

An appeal

- by -

Karla Phillips operating as Student Works Painting  
("Phillips")

- 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:** M. Gwendolynne Taylor

**FILE No.:** 2002/443

**DATE OF DECISION:** December 17, 2002

## DECISION

Pursuant to section 112 of the *Employment Standards Act*, Karla Phillips (“Phillips”) filed an appeal from a Determination by the Director of Employment Standards (the “Director”) dated July 22, 2002, concerning complaints filed by four individuals who claimed to be her former employees (the “employees”).

The Director’s delegate found that Phillips was the employer of the four individuals and that Phillips owed them for unpaid wages in a global amount of \$3,240.50.

On August 14, 2002, Phillips appealed the Determination on the grounds that she was an employee of 3717 Investments Ltd. dba Student Works Painting (“SWP”) who should be held responsible for paying the outstanding wages. Further, since Phillips was a minor when she contracted with SWP, she claims that contract is void under the provisions of the *Infants Act*, [RSBC 1996] CHAPTER 223.

### ISSUE

1. Was Phillips an employer for the purposes of the Employment Standards Act? This issue is based on a determination of whether the relationship between Phillips and 3717 Investments Ltd. dba Student Works Painting that of a franchise contract or an employment contract.
2. What is the effect of the *Infants Act* on the contractual relationships?

### BACKGROUND

On October 4, 2000, Phillips signed ‘2001 Franchise Agreement’ to operate a painting business under the name of SWP. The term of the contract was October 2, 2000 to December 31, 2001. Phillips, whose birthdate is September 24, 1982, was 18 years old when she signed the agreement. Phillips hired the 4 employees as painters. When she was not able to continue paying them, they resigned. Phillips also resigned around the same time. The 4 employees claimed for unpaid wages against Phillips, which the Director awarded. Phillips has not appealed the amount of the Determination.

Phillips submitted that the Director did not consider all of the facts and disregarded a number of points of law. In particular, she asked the Tribunal to consider the issue of her age. She raised the fact that her signature to the contract with SWP was not witnessed. She submitted that she was an employee of SWP, not a franchisee, based on the facts that she was not required to purchase any rights, she was interviewed by SWP just like any other job interview, she was always referred to as a manager, her work was supervised, SWP handled all the money, bills, pay cheques, and paperwork, and SWP encouraged paying painters by “piecemeal”.

### ANALYSIS

The Tribunal has twice dealt with appeals concerning the legal relationship between SWP and its franchisees: *Re 3717 Investments Ltd. operating Student Works Painting*, BC EST #D337/98 and *Robyn Bourgeois operating Robyn Bourgeois Painting and 3717 Investments Ltd. operating Student Works Painting*, BCEST #D466/01. In both cases, the Director had placed financial liability on SWP for

employment contracts entered into by franchisees. In both cases, the Tribunal determined that SWP did not have the degree of control or direction over the franchisees to support the conclusion that there was an employer/employee relationship or to support the conclusion that SWP and the franchisees were associated under s. 95 of the *Act* (see below). Accordingly, the Tribunal cancelled the Director's Determinations.

In this case, the Director relied on both of those decisions and found that the facts in this case are similar, if not identical, to the facts in both Tribunal decisions. Following those cases, the Director found that Phillips was a franchisee of SWP, and that she was the employer of the 4 employees. The issue of age was not addressed in the Determination although Phillips questioned the legality of the franchise agreement.

Section 95 provides:

**Associated corporations**

**95** If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,

- (a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them, as one person for the purposes of this Act, and
- (b) if so, they are jointly and separately liable for payment of the amount stated in a determination or in an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.

**1. Relationship between SWP and Phillips**

The previous Tribunal decisions, in 1998 and again in 2001, dealt extensively with the issues to be considered in determining liability between the SWP franchisor and its franchisees. The decisions detailed the nature of the contracts, looked at issues of degree of control and direction, determined that the franchisees were not employees of SWP and that the franchisee was the employer of the painter/employees.

In *Robyn Bourgeois operating Robyn Bourgeois Painting and 3717 Investments Ltd. operating Student Works Painting*, BCEST #D466/01, the Tribunal set out the basis of the franchisee's claim that SWP had control and direction of her company, and listed the essential ingredients of the contractual obligations as set out in the Determination, as follows:

During the investigation of the complaints, Bourgeois stated that Student Works Painting had control and direction of her company because Student Works Painting directed and/or controlled number of aspects of her business, from where she should buy the paint to where and how she deposited her business profits.

The Determination noted, and relied on, several factual conclusions, which were derived predominantly from an analysis of the 2000 Franchise Agreement between Student Works Painting and Bourgeois. The Director found that a number of provisions in the Agreement, relating to financial arrangements, business development and operational control, established common control or direction. The Determination noted the following financial arrangements:

- the Franchisor, Student Works Painting, was to set up an account in their name;

- the Franchisee, Bourgeois, was to receive all customer payments payable to Student Works Painting and deposit those payments to the account set up by Student Works Painting;
- Student Works Painting controlled the account, paying Bourgeois' accounts payable, labour, materials, miscellaneous and royalty payments from the account;
- Bourgeois could request payment from Student Works Painting of the profits of the her business from the account if the account balance exceeded \$1000.00; and
- Student Works Painting would assist in arranging a line of credit for Bourgeois with paint and equipment suppliers approved by Student Works Painting, for the purpose of allowing Bourgeois to purchase paint and equipment from those suppliers.

In respect of the business development aspects, the Determination found elements of common control or direction in the following matters:

- a requirement that Bourgeois study training manuals provided by Student Works Painting;
- a requirement that Bourgeois meet Student Works Painting's training expectations for Franchisees, including full attendance at a weekend training seminar, pre-reading the materials provided, completing estimating assignments prior to the seminar, demonstrating punctuality, conformity to a dress code and attend other training as may be required by Student Works Painting;
- directing conformity to how Bourgeois dealt with customers, with Student Works Painting reserving the right to intervene if Bourgeois' conduct in that regard was unsatisfactory;
- controlling how Bourgeois was required to deal with workers, warranty work and reporting to Student Works Painting;
- a requirement that Bourgeois follow all policies, procedures and systems presented by Student Works Painting;
- a provision that Student Works Painting would supply several business forms required by Bourgeois, including contracts, payroll forms, estimate forms, scheduling forms and planners;
- a requirement that Student Works Painting would provide Bourgeois, if she was a first time operator, with a District Manager with some responsibility for assisting her in the development of the business;
- Bourgeois was issued 150 clients contracts and was responsible for returning all those contracts, with a \$50.00 charge levied by Student Works Painting for each missing contract to cover the cost of auditing contracts; and
- Student Works Painting would provide advertising materials to Bourgeois.
- Finally, the Determination identified the following aspects of operational control as demonstrating common control or direction:
- Bourgeois was required to make weekly telephone reports to Student Works Painting, to maintain records, accounts and status of all business activities according to standards set by Student Works Painting;
- Bourgeois was required, on notice, to allow inspection or examination of her business records;

- Bourgeois agreed to appoint Student Works Painting to establish a line of credit with a major supplier to enable Bourgeois to acquire the necessary equipment and supplies;
- Student Works Painting agreed to negotiate the terms of supply and payment with suppliers for Bourgeois;
- the Agreement stated that Bourgeois had to obtain executed contracts for sales by specified dates;
- Bourgeois was required to retain \$500.00 in her account to allow for warranty costs caused by poor workmanship; and
- the Agreement provided for specific instructions about how the business must be closed.

In the *Bourgeois* decision, the Tribunal reviewed the Tribunal's previous decision:

In that decision [BC EST #D337/98], the Tribunal considered an appeal of a Determination that had found Student Works Painting to be the employer of employees of a franchisee. The Tribunal concluded there was no employment relationship between the franchisee and Student Works Painting, allowed the appeal, cancelling the Determination. That conclusion turned on whether the relationship between the franchisee in question and Student Works Painting was an entrepreneurial relationship or an employment relationship. In reaching its conclusion, the Tribunal stated:

There is no doubt that through the device of the Owner-Operator [Franchise] Agreement Student Works Painting has a significant degree of control over certain important aspects of the franchisee's business. They have been listed above. However, this control falls short, in my opinion, of establishing an employer-employee relationship between the franchiser [sic] and the franchisee.

I have no doubt from a review of the evidence that the experience of the franchisee is an entrepreneurial one.

The matters listed in the decision included all of those matters identified in the Determination under appeal in this case.

On the matter of whether the employees of the franchisee could be considered employees of Student Works Painting under the Act, the Tribunal in decision BC EST #D337/98 also stated:

The employees themselves, like the complainants in this case, are hired by the franchisee and are aware from the outset that they are employees of the franchisee and not the Company.

It is clear that there was no relationship between the employees of the franchisee and Student Works Painting that could support a finding that such persons were employees of Student Works Painting.

Concerning the application of s. 95, the Tribunal in the *Bourgeois* decision considered cases decided under the Labour Code concerning the 'common employer' provision, in a franchising context. The Labour Relations Board accepted as a starting point that there is some degree of control by the franchisor over the franchisee, as an inherent feature of the agreement, but found that is not decisive of the issue. The Tribunal followed the development of the Board's jurisprudence in a few cases, looking at the factual basis on which the control test had been applied, and the conclusion that a substantial degree of control must be exerted to establish common control or direction. The Tribunal noted that the Board acknowledged a spectrum of degrees of control.

The Tribunal concluded,

On the facts in this case, I am not satisfied that the precondition of establishing common control or direction for the purposes of Section 95 of the Act has been met. On an assessment of the facts of this case and of the franchise arrangement generally, I cannot conclude that Student Works Painting exerted the degree or kind of operational influence over Bourgeois necessary to justify a finding of common control or direction. I return to the Tribunal's decision in BC EST #D337/98, where the Tribunal made the following general comment concerning the operation of a Student Works Painting franchise:

The successful operation of the franchise on a day-to-day business is in the hands of the franchisee. She hires her own staff without interference from Student Works Painting. It is trite to say that attracting and retaining good employees must be a key objective of any business. The franchisee must decide how to find and attract good people to join her business. She must decide what she can afford to pay her employees, within the constraints of the law and the reality of the market place. Those employees become registered for Workers' Compensation insurance under the name of the franchisee. The franchisee does all of these things without interference from or the involvement of the Company, other than the assistance it provides on an administrative level.

That statement is an accurate reflection of the facts in this case. Bourgeois had a substantial degree of day-to-day control over how she ran her business. The Director says that is not particularly cogent as day-to-day operation of the business by the franchisee is typical of every franchise arrangement. I do not agree that day-to-day operational control is not important. It is an aspect of the actual relationship between the franchisor and franchisee that must be considered. I agree with, and adopt, the Board's view in *Re KFCC/Pepsico Holdings Ltd.*, that how much influence and what kind of influence is exerted, or not exerted, by the franchisor on the daily operations of the franchisee is a relevant, and key, consideration. In my view, it is significant that Student Works Painting had no input into advertising for, interviewing, selecting, hiring, assigning and supervising the work of, setting wages and hours of work for or disciplining and dismissing employees.

The Tribunal considered other aspects of common control or direction such as common ownership, financial control, and operating under the same name. The Tribunal concluded:

There is no indication in the material of any commonality of management between Bourgeois and Student Works Painting. There is an interrelationship or interdependence of operations and representation to the public as a single integrated employer or business. Those matters fall entirely within the general framework of a franchise arrangement. They have little or no impact on the running of the day-to-day business from an operational standpoint.

Even if some of these matters are not caught within the general framework of a franchise arrangement, they do not amount to a substantial degree of control or direction of Bourgeois by Student Works Painting. The Determination outlines a comprehensive list of matters demonstrating Student Works Painting exercised control or direction over Bourgeois. None of those matters, however, has been shown to have substantially influenced the daily operation of Bourgeois as an independent business. There is ample support for the conclusion that Bourgeois made all her own decisions relating to the operation of the business without interference from Student Works Painting. There is nothing in the material to indicate, looking at the actual relationship between Student Works Painting and Bourgeois, that Student Works Painting had the degree of control or direction necessary to satisfy the precondition to a finding of common control or direction under Section 95 of the Act.

I have carefully reviewed the facts and arguments presented in this case as compared to the facts in the 2 previous Tribunal decisions on SWP franchises. I agree with the Director that the facts of those cases do not differ in any substantial way from the facts in this case. I have carefully reviewed the reasoning in the 2 previous Tribunal decisions and concur in their results. Accordingly, I find that the Director did not err in this case in applying those decisions to arrive at the Determinations that Phillips entered into a franchise agreement with SWP and that Phillips, not SWP, was the employer of these 4 employees.

On the facts, I find that Phillips was not an employee of SWP and that she hired the 4 employees. I find that Phillips has not substantiated this part of the appeal and, accordingly, I order that this aspect of the appeal is dismissed.

## 2. *Application of the Infants Act*

Phillips has raised an interesting point about the application of the *Infants Act*. The Director did not deal with the submission in the Determination. In submission on the appeal, the Director took the view that the issue was not enforcement of a contract to which the *Infants Act* would have application, rather Phillips had a statutory obligation to pay wages under the Employment Standards Act.

Section 19 of the *Infants Act* provides:

### **When infants' contract enforceable**

- 19** (1) Subject to this Part, a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her unless it is
- (a) a contract specified under another enactment to be enforceable against an infant,
  - (b) affirmed by the infant on his or her reaching the age of majority,
  - (c) performed or partially performed by the infant within one year after his or her attaining the age of majority, or
  - (d) not repudiated by the infant within one year after his or her reaching the age of majority.
- (2) A contract that is unenforceable against an infant under subsection (1) is enforceable by an infant against an adult party to the contract to the same extent as if the infant were an adult at the time the contract was made.

Phillips' argument under the *Infants Act* has been directed to her contract with SWP. She submitted that the contract is void. That may not be a correct interpretation of s. 19. Section 19 speaks in terms of enforceability. It is not clear to me that this case raises any enforcement issues *vis a vis* SWP. The issue seems to me to be enforcement of the contract between Phillips and the employees. The Director suggests that issue is not 'enforcement' but statutory obligations. Arguably, however, those statutory obligations arise in contract and the issue may still come back to enforcement.

There are other sections of the *Infants Act* that could have some bearing on this case, including sections 20, 26, and 27. Section 20 provides:

### **Application for relief**

- 20** (1) If a contract is unenforceable against an infant under section 19 (1),
- (a) the infant, or
  - (b) if the infant has repudiated or is in breach of the contract, another party to the contract, may apply to a court of competent jurisdiction for relief against
  - (c) a party to the contract, or

- (d) subject to subsection (5), any person who has acquired a right to or interest in property transferred under the contract.
- (2) In an application under subsection (1), the court may order that
  - (a) compensation be paid by or to any of the parties to the contract,
  - (b) there be restitution of property,
  - (c) the parties to the application be discharged from further obligations under the contract or with respect to property transferred under the contract, or
  - (d) compensation be paid to a person, not a party to the contract, who has been ordered to make restitution of property.
- (3) Before making an order under subsection (2), the court must consider
  - (a) the circumstances surrounding the making of the contract,
  - (b) whether the infant induced any person to enter into the contract by misrepresenting his or her age,
  - (c) the subject matter and nature of the contract,
  - (d) in the case of a contract relating to property, the nature and value of the property,
  - (e) the age and means of the infant,
  - (f) whether any party to the application has so changed the party's position that it would be unfair or inequitable to make an order against the party, and
  - (g) any other relevant circumstances.
- (4) For the purposes of subsection (3) (b), an infant does not induce a person to contract with him or her on the basis of a misrepresentation as to his or her age
  - (a) if the person to whom the misrepresentation was made did not have reasonable grounds for believing that the misrepresentation was true, or
  - (b) merely because the infant signed or otherwise adopted a document relating to the transaction that
    - (i) contained a statement that the infant was 19 years of age or otherwise had contractual capacity,
    - (ii) was prepared and tendered by or on behalf of the other person, and
    - (iii) was prepared and used by the other person in similar transactions.
- (5) If property has been transferred under a contract that is unenforceable against an infant under section 19 (1), relief must not be given under this section against a person who has acquired a right to or interest in the property if
  - (a) that person is not a party to the contract, and
  - (b) the property had been transferred in good faith and for value
    - (i) to that person, or
    - (ii) to any of the person's predecessors in title who was not a party to the contract.
- (6) A disposition of property or a grant of security or other interest in property made under a contract that is unenforceable against an infant under section 19 (1) is effective to transfer the property or interest, unless and until an order respecting that transfer is made under subsection (2).

In rendering the Determination, the Director did not, apparently, consider submissions on the effect of Phillips' age. In my view, that amounts to an error of law. This is an issue that needs analysis, based on the provisions of the *Infants Act* and the *Employment Standards Act* and the facts of this case. If s. 19 applies to employment contracts, the provisions of s. 20, or other sections, may be applicable, in which case there would be a need for further fact finding. I find that this is an appropriate case to refer back to the Director for further investigation.

Given the time that has elapsed since the filing of these complaints, it would be preferable that the Director proceed on this referral back in an expeditious manner. I appreciate that this is coming at a time when many people take annual vacation. With those considerations in mind, I ask that the Director



provide an update to me no later than January 17, 2003, so that I will have an indication of how long in anticipated for this matter to be concluded.

## **ORDER**

Pursuant to section 114 of the *Act*, I refer the Determination issued July 22, 2002, back to the Director for further investigation around the issue of the application of provisions of the *Infants' Act*.

Pursuant to section 115 of the *Act*, I order that the aspect of the appeal dealing with the nature of the relationship between SWP and Phillips be dismissed.

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**M. Gwendolynne Taylor**  
**Adjudicator**  
**Employment Standards Tribunal**