Employment Standards TRIBUNAL

An appeal

- by -

Old Dutch Foods Ltd.
("Old Dutch")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2009A/035

DATE OF DECISION: June 4, 2009

DECISION

SUBMISSIONS

Sheila M. Tucker & Maggie Campbell	on behalf of Old Dutch Foods Ltd.
Simon Kent	on behalf of Tim G. Kellahan
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. Old Dutch Foods Ltd. ("Old Dutch") appeals, pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*"), a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on February 11, 2009 ordering Old Dutch to pay Tim G. Kellahan ("Kellahan") the sum of $17,782.30 on account of unpaid wages and section 88 interest (the "Determination"). By way of the Determination, Old Dutch was also ordered to pay two separate $500 monetary penalties (see *ESA*, section 98) and thus the total amount payable under the Determination is $18,782.30. The Determination was issued following an oral hearing held on December 18, 2008 that was attended by both parties and their respective legal counsel.

2. I am adjudicating this appeal based solely on the parties' written submissions and, in that regard, I have before me written submissions filed on behalf of Old Dutch (dated March 20 and May 1, 2009), Mr. Kellahan (dated April 16, 2009) and the Director of Employment Standards (dated April 14 and 22, 2009). I also have before me the delegate's "Reasons for the Determination" as well as the section 112(5) record that was before the delegate when she was making the Determination. I note that although Old Dutch, in its appeal documents, asked for "an oral hearing in respect of its appeal", it did not provide any particulars as to why an oral hearing was necessary. The written submissions are extensive and, in my view, an oral hearing is not required in order to fairly adjudicate this appeal.

ISSUE

3. Old Dutch appeals the Determination on the grounds that: i) the delegate erred in law (*ESA*, section 112(1)(a)), and ii) the delegate failed to observe the principles of natural justice in making the Determination (section 112(1)(b)). Old Dutch seeks an order cancelling the Determination, or alternatively, an order varying the Determination or referring the matter back to the Director. In broad terms, Old Dutch says that the delegate should have granted its pre-hearing application for production of certain documents and, in any event, erred in determining that Mr. Kellahan was an "employee" under the *ESA* (Old Dutch says he was an independent contractor). Finally, Old Dutch says that even if Mr. Kellahan was an employee for purposes of the *ESA*, the delegate incorrectly calculated his unpaid wage entitlement.

THE DETERMINATION

4. Old Dutch manufactures and distributes snack foods such as potato chips and Mr. Kellahan delivers the company's products to various retail grocery outlets. Mr. Kellahan's exclusive distribution territory included the municipalities of Coquitlam, Port Coquitlam and Port Moody (all east of Vancouver). Mr. Kellahan's relationship with Old Dutch was governed by a "distributor" agreement the terms of which were partly written but primarily oral. As I understand the situation, Mr. Kellahan was originally hired as a relief driver for Old Dutch in July 1991 – in essence, he covered the routes of other drivers while they were away on

vacation or otherwise absent. The parties seemingly agree that this was an employment relationship. In January 1992 the parties entered into a separate agreement, which appears to have been largely an oral agreement, whereby Mr. Kellahan became an Old Dutch "Distributor"; as such, he would receive commission based compensation (based on gross sales within a designated exclusive geographic territory) and was required to acquire (by purchase or lease) and maintain his own delivery truck. This arrangement has continued since January 1992 and during these years Mr. Kellahan has apparently filed income tax returns declaring himself to be a self-employed businessperson.

5. On April 1, 2008 Mr. Kellahan filed an unpaid wage complaint claiming that he was not an independent contractor but, rather, an "employee" as defined in section 1 of the *ESA*. This complaint was the subject of a complaint hearing before the delegate on December 18, 2008 that, in turn, resulted in the February 11, 2009 Determination that is now before me in this appeal.

