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 -

Frank Corvin
(" Corvin ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 2000/356

DATE OF HEARING: September 22, 2000

DATE OF DECISION: October 6, 2000

DECISION

APPEARANCES

Mr. Michael Menkes	on behalf of Mr. Frank Corvin
Ms. Lisa Helps	on behalf of Ms. Jennie Middlemass

OVERVIEW

This is an appeal by Corvin pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination of the Director of Employment Standards (the "Director") issued on May 5, 2000. The Determination concluded that he was not owed wages. He was not found to be an employee. In his appeal to the Tribunal Corvin challenges that conclusion.

According to the Determination, Corvin alleged that he was an employee of A-Master TV & VCR Service/Computer Clinic and United Electronics from November 2, 1998 to July 14, 1999 and was owed wages, overtime and vacation pay in the amount of $24,700.

The delegate defined the issue before her as follows: was Corvin an employee? She found that he was not. That conclusion is based, among others, on the following:

- Corvin operated the business before Middlemass became involved.
- Corvin supplied the premises for the business.
- The lease was in his name.
- An agreement, signed by Corvin, indicated that he had the power to operate the business.
- Corvin contracted out repair work and hired employees for the store as required.
- Corvin had signing authority for bank accounts of the business(es).
- Corvin's existing bank account was used for the business for the majority of the time.
- Corvin had unfettered control over the finances of the business and there was some intermingling between the accounts.

The businesses were not incorporated. Nevertheless, the delegate considered, based on the definitions in the British Columbia *Company Act*, and the facts, including those set out above, that Corvin performed the functions typical for a director or officer. She concluded that he was an officer. In the result, he was not entitled to the benefits provided for employees under the *Act*.

FACTS

Corvin testified at the hearing that he met Middlemass though her sister, Dorothy Janecek, whom he had known for some years. He explained that he needed capital for his business. The focus of the business was electronics repair. He testified that he owned the business, the Computer Clinic. This company had to be shut down. According to the Determination, Corvin had experienced a personal bankruptcy. Around August-September, 1998, he asked Middlemass to become involved with the business. Middlemass was to provide finance to the business.

Middlemass testified that she came in to contact with Corvin though her sister, who had known him for some years. It was her understanding that he had some financial difficulties and had filed for bankruptcy. Her sister wanted to help Corvin. She explained that the business was put in her name because of Corvin's financial problems.

On November 2, 1998 the business—A-Master TV & VCR Repair—commenced operations. The business continued to operate out of the premises of Corvin's existing business(es) in Langley, B.C. Corvin explained that Middlemass insisted that the business be set up in her name–they [Middlemass and her sister] wanted their own company." Accordingly, Middlemass was described as the owner in the application for a business licence for A-Master TV & VCR Repair. While the application for the business licence appeared on its face to have been signed by Middlemass, it was, in fact, signed by Janecek. Middlemass agreed that Janecek signed the licence application with her permission. There was no dispute that Middlemass was listed as the owner.

In December, an agreement was signed by Janecek and Corvin. Another version of this document, which had the date January 13, 1999 handwritten on it, was also before me. That version had Middlemass signature on it and was altered in some respects. In any event, the December version purported to give Corvin "power of attorney to operate all the electronic, computer and communications companies," subject to certain terms and conditions. One of those conditions characterised Corvin "as an employee." In the January version, the words "as an employee" were crossed out. The December agreement, as well, contained a provision for a $7,000 loan from Middlemass and Janecek to the Computer Clinic. In the later version, the words "Computer Clinic" were crossed out and "Frank Corvin" inserted. I note, as well, that from the subsequent paragraph of the document, it appears that, in any event, the person responsible for paying back the loan was Corvin. Corvin explained in his direct testimony that he first saw the January version of the agreement in the course of these proceedings. According to either version of the agreement, Middlemass was to receive $100 per month from mid February (she said she never received a "dime"). Janecek was to do bookkeeping work for the business and was to be paid $50 per month.

Middlemass understood that the document had been prepared or typed up by Janecek. She also understood that Janecek was acting as her agent in the signing of the document. She stated that she did not sign the December version. As for Corvin's claim that he only saw the January version of the agreement in the course of these proceedings, she testified that she mailed a copy to him at the time.

Middlemass, who was a pensioner residing in 100 Mile House, British Columbia, also signed a power of attorney with respect to the business. She agreed that she had the power to revoke the power of attorney. This document, dated January 25, 1999, gave substantial powers to Corvin to operate the business (and was one of the conditions provided for in the December agreement). This power of attorney stated that Corvin's powers related to the "operation of the business that I [Middlemass] own

and operate as proprietorship known as A-Master TV & VCR Repair, Computer Clinic and United Electronics." All the same, the document gave substantial powers to Corvin, including:

- the power to open bank accounts in Middlemass' name, deposit and draw funds for the business;
- the authority to hire and discharge employees;
- the power to purchase inventory, sell goods and provide services; and
- "the power to do everything necessary and incidental to the operation of the business."

This power of attorney was drafted by a lawyer and, according to Corvin, Middlemass made changes to it before it was executed. Corvin explained that the intent of the arrangement between him and Middlemass was that he was to operate the business.

The intent of the $7,000 loan, mentioned above, according to Corvin, was to provide funds for the new company, A-Master TV & VCR Repair. He stated that the loan was to be repaid from the revenues of the new company, which was not incorporated. A bank draft, dated January 14, 1999, in the amount of $5,000 made out to Corvin was entered as an exhibit at the hearing (it was attached to the Determination as well). The bank draft stated that it was "re loan Janecek/Middlemass" and was–on its face–purchased by Janecek. Corvin explained that the new business did not have an account at the time and that his existing account was, therefore used, until the new business could set up an account. According to Corvin, this was difficult because the bank refused to accept the power of attorney as the basis for opening an account and wanted Middlemass personally present. Apparently, Middlemass took five months before she "did it." Corvin explained that when the account was set up, the balance from the existing account was transferred into the new account. He had, as mentioned above, power of attorney over that account.

Corvin testified that he was hired as an employee. He was supposed to receive $3,000 per month. In return he would advice them [Middlemass and Janecek], provide goods, fixtures and premises, day-to-day work selling, making orders, give quotes, hire contractors and do "everyday duties of an employee." Corvin acknowledged that Middlemass and her sister had no contacts, no business, no bank account, "nothing at all." He says the entitlement to the $3,000 per month was based on "discussions" with Middlemass and Janecek in October-November 1998. In his direct examination, he said there was a verbal agreement. The revenue of the business was to go to the "owners."

Middlemass testified that she had nothing to do with the operation of the business. She denied that there was an agreement that Corvin would be paid $3,000 per month. She did not agree that Corvin was an employee. Neither did Janecek, despite the fact that she had prepared the December agreement and, as well, the letter terminating the relationship in July 1999. These documents characterised Corvin as an employee. Middlemass stated that it was Corvin's business operated in her name. She explained that she had no involvement with the finances of the business(es), that she was never asked, that she never hired or fired any employees, or dealt with suppliers etc. She explained that she never received any financial benefits from the business(es). She agreed that she had signing authority for one of the accounts for a brief period. As I understood the evidence, Janecek did some work for the business and went to the business at least a few times a week.

Corvin testified that on July 14, 1999, Middlemass and her sister "locked him out". He received a letter from Middlemass, which, among others, advised him that his "employment and power of attorney ... have been terminated." This letter stated that the reasons were that Corvin's loan was in arrears and his failure to provide accurate accounting of the companies revenues for tax purposes, as well as continued violations of Microsoft copyrighted programs." Janecek also explained that Corvin had run up a substantial debt in the business at that time.

Corvin testified that he was never paid wages. He explained that he used the business account for personal use and would withdraw up to $500 per month for those purposes.

ANALYSIS

The issue before me is whether Corvin was an employee. In my view, the Determination reached the correct conclusion, *i.e*., that Corvin was not an employee. However, it is clear on the face of the Determination that the conclusion is reached on the wrong legal basis. The business(es) in question are not incorporated businesses. They are proprietorships. It follows that a person cannot be a "director" or an "officer." Those positions are used in the context of incorporated entities under, for example, the *Company Act*. In any event, I agree that the facts found in the Determination substantially support that Corvin was not an employee for the purposes of 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;*

I approach the employee status issue with the following principles in mind. It is well established that the definitions are to be given a broad and liberal interpretation. 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 (*Machtinger v. HOJ Industries Ltd*., <1992> 1 S.C.R. 986). Moreover, my interpretation must take into account the purposes of the *Act* (*Interpretation Act*). The Tribunal has on many occasions confirmed the remedial nature of the *Act*.

In my view, I must examine the true nature of the relationship considering all the factors (see *Walden v. Danger Bay Productions Ltd.*, April 7, 1994, BCCA No. CA 016174 and CA 016176, unreported). As noted in *Christie et al., above*, at page 2.1-2.2 with respect to the common law tests of "employee" status:

> "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."

Section 2 provides:

> *2 The purposes of this Act are as follows:*
>
> *(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;*
>
> *(b) to promote the fair treatment of employees and employers;*
>
> *(c) to encourage open communication between employers and employees;*
>
> *(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;*
>
> *(e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;*
>
> *(f) to contribute in assisting employees to meet work and family responsibilities.*

The Appellant argues that the documents and, in particular, the contractual arrangement between Middlemass and Corvin are determinative with respect to their relationship. In the documents, Middlemass is described as the owner and Corvin as the "employee." The Appellant argued that the use of the word "employee" was not used flippantly. Rather, it was used deliberately by Janecek (who drafted the December agreement) and she had many years experience as a bookkeeper and, thus, from Corvin's standpoint knew or should know the difference between being an employee or not. The Appellant argues that the 'parol evidence' evidence rule prevents the respondents from arguing that the intent of the arrangement was other than what was set out in the written agreement. In *Ahone v. Holloway* [1988] BCJ No. 1603 (BCCA) that rule is described as follows:

> "When the terms of a contract have been embodied in a writing to which both parties have assented as the definite and complete statements thereof, parol evidence of antecedent agreements, negotiations and understandings is not admissible for the purpose of varying or contradicting the contract so embodied."

I do not accept the Appellant's argument. This is not a matter of contract interpretation. Rather this is an issue of whether or not Corvin was an employee for the purposes of the *Act*.

In any event, even if this were a matter of contract interpretation, I disagree that the parol evidence is applicable. I am of the view that the relationship was not embodied in the contractual documents in evidence at the hearing and relied upon by the Appellant, in particular the December agreement and the power of attorney. For example, the wages or other terms and conditions of employment claimed by Corvin were not set out in these documents. Moreover, the business, on Corvin's evidence started up on November 2, 1998. Yet the written agreement relied upon by him was not entered into until December. The power of attorney was not executed until late January 1999. In short, I am of the view that the parties did not set out their relationship in a "definite and complete" form.

In any event, there is nothing that requires me to park my common sense at the hearing door. In my view, the delegate substantially set out the parameters of the relationship between the parties. It was, in my view, clear on the evidence that Corvin owned the business before Middlemass became involved. It was clear, even on his evidence that he operated the business. The business was his before Middlemass entered the picture. It was located in the premises of his (then) existing business. He provided the goods, fixtures and premises for the business. He hired employees. He had signing authority over the accounts associated with the business. He withdrew money from the business account for his personal expenses (and he did not seek permission to do so). In my view, Corvin provided no credible explanation as to why Middlemass would go into the electronics business, given the acknowledged facts, that she had no experience, knew nothing about the business, and had no contacts. His explained that she "could have learned" and that she was making an "investment." Janecek, as well, had no experience in the business. In my view, it defies common sense that Middlemass, a pensioner with limited means, would have gone in to the business of running an electronics store or that she would have made the "loan" available as an investment.

As for Corvin's claim that there was an agreement that he was to be paid $3,000 per month, he could not even explain when exactly that agreement was made. He stated that there were "discussions" in October-November 1998. When I asked him why, given his authority to operate the business, he did not pay himself from the business, he explained that the business could not afford this. In all of the circumstances, and considering all of the evidence, I prefer the evidence of Middlemass and Janecek that there was no such agreement to pay Corvin $3,000 per month.

The Appellant's argument does not take into account the statutory purpose of the *Act*. The Appellant argues that the parties intended, as evidenced by the written contracts, that Corvin was to be an employee. Even if I accept that the parties had intended the relationship to be an employment relationship, and I do not, in *Straume v. Point Grey Holdings Ltd.* <1990> B.C.J. No. 365 (B.C.S.C.) 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". 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. As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect. The written agreement between Middlemass and Corvin is but one of the facts to be considered. In my view, it is appropriate to consider the "whole of the relationship" in light of the statutory language. While Corvin may well have performed duties commonly performed by an employee, that does not *per se* make him an employee. He was not, in my view, "a person ... receiving or entitled to wages for work performed for *another*."

Looking at the "whole of the relationship," I am of the view that Corvin was not an employee. He was not working for "another." He was working for himself.

In all of the circumstances, I am of the view that the relationship between Corvin and Middlemass was as characterised by the Respondent. Corvin was not an employee. Rather, I agree that he sought the assistance of Janecek, who turned to her sister. The issue of Corvin's financial difficulties, including the bankruptcy, were described in the Determination. Middlemass loaned money to Corvin. I accept their testimony that, while the business licence was in Middlemass' name and she was described in the December agreement and elsewhere as the owner, it was not her business, it was Corvin's. Rather than thanking them for their assistance and generosity, he turned around and tried to take further advantage of them by filing this claim under the *Act*.

ORDER

Pursuant to Section 115 of the Act, I order that Determination in this matter, dated April 27, 2000, be confirmed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal