Employment Standards TRIBUNAL

An appeal

- by -

Isaak Lê
("Le")

- 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: Robert Groves

FILE No.: 2009A/1

DATE OF DECISION: March 13, 2009

DECISION

OVERVIEW

1. This is an appeal by Isaak Le ("Le") challenging a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards dated November 28, 2008. Mr. Le had filed a complaint under section 74 of the *Employment Standards Act* (the "*Act*") claiming that the University of British Columbia ("UBC") had contravened the *Act* by misrepresenting the availability of a position of employment.

2. The Delegate conducted an investigation and determined that in the circumstances the *Act* did not apply to Mr. Le.

3. I have before me Mr. Le's Appeal Form dated January 3, 2009, an attached submission from Mr. Le dated January 2, 2009, the Determination and the Delegate's Reasons for the Determination, a submission from the Delegate in the form of a letter dated January 19, 2009, the record the Director says was before the Delegate at the time the Determination was made, a submission from counsel for UBC dated January 27, 2009, and a final submission from Mr. Le dated February 11, 2009.

4. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I have concluded that this appeal shall be decided having regard to the written materials I have received, without an oral hearing.

FACTS

5. Following communications between Mr. Le and representatives of UBC in 2007, Mr. Le came to believe that UBC had offered him a position of employment as a participant in a program funded by the Canadian International Development Agency ("CIDA"), the major portion of which would be carried out in Brazil. As Mr. Le lived in Europe when his participation was being discussed, he flew back to Canada to commence the engagement, only to find after his arrival that the Brazilian authorities had changed the nature of the position, with the result that UBC no longer required him.

6. Mr. Le then filed a complaint under section 8 of the *Act*, claiming that UBC had misrepresented the nature of the position. Section 8 reads:

> 8. An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
>
> (a) the availability of a position;
> (b) the type of work;
> (c) the wages;
> (d) the conditions of employment.

7. UBC responded to the complaint on two grounds. First, it submitted that the position offered was not a position of employment, and so the *Act* did not apply to Mr. Le. It referred in support to a Letter of Agreement ("LOA") it forwarded to Mr. Le, which outlined the terms and conditions under which UBC was prepared to see Mr. Le participate in the program.

8. The LOA form provided to the Delegate was a draft, and there is no evidence that a copy of it was ever signed. It stated that UBC's Centre for Human Settlements was implementing a "New Public Consortia" project in Brazil along with Brazilian and Canadian partners, and funding from CIDA. Nowhere in the document was there a reference to the fact that the person to whom UBC was making the offer would be retained as an employee. Instead, the LOA identified him variously as an "Intern", or "Contractor", who would provide "services" and "deliverables" during his sojourn in Brazil for a maximum of twelve months, and regular reports to Centre officials in Vancouver, in return for which he would receive a fixed fee per month "to cover accommodation, meals and incidentals while in the field" following delivery of an invoice, together with reimbursement for expenses, rather than wages and benefits.

9. Clause 7.0 of the LOA set out UBC's intentions relating to Mr. Le's employment status. It stated that the Contractor was to be an independent contractor. Clause 7.0 read as follows:

> **7.0 Independent Contractor:** By mutual agreement, the terms of this Letter of Agreement will be met by the Contractor's provision of services as an independent contractor at arm's length from, and not as an employee of UBC. As such, the Contractor is solely responsible for all matters relating to compliance with statutory and other legal obligations arising from the responsibilities in determining how and where the work set forth in this agreement is to be performed, including matters arising between the Contractor and its employees, if any. Such obligations include but are not limited to: remuneration; discipline; assessment of and withholding for income tax, employment insurance, Workers' Compensation, and Canada Pension Plan; leave, vacation, overtime and any other payments which may be assessed against the Contractor under any statutory authority for performance of this Letter of Agreement.

10. Counsel for UBC submitted to the Delegate that several of the other provisions of the LOA, properly construed, constituted further proof that the position offered to Mr. Le was not a position of employment, particularly in light of the control, integration, economic reality and specific result tests normally considered at common law. More specifically, counsel referred to the fact that the LOA provided, *inter alia*:

- that the Contractor would be fully responsible for health and insurance coverage relating to the work performed;
- that the arrangement was to be on a "non-exclusive basis," which meant that the Contractor was not precluded from entering into other service contracts if he wished;
- that the Contractor could determine how and where the work was to be performed, including, if appropriate, the hiring of his own employees to perform the work.

11. While acknowledging that the position had been offered to him through the Centre at UBC, Mr. Le advised the Delegate that the terms governing it were regulated by CIDA, the funding agency, as part of CIDA's International Youth Internship Program ("IYIP"). In support of his argument that the position UBC offered to him was an employment position, Mr. Le submitted an extract from CIDA's website, which stated that IYIP was an "employment program" providing "employment experience" abroad in order to assist Canadian youth in launching

successful careers. Mr. Le also said this in one of his written submissions delivered to the Delegate:

> This UBC project in which I was hired for employment is regulated by CIDA to help Canadians become employed and this is known by UBC staff. For UBC to suggest that it is anything other than employment is contradictory to its very purpose and their own understanding of the situation. As such I take the position that the outlined facts above establish that this was an employment situation because by its very definition it is a program to help Canadians become employed.

12. Counsel for UBC responded by pointing out to the Delegate that the internship offered to Mr. Le was not, in fact, an IYIP internship, as the IYIP internships that were available had been awarded to other candidates, a fact counsel stated UBC had communicated to Mr. Le. UBC had then offered Mr. Le another internship, funded in part by CIDA outside its IYIP program, and in part internally by UBC under the auspices of the university's New Public Consortia Project. As this latter internship was offered outside the IYIP, the LOA made no reference to that CIDA program. Instead, it stated that the internship was "for the CIDA-funded Project, New Public Consortia for Metropolitan Governance in Brazil." Based on this information, counsel argued that the materials from the CIDA website regarding the IYIP program were of no assistance to the Delegate for the purposes of his deciding whether the position offered to Mr. Le was, in substance, a position of employment under the *Act*.

13. In reply, Mr. Le submitted that the internship he was offered came to him through CIDA, it was a position funded by CIDA, and that CIDA only funded one type of internship, which CIDA clearly stated was for "employment."

14. Second, UBC argued that even if one conceded, which UBC did not, that it was an employment position that was offered, the fact that the work was to be performed almost entirely in Brazil meant that the employment had little or no connection to British Columbia, and so Mr. Le could not be said to be an employee *in* this province for the purposes of his receiving the basic standards of compensation and conditions of employment that section 2(a) of the *Act* identified as one of the purposes of the legislative scheme.

15. Mr. Le argued that the position had a connection to British Columbia that was sufficient to bring the arrangement within the purview of the *Act* because it entailed training and debriefing sessions in the province for periods of a few days at the beginning and end of the term of the engagement, and the time spent in Brazil might only be as little as six of the maximum of twelve months prescribed in the LOA.

16. The Delegate determined that the position offered was not a position of employment. He also determined that there was insufficient connection between the location where the services contemplated were to be performed, and Mr. Le, and the province, to warrant a conclusion that the provisions of the *Act* should apply to the arrangement.

17. In determining that the position was not a position of employment, the Delegate alluded to the definition of "employee" in section 1 of the *Act*. The relevant part of that definition reads:

> "employee" includes
>
> (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

18. The Delegate concluded that Mr. Le's participation in the project in Brazil was not training that would prepare him for work at UBC. He also concluded that the work to be performed by Mr. Le was not work that was normally performed by an employee. On the second point, the Delegate relied heavily on the terms of the LOA, which referred to the position on offer as an internship rather than as a position of regular employment. He also alluded to the fact that the LOA made no reference to the IYIP program, but even if it could be said that the IYIP program applied to the position, the purpose of the program was to provide experience abroad to participants, with the assistance of a sponsor, which would assist them in finding employment once the internship came to an end.

19. When addressing whether the *Act* would apply to the arrangement, if it was considered to be an employment relationship, the Delegate stated that the *Act* contained no provision suggesting that the legislation was intended to apply to employment contracts performed entirely in another jurisdiction, at least where the employee in question was not a resident, had no affiliation with the employer beforehand, and no expectation of employment once the engagement was over. As he concluded that the time to be spent in the province was merely incidental to the major portion of the work that was to be performed extraprovincially, that Mr. Le had no employment relationship with UBC prior to the internship position contemplated in Brazil, and there was no intent that Mr. Le would become an employee of UBC after the internship came to an end, the Delegate decided that the *Act* did not apply to Mr. Le in the circumstances.

ISSUES

20. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

21. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which 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.

22. Section 115(1) of the *Act* should also be noted. It says this:

> 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
> (a) confirm, vary or cancel the determination under appeal, or
> (b) refer the matter back to the director.

23. In his Appeal Form, Mr. Le raises issues relating to sections 112(1)(b) and (c).

24. A challenge to a determination under section 112(1)(b), which alleges that there has been a failure to observe the principles of natural justice, raises a concern that the procedure followed by the Director and his delegates was unfair. The principles of natural justice mandate that a party must have an opportunity to know the case he is required to meet, and an opportunity to be heard in reply. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which

25. It is clear from a review of Mr. Le's submissions on this appeal that he is not alleging that the proceedings before the Delegate were procedurally flawed in the sense that he did not know the case he was required to meet, or that he was deprived of an opportunity to respond. The two prongs of UBC's response to the complaint were clearly set out in the submissions of its counsel delivered to the Delegate, which Mr. Le's correspondence in the record clearly shows must have been forwarded to him for his review and comment. The record further reveals that Mr. Le took full advantage of the opportunity to make submissions in reply prior to the Delegate's making his Determination.

26. I see no merit in Mr. Le's assertion that the Delegate failed to observe the principles of natural justice.

27. The Tribunal's right to allow an appeal based on new evidence under section 112(1)(c) incorporates an obligation to exercise a discretion. The discretion must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation or adjudication of the complaint and prior to the determination being made. In other words, was the evidence really unavailable to the party seeking to tender it? At the same time, even if the evidence was not unavailable in this sense, the Tribunal may nevertheless consider it if the appellant can demonstrate that the evidence is important, there is good reason why the evidence was not presented at first instance, and no serious prejudice will be visited upon the respondent if it is admitted (see *Re Specialty Motor Cars* BC EST #D570/98).

28. In this instance, the evidence I discern Mr. Le wishes to lead on appeal which can be said to be "new" in the sense that it does not appear to have been tendered previously, is Mr. Le's assertion in his reply submission dated February 11, 2009 contradicting statements made during the course of the investigation by counsel for UBC, repeated on appeal, that Mr. Le was informed by representatives of UBC that the position being offered to him in the end was not an IYIP position.

29. Since UBC's submission on this point was clearly set out in the material it delivered to the Delegate, to which Mr. Le responded at length prior to the Determination being made, it cannot be said that Mr. Le's evidence contradicting UBC's position was unavailable to Mr. Le in the sense contemplated by section 112(1)(c). Since it is Mr. Le himself who must have known whether he was informed about the CIDA participation in the project in the way that UBC said he was, it is difficult to understand why he would not have raised the matter with the Delegate in a timely way, and in any event before the Determination was issued. It is also troubling that Mr. Le did not refer to the point in his initial submission delivered to the Tribunal along with his Appeal Form, but only in his final reply submission on the appeal. Mr. Le nowhere provides an explanation for the delay. In the circumstances, I cannot conclude that Mr. Le has made a case for disturbing the Determination on the grounds set out in section 112(1)(c).

30. As I see it, the substantive elements of Mr. Le's challenges to the Determination are described inaccurately on his Appeal Form. They are further explained in his submissions. Mr. Le alleges that the Delegate erred in relying almost exclusively on the terms of the LOA to discern the intent of the parties regarding their planned relationship. Mr. Le says also that the Delegate should have accorded greater weight to the CIDA stipulations when considering the essential nature of that relationship. On the question of the applicability of the *Act* where the work to be performed is to be performed extraprovincially, Mr. Le argues that the Delegate erred in neglecting to find that there was to be a

debriefing session at the end of the project, and that his time in Brazil might be significantly less than the twelve months identified as the maximum period he might participate in the project.

31. In my opinion, Mr. Le's challenges to the Determination are more properly characterized as assertions that the Delegate erred in law in drawing the conclusions he did. It follows that Mr. Le should have stipulated in his Appeal Form that he was bringing his appeal pursuant to section 112(1)(a) of the *Act*. Notwithstanding this, and whether a particular box on the Appeal Form is marked appropriately or not, the Tribunal is permitted to take a large and liberal view of the material delivered by an appellant in order to determine if it raises issues that fall within the listed grounds of appeal set out in section 112(1), so that the appeal may be decided fairly on its merits (see *Triple S Transmission Inc.* BC EST #D141/03).

32. Having said that, I am of the view that Mr. Le has failed to demonstrate that the Delegate made errors of the sort contemplated in section 112(1)(a). For the purposes of deciding this appeal, I need only refer to the issue of whether the position offered by UBC was a position of employment. I need not consider the issue of whether the *Act* is meant to cover Mr. Le in the circumstances of his work pursuant to this particular contract, because that issue would only become important if I were to decide that the Delegate erred in law in finding that the position was an employment position, and I have decided that the Delegate made no such error.

33. Mr. Le argues that the CIDA material made available to him, and to which he responded, characterized the position offered to him as a position of "employment." In Mr. Le's view, this is conclusive of the nature of the relationship, and the Delegate was wrong in law to find otherwise. I cannot accept this proposition.

34. It is trite to say that the weight to be ascribed to evidence is for the trier of fact, in this case the Delegate. Several cases in the Supreme Court of Canada have expressed the view that appellate tribunals possessing the jurisdiction to review errors of law should show deference to the assessment of the evidence by the trier of fact, including his assessment of the weight to be given to the various parts of the evidence tendered (see, for example, *Housen v. Nikolaisen* 2002 SCC 33).

35. In this case, the Delegate relied principally on the terms of the LOA for the purpose of defining the nature of the relationship between Mr. Le and UBC. In my view, it was certainly open to the Delegate to do so, and further, I believe he was correct in deciding to proceed in that manner. There was evidence before the Delegate that the CIDA material on which Mr. Le relied to characterize the position offered as an employment position was inapplicable to the specific offer made to him by UBC. It is also clear that while Mr. Le might have made initial inquiries about work abroad through CIDA, he could be in no doubt that it was UBC, not CIDA, with whom he would be contracting if he was to go to Brazil, especially after he received the LOA. Mr. Le's point is that CIDA's characterization of the relationship between Mr. Le and UBC must govern, because CIDA was a funding source for the project, but he presented no evidence, and certainly no legal authority, demonstrating that this must necessarily be so, either to the Delegate, or on this appeal. The terms of the funding for the project were not explored in detail at any time. In any event, the evidence suggests that they were an issue as between CIDA and UBC, and did not involve Mr. Le, either directly, or at all.

36. On the evidence that was presented to the Delegate concerning the nature of the relationship between UBC and Mr. Le, then, can it be said that the Delegate committed an error of law in determining that it was not an employment position that UBC offered to Mr. Le? Whether a person is an employee or an independent contractor depends on the application of a legal standard to a set of facts. It is therefore a

question of mixed law and fact (see *Housen, supra*). Whether the Delegate applied the correct legal standard to the relevant facts is, however, solely a question of law.

37. A leading authority which discusses the content of the common law tests for determining whether a person is an employee is the decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] SCJ No. 61, where Major J. said this at paragraphs 46-48:

> In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor...
>
> ...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 circumstances of the case.

38. In determining whether an applicable principle of the general law has been misapplied in this case, it is important to recall that the common law tests developed to assist in identifying whether a person is an employee or an independent contractor, while useful in resolving such a question posed in the context of a complaint under the *Act*, are not conclusive. The primary focus of the inquiry is the wording of the *Act*, and in particular the definition of "employee", set out earlier in these reasons, which, it has been said, casts a broader net than that which flows from the application of the common law tests (see *Bero Investments Ltd.* BC EST #D035/06). This is consistent with the following comments made by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* (1992) 91 DLR 4th 491 at 507, in the context of the Ontario legislation, a close cousin to our own:

> ...an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible, is favoured over one that does not.

39. Notwithstanding these statements, which favour a finding of employment in cases of doubt, if one emphasizes the terms of the LOA in determining this question, as the Delegate did, I believe correctly, there is but little to support a conclusion that the proposed position was intended to be an employment position. The services and deliverables the LOA asked Mr. Le to provide were cast in language that was general. They were time limited, and they were non-exclusive. The LOA implied that he might, indeed, hire his own employees to assist in completing them. He was to prepare and deliver regular reports to his contacts in Vancouver, but there is nothing specifically delineated in the LOA which supports a conclusion that his activities on the ground in Brazil would be closely controlled or supervised by anyone. Instead of wages and benefits, he would receive a fixed fee to cover accommodation, meals and incidentals while in the field, and reimbursement for other expenses. He would be expected to provide for his own health and life insurance. While it appears he may have been supplied with certain equipment by UBC in order to perform his services he would be obliged to insure it himself, naming UBC as the beneficiary. Importantly, the LOA referred to the participant as a "Contractor," and clause 7.0 declared in no uncertain language that it was as an independent contractor that UBC intended to retain his services. All of these facts support an inference that had Mr. Le participated in the program he would have been

working largely, if not entirely, on his own account, rather than as an employee integral to the operation of UBC.

40. While the form of a contract, and the terms of art that are contained within it, may not artificially establish the nature of a relationship when the substance of that relationship points to a different legal reality, I am not persuaded that the Delegate misapplied any relevant principle of law in finding that UBC offered Mr. Le a position as an independent contractor, and not as an employee. The reality, I believe, was that Mr. Le was being offered an opportunity to be sponsored, and supported financially, in order to gain valuable experience while doing good work abroad, in the hope that it would prepare him to establish a productive career as an employee thereafter. The position that would have permitted him to prepare himself in that way was not, however, itself a position of employment, so as to bring Mr. Le within the purview of the *Act*.

41. For these reasons, the appeal must be dismissed. In the circumstances, it is unnecessary for me to determine whether the *Act* would have applied to Mr. Le because the work he was being asked to do was to be performed almost entirely outside of British Columbia.

ORDER

42. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated November 28, 2008 be confirmed.

Robert Groves
Member
Employment Standards Tribunal