6. The delegate made several findings. First, she concluded that the relationship between the parties was an employment relationship subject to the provisions of the *ESA*. Second, she concluded that Mr. Kellahan's compensation was based entirely on a commission arrangement (varying percentages of gross sales, adjusted for product returns, were paid by Old Dutch to Mr. Kellahan) and that he had been paid for all hours worked including time spent loading his truck at Old Dutch's warehouse.

7. However, the delegate also concluded that certain aspects of the commission payment protocol contravened sections 21 and 22 of the *ESA* (the permitted wage deductions and wage assignment provisions). The delegate concluded at pages 22 – 23 of her reasons:

> Based on the evidence, I am satisfied the express terms of Mr. Kellahan's oral commission agreement included 1) that specific commission rates were applied to completed sales, 2) sale completion was subject to the Old Dutch return policy and 3) an agreement allowing commission overpayments to be deducted from those commissions which were paid. Consequently, I accept Mr. Kellahan was paid in accordance with the wage agreement between himself and Old Dutch…
>
> However, Old Dutch's practice of deducting overpaid commissions from Mr. Kellahan's wages without his written consent or authorization is more problematic. Section 21(1) of the Act prohibits an employer from directly or indirectly withholding, deducting or requiring payment of all or part of an employee's wages for any purpose, unless in accordance with section 22(4), written authorisation for such a deduction is made by the employee…
>
> As set out above, overpayments, even for wages deemed not earned or those paid in error, cannot be unilaterally recovered by the employer. In accordance with their policy and practice, the return of stale or damaged Old Dutch product distributed by Mr. Kellahan effectively reversed the sale upon which commissions had previously been paid to him. Consequently, when product was returned, Old Dutch recovered those specific commissions from Mr. Kellahan's wages. However, in order to ensure that recovery process was in compliance with the Act, Old Dutch needed to have Mr. Kellahan's written consent – which they did not – in order to make the deductions. As they failed to do this, I find Old Dutch's deduction of commission overpayments from wages earned by Mr. Kellahan is in contravention of section 21 of the Act.

8. The delegate awarded Mr. Kellahan $9,779.25 on account of "gross commissions recovered for stale and damaged product returns" (delegate's reasons, page 24). I should add, however, that in her submissions to the Tribunal, the delegate appears to concede that an error was made in calculating Mr. Kellahan's entitlement on this account and that the recoverable amount should be $1,635.67 rather than $9,779.25.

9. The delegate also awarded Mr. Kellahan compensation under section 21(2) of the *ESA*, a provision that prohibits employers from passing on business costs to their employees. Monies paid by employees in contravention of section 21(2) are deemed to be recoverable "wages" under the *ESA* (section 21(3)). Pursuant to the terms of his distributor agreement, Mr. Kellahan was required to acquire and maintain a delivery truck. The delegate held that Mr. Kellahan was entitled to recover certain sums representing fuel/oil costs, repairs and insurance. The delegate also awarded a further sum representing lease costs paid by Mr. Kellahan for a "hand held computer" that was linked to Old Dutch's inventory control system and was used to record purchases for billing purposes. The delegate awarded Mr. Kellahan the total sum of $7,269.37 under section 21(2).

10. In light of the adjustment to be made on account of unlawful wage deductions, the total amount payable under the Determination, according to the delegate, would be $8,905.04 together with a further amount of $383.23 for section 88 interest.

THE PARTIES' ARGUMENTS

11. As noted above, Old Dutch says that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. Since the "natural justice" issue is a threshold matter, I propose to discuss this issue first.

Natural Justice

12. The delegate did not conduct an investigation into Mr. Kellahan's complaint but, rather, presided at a complaint hearing where the parties (both of whom were represented by legal counsel) provided oral testimony and each submitted various documents. The natural justice ground of appeal concerns two separate applications for document production orders that were made by Old Dutch's counsel prior to the December 18, 2008 complaint hearing.

13. As detailed in the delegate's reasons (at pages 2 – 3), on October 31, 2008 Old Dutch's counsel (who mistakenly purported to apply under the Tribunal's document disclosure rule) wrote to the Employment Standards Branch requesting an order for the production of Mr. Kellahan's personal tax returns (and related documents) for 2001 through 2007 as well as for tax returns for the same period concerning any business corporation controlled by Mr. Kellahan and for any family member who was employed by Mr. Kellahan and/or a business corporation that he controlled. Counsel asserted that the documents were relevant to the issue of whether or not the parties were in an employment relationship. At this point, the complaint hearing was scheduled for November 24, 2008 (the complaint was originally scheduled for hearing in October 2008 but was rescheduled following an adjournment application by Old Dutch).

14. The delegate convened a teleconference for November 19, 2008, attended by both parties' counsel, to address the document production request. Although the delegate had the authority under sections 84 and 85 of the *ESA* to order production, she declined to do so (delegate's reasons at pages 2 – 3):

> …Each party provided detailed submission and argument on the issue. [Counsel for Old Dutch] argued the documents were highly relevant in determining Mr. Kellahan's status as an independent contractor, his perception of himself as an independent legal entity and his use of employees in the provision of his services. [Counsel for Mr. Kellahan] did not agree to voluntarily disclose the documents as the exchange of such detailed record [*sic*] would jeopardise his privacy and security. Regardless, he states his client did not dispute the fact he previously filed his taxes as a business. He furthered [*sic*] Mr. Kellahan would be present during the hearing to provide testimony and be subject to questioning and examination on the issue.

> The submissions made by both parties through the pre-hearing conference were considered. I accepted Mr. Kellahan's tax status, operation of a separate business and use of employees had relevance in determining whether he met the definition of employee under the Act. However, Mr. Kellahan's acknowledgement through his counsel that he did in fact file his taxes as a business and would testify of such during the hearing satisfied me the demand for detailed tax documents was unnecessary as such information could be elicited through examination during the hearing. Accordingly and upon conclusion of the pre-hearing conference, I delivered an oral decision denying Old Dutch's request. (my underlining)

15. Another matter was also addressed during the November 19, 2008 teleconference, namely, the scope of Mr. Kellahan's unpaid wage claim. The delegate, at page 3 of her reasons, explains that there was a "strong disparity" between the amount sought by way of the initial complaint and the amount that would be claimed during the hearing (now only a few days away). Accordingly, the delegate granted Old Dutch's application to adjourn the hearing holding (at page 3 of her reasons):

> The adjournment request, while made by Old Dutch, arose from Mr. Kellahan's lack of timely disclosure of critical details of his wage claim against Old Dutch. Specifically, the detailed breakdown of what he was claiming was provided to Old Dutch only 2 business days before the scheduled hearing. Accordingly, I found it reasonable under the circumstance that a failure to adjourn the matter would result in significant prejudice to Old Dutch as their ability to respond and prepare submission and evidence was prejudiced. [*sic*]

16. The complaint hearing was adjourned to December 18, 2008. On November 20, 2008 (*i.e.*, the day after the pre-hearing teleconference), counsel for Old Dutch faxed a letter to the delegate requesting a further adjournment of the hearing. The application was predicated on new information obtained by Old Dutch as a result of Mr. Kellahan's further disclosure regarding the particulars of his unpaid wage claim. The newly disclosed documents indicated he was the principal of another business known as Pureaqua Water Company Ltd. ("Pureaqua") and, in addition, there was an indication that he paid wages to another person in relation to his work as an Old Dutch distributor. By way of a further letter to the delegate dated November 24, 2008 counsel for Old Dutch renewed its application for production of Mr. Kellahan's tax records and those of any related firms. The delegate denied the adjournment request and did not make the document production order sought by Old Dutch's counsel (without giving reasons – an e-mail communication from the Employment Standards Branch dated November 25 simply advised: "The adjudicator will not be issuing a disclosure order").

17. Counsel for Old Dutch says that the delegate's failure to order the disclosure of admittedly relevant documents compromised the fairness of the hearing. Counsel further says Mr. Kellahan's admission that he filed income tax returns as if self-employed, coupled with his availability to be questioned at the complaint hearing, did not cure the fundamental unfairness of the proceeding since counsel was obliged to take any answers given at face value and was otherwise denied an opportunity to "carry out effective and meaningful cross-examination…on critical points" (Old Dutch March 20, 2009 submission at para. 28).

18. As noted above, counsel for Mr. Kellahan initially objected to Old Dutch's request for further documents relating to his tax returns and other activities on the ground that the request was "overly broad" and "not proportional to the size of the claim" (Kellahan's April 16, 2009 submission at para. 10). Mr. Kellahan's counsel also says that Mr. Kellahan made several admissions before and during the hearing that essentially negated the need for further document disclosure. In particular, counsel noted: i) for some 17 years, Mr. Kellahan filed taxes as a self-employed contractor (paras. 11, 14 & 15); ii) he employed his wife as a bookkeeper (para. 12); and iii) in the summer of 2008 he paid another person to service his route "for a few days" (para. 12). With respect to Mr. Kellahan's other business enterprise, Pureaqua, counsel also noted that

although Mr. Kellahan was the president and a director of this company, "he never performed Pureaqua sales or deliveries while working for Old Dutch" and that he used a separate vehicle in this latter business enterprise (para. 27).

19. The delegate, in her submission dated April 14, 2009, says that she properly denied the document disclosure request for several reasons. I do not consider it appropriate for the delegate to have made submissions in support of her reasons for refusing the disclosure order. The delegate's reasons for refusal should be set out in the Determination itself and those reasons should not be "bootstrapped" by an *ex post facto* rationalization that involves additional reasons. The delegate presided at a complaint hearing and did not conduct an investigation into the complaint. As such, her role was more circumscribed than would have been the case had she conducted an investigation. Finally, I note that at least some of the delegate's reasons miss the mark. For example, the delegate says that Mr. Kellahan's income tax returns are irrelevant to the question of his vacation pay entitlement or whether certain Old Dutch "business costs" were improperly passed on to him. That may be true. However, the production order was primarily sought in regard to the issue of whether Mr. Kellahan was an employee or independent contractor. If, after a full consideration of all the relevant documents, one were to conclude that Mr. Kellahan was not an employee, issues surrounding vacation pay and business costs become moot.

FINDINGS AND ANALYSIS – NATURAL JUSTICE

20. This is a case where the evidence as to Mr. Kellahan's status, as recounted by the delegate in her reasons, does not unequivocally suggest that Mr. Kellahan was an employee or an independent contractor. Certainly, some aspects of Mr. Kellahan's relationship with Old Dutch point to the latter status (such as his ownership of his truck, his long-standing self-reported status in his income tax returns, and the apparent mutual understanding of the parties when their relationship changed from a formal employment relationship to something different). On the other hand, other elements in the evidence point to an employment relationship (such as the method of payment; the fact that the clients appeared to be primarily Old Dutch clients and were so invoiced, product pricing policies, Old Dutch's control over the assigned territory and the customers to be serviced within that territory, etc.). If I were to restrict myself to considering the evidence that was before the delegate, I would be hard-pressed to say that her finding that Mr. Kellahan was an employee rather than an independent contractor was, as a matter of law, incorrect.

21. However, Old Dutch's attack on this score is not that the delegate erred in law in finding an employment relationship (although it also takes that position) but, rather, that the delegate's refusal to make the requested document production order, in the circumstances of this case, effectively amounted to a denial of natural justice. Sections 84 and 85 empowered the delegate to make the document production order sought. Further, it is a fundamental tenet of natural justice that parties be given a reasonable opportunity to know, and to respond to, the evidence presented by the adverse party. The critical question, of course, is whether the delegate's refusal to make the document production order sought in this case constituted a failure to observe the principles of natural justice.

22. At page 18 of her reasons, the delegate refers to Old Dutch's policy of providing relief drivers to cover shifts for regular distributors such as Mr. Kellahan. On the other hand, Mr. Kellahan also admitted that he had, on at least one occasion, hired his own vacation relief driver for a few days. However, Old Dutch was left in the position of having to accept that latter assertion at face value. Mr. Kellahan's business records might show that he regularly hired other individuals in which event the case for "independent contractor" status is strengthened since the right to hire helpers is generally not thought to be an incident of employment relationships (see *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, at para. 47 – referred to at page 14 of the delegate's reasons). Old Dutch was not able to explore that issue further since it was

denied access to the relevant business records. The delegate obviously concluded that a single case of hiring someone else to take over his route did not have much probative value in favour of independent contractor status; however, that may have occurred a great deal more often than Mr. Kellahan was prepared to admit and the business records, had they been produced, would have been highly probative in that regard.

23. Old Dutch also advanced that theory that Mr. Kellahan was operating a larger related business enterprise using Pureaqua as the corporate vehicle. If this were true, the case for employment status is weakened while the case for independent contractor status is strengthened. Of course, Mr. Kellahan took the position that the two firms were not only legally independent but wholly independently operated. The delegate, at page 19 of her reasons, observed: "…there is no evidence presented to indicate that Pureaqua was in any way connected with the distributions performed for Old Dutch, that Mr. Kellahan performed marketing and/or delivery for Pureaqua during hours he worked for Old Dutch or vice versa, or that his 'Old Dutch' truck was ever used for the distribution of any other product." However, that conclusion was based solely on the answers given by Mr. Kellahan during cross-examination; counsel for Old Dutch was denied the opportunity to test the veracity of Mr. Kellahan's assertions by putting to him documents that may have stood in contradistinction to his oral testimony. I do not wish to be taken as suggesting that Mr. Kellahan was being untruthful. Nevertheless, counsel for Old Dutch was left in the situation where Mr. Kellahan's evidence had to be taken at face value since documents that might have undermined his testimony were not available (due to the delegate's refusal to make a production order) to test the accuracy of Mr. Kellahan's evidence.

24. In *Simpson* (BC EST Decision # D087/05), the Tribunal outlined some of the fundamental differences between an complaint that is "investigated" by a delegate and one that is "adjudicated" where the delegate's function is more akin to a neutral judge hearing evidence presented by the parties themselves (see para. 20; see also *Whitaker*, BC EST Decision # D033/06 at paras. 33 – 34). As Tribunal Member Lawson observed in *Simpson*, a lack of disclosure can place a party at a disadvantage particularly in conducting a meaningful cross-examination of the adverse party (see para. 23).

25. In several important respects, the present situation is similar to that in *Oster* (BC EST Decision # D120/08) where the delegate conducted a complaint hearing but, prior to the hearing, refused to issue several summons and/or to order the production of certain documents. The delegate ruled that in some instances a summons (accompanied by a document production order; *i.e.*, a summons *duces tecum*) was not required since at least some witnesses would be appearing by teleconference. Tribunal Member Stevenson held, at paras. 107 and 111 – 112:

> …The Director also received and relied on evidence about the existence of and the content of documents that was unsupported by any of those documents as they were not introduced at the complaint hearing. This may not be a valid consideration in all cases, but it is in this case where the documents being addressed were sought by the Director in a demand that was ignored by [the employer] and were sought by [the employee] in a summons, which was refused by the Director, there is an obvious unfairness to [the employee] which cannot be ignored. Her inability to have reference to those documents in presenting her case denied her the opportunity to either challenge the oral evidence given by [a witness] or to rely on the content of the documents to support her claim…
>
> In the natural justice context, the refusal of the Director to issue the summonses prevented [the employee] from having the opportunity to place potentially relevant evidence before the complaint hearing. I agree completely with the submission of [the employee] that having some of the witnesses available over the telephone does not get the documents into the complaint hearing.
>
> The Determination on this issue must be cancelled.

26. As I indicated previously, based on the evidence that *was* before the delegate, I am not prepared to say that her conclusion that Mr. Kellahan was an employee rather than an independent contractor was clearly wrong. However, this is not a case, in my view, where the evidence so compellingly pointed to that conclusion that other evidence, if received and fairly considered, might not have changed the delegate's view of the matter. The delegate herself acknowledged that Mr. Kellahan's "tax status, operation of a separate business and use of employees had relevance in determining whether he met the definition of employee under the Act" (delegate's reasons at page 2). Having made that finding, I am not persuaded that simply allowing Old Dutch's counsel the right to cross-examine Mr. Kellahan fully satisfied the requirements of natural justice. While I do not think that the Tribunal should be creating a form of pre-hearing discovery as is embodied in the B.C. Supreme Court rules, I do say that when a party asks for production of clearly relevant documents that relate to an important issue in an complaint hearing the usual response (especially when the complaint is being determined based on an adjudication rather than an investigation) should be to order production. Different considerations may apply if the delegate chooses to conduct an investigation. In this case, the production order could have, and in my view should have, been made under one or both of sections 84 and 85 of the *ESA*.

27. I, of course, have no idea what difference, if any, these documents might have made to the eventual determination of Mr. Kellahan's status. In the fullness of time, it may prove to be the case that the documents have little impact. However, in my view, given that the matter of Mr. Kellahan's status is not entirely free from doubt, *all* relevant evidence should be taken into account and, to this point, that simply has not occurred. Counsel for Old Dutch asserts that I should cancel the Determination and refer the matter back to the Director for re-hearing by an entirely new delegate (see *Baum Publications Ltd.*, BC EST Decision # D090/05); however, I am not prepared to make that order since I am not convinced that essential findings of credibility or other adverse inferences have been drawn by the delegate against Old Dutch. Indeed, in light of the fact that the delegate suggested that her calculations regarding Mr. Kellahan's wage claim regarding adjustments for "returned products" should be significantly reduced, it would seem that the delegate is open to reviewing and reconsidering her conclusions based on new evidence and argument. Accordingly, while I do propose to cancel the Determination and refer the matter back to the Director, I do not intend to make a direction that the matter be considered afresh before an entirely new delegate.

28. A new hearing will also allow the parties to make fresh submissions regarding the compensation to which Mr. Kellahan may be entitled if he is ultimately determined to be an employee rather than an independent contractor. It appears that Old Dutch, the delegate and even, at least to a degree, Mr. Kellahan, all say that there are some calculation errors contained in the Determination.

29. In light of my findings regarding the natural justice issue, I do not find it necessary to address any of the other issues raised by the parties in their various submissions to the Tribunal.

30. Since I am not ordering that the matter be reheard before a new delegate, it may be that the most efficient manner to proceed would be for the original hearing to be reconvened so that, among other things, counsel for Old Dutch can cross-examine Mr. Kellahan with respect to the documents that will be produced and then the parties can be given a further opportunity to make submissions with respect to the "employee versus contractor" issue. I do think it necessary that an entirely new hearing be conducted. However, I will leave those procedural matters for the Director to determine.

ORDER

31. Pursuant to section 115(1) of the *ESA*, I order that the Determination be cancelled and that Mr. Kellahan's complaint be referred back to the Director for rehearing.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal

Employment Standards TRIBUNAL

BC EST # D057/09b
Corrigendum

An appeal

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TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2009A/035

DATE OF CORRIGENDUM: July 10, 2009

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BRITISH COLUMBIA

CORRIGENDUM

I issued Decision # D057/09 on June 4, 2009. In that Decision there was an error in paragraph 20 on page 8.

The corrected paragraph is as follows:

> 30. Since I am not ordering that the matter be reheard before a new delegate, it may be that the most efficient manner to proceed would be for the original hearing to be reconvened so that, among other things, counsel for Old Dutch can cross-examine Mr. Kellahan with respect to the documents that will be produced and then the parties can be given a further opportunity to make submissions with respect to the "employee versus contractor" issue. I do not think it necessary that an entirely new hearing be conducted. However, I will leave those procedural matters for the Director to determine.

Kenneth Wm. Thornicroft
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