

An appeal

- by -

Cheryl Balcilek carrying on business as Trans Academe Tutoring
(the “Appellant”)

– 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)

and

An application for suspension

- by –

Cheryl Balcilek carrying on business as Trans Academe Tutoring
(the “Appellant”)

– of a Determination issued by –

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Carol-Ann Hart

FILE No.: 2010A/141 & 2010A/142

DATE OF DECISION: January 5, 2011

DECISION

SUBMISSIONS

Cheryl Balcilek	on behalf of Cheryl Balcilek carrying on business as Trans Academe Tutoring
Telyn Kusalik	on her own behalf
Robert Joyce	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Cheryl Balcilek carrying on business as Trans Academe Tutoring (the “Appellant”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”), of a Determination of the Director of Employment Standards (the “Director”) issued on August 31, 2010 (the “Determination”).
2. A delegate of the Director (the “Delegate”) determined that Cheryl Balcilek carrying on business as Trans Academe Tutoring had contravened sections 18 and 34 of the *Act* in failing to pay wages. The Delegate further concluded that vacation pay was owing under section 58 of the *Act*. Two administrative penalties of \$500.00 each were ordered to be paid under section 29(1) of the *Employment Standards Regulation*.
3. The Appellant seeks to have the effect of the Determination suspended, and ultimately have the Determination cancelled. The Appellant contends that the Delegate failed to observe the principles of natural justice in making the Determination and that he erred in law.

ISSUES

4. The issues in this case are the following:
 1. Did the Delegate fail to observe the principles of natural justice in finding that Ms. Kusalik was an employee, rather than an independent contractor?
 2. Did the Delegate err in law in finding that Ms. Kusalik was an employee rather than an independent contractor?

BACKGROUND

5. Telyn Kusalik worked as a tutor for Cheryl Balcilek carrying on business as Trans Academe Tutoring from October 12, 2009, until November 20, 2009, at a rate of \$25.00 per hour. The Delegate conducted an investigation into a complaint filed by Ms. Kusalik. He concluded that she was an employee, and that she was not paid for hours in November 2009 and that she was owed vacation pay.

ARGUMENT

For the Appellant

6. In the submissions filed with the appeal, Ms. Balcilek provided her rebuttal with respect to the factors the Delegate had considered in reaching his conclusion that Ms. Kusalik was an employee rather than an

independent contractor. Ms. Balcilek maintained that the Delegate erred in concluding that Ms. Kusalik was an employee. She argued that Ms. Kusalik was an independent contractor, and pursuant to the written contract she had signed, she was not entitled to be paid for the hours she had claimed.

For the Respondent

7. The Respondent addressed each of the arguments brought forward by the Appellant on appeal. Ms. Kusalik maintained that Ms. Balcilek had control over the work she performed, and that she was, in fact, an employee.

For the Director

8. The Delegate submitted that the Appellant was attempting to re-argue the position she had put forward in the investigation, and had not established a denial of natural justice or an error in law.
9. With respect to the new evidence submitted with the appeal, the Delegate maintained that the Appellant could have provided this evidence during the investigation. The Delegate argued that no weight should be given to the new evidence presented on appeal.

ANALYSIS

The Application for Suspension of the Effect of the Determination

10. The Appellant has requested that the Tribunal suspend the effect of the Determination pursuant to section 113 of the *Act*. Section 113 of the *Act* provides as follows:

Director's determination may be suspended

- 113 (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.
 - (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
 - (a) the total amount, if any, required to be paid under the determination, or
 - (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.
11. There were no submissions made by any party concerning the Appellant's request to have the Determination suspended. Section 113(2) of the *Act* provides that the Appellant must have deposited at least some of the amount required to be paid under the Determination with the Director. There is no indication on the file that any amount has been deposited with the Director by the Appellant. Accordingly, pursuant to section 113(2) of the *Act*, the application for suspension of the effect of the Determination is dismissed.

The Appeal

12. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. That provision 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:

- (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.

13. The Appellant has the onus of establishing on appeal that the Determination is incorrect. The central issue in this appeal is whether Ms. Kusalik was an employee when she performed work under her contract with Cheryl Balcilek carrying on business as Trans Academe Tutoring. If Ms. Kusalik was not an employee, there would have been no breaches of the *Act* and no wages would be owing.

1. Did the Delegate fail to observe the principles of natural justice in finding that Ms. Kusalik was an employee rather than an independent contractor?

14. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them, the right to present their evidence, and the right to be heard by an independent decision maker.

15. There was no information in the appeal or the submissions of the Appellant regarding the allegation that the Delegate had failed to observe the principles of natural justice. There is also nothing in the record or the Determination which is suggestive of a denial of natural justice. It has not been established that the Delegate failed to consider relevant evidence in reaching his conclusions in the Determination. The Appellant has not demonstrated that there was a denial of natural justice by the Delegate.

2. Did the Delegate err in law in finding that Ms. Kusalik was an employee rather than an independent contractor?

16. The Delegate considered the definitions contained in section 1 of the *Act* for the terms “employee”, “employer” and “work” in arriving at his conclusions. He also outlined the following principles which he considered in his analysis, at page R3 of the Determination:

The Employment Standards Act is remedial and benefits conferring legislation and is, in general to be given broad and liberal interpretation, as are definitions contained within legislation itself.

The question is whether Ms. Kusalik was performing services for Trans Academe or on her own account. The control the employer has over the worker is a factor, along with who provides materials/equipment. Can the worker hire helpers or delegate the work, the degree of financial risk or investment on the part of the individual and opportunity for profit are also considerations. This is not an exhaustive list of factors and there is no set formula for their application. Not any one in and of itself would decide the issue; one must look at the overall relationship of the parties.

17. These factors taken into consideration by the Delegate have been taken from court decisions in a variety of legal contexts.

18. It is important to consider the extent of the jurisdiction of the Tribunal in this case, because it is clear from the language of s. 112 of the *Act* that the Tribunal does not have jurisdiction on appeal to review findings of fact made by the Delegate.

19. The Tribunal has adopted the definition of “error of law” set out by the BC Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, (1998) 62 B.C.L.R. (3d) (B.C.C.A.) in a

number of decisions including: *J.C. Creations Ltd. (c.o.b.) Heavenly Bodies Sport*, BC EST # RD317/03. In the *Gemex* decision, the Court of Appeal outlined the following reviewable types of errors of law:

1. a misinterpretation or misapplication of a section of a statute;
 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. exercising discretion in a manner which is wrong in principle.
20. In *Jane Welch, c.o.b. Windy Willows Farm*, BC EST # D161/05, the Tribunal considered the scope of its jurisdiction with respect to an appeal of a determination in which it was found that a person was an employee, rather than an independent contractor. The Tribunal noted that in order to determine whether a person is an employee or an independent contractor, findings of fact must be made, and then legal tests must be applied to those findings of fact. It is therefore a question of mixed fact and law: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 S.C.C. 33. The matter of whether the correct legal standard or test has been applied is, however, a question of law.
21. Errors of fact may still be reviewable as errors of law, if there is no evidence to support the findings of fact made; or that the Director took a view of the facts which could not reasonably be entertained based on the evidence before the Director. (See: *Britco Structures Ltd.*, BC EST # D260/03; and *Digits Information Technology Services Ltd.*, BC EST # D199/05)
22. I turn now to the nature of the factors which should be considered in the analysis of whether a person is an independent contractor or an employee.
23. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 (S.C.C.), at paras. 47 and 48, the Supreme Court of Canada concluded that there is no one conclusive test that can be applied in every case to determine whether a person is an employee or an independent contractor. Instead:
- ... 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 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.
- 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 circumstance of the case.
24. After considering the above authorities and the analysis of the Delegate, I do not find that the Delegate erred in law by applying an incorrect legal test, and indeed the Appellant does not appear to make this allegation in any event. In reality, the Appellant contends in her submissions the Director erred in the findings of fact against which the legal analysis was applied.
25. In the circumstances, the only basis for attacking the findings of fact made by the Delegate is for the Appellant to show that the Delegate concluded that the Complainant was an employee based on no evidence, or on evidence that provided no rational basis for his finding.

26. In the Determination, the Delegate set out the following evidence which he relied on in support of his finding that the Complainant was an employee, rather than an independent contractor:

The contract, which clearly establishes substantial control by Trans Academe, identifies the clients as clients of Trans Academe, establishes hourly rates of pay, and a compensation structure for sessions and/or cancellation of sessions. The contract stipulates that all moneys received by the tutor, must be turned over to Trans Academe within 24 hours. Missed sessions must be reported immediately and Trans Academe retains discretion with respect to expense reimbursement. The contract states that the tutor is not an employee, rather an independent contractor of Trans Academe.

The emails as supplied by Ms. Balcilek to support her position of Ms. Kusalik's control, I find establishes further control by Trans Academe in collecting funds and/or scheduling sheets and in staying apprised of completed any missed scheduled sessions.

Whether or not it was the intention of both parties to enter into a contractor relationship, considering all of the above, I find carries little weight as the legal tests require an examination of the reality of the relationship.

I find that Trans Academe retained substantial control over Ms. Kusalik and that there was no chance for profit or risk of loss for Ms. Kusalik. Further Ms. Kusalik performed the function of tutoring, an essential part of the business of Trans Academe. Additionally, there was no specific result to be achieved, normally associated with a contractor relationship.

The supply or ownership of materials in this case would be minimal subject to Ms. Kusalik determining what she required to complete the tutoring. Ms. Kusalik was responsible for the expense of travelling to and from the session which would be akin to travelling to and from work, given the nature of the job.

Ms. Kusalik acknowledged that she performed other tutoring with people she started with prior to being employed by Trans Academe or met through other means, however (sic.) was not allowed to operate a business. This is supported by the contract supplied by Trans Academe. The contract states that the Tutor may work as a tutor for competing services during their agreement with Trans Academe however the contract establishes a non competition agreement, prohibiting the tutor from rendering similar services during or after their retention with Trans Academe and establishing a monetary amount in compensation for a breach of this clause. The contract also prohibits assignments to third parties. This further establishes the control that Trans Academe retained.

27. Clearly there was evidence, as set out in the Determination, to support the conclusion of the Delegate on Ms. Kusalik's status as an employee.

28. Section 1 of the *Act* provides the following definitions which were set out by the Delegate in the Determination:

“employee” includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee;

“employer” includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

“work” means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

29. The Tribunal has held that the definitions should be given a broad interpretation in light of the policy objectives of the *Act: On Line Film Services Ltd. v Director of Employment Standards*, BC EST # D319/97; and the common law tests of employment are subordinate to the statutory definitions (*Christopher Sin*, BC EST # D015/96).
30. The Delegate correctly indicated in the Determination that the intention of the parties with respect to the nature of the relationship between them in an employment context is not determinative: *Hantula (c.o.b. Cambie Country Garden)*, BC EST # D277/97. Similarly, the language used by the parties in their contract will also not be determinative. The true nature of the relationship between the contracting parties will be considered in order to ascertain the legal consequences of the agreement: *Kely Trigg*, BC EST # D040/03; *North Crescent Cranberries Ltd.*, BC EST # D236/96; *Doyle v. London Life Insurance Co.* (1984), 68 BCLR 285 (C.A.); and *Three Star International Services Corp.*, BC EST # D333/02.
31. I am satisfied that the Delegate in his analysis considered the factors relevant to the distinction between an employee and an independent contractor, and that he did not err in law in his interpretation of the statutory definitions or in the legal tests he applied to the facts in this case.

New Evidence

32. I turn now to the matter of the new evidence filed with the appeal. New evidence was not one of the grounds on which the appeal was filed. However, new evidence was included by the Appellant with the appeal. The Tribunal has held that it should not take a mechanical approach, and decide only on the grounds of appeal for which the box has been checked on the Appeal Form. I find it appropriate to consider the ground of new evidence, despite the fact that it was not indicated by the Appellant on the Appeal Form.
33. The Appellant submitted with her appeal a copy of the contract signed by the parties, which is dated November 1, 2009. That document had been provided to the Delegate during the investigation, as the Delegate acknowledged in his submission for the appeal. The other documents submitted were copies of e-mail exchanges between Ms. Kusalik and Ms. Balcilek.
34. The Tribunal set out four requirements which must be met before new evidence will be considered on appeal in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. The Appellant has the onus of proving 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 evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - 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.
35. In order to succeed in an appeal on the basis that new evidence has become available, the Appellant must not only show that the new information was not considered by the Delegate. The new information the Appellant seeks to submit must have been unavailable at the time of the investigation. The appeal is not a second opportunity to bring forward the case which should have been presented to the Delegate at the investigation stage.

36. The Tribunal will not consider new evidence in the context of an appeal which could have been provided at the investigation stage (*Kaiser Stables Ltd.*, BC EST # D058/97). The Appellant has not identified any of the evidence as “not available” at the time the Determination was being made. Consequently, the appeal cannot succeed based on the ground of new evidence.
37. It is clear that the Appellant disagrees with findings of fact and conclusions reached by the Delegate. However, the Appellant has failed to meet the onus of proving that an appeal should be allowed based on the grounds set out in section 112 of the *Act*.
38. Both the application for suspension and the appeal are dismissed.

ORDER

39. I order pursuant to Section 115 of the Act that the Determination, dated August 31, 2010, is confirmed.

Carol-Ann Hart
Member
Employment Standards Tribunal