Employment Standards TRIBUNAL

An appeal

- by -

State of the Art Bookkeeping/Accounting Ltd.

- 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: Yuki Matsuno

FILE No.: 2009A/023

DATE OF DECISION: May 22, 2009

DECISION

SUBMISSIONS

Klaus Ehlers	on behalf of State of the Art Bookkeeping/Accounting Ltd.
Rebecca Chapman	on her own behalf
Andres Barker	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), State of the Art Bookkeeping/Accounting Ltd. (the "Appellant") appeals a Determination of the Director of Employment Standards (the "Director") issued January 26, 2009 (the "Determination"). The Determination arose from a complaint filed by Rebecca Chapman with the Employment Standards Branch on September 25, 2008.

2. The main issue in the Determination was whether Ms. Chapman was an employee of the Appellant or an independent contractor. A delegate of the Director (the "Delegate") found she was an employee and consequently determined that the Appellant had contravened a number of provisions of the *Act*. The Delegate found that the Appellant owed Ms. Chapman wages under section 18; overtime under section 40; annual vacation pay under section 58; compensation for length of service under section 63; and resulting accrued interest under section 88 of the *Act*. The Delegate calculated the total amount of wages payable to the Respondent to be $2,116.82. The Delegate also imposed two administrative penalties of $500.00 each on the Employer for contravening sections 17 and 18 of the *Act*, as prescribed by section 29 of the *Employment Standards Regulation* (the "*Regulation*"). The Determination found no merit in the Respondent's claim of a $500 signing bonus. The total amount payable by the Appellant was $3,116.82.

3. In its appeal form, the Appellant appeals the Determination on the basis that evidence has become available that was not available at the time the Determination was being made. I have reviewed the Appellant's submissions and understand them to include information and argument that are relevant to the other two appeal grounds available under section 112, namely error of law and breach of the principles of natural justice. Although the Employee did not check off these grounds of appeal on his appeal form, I will in the circumstances proceed to consider their merits. The Tribunal should take a large and liberal view of the appellant's explanation as to why a determination should be cancelled, varied or referred back to the Director and should not take a mechanical approach to appeals relying solely on the grounds of appeal that are indicated by the appellant on the appeal form: *Triple S. Transmission Inc.*, BC EST #D141/03.

4. A finding of credibility is not essential to the disposition of this appeal and no *viva voce* evidence is otherwise required. As a result, I will decide this appeal solely on the basis of the parties' written submissions, as well as the s. 112(5) Record.

THE DETERMINATION

5. The Delegate conducted a hearing on December 17, 2008 into Ms. Chapman's complaint which was attended by Ms. Chapman, on her own behalf, and Natalie Stewart, on behalf of the Appellant. Before the hearing, he had received documents that pertained to the dispute from both parties. In the Determination, the Delegate noted that he had considered all of the evidence before him; however, he noted that not all of the documents

submitted by the Appellant were spoken to by Ms. Stewart, the Appellant's representative, at the hearing, in spite of the Delegate expressly affording Ms. Stewart the opportunity to discuss each document.

6. The Delegate then went on to examine the governing statute. Along with the provisions found in section 2 (purposes of the *Act*) and section 4 (no waiver of minimum employment standards), he set out the definitions of "employer" and "employee" as written in Section 1 of the *Act*:

> **"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;

7. The Delegate also noted the following established principles to be used in interpreting the *Act*:

- The definitions of the *Act* must be given a broad and liberal interpretation.
- The interpretation of the *Act* must take the purposes of the *Act* into account.
- The basic purpose of the *Act* is the protection of employees through minimum standards of employment.
- An interpretation of a definition in the *Act* that extends protection to employees is to be preferred over an interpretation that does not.

8. The Delegate then proceeded to apply the definitions of "employee" and "employer" to the evidence. Both Ms. Chapman and Ms. Stewart agreed that the work done by Ms. Chapman was identical to the work done by an employee of the Appellant. The only difference in how these two performed their work was that Ms. Chapman was permitted to "construct her own hours provided she completed the work". Based on this evidence, he found that Ms. Chapman was performing work normally performed by an employee.

9. The Delegate also found that the Appellant exercised a "fair degree" of control over Ms. Chapman's work, based on the following evidence:

- Ms. Chapman was obliged to perform her accounting duties at the Appellant's office;
- Her presence in the office was recorded by her use of a time clock;

- She was hired through an advertisement placed by the Appellant;
- She was not permitted to subcontract her work, as the work had to be performed at the Appellant's office.

10. The Delegate found that the only "compelling" evidence militating against the Appellant having significant control over her work is that she had latitude over the hours of work she kept, provided the job was completed. The Appellant argued that a Canadian Revenue Agency (CRA) ruling that Ms. Chapman was a contractor was persuasive; however, the Delegate followed Tribunal jurisprudence and found that the CRA ruling had no bearing on the question before him.

11. The Delegate found, after considering the evidence in light of the statutory provisions, that Ms. Chapman was an employee of the Appellant and therefore was entitled to the minimum standards of employment found in the *Act*.

ISSUE

12. Should the Tribunal consider the new evidence that the Employee seeks to adduce? Did the Delegate fail to follow the principles of natural justice or err in law in making the Determination?

ARGUMENT AND ANALYSIS

The Appellant's Submissions

13. The Appellant's submissions included numerous arguments and accompanying documents. Many of the submissions take objection to findings of fact made by the Delegate and appear to encourage the Tribunal to make findings on the merits of the case, which is outside the Tribunal's jurisdiction. I have reviewed all of the submissions and have discussed below only those that are relevant to the issues raised in this appeal.

New Evidence

14. The Appellant indicates on the appeal form that evidence has become available that was not available at the time the Determination was being made. In order for an appeal to succeed on the ground that new evidence has become available, the Appellant must establish that all of the following four conditions have been met before the evidence will be considered:

1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

(*Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BCEST #D171/03).

15. The Appellant's submissions do not expressly identify what the "new evidence" is. From my review of the submissions, it appears that there are several documents that may be considered to be "new evidence": (1) an amended T4A issued by the Appellant to Ms. Chapman, with accompanying letters dated March 15 and 18, 2009; (2) a letter from a current subcontractor of the Appellant dated April 17, 2009, describing her work situation as that of a contractor and not an employee; (3) a letter dated April 17, 2009 from the Appellant to the local Member of the Legislative Assembly (MLA); and (4) a letter from the Canada Revenue Agency dated March 6, 2009 (the "CRA letter").

16. Applying the test above, the first three documents can immediately be excluded from consideration because they are not relevant to a material issue arising from the complaint. In addition, information from another subcontractor of the Appellant could have been presented to the Delegate prior to the Determination being made.

17. The CRA letter, from the Appeals Division of the Canada Revenue Agency, deserves further comment. The letter outlines the Appeals Division's refusal of Ms. Chapman's appeal of a previous CRA decision. In that previous decision, the CRA determined that Ms. Chapman's work with the Appellant between April 10, 2008 and July 10, 2008 was not pensionable or insurable because she was engaged under a contract for service and was not an employee. The Appellant urges the Tribunal to follow the CRA ruling and find Ms. Chapman to be a contractor. The Delegate argues in response that since CRA rulings have no bearing on proceedings under the *Act*, the CRA letter would not have led the Delegate to a conclusion different from the one he reached.

18. The CRA letter meets the first and third conditions listed in *Bruce Davies* above: it came into existence after the Determination was made and therefore could not have been presented to the Director beforehand; further, it is credible. However, the CRA Ruling does not meet the second and fourth conditions, for related reasons. The Appellant puts forward the CRA letter for the purpose of showing that Ms. Chapman is not an employee entitled to the protection of the *Act* but rather is an independent contractor. However, it must be noted that the CRA letter is issued under a completely different statutory regime - federal Employment Insurance and Canada Pension legislation. In the absence of any evidence of its relevance to the question of whether Ms. Chapman is an employee under the *Act*, I find that the CRA letter is not relevant to any material issue arising from the complaint. The CRA letter has little probative value for similar reasons; I agree with the Delegate that the CRA decision that Ms. Chapman was not an employee for the purposes of federal Employment Insurance and Canada Pension legislation would not have led the Delegate to a different conclusion on the material issue, i.e. Ms. Chapman's status under the *Act*. I conclude that I cannot consider the CRA letter.

Failure to Observe the Principles of Natural Justice

19. The Appellant's submissions regarding the circumstances around their representation at the hearing seem to suggest that the Delegate failed to observe the principles of natural justice. The Appellant says that Margit Ehlers, who appears to be a principal of the Appellant, was out of town on the day of the hearing "due to circumstances beyond our control"; the Appellant's representative Ms. Stewart who actually attended the meeting had limited knowledge of the circumstances and had recorded the wrong date for the hearing; and Ms. Stewart felt pressured by the Delegate and Ms. Chapman to participate in the meeting via telephone. There is some suggestion that the Delegate should have adjourned the meeting given the circumstances.

20. The Delegate in his submissions points out that Ms. Ehlers could have remedied her lack of availability on the day of the hearing by requesting an adjournment or permission to attend by telephone. He says that he was aware that Ms. Stewart had mistaken the date of the hearing but she made no request for an adjournment

and there was no indication that she was not prepared to proceed. He says that he did not exert any undue influence on Ms. Stewart, who had knowledge of matter at issue, presented evidence and argument, and cross-examined Ms. Chapman. He further says that it was not incumbent on the Director's delegate to ask parties who appear and are ready to proceed whether or not an adjournment is appropriate. The Delegate says that Ms. Ehlers, in the face of her inability to attend the meeting, chose to delegate the matter to others, and that she cannot now seek to make her own submissions directly to the Tribunal.

21. In order to successfully appeal on this ground of failure to observe the principles of natural justice, a person must prove a procedural defect, amounting to unfairness, in how the Director made the Determination. Such procedural defects include failing to inform a person of the case against him or her and not allowing a person an opportunity to respond to a complaint. In this case, there is no indication of any unfairness in the procedures followed by the Delegate. Both parties were aware of the case against them and both parties had opportunities to submit information to the Delegate for his consideration. They were both able to appear before the Delegate in a hearing, present their information, and cross-examine the other party. The option for seeking an adjournment of the proceedings was available to both parties but was not exercised by either. Further, the choice of a representative to attend on behalf of a corporate party is entirely in the control of the corporate party. In this case, that choice was exercised by the Appellant and as a result, Ms. Stewart appeared at the hearing on its behalf. I find that there was no failure to observe the principles of natural justice in this case.

Error of Law

22. Following its decision in *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal uses the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia* (Assessor of Area #12 – Coquitlam), [1988] B.CJ. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act*;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle. (In the Employment Standards context, this may also be expressed as exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).

23. The Appellant's submissions suggest two possible errors of law, which I will address in turn below.

24. Employee or Independent Contractor: An error in law by the Delegate with respect to his finding that Ms. Chapman was an employee would be reviewable by the Tribunal. Applying the relevant portions of the definition of error of law found in *Britco*, above, I find:

1. The Delegate correctly applied and interpreted the relevant sections of the *Act*, particularly the definitions of "employee" and "employer", to the evidence before him. The Tribunal has held that the overriding test to determine whether a person is an employee under the *Act* is found in the statutory definitions, i.e. whether a person "performed work normally performed by an employee" or "performed work for another": *Kelsey Trigg*, BC EST #D040/03; *Kopchuk,* BC EST #D049/05.

2. The Delegate correctly set out the established principles on how a decision maker should approach the provisions of the *Act*, principles which have been expressed by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986 and which are enshrined in section 8 of the *Interpretation Act*, R.S.B.C. 1996, Ch. 238:

    8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

3. The issue of whether a person is an employee or an independent contractor is a question of mixed fact and law; as a result, it is open to the Tribunal to find an error under points three and four in *Britco*, above. In other words, it would be an error of law if the Delegate, in finding that Ms. Chapman was an employee, acted without any evidence, or acted on a view of the facts which could not reasonably be entertained. However, that is not the case here. The Delegate's findings that Ms. Chapman performed work that is normally performed by an employee and that the Appellant had control over Ms. Chapman's work were based on evidence that was before him and were reasonable findings in light of the evidence.

25. Inclusion of the Goods and Services Tax (GST) in Calculation of Wages Owing: The Appellant notes in its submissions that the calculation in the Determination of wages owing to Ms. Chapman included GST, and opines that this is incorrect. In his submissions, the Delegate states that GST in this case was not part of the agreed upon regular wage and therefore is not payable under the definition of wages in the *Act*. Therefore, GST was not included in calculating wages owing to Ms. Chapman, with one small exception: for part of the calculation of vacation pay, the delegate based his calculations on the total amount of money, including GST, that had already been paid by the Appellant to Ms. Chapman.

26. I agree that amounts paid by the Appellant as GST are not included in the definition of "wages" in the *Act,* since those amounts are not "salaries, commissions or money, paid or payable by an employer to an employee for work" and do not otherwise fall under the definition. Further, I find that it was an error of law for the Delegate to calculate the amount of vacation pay based, in part, on amounts already paid by the Appellant to Ms. Chapman as GST. These monies are subject to the *Excise Tax Act*, R.S. 1985, c. E-15, which is the federal legislation that governs the Goods and Services Tax. Any matter concerning monies paid as GST is governed by the *Excise Tax Act* and is beyond the jurisdiction of this *Act*. Therefore, amounts paid as GST should not be included in the calculation of wages under the *Act*.

27. The Delegate in his submissions addressed the possibility of this outcome and recalculated the amount of vacation pay based on an amount that excludes all amounts paid as GST. Taking into account the resultant adjustments to the amount of accrued interest, the Delegates submits that the Determination should be varied in the amount of $10.13; the adjusted total payable to Ms. Chapman would then be $2106.69. There is no effect on the amount owing for the administrative penalties imposed under the *Regulation*.

DISPOSITION OF APPEAL

28. The appeal succeeds in part.

ORDER

29. Pursuant to Section 115 of the *Act*, I order that the Determination dated January 26, 2009 be varied to reduce the amount of wages payable to Ms. Chapman by the amount of $10.13. I confirm the Determination in the varied amount of $3106.69 plus any interest that has accrued under Section 88 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal