

An appeal

- by -

Andy Wong
("Andy")

- 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: April D. Katz

FILE No.: 2001/329

DATE OF HEARING: August 28, September 25 and
October 9, 2001

DATE OF DECISION: December 04, 2001

ARGUMENT

Andy argues that his relationship with the Quonley's changed from 1997 when he negotiated the purchase of the business on behalf of the family until he stopped going to work on December 13, 2000. Andy's counsel split the periods as December 31, 1997 to January 1, 2000, January 1, 2001 to March 1, 2000 and March 1, 2000 until December 2000. From December 31, 1997 Andy argues he had an interest in the business but no control over the company and merely did the family bidding of working in the store. On March 1, 2000 Andy signed over his beneficial interest in Quonley's effective January 1, 2001. From January 2000 until March 1, 2000 Andy had given up his shares in the business and was working for credit. From March 1, 2000 Andy was no longer trusted by the other members of the family in the business.

Andy argues he had no control in the operation of the business or as an officer of the company and no status as a shareholder. Andy had left the family home in January 2000 and was living independently. When he took money from the till without leaving a note it was reported to his mother. He started to receive a regular salary and benefits in October 2000. When he had the confrontation with Olivia on December and his mother was pushed to the floor, Quonley's did not allow him to return to work but did not fire him. Andy submits that if he was not fired there can be no issue of just cause. Andy argues that his employment ended and he was entitled to compensation for his employment ending.

Quonley's argues the Director's Determination was correct and that Andy was never an employee of the business. Quonley's argues the onus is on Andy to show an error of law or fact in the Determination, which would require the Tribunal to vary or cancel the Determination. Quonley's does not believe the evidence shows any error of fact or law.

Quonley's argues Andy was a partner in the business, an investor with shares and a signing officer of the company. Quonley's position is that Andy was part of the team that made decisions for the business throughout as he was an 'older brother' whose position on issues had to be respected. Quonley's argues that Andy was never an employee of the company but always had a role in directing and operating the business.

FACTS

This dispute involves members of a family who have successfully immigrated to Canada from China. The head of the family is the mother, Chan Choi Ngan ("Mother") who has 8 children, 5 of whom are in Victoria. Each of the children has been brought to Canada and supported until they can manage on their own. Andy was one of the first to arrive. Everyone in the family is expected to work and support each other. All the family members work in one or other of the family's two businesses. Most of the adults have jobs outside the family business in addition to working in the family business.

The family purchased the first business prior to all 5 children being in Canada. All the family members shared responsibilities. The children found jobs in Victoria where they worked full time or part time while continuing to work in the family business. When more children arrived in Canada the family business was not big enough for all the siblings. Mother suggested that a new business be found.

In 1997 Andy was instructed to negotiate for the purchase of Quonley's on behalf of the family. Mother borrowed \$180,000 through a mortgage on her home at 6.2% interest and the capacity to pay down 20% annually. The children understood that this debt would be paid first from any profits in the business and contributions from each of the children.

Andy mortgaged the house he owned with Olivia as a cosigner in order to raise \$30,000 for the business and provided \$10,000 from personal funds and Olivia put in \$30,000. Andy was given 40% of the shares of the business, which was held in trust by Mother due to Andy's financial situation. Olivia had 60% of the shares, which she shared with Mother.

Andy acted as the store manager supervising staff. He worked from 8 AM to 3 PM until he went to his other full time job. Olivia did the books, scheduling, payroll, taxes, ordered goods for the gift section and worked at another job. Andy's daughter Joyce and son Elton worked in the business from when they were young. The children were not paid until they were of age but they received treats and were able to come and go. Olivia did not want the children to be alone in the store but during Andy's shifts he felt he could leave the children alone for short breaks. In March 1999 Joyce started to be paid based on her consistent work habits. Elton was paid the minimum wage but he wanted more. Olivia did not think Elton was responsible. Elton only worked when his father was at work. Joyce worked with Olivia and her father.

Andy's marriage had broken down and he had custody of his children. Mother cared for the children and Andy and the children lived in the lower level of Mother's house. Olivia lived with Mother in the rest of the house. Olivia shared childcare with Mother. Mother worked in the business 7 days a week.

Andy is 10 years older than Olivia and Stella Chew ("Stella") and is considered an authority figure as an 'older brother'. Stella was considered part of the family team and also worked in Quonley's part time. Whenever decisions needed to be made about Quonley's, Stella, Andy, Olivia and Mother participated in the process. When Andy was removed as an officer of Quonley's in January 2001, Stella replaced him as secretary.

Andy was quite comfortable dealing with people on behalf of the family. He was the oldest child in the business. He negotiated the sale of the business, retained a lawyer and instructed counsel who completed the sale of the business and the lease of the building. Andy dealt with the sales representatives who came to the store. Andy and Olivia signed the Guarantee Agreement with BC Lottery Corporation on behalf of Quonley's.

Andy, Stella and Olivia had signing authority at the CIBC, Pacific Coast and Bank of Montreal for Quonley's. Andy signed cheques, which required only one signature. Andy and Olivia were the listed directors of the company created to operate the business. Olivia and Andy were the listed officers, with Olivia as President and Andy as secretary.

Andy had financial difficulties related in part to his divorce and in part to his lifestyle. Olivia became concerned about the business if creditors pursued Andy. In July 1998 Andy was removed as a director but remained an officer of the company until January 2001.

In 1997 Andy asked to receive \$2000 per month as income. The family decided he should be credited with \$1800 per month from the business. Olivia did the books and credited Andy with this every month. Some, about \$700 she credited to rent, \$300 to hydro, \$200 to food, \$600 debt to Mother. The money was paid to Mother who paid for the groceries for Andy's family, the house maintenance and food. No money was paid directly to Andy. Andy received money for gas, car maintenance and cell phone, If he needed money he could take it from the till and leave a note. The books showed the debt Andy had to the company.

When Andy had expenses related to the business when he purchased stock in the mornings. He would reimburse himself from the till for out of pocket expenses and leave the bill for Olivia to enter in the books. Andy would take cash advances if he needed them for expenses. He would leave a note if the expenses were personal.

In January 1999 and 2000 each of the children was expected to contribute capital to paying down Mother's mortgage. In each of 1999 and 2000 the children paid \$36,000 in capital on the mortgage. Andy did not make a contribution when Stella and Olivia did.

In January 2000 Olivia started to be concerned because there were cash shortages and she found lots of till errors. Andy explained that it happened because the store was busy. Olivia spoke with Andy and the problem was less pronounced for a couple of weeks and then it recurred. In September Olivia was reviewing the store video for another purpose and saw Andy take money without leaving a note. Olivia was so shocked she did not do anything for a couple of weeks. Finally she took the video and showed Mother. Mother said she wanted to meet with Andy alone. Andy denied taking anything when he met with Mother.

In October 2000 when Andy's sister Audrey was visiting from Montreal she and Olivia, Stella, Andy and Mother met to discuss the problem of the money. Andy said he did not remember taking any money and that a lot happens. After they referred to the video, he asked his family "What are you going to do about it?". Andy did not deny taking money from the business.

In October Mother offered Andy \$50,000 to leave the business. Andy refused. Andy said he wanted \$300,000. The business had shown a loss for 2 years and did not warrant such a price. Andy continued to work with his Mother and sisters in the business. Mother asked Henry, Andy's older brother, to speak to Andy. Andy did not change.

The family needed Andy to work his shift but they did not think they could trust him. The relationship became tense.

In October 2000 Andy threatened to complain to Employment Standards if he was not paid. Olivia decided to start paying Andy a salary of \$1800 because he was no longer living with Mother. Deductions were made and Andy was given a T4 for 2000 based on his earnings in October, November and December.

Andy started arriving late and leaving early. He did not advise anyone that he had doctors and dentist appointments that he claimed he had when asked where he was. The relationships were increasingly strained.

On December 12, 2000, Andy decided to leave the store and go upstairs to read the paper. He was expected to be in the store. Olivia had a camera and decided to take a picture of Andy reading the paper. Andy became angry and grabbed for the camera. There was a struggle and the camera fell to the floor and broke. Mother tried to intervene and Andy pushed her away and she fell. Olivia called for help and a man from the store came up. Olivia called 911 because she was worried about Mother. Andy destroyed the camera. The police attended and arrested Andy and took him away. He was placed on a recognizance bond and forbidden to come near Olivia or Mother without their consent.

Mother and Olivia were treated by doctors for weeks. The experience was very upsetting and emotional. Andy did not return to Quonley's although he asked through his probation officer for permission to return to work. Mother and Olivia were too worried about working with Andy to allow him to return. Mother has high blood pressure and does not speak much English. Her doctor advised her not to participate in this hearing and she did not attend.

ANALYSIS

Andy has the burden of showing this Tribunal that the Director has erred in finding that he was not an employee. Andy's position is that he was an employee of Quonley's and is entitled to compensation for the period of his employment. Quonley's position is that Andy has always been part of the controlling mind of Quonley's and not an employee. Andy acted as the manager of the store and represented the store with the banks, the accountant and lawyers as well as suppliers and staff. Quonley's argues that Andy selected staff and supervised them. Andy's position was that his word was never final and that his sister Olivia and Mother could over rule anything he recommended.

The *Employment Standards Act* defines the terms employer and employee in section 1 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,
- (c) a person being trained by an employer for the employer's business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall;

"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;

The Tribunal has had to address the issue of partnerships and management relationships in previous hearings. In *Re Trus* BCEST #D520/99 the Tribunal was looking at a situation where a person was a shareholder and participated in making management team decisions and signing documents related to the financing of the business including loans and guarantees similar to Andy's situation with Quonley's.

The alleged employee, Trus was not registered as a director of the company with the Registrar of Companies, but was a shareholder of the company. The Tribunal held that:

“With regard to the facts of this case, it was clear that Mr. Trus was an operating mind of the company, and therefore had no right to obtain a remedy under the Act. Further, it was clear that there were a number of outstanding disputes between Mr. Trus and the other directors and shareholders of the company, which were not within the jurisdiction of the Adjudicator.

...

Part of the terms of Mr. Trus's contract were that he was to receive shares of the company, one share per month for each month during the first year of employment. His contract was of indefinite term, terminable on the giving of three weeks notice. The contracts of other directors and shareholders were 5 to 10 years in duration.

Mr. Trus entered into a salary deferral agreement with the company as did the other shareholders/directors of Prospero. Mr. Trus claims that this was a sabbatical type deferral of his income, however, it is clear given the timing of the execution of this document that it was a deferral because the company did not

have the ability to pay money to its directors. There was no evidence presented by him at this hearing that the document was for an income deferral with regard to a sabbatical.

...

There are some indications in the material that Mr. Trus was part of the directing mind of the employer, and there were some indications that Mr. Trus was an employee. I am not satisfied Mr. Trus has demonstrated any error, during the course of the hearing of this matter. The more evidence that I heard of his relationship with the company the more I became convinced that he was part of the management team and not an employee. It is clear that he did not have the sole authority to hire and fire employees, to authorize or purchase significant capital assets. This company had a consultative management style. Each member of the team had input into the decisions that were made. It may be that some members of the team were able to exert a greater degree of suasion over decisions taken, for example, Mr. Chen, but this does not derogate from the fact that Mr. Trus was part of the directing mind of Prospero.

...

In *Sam D. Bell* BCEST #D96/268 (Suhr), the Adjudicator considered the definitions of employee and employer under the Act, and noted:

“If the nature of the employee's involvement goes beyond that of simply investing in the business and includes participation in the operational decisions of the company, that employee in my view then ceases to be an employee as defined by the Act”

In *Bell* the Adjudicator found that a shareholder agreement, a personal guarantee and regular shareholder's meetings where day to day operational decisions were discussed was sufficient to render Bell not an employee for the purposes of the Act.

In *Barry McPhee* BCEST #D183/97 (Stevenson), the Adjudicator held that;

“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 over-all objectives of the Act, to conclude that it is intended to embrace the controlling minds of the company. The evidence show McPhee one of the controlling minds of the company.** He was largely responsible for his own terms of engagement with Matco.

The Adjudicator further stated:

“I do not wish to be taken as saying a person who is an employer could never be an employee under the Act. But in such a case (as it is in this one), the onus would be on the person asserting the status of employee to show a clearly worded agreement establishing the employer/employee relationship, the authority by which the company is able to establish the relationship with that person, the services to be performed for the “salary” to be paid and the capacity in which the person is performing the services. It will be seldom a controlling mind of a company will be found to be an employee under the Act. Additionally, Adjudicators for the Tribunal are not required to park their practical common sense and experience of business affairs at the door 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.

The critical factors which distinguish the situation of Mr. Trus from an employee in this case are:

- (a) He was a shareholder;
- (b) He signed personal guarantees and loan applications with a Bank;
- (c) He attended regular meetings where day to day issues were discussed and decisions were made;
- (d) He drafted his own "employment contract" and therefore was largely responsible for his own terms of engagement;
- (e) He agreed to defer his salary, and the agreement in which he agreed to defer his salary refers to him as a managing partner;
- (f) Documentary and oral evidence from other members of the management team that Mr. Trus was part of the management team.

While Mr. Trus was not the sole controlling mind, he was part of the controlling mind of Prospero, and as such he is not an employee within the meaning of the Act. He therefore cannot use the provisions of the Act, to resolve his business dispute with the other directors and shareholders of Prospero.”

I have highlighted the key principles, which apply to the evidence before me. The Act was not intended to capture the controlling mind of the employer. It is not necessary to be the sole controlling mind to be found to part of a management team, which controls the business. While the broad definition in the Act could capture someone who performs work in the business it is

not intended to capture the people who are also the controlling mind and who may wish to use the Act when there is a breakdown in the relationships of the partners in the business.

Andy's evidence was that he was not the 'controlling mind' of Quonley's because he could not make final decisions about hiring or firing without consulting Olivia. He did not dispute that he was part of the discussions with Stella, Mother and Olivia about the business and decisions for the business. As indicated in *Re Trus* the fact that the controlling mind of the business involves more than one person does not make one person who is part of that group not part of the controlling mind.

Counsel for Andy has submitted that the relationship Andy had with Quonley's should be divided into three distinct periods and analyzed separately. I have looked at the issue in these periods. There can be no doubt at the outset that Andy, Mother and Olivia were the original group involved in planning and executing the acquisition of Quonley's. They all invested in the business financially and with their time, energy and expertise. Andy decided on the lawyer to use and negotiated the purchase. He was instrumental to the partnership which purchased the business.

The first period is from December 1997 when Andy purchased the business on behalf of the family and secured a mortgage on his property to assist in buying the business. This period ends in December 1999. During this period there is no doubt that Andy was part of the 'management team' made up of Andy, Stella, Olivia and Mother. Throughout this period Andy was the registered secretary for Quonley's and had signing authority with the banks without a second signature for Quonley's transactions with others. At no time during this period did Andy receive a pay cheque. His entitlements were distributed for food, shelter, childcare and debt reduction.

I find based on the analysis in *Bell and McPhee* quoted above that there can be no doubt that Andy was part of the controlling mind of Quonley's during this period. He had authority to bind the company and was part of the management team that made the business decisions for the company. He was an equal partner in the business with his family members, Mother, Olivia and Stella. I find that Andy was not an employee during this period.

The second period counsel referred to was January to March 2000. Andy decided to move out of Mother's home in January 2000. Andy continued to have signing authority and to be registered as secretary to the company. He continued to be part of the management team attending meetings with Stella, Olivia and Mother. His 'partners' were disappointed that he did not contribute to retiring Mother's mortgage on January 23, 2000, for the second year in a row. He had new expenses related to his change in housing arrangements but he was not paid a salary. There is no suggestion from the evidence before me that the management team operated any differently with respect to decisions for the store during this period. I find there was no evidence that Andy's status with Quonley's had changed. He was not an employee during this period.

In March 2000 Andy signed over his shares in the business effective January 2000. I believe this change in Andy's status was a reflection of his indebtedness to Mother for her loans to him prior

to the purchase of Quonley's and his failure to help retire her debt to the bank. He was no longer a shareholder but he continued to be part of the management team and be registered as secretary to Quonley's.

I find that Andy's partners in Quonley's no longer trusted him to act in the best interests of the company from March to December 2000. Andy felt he was being harassed by his sisters and Mother and this was in part related to their distrust of his conduct. Andy's evidence was that his mother was constantly holding him responsible for his divorce. Andy felt stressed and was seeing a doctor for symptoms of stress. Andy's status in the family changed but not his status in the business. Partners and management teams do not always get along. The stress and the treatment by his partners did not make Andy unique or change the business relationship.

Andy was consulted on decisions and attended meetings with Mother, Olivia and Stella. Throughout 2000 Andy had signing authority at the banks. I do not find that he ceased to be a part of the controlling mind of the business.

Why was Andy still part of the decision making after his family lost confidence in him? Why if the others felt he could not be trusted with the money did he retain signing authority with the banks? On these points I think it is obvious that nothing in these relationships was isolated but was all part of the whole relationship, a family relationship. The relationships were not built on employer employee relationships, but family relationships. Good and bad conduct was managed within the family, not on a business standard but on a morale and family dynamic. When Andy miscondacted himself with money and in his obligations to his mother he was punished with the loss of his shares in Quonley's. This was a family decision and not a business decision.

Andy knew he was not an employee and he used it to his advantage. Andy relied on this in his dealings with his partners. When the video showed he had taken money without any accounting for it, he was defiant. He asked what the others would do about it. He demanded to be paid a salary from that time forward or he would go to Employment Standards. The others did as he told them. An employee in these circumstances would expect to be fired without compensation or notice. Andy knew he would not be treated as an employee.

I find that when Andy responded to the questions of the delegate that he did not know the people he worked with, all of whom were his relatives, he set the tone for his claim. His representations about what his claim was about could not be trusted.

I find that based on the evidence before me Andy has not discharged the onus of proving the Director erred in the Determination.

CONCLUSION

Based on the evidence presented I find no basis on which to vary or cancel the Determination. Andy has not discharged the onus on him to demonstrate an error in the Determination. I deny the appeal and confirm the Determination

ORDER

Pursuant to section 115 (1)(a) the Determination dated April 5, 2001 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal