Employment Standards TRIBUNAL

An appeal

- by -

Select Introductions Inc.

- 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: Robert Groves

FILE No.: 2005A/8

DATE OF DECISION: April 6, 2005

DECISION

OVERVIEW

This is an appeal by Select Introductions Inc. ("Select") pursuant to s.112 of the *Employment Standards Act* (the *"Act"*) against a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") on December 8, 2004 in favour of one Susan Aspinall ("Aspinall").

Having made a finding in the Determination that Select had contravened Section 18 of the *Act* and Section 46 of the *Employment Standards Regulation* (the *"Regulation"*), the Delegate ordered Select to pay $118.51 in respect of wages and accrued interest, and two administrative penalties for second offences of $2,500.00 each, for a total of $5,118.51.

Select appealed the Determination on January 17, 2005.

On January 25, 2005, the Tribunal received the record which was before the Delegate, and a brief written submission. Select also delivered a submission, dated February 10, 2005, over the signature of one Amanda Sakve ("Sakve").

On March 9, 2005, the Tribunal informed the parties that the appeal would be determined on the basis of the written submissions received.

ISSUES TO BE DECIDED

On its Appeal Form, Select marked, as its ground for appeal, the box stating that evidence had become available that was not available at the time the Determination was made. It is clear from a generous reading of the material submitted by Select on this appeal, however, that its challenge directed at the Determination is not limited to this ground alone.

For reasons which were ably articulated in *Triple S Transmission Inc. o/a Superior Transmissions* BC EST #D141/03, I decline to mechanically adjudicate Select's appeal based solely on the box it checked off on its Appeal Form. Rather, I have inquired into the substance of Select's challenge to the Determination as revealed in the record and submissions before me, to determine what the real grounds for appeal are, and whether those grounds invoke one of the statutory grounds for appeal set out in Section 112. In addition to the ground identified by Select on its Appeal Form, the other available grounds for appeal are a) the director erred in law, and b) the director failed to observe the principles of natural justice in making the Determination.

Having subjected Select's Appeal Form and submissions to this type of review, I have concluded that the following are the issues which must be decided on this appeal:

- has evidence become available that was not available at the time the Determination was being made?

- did the Delegate fail to observe the principles of natural justice when she conducted a hearing of Aspinall's complaint in the absence of a representative of Select?

- did the Delegate err in law in deciding that Aspinall was an "employee" of Select's under the *Act*?

FACTS

The Determination, the Delegate's reasons for making it, and the record submitted by the Delegate for the purposes of this appeal set out the following as relevant facts:

- Select operates a dating service.
- Aspinall, having responded to a job opportunity on the Human Resources Development Canada Job Bank website, attended at Select's premises at 10:00am on February 28, 2003. After a short interview with Sakve, Aspinall was hired to start work immediately as a matchmaker at a pay rate of $7.00 per hour. On that day Aspinall worked until 7:00pm, taking one break to pick up food for co-workers.
- On February 29, 2003 Aspinall worked from 11:00am until 2:00pm and she received a cheque from Sakve for $80.00 in respect of her work the previous day. No taxes were withheld by Select, which made Aspinall uncomfortable.
- On March 3, 2003 Aspinall worked from 11:00am until 7:00pm and took two breaks totalling about twenty minutes to walk Sakve's dog. Sometime that day, someone told Aspinall that until her work improved she would be paid $6.00 per hour. At 7:00pm, when she finished her shift, Aspinall told Sakve's assistant that she was quitting.
- Aspinall received no remuneration in respect of the time she worked on February 29, and March 3, 2003. She filed a complaint under Section 74 of the *Act* on March 24, 2003, alleging that Select had contravened the *Act* by failing to pay regular wages, and more particularly, wages at $10.00 per hour in respect of the eleven hours she had worked on February 29, and March 3, 2003.
- On September 4, 2003 the Employment Standards Branch (the "Branch") received correspondence from Sakve expressed to be in reply to a demand for employment records. Sakve's letter stated that no one who worked for Select was an employee, and that Select kept no employment records.
- The Branch scheduled a hearing of Aspinall's complaint for March 31, 2004, but no proper notice was provided to Aspinall, so a second hearing date was scheduled, this time for November 3, 2004.
- A Notice of Hearing and a Demand for Employer Records were sent to Select's address on September 8, 2004. The Delegate says these materials were successfully delivered on September 15, 2004.
- On October 28, 2004, Sakve sent a note to the Branch requesting an adjournment of the November 3, 2004 hearing, on the basis that she had been served with a contempt application in other proceedings in the Supreme Court of British Columbia returnable on the same day.

- The Delegate telephoned Sakve on October 29, 2004 to request further particulars of the contempt proceedings, and confirmation of same, before consideration would be given to the request for an adjournment. The Delegate states that Sakve said she would contact her lawyer and have the required material forwarded, but no further communication was received. The Delegate further says that on November 1 and 2, 2004, she telephoned Sakve to follow up on her request, but the telephone number was not in service.
- Neither Aspinall nor a representative of Select appeared at the hearing on November 3, 2004. The Delegate attempted to reach both Aspinall and Sakve by telephone, without success, following which she made her Determination.

Sakve asserted the following in her submissions on this appeal:

- She received no notification of the hearing conducted by the Delegate, and was unaware of it.
- She was unaware, and had not seen any evidence supporting an assertion, that Aspinall ever worked for Select.
- She did not know Aspinall.

ANALYSIS

Has evidence become available that was not available at the time the Determination was being made?

Select's Appeal Form gave notice that its ground for appeal was that evidence had become available that was not available at the time the Determination was being made.

While the Select submissions tendered in support of its appeal nowhere state clearly what the "new" evidence is that Select says is now available, I infer from those submissions that it consists of Sakve's statements that she did not know Aspinall, and she was unaware, and had not seen any evidence supporting an assertion, that Aspinall ever worked for Select.

While this evidence may be said to be "new" in the sense that it does not appear to have been presented to the Delegate at the time the Determination was being made, it is not "new" in the sense required by Section 112(1)(c) of the Act, which requires that it be evidence that was not available at that time.

The "new" evidence Select seeks to tender, through Sakve, is clearly evidence of a type that was available to Select at the time the Determination was being made. Sakve held herself out as the representative for Select from as early as September, 2003. The Determination identifies Sakve as the sole director and officer of Select, a statement nowhere disputed by Select on its Appeal Form or in its submissions on appeal. If Aspinall was unknown to Sakve, and if Select wished to assert that there was no evidence Aspinall had ever worked for Select, those were matters which must have been known to Sakve from the moment she became aware of Aspinall's complaint, yet there is no submission from Select which explains why this information was not presented to the Delegate when the Determination was being made.

Select's appeal on this ground is dismissed.

Did the Delegate fail to observe the principles of natural justice when she conducted a hearing of Aspinall's complaint in the absence of a representative of Select?

Select's assertion that the Delegate failed to observe the principles of natural justice arises by inference from its Appeal Form, which states that it did not have an opportunity to respond to the complaint as it was not aware of the date of the hearing, which must mean the hearing conducted by the Delegate on November 3, 2004, as a result of which the Determination in question was made. Further, Sakve's submissions on the appeal state that she was not notified, on behalf of Select, that a hearing had been scheduled, and accordingly she was unaware of the hearing when it occurred.

As was stated by the Tribunal in *Moon Arc Interiors Co. Ltd.* BC EST #D200/04, a challenge based on an alleged failure to observe the principles of natural justice normally gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in the appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence. While the requirements of natural justice permeate the field of administrative law generally, they are also made expressly applicable to investigations conducted pursuant to the provisions of the *Act*. In this regard, the relevant provision is section 77, which stipulates that if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

In the instant case, the Delegate decided that one of the ways Select would be provided with an opportunity to respond to the complaint would be through the mechanism of the hearing scheduled for November 3, 2004. If, then, it were to have been shown that Select was not notified of the date set for the hearing, I would have been disposed to find that the Delegate had failed to provide Select with the opportunity to which it was entitled.

