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 -

Parduman Singh Kaloti and Kamlesh Devi Kaloti
operating as
National Courier Service

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 98/483

DATE OF HEARING: November 10, 1998

DATE OF DECISION: November 20, 1998

DECISION

APPEARANCES:

Gary Kinar	Counsel for Parduman Singh Kaloti and Kamlesh Devi Kaloti
Crispian D. Starkey	Counsel for Frank Doherty
Ray Stea	Delegate of the Director
John Hiltz, Steven Wells, Wayne Peters	
Susan Mitrou, Trevor Davies	On their own behalf
Manjit S. Dhariwal	Interpreter

OVERVIEW

This is an appeal by Parduman Sing Kaloti and Kamlesh Devi Kaloti operating a courier service under the business name of National Courier Service (the Kalotis, jointly, and the business hereinafter referred to collectively as "National") pursuant to Section 112 of the Employment Standards Act (the *"Act"*) from a Determination (File No. 012427) dated June 30, 1998 by the Director of Employment Standards (the "Director").

National is licensed by the B.C. Motor Carrier Commission to pick up and deliver parcels in the greater Victoria area, Duncan, and Nanaimo. Frank Doherty, John Hiltz, Steven Wells, Susan Mitrou, Wayne Peters, Mike Dixon, and Trevor Davies ("the Drivers") were drivers for National who earned commissions for making the pick-ups and deliveries. They were treated by National as if self employed and therefore were not paid overtime, vacation pay, or for statutory holidays. Following a complaint and investigation the Director determined that the Drivers were employees and therefore entitled to the minimum benefits required by the *Act*.

National appeals on the grounds that the Determination was wrong in fact and law and that the Drivers were at all times contractors and not employees. The appeal carefully analyses the common law "four fold" test and other common law tests for defining employee status and claims that the Determination misinterprets the facts, misapplies these common law tests, and reaches an incorrect conclusion.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the Drivers were "employees" within the meaning of the British Columbia *Employment Standards Act.*

FACTS

The facts were in dispute and I heard evidence from Sonya Kaloti, the daughter of Mr and Mrs Kaloti, who worked for National for ten years as the dispatcher. She was paid wages and was treated as an employee. I also heard evidence from each of the Drivers except Mr Dixon who did not attend the hearing. Mr and Mrs Kaloti did not testify.

The evidence was extensive and often conflicting and I do not intend to recite it all in this decision. However I carefully weighed the evidence and was cognizant of the need to asses it in terms of the test recommended in *Faryna v. Chorny,* [1952] 2 D.L.R., 354 (B.C.C.A.). The following facts are as I find them after hearing and weighing all of the evidence.

The Drivers were hired by National to perform delivery services on a commission basis i.e. a percentage of the scheduled fee charged by National for each delivery. The fee was set by National and not by the Drivers. The supervision and correction of fees and invoicing was carried out by National.

Each Driver was required to provide their own vehicle and to have it inspected and approved by the Department of Motor Vehicles. Drivers were required to maintain their vehicle clean and presentable. Each vehicle was then equipped by National with signage and a radio with a unique frequency for dispatch purposes. The signs were detachable when the vehicle was not being used for business. The Drivers were required to rent the radios from National. The Drivers had no choice or control over the signage nor the radio. I find as a fact that the use of such signage and radios was mandated by National.

The Drivers paid their own vehicle expenses such as insurance, fuel, repairs and maintenance. The Drivers were expected to be available for dispatch from 8:00 am to 5:00 pm weekdays and to be available on alternate Saturdays. There was some flexibility allowed within this scheduling because there were enough drivers to cover the calls. Some drivers, in particular those doing routes up Island, did not report to work early as there was no work to do prior to their up-Island trip. This flexibility did not mean that drivers could work when and where they pleased. There was an expectation that they would normally be at work and available throughout the scheduled hours and often after hours e.g. when a dispatch would come in shortly before 5:00 pm.

Clients were generated by or for National and not for the individual drivers. The customer contracts, witnessed by weighbills, were all in the name of National and all payments were made by the clients to National. Commissions were then paid to the Drivers by National.

Trips were assigned to drivers on geographic proximity or on a first come first served basis. Generally, drivers were expected to take all trips assigned to them and many did. However some drivers would decline calls based on their own assessment of the financial benefit of the trip. This "cherry picking" was not necessarily approved of by National or other drivers but clearly did occur. Certain drivers also declined to attend at one or two specific clients because of particular difficulties with that client. National accommodated the drivers in these circumstances.

Although National suggests that the Drivers could have a sub-driver perform the delivery services, the Drivers all testified, and I accept, that this was not the case. There was no "sub-contracting" of the services and I accept that such sub-contracting would not have been acceptable to National.

Although National suggests that drivers were free to work for other agencies I am satisfied on all of the evidence that this was not the case. The Drivers were hired by National for the full day, used a vehicle clearly marked as "National", and were dispatched by a radio with a frequency unique to National. I find that the services provided by the Drivers was exclusive to National.

Although National did not prescribe the exact manner and precise timing in which deliveries were to be made it was clear that there was an expectation that such deliveries would be accomplished efficiently and within certain deadlines.

The income earned by the Drivers depended on their availability and efficiency and therefore the Drivers could clearly profit from their own work effort. Income also depended on the goodwill of the dispatcher as drivers could be favoured, bypassed, or ignored. Up-Island drivers, who had a shared or exclusive "run", could, and in some cases did, increase their commissions by attracting new clients.

National also gave drivers non-commissionable tasks such as delivering invoices to clients and picking-up cheques. National claims that this was merely a request and not a requirement but I am satisfied that when National made such "requests" there was an expectation that it would be done and an expectation by the Drivers that it was not optional.

National continually monitored the location of drivers, instructed them to hurry, and discouraged breaks or lack of availability. Drivers were threatened with dismissal for poor service or other disagreements with National or its dispatchers. Drivers were "disciplined" by reduced workloads if their work was not considered adequate.

The commission rate was set unilaterally by National. It was a unilateral substantial alteration in this condition of "employment" which resulted in the Drivers discontinuing their services with National. No compensation for length of service was paid by National to the Drivers.

ANALYSIS

The Delegate analyzed the evidence set out above and applied the common law tests of employment status often referred to as the "Four Fold Test", the "Integration" test, the "Economic Realities Test", and the "Specific Results" test. These tests are the appropriate tests to be applied under the common law and applying them to the facts set out above I would have come to the same conclusion.

These common law tests have been applied by the Tribunal in a number of cases to assist in deciding whether a worker is an employee or not. However in a recent decision of the Tribunal *Project Headstart Marketing Ltd,* BC EST #D164/98 the adjudicator pointed out that the statutory definition in the *Act* casts a somewhat wider net than does the common law in terms of defining an "employee".

The task for the Director, and for this Tribunal, is to interpret and apply the definitions set out in the statute itself. The *Act* contains its own definitions of "employee", "employer", "wages",

and "work", the relevant portions of which are as follows:

> "employee" includes
>
> > (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
> > (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee
>
> "employer" includes a person
>
> > (a) who has or had control or direction of an employee, or
> >
> > (b) who is or was responsible, directly or indirectly, for the employment of an employee;
>
> "wages" includes

> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere

The facts in this case must be analyzed in accordance with these definitions. The Drivers performed services on behalf of National. They made pick-ups and deliveries for National of goods entrusted to National by customers who contracted with National for such services. "Work" need not be performed at any particular location and the fact that the Drivers worked primarily out of their vehicles is immaterial. So clearly the Drivers performed "work" as defined in the *Act.*

The evidence was clear that the Drivers were paid commissions which fall within the definition of "wages". Although each driver could earn more or less commission based on their availability and efficiency, they had no ability to control the flow of work assigned to them except by declining work.

In accordance with the definition of "employee" the Drivers were people receiving or entitled to "wages" for "work" performed for another.

National hired the Drivers and exercised control and direction of them as follows:

* the commission rate was set unilaterally by National;

* the volume of work available to each driver was controlled by National through the dispatch service;

* driver invoices were supervised, corrected, completed, and sometimes destroyed by National;

* drivers were required to have their vehicle inspected and maintained to a standard set by National;

* drivers were required to carry National signage;

* drivers were required to rent a radio from National with a unique frequency;

* drivers were required to be available within certain specified hours;

* drivers were disciplined through threats of dismissal or reduced work assignments;

* the clients were clients of National not the individual drivers;

* National controlled the invoicing and did not provide the Drivers with statements of amounts invoiced and commissions payable;

* the Drivers worked exclusively for National;

* drivers were assigned non-commissionable work;

* drivers were not free to "sub-contract" the work or to hire others to work for them;

* there were time deadlines set by National for the completion of work and expectations of efficiency which were enforced by threats of dismissal or disciplined by reduced work assignments.

It is clear that National was an "employer" within the definition contained in the *Act*.

Counsel for National submitted that in many areas of work which have traditionally been recognised as functioning as independent contracting such as the building trades and sub-trades that there is a considerable degree of direction and control by a head contractor over a sub-contractor and yet they are not considered employer/employee. He submitted that although building sub-contracts are job specific over a period of weeks or months, the Drivers work in this case could be considered as job specific over a period of hours or minutes. He submitted that each "trip" could be considered an individual contract between National and the specific driver dispatched. This is a nice point but it simply flies in the face of the realities of the day to day work environment for the Drivers. There was no tender or negotiation for each trip. This was simply not the way the job worked. These Drivers worked for National for many years and quite simply it was not ever considered by either party that each job was a separate contract.

There is certainly some difficulty with the definitions in the *Act*. The definitions are tautological in that an employee is a person entitled to wages and wages are money paid to an employee. An employer is defined as a person who has control or direction of an employee. Work is any service done by an employee for an employer. None of these definitions are particularly helpful to business people, employers, employees, or this Tribunal. However, the bad drafting of the *Act* does not remove the responsibility from the Tribunal to apply these definitions in as logical a manner as possible no matter how wide a net it casts.

I conclude that, based on the definitions contained in the *Act*, the Drivers were employees and that National was their employer.

As stated at the beginning of this analyses, I would have come to the same conclusion applying the common law tests. In applying the "four fold test" there was considerable degree of control, National owned the signage and the radios (although not the vehicles), and there was little chance for profit or loss because the volume of work, commission rate, and invoicing was controlled by National. Certainly the Drivers were an integral part of the business and the economic realities were such that these Drivers functioned as employees in all respects except in the manner of payment of the minimum benefits of the employment legislation. I have dealt with the specific results argument above.

It was suggested that the Drivers should be treated as self-employed because they had filed as such with Revenue Canada for tax purposes. In my opinion that is a matter between the individuals and Revenue Canada and I am not in a position to analyze or apply the Income Tax Act to these complaints.

Having concluded that the Drivers were indeed employees I must decide whether to confirm the Determination or refer it back to the Director for further calculations. In all cases except Ms Mitrou the Drivers did not keep any trip sheets, daily logs or time sheets (one other driver did but later destroyed the logs). The employer did not keep any records and the Director found that it was not possible to accurately reconstruct what may be owing to the employees except for statutory holiday and vacation pay. It is unfortunate that this is the case but I find no fault with the Delegates position or calculations.

During the hearing Ms Mitrou disclosed that she did indeed keep time sheets and I will refer her case to the Director for a review and recalculation of any monies owed to her based on her records.

I note that the Director did not make a determination under section 66 at the time of the particular determination under appeal and therefore the issue of compensation for length of service has not yet been concluded.

ORDER

I order, under Section 115 of the *Act*, that the Determination, in so far as it relates to Trevor Davies, Mike Dixon, Frank Doherty, John Hiltz, Wayne Peters, and Steven Wells, is confirmed.

I order, under Section 115 of the *Act*, that the Determination, in so far as it applies to Susan Mitrou, is referred back to the Director.

JOHN M. ORR
ADJUDICATOR,
EMPLOYMENT STANDARDS TRIBUNAL