



Citation: Uniart Design Group Ltd. (Re)
2019 BCEST 78

An appeal

- by -

Uniart Design Group Ltd.
("Uniart")

- 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.: 2019/33

DATE OF DECISION: August 14, 2019

DECISION

SUBMISSIONS

Ali Sepehr Ghomsheh

on behalf of Uniart Design Group Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), this is an appeal by Uniart Design Group Ltd. (“Uniart”) regarding a Determination (the “Determination”) issued on March 15, 2019, by Jordan Hogeweide, a delegate of the Director of Employment Standards (the “Delegate”).
2. Uniart is an incorporated company which operates a commercial painting business in greater Vancouver. Ali Sepehr Ghomsheh (“Mr. Sepehr Ghomsheh”) is one of Uniart’s directors and the sole officer for Uniart. The other two Directors of Uniart are Babak Emamifar and Farzaneh Yazdani. Nader Balafkan (the “Complainant”) worked for Uniart as a painter from May 24, 2018, to August 10, 2018. The Complainant quit working for Uniart when it would not pay him all of the wages he claimed to be owed.
3. On September 13, 2018, the Complainant filed a complaint under section 74 of the *ESA* for regular wages, overtime, and annual vacation pay. The complaint proceeded to an adjudication hearing on March 1, 2019, in front of the Delegate. The Delegate concluded in his Determination that Uniart owed the Complainant wages, overtime, statutory holiday pay, annual vacation pay, and interest. The Delegate ordered Uniart to pay administrative penalties for each contravention of the *ESA*.
4. On March 22, 2019, Uniart appealed the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made.¹
5. For the reasons that follow, the Determination is confirmed.

ISSUE

6. The issues are whether or not the Delegate failed to observe the principles of natural justice when he determined that the Complainant was an employee and whether or not new evidence has become available that was not available at the time the Determination was being made.

ARGUMENT

7. Uniart submitted on appeal that Babak Emamifar was not in business with Uniart in January 2019. In addition, Uniart submitted that a fair decision was not reached at the hearing because there was no “logical proof” or witnesses to confirm the Complainant’s position. On May 28, 2019, Mr. Sepehr Ghomsheh, on behalf of Uniart, made further submissions and provided documents including copies of

¹ The Appeal Form was received by the Tribunal on March 25, 2019. Although the box to request an extension of time to the statutory appeal period was checked, the Appeal Form was submitted within the required time period and no other explanation was given about the request to extend the appeal deadline.

text messages (regarding no work on July 2, 2018, and August 6, 2018), a list of days worked and payments made to the Complainant. Uniart submitted that labourers and subcontractors were not allowed to work on weekends and holidays and that the Complainant was sometimes paid in advance.

8. Submissions on the merits of the appeal were not requested from the parties.

THE FACTS

Background Facts

9. The Complainant worked for Uniart from May 24, 2018, to August 10, 2018, as a painter at a rate of pay of \$19.00 per hour. The Complainant painted the exterior and interior of houses in the greater Vancouver area. The complainant drove himself to the jobsites and Uniart provided all of the necessary supplies and equipment for the Complainant to do painting work. The Complainant was supervised by representatives from Uniart, told what work to do, and when and where to work. The Complainant kept a record of the hours that he worked and he quit Uniart when they did not pay him all of the wages he claimed that he was owed.

The Determination

10. On March 1, 2019, the complaint proceeded to an adjudication hearing in front of the Delegate. The Complainant gave evidence on his own behalf and Farzaneh Yazdani and Mr. Sepehr Ghomsheh gave evidence on behalf of Uniart.
11. The Delegate identified two issues including whether or not the Complainant was an employee of Uniart and what wages were owed to the Complainant.
12. The Delegate completed the Determination on March 15, 2019, and found that the Complainant was an employee of Uniart. In reaching this conclusion, the Delegate stated (at page 12 of 14/R4):

The Act only applies to employees and employers. It does not apply to independent contractors. The criteria for determining whether an employment relationship existed are found in the definitions of the Act. “Employee” is defined as an individual entitled to wages for work performed for another, or who performs work normally performed by an employee. “Employer” is defined as a person who has control or direction of an employee or who is responsible for the employment of an employee. “Work” is defined as the labour or services an employee performs for an employer.

I find it unnecessary to do an exhaustive analysis in this case because there was nothing about [the Complainant’s] work with Uniart to suggest he was an independent contractor. Uniart owned all of the tools [the Complainant] needed for his work (ladders, paint, truck/van, small hand tools). Uniart directed where, when, and how [the Complainant] was to work. [The Complainant] had no chance to profit from his work and risked no loss. He was paid an hourly rate, such like most employees are. He was a typical painter working for a typical painting company.

13. The Delegate accepted the Complainant’s evidence about the hours that he worked and noted that Uniart did not “seriously challenge” the hours claimed by the Complainant but instead argued that he should not be entitled to all of the wages because his work was poor. Based on the hours recorded by the

Complainant, the Delegate determined that he was owed further wages, overtime, statutory holiday pay (for Canada Day and BC Day), annual vacation pay, and interest.

14. The Delegate determined that Uniart was subject to administrative penalties for not paying the Complainant wages within the prescribed time from his pay period and after he quit, for not providing wage statements to the Complainant, and for failing to comply with a Demand for Employer Records.

ANALYSIS

15. 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.

16. Uniart appealed the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was being made.

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

17. 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. Uniart submits that there was not "logical proof" or witnesses to confirm the Complainant's position. The key issue disputed by Uniart relates to whether or not the Complainant was an employee or independent contractor.

18. Whether or not someone is an employee or independent contractor is not based on common law principles and is determined by application of the *ESA*.² There is no one conclusive test, but some of the relevant factors include: the level of control the employer has over the worker's activities; whether the worker provides his own equipment; whether the worker hires his own helpers; the degree of responsibility for investment and management held by the worker; and the degree of financial risk and opportunity for profit.³

19. Uniart was aware that the key issue related to whether or not the Complainant was an employee and was given an opportunity to provide evidence to the Delegate on this issue. The Delegate was an impartial decision maker. The Delegate reviewed the documentary and witness evidence related to whether or not

² For example, see *Project Headstart Marketing Ltd.*, BC EST # D164/98, *North Delta Real Hot Yoga Ltd.*, BC EST # D026/12, and *Kimberley Dawn Kopchuk*, BC EST # D049/05.

³ See *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983 at para 47-48.

the Complainant was an employee and concluded that he was, essentially due to the complete control that Uniart had over the Complainant's work as a painter.

20. Uniart may disagree that the Complainant was an employee, but this is not determinative of the issue. The Delegate applied the definitions of "employee", "employer", and "work" in the *ESA* and considered the appropriate factors in reaching the conclusion that the Complainant was an employee and not an independent contractor. There is no basis to find that the Delegate failed to observe the principles of natural justice in making the Determination.

New Evidence

21. Uniart also appealed the Determination on the basis that new evidence has become available that was not available at the time the Determination was being made. Uniart's appeal submissions did not specify what the new evidence was, but Uniart did state the following with its Appeal:

Babak Emamifar who is one of the directors from January 2019, was not in business with Uniart at that time.

22. The fact that Babak Emamifar was still listed as a Director with Uniart in January 2019 when the Delegate conducted a BC Registry Services search is not relevant to the grounds for appeal and is not new evidence.

23. Uniart later submitted (to the Employment Standards Tribunal by letter dated May 28, 2019) that the Complainant was hired as a helper and agreed to be paid \$14.00 per hour for three months on a probationary period. Uniart provided two text messages on July 2 and August 5, 2018, confirming that it advised the Complainant that there was no work and also provided a summary of the payment made to the Complainant and the hours that he worked.

24. The text messages and summary of payments made to the Complainant and hours worked by the Complainant were not before the Delegate.

25. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Bruce Davies et al.*, BC EST # D171/03, where it stated (at page 3):

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief;
and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

26. The first stage of the test for admitting new evidence on appeal requires that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. The text messages and summary of payments made to and hours worked by the Complainant were available at the time of the hearing and prior to the time that the Determination was made.

27. Given the new evidence submitted by Uniart with its appeal was available at the time of the hearing and prior to the time that the Determination was made, the first stage of the test to admit the new evidence on appeal has not been met. Accordingly, the new evidence submitted with the appeal will not be considered on the merits as part of the appeal. There is no basis to interfere with the Delegate's Determination that the Complainant was an employee and not an independent contractor.

ORDER

28. I dismiss the appeal and, pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination.

Richard Grounds
Member
Employment Standards Tribunal