

Citation: Les Evaluations Marc Bourret Appraisals Inc. (Re)
2023 BCEST 21

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Les Evaluations Marc Bourret Appraisals
(the “Company”)

- 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: Jonathan Chapnick

FILE No.: 2022/197

DATE OF DECISION: April 14, 2023

DECISION

SUBMISSIONS

Tim Campagna on behalf of Les Evaluations Marc Bourret Appraisals Inc.
carrying on business as MBC Group

Michael Thompson delegate of the Director of Employment Standards

OVERVIEW

1. Les Evaluations Marc Bourret Appraisals Inc. carrying on business as MBC Group (the “Company”) is a consultancy firm with operations across Canada, including in British Columbia. Clark Van Peteghem worked as a senior consultant with the Company’s Western Canada team in British Columbia from October 2019 to May 2020. On May 6, 2020, the Company notified Mr. Van Peteghem that it was ending its working relationship with him. The next day, on May 7, Mr. Van Peteghem filed a complaint (the “Complaint”) to the Director of Employment Standards (the “Director”) alleging the Company had violated the *Employment Standards Act*, R.B.S.C., 1996, c. 113 [ESA] in respect of his employment. The Company, however, took the position that Mr. Van Peteghem had not been its employee, but rather had been an independent contractor.
2. A delegate of the Director, Sarah Balouchi (the “Investigative Delegate”), investigated the Complaint and issued a report on July 27, 2022 (the “Investigation Report”). Another delegate of the Director, Michael Thompson (the “Adjudicative Delegate”), subsequently reviewed the Investigation Report and the evidence provided by the parties during the investigation. On October 13, 2022, the Adjudicative Delegate issued a determination with written reasons (the “Determination”). The Adjudicative Delegate found that Mr. Van Peteghem had been an “employee” of the Company within the meaning of the *ESA* and the Company had violated the *ESA* in respect of Mr. Van Peteghem’s employment. The Adjudicative Delegate ordered the Company to pay Mr. Van Peteghem \$8,547.65 in wages and interest and to pay a total administrative penalty of \$2,500 for its violations of the *ESA*.
3. The Company appealed the Determination to this Tribunal on November 8, 2022. The Company’s appeal focuses squarely on the Adjudicative Delegate’s reasons for concluding that Mr. Van Peteghem was an employee rather than an independent contractor. The Company says the Adjudicative Delegate erred in law and failed to observe the principles of natural justice by not applying certain legal tests in his analysis of the employee status (i.e., employee or independent contractor) issue. Taking a large and liberal approach to the Company’s appeal, I find that it raises the more general question of whether the written reasons for the Adjudicative Delegate’s determination are adequate. For the reasons that follow, I find that the Adjudicative Delegate’s written reasons are inadequate and I conclude that he failed to observe the principles of natural justice in making the Determination. The appeal is therefore allowed, the Determination is cancelled, and the matter is referred back to the Director for determination of the employee status issue (and any issues that follow) in light of my comments below.

THE INVESTIGATION

4. The Investigative Delegate's notes in the materials before me indicate that from the outset of the investigation, Mr. Van Peteghem took the position that he had been an employee of the Company, not an independent contractor. Mr. Van Peteghem's evidence was that although he created a corporation through which he received payment from the Company for his services, he only did so because it was a condition of working with the Company. He said he did not have his own consultancy business, and was not permitted to work for the Company's competitors. Regarding his day-to-day work with the Company, the Investigative Delegate's notes indicate that Mr. Van Peteghem told the Investigative Delegate he did "insurance consulting for construction." If a client's home was damaged, Mr. Van Peteghem would "develop a scope of work and write up a report and evaluate the damage." He told the Investigative Delegate that "all of his work had to be approved by his supervisor" at the Company. He said he worked mostly from home, but a shared workspace was available to him. He said that regular business hours were 8 AM to 5 PM, but he "was expected to always be available," and was permitted (but not required) to work outside regular business hours. Mr. Van Peteghem invoiced the Company monthly for his hours worked, which fluctuated depending on his file volume. In an email to the Investigative Delegate on February 10, 2020, Mr. Van Peteghem noted that he "was doing electrical work on the side" because he was not "getting enough hours" with the Company. Mr. Van Peteghem disclosed two key documents to the Investigative Delegate: an "independent contractor agreement" between his corporation and the Company, setting out the terms and conditions of his work with the Company, and a comprehensive "consultant proposal" setting out detailed requirements and specifications for his role (I will refer to these two documents collectively as the "Contract").
5. The Investigative Delegate first contacted the Company by email on February 16, 2022. In her email, the Investigative Delegate stated that she had concluded that Mr. Van Peteghem was an employee and not an independent contractor based on a number of factors. The Senior Director, Human Resources at the Company, Tim Campagna, represented the Company during the investigation of the Complaint. In his initial email to the Investigative Delegate on April 4, 2022, Mr. Campagna stated that Mr. Van Peteghem was an independent contractor during his tenure at the Company. The Investigative Delegate's notes indicate that in a subsequent phone call, Mr. Campagna told the Investigative Delegate that the Company's contract was with Mr. Van Peteghem's corporation, not Mr. Van Peteghem. By letter dated May 31, 2022, Mr. Campagna advised the Investigative Delegate that the Company disagreed with the Complaint and Mr. Van Peteghem's claim for compensation. In a subsequent email to Mr. Campagna on June 8, 2022, the Investigative Delegate indicated that the information provided by the Company during the course of her investigation would probably be insufficient to support a decision in favour of the Company in the Complaint. She advised that she did not have "anything regarding reasons for [Mr. Van Peteghem's] termination" or the Company's "position on the Complainant being an independent contractor (besides payments being made to [Mr. Van Peteghem's corporation] instead of directly to Clark Van Peteghem), etc."

THE DETERMINATION

6. The primary issue before the Adjudicative Delegate was whether Mr. Van Peteghem was an employee or an independent contractor. The Adjudicative Delegate chose not to recite or summarize the parties'

evidence and arguments in the Determination. Instead, he stated that he had reviewed the Investigation Report and the evidence provided by the parties during the investigation, and he accepted the Investigation Report “to be an accurate reflection of the parties’ evidence and positions.” He then moved on to state his analysis regarding the employee status issue, which I reproduce here in its entirety:

As outlined in the IR [Investigation Report], beyond indicating that it had paid a corporation rather than Mr. Van Peteghem directly, MBC [i.e., the Company] provided no evidence to indicate that it employed Mr. Van Peteghem as an independent contractor. The Complainant for his part stated that he incorporated [his corporation] because MBC would not otherwise employ him. Mr. Van Peteghem’s additional evidence, which went unchallenged by MBC, regarding the duties he performed and the control that MBC exerted over his work establishes, I find, that Mr. Van Peteghem met the definition of an employee found in Section 1 of the [ESA], and that MBC met the definition of an employer. Mr. Van Peteghem consulted with MBC clients at MBC’s direction, and was barred from performing services for anyone else. As such, I find that his employment was covered by the [ESA].

7. The remainder of the Determination dealt with secondary issues (e.g., whether the Company owed Mr. Van Peteghem regular wages) that followed given the Adjudicative Delegate’s primary finding that Mr. Van Peteghem was an employee and not an independent contractor.

ISSUES

8. The issues in this appeal are whether the Investigative Delegate or Adjudicative Delegate failed to observe the principles of natural justice or erred in law in making the Determination. In deciding the appeal, I have considered the Company’s November 8, 2022 appeal submission, comprising the appeal form, Mr. Campagna’s written arguments, and other documents and materials (the “Appeal Submission”). I have also considered the record that was before the Adjudicative Delegate at the time of the Determination (the “Record”). In addition, I have considered the Adjudicative Delegate’s January 20, 2023, response submission in this appeal (the “Response Submission”).
9. In the discussion below, I do not refer to all of the information and submissions I have considered. Rather, I only recount the portions on which I have relied to reach my decision.

ANALYSIS

10. The Company’s arguments under both grounds of appeal (natural justice and error of law) centre on the Determination’s silence regarding “the common law tests for distinguishing between an employee and an independent contractor.” In the Appeal Submission, Mr. Campagna identifies the “control test,” the “four-fold test,” and the “organization and integration test,” as the three “common law tests” that the Tribunal has recognized as being useful for deciding whether a person is an employee or an independent contractor (see *671122 Ontario Ltd. v. Sagaz Industries Canada Ltd.*, 2001 SCC 59 [*Sagaz*] for an explanation and discussion of these legal tests).
11. The Tribunal takes a large and liberal approach to appeals under the *ESA*, which means inquiring into the nature and substance of an appellant’s challenge to a delegate’s determination, to decide whether the

grounds of appeal have been met: *Robin Camille Groulx*, 2021 BCEST 55 at para. 7. This is a purposive exercise, not a mechanistic one: see *Triple S Transmission Inc.*, BC EST # D141/03. In undertaking this exercise, I am mindful of the various purposes of the *ESA*, including the purpose of providing fair procedures for resolving employment standards disputes. Taking a large, liberal, and purposive approach to the Company's appeal, I find, in this case, that Mr. Campagna's narrow assertion that the Determination is deficient because it omits any mention of the common law tests necessarily gives rise to a more general review by this Tribunal of the overall adequacy of the written reasons for the Adjudicative Delegate's decision.

A. Natural justice

12. Under section 112(1)(b) of the *ESA*, a person can appeal a determination on the ground that a delegate of the Director of Employment Standards "failed to observe the principles of natural justice in making the determination." This ground of appeal is about the fairness of the complaint, investigation, and determination processes under Part 10 of the *ESA*. In this context, procedural fairness questions may arise in relation to not only the Part 10 processes themselves, but also the end product of those processes – i.e., the written reasons for the delegate's determination. The adequacy of a delegate's reasons are a "necessary component of ensuring compliance with the purposes of the [ESA] and with the rules of natural justice": *Pierre Borduas operating as Convoi Intermodal Inc. and others*, BC EST # D208/03 at 3 [*Convoi Intermodal*]. As a result, in some instances, a delegate's failure to provide adequate reasons may amount to a breach of natural justice: *Regent Christian Academy, c.o.b. Regent Christian Online Academy*, BC EST # D011/14.
13. In the present case, Mr. Campagna asserts that the Determination's silence regarding the common law tests amounts to a breach of natural justice. In response, the Adjudicative Delegate disputes Mr. Campagna's assertion, noting correctly that in the employee status analysis, the common law tests are subordinate to the relevant *ESA* provisions: see generally *Beach Place Ventures Ltd. and Black Top Cabs Ltd.*, 2019 BCEST 23, aff'd 2019 BCEST 61, aff'd 2021 BCSC 1463, aff'd 2022 BCCA 147, leave to appeal denied, S.C.C., 2023-02-09, 40239. In the Response Submission, the Adjudicative Delegate argues that his written reasons properly focused on the "actual function of the relationship" between Mr. Van Peteghem and the Company in determining that Mr. Van Peteghem was an employee.
14. I agree with aspects of both participating parties' submissions in this appeal. I find that there was a breach of natural justice principles in this case. But I find that the breach was not the Determination's specific silence regarding the common law tests. Rather, it was the general inadequacy of the written reasons for the Adjudicative Delegate's decision.
15. The Tribunal gives a sympathetic reading to a delegate's determination: *Inderpal Singh*, 2021 BCEST 94, aff'd 2022 BCEST 4. Like those of other administrative decision-makers, a delegate's written reasons are not assessed against a standard of perfection: *CCON Recon Inc. and CCON Metals Inc.*, 2022 BCEST 26 at para. 32 [*CCON Recon*]. In the reasons for their determination, a delegate does not need to explain every last one of their findings and conclusions, nor do they need to recite and comment on all of the evidence and facts they considered: *Golden Fleet Reflexology Ltd.*, 2018 BCEST 22 at para. 28 [*Golden Fleet Reflexology*]. Furthermore, I agree with the Adjudicative Delegate's contention in the Response

Submission that a delegate is not required to explicitly reference every relevant legal test in their determination, so long as they generally consider and apply the appropriate legal framework and principles in their analysis.

16. But the Tribunal's sympathetic approach to a delegate's written reasons has its limits. At the end of the day, the parties to a complaint under the *ESA* are entitled to know the basis for the determination resulting from the investigation of that complaint: *Hilliard*, BC EST # D296/97 [*Hilliard*] and *Convoi Intermodal*. Without adequate reasons for a delegate's determination, a party cannot discern the case found against them or the case they must make on appeal: see *Hilliard* and *Convoi Intermodal*. Accordingly, a delegate's reasons and justification for their determination must be transparent and intelligible: *CCON Recon* at para. 66. In the present case, I find that the Determination does not meet this standard, even on a sympathetic reading.
17. The employee status issue under the *ESA* "is necessarily framed by the statutory definitions in the *ESA*, the *ESA* itself, and relevant jurisprudence": *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147 (leave to appeal denied, S.C.C., 2023-02-09, 40239) at para. 49 [*Beach Place Ventures*]. The *ESA* is ameliorative, benefits-conferring legislation, which uses expansive language to define who is an employee and who is an employer, thereby casting a wider net in terms what constitutes an employment relationship, compared to the common law: see *ESA*, s. 2(a) and *CWC Immigration Solutions Inc.*, 2020 BCEST 74 [*CWC Immigration Solutions*]. The starting point and "overriding test" for determining whether a person is an employee for *ESA* purposes is section 1 of the legislation, which sets out the definitions of "employee" and "employer," as well as other relevant defined terms, such as "wages" and "work": see *e.g.*, *Kimberley Dawn Kopchuk*, BC EST # D049/05. From there, the employee status question must be determined contextually, considering, among other things, the numerous context-specific factors identified in *Sagaz* and other decisions: see *Beach Place Ventures* at para. 71. These factors, many of which are identified in the common law tests described by Mr. Campagna in the Appeal Submission, relate to various aspects of the relationship between the putative employee and employer, such as control and direction, provision of work tools, delegation and subcontracting, financial risks and opportunities, contract language, and the intention of the parties: see *e.g.*, *Sagaz* at para. 47; *Ajay Chahal carrying on business as Zip Cartage*, BC EST # D109/14, *aff'd* BC EST # RD005/15; *CWC Immigration Solutions*. The goal of this analysis is to reach a reasoned conclusion regarding the reality of the parties' relationship for *ESA* purposes, drawn from a careful balancing of the relevant facts and circumstances: see *Golden Fleet Reflexology* at para. 29.
18. Given this analytical framework, in their written reasons for deciding the employee status issue, a delegate of the Director should, at the very least, outline the applicable *ESA* provisions, identify the material facts and circumstances of the parties' relationship, and then clearly consider and weigh the relevant contextual factors to determine whether the parties fall within the statutory definitions of employee and employer. The Adjudicative Delegate did not do this in the Determination. He did not set out the statutory definitions of employee and employer. He did not outline the material facts and circumstances of the parties' relationship drawn from the evidence before him. And he did not provide a reasoned analysis of the relevant contextual factors.

1. Reasons provided

19. In my comments above, I do not mean to say that there was no evidentiary basis for the Adjudicative Delegate’s finding that Mr. Van Peteghem was an employee of the Company for *ESA* purposes. On the contrary, the Record shows that there was evidence establishing certain facts that favoured a conclusion the parties were in an employment relationship. But the Adjudicative Delegate did not clearly identify that evidence, and he barely articulated any relevant findings of fact. Instead, the Adjudicative Delegate based his conclusion regarding the employee status issue on an opaque reference to Mr. Van Peteghem’s evidence “regarding the duties he performed and the control that [the Company] exerted over his work,” without providing any description or explanation of the salient aspects of that evidence. The Adjudicative Delegate then went on to articulate only two findings of fact. First, he found that Mr. Van Peteghem consulted with the Company’s clients at the Company’s direction. This finding arguably factored in favour of a conclusion that the parties were in an employment relationship within the meaning of the *ESA*. Second, the Adjudicative Delegate found that Mr. Van Peteghem “was barred from performing similar services for anyone else” other than the Company. Arguably, this finding may also have supported the Adjudicative Delegate’s conclusion regarding the employee status issue; however, it appears to be an overstatement of the actual restriction under the Contract, which stipulates that Mr. Van Peteghem was “free to provide services to other clients,” so long as they were not competitors and it did not interfere with his work for the Company. Viewed as a whole, then, the Adjudicative Delegate’s written reasons regarding the employee status issue were not sufficiently clear and detailed for the parties to logically discern either the relevant evidence or the findings of fact linking that evidence to the Adjudicative Delegate’s conclusions. The Determination therefore fell short of the standard to which a delegate’s reasons are held: see *Golden Fleet Reflexology* at para. 28.

2. Reasons omitted

20. My finding that the Adjudicative Delegate’s written reasons are inadequate is based not only on what he included in the Determination, but also on what he omitted. In the Determination (and again in the Response Submission), the Adjudicative Delegate asserted that the Company provided almost no information or evidence in support of its position that Mr. Van Peteghem was an independent contractor. This appears to be an accurate assertion. But it does not follow that there was no evidence before the Adjudicative Delegate that could have established certain facts that favoured a conclusion the parties were *not* in an employment relationship. On the contrary, the Record includes information and evidence arguably militating against a conclusion that Mr. Van Peteghem was an employee of the Company in the context of the applicable analytical framework.
21. For example, the Contract characterized Mr. Van Peteghem (or, more precisely, his corporation) as an independent contractor, and the parties to the Contract ended up working together for only approximately six months. Under the Contract, Mr. Van Peteghem was not eligible for employee benefits and was not authorized to make commitments on behalf of the Company. As I noted above, Mr. Van Peteghem was “free to provide services to other clients,” so long as they were not competitors and it did not interfere with his work for the Company. Under the terms of the Contract, Mr. Van Peteghem appears to have had control over his work flow, in that he was permitted to decline individual work assignments from the Company and to opt out entirely of taking on additional files. In addition, the Contract stipulated

that if Mr. Van Peteghem missed hours when invoicing the Company, it was his loss – i.e., the hours would be lost and not paid to him. The Contract also stipulated that if clients successfully challenged the hours or expenses invoiced by Mr. Van Peteghem, he was at further risk of financial loss, in that amounts credited to the client would be deducted from his earnings. While the Company provided several specific work tools under the Contract, Mr. Van Peteghem was required to provide all other tools and equipment necessary to perform work for the Company, including a computer, a printer, a camera, a moisture reader, personal protective equipment (e.g., a hard hat, steel toe boots, a respirator, protective masks, coveralls), office supplies, and ladders.

22. Finally, the terms of the Contract suggested that Mr. Van Peteghem was permitted to sub-delegate his work for the Company to his own employees or contractors. The Contract stipulated that Mr. Van Peteghem – or, more precisely, his corporation – was bound by the terms of a confidentiality agreement and that if his corporation “retain[ed] any employees or contractors of its own who will perform services” under the Contract, those employees or contractors would be required to execute similar confidentiality agreements with Mr. Van Peteghem/his corporation. This evidence is particularly important, because the ability to sub-delegate work to others is typically a strong indicator that a person is an independent contractor: see, e.g., *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05.
23. The Adjudicative Delegate did not highlight or make findings of fact regarding any of the above evidence in his written reasons. The Determination does not include a consideration or weighing of the relevant contextual factors engaged by the evidence that was before the Investigative Delegate in the Complaint, thereby leaving important unanswered questions regarding the basis for the Determination. For example, assuming he considered it, did the Adjudicative Delegate decide that the reference to sub-delegation in the Contract was irrelevant? Or, perhaps, was he simply not compelled by this evidence? Even on the most sympathetic reading of his written reasons, I cannot make out the likely answer to these questions, because the Adjudicative Delegate’s written reasons lack intelligibility, in terms of analysis of the evidence and balancing of the material facts and circumstances of the parties’ relationship. As a result, in my view, the case found against the Company is not fully discernible in the Determination.
24. In sum, then, I find that the Adjudicative Delegate’s written reasons regarding the employee status issue are inadequate and amount to a breach of natural justice. The written reasons are so deficient that they deprive the parties of their fair process entitlement to know the basis for the Determination resulting from the investigation of the Complaint. I therefore conclude that the ground of appeal set out in section 112(1)(b) of the *ESA* has been met in this case. In reaching this conclusion, I make no findings and express no opinion regarding the substantive reality of the relationship between the Company and Mr. Van Peteghem for *ESA* purposes.

B. Error of law

25. Given my conclusion that the ground of appeal set out in section 112(b) of the *ESA* has been met, I need not consider the Company’s contention that the Determination’s silence regarding the common law tests amounts an error of law.
26. For all of the above reasons, the Company’s appeal is allowed.

ORDER

27. Pursuant to section 115(1) of the *ESA*, the Determination is cancelled and the matter is referred back to the Director for determination of the Complaint.

Jonathan Chapnick
Member
Employment Standards Tribunal