Employment Standards TRIBUNAL

An appeal

- by -

Provent Technologies Corporation
("Provent")

- 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)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2007A/1

DATE OF DECISION: February 26, 2007

DECISION

SUBMISSIONS

R. John Rogers	on behalf of Provent Technologies Corporation
Mary Walsh	on behalf of the Director of Employment Standards
Hendrik Kamerling	on his own behalf

OVERVIEW

1. This is an appeal by Provent Technologies Corporation ("Provent"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued November 30, 2006.

2. Hendrik Kamerling worked as a Head Technician for Provent, a loss prevention business, from December 1, 2004 until June 30, 2005. Mr. Kamerling filed a complaint alleging that he was entitled to regular wages, overtime wages and vacation pay. Following a mediation in which the parties resolved a number of issues, the sole issue before the delegate was whether Mr. Kamerling was entitled to overtime wages.

3. The Director's delegate held a hearing into the complaint over the course of three days: May 10th, 31st and June 19th, 2006. The employer was represented by Mr. Rogers, Mr. Kamerling represented himself.

4. Following the hearing, the delegate determined that Provent had contravened Sections 18, 40, 45 and 58 of the *Act* in failing to pay Mr. Kamerling overtime wages, and statutory holiday pay and vacation pay on those wages. She concluded that Mr. Kamerling was entitled to wages and interest in the total amount of $10,330.77. The delegate also imposed a $2,000 penalty on Provent for the four contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.

5. Provent contends that the delegate erred in law in failing to consider the purposes of the *Act* set out in section 2 when concluding that the parties had an employer/employee relationship. Provent also argues that the delegate failed to observe the principles of natural justice in awarding vacation pay on the overtime wages and assessing a penalty for Provent's failure to pay vacation pay on those overtime wages when the matter had been settled in mediation.

6. Provent also sought a suspension of the Determination. In light of my reasons, it is not necessary for me to address this application.

7. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practise and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although Provent sought an oral hearing, I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether additional evidence needs to be considered. There is also no need to hear *viva voce* evidence on the issue

of whether there is a denial of natural justice. This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUES

8. Whether the delegate erred in failing to consider the purposes of the Act as set out in section 2 in arriving at the conclusion that Mr. Kamerling was an employee entitled to overtime wages; and

9. Whether the delegate failed to comply with the principles of natural justice in imposing a penalty for Provent's failure to pay vacation pay on disputed overtime wages without notifying Provent that would be an issue.

FACTS AND ARGUMENT

10. The facts relevant to the appeal, briefly, are as follows.

11. Mr. Kamerling installed camera systems at a number of sites. Lisa Rogers, one of Provent's Directors, communicated with Mr. Kamerling about his availability, customer needs, and various jobs. Mr. Kamerling had a good deal of independence carrying out his responsibilities, which included completing pre-wire inspections, surveying the property to assess the number and type of cameras needed, writing proposals, and installing the cameras.

12. Before December 1, 2004, Mr. Kamerling and Provent had a contractual working relationship in which Mr. Kamerling provided his services through his own company and invoiced Provent for his time plus GST. Provent took the position that this contractual relationship continued through to and beyond June, 2005. Mr. Kamerling argued that the relationship changed to one of employee/employer on December 1, 2004.

13. According to the contract, Provent paid Mr. Kamerling $3,000 per month if Kamerling worked between 1 and 100 hours per month, and the parties agreed that Mr. Kamerling worked less than 100 hours in December 2004 and January 2005. There was also no dispute that Mr. Kamerling's volume of work increased in February to June. Mr. Kamerling said that he kept a contemporaneous record of his hours of work in a personal daytimer, and submitted the hours to Provent on a regular basis. He also submitted a breakdown of overtime hours at overtime rates of pay. Mr. Kamerling said that although Provent did not respond to his overtime claims, it did not pay him any amount over $3000.

14. At the hearing, although Provent advanced a number of arguments about the application of the *Act* and whether Mr. Kamerling fell within the exclusions to the overtime provisions, it did not dispute that Mr. Kamerling's hours of work exceeded 100 hours per month over the five month period. Provent took the position that Mr. Kamerling's hours were inflated, and that if he was entitled to wages, he was only entitled to be paid for these hours at the rate of $30 per hour.

15. Following an analysis of the evidence, including that of three witnesses for Mr. Kamerling and three witnesses for Provent, the delegate determined that Mr. Kamerling was an employee. She reviewed the *Act*'s definitions of employer and employee, case authority, common law tests of employer/employee, and concluded that Mr. Kamerling was an employee. She determined that there was, in fact, little evidence to support the theory that Mr. Kamerling was an independent contractor. She noted that he worked for

Provent's customers, performing work normally performed by an employee. She found that Provent was directly responsible for Mr. Kamerling's employment and had control and direction over his work. She noted that during the period Mr. Kamerling performed work under his company, he also performed work for other customers. Provent acknowledged that, after December 1, 2004, there were significant changes in the parties' relationship. The delegate noted that when Provent approached Mr. Kamerling to retain his services, it used employee hire forms and Mr. Kamerling was placed on the employee payroll. It paid him a salary and took statutory deductions. When the relationship ended, Provent issued Mr. Kamerling a T4 slip and a Record of Employment. The delegate placed some weight on a written employment agreement the parties negotiated, but did not sign, noting that it reflected the intentions of the parties.

16. The delegate found that Provent was responsible for instructing and supervising Mr. Kamerling's activities. She noted that Provent provided Mr. Kamerling with key tools and supplies necessary to perform his duties. She found Mr. Kamerling assumed no chance of profit or risk of loss during his relationship, and that he could not delegate the work to anyone else, nor could he hire anyone else to do the job.

17. The delegate also determined that Mr. Kamerling was not exempted from overtime provisions of the *Act* on the basis he was a manager. She analyzed the definition of manager in the *Act*, the types of duties typically performed by a manager and Tribunal jurisprudence, and concluded that there was no evidence Mr. Kamerling was employed in an executive capacity. She also concluded that there was insufficient evidence to establish that his principal employment responsibility was the supervision or direction of human resources or other resources. She found that, at most, Mr. Kamerling was a senior employee.

18. The delegate next analyzed whether Mr. Kamerling was a high technology professional employed at a high technology company under s. 37.8 (1) of the *Regulations*, and thus exempt from the overtime provisions of the *Act*. She determined that Mr. Kamerling was not a high technology professional, and that Provent did not meet the definition of a high technology company set out in the *Act*.

19. The delegate concluded therefore, that Mr. Kamerling was entitled to overtime wages. She rejected Provent's argument that any additional hours found owing to Mr. Kamerling should be paid at the rate of $30 per hour. She determined that such an arrangement would contravene section 4 of the *Act*, as it would constitute an attempt to contract out of the overtime provisions of the *Act*. She determined that Mr. Kamerling was entitled to premium pay for all overtime hours.

20. She reviewed Mr. Kamerling's evidence, including his oral testimony, daytimer and spreadsheets and found that, with the exception of two issues, the evidence was reliable and valid. She also found, in the absence of any employer records, that it was the best evidence available. Although the delegate did not accept Mr. Kamerling's hours in their entirety, she found his evidence to be generally reliable and the best evidence available. She adjusted his claimed hours to reflect certain inconsistencies and reasonableness. The delegate also allowed Mr. Kamerling's claim for travel time, as she considered it both reasonable in the circumstances and for Provent's benefit.

21. The delegate awarded Mr. Kamerling statutory holiday pay as well as annual vacation pay on the overtime wages she determined he was entitled to.

22. Provent contends that the delegate erred in failing to assess the relationship of the parties in light of section 2 of the *Act*, specifically, sections 2(b) (e) and (f). Provent also submits that the delegate failed to

properly interpret and apply the *Machtinger* decision (*Machtinger v. HOJ Industries Ltd.* [1992], 1 S.C.R. 986, (1992), 91 D.L.R. (4th) 491)

23. Provent submits that the issue of vacation pay was resolved in the mediation. It argues that as the parties entered into a settlement agreement on all the identified issues following the mediation, the delegate erred both in awarding Mr. Kamerling additional vacation pay and in imposing a $500 penalty on Mr. Kamerling for its failure to pay that amount. It submits that the delegate failed to observe the principles of natural justice since Provent had no knowledge this would be an issue before the delegate, and had no ability to make representations on the issue.

24. The delegate contends that the appeal is without merit, and seeks to have it dismissed. She contends that Provent has not established either an error of law or that the delegate failed to observe the principles of natural justice. She contends that Provent's appeal represents an attempt to re-argue its case on the merits. The delegate submits that there is nothing in the appeal to suggest that the factual conclusions are unsupported by the record, and says that Provent's submission contains argument based on its view of the evidence, but does not reflect the evidence presented.

25. Further, the delegate submits that, although Provent's subjective sense of fairness is not in accord with the Determination, it has not made out an error of law.

26. Finally, the delegate submits that Provent has misunderstood both the terms and conditions of the Settlement Agreement, and says that the Agreement does not address future vacation pay that may be owed as a result of a finding that Mr. Kamerling was entitled to additional wages.

27. Mr. Kamerling sought to have the Determination upheld, contending that the delegate's analysis was correct.

ANALYSIS

28. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law

(b) the director failed to observe the principles of natural justice in making the determination; or

(c) evidence has become available that was not available at the time the determination was being made

29. The burden of establishing the grounds for an appeal rests with an Appellant. The burden is on Provent to establish, with persuasive and compelling evidence, that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. A disagreement with the result, in and of itself, is not a ground of appeal, nor is an appeal an opportunity to re-argue a case that has been advanced before the delegate.

30. I have concluded that Provent has not demonstrated either an error of law or a denial of natural justice for the following reasons.

Error of Law

31. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

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 be reasonably entertained; and
5. Exercising discretion in a fashion that is wrong in principle

32. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd*., BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.

33. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error.

34. Provent recited a number of "facts" that were not set out in the Determination but submits were "clearly demonstrated by the evidence". The delegate says they are not an accurate reflection of the facts presented at the hearing. If the delegate erred in her factual findings, Provent has the burden of demonstrating that error. It has not done so, and I rely on the delegate's factual findings.

35. Provent continues to assert that the relationship of the parties was one of contractor and customer. Along with re-arguing this point and restating its view of the facts in support of its grounds of appeal, Provent contends that the delegate misinterpreted and misapplied *Machtinger*. It submits that the Supreme Court intended to emphasize the minimum standards provisions of the *Act*, not, as it submits the delegate found, provide Mr. Kamerling with an "undeserved windfall well above any recognized minimum standards". Provent says that the delegate's interpretation failed to consider the objects of section 2 (b) (fairness to the employer), (e) (efficiency and productivity in the workplace), and (f) (assistance to employees in meeting family responsibilities).

36. Provent submits that Mr. Kamerling's compensation package was not unreasonable and met minimum standards, and the delegate's determination that Mr. Kamerling was entitled to an additional $10,330 was unfair to the employer.

37. I am unable to find that the delegate erred. Both *Machtinger* and *Re Rizzo v. Rizzo Shoes* ([1998], 1 S.C.R. 27) found that employment standards legislation was remedial, and an interpretation that extended protections to as many employees as possible was to be favoured over one that did not. The Court emphasized that section 10 of Ontario's *Interpretation Act* provided that all legislation is remedial, and that all legislation shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment and of the object of the Act according to its true intent, meaning and spirit". British Columbia's *Interpretation Act* contains a similar provision. (R.S.B.C. 1996, c. 238, s. 8) In my view, the delegate did not ignore the provisions of section 2, which set out the purposes of the legislation. However, those are broad and general, and where more specific provisions apply, the delegate is bound to apply those. In this case, the delegate considered the *Act*'s specific definitions of employee and employer, as

well as Tribunal jurisprudence and common law tests. I find no error in the delegate's application of the *Act*.

38. As the Tribunal held in *Kopchuk* BC EST #D049/05:

> 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.

39. In *Cove Yachts* (1979) Ltd., BC EST #D421/99, the Tribunal set out the following factors as relevant to determining whether a person is an employee or an independent contractor:

- the actual language of the contract;
- control by the employer over the "what and how" of the work;
- ownership of the means of performing the work (e.g. tools);
- chance of profit/risk of loss;
- remuneration of staff;
- right to delegate;
- the power to discipline, dismiss, and hire;
- the parties' perception of their relationship;
- the intention of the parties;
- the degree of integration between the parties; and
- if the work is a specific task or term

40. The delegate conducted a three day hearing, and heard evidence from Provent and Mr. Kamerling. She also heard oral testimony from three witnesses for Provent, including Provent's President, and considered

the affidavit evidence of four others. She heard oral evidence from three witnesses for Mr. Kamerling. She considered the nature of their relationship in light of the law, including those factors set out above, and Tribunal jurisprudence. Her analysis is contained in a well written decision of over 40 pages. Although Provent continues to assert that the relationship between the parties was one of contractor and customer and in essence re-argues points made before the delegate, it has not demonstrated any legal error in the delegate's analysis.

41. Provent says that the decision was unfair because it awarded Mr. Kamerling a "windfall". However, once the parties' relationship was determined to be one of employee and employer, the delegate had an obligation to determine Mr. Kamerling's wage entitlement according to the provisions of the *Act*, which are minimum standards. Although Provent advanced a number of arguments that Mr. Kamerling was exempt from the overtime provisions of the Act, the delegate rejected those arguments. I find error in her reasoning, and although Provent repeats the arguments it made to the delegate, it advanced no arguments in support of its assertion that she misinterpreted or misapplied a section of the *Act.*

Natural Justice

42. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

43. Provent contends that it had no opportunity to make submissions regarding both the liability for, and the calculation of vacation pay on amounts determined owing by the delegate, and that, in any event, the issue of vacation pay was resolved by way of a mediation.

44. The mediation addressed claims of vacation pay owed on money Provent had already paid Mr. Kamerling. The Settlement Agreement indicates that Provent agreed to pay $840 representing full and final settlement of vacation pay of 4% on $21,000 paid. The hearing was about whether Provent owed Mr. Kamerling any additional amounts for overtime. The delegate concluded that it did. The payment of vacation pay on overtime wages is a statutory obligation. (s. 58 of the *Act*). Even had Provent been given the opportunity to make submissions about its liability in this respect, the award would have been made by operation of law.

45. Section 98 of the *Act* provides that a person in respect of whom the Director makes a determination and imposes a requirement under section 79 is "subject to" a monetary penalty prescribed by the Regulations:

> 1) In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.
>
> (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79.
>
> …

46. Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory. While acknowledging Provent's argument that the imposition of the penalty is unfair, the *Act*

provides for mandatory administrative penalties without any exceptions. (see *Actton Super-Save Gas Stations Ltd.* (BC EST #D067/04) in which the Tribunal found that "The legislation does not recognize fairness considerations as providing exceptions to the mandatory administrative penalty scheme.") The administrative penalty scheme was also considered and upheld by the Tribunal in *Kopchuk*, (*supra*).

47. The appeal is dismissed.

ORDER

48. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated November 30, 2006, be confirmed, together with whatever interest may have accrued since that date.

Carol L. Roberts
Member
Employment Standards Tribunal