Employment Standards TRIBUNAL

An appeal

- by -

Web Reflex Internet Inc.
("Web Reflex")

- 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

TRIBUNAL MEMBER:	Carol L. Roberts
FILE No.:	2004A/215
DATE OF DECISION:	February 18, 2005

BRITISH COLUMBIA

DECISION

SUBMISSIONS

Rick Sousa, Articled Student, Crease Harman & Company	on behalf of Web Reflex
Luke Krayenhoff	on behalf of the Director of Employment Standards
David Cusack	on his own behalf

OVERVIEW

This is an appeal by Web Reflex Internet Inc. ("Web Reflex"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued November 10, 2004.

Three individuals filed complaints with the Director alleging that Web Reflex Internet Inc. ("Web Reflex") failed to pay them regular and overtime wages and vacation pay. The Director's delegate found that the three complainants were employees rather than independent contractors, and that Web Reflex had contravened the Act in failing to pay them wages in the total amount of $4,106.25.

Web Reflex is no longer in business. The appeal is filed by Jason Anson, a Web Reflex director. He contends that the delegate erred in law in concluding that the complainants were employees rather than independent contractors.

ISSUES

1. Whether the delegate erred in law in concluding that the three complainants were employees rather than independent contractors.

2. Whether the delegate failed to observe the principles of natural justice in making the Determination.

FACTS AND ARGUMENT

Web Reflex was an internet based business that offered four services: Web Design, Web Hosting, Web Software and Domain Registration. It went out of business on or about July 4, 2004. Mr. Anson was the owner/operator of Web Reflex.

The three complainants, David Cusack, Corey Anderson and Kevin Boyd are internet programmers who provided their professional services to Web Reflex designing websites.

There is no dispute that all three complainants operated their own web design businesses from their homes. There is also no dispute that they used their own tools and equipment to perform Web Reflex's work. All three invoiced Web Reflex twice a month, with Mr. Cusack and Mr. Anderson's invoices typed

on their company letterhead. The complainants contended that they had not been paid for work performed for Web Reflex during the months of May, June and July, 2004.

The Director's delegate attempted to mediate the complaints. After Mr. Anson was unable to attend the mediation sessions, the complaints were sent for investigation. The delegate unsuccessfully attempted to contact Mr. Anson by telephone. On September 9, 2004, the delegate sent Mr. Anson a letter seeking a response to the complaints. Mr. Anson did not respond to this letter. On September 21, 2004, the delegate issued a preliminary findings letter, to which Mr. Anson sought further details. In a letter dated October 6, 2004, the delegate summarized the documentation provided by the complainants, and referred specifically to several emails and other documents provided by the complainants. Mr. Anson's written submission to this letter, received by the delegate on November 3, 2004, contended that the complainants were independent contractors.

From May 10, 2004 until May 31, 2004, Web Reflex placed an on-line advertisement for web designers on Job Bank Canada (HRDC). The advertisement sought "casual, Part Time leading to Full Time, on Call" web designers, with salary to be negotiated. This job category/classification was apparently one established by HRDC rather than Web Reflex.

Mr. Cusack and Mr. Boyd stated that they applied to Web Reflex for the position of web designer after seeing the HRDC advertisement. Mr. Anderson stated that he applied for a position of web designer or programmer after checking the company's web site, and discovering that it was seeking full time Web Programming, Web Design positions. Mr. Anderson provided copies of the web site job advertisements site, which he said Mr. Anson removed after he received Mr. Anderson's Self Help kit. Mr. Anderson stated that he applied as an employee, not as a subcontractor, since his resume contained no reference to his business apart from indicating that he had previously worked on a contract basis. His letter contains specific references to employment opportunities with Web Reflex and none to his web design business.

Mr. Anderson contended that he was offered a job as a web programmer at a rate of $15.00 per hour, and that, after working "insane" hours and not being paid, he told Mr. Anson that he was quitting. He stated that Mr. Anson asked him to stay and offered him a wage increase to $20 per hour commencing May 25, 2004. Mr. Anderson said that he quit on May 28, 2004 because he had not been paid for the hours he had worked, but stayed on until June 9, 2004 to complete a project at Mr. Anson's request.

Mr. Boyd claimed that he was hired on May 25, 2004 to provide assistance with web programming. He said that he was provided with a company email address, and instructed to use Web Reflex's web mail service for all work-related communication. He stated he was assigned the task of "fine-tune" projects started by other people. He indicated that, on June 9, 2004, he submitted an invoice of his hours of work, which Mr. Anson "disagreed with", and asked him to remove several hours of work. Mr. Boyd stated that Mr. Anson told him that the invoices he was to provide Web Reflex were "at the printers", so he had to make his own. Mr. Boyd stated that he revised his invoice, but that it had not been paid by June 30, 2004, and that he was unable to contact Mr. Anson.

The complainants delivered their final projects to Web Reflex's server. They were also provided with Web Reflex email addresses, and asked to use Web Reflex domain on work-related emails.

Mr. Anson stated that Web Reflex outsourced its web design work to a large base of contractors, and that Web Reflex outsourced tasks to the complainants based on their specific skills. Mr. Anson contended that Mr. Anderson offered his resume in hope of receiving an outsourced project, and that "it was clearly

understood that Mr. Anderson was a contractor rather than an employee". Mr. Anson took the position that the job advertisement posted on the Job Bank was "intended to see what type of programmers was (sic) available in our local market. This would allow us to make a firm analysis of whether we should be contracting out worldwide as normal or hire locally". He submitted it was not clear whether Mr. Boyd and Mr. Cusack actually applied for the HRDC job.

Mr. Anson further submitted that the complainants were not given instructions regarding the time, place and method of how they were to perform their work, were not supervised or controlled, nor subject to any discipline. Further, he stated that the complainants were able to assign the work to others at his own discretion. Mr. Anson advised the delegate that all of the programming work was done at the complainant's places of business, and that none of the complainants were required to attend meetings, apart from the initial introductions. He contended that the complainants offered their services to Web Reflex, and were contracted on a per project basis.

Mr. Anson's evidence was that, before a project was to start, the complainants would provide him with a quote on the hours it would take to complete the project, and thus, the cost, and the complainants invoiced him after the work was completed. He said their invoices were not based on hours worked, but the price quoted at the start of the project, and that they would be paid only if the work was done to the customer's satisfaction. Mr. Anson argued that the complainants assumed a risk of loss, since they were to complete a project within their quoted budget.

He said that the complainants submitted invoices to him twice per month, which he gave to his accountant to pay, along with all the other company invoices.

Mr. Anson also submitted that the work undertaken by the complainants was not normally or previously performed by an employee.

The delegate analyzed the relationship between the parties using common law tests. He determined that, although the complainants used their own tools and equipment, and worked from their own homes, Web Reflex told them how many hours they could bill per project, which ones had priority, and directed on when to submit their bills. The delegate determined that the complainants were to use the Web Reflex server and software, and that these "tools" were owned by Web Reflex.

The delegate further determined that the complainants had no chance of profit or risk of loss, and that they were integrated into Web Reflex's business. He further determined that Web Reflex was responsible for the bidding process, it dealt with the clients, and the complainants had no capital invested in the company. The delegate concluded that the complainants were employees of Web Reflex.

Counsel for Mr. Anson submits that the delegate erred in his application of the common law tests, and in particular, ignored Mr. Anson's submissions. He submits that the delegate ignored or misstated Mr. Anson's evidence with respect to several key factors. Those included the number of hours billed for each project, Mr. Anson's payment system, the instructions on how to design the web sites, and the complainants' use of Web Reflex software.

Counsel also submits that the delegate gave too little weight to the following factors: the complainants worked at home, with their own tools, represented themselves as independent contractors, had the discretion to assign work to others, and undertook work that was normally or previously performed by an employee. He says that Mr. Anson advised the delegate that the complainants never used Web Reflex

software, contrary to the delegate's findings. Further, although he acknowledged that the complainants used Web Reflex's server, it was only to deliver completed projects, not for programming or design work.

Counsel notes that Mr. Anson advised the delegate that the complainants were not required to use Web Reflex email addresses, but could do so at their discretion. He submits that the delegate erred in finding that the complainants were required to do so.

Counsel for Mr. Anson submits that the delegate erred in finding that the complainants were paid hourly rates, since Mr. Anson advised him that the complainants estimated the time it would take to complete a project, and they were paid based on their quotes.

Counsel submits that the delegate ignored or mischaracterized Mr. Anson's evidence with respect to whether the complainants were integrated into the employer's business. Mr. Anson's evidence on that point was that Web Reflex had four major services, one of which was Web Design. Web Design constituted twenty five percent of the business services, and the complainants were three of thirty contractors used by Web Reflex, and worked on less than 10% of the projects. Therefore, counsel argues that the complainants were not significantly integrated into Web Reflex's total business.

Counsel submits that the delegate erred in concluding that the relationship between the parties was open ended with no specific result to achieve. He submits that, in fact, the only relationship was the completion of specific projects.

With respect to the delegate's conclusion under the Economic Reality test, counsel submits that Mr. Anson advised the delegate that the complainants took direction from the clients directly, and in fact, took clients away Web Reflex. Further, Mr. Anson contended that the complainants had their own companies, and were established contractors before they began working for Web Reflex.

The delegate submitted the record before him, and contended that Mr. Anson's submissions were a repeat of submissions made to him, and considered.

In his reply submission, counsel for Mr. Anson contended that much of the record submitted by the delegate was never provided to Mr. Anson, and questions the validity of most of the emails.

Mr. Cusack denied that he bid on any of his projects. He submitted that he was told to make specific changes to projects already started by other employees, and how many hours he had to complete those changes. He further submits that Mr. Anson gave him instruction on site design and specified programming language, and that he was never given full authority to come up with his own designs.

ANALYSIS AND DECISION

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;
>
> …

The burden is on the appellant to discharge the burden of establishing the grounds of appeal. Having reviewed the Determination and the submissions of the parties, I am unable to conclude that the appellant has discharged this burden. I will deal with each ground of appeal separately, beginning with the second ground.

Failure to observe the principles of natural justice

Although not forming part of his original argument on this ground, in his reply submission, Mr. Anson contends that he was not given much of the documentation submitted by the delegate ("the record"), and questions the validity, in particular, of the emails.

The evidence is that Mr. Anson indicated he was unable to attend any of the mediation sessions which the Director attempted to establish to resolve the disputes. The delegate unsuccessfully attempted to contact Mr. Anson by telephone before sending him a letter about the complaints on September 9, 2004. Mr. Anson did not respond to this letter. The delegate then issued preliminary findings on September 21, 2004, to which Mr. Anson sought further details. In a letter dated October 6, 2004, the delegate summarized the documentation provided by the complainants, and referred specifically to several emails. Mr. Anson's reply consisted of a denial of an employer-employee relationship, and responses to the delegate's preliminary findings.

This Tribunal has determined that the delegate has a duty of fairness to put key elements of the complaint to an employer so that the employer can respond. (see, for example, *JC Creations operating as Heavenly Bodies Sport* BC EST #RD317/03 and *BWI Business World* BC EST #D050/96) I find that the delegate's letters provided the essence of the complainants' positions, and that Mr. Anson had full opportunity to respond. Mr. Anson did not challenge the validity of the emails referred to by the delegate, nor did he seek to have copies provided to him. Further, he did not counter or rebut any of the email correspondence with any documentation of his own, despite being requested to do so by the delegate. Mr. Anson's response consisted of two letters, which were, in essence, a denial of an employer-employee relationship. Having failed to participate fully in the investigation process, I am unable to conclude that Mr. Anson was denied natural justice in this respect.

Although the delegate may not have referred specifically to parts of Mr. Anson's submissions, and erred in some of the facts (such as, for example, stating that all the complainants applied for Web Reflex work as a result of the HRDC job advertisement, when only Mr. Cusack and Mr. Boyd did so), I am unable to find that he failed to observe the principles of natural justice. I accept that the delegate considered, and rejected, Mr. Anson's submissions, even though he did not set them out fully in the Determination and expressly say that he was rejecting them.

Error of law

Having reviewed the record and the submission of the parties, I am also unable to conclude that the delegate erred in concluding that the complainants were employees.

Section 1 of the *Act* defines employee to include

(a) a 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....

An employer is defined as including 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 is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."

