

An appeal

- by -

Specialist Real Estate Ltd.  
("Specialist")

- 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:** Ian Lawson

**FILE No.:** 2004A/205

**DATE OF DECISION:** February 22, 2005

## DECISION

### SUBMISSIONS

James Swansburg	on behalf of Specialist Real Estate Ltd.
Joe LeBlanc	on behalf of the Director
Leanne Allen	on her own behalf

### OVERVIEW

This is an appeal by Specialist Real Estate Ltd. ("Specialist") pursuant to section 112 of the *Employment Standards Act* ("Act"). The appeal is from Determination ER#122-275 issued by Joe LeBlanc, a delegate of the Director of Employment Standards, on October 20, 2004. The Determination found Specialist liable to pay regular wages, vacation pay, statutory holiday pay and interest to Leanne Allen ("Allen") in the amount of \$1,216.00, together with an administrative penalty of \$1,500.00. Specialist filed an appeal on November 26, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

### FACTS

Specialist is a real estate firm operating in Kimberly, B.C. Allen delivered her resume to Specialist in May, 2004, seeking employment. The parties shortly thereafter had a meeting, the result of which was that Allen was to use her skills as a trained geographer and produce computer mapping material for Specialist to use in its business. Allen did this work and performed other tasks relating to the business, including the creation of a logo, the making of business cards and brochures, and answering the telephone. At the same time, Allen undertook training in the real estate business, learned specialized computer presentation techniques relating to her geographic background, and worked toward being licensed as a real estate agent.

Allen believed she was an employee entitled to be paid a wage; Specialist believed she was a person training to be a licensed real estate agent and was using their premises and educational materials to that end – if she did any work towards a sale, she would be paid a commission. There is no record of the oral evidence heard by the delegate at the complaint hearing on September 7, 2004, and the Determination makes no reference to what took place at the parties' initial meeting (which Allen believed was a regular job interview and which Specialist says was a meeting to discuss whether Allen would join the firm as an agent-trainee on commission). In its submission, Specialist refers to the initial meeting as follows:

When Ms. Allen solicited our company for work, it was explained that the only opportunities available were that of salesperson [*sic*] working as independent contractors on 100% commission.

Ms. Allen would have to become a licenced [*sic*] Realtor to work for our firm.

In her submission, Allen describes the meeting as follows:

I ... took my resume to Specialist (on May 25, 2004) telling Mary Swansburg, who took my resume, that I was a Geographer with much experience in mapping and GIS technologies. I was surprised to get a call from them only 2 days later, asking me to come in for a job interview the next day. I was offered a position with their company on May 28, 2004, and started work the next day (May 29, 2004). Never once during the interview was it mentioned to me that in order to work there I needed to be a Licensed Real Estate Agent... Instead, I was offered a position as a media/mapping person, and I was always under the impression that I was working for them. As a trained Geographer with much work experience with both government and industry, I would never agree to take employment without pay.

Specialist's reply submission contains the following statement: "Even though hourly paid employment was discussed during the first interview, it was dismissed in favour of a commission-based opportunity."

Allen does not appear to disagree that the initial discussion about wages moved to a discussion about being paid on commission. Nothing was put in writing. In any event, the delegate found that on June 27, 2004, Allen approached Specialist about being paid. Specialist gave her \$1,200.00, without statutory deductions, which it said was an advance against future commissions. The parties apparently discussed Allen's remuneration several times in the ensuing weeks, and Allen grew dissatisfied with the notion of receiving money only as an advance against future commissions. Her involvement with Specialist came to an end on July 20, 2004 (when Allen believed she was fired, but Specialist says she was asked to continue her studies toward becoming a licensed realtor elsewhere).

Allen submits that Specialist President James Swansburg was the only licensed realtor in the firm, which had a staff of five. Apparently, the firm operated on a "team" basis, with staff being paid a share of the commission earned on each sale.

## **ARGUMENT**

Specialist's Notice of Appeal seeks to have the Determination cancelled, on the basis that the Director erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made. Specialist submits Allen is excluded from the *Act's* protection, as section 31(m) of the *Employment Standards Regulation* ("*Regulation*") provides that the *Act* does not apply to agents or salesmen licensed under the *Real Estate Act*. Specialist says Allen was invited onto its premises merely to make use of its extensive library and educational resources, with the objective of eventually becoming a licensed agent. Any work she did do for the firm was to be paid on a strict commission basis. Specialist also submits, however, that Allen was not an employee. Specialist refers to a Canada Customs and Revenue Agency document on self-employment and submits as follows:

There were no 'job duties' that she was required to fulfill for the Company. The Company had no control over Ms. Allen; she assumes all risk in anticipation of future profits; she pays all her own expenses; she supplies her own initiative, vehicle, tools and talents; she is free to form business relationships with any independent contractors (Realtors and non-Realtors) to achieve her goals; and all compensation is based 100% on commission from sales.

Specialist also makes the following submission:

The record of the evidence at the meeting was not recorded in its entirety by an independent party. The Delegate gets to collect \$1,500 if he rules in favour of the claimant. The Delegate had to be brought in for the hearing and incurred costs to attend. I see a conflict of interest! All the documentation provided by the Delegate is set up to support his conclusion. The rest of the information has been omitted from his documentation. From the very first contact with the Employment Standards staff, the conversations were biased and threatening.

In response to the latter, Allen submits:

Mr. LeBlanc was completely professional throughout the entire adjudication proceeding. He gave **both** of us equal opportunity to state our case, with no interruptions, asking both of us several times if we wished to add anything or if we had any further questions. He took copious amounts of notes, making sure that he heard both of us correctly, and also asked questions of the speaker if he did not understand what we said. (emphasis in original)

The Director submits, *inter alia*, that Specialist made no argument at the complaint hearing that Allen was an independent contractor instead of an employee, and should not now be allowed to raise that argument.

## ISSUE

Did the delegate err in finding Allen was an employee, not excluded from the *Act* pursuant to section 31(m) of the *Regulation*?

## ANALYSIS

Specialist identifies no new evidence that was not available at the time the Determination was being made, and so that ground of its appeal must be dismissed. I see no merit to its appeal on natural justice grounds, as there is no evidentiary foundation to Specialist's one-sentence submission that the delegate was "biased and threatening." Further, proceedings before the delegate are not recorded in any way and there is no requirement that a recording be made by "an independent party." As to the novel submission that the delegate had some interest in the proceedings by virtue of administrative penalties to be imposed upon Specialist and the delegate's costs to attend the hearing, it is well-known that the Director's delegates are salaried employees who do not stand to benefit in any way by deciding for or against any party.

In my view, the real question in this appeal is whether Allen is an employee who is excluded from the *Act* by section 31(m) of the *Regulation*, which reads:

31. The Act does not apply to an employee who is

...

(m) a person licensed as an agent or salesman under the *Real Estate Act*

...

so long as that person is carrying on the occupation governed by the Act referred to in paragraphs (a) to (p).

An earlier version of this section was considered by the Supreme Court of British Columbia in *Schulz v. N.R.S. Block Bros. Realty Ltd.* (1994), 92 B.C.L.R. (2d) 109. In that wrongful dismissal action, Schulz was licensed as a nominee of the corporate agent under the *Real Estate Act* – he was not an actual licensed agent or salesman. The defendant company argued Schulz should be excluded from the *Employment Standards Act* and its damages-limiting employment contract should govern Schulz’s dismissal because licensed agents and salesmen are excluded by section 31(m) (then section 7(m)) of the *Regulation*. The defendant argued this section of the *Regulation* ought to be interpreted broadly to recognize the realities of the real estate business, whereby a nominee does sometimes act as a licensed agent and in fact a licensed corporate agent could only do business through a licensed nominee. Huddart J. (as she then was) rejected that argument in the following words:

However sensible such an interpretation may appear to someone in the real estate industry, I am of the view that the words used in the Regulations do not permit that broad interpretation. Section 7(m) of the Regulations is very specific: it says that the Act shall not apply “to an employee ... who is a person licensed as an agent or salesman under the Real Estate Act, ... so long as the person is carrying on the occupation governed by the [Act]. The Real Estate Act clearly distinguishes between an agent and its nominee. It provides for different licences for agents, salesmen, and nominees of agents. A nominee may represent an individual or a corporation, although only a corporation must act through a nominee. Had the Executive Council wanted to exempt an employee of an agent who was acting as a nominee, it could have done so. It did not. In these circumstances I cannot find that Mr. Schulz comes within the exemption provided in section 7 of the Regulations.

This passage was expressly approved of by the Court of Appeal in *N.R.S. Block Bros. Realty v. Schulz* (1996), 26 B.C.L.R. (3d) 114.

To my knowledge, the only time this Tribunal has considered section 31(m) of the *Regulation* is in *Re Annable* BC EST #D342/98 (reconsideration refused on other grounds in BC EST #D559/98). In that case, Annable was a licensed real estate agent, but was found not to have been “carrying on” that occupation pursuant to the closing words of section 31(m). As a result, the Tribunal cancelled the Director’s determination that Annable was excluded, because the work Annable actually performed was not related to his occupation as a licensed agent and he was not acting as an agent at the relevant times.

I note that in section 1 of the *Act*, “employee” is defined to include “a person being trained by an employer to do the employer’s business.” However, section 31 of the *Regulation* specifically excludes some trainees from the *Act*: an articulated student under the *Legal Profession Act* (s. 31(c)); an engineer in training (s. 31(f)); and an articulated pupil under the *Land Surveyors Act* (s. 31(h)). Nursing students and students in training to be practical nurses are also excluded from some parts of the *Act* under section 33 of the *Regulation*.

The *Regulation*, however, makes no reference to persons in training to be licensed as agents or salesmen under the *Real Estate Act* (nor, for that matter, does it refer to students training to be architects, chiropractors, dentists, insurance agents, physicians, naturopaths, optometrists, podiatrists, securities dealers, veterinarians and foresters). The *Regulation* is delegated legislation under the *Act* and there may well be good policy reasons for excluding trainees in some occupations and not others. It is not my place to question the wisdom behind these regulatory pronouncements, nor do I accept Specialist’s submission that the real estate world would be shocked that people in training to be real estate agents are not in fact excluded from the *Act*. Section 31(m) of the *Regulation* has clearly been interpreted narrowly by the courts and by this Tribunal, and I see no reason to consider a broader interpretation in this appeal. I

therefore find the delegate made no error in deciding Allen was not excluded from the *Act*'s protection by section 31(m) of the *Regulation*.

As to whether Allen was an employee or an independent contractor, it is well-established in the Tribunal's jurisprudence that an appellant may not lie in the weeds with important evidence before the delegate, and then bring that evidence out on appeal, after an adverse decision by the delegate (see *Tri-West Tractor Ltd.*, BC EST No. D268/96, and *Kaiser Stables Ltd.*, BC EST No. D058/97). While Specialist has no new evidence to adduce here, it asks the Tribunal to find the Determination is in error on an issue it did not raise before the delegate, and respecting which the delegate need not have been concerned. I am satisfied, however, that even had Specialist argued before the delegate that Allen was an independent contractor, the result would have been the same. There seems little doubt the parties understood they were in an employment relationship – the only question was how Allen would be paid. Specialist agrees there was an initial discussion about the payment of an hourly wage. As the delegate noted in the Determination, Allen could not possibly earn commission as a licensed agent, and the only means by which she could earn commission would be as a member of the Specialist "team." If she was in business for herself, it would make no sense for her to be paid only when Specialist accomplished a sale. As such I cannot see how it could successfully be argued by Specialist – whether before the delegate or before the Tribunal – that Allen was in business for herself, in an enterprise unconnected with Specialist's own business. The appeal must therefore be dismissed.

## **ORDER**

Pursuant to section 115(1) of the *Act*, the appeal is dismissed and Determination ER#127 295 issued on October 20, 2004 is confirmed, with interest pursuant to section 88.

---

**Ian Lawson**  
**Member**  
**Employment Standards Tribunal**