Employment Standards TRIBUNAL

An appeal

- by -

Linda Barwick
("Barwick")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/263

DATE OF HEARING: August 20, 2001

DATE OF DECISION: September 4, 2001

DECISION

APPEARANCES:

on behalf of the Appellant	Linda Barwick
on behalf of Vedanta Education Society	George Lensen Lorna Dumaresq

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Linda Barwick ("Barwick") of a Determination that was issued on March 9, 2001 by a delegate of the Director of Employment Standards (the "Director").

Barwick had filed a complaint with the Director under the *Act* alleging she had been employed by Vedanta Education Society ("Vedanta") as a manager of a childcare facility and had not been paid all wages earned in that capacity. The Determination concluded that Barwick was not an employee of Vedanta, that, consequently, the *Act* had not been contravened, ceased the investigation of the complaint and closed the file.

Barwick says that the Director failed to differentiate between the relationship Vedanta had with her as a Director of Barwick Creative Services Inc., a company owned and controlled by Barwick, and her position as an employee of Vedanta. Barwick says that as a result, the Determination wrongly concluded she was not an employee under the *Act*.

ISSUE

The issue is whether the Director correctly concluded Barwick was not an employee of Vedanta for the purposes of the *Act*.

THE FACTS

The Determination set out the following background to the complaint:

> The Society [Vedanta] operates a private school for the grades Kindergarten through to sixth and entered into a joint venture agreement to operate a child care facility adjoined to the school, which is under the jurisdiction of the Act. Barwick claims she worked from September 7, 1999 to July 31, 2000 as a Childcare Facility Manager at the rate of $12.00 per hour.

Vedanta took the position in response to the complaint that Barwick was not an employee, but was a co-venturer with Vedanta, acting through her company Barwick Creative Services Inc. ("BCS"), in a preschool/day care facility adjoined to the private school run by Vedanta.

The position attributed to Barwick in the Determination was that because her company, BCS, was unable to acquire the necessary licence to operate the childcare facility, Vedanta applied for, and obtained, the childcare operating licence in their name and, as required under Section 4 of the *Community Care Facility Act*, identified Barwick as manager of the facility. Barwick, not disputing the existence of a joint venture, or partnership, arrangement, contended that at the point in time Vedanta received the licence to operate the facility, the relationship between her and Vedanta changed from being co-venturers to being employer and employee.

The Determination sets out several findings of fact. Most critical to the conclusion reached in the Determination was that BCS and Vedanta entered into an agreement to operate a childcare facility, that Barwick signed the agreement on behalf BCS, that Barwick was at all material times a Director and Officer of BCS, that Barwick, on behalf of BCS, notified Vedanta that BCS was "pulling out" of the contractual arrangement with Vedanta and that prior to notifying Vedanta of its intention, Barwick, on behalf of BCS, had requested the Community Care Facilities Licencing Branch to cancel the licence of Vedanta to operate the facility and to issue a licence to BCS to operate a childcare facility. The Determination also noted that:

- Vedanta had no authority to dismiss Barwick
- Barwick operated the childcare facility as she wished
- any profit from the operation of the facility was split equally between Vedanta and Barwick
- Barwick provided all the furniture, equipment and supplies
- Barwick set the fees charged to the parents
- Barwick handled all the monetary transactions of the facility

On the last point, Vedanta had opened a bank account in the name of Vedanta Education Society Childcare Centre. Cheques drawn on that account required two signatures. Barwick was given signing authority over that account along with some of the Directors of Vedanta. The practice in respect of administering the account was that a number of cheques would be pre-signed by one of the signing authorities other than Barwick on the account and given to Barwick. When an amount was to be drawn on that account, Barwick would make out the amount and add her signature. There was, apparently, little or no accountability by Barwick for the cheques drawn on the account.

The evidence presented at the hearing added some additional facts and details not specifically included in the Determination:

1. The licence to operate the facility was acquired in the name of Vedanta because BCS was unable to acquire the licence at the time it was needed. Both Vedanta and Barwick agreed to this course of action. The licence was issued on September 14th, 1999.

2. The agreement between Vedanta and BCS was signed by Barwick on October 22, 1999.

3. In late May, 2000, George Lensen, acting on behalf of Vedanta, had a discussion with a representative of the Community Care Facilities Licencing Branch, indicating Vedanta wished to give up its licence. Following the discussion, Vedanta cancelled their insurance on the facility, cancelled phones and generally abandoned the facility to Barwick, who continued to operate the facility, receiving cheques directly from the parents of children in the facility and depositing them to BCS' account, which was also Barwick's personal account. In March, 2000, Barwick wrote four cheques payable to BCS, all of which were deposited to the BCS/Barwick account. Two of cheques were identified, one for "supplies" and the other for "rental on equipment". Barwick was uncertain what the other cheques covered.

In her evidence before me, Barwick contended she was coerced to sign the agreement between BCS and Vedanta to operate the childcare facility. She said that once it became apparent that BCS couldn't get the licence and that Vedanta would acquired the licence, naming her as manager, that agreement became irrelevant, but felt she was forced to sign it under threat that the facility would be closed. I do not accept that she was coerced to sign the joint venture agreement.

Not only is such an assertion inconsistent with the preponderance of evidence and the balance of probabilities in all the circumstances, there is every indication this assertion is of recent origin. I have read the appeal submissions very carefully for some indication that Barwick has, before giving that evidence in the appeal hearing, said she had been forced to sign the joint venture agreement. In her initial appeal submission she contends she was "forced" to sign a letter in April confirming her as an employee of BCS, not Vedanta, and that she was "forced" to divert funds to an account set up by her at Canada Trust to ensure the stability of the business, but those are the only references to being forced or coerced by Vedanta or its representatives. The following statement, however, does appear in the initial appeal submission

> The joint venture agreement was drawn up to ensure that B.C.S. Inc. would be re-imbursed for their services in setting up the business for Vedanta.

In a later submission, dated May 2, 2001, Barwick similarly makes no reference to being forced or coerced into signing the joint venture agreement. In that submission, she states:

> The joint venture agreement that we finally ended up signing, outlined the responsibilities of the directors of both entities involved in setting up this facility, but it was not an employment contract, and made no reference that any member of either entity would have to take an employable position in the company . . . .

In a submission received by the Tribunal on May 9, 2001, Barwick once again asserts she was coerced into signing the April document, saying she was an employee of BCS. Even as late as July 31, Barwick filed a submission to the Tribunal making a number of references to the joint venture agreement without once suggesting she was forced or coerced into signing it. It is only in early August, in communications relating to efforts by the Tribunal to settle the matter, that Barwick first refers to being coerced into signing the joint venture agreement. I find that Barwick, on behalf of BCS, knowingly and voluntarily entered into the joint venture agreement with Vedanta.

During April, May and June, 2000, Barwick was communicating with representatives of the Community Care Facility Licencing Branch and with Vedanta concerning a transfer of the operating licence from Vedanta to BCS. Those communications are instructive. In a letter dated April 18th, 2000 to Vedanta, Barwick wrote:

> On April 17th, 2000, I Linda Barwick met with licencing officer Jennie Corbett, to discuss the procedure to have the Licence of the Childcare Centre switched to B.C.S. Inc. Licensing suggested that we switch the licencee and the name with the issuing of the next interim permit. This did not affect the permit since it is the program and manager as well as the business that is being licenced. Note, that we have changed the name of the Centre to Wood Lake Childcare Centre. I was not going to change the name right away, however, licencing suggested that I do. This change in Licencee has been completed primarily due to the fact that Vedanta Education Society was in non-compliance with the Community Care Facilities Licencing Act by *appointing a corporation to be Manager of their facility*.
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> (emphasis added)

The reference to a "corporation" being named as manager is a reference to BCS. On or about May 5, 2000, Barwick received a letter from a representative of the Community Care Facilities Licencing Program, which included the following statement:

> As per the most recent application for a Community Care Facility Licence, the licencee of this program is Vedanta Education Society and you, Linda Barwick are the manager approved by Licencing. However, when you were approved as the manager it was with two conditions. One of the conditions was that you

> would continue to be employed under the authority of the Vedanta Education Society.

In a letter dated May 12th, 2000, addressed to Vedanta, Barwick wrote:

> Please be notified that as of June 1st, 2000, B.C.S. Inc. will be pulling out of the contract between B.C.S. Inc. and V.E.S. We are finding that due to the financial difficulties that both parties are experiencing in this first year of operation, that both parties are unable to comply with this agreement as it is written. . . . and it is in violation of the C.C.F.L. Act for B.C.S. Inc. to act as Manager or to hire the Manager for your facility. Therefore if we are to be liable for the Manager's wages, then we must be the Licencee.

Once again, the reference to "we" is a reference to BCS. The joint venture agreement was brought to an end as of June 1, 2000. On June 5th, 2000 Barwick sent a communication to all parents of children at the childcare facility, which stated, in part:

> As you may or may not know, Vedanta Childcare Centre has been operating as a joint venture between Barwick Creative Services Inc and Vedanta Educational Society.

ARGUMENT AND ANALYSIS

Barwick's argument in this appeal is singular and direct:

> I . . . was the person named as the Manager on the Vedanta Education Society's application to open a childcare facility and I was the person approved by licencing to fill that position and the position of Manager of a Community Care Facility in this province is an employable position. Since I was the person named as Manager of their facility it confirms that they would have to hire me or I wouldn't be named as Manager.
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> . . .
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> . . . it is all quite straight forward. I ended up being an employee of someone else's facility, rather than owner of my own childcare facility. How that happened is irrelevant, that fact remains it did happen . . . .

Vedanta relies on the conclusions of fact made in the Determination and on the facts as they have been established at the hearing. Vedanta contends that, for the purpose of implementing the terms of joint venture agreement, there was no distinction between Barwick and BCS and at all relevant times Barwick was, in her personal capacity, acting as BCS under the agreement in her efforts to make the childcare centre a viable and, ultimately, a financially successful business.

The Director has submitted that the available facts confirmed there was a business relationship, identified variously as a "partnership" or joint venture, between Barwick, using the vehicle of BCS, and Vedanta and the licencing arrangements upon which Barwick relies were established by mutual agreement, primarily because BCS could not be named as the licencee. The Director says that how the licence was issued and whether Vedanta was in contravention of the *Community Care Facility Act* or the Child Care Regulations does not contribute to whether she was an employee under the *Act*.

I agree. It is clear from the evidence that the development of the childcare facility was a business venture between Barwick, using the vehicle of BCS, and Vedanta. The arrangement under which Barwick came to be the manager of the facility was perceived, at the time, to be mutually beneficial to both sides in the business transaction. Undoubtedly, Barwick made the decision to allow herself to be named as the manager because her business objective of establishing a childcare facility would have been adversely impacted had she not. This decision was but one step in achieving her business objective. It was, in a very real sense, a contribution made by her to the success of the joint venture. But even more compelling is that this decision is just one of a number of decisions leading to the inescapable conclusion that Barwick was a controlling mind of the joint venture. She had substantial control in respect of the operation of the facility. The evidence indicates she made all the key decisions for the facility. Vedanta relied almost entirely on her in respect of matters involving the childcare facility.

Barwick has not provided any justification why she should be considered an employee for the purposes of the *Act*. Her entire argument demands the Tribunal place form over substance and I refuse to do that. The Director was absolutely correct to discount whether there would be a contravention of the *Community Care Facility Act* and Regulations if Barwick were not found to be an employee of Vedanta. The Director is statutorily mandated to administer the *Act*. That mandate does not require the Director to be bound by results that might arise through the administration of other, unrelated, legislation.

In the context of who is an employee for the purposes of the *Act*, the Tribunal has said on previous occasions that it is not consistent with the purposes and objectives of the *Act* that persons who are the controlling mind of a business should be considered employees under the *Act*. In *Re Barry McPhee*, BC EST #D183/97, for example, the Tribunal was faced with similar circumstances as those present in this case. One of the partners in a failed partnership claimed he was owed wages for work he performed for the business. In dismissing the appeal, the Tribunal stated:

> In spite of the above observations, the *Act* does not exclude the application of the normal concepts of the law of master and servant. In this context, Courts have stated partners cannot be employed by the partnership, any more than a person can be his own employee. This notion has also been extended to directors of companies, who, it has been decided, are not considered to be employees at common law unless they can prove an independent contract of employment. . . .

> I do not wish to be taken as saying a person who is an employer could never be an employee under the Act. But in such a case (as it is in this one), the onus would be on the person asserting the status of employee to show a clearly worded agreement establishing the employer/employee relationship, the authority by which the company is able to establish the relationship with that person, the services to be performed for the "salary" to be paid and the capacity in which the person is performing the services. It will be seldom a controlling mind of a company will be found to be an employee under the Act. . . .

In this case, we not only do not have any clearly worded agreement establishing an employer/employee relationship, we have a document specifically stating no such relationship exists. In *Re Barry McPhee,* the Tribunal also noted:

> Despite the broad language used to define who is an employee, it is not a reasonable interpretation of that language, taking into account the scope, purposes and the over-all objectives of the Act, to conclude it is intended to embrace the controlling minds of the company. . . .

No error in the Determination has been shown and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated March 9, 2001 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal