Employment Standards TRIBUNAL

Citation: Antonio Oliveira (Re)
2019 BCEST 14

An appeal

- by -

Antonio Oliveira carrying on business as Vanwin Courier Services
("Vanwin")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

PANEL: Richard Grounds

FILE NO.: 2018A/97

DATE OF DECISION: February 4, 2019

DECISION

SUBMISSIONS

Antonio Oliveira	on his own behalf, carrying on business as Vanwin Courier Services

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Antonio Oliveira carrying on business as Vanwin Courier Services ("Vanwin") has filed an appeal of a Determination issued on August 10, 2018, (the "Determination") by Elaine Ullrich, a delegate ("Delegate Ullrich") of the Director of Employment Standards (the "Director").

2. Michael Bier ("Mr. Bier") started working for Vanwin as a delivery driver on June 1, 2012. Vanwin hired Mr. Bier as a subcontractor and terminated the contract on February 24, 2017. Mr. Bier filed a complaint under section 74 of the *ESA* alleging that Vanwin contravened the *ESA* by failing to pay all wages owed to him including overtime, annual vacation pay, statutory holiday pay, compensation for length of service, and for gas and cellphone expenses. Mr. Bier claimed that he worked 9 hours each day, 5 days a week.

3. The complaint proceeded to mediation on November 6, 2017, in front of Arshdeep Dhillon ("Delegate Dhillon"), an Employment Standards Officer with the Richmond Employment Standards Branch office. The complaint then proceeded to an adjudication hearing on November 30, 2017, in front of Delegate Ullrich, an Employment Standards Officer with the Langley Employment Standards Branch office.

4. Delegate Ullrich concluded in her Determination that Mr. Bier was an employee of Vanwin and not a subcontractor. Delegate Ullrich concluded that Mr. Bier was not owed any overtime but was entitled to annual vacation pay, statutory holiday pay, compensation for length of service, and reimbursement for gas and cellphone expenses.

5. Vanwin appealed the Determination on the basis that the Delegate erred in law and / or failed to observe the principles of natural justice when she concluded that Mr. Bier was an employee. Vanwin requested that the Determination be cancelled.

6. For the reasons that follow, the appeal is dismissed and the Determination is confirmed.

ISSUE

7. The issues are whether or not Delegate Ullrich erred in law or failed to observe the principles of natural justice when she determined that Mr. Bier was an employee of Vanwin.

ARGUMENT

8. Vanwin submitted that he was not treated fairly and impartially and that he was the victim of bias in the complaint proceedings. Vanwin submitted that Delegate Ullrich twisted what he said to corroborate her conclusion. Vanwin submitted that "the judge's interpretation of the facts is biased" because the

"arbitrator" was friends with Mr. Bier's girlfriend.[1] Vanwin submitted that the "arbitrator" should have recused himself from the proceedings. Vanwin submitted that his evidence about the direction he gave to his subcontractors was wrongly interpreted and that the "judge's conclusion" was biased in favour if its own interpretation.

9. Vanwin submitted that the fact that Mr. Bier only worked for Vanwin was not in itself a reason to conclude that he was not in business for himself. Vanwin submitted that Mr. Bier's yearly tax returns would attest to the nature of his business. Vanwin noted that Mr. Bier never contested that he was an independent contractor until his contract was terminated. In regards to the termination of Mr. Bier's contract, Vanwin submitted that Mr. Bier could have chosen to question the witnesses (who corroborated the reasons for the termination) but chose not to. Vanwin submitted that Mr. Bier was hired as a subcontractor and not an employee. In support of this, Vanwin submitted that Mr. Bier provided his own car, paid for his own gas and repairs, and was at all times able to subcontract out himself.

10. Vanwin noted that Mr. Bier acknowledged that he understood at the beginning that he was an independent contractor and not an employee. Vanwin submitted that the fact that Mr. Bier did not have any other contracts does not negate the nature of his relationship with Vanwin and Mr. Bier could have looked for other contracts or hired someone else to replace him in his daily activities for Vanwin. Vanwin submitted that text messages sent to Mr. Bier and telephone calls from customers directly to Mr. Bier could have been forwarded or transferred to a subcontractor. Vanwin disputed Delegate Ullrich's summary that Mr. Oliveira said that he was unsure if Mr. Bier was an employee or subcontractor. Vanwin clarified that Mr. Oliveira had said that he was unsure if Mr. Bier, even as a subcontractor, was entitled to 2 weeks' notice.

11. Vanwin submitted that Mr. Bier's work hours were based on the nature of the business, being the delivery of groceries, and that this was the reason for the set expectations of when the deliveries would be made. Vanwin submitted that this was not a basis for determining that Vanwin controlled how or when to do the work. Vanwin submitted that it has an independent subcontractor relationship with Safeway to deliver groceries and that Mr. Oliveira is the point of contact with Safeway and is also the point of contact for Vanwin's independent subcontractors.

THE FACTS AND ANALYSIS

FACTUAL ANALYSIS

Background Facts

12. Antonio Oliveira carrying on business as Vanwin Courier Services was registered in British Columbia as a sole proprietor with the Registrar of Companies on July 7, 2008. Vanwin operates a delivery and courier service and was contracted to deliver products for Canada Safeway ("Safeway") in the Vancouver area. Mr. Bier was contracted by Vanwin to work as an independent contractor to deliver products for Safeway.

[1] Vanwin submitted that at the "first hearing" the "arbitrator" stated that he and Mr. Bier's girlfriend were friends.

Mr. Bier delivered groceries, flowers, pharmacy items, and delicatessen items. Mr. Bier provided his own vehicle and cellphone and paid for his own expenses.

13. Mr. Bier worked delivering products for Safeway Monday to Friday each week and his hours of work varied depending on the number of deliveries. Mr. Bier was initially paid $120 per day but this was subsequently increased to $150 per day, regardless of the number of hours worked. On some occasions, Vanwin asked Mr. Bier to answer incoming delivery calls and paid Mr. Bier and extra $10 per day. Vanwin would communicate delivery orders to Mr. Bier by text and phone.

14. Mr. Bier started working as a delivery driver for Vanwin on June 1, 2012. Vanwin received complaints from Safeway about Mr. Bier's performance and terminated its relationship with him on February 24, 2017.

Concerns Regarding Mr. Bier's Girlfriend

15. Mr. Oliveira raised concerns on October 4, 2017, about the fact that Mr. Bier's girlfriend works at the Employment Standards Branch. This was prior to the mediation on November 6, 2017, and the adjudication hearing on November 30, 2017. Mr. Oliveira wrote the following in an email (responding to a suggestion by the Employment Standards Branch that mediation by tried to resolve the complaint):

> … what assurances do I have that it will be fair considering his girlfriend works at employment standards. (Page 329 of the Director's Record)

16. The Employment Standards Branch responded that Mr. Bier's girlfriend, who was acting as Mr. Bier's representative, did not work at the Employment Standards Branch. The response from the Employment Standards Branch did not address whether or not Mr. Bier's girlfriend had previously worked at the Employment Standards Branch.

17. The complaint proceeded to mediation on November 6, 2017, in front of Delegate Dhillon. According to Vanwin's appeal submission, the "arbitrator" at his first hearing stated that he was friends with Mr. Bier's girlfriend. It is apparent that the "arbitrator" referred to was the mediator, Mr. Dhillon, who apparently worked in the same Employment Standards Branch office in Richmond at some point with Mr. Bier's girlfriend.

18. The complaint was not resolved at mediation and proceeded to an adjudication hearing on November 30, 2017, in front of Delegate Ullrich.[2] Mr. Oliveira advised the Delegate at his hearing that "Mr. Bier bragged that his girlfriend worked at the Employment Standards Branch Richmond office where Mr. Bier filed his complaint and where mediation was held".

19. Delegate Ullrich noted in her Determination that Mr. Oliveira was asked "if he had any concerns with the complaint hearing proceeding in the Employment Standards Branch Langley office and he stated he had no objection".

[2] The adjudication hearing was initially scheduled to occur in the Richmond office but the mediator informed Mr. Oliveira that it would be held in the Langley Office. See page 317 of the Director's Record.

The Determination

20. Delegate Ullrich reviewed the evidence from Mr. Bier and Mr. Oliveira. Some of the key points of Mr. Bier's evidence included the following:

- Mr. Oliveira told him what to do, where to go, and how to do the job.
- He was not in business for himself and only worked for Vanwin.
- He received text messages or phone calls from Mr. Oliveira or the Safeway store directly about his day's deliveries which he would use to plan his route for the day.
- He received the text messages and phone calls from approximately 9:00 am to 10:00 am and arrived at his first delivery at approximately 10:00 am each day.
- In addition to planned deliveries, there were also unplanned deliveries through the day.
- He was paid $750 in gross wages once a week by company cheque or Money Mart cheque.
- He often worked until 6:00 pm.
- He used his own cellular phone to conduct work for Vanwin and approximately $40 per month of his monthly cellular phone bill was for work purposes.
- He used his own vehicle and paid for his own gas and estimated that for one period he used approximately $25 in gas per week and for another period he used $70 in gas per week.
- On February 8, 2017, Mr. Oliveira advised him by telephone that his employment was terminated, and he was given two week's verbal working notice.
- Mr. Oliveira told him that the termination was because he had forgotten to deliver an order on January 20, 2017, which cost Vanwin $400.
- On February 24, 2017, he forgot another order and Mr. Oliveira told him it was the "last straw" and terminated him.

21. Some of the key points of Mr. Oliveira's evidence included the following:

- Vanwin has month to month verbal contracts with Safeway stores and, because there is no guarantee of work, he hires contractors rather than employees to do the delivery work.
- Vanwin's sole business is providing delivery services for Safeway stores and a couple of independent grocery stores.
- Mr. Bier was hired as a subcontractor and was told that he could work as much as he wants or as little as he wanted and it was up to him to decide when he was available.
- Each day, Mr. Bier was free to take or refuse deliveries, and if Mr. Bier was unable to do a delivery order, another subcontractor for Vanwin would be asked to complete the order.
- He showed Mr. Bier what to do and what was expected of him as a delivery driver.
- Mr. Bier was expected to finish all the deliveries given to him on the same day without customers complaining to him.

- He initially paid Mr. Bier $120 per day but increased this to $150 per day when he gained more experience, and he paid Mr. Bier an additional $10 when Mr. Bier answered incoming delivery phone calls.
- He paid Mr. Bier a week in advance by cheque, cashed through Money Mart.
- Mr. Bier normally started work at approximately 10:00 am and generally worked until 6:00 pm or 6:30 pm but he did not tell Mr. Bier when to start or finish work.
- It was part of Mr. Bier's subcontract agreement to pay his own gas and cell phone expenses.
- He received numerous customer complaints about Mr. Bier and felt his business was in jeopardy.
- On February 8, 2017, he told Mr. Bier that his work with Vanwin was ending for missing an order and for all the complaints from store managers, customers, and staff from downtown stores.

22. Mr. Oliveira provided emails from a Safeway Assistant Manager regarding Mr. Bier's failure to deliver a deli order on January 20, 2017, and another email from a Safeway Manager regarding a failure to deliver an order on February 24, 2017.[3]

23. Delegate Ullrich stated that she asked Mr. Oliveira why he gave Mr. Bier two weeks' notice if he was a subcontractor and Mr. Oliveira "responded that he suddenly became unsure whether Mr. Bier was an employee so, to be safe, he provided a verbal two week notice period".

24. Delegate Ullrich reviewed the definitions of "employee", "employer", and "work" and noted that the *ESA* is remedial and benefits conferring legislation and is to be given a broad and liberal interpretation. Delegate Ullrich noted that when deciding whether a person performed work as an employee, the substantive nature of the relationship must be evaluated and that the definition of employer provides that control and direction are important aspects of an employment relationship.

25. Delegate Ullrich acknowledged that Mr. Bier had agreed to pay his own gas expenses and cellular phone charges. Delegate Ullrich assigned no weight to an email from another Vanwin delivery driver who stated that he was a subcontractor including that he was told when he was hired that he would be doing his own taxes, deducting cellphone and gas expenses, and that he could work any other job with one day notice to Vanwin.[4] Delegate Ullrich noted that these did not conclusively make a worker an independent contractor.

26. Delegate Ullrich concluded that Mr. Oliveira "directed and controlled many of Mr. Bier's daily activities". Delegate Ullrich noted that Mr. Bier had to be ready and available to take phone calls and text messages from Mr. Oliveira and that Mr. Oliveira told Mr. Bier where to pick up orders and what was needed to be done for each order. Delegate Ullrich concluded that Mr. Oliveira was the primary receiver of the orders and directed the work that Mr. Bier did.

[3] The emails were dated November 8 and 7, 2017, respectively. See pages 9 and 10 of the Director's Record.
[4] See page 13 of the Delegate's Record for this email.

27. Although Mr. Oliveira testified that Mr. Bier was free to accept or refuse work, Delegate Ullrich noted that Mr. Oliveira was dissatisfied when Mr. Bier arrived at work late and set expectations on when and how Mr. Bier performed work. Delegate Ullrich concluded that Mr. Oliveira was the direct contact for Safeway and Mr. Oliveira decided who received the order and assigned which area each delivery driver would work. Delegate Ullrich noted that Mr. Oliveira was the point of contact for customer complaints about Vanwin's drivers.

28. Although Mr. Oliveira argued that there was no permanency to Mr. Bier's work because of Vanwin's month-to-month contract with Safeway stores, Delegate Ullrich noted that Vanwin had been in business for over 10 years and that Mr. Bier worked for Vanwin for over four and a half years. Delegate Ullrich concluded that this demonstrated that there was a permanency to the relationship between Mr. Bier and Vanwin and that his delivery services were needed for an ongoing basis rather than for a definite period.

29. Delegate Ullrich concluded that Mr. Oliveira's training of Mr. Bier was consistent with an employer training an employee for the employer's business. Delegate Ullrich assigned considerable weight to the fact that Mr. Bier's work as a delivery driver was highly integrated into Vanwin's business. Delegate Ullrich concluded that while Mr. Bier used his own car, cellular phone, and dolly, this was because they were essential tools and Vanwin did not provide them. Delegate Ullrich acknowledged that Mr. Bier understood at the outset that he was an independent contractor but concluded that the mere fact he provided these "tools" did not indicate that he was in business for himself.

30. Delegate Ullrich stated that the central question when assessing whether a person is an employee or an independent contractor is "whose business it is?" The Delegate concluded that the delivery driver services belonged to Vanwin, Mr. Bier worked under Vanwin's control and direction for over four years, Mr. Bier was trained for the purpose of Vanwin's benefit and performed work that was fundamentally integrated into Vanwin's business, and there is no evidence that Mr. Bier was in business for himself.

31. Delegate Ullrich concluded that Mr. Bier was an employee of Vanwin for the purposes of the *ESA*. Delegate Ullrich concluded that Mr. Bier's rate of pay was $18.75 per hour ($150 per day / 8 hours per day). Delegate Ullrich concluded that there was insufficient evidence to find that Mr. Bier worked in excess of 40 hours per week and, therefore, no overtime wages were owed to Mr. Bier.

32. Delegate Ullrich accepted Mr. Bier's evidence in regards to his estimated cellphone and gas expenses, which was based in part on receipts, and found that Mr. Bier was owed a total of $1,160 in business expenses for the allowable six month period (pursuant to section 80(1) of the *ESA*).[5] Delegate Ullrich calculated the amount of annual vacation pay ($2,705.90) payable to Mr. Bier for the recovery period based on his gross wages of $67,647.60 from June 1, 2015, to February 24, 2017.[6] Delegate Ullrich calculated that Mr. Bier Was owed $900 in statutory holiday pay for six statutory holidays based on an average day's pay of $150.

[5] Delegate Ullrich found that Mr. Bier paid approximately $40 per month for the use of his cellphone for work purposes and $25 per week for fuel for 20 weeks and $70 per week for fuel for 6 weeks.

[6] Delegate Ullrich noted that vacation pay is payable by the end of following year when it is earned. Accordingly, the vacation pay for June 1, 2015, to May 31, 2016, was payable by June 1, 2017 and, thus, was payable at the time of his termination on February 24, 2017.

33. Delegate Ullrich concluded that Mr. Bier was owed 4 weeks' compensation for length of service because there was no clear single act of misconduct serious enough to justify dismissal. Delegate Ullrich concluded that, while Mr. Bier did not deny making the mistakes (relating to the missed deliveries on January 20, 2017, and February 24, 2017), there was no evidence that Mr. Bier was "warned of standards that jeopardized his continued employment; given a reasonable time to remedy them; and that his employment was in jeopardy if not remedied". Delegate Ullrich concluded that the two weeks "verbal notice" given by Mr. Oliveira by text did not meet the requirements of written notice under section 63 of the *ESA*.

34. Delegate Ullrich imposed mandatory administrative penalties for failing to pay business expenses, annual vacation pay, statutory holiday pay, and compensation for length of service within the required times. Delegate Ullrich also imposed a mandatory administrative penalty for failing to keep payroll records.

ANALYSIS

35. Section 112 of the *ESA* sets out the Tribunal's jurisdiction to consider appeals of the Director's determinations:

> 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:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

36. The Appellant appealed the Determination on the basis that Delegate Ullrich erred in law and failed to observe the principles of natural justice when she concluded that Mr. Bier was an employee of Vanwin.

Failure to Observe the Principles of Natural Justice in making the Determination

37. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them, and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.

38. Vanwin submits that Delegate Ullrich's Determination was biased because Mr. Bier's girlfriend worked for the Employment Standards Branch Richmond office. Vanwin submits that this bias is supported because the mediator from the Richmond office told him that he was friends with Mr. Bier's girlfriend. Although Vanwin submits that Delegate Ullrich's interpretation is biased, Vanwin has not submitted that there is any relationship between Delegate Ullrich from the Employment Standards Branch Langley office and Mr. Bier's girlfriend.

39. The general test for bias was enunciated by the Supreme Court of Canada in *R.* v. *R.D.S.*, [1997] 3 S.C.R. 141 where McLachlin J. stated (at paragraph 36):

> The presence or absence of an apprehension of bias is evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail (*Committee for Justice and Liberty*, *supra*.) The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.

40. In the same case, Cory J. stated (at paragraph 112) that "a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not enough." Although *R.D.S.* was a criminal case, this general test for bias has been adopted by the Tribunal.[7]

41. It is not necessary to determine whether Mr. Bier's girlfriend was in fact friends with the mediator. The mediation was not successful, and the complaint proceeded to a hearing in front of another Employment Standards Officer from another Employment Standards Branch office. The mediator was not involved in the complaint hearing before Delegate Ullrich and Delegate Ullrich did not rely on the mediation in any way for her Determination. There is no obvious indication that Delegate Ullrich was biased against Vanwin in her Determination. The fact that Delegate Ullrich concluded that Mr. Bier was an employee does not by itself support that she was biased. Indeed, Delegate Ullrich expressly found against Mr. Bier in regards to his claim for overtime.

42. There is no evidence that there was any relationship between Delegate Ullrich and Mr. Bier's girlfriend. Delegate Ullrich addressed Vanwin's concern and confirmed that Mr. Oliveira had no objection to the hearing proceeding in the Employment Standards Branch Langley office.

43. Given the evidence, Vanwin has not demonstrated there was a real likelihood or probability of bias on the part of the Delegate. Accordingly, this ground of appeal is dismissed.

Error of Law

44. Vanwin submits that Delegate Ullrich erred in law by finding that Mr. Bier was an employee of Vanwin and not an independent contractor. Vanwin did not expressly appeal any of the resulting findings of Delegate Ullrich related to the wages owed to Mr. Bier. Rather, Vanwin appealed Delegate Ullrich's Determination on the basis that Mr. Bier was not owed any wages because he was an independent contractor.

45. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp*. v. *British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (C.A.):

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

[7] For example, see the Tribunal's Reconsideration decision re Milan Holdings Inc., BC EST # D313/98

46. For example, see *Britco Structures Ltd*., BC EST # D260/03. *Britco Structures Ltd.* confirms that the Tribunal does not have jurisdiction over a question of fact alone but does have jurisdiction over questions of mixed fact and law. This includes where a trier of fact applies a legal standard to a set of facts, as was considered by the Supreme Court of Canada in *Housen* v. *Nikolaisen*, [2002] 2 S.C.R. 235.

47. The court in *Housen* considered what constitutes a palpable and overriding error in regards to factual findings and held that an appellate court should not interfere with the findings of fact reached by a trial judge, and only where a palpable and overriding error exists on the record, should a finding of fact be overturned. The Justices of the majority decision in *Housen*, at paragraph 23, stated:

> ... that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.

48. The majority of the court in *Housen*, at paragraph 6, determined that a palpable error is one that is "plainly seen."

49. In *Waxman* v. *Waxman*, 2004 CanLII 39040 (On CA) the Ontario Court of Appeal reiterated that the palpable and overriding standard demands strong deference to findings of fact made at trial and stated as follows (at paragraphs 296 and 297):

> [296] The palpable and overriding standard addresses both the nature of the factual error and its impact on the result. A palpable error is one that is obvious, plain to see or clear...Examples of palpable factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
>
> [297] An overriding error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact is based on a constellation of findings, the conclusion that one or more of those findings is founded on a palpable error does not automatically mean that the error is also overriding. The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Schwartz* v. *Canada*, 1996 CanLII 217 (S.C.C.), [1996]1 S.C.R. 254 at 281.

50. The issue of whether or not someone is a contractor or an employee is not unique and has previously come before the Tribunal. It is clear that such a decision is not based on common law principles and is determined by application of the *ESA*. For example, in *Project Headstart Marketing Ltd*., BC EST # D164/98, the panel stated (at page 3):

> … I need not even concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee".

51. In *North Delta Real Hot Yoga Ltd.,* BC EST # D026/12, the panel stated (at paragraph 55):

> Many decisions of the Tribunal have considered the issue raised here and all have made it clear that the definition of "employee" is to be broadly interpreted and that the common law tests for employment developed by the courts are subordinate to the definitions contained in the *Act*, see, for example, *Kelsey Trigg*, BC EST # D040/03, *Christopher Sin*, BC EST # D015/96, and *Jane Welch operating as Windy Willows Farms*, BC EST # D161/06.

52. In *Kimberley Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied BC EST # RD114/05), the panel considered the issue of whether a person is an employee under the *ESA* and stated (at page 6):

> The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd*. v. *Sagaz Industries Canada Inc*., [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:
>
> > 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 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 own tasks.
> >
> > 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.

53. Delegate Ullrich reviewed the evidence of Mr. Bier and Mr. Oliveira in detail to conclude that Mr. Bier was an employee of Vanwin and not an independent contractor. Delegate Ullrich found that the delivery driver services belonged to Vanwin, Mr. Bier worked under Vanwin's control and direction for over four years, Mr. Bier was trained for the purpose of Vanwin's benefit and performed work that was fundamentally integrated into Vanwin's business, and there was no evidence that Mr. Bier was in business for himself.

54. While Mr. Oliveira relied heavily on the fact that Mr. Bier was hired as an independent contractor, filed taxes as an independent contractor, provided his own vehicle and cellphone which expenses Mr. Bier paid himself and had flexibility in regards to the work that he performed, Delegate Ullrich found that these facts did not take the relationship between Mr. Bier and Vanwin outside the definitions of "employee" and "employer" in the *ESA*.

55. Delegate Ullrich applied the definitions of "employee" and "employer" in the *ESA* in reaching her conclusion that Mr. Bier was an employee and not an independent contractor. Vanwin disagrees with Delegate Ullrich's interpretation of the evidence and, implicitly, submits that the proper interpretation of the evidence does not support a conclusion that the definitions of "employee" and "employer" in the *ESA* have been met. While Vanwin effectively disagrees with Delegate Ullrich's application of the definitions in the *ESA*, such disagreement by itself does not amount to an error of law.

56. As noted above in *Gemex*, *supra*, to amount to an error of law, Delegate Ullrich's finding that Mr. Bier was an employee must engage one of the following:

1. a misinterpretation or misapplication of a section of the Act;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

57. In addition, an error of law may be found where there are findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence, and findings of fact drawn from primary facts that are the result of speculation rather than inference.

58. Given the evidence, Delegate Ullrich's detailed reasons, and the Tribunal decisions cited that consider when a person is an employee, I am satisfied on a balance of probabilities that Delegate Ullrich did not commit an error of law when she decided that Mr. Bier was an employee of Vanwin. This ground of appeal is dismissed.

59. I have also reviewed the conclusions of Delegate Ullrich in regards to Mr. Bier's entitlement to annual vacation pay, statutory holiday pay, compensation for length of service, and reimbursement for gas and cellphone expenses. I am satisfied on a balance of probabilities that Delegate Ullrich did not commit an error of law in regards to her calculation of the wages owed to Mr. Bier.

ORDER

60. I dismiss the appeal and confirm the Determination under section 115(1)(a) of the *ESA*.

Richard Grounds
Tribunal Member
Employment Standards Tribunal