Employment Standards TRIBUNAL

An appeal

- by -

Blair Raimondo
("Appellant")

- 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: Alison H. Narod

FILE No.: 2005A/27

DATE OF DECISION: May 9, 2005

DECISION

This Decision concerns an appeal by Blair Raimondo (the "Appellant") of a Determination dated January 14, 2005 (the "Determination") issued by a Delegate of the Director of Employment Standards (the "Delegate") which held that the Appellant was not an employee of CV Home & Auto Glass Ltd. ("CV") and dismissed the Appellant's claim for outstanding wages under the *Employment Standards Act* (the "*Act*"). The Appellant alleges that the Delegate failed to observe the principles of natural justice in making the Determination.

Although the Appellant has requested an oral hearing, I find that I can determine the matter on the basis of the submissions before me.

The Determination

In his Determination, the Delegate reviews the evidence, facts and law in detail. I will not reproduce that detailed review. Rather, I will summarize the Determination, below.

According to the Delegate's review of the evidence and submissions, CV operated a home and auto glass business on Vancouver Island. The Appellant claimed to have been an employee of CV for the period of February 2, 2003 to July 31, 2003.

The Appellant approached CV with a proposal to perform windshield repair and installation for companies owning fleet vehicles. They ultimately reached an agreement for the supply and installation of windshields. CV would provide windshields. The Appellant would arrange for the installation, utilizing a network of installers he hired to perform the work. Initially, they agreed CV would pay a flat rate of $50 to $40 per installation. This was later reduced to $40 per windshield. The installers would be paid directly by CV, who supplied their cheques to the Appellant for distribution.

The Appellant claimed that CV supplied him with a glass repair kit and a pick-up truck and that it eventually rented a warehouse in the Lower Mainland which was used to store windshields and to operate the business. The parties agreed that the Appellant was to make the required payments on the truck and that this arrangement was separate and distinct from the installation arrangement.

The Appellant said that initially, his agreement with CV was a shared/profit arrangement and he would have a chance of profit and a risk of loss. He said this changed to a piece rate when the negotiated $50 per windshield was lowered to $40. The Appellant claimed that it was at this point that he became an employee. CV did not agree with the proposition that the Appellant was its employee.

Additionally, the parties disagreed over such issues as the degree to which CV exercised control over the Appellant, the extent of their respective involvement with each other and the nature and relationship of their respective activities vis-à-vis each other and clients.

In reaching his conclusions, the Delegate reviewed the statutory definition of employee and employer under the *Act*, as well as various common law tests that have been applied to distinguish between employees and independent contractors.

The Delegate specifically reviewed the following definitions of "employer" and "employee" in the *Act*.

> "**employee**" includes
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> "**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 common law tests that the Delegate considered included the "four-fold" test which he said asks: who in the relationship has control; who has ownership of the tools of the business; does the worker have a chance of profit or risk of loss; and is the work integrated and done as part of the business or is it simply an accessory to the business.

Additionally, the Delegate considered the "economic reality" test, which he said considers whether the worker is in business for himself/herself, or does he/she work for someone else. He referred to the "specific result" test, which asks whether the contract is to accomplish a specific result or to perform general work. He also referred to what is known as the "permanency" test, which asks whether or not there was a permanent relationship between the worker providing the service or the person paying for the service as opposed to an arrangement to accomplish a specific job. Additionally, in the course of his reasons, he considered what is known as the "integration" test, which assesses whether the work activities of the alleged employee are integrated into the alleged employer's organization.

The Delegate noted that no single test is used as a determining factor. All aspects have to be considered together and the relationship between the parties has to be viewed in its entirety. Further, he noted that the intention of the parties, although taken into consideration in determining the substantive nature of a relationship, is not decisive of the issue.

The Delegate then proceeded to apply the law to the evidence before him. For instance, with respect to "control", the Delegate found that the Appellant was in control of his own time and the time of his installers as well as the method of work relating to the installation of windshields. Additionally, he was in control of the number of windshields installed and therefore the money he made on them. He secured and communicated with clients and CV did not interfere with them. CV made money on the clients' payment for glass.

With respect to "chance of profit", "risk of loss" and "financial investment", the Delegate found that the Appellant relied on the business he generated, outside of CV's control, in order to make money. He paid the initial expenses to generate that work, and he would cover those expenses himself if business was not generated. If he could not generate work, he could not invoice CV and therefore he could not generate any income. He paid his own expenses. He hired persons to perform the work. The Delegate found the Appellant assumed the chance for profit and risk of loss because he directly controlled the potential for the amount of work he could generate. The Delegate found CV had minimal risk of loss as its only commitment to the venture was the supply of glass and the rent of the warehouse. Additionally, the

Delegate found the Appellant directly and indirectly invested financially in connection with the installation of windshields.

With respect to the permanency of the relationship, the Delegate found that CV's business was established and located on Vancouver Island. The Appellant operated in the Greater Vancouver area, with his network of installers. The Appellant brought a business proposal to CV. CV and the Appellant entered into a business partnership in which CV supplied its windshield glass-purchasing power and the Appellant installed the windshields through a network of installers for a flat fee. There was a clear separation between the work performed by each.

In addressing the degree of integration of the parties' operations, the Delegate found that CV's business would not be adversely affected if the Appellant ceased installing windshields. The Delegate concluded that the Appellant's work was ancillary, not integral, to CV's core business.

With respect to what the Delegate described as the issue of "diversity", the Delegate found that there was no evidence that CV was involved in installation work for any of the Appellant's client companies. The Appellant's installation service performed work for companies other than CV who may or may not have had contact with CV.

In the result, the Delegate concluded that the relationship between CV and the Appellant was not that of employer and employee. Accordingly, he was not required to analyze the merits of the wage complaint.

The Parties' Submissions

As noted, the Appellant says the Delegate breached the principles of natural justice. The Appellant says that the principles of natural justice require that:

i) the parties to an action must be fully informed of any allegations made;

ii) the parties to an action must be given an opportunity to state their case;

iii) the adjudicator must make a proper investigation of the allegations ensuring that all parties are heard and that all relevant submissions are considered.

The Appellant makes the following submissions.

> In this case, the Appellant (hereinafter "Raimondo") stated in evidence that, as a condition of his employment by CV Home & Auto Glass Ltd. (hereinafter "CV") Raimondo was required to release his interest in all of his previously existing clients and turn their business over to CV Home & Auto Glass Ltd. Counsel for CV not only did not argue that such had not been the case, he agreed that the statement was true. Furthermore, CV continues to service those accounts.
>
> In his Reasons for Decision, paragraph VI under the heading "Control" the adjudicator stated that "it was clear from the ledger that Raimondo was providing business to several companies".
>
> It is submitted that the Director failed to properly consider not only the submissions of the Appellant but also the evidence of CV and its counsel, which corroborated those submissions and, in so doing, failed properly to apply the principals [*sic*] of natural justice.

In response, CV denies the Appellant's allegations and, in particular, it denies that the Appellant gave precisely the evidence he alleges to have given. Moreover, CV says that, contrary to the Appellant's assertions, its legal counsel did not give evidence at the hearing. Nor did CV give any evidence on the point asserted by the Appellant. Additionally, CV says that the Determination was made in accordance with the principles of natural justice. The Delegate conducted a hearing consuming a whole day, which allowed for direct and cross-examination and a full disclosure of the facts and evidence of both parties. CV says that all parties were present and that the Appellant was given the opportunity to conduct direct and cross-examination and to fully state his case. Further, CV says that the Delegate considered any relevant submissions.

CV notes that the Delegate specifically mentioned in the Determination that the Appellant "took all the work and contacts he had arranged with another distributor over to CV." Therefore, the Delegate was aware of the point raised by the Appellant in his appeal and it cannot be said that the Delegate failed to consider it. The Delegate was entitled to consider the evidence and submissions and reach the determination that he did and, in so doing, he reached the correct result in compliance with the rules of natural justice.

In his submission, the Delegate recommends that the appeal be dismissed. He notes that the Appellant says he stated in evidence that, as a condition of his employment with CV, he was required to release his interest in all of his previously existing clients and turn their business over to CV. The Delegate points out that in his Reasons for Decision, he stated "it was clear from the ledger that Raimondo was providing business to several companies."

The Delegate submits that this particular sentence must be read in conjunction with all the information in the Determination and specifically with the two paragraphs under the title "control". The sentence in question refers to the finding of fact that the Appellant was in control of his own time and serviced many different companies, as the ledger indicated. In this section, the Delegate found CV did not control the Appellant. He took into account all testimony and evidence. Further, the Delegate says, the "control" test is one part of several tests used to determine that the Appellant was an independent contractor and not an employee.

Decision

The burden is on the Appellant to persuade the Tribunal that the Determination ought to be set aside on the basis of one or more of the statutory grounds set out in subsection 112(1) of the *Act*. Subsection 112(1) states:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was made.

As noted above, the Appellant claims that the Delegate breached the principles of natural justice in concluding that he was not an employee of CV. More particularly, he submits that the Delegate failed to

properly consider his submissions, as well as the evidence of CV and its counsel which corroborated those submissions. The Appellant specifically complains about the Delegate's finding, with respect to the issue of "control", that "it was clear from the ledger that Raimondo was providing business to separate companies". The Appellant says that he was required to release his interest in all of his previously existing clients and turn their business over to CV. Additionally, he says that CV continues to service those accounts.

In *CCD Corporate and Career Development Inc.*, [2004] B.C.E.S.T.D. No. 68, I said the following about natural justice at paragraph 23:

> The law takes a flexible approach to what constitutes a form of hearing sufficient to meet the requirements of natural justice. The question as to what is required depends on the facts and circumstances of each case and the subject matter under consideration (*Knight* v. *Indianhead School Division (No. 19)* [1990] 1 S.C.R. 653). For instance, the rules of natural justice do not require that there always be an oral or in-person hearing. An exchange of written materials may suffice (*Mobile Oil Canada Ltd.* v. *Canada Newfoundland Offshore Petroleum Board* (1998), 21 Admin. L.R. (2d) 248 (S.C.C.)). What is required is that the parties must know the case being made against them and be given an opportunity to reply. They must be given a fair opportunity to correct or controvert any relevant or prejudicial statement (*Emery* v. *Alberta (Workers' Compensation Board, Appeals Commission)*, 2000 ABQB 704).

In my view, the Delegate did not breach the principles of natural justice in reaching his conclusion that the Appellant was not an employee. It is clear from the Determination and the parties' submissions that the Appellant knew the case he was required to meet. The Appellant knew that a key issue was whether or not he was an employee of CV. It is also clear from the Determination and the submissions of the parties that an oral hearing was held and opportunities were given to the parties to adduce evidence and make submissions, as well as to respond to each other's cases. What the Appellant complains of is the fact that the Delegate did not consider the Appellant's evidence about his relationship with clients as persuasive and conclusive of the issue of whether the Appellant was an employee and, instead, preferred CV's evidence on the issue.

What occurred in this particular case is that the Delegate heard the conflicting evidence and submissions of the parties, he assessed that evidence, weighed it, and decided which evidence he preferred in reaching factual findings. Moreover, he considered the evidence and his factual findings in light of the statutory and legal tests that may be applied in determining whether an individual is or is not an employee. On balance, he concluded that the Appellant was not an employee. This, the Delegate was entitled to do.

For instance, with respect to the question of whether the Appellant was doing business with one or more companies, the Delegate noted that it was clear from the ledger the Appellant was providing business to several companies. There was evidence before the Delegate that supported this finding, namely, the Appellant's ledger. Moreover, this finding was not made in isolation. Elsewhere in the determination, the Delegate found that CV did not interfere with the clients the Appellant secured. The Delegate also found that the Appellant relied on the business he generated, outside of CV's control, in order to make money. The Delegate went on to say he preferred CV's evidence that its only commitment to the venture was the supply of glass and later the rent of the warehouse. In this regard, the Delegate weighed the evidence and chose whose he preferred.

Additionally, the Delegate said the Appellant testified he had a relationship with other companies who installed windshields. He brought a business proposal to CV. He intended his relationship with CV to be

one of a business partnership or shared profit. He confirmed there was a clear separation between CV's work on Vancouver Island and the work performed in Greater Vancouver. However, later in his reasons, the Delegate said he did not accept the Appellant's testimony that the shared/profit relationship changed once the price per windshield was renegotiated. Rather, the relationship, as initially intended, was and continued to be a business partnership. In this regard, the Delegate again weighed the evidence and decided which evidence he preferred.

Further on in the Determination, the Delegate found there was no evidence that CV was involved with the installation of windshields for any of the companies for whom the Appellant installed windshields. The Delegate went on to say:

> Raimondo testified he did work for CV but evidence in the form of invoices, ledger and testimony shows work performed for other individuals or firms. This is not consistent with his testimony. Upon questioning Raimondo confirmed he was able to generate business independently and would invoice CV for windshields installed. I accept CV set glass pricing with clients and it is separate from Raimondo's installation service. I also accept Raimondo's clients may have contacted CV for glass but ultimately the process of physically installing it was solely in the control of Raimondo and his installers. Raimondo performed work for other companies that may or may not have had, contact with CV. I find Raimondo's service of installing and repairing windshields was provided for more than one firm or company using the same billing methods and network of installers.

Here, too, the Delegate weighed the evidence and decided which evidence he preferred.

In short, the Appellant submitted to the Delegate, and continues to submit in this appeal, that the work he performed was for clients of CV. The Delegate concluded, on the basis of documentary and testimonial evidence, that he preferred the position of CV. CV's position, which was consistent with evidence before the Delegate, was that the Appellant performed work for clients that he either brought to or later found for what he expected to be (and the Delegate found was) a partnership arrangement. It was not an employer and employee relationship. I find that, in so doing, the Delegate did not fail to comply with the principles of natural justice. Rather, he heard and considered the Appellant's evidence and submissions, but did not accept all of those submissions. Instead, he preferred the evidence and submissions made by CV and reached a conclusion adverse to the Appellant. This, the Delegate was entitled to do.

In addition, I note that the fact, if true, that the Appellant was required to release his pre-existing clients to CV as a condition of his agreement with CV does not alter the result. The Appellant's position was that the relationship initially was a share/profit arrangement, but he subsequently became an employee of CV when CV changed the price it charged for windshield glass. The Delegate found the arrangement was a business partnership and that it continued to be a partnership throughout, despite the change in the rate CV charged for glass. In my view, it is up to the parties to a partnership to decide the terms of that arrangement. A party who enters a partnership agreement may agree to contribute his pre-existing clients. It is up to the contracting parties to agree what will happen to the assets they bring to the partnership when it terminates. The mere fact that they failed to agree to return assets to a departing partner does not convert the relationship into one of employee and employer. Accordingly, I find the Delegate did not err in concluding that the relationship was a partnership, despite the allegation that the Appellant surrendered his pre-existing clients as part of the partnership arrangement.

Summary

The Determination is confirmed.

Alison H. Narod
Member
Employment Standards Tribunal