I find, however, that the evidence does not support Select's assertion that it was not notified of the hearing date. There are two reasons which, taken together, have led me to this conclusion.

First, the Delegate states in the Determination that notice of the November 3, 2004 hearing was sent to Select on September 8, 2004. The record provided for the purposes of this appeal encloses a copy of a letter bearing that date from the Branch to Select at its address at 2624 St. John Street in Port Moody, British Columbia, and a Notice of Complaint Hearing returnable November 3, 2004. Both documents are marked "by registered mail". The record also contains a Branch Registered Mail Trace Sheet and Canada Post tracking documentation indicating that these materials were "delivered" on September 15, 2004.

Second, the record also contains a copy of the note from Sakve the Delegate in the Determination states Sakve sent on October 28, 2004 requesting that the November 3, 2004 hearing be re-scheduled, owing to Sakve's having been served with a contempt application in the Supreme Court of British Columbia returnable on the same day. Clearly, Sakve, and therefore Select, could not have felt it necessary to request an adjournment of the November 3, 2004 hearing if they had not been notified that the hearing had been scheduled.

This would appear to be sufficient to dispose of Select's appeal on this ground, but lest there be any misunderstanding on my part as to the true basis for Select's challenge, I must say that I am also persuaded there was no denial of natural justice arising from the Delegate's handling of Select's October 28, 2004 request for an adjournment.

On this point, I must give credence to the statements in the Determination to the effect that following receipt of Sakve's note, the Delegate, on October 29, 2004 telephoned Sakve to request evidence, perhaps in the form of court documentation confirming the conflicting court date, before consideration would be given to the request for an adjournment. The Determination states that Sakve advised she would contact her lawyer to send the required material, but none was received. On November 1 and 2, 2004, the Delegate telephoned Sakve to follow up on the request, but the telephone number was not in service. Further, when Sakve did not appear on November 3, 2004, the Delegate again attempted to make telephone contact with Sakve, but without success. Nowhere in Select's Appeal Form, or in the submissions made supporting it, does Select take any direct issue with any of this evidence.

Finally, notwithstanding that Sakve may have had to be elsewhere on November 3, 2004, no explanation was provided on behalf of Select as to why no one else on behalf of the company could not have attended at the hearing, if for no other reason than to make further representations regarding an adjournment.

In these circumstances, I am of the view that the Delegate was entitled to conclude that Select wished to make no further submissions not only with respect to the adjournment, but also with respect to the merits of the complaint. There was, therefore, no failure by the Delegate to observe the principles of natural justice in declining to adjourn the hearing.

Did the Delegate err in law in deciding that Aspinall was an "employee" of Select's under the Act?

Select takes issue with the Delegate's Determination that Aspinall was its "employee", and therefore entitled to "wages" for the purposes of the *Act*.

The material before me discloses what appear to be two separate bases on which Select claims that Aspinall was not an "employee". The first basis can be said to flow by inference from the following statements of Sakve, contained in her submissions tendered on behalf of Select on this appeal:

> "I do not know this employee."
>
> "I am not aware that she was even employed by Select Introductions."
>
> "I have not seen any evidence such as a letter of employment or a pay stub for this person Sara (sic) Aspinall. I have not seen any evidence that she worked for Select Introductions Inc."
>
> "I have no information, an address, telephone number, resume or any documentation to support her claim that she worked for Select Introductions Inc."

The second flows from Sakve's letter to the Branch, received on September 4, 2003, from which one must infer Select considered all the persons who worked for it to be independent contractors and not employees.

As to the first basis, the material before the Delegate at the time the Determination was made concerning Aspinall's status as an employee in part consisted of the particulars of her being hired, and the work she performed, which formed part of the Self Help Kit she completed in support of her complaint. The record also contains a statement by Aspinall in which she asserts that she forwarded the Kit to Select and tracked the package through Canada Post, which subsequently confirmed that it had been received. Select nowhere denies that it received the particulars of Aspinall's complaint which appears in the Kit.

It is clear that Select received notice of Aspinall's complaint, at least because Sakve wrote a letter to the Branch, received on September 4, 2003, in response to a demand for employment records. That letter stated that Select kept no employment records and that no one who worked for Select was an "employee" for the purposes of the *Act*. Importantly, there was no reference in that letter to the fact that Select might be taking the position that Aspinall never worked for Select, or that she was unknown to Sakve. Further, there is no evidence that Sakve raised these matters with the Delegate in the telephone conversation which occurred between the Delegate and Sakve on October 29, 2004 in respect of Sakve's request for an adjournment. Indeed, it would appear from the record that they were not raised at all until Select filed its Appeal Form and the submissions in support of it.

I decline to give credence to Sakve's statements made on behalf of Select which imply that Aspinall never worked for Select. I am not persuaded that evidence in support of such an assertion was unavailable to Select at the time the Determination was being made. This in itself would be sufficient to dispose of the issue, but I am further supported by the fact that Sakve's statements tendered on the matter in the appeal do not go so far as to deny, categorically, that Aspinall worked for Select. Rather, Sakve merely states that Aspinall is unknown to her, and that there are no documents to support Aspinall's claim that she worked for Select, neither of which facts are necessarily inconsistent with Aspinall's having worked there, particularly as Aspinall only worked for Select for a total of 11 hours, and Select, by its own admission, kept no employment records.

The second basis for Select's challenge involves an analysis of the relevant provisions of the *Act*, insofar as they relate to a determination that a particular individual is an "employee".

The term "employee" is defined broadly in s.1 of the Act, and "includes", *inter alia*, a person "receiving or entitled to wages for work performed for another" and a person "an employer allows, directly or indirectly, to perform work normally performed by an employee".

An "employer" is defined as including a person "who has or had control or direction of an employee", or "who is or was responsible, directly or indirectly, for the employment of an employee".

The term "work" is defined to mean "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere".

Previous decisions of the Tribunal have made it clear that the definition of "employee" is to be broadly interpreted and that the common law tests for employment developed by the courts are subordinate to the definitions contained in the *Act*: *Re Trigg* BC EST #D040/03).

Still, the common law tests are useful by reason of the fact that they delineate the factors which should be examined when considering whether, in the circumstances, an employment relationship has been created. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] SCJ No.61 the Supreme Court of Canada reviewed the several tests which have been developed and concluded that there is no one conclusive test that should be applied in every instance. Instead, the Court said this:

> The central question is whether the person who has 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. What does seem clear, and this is important for the purposes of this appeal, is that the question of whether a person is an employee is one based on an assessment of the relationship between the parties, not on the unilateral intent of one of them: *Re Stirrett (c.o.b. Fortune Financial Corp.)* BC EST #D019/98.

In the instant case, the Delegate considered the evidence weighing on the issue of whether Aspinall was an "employee", and said this, in part:

> To determine the difference between an employer/employee and a contractual relationship, the courts have traditionally considered four factors: control, integration, economic reality, and specific result. Aspinall applied to a job advertisement, and was interviewed by Sakve and offered a job at a set rate of pay. She was directed to start working immediately. Select was a dating service, and Aspinall's job was to match up dates, which was an integral part of Select's business. The perception of the "ordinary man" would be that the relationship was one of an employer/employee. Aspinall did not bear any risk of loss or gain any possibility of profit. Select paid her $10.00 per hour. There was no evidence provided to suggest that Aspinall was working for anyone other than Select. Aspinall personally provided all labour and services at the office of Select and even walked Sakve's dog. If Aspinall were an independent contractor, it should have been for specific work to be performed in a specific period. In this case, there was a verbal contract for Aspinall to work as a matchmaker for an indefinite period of time until Aspinall resigned.

This comprehensive discussion takes into account many of the standard indicia of employment as set out in the authorities. I cannot say that the Delegate erred in her application of any of them.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination dated December 8, 2004 be confirmed.

Robert Groves
Member
Employment Standards Tribunal