

An appeal

- by -

Avante Furniture Manufacturing (1992) Ltd.
("Avante")

- 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

ADJUDICATOR: Cindy J. Lombard

FILE No.: 2000/643

DATE OF HEARING: November 17, 2000

DATE OF DECISION: February 5, 2001

DECISION

APPEARANCES:

For the appellant: Avante Furniture Manufacturing (1992) Ltd.
Kelly Spence, President
James DeWar, Representative
Tony Blasko

The respondent: Ian Lang, appeared on his own behalf.

For the Director: Donna Miller.

OVERVIEW

This is an appeal by the employer, Avante Furniture Manufacturing (1992) Ltd. (“Avante”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards (the “Director”) issued on August 28, 2000 (the “Determination”).

The Determination was issued following a complaint by the former employee, Iain Lang (“Lang”) that he had been terminated without reasonable notice or compensation in lieu of notice.

The Determination found that the respondent, Lang, was an employee of Avante rather than an independent contractor as alleged by Avante and as such had rights afforded by the *Act* and further that Avante had dismissed Lang without cause and without notice or pay in lieu of notice nor had he been paid all vacation pay due in contravention of the *Act*. The Determination found that Lang was due three weeks pay in lieu of notice, vacation pay and interest in the total amount of \$5,463.84 calculated as follows:

3 weeks wages in lieu of notice	\$2,596.16
4% vacation pay on \$2,596.15	\$103.85

Vacation pay:

Total gross earnings		
\$144,434.52 x .04%	\$5,777.38	
Less vacation taken	<u>1,730.77</u>	
	\$4,046.61	<u>\$4,046.61</u>

Total Compensation and vacation pay owing:	\$6,746.61
Less GST paid by employer to Lang	<u>-\$1,543.00</u>

Total due:	\$5,201.61
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ISSUES TO BE DECIDED

- 1) Was Lang an employee of Avante and as such have the benefit of rights under the *Act* or was he an independent contractor in which case the *Act* does not apply;
- 2) If Lang was an employee, did Avante have just cause for dismissing Lang thus releasing Avante from liability to pay compensation in lieu of notice;
- 3) If Lang was an employee, was he due vacation pay;

FACTS and ANALYSIS

Avante manufactures furniture. Commencing November 15, 1996, Lang began working for Avante as a Director of Marketing and sales and ending on December 6, 1999.

The onus is on Avante to show that the Determination was incorrect.

- 1) Was Lang an employee of Avante and as such have the benefits of rights under the *Act* or was he an independent contractor in which case the *Act* does not apply?
 - a) According to Lang

Lang says that he was employed by a competitor of Avante in 1996 when he was approached by Kelly Spence (“Spence”) to work in their business. Because he had some concerns about financial difficulties that his current employer was having, Lang decided to make the change. According to Lang, Spence suggested that because Avante could not match the salary he was earning as an employee at his former position, that he form a company and bill Avante as a contractor in order that he would not have to pay CPP, EI or taxes, and would be entitled to tax breaks that would net him approximately his previous salary.

On October 4, 1996, Spence on behalf of Avante and Lang operating as Creative Venture Marketing signed a memorandum of working agreement whereby Avante:

- 1) Confirmed “the hiring of Iain Lang of Creative Venture Marketing commencing November 15, 1996”;
- 2) Avante agreed to pay an “annual salary” of \$45,000.00 with \$1,730.77 to be paid every two weeks plus medical;
- 3) Expenses were to be paid as detailed in an appendix including all travel costs, mileage and a company car.
- 4) Avante agreed to pay an incentive bonus to Lang which was detailed in an appendix.

Lang was given Avante business cards which read “Iain Lang, Director of Marketing and Sales” and Avante’s Website indicated the same. No reference was made to Creative Venture Marketing.

Lang says that apart from a small job working as a marketing assistant with the local junior “B” hockey team 10 to 20 hours per week in evenings on weekends during the five months prior to his dismissal in December 1999, he did no other contract work.

Lang further says that everyone in the furniture manufacturing business knew him as Lang who worked for Avante. No one knew of Creative Venture Marketing because he held himself out as an employee of Avante not as an independent contractor. Lang says that at no time did Avante request that he go on the employee payroll.

b) According to Avante

Spence on behalf of Avante agrees that its working relationship with Lang commenced on November 15, 1996, on the terms outlined in the working agreement memorandum dated October 4, 1996.

Spence says that after Lang had been with Avante for approximately one year, it was then clear that the relationship would be long-term that he asked Lang to go on the payroll as an employee with the appropriate deductions and remittances being made but that Lang refused. Spence says that such a discussion and refusal occurred on two occasions, one being in late 1997 and the second in late 1998. On the second occasion, Spence says that he showed Lang documentation outlining the definition of an employee.

Spence further says that Tony Blasko (“Blasko”), Avante’s bookkeeper, was concerned that Lang met the definition of employee and should be on the payroll. Mr. Blasko confirmed that this was his opinion and that he conveyed this opinion and the consequences of not remitting to Spence as well as Lang. In the case of Lang, Blasko says that Lang said that he would be responsible for any and all deductions and penalties. Blasko says that these discussions normally took place at Avante’s year end.

Blasko says as well that other employees were paid bi-weekly as was Lang but all others were on the employee payroll.

Section 1 of the *Act* sets out the definition of “employee” and “employer” as follows:

“employee” includes

- (a) a person, including a deceased 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,
- (c) a person being trained by an employer for the employer’s business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall;

“employer” includes 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;

The traditional test used by the Courts to distinguish between an employee/employer relationship and that of an independent contractor has centred on the question of the degree of control exercised by the person to whom the work is being done for over the person doing the work. Important but not all-inclusive factors are:

- 1) Does the employer have the control or direction of the employee in the sense of a traditional master/servant relationship?
- 2) To what extent is the person integrated into the business?
- 3) Was Lang in business for himself or working for Avante who has the chance of profit or loss?
- 4) Who owns the tools?
- 5) Was Lang required to perform general work or to complete a specific job at which time his relationship with Avante was to come to an end.

See, for example, *Re: Castlegar Tax (1988) Ltd.*, (1991) 84D.L.R.(4th), 58B.C.L.R. (2d), 341 (B.C.S.C.) and *Montreal (City) vs Montreal Locomotive Works Ltd.* [1947], D.L.R. 161; 3W.W.R., 748 (P.C.)

In this case, the facts support a finding that Lang was an employee rather than a contractor and as such that relationship is governed by the *Act*.

Avante had control of Lang in the traditional sense of employer/employee. In the last few months of his employment, Lang had one small contract that he performed on his off hours. Otherwise, Lang’s relationship with Avante was exclusive and long-term i.e. three years and was an integral part of the Avante business as indicated, for example, on Lang’s business

card and the Avante website. Lang worked in an office on the Avante premises, not at home, he had a company vehicle and his medical was paid for by Avante.

Spence and the bookkeeper, Blasko, both concluded that Lang was an employee. Spence says that he asked Lang to go on the payroll. Lang denies that such a request was ever made. If in fact Avante was that concerned they should have simply put Lang on the payroll as Spence clearly understood what the consequences to Avante would be if he did not. It appears that Spence on behalf of Avante decided to take that risk. He further affirmed this position in June, 1999, in agreeing to have Avante pay GST to Lang who then remitted it.

2) If Lang was an employee, did Avante have just cause for dismissing Lang thus releasing Avante from liability to pay compensation in lieu of notice?

Avante says that it had just cause to dismiss Lang without notice on the following grounds:

- a) Lang was pursuing other employment opportunities.
- b) Lang made unauthorized use of computer time.
- c) Lang did not provide receipts for a cash advance of \$1,500.00 U.S. funds when he went to Japan on company business.

Section 63(1)(b) of the *Act* provides that after 3 consecutive years of employment, an employee who is dismissed is entitled to three weeks wages in lieu of notice. This liability is deemed to be discharged by section 63(3)(c) if the employee "... is dismissed for just cause."

The burden of proving that the conduct of Lang justifies dismissal is on Avante.

Just cause can include a single act of misconduct if the conduct is willful, deliberate and of such consequence as to repudiate the relationship. In other words, a single act must be very serious. In the absence of such serious misconduct, then an employer may establish just cause by proving:

- a) that reasonable standards of performance have been set and communicated to the employee;
- b) that employee was warned clearly that his or her continued employment was in jeopardy if such standards were not met;
- c) a reasonable period of time was given to the employee to meet such standards; and
- d) the employee did not meet those standards.

With respect to the three grounds of cause for dismissal put forth by Avante, Lang says:

- a) He did not pursue other employment opportunities. The business card of Mr. Bendall, a competitor of Avante's referred to by Spence, Lang says was simply an acquaintance in the industry of which he had many whom he met at trade shows and in the course of doing business. This ground does not support a finding of cause for dismissal.
- b) With respect to use of the internet on the company computers, Lang's evidence that such access was available to all employees as long as it was not abused is credible, as is his evidence that he did not abuse that privilege. In any event, even if there had been unauthorized use, it would not have been grounds for dismissal without any discussion or warning which did not take place here.
- c) The issue of providing receipts for the cash advance of \$1,500.00 U.S. funds is the subject matter of a small claims action brought by Avante against Lang and will be dealt with in that forum. There is no proof of dishonesty as alleged by Avante on the part of Lang.

I uphold the finding of the Delegate of the Director that there was no just cause for dismissal without notice.

3) If Lang was an employee, is he due vacation pay?

Spence says that Lang had the following vacation days during the period of his employment:

1996	December 23 to January 6, 1997	8 days
1997	December 25 to January 5, 1998	5 days
1998	December 28 to December 31, 1998	4 days
1999	Christmas period	10 days
	July 1999	2 days
	August 1999	5 days
	October 1999	<u>3 days</u>
		37 days

Lang says that he took just ten days, namely,

July 1999	2 days
August 1999	5 days
October 1999	<u>3 days</u>
	10 days

Lang says and I accept his evidence as credible that the manufacturing facility was closed between Christmas and New Years in each year and any time off during those periods was not vacation time.

For the foregoing reasons, the appellant Avante has not discharged its onus that the Determination was wrong on the issue of vacation pay.

On a further point raised by Lang that the GST paid to him by Avante should not have been deducted, I have not dealt with that issue as Lang did not appeal the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination with respect to Lang be confirmed as issued in the amount of \$5,201.61 plus whatever further interest may have accrued pursuant to Section 88 of the *Act* since the date of its issue.

CINDY J LOMBARD

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal