

An appeal

- by -

Cathy Greschner

- 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:** Sheldon M. Seigel

**FILE No.:** 2009A/004

**DATE OF DECISION:** March 27, 2009

## DECISION

### SUBMISSIONS

Cathy Greschner	on her own behalf
Raymond Van Empel	on behalf of Van Empel Financial Ltd. coba Pacific Mitsubishi
Joe LeBlanc	on behalf of the Director

### OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by the Employee, of a Determination that was issued on December 17, 2008 by a delegate of the Director (“Director”). The Determination found that the complainant Greschner was an independent contractor doing work outside of the terms of an agreement between a corporation of which Greschner was principal, and Van Empel. Accordingly the Director held that Greschner was not an employee of Van Empel and the *Act* did not apply to her claim.
2. Ms. Greschner submits that the Director erred in law in making the Determination.
3. The Employee seeks to have the matter referred back to the Director for reconsideration.

### ISSUE

4. The issue is whether or not the Director erred in law in coming to the conclusion that either the claimant was not an employee or that the *Act* did not apply.

### ARGUMENT

5. The Appellant submits that she was an employee at the relevant time and in support of that proposition says:
  - Mr. Van Empel had control over her work and hours
  - Mr. Van Empel owned the tools required to do her job
  - She had no chance of profit or risk of loss other than her commission
  - She was not allowed to delegate work to others
  - She worked only for Van Empel
  - She had no written agreement
  - The Director’s decision was based on a contract entered into between Van Empel and another (the Appellant’s husband).

6. In addition, the Appellant seeks to augment her claim by adding statutory holiday pay and vacation pay.
7. The Director provides a comprehensive response to the Appellant's arguments, which response I find to be a re-telling of the methodology he used to reach his conclusion in the Determination.

### **ANALYSIS**

8. A review of the Determination indicates that the Director provided ample opportunity for the parties to argue and present evidence as to the nature of the relationships between Ms. Greschner, Mr. Van Empel, and the various relevant corporate entities. The Director reviewed the *Act* and the question of its applicability. He concluded that in order for the *Act* to apply to Ms. Greschner, and as a result for Ms. Greschner to be entitled to the wages as claimed, Ms. Greschner would have to be an employee (s.76(3)). He found that she was not an employee. I find that this test was the appropriate one and administered by the Director in accordance with applicable standards of reference (the language of the *Act* and appropriate evidentiary considerations).
9. The remaining question is whether or not the Director erred in law in concluding that Ms. Greschner was not an employee. The evidence identified on the face of the Determination is such that I am compelled to agree with the Director. Ms. Greschner was the operating mind of a corporation that had a written contract with Mr. Van Empel, and was also entitled to pay for work outside of the contract. As such it might have been inevitable that one or another of the parties might find the opportunity to confuse their roles in appropriate circumstances. Notwithstanding the potential for confusion, and the unusual nature of the relationships, the Director found that the contractual obligations and working relationships were clearly identifiable by examination of the written contract and the evidence of the parties. The only significant contradictory evidence was the question of whether the relationship between Ms. Greschner and Mr. Van Empel changed at a meeting, the factual existence of which the parties disputed. The Director found that the claimant had not established on the balance of probabilities that the meeting had occurred or that the relationship between the parties had changed to the extent that Ms. Greschner would be entitled to the commissions she was claiming. There is insufficient evidence before me to establish any irregularity with the Director's legal process or findings in that regard.
10. The Appellant's submissions indicate an alternative approach to the question of whether to find a person a contractor or employee, relative to the submissions made for the Determination. An Appeal is not an opportunity to rephrase one's initial claim, and a plea that the Director erred in law is not an acceptable mechanism for so doing. The Appellant failed to persuade me that she has any new argument that would alter the Director's conclusion, or that any of her arguments or evidence already put forth were dismissed in error or considered incorrectly.
11. I find that the Director did not make an error of law. The Appeal fails.

**ORDER**

<sup>12.</sup> Pursuant to section 115 of the *Act*, I confirm the Determination.

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**Sheldon M. Seigel**  
**Member**  
**Employment Standards Tribunal**