EMPLO YMENT ST AND ARDS TRIBUNAL
In the matter of an Appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, c. 113

-by-

Super Cat International Enterprises Ltd.
("Super. Cat")

-of a Determination issued by -

The Director of Employment Standards ..(the
"Director)

ADJUDICA *TOR:*	Paul E. Love
FILE No:	98/446
DATE OF HEARING:	October 3, 1998
DATE OF DECISION:	October 22, 1998

DECISION

APPEARAN CES

Donald Taylor, Esq for Super Cat International Enterprises Ltd.

Robin Hood on his own behalf

OVERVIEW

This is an appeal by Super Cat International Enterprises Ltd. ("Super Cat") of a Detennination dated June 18, 1998. The Director's delegate found that Robin Hood was an employee of Super Cat and entitled to the sum of $40,374.40 in wages. The delegate appears to have relied on a decision by Human Resources Development Canada to validate for immigration purposes a job offer made by Super Cat to Hood, as well as on an advertisement placed in a newspaper for an employee. In my view this was clearly a case of an unresolved business dispute between the parties, and Mr. Hood cannot reasonably be characterized as an employee.

ISSUES TO BE DECIDED

Was Mr. Hood an employee of Super Cat?

FACTS

Procedural History:

I note that while this is a very narrow issue, this matter was the subject of a full day hearing, with extensive Written submissions to the Tribunal before the hearing by Mr. Hood, document brief, an argument brief and brief of authorities filed by the appellant. Unfortunately due to the facility available for this hearing Mr .Hood, although apparently close to finishing his oral argument, was unable to finish by 4:30 pm.. I gave him the option of filing a further Written submission with the Tribunal provided it was filed by fax by the close of business on October 15, 1998. After the allotted time for the filing of the written submission expired I prepared a draft decision. After my initial draft of this Decision, I received and reviewed a written submission prepared by Mr. Hood. I have ignored those portions of the submission which are an attempt to introduce new evidence, or portions that were unsupported by the evidence. The submission did not change the substance of my decision, however, I have referred to portions of that submission in the final draft of this

Decision. Mr. Taylor also filed a further written rebuttal submission responding to Mr. Hood's submission.

This Decision is based on the information filed with the Tribunal as well as the oral and documentary evidence adduced at the hearing. I have considered the written submissions of both parties.

I noted with interest Mr. Hood's submission that he considered himself disadvantaged at the hearing:

> In conclusion I wish to respectfully bring to the adjudicators attention the following. I consider that I have been completely disadvantaged in this hearing and that I did not find myself on a level playing field, not through any fault of the adjudicator, but rather what I was lead to believe the purpose and format of the hearing would be. I had expected at the very least somebody from the Ministry of Labour would have been in attendance. I was not aware that questions and ensuing discussions outside of the essential facts would take place. I had no idea that witnesses who had absolutely nothing whatsoever to do with the formation and operation of the company, nor who had any intimate knowledge of the goings on of the company could attend to give nothing more than irrelevant character references and could contribute facts completely divorced from the affairs of the company and which were of a private and personal nature, and that attempts at character assassination were permissible. This is the kind of thing I would expect in the supreme court and not in a low profile hearing designed to eliminate the substantial costs of legal counsel and everything that flows from it ...
>
> Two witnesses I had discussions with about their attending what I was lead to believe was a low profile event were both contacted by Mr. Taylor and threatened with being summoned to attend by subpoena. Mr. Silvester declined to attend adding that Mr. Taylor would not want to hear what he had to say. Mr. Morrison also declined to attend, advising Mr. Taylor that he would be a hostile witness.
> Aware that this hearing had now taken on a somewhat higher profile, my potential witnesses felt they would rather not attend and that the correspondence they had given would suffice, expecially since I understood that it would not be encumbent on me to prove I was an employee. Despite the foregoing, it should be noted that the only really two material witnesses who were intimately associated with the affairs of Super Cat could not be coersed (sic) into attending on behalf of Mr. MosdelI/Super Cat, but rather supported my cause with correspondence we perhaps naively believed if it was good enough for the Employment Standards officer to make a determination, then similarly the correspondence would suffice for the hearing. I would also. like to point out that I respected the positions of these two

gentlemen in the sense that Mr. Silvester is still in business with Mr. Mosdell, and that Mr. Morrison likewise has contact with Mr. Taylor on a professional basis.

