

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 -

444 Flowers Flowers Ltd.
("444")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE Nos.: 97/620, 97/621

DATE OF DECISION: November 19, 1997

DECISION

OVERVIEW

This is an appeal by 444 Flowers Flowers Ltd. (“444”), under Section 112 of the *Employment Standards Act* (the “Act”), against 2 Determinations dated July 23, 1997 issued by a delegate of the Director of Employment Standards (the “Director”). 444 alleges that the delegate of the Director erred in the Determinations by concluding that Michel Zarichuck (“Zarichuck”) was an employee and by concluding that 444 had contravened Section 18 of the *Act*. The delegate of the Director determined that Zarichuck was owed wages in the total amount of \$983.23 and the delegate of the Director issued a penalty Determination in the amount of \$0.00 for a contravention of Section 18 of the *Act*.

ISSUES TO BE DECIDED

The issues to be decided in this appeal are:

1. Was Zarichuck an employee ?
2. If Zarichuck was an employee, are wages owed ?
3. Is the imposition of a penalty Determination appropriate in the circumstances of this appeal ?

Determination No. 1

FACTS

Zarichuck responded to a sign posted in the Company’s window which stated “DRIVERS WANTED”.

Zarichuck delivered flowers for 444 from October 16, 1996 to mid-December 1996.

Zarichuck used his own vehicle and was paid on the basis of \$4.00 per delivery.

Zarichuck quit on December 20, 1996 as he felt he wasn’t making enough money.

Zarichuck filed a complaint alleging wages were owing from 444.

444 alleges that Zarichuck was an independent contractor as he set his own hour; worked at his own pace; could do whatever he wanted during the course of the deliveries; used his

own vehicle; paid for his own insurance, gas, repairs; had the ability to reschedule the delivery to meet his own needs.

The delegate of the Director investigated the complaint and determined that Zarichuck was an employee and owed wages in the amount of 956.16 plus interest for a total of \$983.23.

ANALYSIS

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.

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.

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 himself, or does he work for someone else ?

- 4. Specific Result** - is the individual required to perform general work or to only accomplish a specific job?

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 considered the characteristics of their relationship;

Selection - 444 offered Zarichuck employment.

Dismissal - 444 accepted Zarichuck's resignation without any complaint of a breach of contract.

Method of Work - 444 accepted the orders from the clients, arranged for the delivery, collected from the clients for the cost of the flowers and the cost of the delivery. 444 assigned deliveries to the drivers.

Remuneration - 444 set the rate of \$4.00 per delivery.

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 Zarichuck integrated and done as part of the business of 444 or simply an accessory to the business of 444 ?
2. **Part and Parcel** - is Zarichuck an integral part of the organization ?
3. **Ordinary Man** - would an ordinary person view the relationship between Zarichuck and 444 as one of employee/employer ?

Clearly, in the case at hand, delivering flowers ordered from 444 was an integral part of 444's business. The perception of the "ordinary man" would be of the view the relationship was one of an employee/employer as Zarichuck delivered 444's flowers and any payments were made payable to 444, not to Zarichuck.

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 himself 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 Zarichuck bears any risk of loss or possibility of profit ?
2. **Financial Investment** - does Zarichuck have an ownership of machinery and equipment and if so, is the investment substantial ?
3. **Lasting Relationship** - is there an ongoing permanent relationship between Zarichuck and 444 ?
4. **Diversity** - is Zarichuck permitted to provide the same or similar services to other parties and, if so, is Zarichuck actively involved in searching out other business opportunities ?

Zarichuck had no risk at all. In the case at hand, although Zarichuck supplied his own vehicle and expenses for the vehicle, he takes no financial risk, has no liability regarding the business of 444 and has an on-going, indefinite term relationship with 444.

Zarichuck ventured no capital investment into 444 and can expect no return for profit other than which would result from increasing the number of deliveries made. His method of remuneration provides this incentive.

With respect to “diversity”, there was no evidence of Zarichuck performing the same or similar work for anyone else during the period in question or to suggest that he 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 contract is to provide for a single service leading to a specific result or whether Zarichuck is simply required to provide general efforts on behalf of 444 through his deliveries of 444’s flowers.

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

1. **Specific Work** - if Zarichuck is an independent contractor, it is agreed that certain specific work would be done for 444. Conversely, in an employee/employer relationship, Zarichuck agrees to provide labour and services for 444.
2. **Personal Service** - a contract of employment normally requires a specific person to place his 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, Zarichuck personally provided all labour and services relating to the delivery of the flowers.

If Zarichuck 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 delivering flowers when and as needed.

Based on the evidence provided and on the balance of probabilities I conclude that Zarichuck was an employee of 444. My conclusion is founded primarily on the evidence of the relationship between Zarichuck and 444, which is more consistent with a relationship of employer-employee rather than one of a contractual nature.

I further conclude, based on the evidence provided and on the balance of probabilities, that Zarichuck is owed wages as calculated by the delegate of the Director and set forth in the Determination.

Determination No. 2

FACTS

The text of the second Determination (also dated July 23, 1997) is set out below:

On July 23, 1997, a Determination was issued by Pat Cook, Industrial Relations Officer (copy attached). As 444 Flowers Flowers Ltd. has contravened a specified provision of a Part of the *Employment Standards Act* or of a Part of the *Employment Standards Regulation*, this is a penalty in the amount of \$0.00 for these contraventions.

A further contravention by 444 Flowers Flowers Ltd. of these specified provisions will result in a penalty of \$150.00 per employee by the contravention as set out in Section 29 of the *Employment Standards Regulation*. Contraventions beyond that may result in penalties to a maximum of \$500.00 per affected employee.

ANALYSIS

The *Act* gives the Director many powers to administer and enforce the provisions of the *Act*. Among those powers is the power to impose a penalty.

I concur with the reasoning of adjudicator Crampton in *Super Save Gas* BC EST No. D374/97, wherein he states that as the power to impose a penalty is a discretionary power and, as Section 81(1)(a) of the *Act* requires the Director to give reasons for the Determination, any Determination which does not contain reasons why the Director has

chosen to exercise that discretionary power does not comply with the requirements of Section 81(1)(a) of the Act.

This Determination being appealed does not contain adequate and clear reasons why the Director chose to exercise the discretionary power of imposing a penalty.

For all of the above reasons, I conclude that Determination No. 2 should be cancelled.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination No. 1 dated July 23, 1997 be confirmed in the amount of **\$983.23**

I further order that Determination No. 2 dated July 23, 1997 for a penalty in the amount of \$0.00 be cancelled.

Hans Suhr
Adjudicator
Employment Standards Tribunal

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