Employment Standards TRIBUNAL

An appeal

- by -

Pacific Rim Giftware Ltd.
(formerly known as Canada International Craft Industry Ltd.)
(the "Appellant")

- 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:	Ib S. Petersen
FILE No.:	2002/402
DATE OF HEARING:	October 18, 2002
DATE OF DECISION:	October 23, 2002

DECISION

APPEARANCES:

Mr. Jim Zhang	on behalf of the Appellant
Ms. Esther Austin	on behalf of herself

OVERVIEW

This is an appeal, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director's Delegate issued on July 2, 2002 (the "Determination"). In the Determination, the Delegate concluded that Ms. Austin was an employee of the Appellant. She was not, as asserted, an independent contractor.

The background facts may briefly be stated as follows. Ms. Austin was retained as a "full time sales manager" for a six month period pursuant to a written "contract" entered into on April 6, 2002. The contract characterized her as an "employee." She was remunerated by a "salary" of $5,000 per month plus commission. The "contract" set out her duties in some detail. She worked until October 6, 2002, when the Appellant decided not to renew or extend the agreement.

The Delegate rejected Ms. Austin's claim for compensation for length of service, claim for expenses and outstanding commissions. The delegate awarded her $1,238.21 in vacation pay and interest.

FACTS AND ANALYSIS

The basic issues to be resolved is whether the Delegate erred in concluding that Ms. Austin was not an independent contractor and whether she is entitled to the vacation pay awarded. The Appellant has the burden to persuade me on the balance of probabilities that the Determination is wrong and, briefly put, I am of the view that it has not met that burden.

It is fair to say that the hearing was not conducted in an amicable manner. Both parties essentially took the position that the other party was being untruthful about most of the material matters before me.

At the hearing, Mr. Zhang sought to introduce documents not provided to the Tribunal before the October 4, 2002, deadline indicated on the hearing notice. I ruled that I was not prepared to admit these documents into evidence. This evidence included a statement from a witness, dated October 11, 2002, apparently to support the Appellant's position that Ms. Austin was an independent contractor. At the hearing, I indicated that I was not prepared to accept the letter first, because it had not been provided to the Tribunal in a timely manner and, second, because of the hearsay nature of the evidence contained in it. The witness was not present for cross examination and, in the circumstances, I would have attached little weight to it anyway.

At the outset of the hearing, Mr. Zhang sought to arrange for the witness to participate via telephone conferencing. I ruled against that request. When I first inquired whether he had requested of the Tribunal that the witness participate in that manner, his evidence suggested that he had not made such a request

from the Tribunal but merely indicated that there were two potential witnesses and that he needed an interpreter at the hearing. The Tribunal's records do not indicate that such a request was made. Later, after I had ruled against the admissibility of the letter from the witness, and Mr. Zhang revisited the issue of the witness testifying via telephone conferencing, he stated categorically that he had, in fact, been promised that the witness could participate via telephone conference. His evidence on this point was different from the first time the issue came up. In the circumstances, I do not accept his testimony on this point.

The application of the statutory definitions of "employee" and "employer" is not as easy or simple as one might expect. A useful summary is set out in my decision in *Knight Piesold Ltd.*, BCEST #D093/99:

> "Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2nd ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

The fact that the "contract" expressly characterizes Ms. Austin as a "employee" is not determinative. All the same, it does call for an explanation. The Delegate is required to look at the substance of the relationship, not the "label" attached to it by the parties, in light of the various common law tests, the statutory definitions, and the principles generally applied to remedial statutes such as the *Act*. Overall, I am of the view that the Delegate did just that. Ms. Austin was hired as a "full-time sales manager," she was paid a "salary," and she travelled for the Appellant to trade shows and her expenses were paid by the Appellant. On the facts of this case, there is not much to support that Ms. Austin was an independent contractor and the responsibility for drawing my attention to those facts rests with the Appellant.

I do not see any merits to the Appellant's argument that Mr. Zhang, who holds a doctorate in engineering from the University of British Columbia, used the wrong words when he prepared the contract because he was in a "hurry" and because English is his second language. In my view, the contract language clearly provides that the parties intended that Ms. Austin be an employee. I do not accept Mr. Zhang's testimony, vigorously denied by Ms. Austin, that she wanted to be an independent contractor, and, I might add, even if I did, I would not find that particularly persuasive in the circumstances of the relationship.

Mr. Zhang also claimed that Ms. Austin was not entitled to vacation pay because she had received time off with pay. This related to a visit to Los Angeles by Ms. Austin. She attended a trade show for the Appellant there. Ms. Austin acknowledged that she had time off during that trip, that she brought her son with her, and that she stayed with relatives during the visit. She explained that the Appellant booked air travel for her based on price and availability, and that she often went to her destination several days before the trade show actually started because the airfare was cheaper. She stayed with relative to save hotel costs. Ms. Austin testified that her trip to Los Angeles was no different from other trips she took on behalf of the Appellant. In the circumstances, I am not persuaded that Ms. Austin's trip to Los Angeles counts as paid vacation time.

In short, on the evidence before me, I am of the view that the Appellant has failed to discharge the burden to show that the Delegate erred and, therefore, the appeal fails.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated July 2, 2002 be confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal