

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 -

Image House Inc.
("Image")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

File No.: 97/505

DATES OF HEARING: September 5, 30, 1997

DATE OF DECISION: October 22, 1997

DECISION

APPEARANCES

Brad Hammerstrom	on behalf of Image House Inc.
Vince Lafek	on behalf of Image House Inc.
Vince Carl	counsel for Image House Inc.
Cheryl Saxon	counsel for Image House Inc.
Denise M. McConachie	on her own behalf
Todd P. Sullivan	on behalf of Denise M. McConachie
Christine McConachie	on behalf of Denise M. McConachie

OVERVIEW

This is an appeal by Image House Inc. (“Image”), under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated June 13, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). Image alleges that the delegate of the Director erred in the Determination by concluding that Denise M. McConachie (“McConachie”) was an employee and was owed wages in the amount of \$1,907.26 plus interest for a total of \$2,038.10.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was McConachie an employee ?
2. If McConachie is determined to be an employee, are wages owed ?

FACTS

The following facts are not in dispute:

- The period in question is from October 1, 1995 to April 2, 1996;
- McConachie sold various promotional material such as personalized pens, mugs, etc to businesses;
- McConachie sold a “discount coupon” item referred to as a “Prospector Card”;
- McConachie sold advertising space for Image’s “Business to Business” magazine as well as for publications of the Cariboo Tourist Association;
- no records were kept of the hours worked by McConachie.

Image states that McConachie was not an employee, rather she was an independent contractor who utilized their office space and facilities from time to time in the pursuit of her own business.

Image further states that with respect to the sales performed on behalf of Image, McConachie was not provided with any direction or control, neither was she required to keep any regular schedule of hours or prepare regular reports of her activities.

Image further states that McConachie was not supplied with any tools, i.e., desk, phone, space, etc., she merely utilized those when she happened to be in the office.

Image further states that McConachie was engaged in providing the same or similar services to other clients at the same time as she provided those services to Image.

McConachie states that she was an employee of Image and that her work activities were directed and controlled by Image.

McConachie further states that she performed receptionist duties for Image on a temporary basis while the principals were away.

McConachie further states that she did not perform work that was the same or similar in nature to the work being performed on behalf of Image for any other person during the period in question.

ANALYSIS

The parties provided much in the way of documentary material for me to consider in addition to the evidence provided by Brad Hammerstrom (“Hammerstrom”) on behalf of Image and McConachie and Todd Sullivan (“Sullivan”) on behalf of McConachie. The evidence provided by Image, both written and verbal, was at times both confusing and contradictory which was not surprising given the length of time since the events in question took place. I am satisfied that all witnesses testified to the best of their recollection, however, where there were contradictions, I have accepted that evidence which is in harmony with the likelihood of the circumstances actually having transpired.

I will not attempt to recapitulate all of the evidence received, however, I will note certain relevant facts.

The burden of proving that the delegate of the Director erred in the Determination rests with Image.

I have concluded that Image has not met the burden of proving that the delegate of the Director erred in determining that McConachie was an employee and was owed wages in the amount of \$2,038.10. My reasons are as follows:

Judy O'Neil ("O'Neil"), one of the partners in Image, was the person who had the majority of discussions with McConachie, however, O'Neil did not attend the hearing.

Brad Hammerstrom ("Hammerstrom") testified that he was the person who was responsible for the 'hiring and firing' of employees at Image and he did not 'hire' McConachie. Hammerstrom's evidence with respect to sales alleged to not have been made by McConachie yet paid for by Image was vague and contradictory. Hammerstrom was not able to identify some alleged invoices from McConachie, nor was he able to explain why the original of an invoice from Image to the Cariboo Tourist Association which had been 'revised' was not available.

In response to a question from counsel for Image, Hammerstrom also testified that another person in the office at the time, Sullivan, was a 'sub-contractor'. Hammerstrom further testified that he never told Sullivan to be a sub-contractor, rather, Sullivan was "pushed into it by the bookkeeper".

The evidence of Hammerstrom was largely "hearsay" as he was not directly involved in most of the discussions between O'Neil and McConachie.

Counsel for Image also provided a number of statements from persons who were not available at the hearing. Those statements were "hearsay" and have not been given much weight in my deliberations.

Vince Lafek, ("Lafek") testified that he often visited the offices of Image and did not observe McConachie to be there. Lafek further testified that he was approached by McConachie "sometime in the winter" he was "not sure when" and had a "minimal discussion" with her in regard to selling cruises. Lafek further testified that he provided some videos and training manuals to McConachie around that time. Lafek further testified that he is a friend of Hammerstrom and O'Neil, the partners of Image. Lafek finally testified that he understood McConachie to be an independent contractor for Image.

McConachie's evince was, for the most part, consistent with the information provided to the delegate of the Director and was presented in a logical and orderly manner and free of contradictions. McConachie confirmed that O'Neil and Hammerstrom had instructed her to "get out of the office and get some sales".

Sullivan's evidence was provided in a forthright manner and generally, confirmed the evidence of McConachie. Sullivan testified that he was at Image during the period in question and that McConachie usually worked from around 10 am to 5 pm, Monday to Friday. Sullivan further testified that he recalled being in the office when McConachie and someone from the Williams Lake Stampede Association were in discussions. Sullivan further testified that he was invited by O'Neil, during a meeting between O'Neil and McConachie, to become a 5% shareholder in the "Business to Business" magazine owned by Image. Sullivan further testified that after this offer from O'Neil, he and McConachie put together a business plan and had a friend at the Community Futures office look it over for

them. Sullivan further testified that the offer of ownership was subsequently withdrawn by O'Neil.

In response to questions from counsel for Image, Sullivan testified that he was originally hired as an employee but, after a short time, O'Neil suggested that he should consider becoming a sub-contractor. Sullivan further testified that O'Neil took him to her bookkeeper who explained the "benefits" of becoming a sub-contractor. Sullivan further testified that after talking to the bookkeeper and, after a few weeks of O'Neil frequently requesting him to become a sub-contractor, he decided it would be easier to do it as that was what O'Neil wanted.

Counsel for Image presented the Tribunal with a copy of a search warrant executed on the premises of Image on September 29, 1997 for the purpose of investigating allegations of fraudulent activities by McConachie. I ruled that the copy would be accepted for information purposes only and that allegations are simply that, and not proof of any misconduct on behalf of McConachie.

The issue of whether a person is an employee or an independent contractor is often difficult to determine, especially in the absence of any written agreement between the parties which sets forth their understanding of the circumstances surrounding the performance of work.

To differentiate between an employee/employer relationship as opposed to a contractual one, all elements of the relationship between the parties must be considered carefully. Being in harmony with any one element on its own doesn't necessarily mean a person is or is not an employee, rather, I would suggest, it is a matter of balance. If there are enough elements or factors suggesting there is an employee/employer relationship the decision would then, on the balance of probabilities, lean towards the person in question being considered an employee.

Professor P.C. Weiler, as chairman of the Labour Relations Board, stated in *Hospital Employees Union, Local 180 v. Cranbrook and District Hospital (1975)*, CLRBR 42, page 51;

"The difficulty is that there is no single element in the normal make-up 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...."

When determining whether or not there is an employee/employer relationship I must consider the definitions and language of the *Act*, other relevant statutes and the applicable jurisprudence pertaining to this issue.

Statutory Considerations

The *Act* in Section 1 defines 'employee' and 'employer' as:

"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 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;*

When considering these definitions, I note that they both contain the word “includes” which indicates that the items noted in the definitions are not exclusive of the ordinary meaning of the terms ‘employee’ and ‘employer’.

When considering the objectives of the Act, I must take note of Sections 2 and 4 which state:
Section 2, Purposes of this Act

The purposes of this Act are to

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

Section 4, Requirements of this Act cannot be waived

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

My reason for taking note of these Sections of the *Act* is to illustrate that a person may not, under the guise of a contractual relationship, waive the basic minimum standards of compensation as required by the *Act*.

Jurisprudence

To differentiate between an employee/employer and a contractual relationship, the courts have traditionally considered four factors.

1. **Control** - is there a traditional master/servant relationship ?
2. **Integration** - to what extent or degree is the individual involved in the operation or organization ?
3. **Economic Reality** - is the individual in business for herself, or does she work for someone else ?
4. **Specific Result** - is the individual required to perform general work or to only accomplish a specific job?

Analysis of the Jurisprudence

Control

Perhaps the most important factor in determining the status of a person is the nature or degree of direction and control exercised by one party over the other. The Control Test determines whether one person is in a position to order not only what is to be done, but also the manner in which it is to be done.

When reviewing the Control Test as it applies to the circumstances of this case, I have characteristics of their relationship;

Selection - Image, through Judy O'Neil, offered McConachie employment.

Dismissal - Image, through Brad Hammerstrom, threatened to dismiss McConachie prior to her quitting.

Method of Work - Image, through both Judy O'Neil and Brad Hammerstrom told McConachie to "get out of the office and sell"

Remuneration - While McConachie and Judy O'Neil negotiated with respect to the percentage of commission that McConachie was to receive, such negotiation is the norm in circumstances of sales representatives.

Integration

The Integration Test examines the extent or degree to which an individual interacts with the organization or operation. This test looks at whether an individual is an integral part of the operation or is merely ancillary to the operation.

1. **Integration** - is the work performed by McConachie integrated and done as part of the business of Image or simply an accessory to the business of Image ?
2. **Part and Parcel** - is McConachie an integral part of the organization ?
3. **Ordinary Man** - would an ordinary person view the relationship between McConachie and Image as one of employee/employer ?

Clearly, in the case at hand, selling promotional products, advertising and writing/editing stories for Image was an integral part of Image's business. The perception of the "ordinary man" would be of the view the relationship was one of an employee/employer because any payments were made to Image, not to McConachie. McConachie was also provided with business cards which identified her as being from Image.

Economic Reality

The Economic Reality Test requires the analysis of the entire relationship between the parties in order to determine whether a particular individual is carrying on business for herself or for someone else.

Reviewing the Economic Reality Test as it applies to this case involves the close analysis of the four criteria;

1. **Risk** - whether McConachie bears any risk of loss or possibility of profit ?
2. **Financial Investment** - does McConachie have an ownership of machinery and equipment and if so, is the investment substantial ?
3. **Lasting Relationship** - is there an ongoing permanent relationship between McConachie and Image ?
4. **Diversity** - is McConachie permitted to provide the same or similar services to other parties and, if so, is McConachie actively involved in searching out other business opportunities ?

McConachie had no risk at all. In the case at hand McConachie supplied no capital, takes no financial risk, has no liability regarding the business of Image and has an on-going, indefinite term relationship with Image.

McConachie ventured no capital investment into Image and can expect no return for profit other than which would result from increasing sales. Her commission rate of pay provides this incentive.

With respect to “diversity”, the only evidence of McConachie performing work for anyone else during the period in question was when she did some “drawings” for Weenk Business Services. McConachie was given permission by Image to do the drawings for Weenk as this was the type of work which Image did not do. There was no evidence provided to suggest that McConachie was working for anyone other than Image, not to suggest that she was actively searching out other business during the period in question.

Specific Result

The Specific Result Test looks at the intent of the parties and whether a contact is to provide for a single service leading to a specific result or whether McConachie is simply required to provide general efforts on behalf of Image through her sales activities.

A review of the Specific Result Test as it relates to this case involves two criteria;

- 1. Specific Work** - if McConachie is an independent contractor, it is agreed that certain specific work would be done for Image. Conversely, in an employee/employer relationship, McConachie agrees to provide labour and services for Image.
- 2. Personal Service** - a contract of employment normally requires a specific person to place her own services at the disposal of the company. Usually an independent contractor’s only obligation is to see that a certain agreed upon task is completed. In other words, it does not matter who actually performs the work.

In this case, McConachie personally provided all labour and services relating to sales of promotional products, advertising, writing/editing for Image’s magazines and some office work.

If McConachie were an independent contractor, the contract should have been for specific work required to be performed in a specific period. In this case, there was an indefinite term verbal contract to provide labour and services by way of sales of promotional products, advertising, writing/editing for Image’s magazines.

For all of the above reasons, the appeal by Image with respect to McConachie being an employee is dismissed.

Counsel for Image argued that the calculation of wages owing performed by the delegate of the Director was incorrect and should be adjusted.

The evidence provided by Image with respect to the amount of wages determined to be owing was contradictory, confusing and did not persuade me that the delegate of the Director erred in his calculations except to the extent as confirmed by the delegate to counsel for Image. The delegate of the Director acknowledged to counsel for Image that the Determination total should be amended to be \$1,992.80. I am satisfied that this is the correct calculation of wages owed.

There was also evidence provided with respect to the calculations performed by the delegate of the Director in regard to Statutory Holidays. The parties agreed that the correct calculation for the 3 Statutory Holidays should be “Total wages ÷ 120 x 3”. Application of this formula results in $(9218.83 \div 120 = \$230.46)$ the same quantum for Statutory Holidays as calculated by the delegate of the Director.

With respect to the appeal by Image in regard to the amount of wages owing, the appeal is allowed to the extent as outlined above.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated June 13, 1997 be varied to be in the amount of **\$1,992.80**.

Hans Suhr
Adjudicator
Employment Standards Tribunal