I note that the Director's Delegate found that a sum in excess of $40,000 was due and owing to Mr. Hood. It is unfortunate that Mr. Hood apparently had the impression that the purpose of the Tribunal hearings was to rubber stamp the Determination made by a delegate. The process before this Tribunal is an appeal. The focus is for the appellant to identify errors made in the Determination.

Mr .Hood, had a very gentle experience with the adversarial process, at the hands of an experienced advocate who developed and lead relevant evidence in support of a cogent theory of the case. It would have been helpful for me to hear from the two witnesses who Mr .Hood chose not to call. I note that I accorded very little weight to the written letters of Mr. Morrison and Mr. Silvester that were prepared and tendered for evidence at this hearing as these gentlemen were not produced for cross-examination. I found the evidence lead by Mr. Taylor to be very helpful to the conclusions that I fonned in this case. While the onus in the proceedings is on the appellant, I can weigh all the evidence tendered in the hearing. If a party errs from a tactical view point with regard to the evidence he should have called, that is the nature of the process.

On October 16, 1998 at 9:44 pm Mr .Hood faxed directly to my office a further submission to "withhold my decision" pending a review of the evidence and submissions by an attorney who was put at his disposal to review evidence and submissions to date. I decline to stay my decision. The evidence portion of this hearing finished on October 13, 1998. This was not a complex case. It is quite common, in my experience for parties to be without counsel at a hearing -that is their choice. As I have noted above, this was a very narrow issue. Mr .Hood appeared to be prepared to participate and did participate in the hearing by cross-examining witnesses, giving evidence and by making extensive oral and written submissions. It is apparent that he chose not to have key witnesses available, believing that letters would suffice. Those documents were before me, considered by me, but I gave these documents limited weight. Mr .Hood apparently wishes to re-open the hearing to call character evidence from friends. This would of course be of no assistance in detennining the narrow issue in this case. In my view, there was not a power imbalance between the parties such that this hearing could be considered to have been an unfair hearing. At no time during the hearing did Mr. Hood request an adjournment to obtain counsel. I decline to permit him to re-open his case.

Findings of Fact:

Mr .Hood is a citizen of South Africa, who was in Canada on a work permit. The work permit allowed him to work as a yacht broker at Bird's Eye Marina in Maple Bay. He arrived in Canada in 1995. He was hoping to become a Canadian citizen. He had a very marginal income and was

chronically short of funds at all material times, nevertheless, he is a very talented individual. He has skills as a marine architect.

Mr .Mosdell had retired to Maple Bay on Vancouver Island at a comparatively early age from his truck parts business in Prince George because of ill health. He was a restless retiree who was looking for a project to keep himself engaged during the time he spent on Vancouver Island. He spent the winters in Mexico.

Mr. Hood and Mr. Mosdell met while Mr. Hood was employed as a yacht broker at Bird's Eye Marina. Mr .Mosdell found out from Mr .Hood that the latter was a person skilled in the design of boats. Mr .Mosdell approached Mr .Hood to design a 14 foot dinghy. The parties decided that the design was so good that they decided to go into the business of making boats.

The parties built a plug based on Mr. Hood's design. Moulds were taken from the plug. The parties worked together on the project. Mr. Mosdell treated this as a retirement project. Mr. Hood worked part time on the vessel while working as a yacht broker. Mr .Mosdell also worked on the project while he was not away on his Mexican holidays.

In January of 1996 Mr. Hood's employment at the marina came to an end as a result ofa sale of that business. Mr. Hood made an emergency phone call to Mr. Mosdell in Mexico. As a result of that phone call Mr. Mosdellloaned money to Mr. Hood. Shortly upon Mr. Mosdell's return from Mexico the parties decided to engage in the manufacture ofboats. Super Cat was a company which was incorporated on June 24, 1996 for the purpose of constructing catamaran vessels. Mr .Mosdell was the president, secretary and sole shareholder.

Mr. Hood was an essential party for the production of boats. It was his design. He wished to see the project through. He also was hopeful that the business would be a fmancial success. In his own words Mr. Hood had a very strong motivation to remain in Canada. In order to secure this he had to impress upon the relevant immigration authorities that he was employed in Canada.

The parties presented a letter to Human Resources and Development Canada by way of a letter signed by RJM Consulting Services dated July 8, 1996 which represented that Mr. Hood was to be employed in a senior management capacity .Attached to the letter was an advertisement placed in a paper. In my view this advertisement was carefully crafted to ensure that Mr. Hood would be the only successful applicant. As a result of the advertisement and the representations made, a validated offer was issued on July 23, 1996 by Larry Bell, a program and services officer with Human Resources Development Canada and a work permit was issued by Immigration Canada.

I surmise from the manner in which Mr .Hood and Mr .Mosdell gave evidence concerning the immigration documents, that both parties played an equal role in putting forward a characterization of the relationship which did not accord with the reality of the situation known to both. I accept that Mr. Mosdell attempted to help Mr. Hood as he had helped him in the past with charitable

donations and gifts of money, clothing and food. Both parties benefitted from the characterization with regard to ensuring the progress of the business venture towards a profitable conclusion, and Mr Hood also was able to further his immigration objectives.

In an article in Pacific Yachting (September 1997) which was filed as an exhibit in these proceedings Mosdell and Hood were characterized as partners. There was oral evidence before me from Super Cat's witnesses, Barry Allard, John Morgan and Donna Wooton , who in essence characterized the relationship between Hood/Mosdell as a co-equal relationship in the nature of a partnership. Mr .Hood did not take direction from Mr .Mosdell. Mr. Mosdell was the financier of the venture, Mr .Hood had the design expertise, and until he dropped out of the business Mr . Morrison was to be involved in marketing.

It is apparent in this case that the Director's delegate based her decision entirely on the employment authorization issued by Citizenship and Immigration Canada and the validated offer of employment set up through Human Resources Development Canada. It is somewhat puzzling that the delegate did not refer to a later decision of the same officer. On November 7, 1997 Human Resources Development Canada refused Mr .Mosdell ' s request for foreign worker validation. One of the grounds cited by the officer was that there was not a "normal" employer/employee relationship.

Super Cat filed in its exhibit book (exhibit 1), a number of cheques payable to Mr. Hood from Mr. Mosdell, Micon Marine (an entity controlled by Mr. Mosdell) and Super Cat. Most of the payments are characterized as a loan. There is no consistent amount that reflects that regular pay cheques for wages was issued to Mr. Hood. Mr. Hood drew the sum of $3,000 per month for a four month period while a vessel was constructed. There were 4 or 5 vessels constructed prior to the business closing in October of .1997.

The delegate stated that she had no doubt that Mr. Hood was an employee for the following reasons:

> In order to work in Canada any foreign individual must have an Employment Authorization issued by Citizenship and Immigration Canada.
>
> To obtain this Authorization the employee and the employer must make application to the Human Resources Development Canada and have that offer of employment validated. This was done by Super Cat International Enterprises Ltd. for the complainant
>
> The employer advertised for an employee, not for a partner or investor.
>
> A letter to Human Resources Development Canada, from Mr .Morrison of RJM Consulting Services, on behalf of Super Cat International Enterprises Ltd., clearly refers to the complainant as an employee.

> The complainant, although he was treated as a senior manager, was never given a Directorship in Super Cat International Enterprises Ltd. This is reflected in a Company search as late as May of 1998.
>
> The complainant was never given any shares in Super Cat International Enterprises Ltd. Also he is not credited with any investment in the company.

There was no serious dispute between the parties as to the. nature of the pre-incorporation relationship. It was clearly a joint venture or partnership.

ANALYSIS

In this proceeding the burden rests with the appellant, Super Cat, to demonstrate that an error has been made in the Determination such that I should vary or cancel the Determination.

Super Cat:

Mr. Mosdell says that the true substance of the relationship between the parties was a business arrangement, and that Mr. Hood was a co-equal participant in a business relationship. Mr. Mosdell says that if the business would have become profitable and paid off the debt Mr. Hood would have received a directorship, shares, and an income. Mr. Mosdell says that the characterization of Mr. Hood as an employee for immigration purposes is not an accurate characterization. Super Cat says that Mr. Hood was not in any financial position to subsidize the company by foregoing wages" for a 14 month period, and accepting only small amounts of money. This is consistent with the view that any monies advance were loans and not wages.

Mr. Hood:

Mr. Hood says that clearly he was an employee because he was a person in need of a wage due to his financial circumstances, that he did not work for free and that he was subject to the direction of Super Cat as evidenced by Mr. Mosdell's decisions regarding the name of the product line, marketing decisions, and production decisions to produce the 20 foot boat, rather than the whale watching boat. He says that he was a foreign worker exploited by an unscrupulous employer.

In my view, the facts found by the Director's delegate were flawed fundamentally. The delegate approached this matter on the basis that she found that the employer was engaged in the business of designing constructing and marketing boats, and that the employer advertised for an employee with 15 years of marine engineer and design experience, and that Mr. Hood was the successful applicant.

It is common ground in this case that up to the time of incorporation of the Super Cat, that Mr. Hood and Mr. Mosdell were in a partnership or joint venture relationship. This important and

undisputed fact is absent from the Delegate's consideration of the post incorporation relationship and in my view constitutes a serious error in her analysis.

I am not satisfied that the documents filed with Human Resources and Development Canada accurately reflect the true relationship between the parties. This was not an employment relationship, but a continuing business relationship. What appears to have been presented to Human Resources Development Canada was a sham. This sham benefitted both parties -Mr .Hood was able to remain in Canada and work towards his landed immigrant status, with the benefit of possibly making a profit from the boat building business. Super Cat had the benefit of Hood's design expertise and labour. The sham appears to have been initiated by Mr. Hood. Mr. Mosdell appears to regret his involvement in this matter, and testified that he felt he had no choice given the amount of money he had into the project.

The real issue in this case is whether the relationship between the parties changed upon the incorporation of Super Cat. The definition of employee in section 1 the *Act is* a very broad one:

> (a) a person, including a deceased person, receiving or entitled to receive wages for work performed for another;
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee ...

I have no doubt that a person engaged by another for the purposes of designing and building a boat could be considered an employee under the definition stated in the *Act*, provided that such a person was engaged and paid or was entitled to receive wages for the work. It is conceivable that Mr. Hood could fall into section 1 (b) of *Act.*

While the definition 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.

Mr. Mosdell decided that he was no longer prepared to finance Super Cat. By the time he locked the doors in October of 1997 he had made available to Super Cat by way of personal loan, loan guarantees and borrowing, a sum in excess of $120,000. There were no significant sales in place. He had his son obtain storage insurance on the premises, moulds, plug and vessels and he locked Mr. Hood out from the premises. I make no finding as to whether this was justified or not. It does appear to be a self help remedy consistent with the termination of a business relationship. I note Mr .Hood was locked out while he attended for a brief visit to South Africa. Mr .Hood was left at loose ends and without a valid work permit.

 It is clear that Mr. Hood treated this as a business dispute. Mr. Hood wrote a letter dated February 25, 1998 to Mr. Mosdell in which he alleged a breach of a joint venture agreement and made an offer to settle the dispute on certain terms. Significantly absent from that proposal was any allegation of arrears in wages.

The letter also indicated as follows:

> In conclusion I have sought legal advice with regard to my position relative to this whole affair and have been advised that in addition to the settlement claim detailed above, you may be liable to aggravated and punitive damages, as well as the costs relating to any legal action I wish to take. Also your approach to this settlement and the amount in which you agree to settle, will reflect directly on the extent to which I would involve Employment Standards.
>
> My position is to commence legal action should you fail to respond within two weeks of receipt of this letter, which response I would accept in writing only.

From the evidence lead at this hearing I am satisfied that the relationship between the parties remained one of partnership or joint venture. Mr. Hood may have a claim against Mr. Mosdell for a breach of the joint venture or partnership by failing to deliver to Mr .Hood shares in Super Cat, or alternatively a claim against the company in quantum meruit for labour bestowed in the design and fabrication of a number of vessels constructed by Super Cat. Such an action is likely to be complicated and an expensive proposition. By his own admission Mr. Hood is a person lacking in resources. The proper forum for such a claim, however, is in the Supreme Court of British Columbia.

I cannot address the equities in the business relationship between Mosdell and Hood, and make no findings in that regard. My jurisdiction is limited to determining whether there was an employment relationship between the parties and whether there was a breach of the minimum standards set out in the *Act.* There was no issue taken by the Appellant with regard to the calculations of wage entitlement made by the delegate. If I found that Mr. Hood was an employee, I would award, without hesitation, the full amount found to be due and owing by the Director's delegate, together with interest. I cannot find that Mr. Hood was an employee for the purpose of ensuring that "fairness" or "equity" is achieved as between Mr. Hood and Mosdell in this business dispute, or because of sympathy for Mr. Hood's precarious financial position. There was no common intention by the parties to create an employment relationship.

Super Cat, through its solicitor, Mr. Taylor filed a number of authorities. It is clear from a review of the Fenton v. Forensic Psychiatric Services Commission (1991),56 BCLR (2d) 170 (C.A.) that I may analyze the true substance of the relationship between the parties. This case quoted from the

decision of Paul Weiler in Hospital Employees Union. Local 180 v. Cranbrook & District Hospital, [1975] 1 Can. L.R.B.R. 42 (BCLRB):

> What are those features which go to make up an employee in the usual sense of the term? Someone is interviewed by an employer and hired for ajob. He will work for some period of time and will be paid a fixed wage, computed hourly, weekly or monthly. He will perform tasks assigned by the employer and subject to the direction and supervision of the latter. This work is of benefit to the employer's business or enterprise. For that reason, it is worth the while of the employer to pay the employee for doing it. The difficulty is that there is no single element in the normal makeup of employee which is decisive, and which would tell us exactly what point of similarity is the one that counts. Normally, these various elements all go together but it is not uncommon for an individual to depart considerably from the usual pattern and yet still remain an employee. Sometimes employees are dispatched to an employer by someone else, and work only for short or intermittent periods (as in construction); some employees work on commission, or on a profit- sharing basis (such as salesmen or fishermen); some employees are subject to very little in the way of meaningful direction and control (such as professionals). But while the legal conception of an employee can be stretched a fair distance, ultimately there must be some limits. It cannot encompass individuals who are in every respect essentially independent of the supposed employer. In making the judgement about whether or not these limits have been reached, these observations quoted from the book Vicarious Liability by Professor Atiyah, state the dilemma:
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> > "It is now clear. that it is impossible to *define* a contract of service in the sense of stating a number of conditions which are both necessary to, and sufficient for, the existence of such a contract. The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. The plain fact is that in a large number of cases the court can only perform a balancing operation, weighing up the factor which point in one direction and balancing them against those pointing in the opposite direction. In the nature of things it is not to be expected that this operation can be performed with scientific accuracy ."
>
> Finally, this balancing process does not take place in a legal vacuum.

As one adjudicator noted'

> Additionally, Adjudicators for the Tribunal are not required to park their common sense and experience of business affairs at the doors of the hearing room. The Tribunal must carefully consider the context in which a company director, officer, owner or manager seeks to claim employee rights and to pay particular attention to the purposes and over-all objectives of the Act. For example, where the result of a claim would give the "employee" statutory priority over the claims of third parties, the Tribunal will be meticulous in ensuring that the wages were earned.

In the appellant's brief there are a number of legal tests that have been referred to including the control test, the degree of integration test, the economic benefit test and the specific results tests. Whatever the test applied, it is essentially a matter of characterization, considering the relevant factors.

I note that Mr .Hood is far from the archetypal employee. He was not hired by Super Cat to do a job, for which he was paid or supervised. He was clearly a high-Ievel professional who was involved as a party in a business venture. He would succeed in a financial manner if that business were to become successful. The payments made by Super Cat to Mr .Hood made over an extended period of time, and in different amounts, were loans not payment of wages.

This Tribunal has proceeded cautiously in expanding the definition of employee where the person seeking the characterization of employee is a directing mind of a business. Although Mr. Hood was not a director or officer of the business he made almost all the key technical or design decisions with regard to the fabrication of the boats, he had signing authority for the business, he represented himself as a partner of the business in press and magazine articles, he ran the business exclusively when Mr. Mosdell was in Mexico. He was largely responsible for his own terms of engagement - particularly with regard to the preparation of the documents submitted for immigration purposes, including the job advertisement. As the Tribunal noted in McPhee, BC EST #D 183/97 (Stevenson).

> 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.

In that particular case the Tribunal held that the persuasive onus was on the person who was alleged to be the directing mind to prove that he was an employee. I note that McPhee was a case where that person was also the appellant and would therefore bear the onus in the proceedings before the Tribunal. It is incumbent on the delegate investigating the matter to analyze the substance of the relationship between the parties. The absence of shareholder or director status does not automatically qualify Mr .Hood as an employee, particularly where the very nature of his claim is that he was unfairly deprived of his status due to the actions of his former partner. On Mr. Hood's theory he has been kept out of his just position as a shareholder and director of the company

because of the conduct of Mr. Mosdell. He has characterized that conduct essentially as fraudulent in his letter to Mr. Mosdell of February 25, 1998. I do not accept Mr. Hood's submission that he gave up all claims to an interest in the company, and return for the security of employment at the time the company was formed. This is not consistent with the oral and written evidence tendered at this hearing.

In this case Mr .Hood indicated that he had entered into an agreement for wages in the amount of $4,000 per month which he agreed then to reduce to $3,000. He allowed the arrears to accumulate to an amount in excess of $40,000. Mr. Mosdell's evidence was that once the company became profitable Mr .Hood could have a salary .If I were to characterize Mr .Hood as an employee, the arrangement alleged by Mr. Mosdell, although agreed to by Mr. Hood, would clearly be a violation of section 4 of the *Act.* Employees and employers cannot make contractual arrangements which do not meet the minimum standards set out in the *Act.*

I do not accept that Mr. Hood would have entered into an employment relationship where his wages were contingent upon sales. I do think, however, that the true picture is that he anticipated that the business would become profitable quickly, that he accepted loans from Mr Mosdell and courtesies from other friends which allowed him to minimize his personal expenses. He was prepared to accept loans from the company against future anticipated profits. He was prepared to accept a short term financial hardship to get his citizenship and to build a profitable business.

I note that if Mr. Hood had been entitled to wages, he did not demand those wages, and permitted those wages to accumulate for about one and a half years. I do not accept that any employee would allow that situation to continue. A reasonable employee, would have made demand for payment of salary shortly after the employer missed the first payment. There would have been a lawsuit or a complaint filed with the Employment Standards Branch shortly after the first missed wage payment.

I have considered whether Mr. Hood might have foregone his demands for money, as an employee, because he was concerned about his immigration status. I am not satisfied that this was the case.
Mr. Hood, is a sophisticated individual, with financial needs and I do not accept that he was taken advantage of, at least in an employment relationship context, by Mr. Mosdell or Super Cat.
Mr .Hood is obviously an articulate, bright and very talented individual. He has no cogent explanation for his failure to press for payment of "wages". He says that he accepted loans rather than wages during a period of time when he had no valid work permit, but he has no cogent explanation why the amount of the loan was not equal to the amount of the wages. I surmise this is because there was no employment relationship between the parties, and therefore no entitlement to wages.

I have considered and applied the case of Far.Yna v. Chornx (1951) 4 W.W.R. (N.S.) 171 (B.C.C.A.) when assessing the credibility of the witnesses.

ORDER

I order that pursuant to section 115 of the *Act*, the Determination is cancelled.

Paul E. Love
Adjudicator
Employment Standards Tribunal