Employment Standards TRIBUNAL

Citation: Abhishek Dabas (Re)
2018 BCEST 98

An appeal

- by -

Abhishek Dabas
(the "Complainant")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Robert E. Groves

FILE NO.: 2018A/74

DATE OF DECISION: September 26, 2018

DECISION

SUBMISSIONS

Abhishek Dabas — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Abhishek Dabas (the "Complainant") has filed an appeal of a determination (the "Determination") issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on June 5, 2018.

2. The Complainant had filed a complaint pursuant to section 74 of the *ESA*, claiming that BCS Group Business Services Inc., carrying on business as BCSI Investigations ("BCS") had employed him for a time late in 2017 and had failed to pay him wages.

3. The Determination dismissed the Complainant's complaint. The Delegate found that the Complainant was not an employee of BCS for the purposes of his seeking relief under the *ESA*. Instead, the Delegate decided that the Complainant was an independent contractor.

4. The Complainant has appealed the Determination, asserting that the Delegate erred in law and that evidence has become available that was not available at the time the Determination was made. The Complainant asks that the complaint be referred back to the Director.

5. The Director has delivered the record pertaining to the complaint to the Tribunal, as required under subsection 112(5) of the *ESA*. Copies of the material in the record were delivered to the parties, and no one has objected that the record is incomplete. I also have the benefit of submissions from the Complainant and on behalf of the Director concerning the merits of the appeal.

6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *ESA*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find that the matters raised in this appeal can be decided on the basis of a review and consideration of the materials now before me.

ISSUE

7. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director, either on the basis that the Delegate erred in law, or that evidence has become available that was unavailable at the time the Determination was made?

FACTS

8. The Delegate disposed of the complaint by way of a conference call hearing that he conducted on May 23, 2018. The Delegate's Reasons for Determination (the "Reasons") state that the original hearing date

was scheduled for May 14, 2018. BCS called in on that date, but the Complainant did not. The Delegate adjourned the hearing to the May 23, 2018, date. Another delegate of the Director contacted the Complainant and advised him of the hearing date. The Reasons state that the Complainant advised the other delegate he did not intend to participate in the May 23, 2018, complaint hearing and, in fact, he did not do so. The Complainant's submission on appeal does not take issue with these statements of fact in the Reasons.

9. Representatives of BCS did attend the May 23, 2018, complaint hearing and gave evidence. The Delegate relied on this evidence, as well as the Complainant's complaint form, and the documents he had delivered, when preparing the Determination.

10. The Delegate made the following findings of fact:

- BCS operates a private investigation business. It engaged the Complainant as a security/surveillance officer from September 1, 2017, until September 20, 2017. The engagement was offered on the basis that it related to a specific assignment for a specific client. It did not involve continuous work. The Complainant was engaged to apply for and, it was hoped, obtain an employment position with a company targeted for surveillance by a BCS client.
- In the event, the Complainant failed to obtain employment with the targeted company. The underlying rationale for his engagement by BCS therefore evaporated. For a time, BCS did look for other opportunities that might require the Complainant's services, which resulted in the Complainant's performing surveillance work on behalf of BCS for one day. Shortly thereafter, the engagement relationship ended when the Complainant was obliged to attend to some personal matters.
- The terms of the Complainant's engagement with BCS were incorporated into a written contract signed by the Complainant (the "Contract"). The Contract provided that the Complainant would be engaged from September 1, 2017, until December 31, 2017, and would complete all assignments within that timeframe. The Complainant, referred to as "The Contractor" in the Contract, was to "assist with...investigative services upon request" from BCS, and in particular with respect to his attempt to seek employment with the targeted company. He was to invoice BCS twice monthly for his services, for which he would receive a "base hourly" rate of pay of $16.00.

11. A provision on which the Delegate appears to have relied heavily is included in Clause 4 of the Contract. It says this:

> In the event The Contractor" [*sic*] does not complete this assignment, they [*sic*] will [*sic* "be"] responsible for all costs required to find and/or replace "The Contractor".

12. The Delegate determined that the Complainant was engaged by BCS as a contractor and not as an employee for the purposes of the *ESA*. He noted, correctly, that the parties' characterization of their legal relationship was not conclusive of the matter. Instead, the nature of the relationship was to be decided having regard to the realities of the work, informed by the expansive definitions of "employee", "employer", and "work" contained in the statute.

13. The Delegate found that there were factors supporting both an employment and contractor relationship. He said this at page R4 of the Reasons:

> Factors supporting an employment relationship include that the Complainant was required to follow BCS's instructions and policies, that BCS dictated the terms of the Complainant's payment for his services, and that BCS's core business of private investigation is loosely related to the Complainant's assignment to conduct surveillance.
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> Factors supporting the conclusion that the Complainant was a contractor, not an employee, include that his engagement was for a limited time and for a specific job, that [*sic* "it"] was a unique assignment for BCS, and somewhat outside the scope of its usual business. He signed a contract requiring that he find a replacement if he was unable to conclude the assignment. He worked away from BCS's business location. In addition to BCS's engagement of him, he had other employment with a security company. The absence of a TD-1, while not determinative of his status, suggests that BCS did nothing implying that he was its employee.
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> Although it was a requirement of his engagement that the target company hire him, BCS would direct him in the surveillance work he performed. While this suggests a degree of control, I find this to be a neutral factor, equally consistent with an employment relationship as it is with a contractor relationship.

14. The Delegate then concluded, as follows:

> The weight of the evidence leads me to conclude that the Complainant was a contractor and not an employee. The determining factor is the Complainant's ability to substitute another for himself in performing the work contemplated by the contract. Employees cannot provide an employer with a substitute employee nor are employees required to find substitutes for themselves in their absences. The ability to provide a substitute, as long as the work requirements are completed, is a hallmark of a contractor relationship. I am supported in this conclusion by the fact that the Complainant worked for another employer, by the brevity of the relationship, lasting less than three weeks during which the Complainant worked 12 hours, and the fact that BCS's engagement of him was for a time limited, specific task and not intended to be an open-ended indefinite engagement.

ANALYSIS

15. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

16. Subsection 115(1) of the *ESA* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
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> (a) confirm, vary or cancel the determination under appeal, or
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> (b) refer the matter back to the director.

17. The Complainant's appeal engages subsections 112(1)(a) and (c). I will deal with them in reverse order.

Subsection 112(1)(c) – New Evidence

18. The Complainant submits that additional facts and evidence have "surfaced" since the proceedings resulting in the Determination were concluded. Some of this evidence consists of the Complainant's version of the events that surrounded his being hired by BCS, his employment status at the time, and the kind of work he performed for the company. He also refers to the types of tools he made use of when conducting surveillance for BCS and the degree of supervision he was subject to in his dealings with the company.

19. The Tribunal's power to allow an appeal based on new evidence under subsection 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. A rationale for this approach is expressed in section 2(d) of the *ESA*, which stipulates that it is a purpose of the legislation to provide fair and efficient procedures for resolving disputes over its application and interpretation. It would discourage the realization of that purpose if an appellant were to be permitted, as a matter of routine, to submit new evidence to bolster a case which it failed to persuade a delegate at first instance. Rather, proceedings under the statute are likely to be more fair and efficient if parties are encouraged to take care to seek out all relevant information during the investigation phase and present it to a delegate before he or she issues a determination.

20. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been presented during the investigation or adjudication of a complaint and prior to a determination being made. In other words, can it be said for certain that the evidence was "not available" to the party seeking to tender it? That said, even if the evidence could have been presented, the Tribunal may nevertheless consider it if an appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars*, BC EST # D570/98).

21. I have reviewed the evidence the Complainant seeks to tender on this appeal, but which he did not provide to the Delegate. The evidence is probative, to a degree, in the sense that it addresses some of the factors the Delegate would have been obliged to consider when deciding whether the Complainant was an employer or a contractor. However, it is by no means conclusive of the issue that the Delegate was bound to determine. More importantly, all of the evidence to which the Complainant now refers was known to him before the Determination was issued. Yet, for reasons that are unexplained, the Complainant neglected to share the evidence with the Employment Standards Branch during the investigation of his complaint, a failure that was compounded when the Complainant expressly declined to attend the hearing conducted by the Delegate, despite being given a second opportunity to do so.

22. In these circumstances, I am not persuaded that the Complainant has established that the Delegate's conclusions set out in the Determination should be disturbed on the grounds set out in subsection 112(1)(c) of the *ESA*.

Subsection 112(1)(a) – Error of Law

23. The Complainant also alleges that the Delegate erred when he decided that the Complainant was an independent contractor, and not an employee, in his dealings with BCS.

24. Much of what the Complainant submits in support of his appeal consists of argument based on the "new" evidence he has sought to introduce. For the reasons I have given in my discussion of the application of subsection 112(1)(c) of the *ESA* in this case, I have not relied on those arguments.

25. It was for the Delegate to determine the facts of the complaint. The Tribunal has no authority to correct a delegate's errors of fact unless those errors of fact can be said to constitute errors of law. An error of fact is not an error of law unless it can be shown that a finding of fact was irrational, perverse, or inexplicable. Put differently, an error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. B.C. (Assessor of Area #12 - Coquitlam)* [1998] BCJ No. 2275; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No. 331).

26. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal, relying on the comments of the court in *Gemex*, discussed the principal grounds on which a party might successfully assert that a decision-maker has made an error of law. Those grounds are:

- a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
- a misapplication of an applicable principle of general law;
- acting without any evidence;
- acting on a view of the facts which could not reasonably be entertained; and
- adopting a method of assessment which is wrong in principle.

27. Deciding whether an individual is an independent contractor or an employee requires the application of a legal standard to a set of facts, and so it involves a question of mixed law and fact (see *Koivisto*, BC EST # D006/05). While the Tribunal may not correct errors of fact, it may intervene where there has been an error of mixed law and fact. However, in order for the Tribunal to do so the circumstances must reveal that there has been an extricable error of law (see *Britco*, above).

28. In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1996] SCJ No.116, the Supreme Court of Canada provided guidance as to the kinds of circumstances which might reveal an extricable error of law. For example, if the law requires a decision-maker to consider several different factors when applying the correct test to the facts as found, but the decision-maker considers only some of those factors, the decision-maker has in effect applied the wrong law, and so it has made an error of

law. A similar conclusion may be drawn where the decision-maker ignores items of evidence the law requires it to consider.

29. In Canada, at common law, the classic test for determining the status of a person who performs work for another has been stated in the decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] SCJ No.61. Major J., speaking for the court, said this:

> 46. In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. ...I agree...that what must always occur is a search for the total relationship of the parties....
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> 47. Although there is no universal test to determine whether a person is an employee or an independent contractor...[t]he 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.
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> 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.

30. For the purposes of interpreting the provisions of the *ESA*, these comments are instructive, to be sure. That said, and as the Delegate correctly noted in his Reasons, the definitions of "employee", "employer", and "work" appearing in the statute must be interpreted broadly to include and protect as many workers as possible. This inclusive attitude coincides with the remedial purpose of the *ESA* (see *Machtinger v. HOJ Industries Ltd.* [1992] SCJ No.41; *Re Rizzo & Rizzo Shoes Ltd.* [1998] SCJ No.2). It means that under the *ESA* there may be situations where a person determined to be an independent contractor at common law will be found to be an employee for the purposes of proceedings under the statute.

31. It is clear from the Delegate's Reasons that the "determining factor" in the case was "the Complainant's ability to substitute another for himself in performing the work contemplated by the contract." It is true that the ability to sub-contract work is highly indicative of independent contractor status (see, for example, *Re Welch (c.o.b. Windy Willows Farm)* BC EST # D161/05). I am, however, troubled that the Delegate appears to have isolated this factor, and identified it as conclusive, without considering some of the other factors, or evidence underscoring their potential relevance, that would have assisted in establishing the total relationship of the parties.

32. For example, the Delegate's Reasons contain no reference to the aspect of the test to be applied in these cases which the court in *Sagaz* identified as fundamental, that is, whether the evidence established that the Complainant was in business on his own account. There were, in fact, several aspects of the evidence that indicated he was not. I refer to the Delegate's findings that the Complainant did not have, and never had, a private investigator's licence. In addition, after interviewing him, BCS obtained authorization from its client to provide four hours of training to prepare the

Complainant for the specific assignment for which BCS was seeking to hire him. A person who is trained by an employer for the employer's business is a person specifically identified in section 1 of the *ESA* as someone who falls within the definition of an "employee".

33. The Director's submission on appeal suggests that this portion of the definition of "employee" is inapplicable because the assignment contemplated was in respect of a type of surveillance work that was outside of the normal business of BCS and so it cannot be said that it related to "the employer's business". I reject this submission. The assignment was work that BCS was prepared to take on as part of its private investigation business. The fact that it might have been a "unique" type of investigation work for the firm is of no moment, in my view. Further, applying such a narrow view of the scope of the definition of "employee" in the statute is, I believe, inconsistent with the large, liberal, and inclusive approach that must be utilized when interpreting its provisions.

34. While the Delegate found that the Complainant was working for a security company at the time, there was no evidence indicating what he was doing there. Certainly, there was no evidence suggesting that the Complainant had ever done work of the type that BCS wished to hire him to perform, or that he was holding himself out as a person who was in any way skilled, experienced, or qualified to perform the type of surveillance work BCS required.

35. I note further that the Contract the parties entered into was drawn by BCS. There is no evidence it was the subject of negotiation. Its provisions are also highly indicative of the control over the relationship that was to be exercised by BCS. The company was in charge of all the assignments to be performed, according to a schedule that it alone would prepare. The Contract also contained a non-competition clause providing that the Complainant would "not provide similar services to any competitive firms and/or agencies" during the term of the Contract. It is, of course, a mark of contractor status that the person hired is an independent businessperson, one who is free to offer his services to other customers within the relevant marketplace. Conversely, if the individual provides services exclusively to the firm hiring him, it is more indicative of a relationship of employment (see *Macdonald v. Richardson Greenshields of Canada Ltd.* [1985] BCJ No.2865).

36. The Delegate acknowledged that it was understood BCS would direct the Complainant in the surveillance work he was to perform. However, there are other items in the Contract, to which the Delegate did not refer specifically in his analysis of the Complainant's status, which also support a conclusion that BCS was to exercise significant control in the relationship. They include a provision requiring strict confidentiality, the delivery of all paper and cyber documentation to BCS on completion of the Complainant's assignment, a promise to refrain from contacting any of BCS's clients for any purpose for three years after the completion of the contractual assignment, stipulations requiring the Complainant to exercise a "professional demeanor" when representing BCS, a requirement that the Complainant provide no services while under the influence of illegal drugs or alcohol, and even a right granted to BCS "to request an illegal drug test" of the Complainant on one day's notice.

37. Another factor the Delegate did not expressly consider is that, absent an authority to sub-delegate his work, to which issue I will refer later, the evidence does not support a finding that the Complainant had an opportunity to earn a profit, or suffer a loss, as a result of the work he performed for BCS. He was to be paid at a fixed rate per hour for any time spent working throughout the term of the Contract.

38. There was also no evidence that the Complainant supplied any of his own tools or equipment when performing his work. Indeed, the record reveals a template, prepared by BCS, which the Complainant was to utilize when filing reports on his surveillance activities.

39. Finally, the Delegate did not consider whether the surveillance work the Complainant performed after he failed in his effort to be hired as an employee at the targeted firm constituted a different form of work from the type of work contemplated in the Contract. The Delegate found that the Contract was entered into in respect of a specific assignment, one that required the Complainant to be hired by a targeted firm that a BCS client wished to be placed under surveillance. However, the Complainant failed the interview at the targeted firm and so, as the Delegate noted, "[t]he reason for BCS engaging him ended." BCS then looked for alternative opportunities for the Complainant, which resulted in the Complainant's being offered a day's work conducting surveillance for another of BCS's clients, provided that he was available to perform it. The Complainant accepted this later offer, and performed the surveillance assignment. In my view, it was necessary for the Delegate to consider, as a separate matter, whether the Complainant also performed this later work as an independent contractor, rather than as an employee, because it involved a different assignment from the "unique" type of work for which the Complainant was originally hired.

40. I now turn to the Delegate's statement in his Reasons that Clause 4 of the Contract must be interpreted to mean that the Complainant had the ability to retain someone else to perform the work assigned to him by BCS. In my view, the Delegate's decision on this point is in error. A principal reason why I have come to this conclusion is that Clause 4 does not, with certainty, transmit the meaning the Delegate has attributed to it. It does not clearly state that the Complainant could sub-contract his work.

41. While the omission of the word "be" in the Clause makes its meaning more opaque than it needs to be, what the Clause does appear to say is that the Complainant would be "responsible" for "costs" in the event he did not complete his assignment. However, the "costs" the Complainant would be responsible for are identified as those costs "required to find and/or replace" him. Again, the wording, and the manner in which it is arranged, is unfortunate. Several plausible interpretations present themselves on a plain reading of this portion of the Clause. The words could mean that if the Complainant found someone else to perform his work – a replacement if you will – he would be responsible for the associated costs. Such an interpretation would be consistent with a right to sub-contract the work. But the words could also mean that if the Complainant failed to complete the assignment, and BCS was required to find someone else to replace him, the Complainant would be responsible for reimbursing to the company its attendant costs.

42. The latter interpretation is more punitive, from the point of view of the Complainant. It also seems to be more consistent with the high degree of control of the work, and the terms regulating it, drawn to favour BCS and set out elsewhere in the Contract, to which I have alluded above. Given the sensitivity of the work for which the Complainant was being hired, his inexperience, his need for training, and the stipulations regarding his conduct in performing his work, it seems unlikely that BCS would include a term permitting the Complainant to substitute another individual to perform his work, so long as he absorbed the cost of his doing so.

43. It is an error of law when a decision-maker fails to interpret a provision in a contract having regard to the terms of the contract as a whole (see Geoff Hall, *Canadian Contractual Interpretation Law*, First

Edition, Lexis Nexis, 2007 at pages 106 – 110). For the reasons I have stated, I am of the view that the Delegate interpreted Clause 4 of the Contract independently, and without any, or any sufficient, consideration being given to the Contract's other relevant terms. In doing so, the Delegate erred in law.

44. In summary, the Determination reveals that the Delegate committed errors of law. In my view, the Determination must be cancelled and the complaint referred back to the Director for consideration afresh, having regard to what I have said in this decision.

ORDER

45. Pursuant to section 115 of the *ESA*, I order that the Determination be cancelled and the complaint referred back to the Director for consideration afresh.

Robert E. Groves
Member
Employment Standards Tribunal