Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No: **0917-17-ES**

Marilyn Monteiro, Applicant v. **A & H Health Horizon Inc.**, and Director of Employment Standards, Responding Parties

Employment Practices Branch File No: **70176299-5**

BEFORE: Gita Anand, Vice-Chair

APPEARANCES: Richard Gorrin and Marilyn Monteiro appearing for the applicant; Nikolay Chsherbinin and Hamid Mirza appearing for A & H Health Horizon Inc., responding party; no one appearing on behalf of the Director of Employment Standards

DECISION OF THE BOARD: September 13, 2018

1. This is an application filed under section 116 of the *Employment Standards Act, 2000*, S.O. 2000, c.41, as amended, (the "Act"), as amended (the "Act") for review of an Employment Standards Officer's refusal to issue an Order to Pay against the corporate responding party, A & H Health Horizons Inc. ("A & H Health"). The refusal was based on the Employment Standards Officer's conclusion that the applicant was not an employee of A & H Health within the meaning of the Act, but rather that the applicant's roles and responsibilities were indicative of those of an independent contractor. The applicant challenges that finding.

2. During the course of this case, the Board heard testimony from nine witnesses over several days of hearing. Donnell Kent, Marilyn Monteiro and Shirley Montiero were called as witnesses for the applicant. Joel Lewis, Anne Bacchus, Renuka Pendem, Cyndy Ng, Dr. Marco Curcio and Hamid Mirza testified on behalf of A & H Health. Both parties entered voluminous documents into evidence. The Board has considered the testimony of the witnesses and reviewed all of the evidence tendered, but refers here only to that which is relevant to the parties' arguments and the Board's conclusions.

3. The threshold issue to be determined is whether or not the applicant was an independent contractor or was employed by A & H Health. If the applicant is found to have been an employee, the Act applies. Consequently, the Board must assess whether she is owed the wages, vacation pay, termination pay that she claims, and also whether the termination of her retainer was a reprisal for her efforts to renegotiate her retainer agreement.

4. I have carefully considered the evidence tendered and the submissions made by the parties and have concluded that the applicant did not have employee status and that the application should be dismissed. Credibility became a significant issue, and my assessments of credibility are set out following my evidentiary findings.

The Evidence

5. A & H Health provides physiotherapy services to clients at a clinic located in Scarborough. Mr. Hamid Mirza is the sole owner and director of A & H Health. For marketing purposes, A & H Health and two unrelated corporate entities, Health One Physio, and Spinex Rehabilitation Inc., operate under the umbrella name of "HealthMax Physiotherapy Clinics" ("the affiliated clinics"). Health One Physio is located in Thornhill, and is operated by Dr. Marco Curcio. The owner and principal of Spinex Rehabilitation Inc., located in Etobicoke, is Dr. Tahir Hashi.

6. The applicant, Marilyn Monteiro, is a paralegal licenced in 2012 by the Law Society of Ontario. In 2014, the applicant commenced a paralegal practice at "Monteiro & Associates" ("M & A"), a business registered on November 4, 2014 by her mother, Shirley Monteiro as sole proprietor. Shirley Montiero had been working as an immigration consultant (unlicenced) since 2013 at a building on Lesmill Road. According to Shirley Monteiro, she registered the business so that her daughter could provide legal services and practice there as a licencee. The offices of M & A are located at 4-25 Lesmill Road in North York ("Lesmill Office").

7. The applicant recruited her classmate, Mr. Kent, also a paralegal, to practice alongside her at M & A. Mr. Kent testified that they shared an office, were provided with laptops, paid rent to Shirley Monteiro, and received as remuneration a percentage on files that they settled. Mr. Kent left M & A near the end of 2015. The applicant clarified that she did not pay rent, and that they also had telephones and letterhead provided. The applicant testified that she used her mother's HST number. According to Shirley Monteiro, she never applied for such a number.

8. In late January, 2015, the applicant was contacted by Joel Lewis, a licenced paralegal who had referred to her some collections litigation work for clinics since 2014, regarding a potential opportunity to assist with collections for A & H Health's clinic. According to Mr. Lewis, he suggested that the applicant meet Mr. Mirza to pursue the opportunity, and introduced the two by email. Mr. Mirza emailed the applicant on January 26, 2015 to arrange a meeting to "discuss how we could work together".

9. The applicant and Mr. Mirza arranged to meet on February 2, 2015. The applicant characterizes this meeting as a "job interview", during which time she was questioned about her qualifications and experience. She testified that she thought she was being interviewed for an in-house paralegal position, responsible for collections in small claims court. She would report to Mr. Mirza, and was told that her compensation would be 20 percent of what she collected in court, and 15 percent of what she collected by early resolution of claims. On cross-examination, the applicant admitted that based on what Mr. Lewis told her, she was not going to a job interview at all, but that she expected to pick up files to take back to her Lesmill Office. She was shocked that she was asked questions about her qualifications and that Mr. Mirza mentioned "in-house representative". At first she stated that he said that she should "test the waters", and subsequently stated that the job was full time from the beginning, following a one month orientation. On cross-examination, her evidence shifted, as she indicated that she became a full time employee on April 19, 2015, since she was working the majority of her time at 1401 Ellesmere Road.

10. Mr. Mirza disputes the applicant's version of the meeting. He testified that his clinic was not looking for an in-house representative, and that the applicant made it clear that she had her own paralegal firm. He asked her about her paralegal firm, and it was understood that the clinic would retain her firm to collect outstanding fees and some bad debt. There was no discussion about a salary or hourly rates. According to Mr. Mirza, at this meeting, they negotiated an arrangement based on percentages of recovery before and after litigation, which arrangement was subsequently renegotiated in July 2015. The applicant also proposed to renegotiate the terms of her retainer commencing on February 10, 2016 (text reproduced below).

11. The applicant testified that she commenced work on February 4, 2015, and that she received a "hiring letter" dated February 5, 2015 which set out her office hours. The letter was signed by Annie Bacchus, whom the applicant referred to as her "assistant". According to the applicant, she was able to determine her own hours, but normally worked Monday to Friday from 10:00 a.m. to 7:00 p.m. at the Scarborough clinic located at 1920 Ellesmere

Road and then at its new premises at 1401 Ellesmere Road. She testified that she occasionally worked out of other affiliated locations, and that she considered the affiliated clinics to be her employer also. While she was free to come and leave when she wanted, the applicant also stated that Mr. Mirza controlled her hours. She testified that she docketed her hours in "Universal", a software program utilized by the clinic which she described as an in-house legal database. She also recorded her hours in a personal day planner. She was invited to staff events.

12. The applicant maintained that she was afforded a private room at 1920 Ellesmere Road and the exclusive use of a private office at 1401 Ellesmere Road. These offices were furnished, had a computer, and stationery. She had the use of staff. The applicant requested a "HealthMax" email address and a new computer. The applicant produced a text which referred to delivery of a new file to "her office". The applicant produced a photograph of stuffed toy lambs that she says were in her office.

13. Shirley Montiero and Mr. Kent testified in support of the applicant's contention that she was hired as an employee. Their evidence was general and vague, and conflicted to some degree with the applicant's evidence. For example, Shirley Monteiro testified that sometime in December 2014-January, 2015, the applicant told her that Hamid Mirza wanted the applicant as an employee, and that she would be working there. This evidence cannot be true, since it has been established that Mr. Mirza did not meet the applicant until February, 2015. Shirley Monteiro also testified that faxes were sent occasionally to Marilyn's attention (once or twice weekly), that she once met Hamid Mirza at the A & H Health office, and saw the applicant's stuff all over the place. According to Shirley Monteiro, the applicant worked daily at A & H Health until April, 2016. This conflicts with the applicant's evidence, as noted below. Mr. Kent's evidence is also general. He stated that the applicant was not in the office from February 2015 onward. According to Mr. Kent, the applicant told him she was working at A & H Health. She sent him a photo of her toy lambs.

14. Ms. Bacchus testified. She is the office manager for the Scarborough clinic, supervising three staff. She was not the applicant's assistant. According to Ms. Bacchus, she sent the applicant a standard letter, advising her of the hours the office was open (Monday to Friday 10:00 a.m. to 6:00 p.m.), and that she would be given an office to use rent-free while working on the small claims files. Ms. Bacchus kept track of all who entered and left the office. She stated that she rarely saw the applicant in the office. The applicant was not given exclusive use of a private office at either Scarborough location. At 1920 Ellesmere Road, the applicant had the use of an examination room behind the

reception area when she was there, and at 1401 Ellesmere Road, the applicant used Hamid Mirza's office when he was not there.

15. The evidence of Cyndi Ng, Office Manager at the Head Office located at 885 Don Mills Road, Dr. Marco Curcio of Health One, and Renuka Pendum, Office Manager at the Spinex Rehabilitation Inc. clinic, confirmed that the applicant attended rarely at those sites, if at all. Moreover, Dr. Curcio and Ms. Ng were clear that while the applicant may have been invited to staff events, friends, family, other contractors and suppliers were often invited too.

16. On cross-examination, the applicant admitted that she used her personal cell phone without charging back the expense to A & H Health (since it was part of the 20 percent commission) and had faxes sent to the M & A office fax number. A & H Health never provided her with an email address, and she used her own, changing it once, and absorbing the fee. Further, she paid her Law Society licencing fee, without charging the expense. The applicant agreed that the computer provided was an older laptop and that she never saw anyone else use it. She used her M & A laptop for legal research. She had her own "Westlaw" account for legal research. The M & A website listed her personal cell phone as a contact number.

17. According to Mr. Mirza, the applicant did not have exclusive use of any office. He identified the photograph tendered by the applicant as "her office" at 1401 Ellesmere as his office, showing his jacket hanging there, and his computer monitor. Mr. Mirza maintained that the applicant worked primarily out of the M & A office at 25 Lesmill Road. She did not work the hours she claimed at either of the Scarborough offices. Mr. Mirza explained that the "Universal" software was a patient management system for booking appointments, billing and correspondence. It does not have the functionality to track time. The applicant did not have login credentials for the program. In any event, there was no necessity for the applicant to track time because she was paid on a percentage basis. He confirmed that no one at A & H Health had access to the applicant's personal email account, and that the applicant was not given an email address by A & H Health. The applicant utilized a common computer when on the premises, but carried her personal laptop in her briefcase. Mr. Mirza testified that he met Shirley Monteiro on one occasion and had a brief conversation, during which time she purchased from him a video surveillance camera.

18. On cross-examination, the applicant maintained that she was present and working at one of the clinic locations between 10:00 a.m. and 7:00 p.m. daily. She was unable to be precise as to which clinic she worked at on these days. I accept the evidence of Hamid Mirza that the Universal program did

not log time. A review of the applicant's personal diary shows that times are recorded, but there is no indication of when the record was created. What I did observe on the original diary, for the date of April 4, 2016, was a whited-out square with "Health Max 10-7pm", which when held to the light, showed a prior recording of "trial speeding ticket". The applicant testified that the prior recording was a personal matter, and she didn't have a trial on that date. In any event, the evidence produced by the applicant is not persuasive to determine the hours she worked on behalf of A & H Health. It defies logic that the applicant would have spent so much time on a relatively few number of files.

19. Moreover, I am not convinced that the applicant worked full time at an office provided by A & H Health. The mere act of depositing belongings in a work space is not determinative in any way. Moreover, not only do the employees who did work at A & H Health's premises, and those of the affiliated clinics deny seeing her on a regular basis, the applicant wrote the following emails, which indicate she was working from the Lesmill Office:

> May 15, 2015
>
> From: Marilyn Monteiro
>
> To: Hamid Mirza
>
> I will not be working the file, I will return it back Monday with the cheque.
>
> Also, please mail the Lenoard Pierre cheque to my office, when you can.
>
> Thanks.
>
> Marilyn.
>
> * * *
>
> June 23, 2015
>
> From: Marilyn Monteiro
>
> To: Hamid Mirza
>
> As I do not have an office at HealthMax to use, nor do I have a proper computer; because the one I currently use has a virus and I do not have access to Universal, I will require information, for the above referenced file that was given to me to proceed to Mediation.
>
> Legible treatment plans that were submitted and denied;

> The total outstanding that is owed to HealthMax Physiotherapy Clinics.
>
> Marilyn.
>
> * * *
>
> August 13, 2015
>
> From: Marilyn Monteiro
>
> To: Hamid Mirza; Ali Mirza
>
> Hi everyone,
>
> On a going forward basis, I am recommending ALL correspondences be directed to my office at Lesmill. I am finding out bits and pieces of information from the courts, and/or representatives that have filed **prudent** documents in court and is not in the file.
>
> Please confirm.
>
> Thank you,
> Marilyn.
>
> Marilyn Monteiro
> **Licensed Paralegal**
> Monteiro & Associates

20. When asked on cross-examination about these emails, the applicant explained that her mother would bring home the mail and faxes she received at the Lesmill Office. I reject this explanation.

21. The applicant testified that she was provided with training in the area of accident benefits, and was offered an hourly rate for work completed on the claims of the clinic's patients. She would be paid after the insurance company was billed and paid the invoice. A & H Health denies this. The office managers/administrators testified that the applicant was not provided with training. Hamid Mirza stated that A & H Health did not give the applicant any training in performance of paralegal duties, but some familiarization with the systems and software would have been given. He gave the applicant an introduction to a lawyer practicing personal injury law who had referred clients to the clinic, as the applicant had expressed an interest in getting into the field of accident benefit claims. This was to help the applicant with her own business.

22. The applicant testified that her work was controlled by Hamid Mirza, who had to review all documents, told her who to call, and how to speak and

what letterhead to use. She was instructed to be more aggressive by Dr. Ali Mirza and Dr. Hashi, and was coached on how to perform in small claims court. This evidence was challenged by Hamid Mirza, who denies the characterization. He testified that he offered her input, as she didn't have medical knowledge and provided direction, as the client. However, the applicant worked independently on the files. I find that while Hamid Mirza may have provided direction and instruction, it is no more than a client would otherwise provide, particularly if the agent is inexperienced or not knowledgeable about the subject matter and industry norms.

23. The applicant took a vacation from January 12 to 26, 2016. This vacation was unpaid. She testified that she understood she needed permission to go, but produced no document indicating that she sought or obtained such permission. Instead, it appears that she informed the clinic when she would be away. In her absence, she activated an out-of-office email which instructed that in an emergency, individuals were to contact Mr. Kent at M & A.

24. The applicant did not receive any salary, advances or draws. She did not provide a social insurance number to the clinic. She rendered invoices for payment to A & H Health.

25. A & H Health submitted invoices into evidence rendered by the applicant on a selection of dates from January 27, 2015 (which the applicant testified was a typographical error since she hadn't yet met Mr. Mirza) to March 14, 2016. Each invoice demonstrates that she earned a percentage of fees paid to A & H Health. These invoices were rendered on the letterhead of M & A, and charged HST. Other invoices are charge-backs for court fees incurred, and paid by M & A from a cheque indicating an account referred to as "Montiero and Associates in Trust". The applicant testified that she was paid for these invoices. Some invoices indicated that payment was "transferred from trust". No statutory deductions were withheld. The applicant testified that she was paid a total of $ 6,800.00 for the 13.5 month period she had a relationship with A & H Health. She worked on fewer than 20 collections files.

26. The applicant testified that she worked Monday to Friday from about 10:00 a.m. to 7:00 p.m., recording her hours, as mentioned above, in a personal diary, which she produced, and in Universal.

27. The applicant issued demand letters to various individuals seeking to collect payments owed to her client A & H Health or HealthMax Physiotherapy Clinic. These letters were issued on M & A letterhead, indicate that she was retained to accomplish such collection, and listed the applicant's cell phone

number for contact. The applicant sent other correspondence by email, which were sent from her email address of M & A. The applicant testified that she was told to correspond in this way by Mr. Mirza, yet understood that she was acting as an independent contractor, thought of herself as an independent contractor, and that's why she used the word "retained". While the applicant may have, on occasion, used HealthMax letterhead, Hamid Mirza denies instructing the applicant to do so.

28. The applicant did not demand payment based on an hourly rate arrangement on motor vehicle accident files, but testified she docketed her time in the Universal software. She stated she was fired after she demanded payment of those unspecified amounts. The applicant also did not bill for or receive payment for work she agreed to undertake for Ali Mirza, clinic manager, involving a preparation of a research memo for his father's business.

29. The applicant was not precluded from performing work for other clients. However, the applicant testified that she did not do so because she had no time. The credibility of the applicant's adamant and continuous assertion in this regard is undermined by a number of factors, including her own evidence, and the testimony of other witnesses. Joel Lewis continued to refer work to the applicant throughout 2015 and 2016. According to Mr. Lewis, he referred 20 to 25 litigation files to the applicant involving other clinics and clients which had retained him. He would request and receive updates and client status reports from the applicant on these files. He submitted once such status update into evidence, demonstrating that updates were provided on fifteen files, including motions, trials and settlements occurring in the first half of 2016. Mr. Lewis testified that he met with the applicant at her M & A office at 25 Lesmill Road in 2015-2016 to discuss the files. He would get a percentage of the result as a referral fee. Mr. Lewis testified that he received files from Dr. Hashi in 2016 relating to Spinex Rehabilitation Inc., which were also referred to the applicant. Mr. Lewis' testimony was not challenged on cross-examination. The applicant also accepted files from the other two clinics affiliated with A & H Health, and invoiced separately from M & A. She collected a retainer from an M & A client J. Herold on March 2, 2015 and continued work on that file, which was a landlord and tenant matter. It is undisputed that Hamid Mirza knew about it (since she mistakenly sent him an email). His testimony was that he was aware she was working for other clients.

30. On or about February 10, 2016, the applicant sent an email to an undisclosed group regarding "New Agreement". In this correspondence, she set out a new retainer agreement for the Scarborough and Thornhill clinics as follows:

Hi everyone,

I have undertaken new files from both Scarborough and Thornhill. Before I proceed to work on them I would like to discuss the terms of our agreement, and also have a retainer agreement in place for both clinics.

a) I am increasing my fees to 30% of the amount claimed; **and not the settlement amount**, on both Demand Letters and S.C.C files;

b) I will only take on files that are $2,500.00 and above;

c) Disbursements will be billed separately; such as, but not limited to, photocopying @10cents/per pages, faxes @.25 cents/per pages, postage will be billed based on the weight of the documents being sent out, and courier services, if needed, will be billed based on the invoice sent by the courier company. If it is cheaper to have the documents process served than I will do so accordingly;

d) Once I receive a file; Demand Letter and/or Small Claims action, I am to work these cases myself; including but not limited to process serving, and attending court proceedings, and your office is to not negotiate and/or communicate with the Defendants. Your office is to advise them to contact me directly;

e) Should your office proceed to settle a file that has been given to me, I would like for your office to advise me of the settlement in writing, immediately, so I can close the file and inform the courts;

f) My accounts is to be paid immediately upon receipt of the invoice;

g) A 2% interest rate, per month, will be applied for unpaid invoices after 30 days;

h) I would like an upfront fee of $200.00, for each claim to be issued in court. This consists of the court cost, process serving (issuing and serving), and disbursements;

i) All cheques should be made payable to Monteiro & Associates, in trust, and should be attached to the files) that will be proceeding to court;

j) Should you require a copy of any of my pleadings, there will be a photocopying costs of $1.00/per pages;

k) All files that are ready to proceed to court; including demand

> letters, kindly have them dropped off at my office at 25 Lesmill Road, Unit 4, North York ON M3B2T3;
>
> I do have some filed under $2,500.00, and will proceed to work on these files, but only at the rate and terms as mentioned above. Once everything is finalized I will prepare the official retainer agreement.
>
> Regards,
>
> Marilyn.
>
> Marilyn Monteiro
> **Licensed Paralegal**
> Monteiro & Associates

31. It is clear from the above communication that the applicant was working from her Lesmill Office, despite her testimony and that of Shirley Monteiro. She was proposing terms which included charging interest on late payments, arrangements for disbursements and copying charges.

32. Following the applicant's email, the relationship appeared to deteriorate between herself and Hamid Mirza, with a dispute arising which is unnecessary to outline. On April 13, 2016, Hamid Mirza by email directed the applicant to stop work on all files she had, and to stop all communication with himself and his employees, and to direct communication to another representative. The applicant refers to this email as her "firing letter".

33. No Record of Employment nor T4 slips were issued. Four months after the end of the commercial dealings between the applicant and A & H Health, the applicant filed a claim under the Act.

Positions of the Parties

34. The applicant submitted that, in reviewing the evidence, she was not in business for herself. She pointed to her hours of work, control, ownership of tools, exclusivity, lack of financial risk and daily close supervision as factors which support this position.

35. A & H Health points out that it was well after the professional relationship ended that the applicant asserted that she was an employee. A & H Health submits that this is a "cash-grab" case. The applicant's testimony is not credible, and that she has attempted to construct a story of continued direction being provided by A & H Health and the directors of the affiliated clinics. She has conflated her relationships with separate and distinct clinics.

Credibility

36. Credibility became a significant issue in the hearing. Both the applicant and A & H Health made submissions on the credibility of the witnesses. The applicant urged the Board to prefer the evidence of the applicant and her witnesses over the evidence adduced by A & H Health through its witnesses. In reply argument, the applicant made submissions on the application of *Browne v. Dunn,* (1893) 6 R. 67 (H.L.) to the evidence of Mr. Lewis, contending that as his evidence had not been put to the applicant, it should be inadmissible. A & H Health pointed to the applicant's admissions, the applicant's lack of candour, the contradictions in the applicant's own testimony, the inconsistencies of the applicant's testimony with that of Shirley Montiero, and the consistency of the evidence of A & H Health's witnesses.

37. In making the findings and reaching the conclusions set forth in this decision, the Board has duly considered all of the oral and documentary evidence, the submissions of the parties and the usual factors that are relevant to assessing evidentiary credibility and reliability, including: the clarity and consistency of the testimony, the demeanor of the witness, and the overall plausibility of the testimony when challenged by cross-examination, the firmness of the recollections of the witnesses, and the ability of the witnesses to testify truthfully and avoid the tug of self-interest. The Board has assessed what is more probable in the circumstances of the case and considered the inferences which may reasonably be drawn from the totality of the evidence. In weighing the competing evidence between the applicant's and the A & H Health's witnesses, the Board has considered the judicial instruction in *Faryna v. Chorny* [1952] D.L.R. 354 (B.C.C.A.) at page 356 to assess the testimony to determine whether it is in "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions". The Board has also considered the applicability of the principle in *Browne v. Dunn, supra.*

38. Generally, I found the evidence of Hamid Mirza and the other witnesses who testified on behalf of A & H Health to be more credible than the evidence of the applicant and her witnesses. I find that the applicant sought to overstate and skew her testimony in her self-interest, and in doing so was combative and aggressive. More important perhaps, that evidence was frequently inconsistent and often contradictory. Her evidence was contradicted by the documentary evidence, and the evidence of her mother. She was unwilling to respond directly to questions on numerous occasions, preferring instead to provide her version of the truth. Accordingly, to the

extent there are disagreements between the applicant's and A & H Health's evidence, I prefer the evidence of A & H Health.

39. I must also address the evidence of Mr. Lewis with respect to the applicability of the rule in *Browne v. Dunn, supra*. I found Mr. Lewis' testimony to be forthright. He was unshaken on cross-examination. He did not have a direct interest in the outcome of the proceeding. The applicant did not object to his testimony at the time it was given, which was after the applicant had testified. If such an objection had been made, I would have heard full argument and rendered a ruling. Moreover, the applicant did not raise an objection during final argument, waiting only until reply submissions to contend that Mr. Lewis' evidence should be inadmissible because of the rule in *Browne v. Dunn, supra*. A & H Health did not have an opportunity to address that argument. In these circumstances, I cannot accept the submission that Mr. Lewis' testimony is inadmissible on the basis of *Browne v. Dunn, supra.* It was too late to raise such an argument, as the applicant waived its opportunity. Accordingly, I accept, without reservation, Mr. Lewis' testimony in its entirety.

Decision

40. Section 1(1) of the Act defines an employee and an employer as:

> "employee" includes,
>
> (a) a person, including an officer of a corporation, who performs work for an employer for wages,
>
> (b) a person who supplies services to an employer for wages,
>
> (c) a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees, or
>
> (d) a person who is a homeworker,
>
> and includes a person who was an employee;
>
> * * *
>
> "employer" includes,
>
> (a) an owner, proprietor, manager, superintendent, overseer, receiver or trustee of an activity, business, work, trade, occupation, profession, project or undertaking who has control or

> direction of, or is directly or indirectly responsible for, the employment of a person in it, and
>
> (b) any persons treated as one employer under section 4, and includes a person who was an employer;

41. The determination of whether a person is an employee under the Act requires an analysis of the substance of the relationship. Each case is decided on the basis of its own facts.

42. The responding party in this case is A & H Health Horizon Inc. I reject the applicant's submission that she was employed by all three affiliated clinics, and that the distinction amongst the clinics is merely "technical". There has been no finding that the clinics are related entities, and I do not have the evidence to make such a finding.

43. The Board, in *2006515 Ontario Inc. (c.o.b. Greco Health Shack)* [2005] O.E.S.A.D. No. 34 adopted the judicial test concerning employee status, at paragraphs 37 to 39 as follows:

> **37** The test to be applied in determining whether an individual is an employee or an independent contractor at common law was recently reviewed by the Supreme Court of Canada in 671122 ONTARIO LTD. v. SAGAZ INDUSTRIES CANADA INC. [2001] 2 S.C.R. 983. The Court reviewed the various tests which have been articulated at common law over time: the "control test"; the "fourfold test"; and the "organization test" or "integration test". The Court noted the difficulties which have emerged from the application of each of these tests. Of note, with respect to the "organization test", the Court referred favourably to the following statement by MacGuigan J.A. in WIEBE DOOR SERVICES LTD. v. M.N.R., [1986] 3 F.C. 553:
>
> • Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. WE MUST KEEP IN MIND THAT IT WAS WITH RESPECT TO THE BUSINESS OF THE EMPLOYEE THAT LORD WRIGHT [IN MONTREAL v. MONTREAL LOCOMOTIVE WORKS LTD. [1947] 1 D.L.R. 161] ADDRESSED THE QUESTION "WHOSE BUSINESS IS IT?" [Emphasis added [by the Supreme Court of Canada].]

> **38** The Court concluded (at paragraph 46) that: "there is no conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor". The Court continued, however, as follows:
>
> - para.47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in MARKET INVESTIGATIONS, SUPRA [MARKET INVESTIGATIONS LTD. v. MINISTER OF SOCIAL SECURITY [1968] 3 All E.R. 732]. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> - para.48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.
>
> **39** Finally, it is important to note that whether or not an individual is an employee or an independent contractor is a question of law to be determined after consideration of all of the relevant factors. The intention of the parties is relevant only to the extent that it is reflected in the actual arrangements they have made with each other in structuring their relationship. Put another way, the parties cannot by their "agreement" render the relationship of an employee an independent contractor or VICE VERSA: see for example GREYPOINT PROPERTIES INC. [2000] OLRB Rep. May/June 479 at paragraph 15.

44. Whether one applies the more traditional fourfold test or the more modern “organization” test, I am satisfied that the applicant was not an employee of A & H Health. The following findings point me to the conclusion that the parties did not intend to create an employment relationship:

a. The key factor is that the applicant was performing work in business for her own account. She did not exclusively work for A & H Health. She carried the files of A & H Health,

and the files referred by Mr. Lewis and the files of other clients. She accepted files from affiliated clinics, and invoiced separately.

b. The applicant negotiated and renegotiated her percentage payment. She rendered invoices seeking payment to her trust account in accordance with the percentage agreement, charged HST, and was paid. She negotiated other payment terms. She indicated she would charge interest on late payments.

c. The applicant accepted loss of profit when she accepted the percentage agreements, didn't charge back for disbursements and did not bill for other work undertaken.

d. The applicant had no fixed hours, and could come and go as she saw fit. She did not report the hours worked in any given week, nor was there a system for doing so. She had complete freedom in scheduling.

e. The applicant used her own email address, letterhead, cellphone, fax, Lesmill Office, laptop, and Westlaw subscription account without charge-back. She paid her own Law Society fees.

f. The applicant advertised on the internet, which web ad listed the applicant's phone number as a contact.

g. The applicant was not trained by A & H Health nor did A & H Health exercise a meaningful level of control beyond ensuring quality and adherence to industry norms.

h. The applicant determined when she took time off, and her vacation was unpaid. She directed enquires during her vacation to her M & A colleague.

i. The applicant was apparently indifferent at not having received any regular paycheques, nor remuneration for the alleged hours spent on A & H Health's files.

45. For the reasons above, I find that the applicant was not an employee under the Act. The application is dismissed.

"Gita Anand"
for the Board

APPENDIX A

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