

An appeal

- by -

Benjamin Roy McDougall
(“Mr. McDougall”)

- 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: Carol L. Roberts

FILE No.: 2014A/72

DATE OF DECISION: July 25, 2014

- After completing three days of work on August 12th, Mr. McDougall requested payment from Mr. Sweett. Mr. Sweett paid Mr. McDougall for the work performed to date. Mr. Sweett made no payroll deductions.
 - On August 14, Mr. McDougall asked for payment for work performed on August 13 and 14. Mr. Sweett told him he would pay him after the job was completed and refused to pay. The parties had a disagreement about payment and the RCMP were called. Mr. McDougall did not complete the job.
 - Mr. McDougall asserted that he was an employee. In support of his assertion, Mr. McDougall stated that EZ Coat Painting was not the name of a company but the title of the advertisement and a description of the services offered. He also asserted that the title was a “system” he had coined and was common to the profession. Mr. McDougall argued that he did not have a contractual arrangement but provided work on an hourly basis as well as “technical support” to those DIYers who required it, a service not normally offered by contractors.
 - Mr. McDougall submitted that the parties agreed to an hourly rate, there was no written contract, he did not prepare an estimate for supplies and labour, he did not require a deposit and he did not require lump-sum payments. Mr. McDougall did not have workers compensation insurance coverage.
 - Mr. Sweett contended that Mr. McDougall was a self-employed contractor.
6. The delegate considered the definitions of employee and employer in the *Act*, as well as the specific results test, the economic reality test and the integration test, common law tests used in evaluating whether an individual is an employee or a self-employed contractor.
 7. The delegate found that Mr. McDougall was hired to paint a single town house, and although he was offered the possibility of additional work, there was no promise of a continuing relationship. She considered Mr. McDougall’s evidence that he wanted to be paid each day, indicating that there was no expectation that the relationship would continue indefinitely. She found that the specific job Mr. McDougall was retained to complete was suggestive of an independent contractor.
 8. The delegate noted that Mr. McDougall set his own hours of work and that there was no evidence Mr. Sweett directed how the work was to be performed. She also considered Mr. McDougall’s evidence that he had a level of expertise and concluded that he needed little to no direction in how to perform the job.
 9. The delegate found that Mr. McDougall accepted little risk because he was paid on an hourly basis and the employer supplied the tools, factors that were more indicative of an employment relationship.
 10. The delegate also considered the fact that Mr. McDougall advertised himself as an experienced professional who could paint and offer technical support. She noted that his advertisement indicated that he could work for individuals and companies other than Mr. Sweett, a factor more indicative of a self-employed contractor.
 11. Finally, the delegate considered the fact that Mr. Sweett’s business was as a property manager and that painting was not an ongoing integral component of renting properties.
 12. The delegate concluded, on balance, that Mr. McDougall was a self-employed contractor in business for himself, and that the *Act* did not apply to his complaint.

13. The delegate also determined that although Mr. McDougall contended that the Employment Standards Branch was biased in favor of Mr. Sweett, he had provided no evidence in support of that allegation.

Argument

14. Mr. McDougall asks the Tribunal to review the evidence and submissions and “make any adjustments according to the evidence”. He says that the Tribunal “may find that the delegate erred at law to some extent or ignored pertinent issues that may or may not have affected the outcome of the determination.”
15. Mr. McDougall asserts that an employment relationship existed between the parties:
- ... The main claim of the appeal is that there is a clear distinction between independent Contractor and employee that is paid an hourly rate and it is an extreme travesty of justice for the director to error [*sic*] so blatantly as if they were acting as lawyers for a con artist and insult the complainant as though he were a complete idiot. ...
16. Mr. McDougall says that the Director’s delegate did not provide adequate reasoning for her Determination. He argues that an employment relationship was established as evidenced by the timesheets and the fact that Mr. Sweett provided all tools and supplies. He submits that the delegate’s conclusion that he was in business for himself is not supported by the evidence.
17. Mr. McDougall also says that the delegate did not apply the Branch’s Policy Interpretation guidelines on factors to be considered when assessing when an individual is an employee. Mr. McDougall argues that the delegate considered only one test in arriving at her conclusion.
18. Finally, Mr. McDougall contends that the delegate breached the principles of natural justice in deciding that the intentions of the parties were not determinative of an employment relationship.

ANALYSIS

19. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (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 being made.
20. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
21. I find that Mr. McDougall has not demonstrated either an error of law or a denial of natural justice.

Error of Law

22. In *Gemex Developments Corp. v. British Columbia (Accessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) the British Columbia Court of Appeal set out the following elements as constituting an error of law:
- 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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.

23. The Tribunal has adopted the analysis of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Ltd.* ([2001] 2 S.C.R. 983) in assessing the legal status of a person performing work. At paragraphs 46-48, the Court said as follows:

[T]here is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor.... [W]hat must always occur is a search for the total relationship of the parties....

...The central question is whether the person who has been 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.

24. The delegate considered the definitions contained in the *Act* as well as a number of tests. She noted that some of the factors led to a conclusion that the relationship between Mr. McDougall and Mr. Sweett was that of employee-employer while others led to an opposite conclusion. I am satisfied that the delegate conducted a thorough analysis of the statutory and common law tests, and considered the facts in light of those tests, as the court suggested in *Sagaz*.

25. The delegate determined that, on balance, having regard to all of the factors, that Mr. McDougall was not an employee. In my view, Mr. McDougall has failed to demonstrate that the Director committed a palpable or overriding error in arriving at that conclusion. There is sufficient evidence to support the conclusion she made and I find no basis to interfere with that conclusion.

Natural Justice

26. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

27. Having reviewed the Determination, the record and the submissions, I find that the delegate "heard" Mr. McDougall and fully considered the evidence of both parties. The Determination sets out a significant amount of evidence and clearly indicates that the delegate applied the facts to the factors she was obliged to consider.

28. The delegate's statement that the intention of the parties was not a factor to be considered in evaluating whether or not an employment relationship existed between the parties does not demonstrate a closed mind or bias. The Tribunal has long affirmed this statement, stating that an analysis of all of the factors outlined in

Saga will carry more weight than any written agreement between the parties. In other words, it is the substance of the relationship, objectively determined, and not the subjective views of the parties as to the proper characterization of that relationship that will prevail. (see, for example, *Green Team Eco Clean Ltd.*, BC EST # D062/13)

29. I dismiss the appeal.

ORDER

30. Pursuant to section 115 of the *Act*, I order that the Determination, dated June 6, 2014, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal