Occupational Health and Safety Tribunal Canada

Tribunal de santé et sécurité au travail Canada

Ottawa, Canada K1A 0J2

Citation: Day & Ross Dedicated Logistics Inc., 2011 OHSTC 2

Date: 2011-02-11
Case No.: 2009-28

Rendered at: Ottawa

Between:

Day & Ross Dedicated Logistics Inc., Appellant

Matter:	Appeal under subsection 146(1) of the *Canada Labour Code* of four directions issued by a health and safety officer.
Decision:	The directions are rescinded
Decision rendered by:	Mr. Jean-Pierre Aubre, Appeals Officer
Language of decision:	English
For the appellant:	Mr. Jordan D. Winch, Ogilvy Renault

REASONS

[1] This appeal is brought by the appellant Day & Ross Dedicated Logistics Inc. (Day & Ross) against four directions issued to the appellant, as the employer, by Health and Safety Officer (HSO) Amy Ferguson following an investigation into a work-related accident which occurred on June 11, 2009, and resulted in a disabling injury to Mr. Michael (Mike) Edem, more specifically the permanent loss of the end portion of his right hand middle finger. The hearing of this appeal proceeded solely through written submissions by Day & Ross.

Background

[2] Day & Ross is a federally regulated company which offers a full range of comprehensive transportation and freight services throughout North America. In its day-to-day operations, it makes abundant use of personnel provided by a number of companies and agencies that specialize in the placement of temporary labourers for undertakings who require temporary staffing solutions. At the time of the occurrence, Mr. Edem was performing work for Day & Ross as a "Driver Helper/Labourer". The task being performed at the time of the accident involved the offloading of an 1800kg skid of batteries at a location known as St. Matthews Bracondale House situated at 707 St. Clair Avenue West in Toronto. In that instance, Mr. Edem was part of a crew of four people which included Alex Garcia (Pump Truck Operator), Larry Morandin (Boom Operator) and Tristan Nisble (Labourer). The accident can be briefly described as the middle supporting 2x4 of the skid of batteries being lowered by the pump truck operator onto the middle right hand fingertip of Mr. Edem, who was assisting in the offloading, crushing his finger between the truck tailgate and the 2x4 of the skid. On the date of the accident, Mr. Edem was working his sixth shift at Day & Ross, the previous five having been on June 3, 5, 8, 9 and 10 of 2009.

[3] Following this work-related accident, an investigation was conducted by HSO Amy Ferguson, who examined extensively the issue of employer-employee relationship between Mr. Edem and Day & Ross, and also that of two other workers who were part of the crew of four involved in the accident. It would appear from the investigation report that HSO Ferguson decided to concentrate on that issue because her previous dealings with this employer had caused her to consider the employer-employee relationship between Day & Ross and personnel agency workers to be unclear. This involved the submission of three extensive questionnaires to those three workers, the injured Mr. Edem, the supervising worker Larry Morandin and the pump truck operator Alex Garcia. It is worth noting here that the fourth member of that work crew, labourer Tristan Nisble, received no questionnaire and thus the particulars of that worker's relationship to Day & Ross were not examined although he, as the three others, had come to work at Day & Ross through reference by a personnel agency. Upon completion of this investigation, which had originated after a work place accident and injury to a single worker, Mr. Edem, HSO Ferguson came to the conclusion that the three members of the crew of four that her investigation had instead examined ought to be considered employees of Day & Ross Dedicated Logistics "in so far as the federal employer has responsibilities to protect

their workers and those responsibilities ought not to be contracted out to an agency". HSO Ferguson completed her conclusion by rationalizing rather inclusively that "it is necessary that the federal company be deemed an employer of all individuals engaged in work under their exclusive control for the purposes of health and safety, in keeping with the spirit of the legislation which is to ensure safe, equitable work for all Canadians", thereby extending beyond her jurisdictional boundaries.

[4] By way of background, it is also worth noting that in January 2008, Day & Ross Inc. acquired the sites of a company named Wesbell Logistics Services, thereby becoming Day & Ross Dedicated Logistics Inc. (Day & Ross), and that the employees of the previous Wesbell, including agency workers, remained in place. Wesbell Logistics Services was also a federally regulated undertaking. According to HSO Ferguson's report, the practice of using the services of a personnel agency was that of Wesbell, and has been continued unchanged by Day & Ross. That company (Day & Ross) however does not have any sort of exclusivity arrangement with CGM Transport Services (personnel agency), including any of its employees. The agency provides its services to other companies, including other companies offering truck transportation and freight services.

Issue

[5] Day & Ross is challenging the validity of all four directions through its appeal and is asking that they be rescinded. The appeal raises a single issue common to all four directions. The appellant is questioning the status of Mr. Edem as an "employee" of Day & Ross. The appellant maintains that it is not the employer of Mr. Edem for the purposes of the *Canada Labour Code*, Part II (the Code) and the *Canada Occupational Health and Safety Regulations* (the Regulations). Rather, the appellant claims that at the time of the accident, it had commercially contracted with Mr. Edem's real employer, CGM Transport, a personnel agency, for the provision of temporary labour, and that as such and at all material times, Mr. Edem was supplied to Day & Ross as a representative of CGM Transport, a provincially regulated employer and that at no time was the latter an employee of the appellant.

Evidence and Submissions

[6] As previously mentioned, the hearing of this appeal proceeded solely through written submissions. Consequently, apart from the investigation report prepared by HSO Ferguson in support of her conclusions and decision to issue four directions to the appellant Day & Ross, no other evidence was presented to the undersigned Appeals Officer to support his decision, which will thus be restricted to his interpretation of the information gathered by HSO Ferguson and submissions of the appellant.

[7] A fact that also cannot be ignored at this juncture is that while the qualification of the relationship between an "employer" and a "worker" is essentially individualistic, in that it is to be considered and conducted on a case by case basis according to the particulars of that "worker" vis-à-vis that "employer", HSO Ferguson, in establishing her conclusion

[8] The facts, as they pertain to the injured Mr. Edem, are as follows. Having learned of the work opportunity through a third party and internet advertisement (Kijiji) placed by CGM Transport Services, Mr. Edem applied through CGM Transport Services (CGM) to be a labourer/helper and completed the required forms. He was interviewed by the same CGM and the final selection/assignment to Day & Ross was made by the agency based on criteria that had been communicated by Day & Ross to the agency a short time after Mr. Edem had apparently been hired by the agency. It would appear that Day & Ross was looking for temporary, short-term and as-needed basis, labour to provide non-driving, general labourer duties in respect of loading and offloading cargo from trailers owned and operated by Day & Ross. CGM was required by Day & Ross to pay each worker a per hour rate determined by Day & Ross to which, according to HSO Ferguson, an agency surcharge remunerating the agency for its services could be negotiated and added based on Day & Ross's satisfaction with the agency services. It would appear that the surcharge was the only part of the remuneration that CGM could vary. Day & Ross however described this remuneration somewhat differently in that it considered the whole amount that CGM could invoice would be capped as the maximum that Day & Ross would accept to be charged for the services of the agency finding them a labourer. It maintained that a remuneration package of $14.85/hour+GST was negotiated between Day & Ross and CGM for the provision of a labourer's services by Mr. Edem, although a rate of $11.00/hour (from which statutory deductions would be made by CGM) had been agreed upon by Mr. Edem with the agency prior to Day & Ross contacting CGM Transport for the provision of temporary labour for which Mr. Edem was supplied.

[9] The investigation report states that while on assignment at Day & Ross through CGM, direction and control over Mr. Edem's day-to-day work was exercised by both Day & Ross dispatchers and supervisors as well as agency employed lead hands. CGM did not control the activities, equipment, locations, territory, time requirements, client expectations or site-specific needs, in other words, Day & Ross's business. These matters were all set forth by Day & Ross and adherence was overseen by Day & Ross personnel and other temporary agency workers. Counsel for Day & Ross contends however that Day & Ross did not have sole control and direction over Mr. Edem and his work on assignment to Day & Ross. HSO Ferguson recognized that failure by the worker in these matters would not result in legal termination *per se* of the latter, but would bring about discontinuance of the assignment at Day & Ross, with potential for the same ultimate effect since the agency does not guarantee placement on other assignments, although there was a possibility of such. Thus, while Day & Ross could tell the agency not to send Mr. Edem back if they were not satisfied with his work, the agency had the final authority to dismiss him from their employment. In this scenario, the HSO states that Day & Ross

[10] HSO Ferguson determined that Mr. Edem considered both the agency and the client business (Day & Ross) to be the employer, each with differing roles. He was made aware of to whom at either he would be required to report in the event of lateness, illness, an issue with a task or concern regarding a piece of equipment. His day-to-day activities were controlled and directed by Day & Ross through its personnel, permanent and agency referred. As such, after his second shift at Day & Ross, dispatchers informed him of when he could return to work for them, at what time he should report to the site, what crew he would be assigned to and the fact that he was expected to report back to Day & Ross terminal after each shift. Day & Ross submits however that CGM Transport maintained ultimate control and direction over Mr. Edem as it was CGM who decided whether Mr. Edem was to be assigned to Day & Ross, how often and whether he would remain at Day & Ross. Also, according to the appellant, CGM Transport could unilaterally choose to reassign the worker elsewhere.

[11] On the subject of remuneration, Mr. Edem was to submit his daily trip sheets to Day & Ross dispatchers, who in turn were to submit the information to CGM weekly to allow the agency to prepare the worker's pay cheque that would then be delivered weekly to Day & Ross by CGM representatives for distribution. In the case of Mr. Edem, only one such cheque was prepared by CGM. Although Mr. Edem reported to Day & Ross for a total of six occasions where he worked in crews with other Day & Ross agency-employed workers, he attended at the office of the agency, CGM Transport Services, only once for the purpose of completing initial paperwork and being interviewed for the work envisaged at Day & Ross.

[12] Remuneration and recruitment were clearly responsibilities of the agency, while the client business, Day & Ross, maintained that they were controlling and supervising the actual work being performed and that along those lines, they had intended to train Mr. Edem as to the specific tasks he was expected to execute, just as it did other agency-employed workers. Yet, in the case of Mr. Edem, neither Day & Ross nor the agency took any responsibility, as employer, to provide instructions or training in safe work procedures. The hazards associated with the work were not communicated by either party nor was any generic safety training provided. It would appear however that CGM Transport Services, as it did for other workers it assigned to Day & Ross, was to provide certain training to Mr. Edem, including Workplace Hazardous Materials Information System (WHMIS) and transportation of dangerous goods (TDG). Generally, CGM would provide the training material and pay the costs associated with such training, including the worker's salary to attend those sessions. On the other hand, Day & Ross would normally provide certain training to agency-referred personnel to ensure they acquired some familiarity with its operations. It is a noteworthy fact here that Day & Ross provided no such training to Mr. Edem, just as CGM did not provide him with WHMIS

[13] As mentioned earlier, the investigation conducted by HSO Ferguson extended to two other workers who had come to work at Day & Ross also through reference by a personnel agency. On the surface, the particulars of the situation of these two other workers would appear to have somewhat limited relevance in determining whether Mr. Edem had actually become an employee of Day & Ross. However, consideration of their particulars, as listed in the investigation report, serves to demonstrate the great difference in those two workers situation with that of Mr. Edem, quite apart from the comparative lengths of time all three had been providing their services to Day & Ross, and thus assists in arriving at a determination. In fact, in examining the information gathered by HSO Ferguson in this three part investigation, one cannot escape the thought that the HSO was clearly conscious of how little time Mr. Edem had been providing services at Day & Ross and through the situation of Mr. Garcia and Mr. Morandin, may have sought to demonstrate what the situation of Mr. Edem would become with the passage of time. It is thus important to have a brief look at the circumstances of those two workers.

[14] Larry Morandin, who has been with Day & Ross for seven years, was made aware of possible employment at Wesbell (now Day & Ross) by a friend and went to the federal worksite to apply. He was interviewed by Wesbell management, required to demonstrate his truck driving skills for Wesbell management and he was provided a Wesbell uniform. As part of the hiring process, he was referred to KAS Agency to complete an application form, was instructed by Wesbell to apply through that agency with the mutual understanding that he would be coming to work for Wesbell.

[15] Where training is concerned, the agency provided Mr. Morandin with WHMIS and TDG training prior to his work at Wesbell. In addition, he received on-the-job training at Wesbell who paid for him to receive HIAB (crane) training, included his time spent in the training as hours worked and eligible for compensation and provided Mr. Morandin with one of their trucks to complete that training. The agency did not provide Mr. Morandin with training for material handling operations, emergency procedures, work refusal procedures or client/site specific loading and unloading requirements. At the same time, he received from Day & Ross some training in material handling, use of their equipment, is included in regular “tailgate” meetings, informed of client/site needs and receives special instructions relative to his daily tasks. He indicates having only sporadic contact with the agency, mostly for the purpose of receiving his vacation pay, although he does not require the agency’s permission to take his vacation. Furthermore, Day & Ross is perceived by Mr. Morandin to be the sole party exercising control and direction over his work as he has never received instructions or guidance from the agency regarding his

[16] Where remuneration is concerned, his pay is deposited directly, but he receives a weekly pay stub from the agency and has to contact them in the event he takes vacation and would like to receive his vacation pay. He has occasionally received pay raises which he negotiated himself with Day & Ross management. On a few occasions, he has even received unexpected raises which he equates with Day & Ross being satisfied with his performance. On the questionnaire completed at the time of his hiring, it was indicated that the company does not evaluate agency workers performances and no party has taken responsibility for evaluating the work of agency workers. On the matter of dismissal, Mr. Morandin understands that Day & Ross's authority is limited to ending a worker's assignment, which may result in the same ultimate outcome if the worker does not receive another assignment. However, the legal separation of employment can only come from the agency. Mr. Morandin clearly perceives Day & Ross to be the employer. However, a representative of Day & Ross Inc., the parent company of Day & Ross Dedicated Logistics, the appellant, indicated that with the exception of the appellant, in all other divisions of the parent company, Mr. Morandin would have been hired as a permanent employee, but that even after seven years of service, there is no indication that such a permanent relationship would occur for Mr. Morandin at the appellant's, since with Day & Ross Dedicated Logistics, there never is any intention of creating a permanent legal relationship with agency workers.

[17] The case of long term (5 years) agency referred worker Alex Garcia offers great similarity to that of Larry Morandin and thus need not be described at length. He was similarly informed of available positions at Day & Ross and while he sought to apply there, he was told to go through an agency, in fact agencies, to complete the necessary paperwork. Mr. Garcia's situation however is somewhat unique in that he received and completed the necessary paperwork directly at the place of work and not at the agency or agencies and thus was not interviewed by agency personnel, as Mr. Edem was, before being assigned to Day & Ross. As to his employee status at Day & Ross, Mr. Garcia indicated to HSO Ferguson that the company makes sure that agency workers do not acquire or perceive that they acquire a permanent status with the company. To quote the words he used to HSO Ferguson in speaking of Day & Ross, they " "make a point of making sure you know you aren't permanent" and that you're "second class agency"".

[18] It would appear that he received all of his on-the-job training from workers at Day & Ross, takes part in the regular "tailgate" meetings and his aware that Day & Ross maintains a record of the training they have provided to him. Mr. Garcia indicated to HSO Ferguson that his work and job assignments are at the sole direction and control of Day & Ross, that he reports daily to their location, checks in with their supervisors on a regular basis, uses their equipment, reports his daily trip sheets to company dispatch from which he receives guidance if he has a problem in the field. Approval of his requested vacations is dependent on the client business approval. Where his remuneration is concerned, his pay is also deposited directly and his weekly pay stub indicates the agency

[19] Counsel for the appellant formulated a two-pronged argument in support of the appellant's position that Day & Ross is/was not the employer of Mr. Edem and that there is no employer-employee relationship between the company and the injured worker. His submission is developed first on the actual factual circumstances of the situation that existed between Day & Ross and Mr. Edem, and secondly on the application of the law, that is the test developed through case law to identify an employer-employee relationship in the peculiar situation of a third party being involved to wit, a personnel agency. That test, referred to as functional or fundamental control, has been elaborated through case law, in particular in *Pointe-Claire (City)* v. *Quebec (Labour Court)*[1], which advocates a comprehensive approach to determining the identity of an agency-supplied worker's real employer because in a tripartite situation, it would be patently unreasonable to only or solely or predominantly rely on legal subordination, thereby ignoring the other fundamental aspects of such a tripartite situation.

[20] Additionally, counsel put forth that I should not be influenced by the fact that the investigation conducted by HSO Ferguson bore on the circumstances of three workers, two of whom had been employed at Day & Ross for a long time. The point being made was that as the central issue in dispute concerned the employment status of Mr. Edem, the determination should concern and be based solely on the personal circumstances of Mr. Edem, more precisely his working situation. He submitted that Day & Ross's relationship with other companies and/or personnel agencies was not relevant, nor was its relationship with the employees of such other companies and/or personnel agencies, including Larry Morandin, Alex Garcia and/or Tristan Nisble. Counsel added that "the inclusion of these companies and/or personnel agencies and their employees within the investigation report [would] not assist the Appeals Officer in his/her fact finding exercise which (…) should be specific to Day & Ross, CGM Transport and Mr. Edem".

[21] Regarding the use of temporary or agency-referred personnel, counsel argued that Day & Ross's work force is not made up of agency workers, and that these workers are only resorted to in order to supplement its regular full-time work force. In his words, "Day & Ross utilizes the services of CGM Transport to assist with its temporary staffing needs. In this respect, Day & Ross maintains a regular full-time work force to assist with its day-to-day business. However, where there are upward fluctuations in business, Day & Ross can require the assistance of additional labour on a temporary basis." In this respect, counsel also pointed out that when Day & Ross contacted CGM Transport on June 2, 2009, in relation to the provision of temporary labour to execute general labourer duties, Mr. Edem had already been hired by CGM approximately four days earlier, which evidenced the non-exclusive relationship between CGM and Day & Ross.

[1] [1997] 1 S.C.R. 1015

[22] As to the applicable test in analysing and determining the employment relationship, counsel described the jurisprudence-developed functional control test as requiring a comprehensive and flexible approach, in line with such a non-traditional tripartite situation, one which will endeavour to establish which party has the most control over all aspects of the work on the specific facts of each case upon consideration of many factors such as the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business, this latest necessarily taking into account the length of time a person has been working for and at a particular employer. Such functional control would not be depending on knowing who provides instructions in the day-to-day work, something that is recognized as being the domain of the agency client. Again, in the words of counsel, "with respect to fundamental control, the applicable jurisprudence has recognized that it will be the client who will ultimately have to instruct the agency employee in his or her day-to-day work and, as such, this fact will not be determinative in identifying the true employer. Likely, the underlying reasoning for such a finding is that it is the client who needs something done and communicating the relevant instructions to anyone else would result in ridiculous results mired in administrative red-tape and business inefficiencies."

[23] In the end, counsel for the appellant isolated a number of facts drawn from the investigation into the case that, when considered from the fundamental/functional control standpoint, in his opinion clearly support the conclusion that such fundamental control rests with CGM Transport as it was the entity empowered to approve or decisively influence Mr. Edem's selection, assignment and terms of employment. His conclusion is based on the following list of factors: CGM Transport

- recruited and hired Mr. Edem;
- entered into an employment contract with Mr. Edem;
- identified itself as the employer of Mr. Edem;
- determined that Mr. Edem was capable of being provided to Day & Ross as a general labourer;
- controlled Mr. Edem's assignments;
- could end Mr. Edem's assignments at any time;
- set Mr. Edem's wage rate prior to him being assigned to Day & Ross;
- paid Mr. Edem's wages;
- was responsible for performance evaluations of Mr. Edem;
- was responsible for discipline of Mr. Edem;
- imposed rules and restrictions on Mr. Edem;
- was responsible for training Mr. Edem;
- continues to maintain Mr. Edem in its labour pool.

Counsel also noted that Mr. Edem had been supplied to Day & Ross for only six shifts and that as such could not be found to have been integrated into Day & Ross's business.

[24] It was therefore counsel conclusion that there existed no employer-employee relationship between Day & Ross and Mr. Edem.

Analysis

[25] In its submissions, counsel for the appellant referred the undersigned Appeals Officer to comments made by the Honourable Minister of Labour for Ontario in relation to temporary help agencies and their employees. Those comments were made in relation to legislation purporting to amend the employment standards legislation of Ontario and were drawing attention to the changing picture of the working world. They served to support Day & Ross's contention that the commercial reality has changed and that today, temporary help agencies no longer just provide their employees for short term clerical jobs and an employee of an agency might be assigned to a single-client business for several months if not years. The intent of this reference was obviously to bring this Appeals Officer's thinking to accept that with this new reality being so, the understanding of the reality of employment relationships should also be adapted accordingly. I recognize that those comments were made in relation to a situation existing in Ontario. However, I have no reason to believe that such situation does not exist in other jurisdictions such as the federal jurisdiction. It is for this reason that I cite those comments as if they were mine as I am in full agreement with their import and of the view that they could be applied to any jurisdiction:

> The nature of the work has changed. Today, temporary employees are an important part of Ontario's workforce. They actually make up about 11% of our workforce. More than 700,000 people in the province have temporary jobs, many through temporary help agencies. There are about 1,000 such agencies operating in Ontario. They provide their employees to client businesses that want staff on a non-permanent basis.
>
> A few decades ago, temporary help agencies provided workers for short-term clerical jobs that lasted a few days or weeks. Agency workers were called in when regular staff members were away sick or on vacation. Today, agencies supply workers in a wide range of occupations: to industries such as manufacturing, construction, the service industry and information technologies. An employee of an agency might be assigned to a single client business for several months or even years. They work side by side with permanent regular employees.
> (…)
> A temporary help agency is generally considered to be the employer of a person it sends to work for a client business. The client business is not the employer.
> (…)
> Often, a person who works for a temporary employment agency doesn't really understand who their actual employer is. Some people think it's the client business they work for; other people think it's the temporary agency. What should be made clear today, I think, and is made clear by this bill, is that the client business is not the employer of the temporary person who is working there. The temporary employee actually works for the temporary agency.

While I am generally in agreement with the general tenor of the above statement as it relates to a changed work world, I will add that many factors such as duration, control, integration, may result in agency workers becoming employees of the agency client, and it is not correct to make the designation of "employee" in such tripartite situation all one or all other.

[26] As stated above, the evidence that I have to examine has been gathered and summarized wholly and solely by HSO Ferguson and in that respect bears the stamp of a very motivated HSO. In his submissions, counsel for the appellant has challenged some of the elements described by HSO Ferguson and pointed to what counsel described as "inaccuracies and unfounded assumptions". Those concerned the determination of the hourly rate of pay of Mr. Edem, the matter of (sole) control and direction over Mr. Edem and his assignment at Day & Ross and daily (verbal) directions to Mr. Edem on his daily tasks, the question of integration into the business of Day & Ross as well as that of where the authority arose to pay Mr. Edem overtime. Vis-à-vis those elements, counsel has claimed that there existed no objective evidence found in the investigation report to support the allegations of the HSO or that the conclusions arrived at by the HSO far exceeded that which the evidence could support. In my presentation of the evidence above, as well as in my summary of counsel's submissions, I did not consider this to be of major importance in my determination and, in reading what had been described and concluded to in the investigation report, had already formed the opinion that HSO Ferguson was indeed a very motivated HSO. This being said, I am aware of the issues raised by counsel and do empathize somewhat with the conclusions he has reached. I also take note of the uncontested statement by the Day & Ross Inc. Director of Safety, noted by HSO Ferguson in her investigation report, to the effect that at Day & Ross Dedicated Logistics, contrarily to other Day & Ross Inc. divisions, no intention ever existed to render permanent the relationship with agency-referred workers.

[27] I noted at paragraph seven above that while the accident involved a single worker, the HSO had elected to investigate the situation of three agency-referred workers, two of which had been working a number of years at Day & Ross Dedicated Logistics, as opposed to Mr. Edem. I commented then that the qualification or determination of the relationship between worker and employer was essentially individualistic and required a case-by-case examination. In this respect, I am in agreement with counsel for the appellant that the situation of other workers examined by HSO Ferguson is not relevant to the issue before me. HSO Ferguson provided no explanation as to why, in an investigation initiated as a result of an accident involving one individual, she chose to examine other workers whose situation greatly differed from that of the injured employee. Her brief explanation that she chose to act in this manner because she considered the employer-employee relationship between Day & Ross and personnel agency workers to be unclear does not, in my opinion, explain this grouping given the purpose of this specific investigation.

[28] That being said, I cannot help but think that given the very few "shifts" worked by Mr. Edem for Day & Ross Dedicated Logistics, the HSO may have intended to demonstrate how the situation of Mr. Edem would evolve at Day & Ross over time. In

> "[57]…the length of assignments is an important factor in assessing the feeling of integration into the business."

With this in mind, there is no doubt that the element of time would impact greatly on the potential determination as "employee" of the two long term workers (Morandin, Garcia) examined by HSO Ferguson. Equally, the very short assignment of Mr. Edem at the same business takes on great importance in evaluating whether the latter's integration into the said business has occurred. As such then, if by the scope of her investigation, HSO Ferguson meant to describe or illustrate for the undersigned what the situation of Mr. Edem would be destined to evolve into, given the other agency-referred workers situations evidencing how Day & Ross conducts its business, and in doing so bringing the undersigned to consider this in assessing the "status" of Mr. Edem, this will not be as this would require that I take a step in time and draw an assumption from circumstances germane to other individuals.

[29] Considerable importance was given by the investigating officer to the fact that Mr. Edem was receiving his instructions as to day-to-day work from Day & Ross through permanent or agency workers, and that this served as evidence of functional control over the worker. I would agree that this can serve as indicia of functional control, but not by itself. Counsel for the appellant also argued on this point, claiming that applicable jurisprudence recognized that it is the agency client who will ultimately have to instruct the agency worker in his or her day-to-day work, something that would not be determinative in identifying the true employer. I agree with this. In fact, in the Supreme Court of Canada decision *Pointe-Claire(City)*, mentioned above, Chief Justice Lamer cites with approval J.A. Deschamps in the *Vassart* decision of the Court of Appeal who describes as follows the comprehensive approach that must govern the determination of an agency-supplied worker's real employer:

> "[22] It seems improbable to me that a client using the services of a temporary personnel agency would end up being the employer of the agency's employees simply because it controls the work that is to be done every day. This reduces the concept of "employer" to insignificance and ignores reality, which calls for a much more comprehensive view. The factors that must be considered include not only recruitment, selection, training, remuneration and discipline, but also integration into the business, continuity of employment and the employees' sense of belonging. I cannot conceive of an employer-employee relationship that involves none of these aspects.

> The concept of "legal subordination", a term that was used by the Labour Court, actually involves, in its view, merely the day-to-day supervision of the performance of work. The concept of legal subordination thus simplified is therefore totally inadequate to characterize the tripartite relationship that exists among the agency, its client and the employee."

[30] Chief Justice Lamer, in the previously mentioned *Pointe-Claire(City)* decision at paragraph 48, refines somewhat that approach by recognizing that in a tripartite situation such as the one in this case, control is not totally in the hands of one party and that consequently, what is assessed is which of the parties has the most control over all aspects of the work on the specific facts of each case, thereby indicating that the situation of one should not impact on another:

> "[48] Moreover, when there is a certain splitting of the employer's identity in the context of a tripartite relationship, the more comprehensive and more flexible approach has the advantage of allowing for a consideration of which party has the most control over all aspects of the work on the specific facts of each case. Without drawing up an exhaustive list of factors pertaining to the employer-employee relationship, I shall mention the following examples: the selection process, hiring, training, discipline, evaluation, supervision, assignment of duties, remuneration and integration into the business."

I note that the list of factors to be considered is not considered to be exhaustive.

[31] I have considered all the above factors part of the comprehensive approach which in my opinion is the proper approach to apply to this case. For the purpose of assessing the status of Mr. Edem, independently of the situation of Larry Morandin and Alex Garcia, I have also isolated, but not ignored, the day-to-day supervisory steps described by HSO Ferguson for the purpose of more clearly identifying those others that mark the relationship of Mr. Edem with both CGM Transport Services and the appellant as well as Mr. Edem's own perception of those, where described in the investigation report. I have also given much importance to the time factor since Mr. Edem could claim only six shifts in the service of Day & Ross. Furthermore, as to his integration into the business, I have considered both the short duration of this assignment at the time of the accident, which is the moment in time that is under examination, and the obvious absence of many elements present in the situations of Morandin and Garcia that would militate in favour of a conclusion of integration into the business in the case of those two workers. I have also noted that some of the factors listed above were not present in the description of Mr. Edem's situation, presumably in light of the short duration of the assignment and thus cannot be assessed. Given all that precedes, on balance I have come to the conclusion that at the time, Mr. Edem was certainly not integrated into the business of the appellant and CGM Transport Services retained more control over Mr. Edem and therefore there was no employer-employee relationship between Mr. Edem and Day & Ross at the time of the accident to Mr. Edem.

Decision

[32] Considering all that precedes and the conclusion arrived at, the four directions issued to Day & Ross Inc. as a result of the injury sustained by Mr. Edem are rescinded.

Jean-Pierre Aubre
Appeals Officer