

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Christopher Sin

(“Sin”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE NO.: File No. 95/031

DATE OF HEARING: February 16th, 1996

DATE OF DECISION: February 23rd, 1996

DECISION

APPEARANCES

Christopher Sin **for** on his own behalf
R.M. Carrière **for** The Director of Employment Standards
Peter Roumeliotis **for** on his own behalf

OVERVIEW

This is an appeal brought by Christopher Sin (“Sin”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. CDET 000175 issued by the Director of Employment Standards (the “Director”) on November 23rd, 1995. The Director determined that Sin owed Peter Roumeliotis (“Roumeliotis”) the sum of \$2,507.42 representing unpaid base wages for the period June 1st to June 6th, 1995, vacation pay and commissions earned by Roumeliotis but not paid by Sin.

In bringing this appeal, Sin maintains that Roumeliotis was an independent contractor rather than an employee and that Roumeliotis was to be paid strictly on a commission basis rather than on the basis of a base wage plus commissions as determined by the Director.

The appeal was heard at the Employment Standard Tribunal’s Vancouver office on Friday, February 16th, 1995. At the appeal, I heard testimony from Sin, Roumeliotis and from a witness called on behalf of Roumeliotis, a Mr. Jimmy Charalambidis.

Although the central dispute between the parties arose prior to the enactment of the current Act, the Director did not issue a Determination until after November 1st, 1995; that is, the Determination was issued after the repeal of the former Employment Standards Act. Accordingly, pursuant to section 128(3) of the Act, Roumeliotis’ original complaint, and Sin’s subsequent appeal with respect to the Determination made concerning that complaint, are governed by the provisions of the current Act.

FACTS

While there is some common ground between Sin and Roumeliotis, these two gentlemen part company on the critical issue in this appeal, namely, the terms and conditions under which Roumeliotis was engaged by Sin.

Sin operates a glass insurance business as a proprietor under the firm name Chelwood Glass and has done so since 1992. The business offers a form of glass replacement insurance for,

primarily, retail establishments and other businesses that have storefront offices. Chelwood Glass negotiates an insurance policy and arranges for other subcontractors to repair any glass breakages that occur at their customers' places of business. It is common ground that the parties were introduced to each other by Mr. Jimmy Charalambidis who is a long-standing friend of Roumeliotis and who was a subcontractor for Chelwood Glass. Mr. Charalambidis, who knew that his friend Roumeliotis was looking for a new employment opportunity, and who also knew that Sin was looking to retain someone to help with his business, thought that bringing the two together would prove to be mutually beneficial.

Both Sin and Roumeliotis, however, testified as to quite different terms and conditions of their association. Sin maintained that Roumeliotis was retained as an independent contractor and was to be paid strictly on a commission basis: a 25% commission on business generated from existing Chelwood Glass customers and a 40% commission on business generated from entirely new customers. Sin testified that in the early months of their arrangement (which began on December 1st, 1994), Roumeliotis was to receive a monthly payment of \$1500 which was to be treated as an advance against commissions to be earned. Roumeliotis, for his part, testified that the arrangement with Sin was quite different. Roumeliotis maintains that he was hired as an employee and that he was to receive a 25% commission on business generated from existing Chelwood clients and a 40% commission on any new business that he generated together with a monthly base wage of \$1,500 "clear"; that is, a net \$1,500 payment after taking into account income tax deductions and other statutory remittances for unemployment insurance and the Canada Pension Plan. Roumeliotis also testified that he was to receive in any one month, regardless of actual commission earnings, a maximum of \$2,500.

Mr. Charalambidis was called as a witness by Roumeliotis to corroborate Roumeliotis' version of the terms of his engagement by Sin. Although Mr. Charalambidis was present during several meetings between Sin and Roumeliotis (many of which took place at Mr. Charalambidis' business office), he was not able to offer a clear statement as to the terms of Roumeliotis' engagement by Sin. My note of Mr. Charalambidis' evidence is that he was present when the phrases "25%", "40%" and "\$1,500 clear" were mentioned, but he was not sure as to how these various figures were to be applied in any agreement that was reached between Sin and Roumeliotis. As he put it, "I just remember the numbers".

These issues are further clouded by a lack of adequate, or indeed much of any, documentary records. Roumeliotis did prepare, five or so months after he began his formal association with Sin, a two-page handwritten "Business Agreement" that purported to set out the terms of his engagement by Sin, however Sin refused to sign this document claiming that it did not accurately reflect his understanding of their agreement. Further, at least as at the date of the hearing of this appeal, Sin has not remitted any statutory deductions to Revenue Canada on behalf of Roumeliotis. Nor, apparently, are there any payroll records--Sin always paid Mr. Roumeliotis in cash, with the single exception of a "final" payment by way of a Chelwood Glass cheque dated May 31st, 1995 for \$1,500 (Exhibit 1).

ISSUES TO BE DECIDED

1. Was Roumeliotis engaged as an employee or as an independent contractor?
2. How was Roumeliotis to be compensated for the services he rendered to Sin?

ARGUMENTS OF THE PARTIES

As noted above, Sin takes the position that Roumeliotis was retained as an independent contractor and that he was to be compensated for his services strictly on a commission basis whereas Roumeliotis says (and he is supported in this by the Director's Determination) that he was hired as an employee and was to be paid on a "base salary" plus commission basis.

At the appeal hearing, Sin buttressed his position that Roumeliotis was an independent contractor by noting that:

i) unlike at least one previous "employee" of Chelwood Glass, Roumeliotis was not recorded as an employee for purposes of Revenue Canada records and remittances;

ii) Roumeliotis was free to work as hard as he wished and his earnings were dependent entirely on his own individual efforts;

iii) Roumeliotis was not carefully or closely monitored or directed by Sin and Roumeliotis was not obliged to come to work on a regular and continuing basis; and

iv) Roumeliotis arranged for a telephone pager at his own personal expense.

On the other hand, both Roumeliotis and the Director submit that the relationship between Sin and Roumeliotis was one of employment. Among other things, Roumeliotis and the Director note the following points in support of their position:

i) Sin arranged, at his expense, for business cards to be printed up which refer to Roumeliotis as the "Marketing Director" for Chelwood Glass (Exhibit 2) and this title was commonly used by Sin when he introduced Roumeliotis to existing and potential customers;

ii) Sin did exercise some degree of direction over Roumeliotis, particularly in terms of following up sales leads;

iii) During the period of his relationship with Sin, Roumeliotis exclusively devoted himself to Chelwood Glass and looked to this firm for his livelihood;

iv) Sin was retained to fulfill an integral role in the business by servicing existing customers and by seeking out new customers.

ANALYSIS

While Sin may will have assumed that he retained Roumeliotis as an independent contractor, as a matter of law, I am of the view that the relationship between them was one of employer/employee. It appears to me that Roumeliotis was an employee regardless of which common law test of employment one applies [*i.e.*, both the so-called “four factor test”--*cf. Walden v. Danger Bay Productions Ltd.* (1994) 90 B.C.L.R. (2d) 180 (BCCA)--and the more recently developed “integration test”, otherwise known as the “organization” or “economic dependency” test, suggest that Roumeliotis was an employee]. Further, these two common law tests must be subordinated to the statutory definition of “employee” contained in the Act [*cf. Yellow Cab Ltd. v. Board of Industrial Relations* (1982) 114 D.L.R. (3d) 427 (SCC)]:

1. (1) “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**,
- (c) a person being trained by an employer for the employer’s business...

(emphasis added)

Further, wages are defined in the Act as follows:

1. (1) “wages” includes

- (a) salaries, **commissions** or money paid or payable by an employer to an employee for work,
- (b) money that is **paid or payable by an employer as an incentive** and relates to hours of work, **production** or efficiency...

(emphasis added)

Work is defined in the same section of the Act as follows:

- 1. (1) “work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

Applying these interrelated statutory definitions to the facts at hand, I am driven to the conclusion that Roumeliotis was an employee of Sin and not an independent contractor. Roumeliotis was engaged to assist Sin in servicing existing firm accounts and to expand the business by seeking out new accounts. He was paid, even on Sin’s evidence, on a commission basis and thus received “wages”; the services that he performed were for the ultimate benefit of Sin to whom he reported. There was nothing particularly unusual about Sin’s duties--they were the sort of duties that are regularly and routinely performed by salespeople in any number of

organizations. That is, the work done by Roumeliotis was very much like the sort of work that employees in sales positions typically perform for their employers. Finally, the evidence persuades me that Sin introduced Roumeliotis to existing and potential Chelwood Glass customers, not as an independent contractor, but rather as an employee. Sin did engage independent contractors, such as Mr. Charalambidis who carried on business under the firm name "Bill's Glass", to carry out glass repairs on a subcontract basis, but in these latter cases, these individuals were more clearly identified as being separate and apart from Chelwood Glass.

Having determined that Roumeliotis was an employee, I now turn to the question of the terms and conditions of Roumeliotis' employment contract and the matter of his claim for unpaid wages.

Roumeliotis' unpaid wage claim is particularly problematic in that Roumeliotis never formally resigned his employment, nor was he ever formally terminated by Sin. Indeed, the employment relationship seems to have been abandoned by both parties sometime during the late spring or early summer of 1995. The Employment Standards Officer fixed June 6th, 1995 as the termination date as this was the date that a letter was sent from Roumeliotis' solicitor to Sin seeking an accounting for commissions allegedly owed and threatening an action for "wrongful dismissal". Mr. Sin also testified, on cross-examination, that he understood the solicitor's letter to be a "termination of our relationship". Thus, Mr. Sin tacitly acknowledged that Roumeliotis was "associated" in some way with Chelwood Glass at least until June 6th, 1995. Therefore, in light of this evidence, I cannot say that the Employment Standards Officer was clearly wrong in fixing June 6th, 1995 as the effective termination date, particularly as the tenor of the solicitor's demand letter appears to imply that Roumeliotis was taking the position that he had been constructively, if not actually, dismissed from his employment.

Roumeliotis' unpaid wage claim cannot be determined without first determining the basis upon which he was to be remunerated by Sin. The Employment Standards Officer essentially accepted the evidence of Roumeliotis that he was to be paid on a base wage plus commission basis. The dispute as between the parties is not with respect to the commission percentages, but rather as to whether or not Roumeliotis was to receive a net monthly payment of \$1500 as an advance on commissions to be earned (Sin's position) or as a base wage in addition to any commissions earned, subject to a monthly maximum of \$2,500 (Roumeliotis' position).

According to the Employment Standards Officer, Roumeliotis earned \$1,792.10 in commissions (based on the 25%/40% formula) during his association with Chelwood Glass. Sin, for his part, has not taken issue with that particular calculation. Sin, by his own admission, never provided any formal accounting to Roumeliotis as to the latter's commission earnings although, according to Sin, Roumeliotis' commission earnings were to be set-off against the monthly \$1,500 "advances" that Sin paid to Roumeliotis. Sin also testified that he did not sign the so-called "Business Agreement" when it was presented to him by Roumeliotis, and which sets out a compensation structure consistent with Roumeliotis' position, only because under that "Business Agreement" the commissions Roumeliotis earned on new business were to be paid "indefinitely" so long as Chelwood Glass remained in business. The Chelwood Glass cheque dated May 31st, 1995 made payable to Roumeliotis (Exhibit 1), is in the amount of \$1,500 and was characterized by Sin, during the hearing, as being a "final payment" to Roumeliotis. If, indeed, it was a "final

payment”, then I would have thought that, along with the cheque, Sin would have provided an accounting with respect to commission earnings. Further, if the monthly \$1,500 payments to Roumeliotis were merely “advances” against commissions, on the basis of the commission entitlement calculated by the Employment Standards Officer, rather than Sin being indebted to Roumeliotis, Roumeliotis would have been indebted to Sin.

Accordingly, on the whole of the evidence, I am satisfied, on a balance of probabilities, that the agreement between Sin and Roumeliotis as to the latter’s compensation was as submitted by Roumeliotis, namely, a monthly base wage of \$1,500 “net” together with commissions on a 25%/40% basis.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. CDET 000175 be confirmed in the amount of \$2,507.42.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal

February 23rd. 1996
Date