

**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 -

Andrew Jaster  
(Dean Barrie and Andrew Jaster operating as Jaster Barrie & Associates)

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorne D. Collingwood  
**FILE NO.:** 97/519  
**DATE OF HEARING:** October 15, 1997  
**DATE OF DECISION:** November 13, 1997

**DECISION**

**OVERVIEW**

The appeal is by Andrew Jaster, of Dean Barrie and Andrew Jaster operating as Jaster Barrie & Associates (“Jaster Barrie”), under section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) dated June 19, 1997. The Determination is that Sean Howell was employed by Jaster Barrie and is owed wages and other moneys as a result of his employment.

**APPEARANCES**

Andrew Jaster

On his own behalf

**ISSUES TO BE DECIDED**

Was Howell employed by Jaster Barrie? If so, Does Jaster owe Howell wages?

**FACTS**

Dean Barrie and Andrew Jaster decided to start a business on completing their computer programming studies. Their plan was to sell computers and assist people with software problems. Barrie was to be in charge of sales and Jaster in charge of administration. Each was to contribute \$2,000 to the ‘partnership’. They began their venture on or about August 1, 1996, without setting the terms of their relationship down on paper or developing a proper business plan. On August 24, 1996, the two ended their business as a result of differences over whether or not to arrange for a loan.

In filing his complaint, Sean Howell, a friend of Barrie’s sister, claimed that he performed work for Barrie in Barrie’s home starting July 19, 1996 and then for Jaster Barrie in the period August 1, 1996 to August 26, 1996. Howell lived in Barrie’s home in the period when work is said to have been performed in the home.

The Director’s delegate was unable to establish that Howell worked for Barrie in July. He has found that Howell performed work for Jaster Barrie beginning August 1, 1996. Both Barrie and Jaster denied ever having hired Howell but a Ray Reid and a Gregg Klassen (which may actually be spelled Clausen) appeared to corroborate the claims of Howell. Reid is part owner of Trumpet Distributors Ltd. and his office was below warehouse space used by Jaster Barrie as its headquarters. Klassen was employed by Jaster Barrie, at least that was the delegate’s conclusion.

As matters are presented to me, there is nothing to show that Klassen worked for Jaster Barrie. As 'proof' that Klassen worked for Jaster Barrie, the delegate relies on a letter of reference written by Barrie for Klassen. That letter refers to work by Klassen (Clausen) of some 9 months. Jaster Barrie did not last that long. The letter may refer to Klassen's work for Barrie when he operated as Surrey Micro Computers but it does not refer to work for Jaster Barrie. Nothing else points to Klassen as an employee of Jaster Barrie.

Jaster informs me that Howell, on moving out of Barrie's home, moved in with Klassen. Nothing to the contrary, I accept that the two are friends.

Jaster disagrees with the reported comments of Reid. He says it just does not sound like Reid. He says, for example, that Reid found Howell going through their files one night and was very alarmed by that, yet there is no mention of it.

As Jaster presents matters, there is agreement that Howell was regularly at Jaster Barrie. Jaster also accepts that Howell would help on occasion but says that was as a volunteer and not substantial. Jaster says that Howell was not hired by, and did not ever work for, Jaster Barrie. According to Jaster, he just hung around because he had nothing better to do, no money, wanted to borrow their cars and eat lunches brought in by Jaster's wife.

There is agreement that on or about mid-August, Jaster and Barrie discussed an hourly rate of pay of \$15 an hour with both Howell and Klassen.

Jaster presents me with a description of the life of Jaster Barrie. That is accepted as fact as it is plausible and I am presented with nothing to the contrary. The facts are as follows: On August 1, 1996, Jaster Barrie had neither furniture, nor business. Barrie in short order acquired furniture at an auction. Barrie then began to look for business while Jaster set about deciding how Jaster Barrie would operate. Jaster and Barrie interviewed some 30 people in mid-August, Klassen and Howell included, and wage rates were discussed as part of that. The partnership acquired business around the 20<sup>th</sup> of August but never managed to acquire dependable business. It was for that reason, that Jaster would not agree to a loan. That lack of agreement led to a heated exchange on the 24<sup>th</sup> of August and the partnership was on that day ended.

There is a hand written agreement between Jaster and Barrie which shows that their business relationship was severed on the 24<sup>th</sup>. It provides that Jaster would leave with the computer equipment, software, furniture, books and supplies which he brought to the partnership. The word "etc." is struck from the list of what he was to take. That change meant that other personal assets would be left behind, chief among those being his \$2,000. Other wording leads me to conclude that it was understood that Jaster was leaving with no debts owing.

There are no documents pointing to Howell's employment and no hard evidence of the product of his alleged work.

## **ANALYSIS**

I suspect that Barrie led Howell to believe that he might find work and that is why he hung around Jaster Barrie. It may also explain the complaint. But did he perform work to the extent that he can be considered an employee as defined by section 1 of the *Act*? If Howell is an employee it is simply because he was allowed to perform work.

The Determination relies completely on statements by Reid and Klassen. Jaster on the other hand was found to lack credibility in the face of Reid's comments and because of conflicting statements of when the partnership was severed. On hearing from Jaster, I find no conflict at all in the latter regard, merely a misunderstanding of what Jaster tried to say. I also find, possibly because I have heard from neither Howell, Klassen, nor Reid, nothing which suggests that he is anything but credible.

As the facts are presented to me, there is absolutely no support for a conclusion that Howell began work on August 1<sup>st</sup>, indeed, at any time before the middle of August. I, moreover, find it unlikely that Howell would have been hired before Jaster Barrie had either furniture or business. I find it unlikely that a small operation like Jaster Barrie would interview a person already in their employ. I find it most unlikely that Howell would start work without first discussing his rate of pay.

I am, moreover, unable to conclude that Howell performed work for Jaster Barrie beginning mid-August or at any time thereafter. No documents point to it. Nothing indicates any product of the alleged work. There are only the comments of Reid and Klassen to the delegate.

Klassen has an apparent interest in the complaint and there is no proof that he was an employee and in a position to know whether Howell performed work. As such, even if he were to repeat what he told the delegate, to me and under oath, I would give that little weight.

I accept that Reid has no interest in the complaint but he is clearly an outsider and, with no opportunity to examine him, I am unable to place his comments in their context or know the basis of his observations. As his comments are reported to me, they do not confirm an employment relationship. There are just too many unanswered questions with the result that it is possible that all of what he said could be true and yet Howell still not be an employee.

The hard evidence in this case is rather limited, the credibility of key witnesses not being established. That which is before me, does not support a conclusion that Howell was an employee. If important evidence has been missed, Howell has only himself to blame. He chose not attend the hearing and assemble his witnesses. This case may serve to emphasize the importance of doing just that in cases where the credibility of witnesses is key.

**ORDER**

I order, pursuant to section 115 of the *Act*, that the Determination dated June 19, 1997 be cancelled.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**

LDC:lc