Employment Standards TRIBUNAL

An appeal

- by -

Vince Hall operating as VHALL Distributing
("VHALL")

- 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: James Wolfgang

FILE No.: 2001/239

DATE OF HEARING: October 9, 2001

DATE OF DECISION: October 19, 2001

DECISION

APPEARANCES:

Vincent Hall	on behalf of VHALL Distributing Ltd.
Norman R. Evans	for VHALL Distributing Ltd.
Gregory. Palmer	on his own behalf

OVERVIEW

This is an appeal by Vince Hall ("Hall") operating as VHALL Distributing ("VHALL") pursuant to Section 112 of the *Employment Standards Act (the "Act")* of a Determination issued by the Director of Employment Standards (the "Director") dated February 28, 2001. The Determination found Gregory F. Palmer ("Palmer") to be an employee of VHALL and is owed $3,609.42 for statutory holidays, annual vacation pay and interest. The Determination found violations of Section 44 and 57 of the *Act.* No penalty was imposed.

The appeal to the Employment Standards Tribunal ("Tribunal") by VHALL dated March 23, 2001 dealt only with the quantum of the Determination and did not appeal the finding that Palmer was an employee and not a sub-contractor. VHALL argued the money they paid to Palmer included both the employer and employee contributions to EI, CPP and income tax.

There was a preliminary matter of whether the Tribunal should hear evidence on the question of whether Palmer was a sub-contractor as it was not included in the original appeal. In the submissions to the Delegate during the investigation and in subsequent representations to the Tribunal VHALL maintained Palmer was a sub-contractor and therefore is not owed any money for statutory holiday pay or annual vacation pay. It was agreed I would hear argument on that issue and rule later on the admissibility of the evidence.

The witness who testified was:

- Lynne Smith, spouse of the Respondent

The appeal was heard by way of an oral hearing on October 9, 2001. Palmer and Lynne Smith ("Smith") participated by telephone conference call.

Evidence was taken under oath from all parties.

ISSUES

Was Palmer an employee or a sub-contractor of VHALL? If Palmer is an employee, does VHALL owe him statutory holiday pay and annual vacation pay?

THE FACTS AND ARGUMENT

VHALL is a distributor for Weston Bakeries Ltd. ("Weston"). VHALL has a Distributor's Agreement with Weston, which gives him the right to hire such employees, as he deems appropriate. There is no specific reference in the Distributor's Agreement to employing sub-contractors. It states specifically that VHALL is responsible for all "Liabilities imposed upon employers under Labour, Employment Standards, Workers' Compensation, Unemployment Insurance, Pay Equity Legislation and other Governmental Requirements and withhold all applicable Payroll Related Taxes and Deductions".

According to VHALL, Palmer had a similar distributorship for Weston on the north end of Vancouver Island. Palmer ceased to operate the distributorship and VHALL hired him as a sales/delivery driver from June 5, 1998 to August 26, 2000. The rate of pay was $500 per week if sales were below $3,500, at $600 per week if sales were between $3,500 and $4,000 and $700 per week if sales were over $4,000.

The routes were determined by Weston, VHALL and, to some extent, by Palmer. The route and sales were recorded on a "hand held", a mini-computer, in which the daily route and the customers scheduled for that day were pre-listed. The amount of product sold to each customer was then recorded. At the end of each day this information was transmitted by telephone link to Weston. A printout was also produced for the driver. That information was then processed by Weston and VHALL was credited with the commissions on those sales. Palmer was not paid any portion of the commission earned.

Palmer was free to develop additional sales by having retailers include Weston products in their promotions and advertising. He was also able to deal directly with Weston on the sale prices for products included in promotions.

VHALL's drivers, including Palmer, could earn additional money by picking up and transporting outdated products to other retailers. Also, if Palmer took over the route of another driver, including the owner, and his sales went over the threshold amounts of $3,500 or $4,000 he would be paid at the higher weekly rate. VHALL claimed Palmer was free to sell any other product that was not in conflict with Weston products however they believed he did not do so.

VHALL supplied the truck, including fuel and repairs, and a uniform to Palmer. VHALL did not set the hours of work. This was left to Palmer and his customers.

VHALL stated Palmer was required to find his own relief if he were to take time off for statutory holidays and annual vacation. They also claim Palmer chose to work on statutory holidays,

however it was not a requirement of VHALL. In fact the owner, Hall, indicated he did not work statutory holidays.

According to Palmer, the original discussion with VHALL indicated the job would be for four days per week and average from 32 to 35 hours. He would be paid $600 per week, which would include his share of EI, CPP and income tax. He also claims it did not include any money for statutory holiday pay or annual vacation pay. Palmer indicated he was unaware of the salary structure outlined by VHALL but agreed he was occasionally paid a bonus but this was discretionary. The money paid did not include the employer portion of EI, CPP or any other employer contribution. There is no evidence of any written employment contract.

When Palmer started working he realized the job took more hours and after two or three weeks wrote a letter to VHALL. A two page undated handwritten document from Palmer to VHALL was entered indicating a number of changes in the working relationship sought by Palmer. It was later established this was presented to VHALL near the end of June or early July 1998. The substance of the letter was Palmer had believed he would be working a four-day week of some 32 hours for the $600. He found the route took more time and he was seeking an increase in what he was being paid. Palmer claimed he was working an average of forty-three hours per week. VHALL rejected his proposals and Palmer continued to work under the original arrangement.

Palmer claims he worked statutory holidays because some of his customers would insist on deliveries on those days. No evidence was presented to indicate any attempt had been made by Palmer to be paid statutory holiday pay or annual vacation until after leaving VHALL. According to Smith, she called VHALL for a T-4 slip in March 1999 and was told they would not be issuing one, as Palmer was self-employed. She disagreed with that position claiming Palmer was entitled to a T-4 slip. She also raised the question of WCB coverage. She claims Hall agreed to look into that but no further action was taken. There is no evidence of a similar request being made in 2000.

The Delegate applied the "fourfold" test to the relationship between Palmer and VHALL and found an employer/employee relationship existed and Palmer was an employee of VHALL. The Determination found, in part:

> Mr. Hall, determined the rate of pay, the territory in which the complainant was to make deliveries and Hall set the prices of the product Palmer was to sell. In addition, the employer provided the equipment that enabled the complainant to perform the work and set the hours of work. Mr. Palmer was required to take direction from Mr. Hall, and it was the employer's customers to whom the complainant made his deliveries.
>
> Mr. Palmer, had no opportunity for profit or loss…….

ANALYSIS

The first issue that must be considered is whether Palmer was a sub-contractor and not an employee.

There is evidence in the Determination VHALL made representation to the Delegate claiming Palmer was a sub-contractor. However, when VHALL appealed the Determination they made no reference to Palmer being a sub-contractor. The sole ground of their appeal was:

> The determination did not make the appropriate deductions from the amount paid to Gregory F. Palmer. Mr. Palmer was paid monies which included all deductions and these amounts have not been credited to the account of Vincent Hall.

The Delegate responded to that appeal in a letter dated April 5, 2001 and sought to clarify what "appropriate deductions" VHALL was making reference to but assumed they were the statutory deductions for EI, CPP, Income Tax and possibly WCB.

VHALL submitted a response dated May 10, 2001 indicating "it was never Mr Hall's understanding he would submit any part of the employers portion of the statutory deductions including the Workers' Compensation Premiums, as it was always his understanding Mr. Palmer was acting as a sub-contractor".

At that point it would appear VHALL had changed the basis of the appeal and were reverting to the position Palmer was a sub-contractor.

The Delegate did not respond to that letter although he had responded to all correspondence submitted previously from either Palmer or VHALL.

In the last page of the May 10, 2001 letter, Counsel for VHALL stated:

> Finally, given the foregoing, it is our opinion and submission the tribunal must deduct from the amount payable all the aforementioned deductions as Mr. Palmer has received those monies in error. (emphasis added)

That suggests the thrust of VHALL's case is to recover monies paid to Palmer.

I permitted VHALL to make representation in respect to whether Palmer was an employee or a sub-contractor. I have decided to allow that evidence.

I have reviewed the authorities supplied by VHALL. They rely on K*erry Randall Dixon* and *Eldorado Development Corp. Ltd et al.* [1999] to determine whether a worker is an employee or an independent contractor. I disagree with the contention of VHALL that a majority of the factors support the position Palmer was a sub-contractor.

The Determination found that, using the same "fourfold test" as referred to above; Palmer met the criteria under Control, Integration, Economic Reality, Specific Results, Ownership of Tools

and Payment. The Delegate found an employer/employee relationship existed between Palmer and VHALL and ruled accordingly.

There is a responsibility on the appellant to prove the Determination was in error in fact or in law. In respect to the question of whether Palmer was a sub-contractor I find they have failed on that issue and the Determination is confirmed.

It is entirely possible VHALL believed Palmer was coming to work as a sub-contractor and it is also possible Palmer may have believed he had a different working relationship than just being an employee. Palmer and Smith had been in business before and had employees. They knew the requirements of the various Acts including the *Employment Standards Act* yet made no attempt, to my knowledge, to be paid statutory holiday pay or to take annual vacation. When Palmer quit that changed and Palmer sought the benefits of the *Act.* The provisions of the *Act* are minimums and cannot be bargained away or waived by the parties.

VHALL claims the amount paid to Palmer included money to pay all statutory obligations, both the employer and employee portions. There is no provision in the *Act* for an employer to pay an employee an amount for wages that would include both the employer's and the employee's contribution to EI, CPP, statutory holiday pay and annual vacation pay. As the employer, VHALL must bear the responsibility for the statutory holiday and annual vacation pay for Palmer.

I believe Palmer had some obligation to work statutory holidays because of customers demand. VHALL was aware Palmer was working statutory holidays and chose not to make any corrections. .

For the reasons outlined above, the Determination is confirmed.

ORDER

In accordance with Section 115 of the *Act* I confirm the Determination by the Director dated February 28, 2001. Additional interest is to be calculated in accordance with Section 88 of the *Act.*

James Wolfgang

James Wolfgang
Adjudicator
Employment Standards Tribunal