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 -

Jonathan Dunn
("Dunn")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	2000/454
DATE OF HEARING:	September 22, 2000 & October 13, 2000
DATE OF DECISION:	October 23, 2000

DECISION

APPEARANCES

Allen L. Cole, Barrister & Solicitor	for Jonathan Dunn
James E. Dunsmore	on his own behalf
No appearance	for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Jonathan Dunn ("Dunn") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 5th, 2000 under file number ER 093-183 (the "Determination").

The Director's delegate determined that Dunn owed his former employee, James E. Dunsmore ("Dunsmore"), the sum of $11,146.83 on account of unpaid wages earned by Dunsmore during the period from the beginning of May to early October 1998. By way of the Determination, the Director also levied a $0 penalty pursuant to the provisions of section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

This appeal was heard over two days during which time I heard evidence and submissions from both parties as well as the further *viva voce* evidence of several other witnesses (some appeared in person, others by teleconference) all of whom testified on Dunn's behalf. The Director's delegate did not appear at the appeal hearing.

ISSUES ON APPEAL

Dunn's principal submission, both during the delegate's investigation and on appeal, is that the he and Dunsmore were partners and, accordingly, since Dunsmore was not an "employee" as defined in section 1 of the *Act*, Dunsmore's claim falls outside the ambit of the *Act.*

Alternatively, Dunn says that even if Dunsmore was an "employee", his unpaid wage claim ought to have been determined in an amount substantially lower than that set out in the Determination.

FACTS AND ANALYSIS

If the parties were partners, it follows that the Determination must be cancelled since the Director would not have had any jurisdiction to investigate and determine Dunsmore's claim. Accordingly, and since Dunn's alternative argument relating to the quantum of Dunsmore's wage claim becomes moot if the parties were partners, I propose to address the partnership issue first.

The nature of the relationship between the parties

The delegate observed, at page 1 of the Determination, that "the business was a charter dive operation" and that Dunsmore was to receive "one half of the boat's profits". However, the delegate also concluded that in the absence of reliable evidence as to the profits earned, if any, by the charter dive business "this complaint is considered to be a minimum wage complaint".

"Partnership is the relation which subsists between persons carrying on business in common with a view of profit" [see section 2(1) of the B.C. *Partnership Act*]. In a number of decisions the Tribunal has affirmed the principle that partners are not entitled to file claims for unpaid "wages" under the *Act*–see *e.g. Swetnam* (BC EST #D231/96); *Caba Mexican Restaurants Ltd.* (BC EST #D370/96); *Super Cat International Enterprises Ltd.* (BC EST #D483/98). Thus, based on the delegate's above noted findings–which are entirely consistent with the evidence before me–it would appear that the two parties were engaged in a common enterprise and intended to share the profits of that enterprise. However, the delegate, although acknowledging that the evidence was somewhat equivocal, nonetheless concluded that Dunn exercised sufficient control over Dunsmore to constitute his employer.

Based on the evidence before me, I am of the view that the relationship between the parties was that of partnership. I would echo the comments of my colleague Adjudicator Love in *Super Cat, supra.* (at para. 29, Quicklaw):

> "While the definition [of "employee"] is a broad one and ought to be given a liberal interpretation, the Legislature, I believe, could not have intended that a partner or shareholder could use the *Act* to gain a preference over another partner or shareholder in a business dispute. The true substance of this matter is a dispute concerning a business relationship between the parties."

The business enterprise at issue in this case, and which was not incorporated at the relevant time, was operated under the firm name Pacific Coast Ocean Adventures ("Pacific Coast"). The purpose of the business was to take groups of scuba divers out to sea for escorted diving day-trips. The charters were arranged, for the most part, through greater Vancouver diving shops. The boat used in the business was owned by a third party and leased to Pacific Coast. The business was not successful and, in the end, not only did the business fail to become profitable but the friendship between Dunn and Dunsmore also deteriorated to the point where they are no longer on speaking terms.

Although I am advised that Revenue Canada concluded that Dunsmore was not employed by Dunn, I have reached my conclusion that the parties were partners without regard to the Revenue Canada decision. In concluding that the parties were partners, I have been influenced by a number of factors which, when considered collectively, lead inexorably to a declaration of partnership as between Dunn and Dunsmore.

Dunn and Dunsmore's original agreement–and it should be noted that there is little in the way of documentation that would support either party's view of the relationship–was that they would work together in a dive charter business and share the *profits.* Dunsmore, in his testimony,

attempted to resile from his original position communicated to the delegate by saying that their agreement was that he would receive 50% of the *gross revenues.* I reject that position because:

(i) it represents a strategic retreat from his initial position; and

(ii) it is simply not credible in that, if accepted, Dunsmore (as an employee) would have received significantly greater compensation than his supposed employer, Dunn, inasmuch as Dunn would have only received 50% of the revenues but then would have had to pay all of the operating expenses out of his own share leaving him with very little to show for his efforts.

The uncontradicted evidence before me is that when the two worked together doing "hull cleaning work" (cleaning the underwater hulls of boats docked at a wharf, facilitated by their diving gear) under the Pacific Coast banner they split the proceeds equally. This sharing of the profits of the "hull cleaning work" was carried forward in their joint dive charter operation.

As noted by several witnesses–all of whom had little, if any, personal stake in the outcome of these proceedings–Dunn and Dunsmore held themselves out to the world at large as "partners" and frequently referred to themselves in general conversation and during business-getting opportunities as "partners".

During the relevant period Dunn and Dunsmore were roommates and used their apartment as the "base of operations" for their business. They equally shared the rent and both contributed to other operating expenses such as telephone and other utilities. The apartment was rented in their joint names as co-tenants. Pacific Coast used, in its business operations, a computer that was owned by Dunsmore.

At the outset of his "employment", Dunsmore never completed a TD-1 form. During the entire course of his association with Pacific Coast, Dunsmore–a former fraud investigator with the federal government and who was then in his late 20s–*never*, by his own testimony, received any wages, nor any wage statements, nor any any T-4 statement of earnings from Dunn. On this latter point, Dunsmore apparently never even requested that Dunn issue him (Dunsmore) a T-4 statement of earnings for the 1998 tax year.

Although Dunsmore knew that the business was not doing well, he was nonetheless willing to make a significant cash infusion–with virtually no documentation or security–into the business. Dunsmore also admits to regularly paying various operating expenses relating to the dive charter operation out of his own pocket. This sort of behaviour is inexplicable for an *employee,* but entirely consistent with his being a *partner* in the business.

Pacific Coast was advertised in a local diving magazine as being "*owned, operated* and designed by *divers* for divers" (my *italics*). In that same advertisement, both Dunn's and Dunsmore's names appear next to their respective telephone numbers (indeed, Dunsmore's name is listed first). Both parties were involved in the design of the advertisement in question. In my view, the only reasonable inference to be drawn from this advertisement is that both Dunn and Dunsmore considered themselves "owners" and "operators" of the dive charter business. Since the business was not incorporated, they could not have been referring to themselves as co-shareholders,

officers or directors but, rather, as partners. This advertisement, I might add, is consistent with other Pacific Coast documentation that lists both Dunn and Dunsmore–and their telephone numbers–without further description as to their status vis-à-vis the business.

While it is true that there was a division of labour in the business both at sea (Dunn was the boat captain; Dunsmore the "dive master") and on land (Dunn handled the finances; Dunsmore the company's books and other financial records), such a division does not in any fashion imply that they were not partners. Indeed, many partnerships are built on an amalgamation of different skill-sets and on a division of primary responsibility for particular tasks. However, both Dunn and Dunsmore were jointly involved in all key business decisions and intended to (and, I find, in fact did) share the business profits.

As noted above, there is little in the way of probative documentation; the few documents that are available, however, suggest a partnership rather than an employment relationship. For example, in mid-September 1998, when their relationship was beginning to deteriorate, Dunsmore approached Dunn and demanded that they both sign a form of "Partnership Agreement"–this agreement was never signed since Dunn was not prepared to do so without legal advice. The blank agreement (a 4-page draft document published by Self-Counsel Press that can be purchased from various retail outlets) does not, obviously, prove that Dunn and Dunsmore were partners. On the other hand, the document does show that it was Dunsmore's belief–at least in mid-September 1998, if not sometime later–that he considered himself and Dunn to be partners in the Pacific Coast dive charter business.

I am particularly driven to the conclusion that the parties were partners by the circumstances surrounding the acquisition of an air "compressor" (and some ancillary items such as air storage cylinders) which is a piece of specialized equipment used to fill scuba tanks. As noted in the Determination, Dunsmore says that his involvement in the purchase of the compressor was strictly as a lender. I unreservedly reject that contention.

First, the parties jointly concluded that the business would benefit from the purchase of the compressor which became available when its owner was required to sell the compressor as part of a general resolution of a matrimonial dispute. Second, the purchase was originally to be financed by a business loan–*both* parties *jointly* applied (and met with the loans officer) for a loan at the Scotia Bank in order to obtain the purchase funds; their loan application was turned down. Third, after their bank loan application was turned down, Dunn and Dunsmore each agreed to provide $6,000 toward the $12,000 purchase price. Dunsmore obtained funds from his father and, in turn, converted the funds to a money order made payable to Dunn–this money order is noted, in Dunsmore's hand, to be "For PCOA [*i.e.,* Pacific Coast Ocean Adventures] Equipment Purchase". These funds, along with Dunn's $6,000 contribution, were deposited into the Pacific Coast bank account and a cheque was drawn on the account payable to the owner of the compressor. Fourth, both parties attended at Sechelt to pick up the compressor and finalize the transaction.

If this transaction relating to the purchase of the compressor involved merely a loan from Dunsmore to Dunn, I would have expected Dunsmore's money order payable to Dunn to so indicate. Further, if this was a loan, I would have expected *some* written documentation confirming the loan. Finally, why would Dunsmore make a loan to Dunn when, as he

(Dunsmore) admitted, there was *no specific agreement* as to when the loan was due and payable, *no agreement* as to interest, *no agreement* as to monthly payments and *no loan security* (not even a promissory note!). Shortly after their business and personal relationship ended, Dunsmore asked Dunn to sign a "joint ownership" agreement relating to the compressor and subsequently Dunsmore accused Dunn, in writing, of "theft" of Dunsmore's ownership interest in the compressor. If the $6,000 was merely an unsecured loan, on what possible basis could Dunsmore assert *any* ownership interest in the compressor? However, if Dunsmore advanced $6,000 toward the joint purchase of the compressor (so that it could be used in Pacific Coast's business) his subsequent assertions regarding ownership are entirely explicable.

Given the foregoing uncontroverted facts, in my view, the notion that this $6,000 payment was a loan is simply not credible. The $6,000 was Dunsmore's contribution–matched by an equal contribution from Dunn–toward the purchase of a business asset. Viewed in that light, and from Dunsmore's perspective, this transaction is wholly inconsistent with his assertion that he was Dunn's employee and entirely consistent with Dunn's assertion that the two of them were partners.

SUMMARY

I am satisfied, on the balance of probabilities, that the delegate erred in determining that Dunn and Dunsmore were not partners but rather were employer and employee. Inasmuch as the relationship between Dunn and Dunsmore was that of partnership, the delegate did not have any jurisdiction to make an award in Dunsmore's favour on account of unpaid "wages" since Dunsmore was not Dunn's "employee".

Dunsmore may well be entitled to an accounting as to his share of the business profits but that claim, as well as the various other claims that Dunsmore apparently wishes to assert against Dunn, must be adjudicated in the civil courts in accordance with the provisions of the *Partnership Act.*

In light of my conclusion that the parties were partners, I need not address the matter of whether or not the quantum of Dunsmore's unpaid wage award was correctly determined.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination, including the $0 penalty, be cancelled.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal