EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Canadian Council of the Blind, British Columbia- Yukon Division

("CCB")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

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ADJUDICA TOR: Kenneth Wm. Thomicroft

FILE No.: 97/881

DATE OF DECISION: March 11, 1998

DECISION

OVERVIEW

This is an application filed by the Canadian Council of the Blind, British Columbia- Yukon Division ("CCB") pursuant to section 116 of the Employment Standards Act (the *"Act")* for reconsideration of an adjudicator's decision issued on October 30th, 1997 under file number 97/576. The adjudicator confiffi1ed a Determination issued by Director of Employment Standards on July 8th, 1997 wherein CCB was held liable for $864.32 on account of vacation pay and interest owed to its former employee, Raymond Abraham Draznin ("Draznin").

CCB's request for reconsideration is contained in two-page letter to the Tribunal dated November 28th, 1997, under the signature of Sharon Wagner, Executive Director, and a further Brief, dated January 16th, 1998, submitted by CCB's legal counsel. In particular, CCB challenges both the Director's and the adjudicator's finding that Draznin was an "employee" as defined in section 1 of the *Act,* rather than an independent contractor.

ANALYSIS

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the Act (the "reconsideration" provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

In his original complaint filed with the Employment Standards Branch, Draznin alleged that he was employed as a canvasser with CCB from April 1995 to October 1996. During this latter period, Draznin was paid $20,892.75 in commission earnings (based on a "sliding scale" ranging from 40% to 50% of donations obtained). As noted above, the Director held that Draznin was an employee, as defined in the *Act,* and accordingly, awarded him $835.71 *[i.e.,* 4% of $20,892.75--see section 58(1)(a) of the *Act]* plus $28.61 on account of interest (see section 88 of the *Act]*.

CCB appealed the Determination to the Tribunal solely on the issue of Draznin's employment status. Following a oral hearing, the adjudicator upheld the Director's Determination that Draznin was a CCB "employee" as that term is defined in the *Act.*

In the course of her written submission, counsel for CCB referred to a number of legal authorities and to the various factors that common law courts have identified to differentiate an employee from an independent contractor. Counsel also noted that Draznin appears to have been treated by CCB as an independent contractor insofar as Revenue Canada was concerned *(i.e.,* he was not treated as an employee for purposes of the *Income Tax Act--however,* parenthetically, I note that counsel for CCB notes in her Brief, at para. 7, that CCB was, apparently, prepared to reverse itself and treat Draznin as an employee under the *Income Tax Act).*

For my part, however, I do not think that the various common law tests are particularly relevant in the face of a clear statutory definition. Indeed, that is the very position espoused by the Supreme Court of Canada in *Re Yellow Cab Ltd.* (1980) 114 D.L.R. (3d) 427. Nor do I find particularly relevant decisions, such as *Wiebe Door Services Ltd.* [1986] 3 F .C. 553 (F .C.A.), that deal with completely different statutory definitions of "employee".

No doubt many individuals may be characterized as employees for purposes of the common law, but not for purposes of a statute--see, *e.g.,* the definition of "employee" in the B.C. *Labour Relations Code.* Conversely, an individual can be characterized as a employee under a particular statute even though that person might not be an employee at common law (see, *e.g.,* the definition of "employment" in the B.C. *Human Rights Code)* .

In the case at hand, the adjudicator specifically directed his mind to the definitions of "employee" and "employer" contained in the *Act.* While he did not specifically direct his mind to the interrelated definitions of "wages" and "work" also contained in the *Act,* had he done so, I am of the view that the adjudicator's conclusion as to Draznin's status would only have been more fully solidified.

On the basis of the evidence before the adjudicator, it is clear that Draznin was engaged in "work" ("labour or services... [perfornled for CCB]...in the employer's residence or elsewhere") for which he received "wages" ("...commissions...paid or payable...for work") and, accordingly, was quite properly characterized as an "employee".

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft, Adjudicator
Employment Standards Tribunal

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