything, before me that was not provided to the investigating officer during the investigation. In addition, the investigating officer had the benefit of discussions with Benjamin, with the homeowner of the project for which Anjum was employed by Benjamin as Project Manager/Superintendent and other persons associated with the claim.

Apart from one telephone discussion, Benjamin did not participate in the investigation and he did not attend the hearing. Benjamin took the position during the investigation that Anjum was not an employee. He alleged Anjum had been contracted by Benjamin to perform project management of a renovation in Richmond for 5% of the total contract price. He also said that Anjum had been given two or three cash payments for some of the work he did. He also contended that Anjum was seldom at the worksite, a comment that was confirmed during the investigation by the homeowner for whom Benjamin was doing the renovation.

From the evidence and from the material on file, few, if any, of the trades who worked on the project have been paid for their work. Anjum says he is out of pocket for several material invoices that he personally paid during the period he says he was employed. He says he also worked on two other projects for Benjamin during his employment, a garage on West 15th Avenue in Vancouver and a house in Coquitlam.

Anjum says he was to be paid \$3000.00 a month plus a \$100.00 car allowance. He provided a document during the investigation, dated September 1, 1997 and signed by Benjamin, which, he says, outlines his terms of employment. In Benjamin's telephone discussion during the investigation, he said this document was signed by him at Anjum's request so he could obtain a loan, but it does not represent how Benjamin was to be paid. He also says that the amount was filled in by Anjum after he signed the letter.

ANALYSIS

When the Director makes a Determination under the *Act*, subsection 81(1) of the *Act* requires, among other things, that the reasons for the Determination be included in it. This determination falls short of that requirement. A key aspect to the complaint was whether the Anjum was an employee or an independent contractor of Benjamin. A second aspect of the complaint was determining, if the event Anjum was an employee, whether he was owed wages and, if so, how much he was owed. The findings made in the Determination reach conclusions on those matters without any analysis for those conclusions and are stated as follows in the determination:

I am unable to determine if money is owed to Anjum. The evidence provided by Anjum is not credible.

Benjamin did not participate in the investigation in any significant manner.

There is no evidence to support the position that Anjum was an employee.

I have reviewed the Determination several times and I am still uncertain of the basis for the two key conclusions in this case. The first conclusion that had to be made was whether Anjum was an employee of Benjamin for the purposes of the *Act*.

On that issue, I do not agree there is no evidence of an employee/employer relationship between Anjum and Benjamin. As I said above, the evidence put before me in the hearing was, for the most part, provided during the investigation. That evidence justified a more serious consideration of Anjum's status for the purposes of the *Act* than what appears on the face of the Determination.

There is a lack of any analysis of the facts of this case in the context of the language and purposes of the *Act*. In *F.O.R.E. Marketing Canada Inc.*, BC EST #D333/99, the Tribunal said:

An analysis of whether a person is an employee under the *Act* starts with the language of the *Act*. Also, when considering whether a person is an employee, the remedial nature of

the *Act* and the purposes of the *Act* are proper considerations. While ultimately it is the language, the remedial nature and the purposes of the *Act* that will be determinative, there are several common law tests that provide a helpful guide because these they identify factors within the relationship that help to characterize it as an employer/employee relationship or one of independent contractor/client. In this case, factors such as control, ownership of tools, chance of profit, risk of loss and the degree of integration of the work being performed by Hamilton into the business of FORE all strongly point to a conclusion that, at law, Hamilton would be considered to be an employee, not an independent contractor.

In respect of the *Act*, the language used to define “employee” and “employer” for the purposes of the *Act* is found in Section 1 of the *Act*:

“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 with 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, either directly or indirectly, for the employment of an employee;

Those definitions are inclusive. There is some evidence in this case that suggests the work performed by Anjum was done under the control and direction of Benjamin and that Anjum was entitled to wages for that work. On the other hand, there is nothing in the Determination that points to a conclusion that Anjum was an independent contractor. Even if, as Benjamin said, Anjum may have been paid on a percentage of the total contract price, there is no particular magic in that fact. The definition of wages under the *Act* contemplates and includes commission or incentive based wage schemes.

The purposes of the *Act* are set out in Section 2. The *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtlinger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.) And *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I specifically note the following comment from *Machtlinger v. HOJ Industries Ltd.*, *supra*

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

I do not suggest that it is necessary in every case to provide a detailed analysis of the language and purposes of the *Act* against the available facts. In most cases, the facts themselves will point in one direction or the other. That is not so in this case and more was needed in order to meet the requirements of subsection 81(1).

In respect of the whether any money was owed to Anjum, I have the same concern with the Determination. It is apparent from the Determination that Anjum's claim that he was owed money turned significantly on an assessment of the credibility of his information and supporting material. What isn't apparent from the Determination are the reasons why the information provided by him was deemed to be not credible. I am struck by what seems to be the acceptance of information provided by others in preference to the information given by Anjum. The assertion made by Benjamin in the telephone discussion that Anjum fraudulently "doctored" the September 1, 1997 employment letter is no less incredible than any information provided by Anjum. Benjamin's assertion that he made two or three cash payments to Anjum, without revealing the amounts of those payments, was something that could and should have been followed up. I note that Benjamin failed or refused to participate in the investigation. The Director's obligation is to investigate the claim that wages have not been paid. The Director is given a considerable number of powers that are designed to make that task easier, more efficient and more comprehensive. Benjamin ignored two Demand for Records made on him without any apparent repercussions. The efforts made to examine the Benjamin's records in this case seem to be cursory, coloured perhaps by an initial conclusion that Anjum's claim was not credible and the results of the single telephone discussion are not sufficient, when considered with all the other material, to allow any reasoned conclusion to be made.

Similarly, the reference to the interview with Rev. Masih and the apparent acceptance of his claim that Anjum had added words to a document that he signed is, when the document is examined, highly improbable. It is also largely irrelevant. Rev. Masih said the following was added:

Mr. Anjum has not been paid for this time period.
Furthermore, he has incurred out of pocket expenses during this time for which he has not been reimbursed.
I hereby declare this to be a true statement.

In his testimony before me, Anjum said those words were on the document when Rev. Masih signed it. I accept that evidence. But even if I did not, Rev. Masih, while denying he attested to the above statement, continued to acknowledge that he had helped Anjum negotiate his employment agreement and salary with Benjamin. He says:

This is to confirm that Mr. Anjum was employed by Mr. Collins Benjamin from Sept. 1st, 1997. His salary was \$3000.00 P.M. plus a gas allowance of \$100.00 per month. This was the salary which I personally helped to negotiate between the two parties.

I am unable to conclude, and the Determination does not assist, whether the above passage was given some consideration or, if it was not accepted, why it was not accepted. If accepted, the implication of the above statement contradicts what Benjamin said the arrangement was and, it would seem, casts some doubt on the truth of his assertions.

All of the above is, perhaps, an overly lengthy way of saying that the Determination does not meet the requirements of the *Act* and it must be canceled. The matter is referred back to the Director.

ORDER

Pursuant to Section 115, I order the Determination dated June 18, 1999 be canceled and the matter referred back to the Director

David Stevenson
Adjudicator
Employment Standards Tribunal