Remedial and benefits conferring legislation is, in general, to be given broad and liberal interpretation, as are definitions contained within legislation itself. (see s. 8, *Interpretation Act,* R.S.B.C. , *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2nd) 170, and *Machtinger v. HOJ Industries Ltd.* , [1992] 1 S.C.R. 986)

The overriding test is whether the complainants "performed work normally performed by an employee," or "performed work for another." The Tribunal has held that the definition is to be broadly interpreted: (*On Line Film Services Ltd v Director of Employment Standards* BC EST #D 319/97), and the common law tests of employment are subordinate to the statutory definition (*Christopher Sin* BC EST #D015/96).

The first issue to be addressed is whether the parties fell within the statutory definitions of employer and employee. In other words, the issue is whether the complainants “performed work normally performed by an employee”, and whether Mr. Anson had “control or direction” of the complainants, or who was responsible, directly or indirectly, for their employment. Furthermore, regard must be had to whether the complainants performed labour or services for an employer whether in their residence or elsewhere.

The delegate did not turn his mind to these statutory definitions, concentrating instead on the common law tests. Not only are those tests subordinate to the statutory definition, they are fraught with many difficulties, particularly in positions involving advanced skills. (see *Trigg* BC EST #D040/03)

In *671122 Ontario Ltd. V. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 (S.C.C.), the Court concluded that there is no one conclusive test that can be universally applied to determine whether a person is an employee or an independent contractor. Rather,

> ..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. (at paras. 47 and 48)

In order to determine the true nature of a relationship, all of the factors must be examined, with a view to determining "whose business is it?"

Although I find that the delegate erred in not turning his mind to whether the complainants were employees according to the statutory definitions of employee and employer, I have decided that the Determination should be upheld.

Statutory definitions

In my view, all of the documentation provided by the complainants, which was not countered by any rebuttal documentation by Mr. Anson, supports the delegate's conclusion that they were employees rather than independent contractors.

All three complainants applied to advertised positions with Web Reflex, whether those positions were advertised on the HRDC site or Web Reflex's own web site. The evidence is that Web Reflex's web site contained advertisements for web designers and programmers, and the HRDC advertisement sought an employee, albeit a part time, casual employee. None of the advertisements indicated that the positions were for independent contractors. There is no evidence the complainants applied under their business name for contract work as opposed to an employment opportunity. Their letters all indicated a desire for long term employment. Mr. Anson did not supply any documentation to the contrary. Indeed, it appears that he also removed the job opportunities web page from the Web Reflex site once he became aware of the complaints. I conclude that the work performed by the complainants would normally be performed by an employee. I also find that Mr. Anson was responsible for the employment of the complainants

Although there is no dispute that all three complainants worked from their homes using their own tools, the evidence shows that they work they performed was directed by Mr. Anson.

Despite Mr. Anson's denials, the documents provided by the complainants, including emails and letters from Mr. Anson, establish that Mr. Anson directed that they use Web Reflex's software and email domain addresses and that he directed the scope of their work as well as directing the amount of time they were to spend on it. Mr. Anson provided no evidence to the contrary. Furthermore, Mr. Anson provided no evidence that any of the complainants "bid" or provided quotes on any of Web Reflex's projects, contrary to his assertions. There is also no evidence that the complainants billed their time only after a project was completed satisfactorily. Their time was billed on a twice monthly basis according to Mr. Anson's directions.

Therefore, I find that the three complainants fell within the statutory definition of employee and employer, and that they are entitled to the benefits conferred in the Act.

Common law definitions

The evidence is that the complainants worked for Mr. Anson's business rather than their own business. There is no evidence they took a financial risk in Web Reflex or had any opportunity to make a profit. They were paid rates negotiated by Mr. Anson. Mr. Anson provided no evidence to support his contention that the complainants gave quotes to perform work on a particular project. In fact, the evidence provided by the complainants supports their contention that Web Reflex bid on the projects, and Mr. Anson then told them how much time they were to spend on each project. There is no evidence the complainants

were performing work in business on their own account even though two of them submitted invoices on their company letter head.

The documentary evidence shows that Mr. Anson exercised a large degree of control over the timing and scope of the complainants' work, despite his assertions to the contrary. Mr. Anson had full opportunity to provide evidence that would show that the complainants were independent contractors. His only "evidence" consisted of his letters denying an employer-employee relationship. In the face of the evidence of the complainants, I am not persuaded the delegate erred in concluding that such a relationship existed.

The appeal is denied.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated November 10, 2004, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal