

An appeal

- by -

Robert Saint Amour
("St. Amour" or "Employee")

- 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: Paul E. Love

FILE No.: 2002/356

DATE OF DECISION: October 30, 2002

DECISION

OVERVIEW

This is an appeal by, Robert Saint Amour, from a Determination dated June 14, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“*Delegate*”) pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”). The Delegate issued a Determination finding that Cindee Grant operating as Small-A-Fare Café (“Grant”) was not the employer of Mr. Saint Amour. At the commencement of the oral hearing, the parties agreed to have this appeal determined based on the written submissions filed in this appeal. I therefore adjourned the hearing to consider the written submissions and prepare this decision.

There was a delay in the investigation of this matter, however, that delay does not show any error in the facts determined by the Delegate. Mr. Saint Amour alleged that the Delegate failed to interview all the witnesses, however the Delegate did interview the alleged employer and four out of six employees, and was unable to locate one employee for an interview. The Delegate did not interview external suppliers, or obtain and tender information from the Canada Customs and Revenue Agency, municipal business licences, GST, PST or other registrations for the business. It is apparent that the “other information” would be of no assistance in determining the issue of whether Mr. Saint Amour was an employee of Ms. Grant.

In my view, the Delegate correctly considered the evidence and determined that there was no evidence of direction or control of Mr. Saint Amour, by Ms. Grant. The nature of the relationship between the parties had some elements of a business relationship, personal relationship or friendship.

I was not satisfied that the Delegate erred in the conclusion reached that Mr. Saint Amour was not an employee of Ms. Grant.

ISSUES:

Did the Delegate err in finding that Mr. Saint Amour was not an employee?

FACTS

This case was set for an oral hearing, at the request of Mr. Saint Amour. In my opening comments to the parties, it was apparent that both parties wished this matter to be determined upon the written submissions presented to the Tribunal during this appeal process. None of the parties called evidence or made argument. I therefore decided this case after considering the written submission of the Employer, Employee and the Delegate, filed with the Tribunal.

The Delegate conducted an investigation into the nature of the relationship between Mr. Saint Amour and Ms. Grant, and in particular identified the issues of whether Mr. Saint Amour was an employee, Ms. Grant an employer and whether Mr. Saint Amour worked for Ms. Grant. The Delegate concluded that there was no employment relationship.

Mr. Saint Amour alleges that he was involved in the hiring of staff, managing the restaurant, dealing with suppliers and staff including dealing with the Delegate on employment standards matters, and cooking. During the course of the investigation Ms. Grant denied that Mr. Saint Amour did any of the work that he claims to have done. Ms. Grant alleged that she had known Mr. Saint Amour for about 10 years, and that as of September 15, 2000, Mr. Saint Amour resided in a portion of her home, and used her car. Ms. Grant alleges that Mr. Saint Amour “imposed himself” in her business affairs, that this imposition was “not entirely welcome”. Ms. Grant claimed that Mr. Saint Amour hung around the kitchen, ate free food, and was a “privileged friend”.

The Delegate interviewed four staff members of the restaurant. The evidence from the staff members was mixed as set out at pages 5 and 6 of the Determination:

One stated that Mr. Saint Amour was neither a manager nor partner. In response the question asking what his role was, “he stood around a lot”. The witness recalled there being a manager of the serving staff and the cook who managed kitchen staff, neither of whom were Mr. Saint Amour. This witness confirmed that Mr. Saint Amour would pop in and out and that he wasn’t really there for more than an hour at a time. Neither did this witness see Mr. Saint Amour report his presence or absence to Ms. Grant. Another front end staff person said that they did not witness Mr. Saint Amour taking orders, serving, or working while they were employed.

Another witness could recall that Mr. Saint Amour did payroll. Specifically, the witness recalled reporting payment errors to Mr. Saint Amour and that he would recount hours on the schedule, and ultimately be the one to provide a cheque, the witness does not believe the cheque was signed by Mr. Saint Amour. This witness confirmed they were interviewed and hired by Mr. Saint Amour. [Ms. Grant’s response was that she left this persons resume for the head server to interview, and it is possible Mr. Saint Amour inserted himself in the process.] This witness recalled that if Ms. Grant was stuck for a cook, Mr. Saint Amour would help her, but this only happened a couple of times. Asked if Mr. Saint Amour was doing anything else in the course of a day, the witness stated, “not really”. The witness stated that Mr. Saint Amour, “came and went as he pleased” and did not see Mr. Amour ask Ms. Grant for permission before leaving.

Still another witness who was employed for two weeks after Ms. Grant acquired the business, thought that Ms. Grant and Mr. Saint Amour were business partners. They came in as a couple, and on their way out on the first day they introduced themselves as the new owners.

The vendor of the business was under the impression the Mrs. Grant and Mr. Saint Amour were business partners, although they didn’t actually say so. the witness recalled that he seemed to be calling the shoots (sic) and she signing the cheques.

The Delegate concluded that there was “no substantive evidence to suggest that Mr. Saint Amour was either required or requested to perform “work” or take direction from Ms. Grant.”

Mr. Saint Amour’s Argument:

Mr. Saint Amour submits that a year to investigate a simple matter is unreasonable and unjustifiable. Mr. Saint Amour submits that other witnesses should have been interviewed. Mr. Saint Amour submits that there was evidence that he was an employee. Mr. Saint Amour submits that he was waiting to be paid when the restaurant picked up and cash flow improved. He states that Ms. Grant lied, and that vital evidence was ignored in the determination, and that reviewing existing evidence and expanding interviews of past employees would prove his claims. Mr. Saint Amour indicates that he was not the

author of letters to the Driftwood Mall or to Ms. Grant, which were referred to by the Delegate in the Determination as having been authored by Mr. Saint Amour.

Cindy Grant's Argument:

Ms. Grant submits that the Delegate talked with all her employees about Mr. Saint Amour. She submits that Mr. Saint Amour "inserted himself" into her business affairs and was neither a partner, nor an employee. Ms. Grant has made a lengthy submission, much of which is not helpful to the issues of whether Mr. Saint Amour was her employee. Much of the submissions is of an inflammatory nature.

Delegate's Argument

The Delegate submits that he interviewed the "front end staff" which Mr. Saint Amour referred him to during his interview of Mr. Saint Amour on October 10, 2001. The Delegate submits that he was unable to contact Mr. Grant, a witness that Mr. Saint Amour directed him to. The Delegate says that Mr. Saint Amour does not specify what information was missing. The Delegate apparently interviewed four of the six employees at the business.

ANALYSIS

In an appeal under the *Act*, the burden rests with the appellant, in this case, the Employer to show that there is an error in the Determination, such that the Determination should be canceled or varied.

Delay in Investigation:

It is unfortunate that this matter took a year to investigate. Mr. Saint Amour pointed out that he has made a complaint against the Delegate as a separate matter, and he suggests that this makes the entire position of the Delegate suspect. In my view, it is not my function to "supervise" or "discipline" the Delegate. Delays in investigations can often be a function of administrative considerations such as budgets, and staff resources available to deal with a volume of complaints.

In the first instance investigation by the Delegate, and as an appellant in this process, Mr. Saint Amour bears the persuasive burden. He must persuade the Delegate that he is an employee, on a balance of probabilities. I am unable to reverse the Delegate's conclusion on this point or infer that he was an employee because of a "delay in an investigation". He must persuade me that an error has been made such that the Determination ought to be varied or cancelled. I am not satisfied from the submissions that the length of time to investigate this matter, has had any bearing on the available evidence or ultimate conclusions reached by the Delegate.

Failure to Interview Other Witnesses:

It appears that there may have been other potential witnesses that the Delegate could have contacted during the course of the investigation. The Delegate explains at page 6 of the Determination that he did not contact the witnesses because "there was no suggestion they would have direct knowledge of the relationship between Ms. Grant and Mr. Saint Amour. The Delegate further noted that this would not counter the evidence of the staff.

In reading the appeal submission of Mr. Saint Amour, I am struck that there may have been other witnesses, but those witnesses are not named, the nature of their evidence was not disclosed. From the information presented by Mr. Saint Amour in his written submission, I find that he has not established an error in the investigation which would have effected the Determination.

Failure to Gather Information from Other Government Sources:

It is clear that the Delegate did not gather information available from government sources such as the Canada Customs and Revenue Agency, City of Courtenay, with regard to the issuance of business licences, GST registration numbers, which would be evidence of ownership of the business. Mr. Saint Amour says that all this information would have supported Cindee Grant as sole owner of the business. This information however, would not prove the existence of an employment relationship between Mr. Saint Amour and Ms. Grant. Further, such evidence would not address the issue of Mr. Saint Amour's expectation of an interest in the business through his contributions. The information would not address the issue of whether Mr. Saint Amour performed work in expectation of an interest in the business.

Use of a Letter

In the appeal submission Mr. Saint Amour alleges that at page 5 of the Determination the Delegate relied on a letter, which Mr. Saint Amour says in his appeal submission:

On page 5, Mr. Krell again produces a letter that I do not acknowledge, he goes on to comment about its content, yet this is not the same letter I sent to ms grant, while in her employ I used her computer to keep the books, she had full access to my templates and could write any letter she wanted, Mr. Krell had a duty to show me the letter, not quote a few words.

The Delegate quoted from the letter, which was provided to him by Ms. Grant, and was apparently issued on or about the same time as Mr. Saint Amour filed his employment standards complaint:

Don't be stupider than you already are, I will get what is owed to me.

In a nutshell this is what will happen unless you pay me what you owe me, you will lose the Toyota, I will go to Employment Standards, the BC Human Rights Comm. And Revenue Canada. You will not win, you're horribly dishonest and you can't lie your way out anymore. You've screwed everybody around you and I'm sure your staff would be thrilled.

I want this money today Cindee, don't call my bluff. [underlining for emphasis]

This letter accompanied a August 9, 2001 notice of claim for \$1,665.00 under the Repairers Lien. In his submission to the Tribunal Of June 27, 2002 Mr. Saint Amour alleges that the letter noted by the Delegate was not authored by him. At the time of the investigation Mr. Saint Amour's apparent explanation for the letter was that this letter was written in the context of claims made by him for vehicle repairs. The Delegate noted that it was surprising that the letter contained no reference to wages, if in fact wages were then believed by Mr. Saint Amour to be owing. In my view it is not necessary for me to make any findings with regard to Mr. Saint Amour's allegation that this letter was not authored by him. The letter is of relatively little assistance in deciding the issues of whether Mr. Saint Amour was an employee and whether he was owed wages.

Letter to the Driftwood Mall:

In the Determination, the Delegate refers to a letter from the Driftwood Mall to Ms. Grant dated May 16, 2001 asking her to ensure future communication came from her and not Robert Saint Amour as some of this communication was unclear and derogatory. Mr. Saint Amour in his submission claims that Ms. Grant had access to his computer templates and authored the correspondence. Ms. Grant claims Mr. Saint Amour authored the correspondence. The Delegate refers to the correspondence in the portion of the Determination which sets out the employer's position. It is clear that the Delegate did not make any findings of fact based on the correspondence. The appellant's argument with regard to this correspondence, is therefore of no assistance to me in considering the issue of whether the Delegate erred in the Determination.

In my view, the Delegate appears to have addressed the relevant considerations in looking at whether Mr. Saint Amour was an employee. In the investigation before the Delegate, the burden of proof rests with the complainant to demonstrate that he is an employee, that Ms. Grant was his employer, and that he worked for wages. There is no doubt that Ms. Grant was an employer as she operated a restaurant with employees. The question, however, is whether Ms. Grant was Mr. Saint Amour's employer. At page seven of the Determination the Delegate concludes

... I find no substantive evidence to suggest the existence of an employment relationship. On the contrary, Mr. Saint Amour asserts there was a partnership, a partnership that somehow became and (sic) employment relationship. What is missing is evidence to indicate that Mr. Saint Amour, or Ms. Grant considered such a relationship, until such time as Mr. Saint Amour was locked out of the business. Apart from the absence of evidence showing an express or implicit intention to enter into an employment relationship there is no significant evidence flowing out in the approximate 6 month period to show that Mr. Saint Amour was performed "work" or services within the realm expected of an "employee", i.e. having tasks or duties assigned to him by an "employer".

In the Determination, the Delegate noted, correctly, that the performance of the duties of a manager, do not render a person an employee under the *Act*. Management duties can be performed by business partners, contractors, or agents, without the existence of an employment relationship. In order to use the wage recovery provisions of the *Act*, the complainant must be an employee seeking recovery of wages from his or her employer. It is apparent that the Delegate undertook the "correct approach" in the investigation:

Despite the approach taken by Mr. Saint Amour in his written complaint, it is also clear that Mr. Saint Amour's fundamental contention is that the nature of his relationship with Ms. Grant entitles him access to the wage protection provisions of the *Act*. Consequently, investigation into Mr. Saint Amour's complaint has been conducted on that basis.

In the *Act*, a broad definition is given to "employee" and "employer". An employee can include

- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee

An "employer" includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is responsible, directly or indirectly, for the employment of an employee

Quite often the issue is raised in the context of whether a person is an employee or an independent contractor, and there is common law and tribunal case law relating to the tests to be applied in analyzing the facts.

There are certain unusual facts, in this case, which militate against a finding of an employment relationship. Firstly, it is apparent that Mr. Saint Amour did not work regular scheduled hours, or perform regularly scheduled tasks at the request or under the direction of Ms. Grant. This would suggest a “lack of control or direction” by Ms. Grant over Mr. Saint Amour. Secondly, Mr. Saint Amour alleges to have made a substantial contribution to the acquisition of the restaurant through negotiations with the former owner. Mr. Saint Amour referred to this in his dealings with the Delegate as “his equity” in the business, and alternatively that he was working to acquire an interest in the business. Ms. Grant now denies this contribution in her written submission to the Tribunal. Employees generally do not provide equity or capital for a business. The provision of equity or capital is more consistent with a business than an employment relationship. Thirdly, it appears that Mr. Saint Amour intended that he would acquire an interest in the business, and this was to be financed by equity derived from his negotiating skills, his interest in his boat, and working in the business.

While the parties are not ad item on the nature of the relationship between Ms. Grant and Mr. Saint Amour it is apparent that there was a personal relationship. This relationship may well have changed from the date of acquisition of the restaurant through to the date Ms. Grant “locked out” Mr. Saint Amour. Mr. Saint Amour used Ms. Grant’s vehicle. He drove Ms. Grant’s children to school. He drove his daughter to school. He appears to have paid rent for a portion of Ms. Grant’s home. He appears to have used Ms. Grant’s computer for a use other than use of the business. He appears to have eaten meals at the restaurant. These facts seem inconsistent with an employment relationship, and more consistent with a personal relationship or a friendship.

In analyzing the information available to me, I am struck by the absence of any evidence showing an intention by the parties to create an employment relationship. Further I am struck by the absence of evidence showing any direction given by Ms. Grant to Mr. Saint Amour, or control exerted over Mr. Saint Amour by Ms. Grant. There is some evidence relating to work performed by Mr. Saint Amour, however, there is also evidence that Mr. Saint Amour saw himself, and expressed to others, on certain occasions as a partner in the business.

This was obviously a difficult case for the Delegate to resolve, and the case turned on credibility. The Delegate was looking at the relationship between these parties to determine if there was an employment relationship. There is very little evidence of a traditional employment relationship based on direction and control. There is evidence of other relationships relating to business, and a personal relationship. The Delegate heard directly from the parties. While I would not hesitate to overturn a finding based on credibility, provided that I had some oral evidence from the parties, the written submissions are not of much assistance to me in this case, in resolving any questions of credibility. In reviewing the evidence before me contained in the submissions of the parties, I am not satisfied that Mr. Saint Amour has shown an error in the Determination.

I note that it may be that Mr. Saint Amour has a claim, to be processed in another forum in the nature of partnership or constructive trust. I also note that Ms. Grant denies a partnership, as does Mr. Saint Amour. These are matters, however, which are outside of my jurisdiction to deal with.

ORDER

Pursuant to s. 115 of the *Act* I order that the Determination dated June 14, 2002 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal