

An appeal

- by -

LaVonne Girard

- 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: Robert Groves

FILE No.: 2006A/49

DATE OF DECISION: June 23, 2006

DECISION

SUBMISSIONS

LaVonne Girard	on behalf of herself
Homa Pashaye	on behalf of Oakridge Productions Ltd.
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by LaVonne Girard (“Ms. Girard”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “*Determination*”) issued by a delegate of the Director of Employment Standards (the “*Delegate*”) on December 16, 2005.
2. The Delegate investigated the complaint Ms. Girard had filed against her alleged employer, Oakridge Productions Ltd. (“Oakridge”), and decided that since it had not been demonstrated that Ms. Girard was an employee of Oakridge for the purposes of the *Act*, the investigation must be stopped pursuant to section 76(3)(b).
3. The matter initially came before me on the question whether Ms. Girard’s appeal had been filed in a timely way. In a Decision dated April 10, 2006, I decided that the appeal should proceed. The appeal has now been returned to me for a decision on the merits, without an oral hearing.

FACTS

4. Ms. Girard is a set decorator. She is also the principal of a company called Girard Productions Inc. (“Girard Productions”), through which she provides her services. Contained within the record provided to the Tribunal by the Delegate for the purposes of this appeal is a document headed “Crew Deal Memo” (the “*Agreement*”) which sets out the terms and conditions under which Girard Productions agreed to provide set decoration services for Oakridge on a film called “Neal N’ Nikki” (the “*Film*”).
5. Pursuant to the *Agreement*, Ms. Girard worked on the *Film* from June to September in 2005. Throughout her tenure on the *Film*, Ms. Girard was paid for her services through Girard Productions.
6. Following completion of her company’s engagement with Oakridge on the *Film*, Ms. Girard filed a complaint pursuant to section 74 of the *Act*. She alleged that she had not been paid for periods of time during which she had worked on the *Film*, and for all of her cellphone charges as agreed. She also stated that she had provided props and set decoration items to the production, and that some of her own equipment was lost and damaged during the shoot, for all of which she had received no reimbursement.
7. The Delegate commenced an investigation, and received detailed submissions, replete with supporting documentation, from both Ms. Girard and Oakridge. On October 28, 2005 the Delegate wrote to Ms. Girard to inform her that the Delegate had made a preliminary finding that the *Act* did not apply to her complaint. While the letter did not state specifically that the Delegate had come to this conclusion

because she had decided that Ms. Girard was not an employee of Oakridge, the inference to be drawn from the matters discussed in the letter would, in my opinion, have led a reasonable person to deduce that it was Ms. Girard's employment status which was the focus of the Delegate's concern.

8. The October 28, 2005 letter was forwarded to Ms. Girard by certified mail. A Canada Post Advice of Receipt card shows that it was delivered on November 12, 2005, and signed for by one Bob Bottieri, the individual who later took responsibility for filing Ms. Girard's appeal on her behalf. The letter requested that if Ms. Girard took issue with the preliminary finding she should provide further evidence and submissions to the Delegate by November 10, 2005. Ms. Girard did not respond. The Delegate subsequently contacted Ms. Girard by telephone on November 18, 2005, and confirmed with her that she had received the October 28, 2005 correspondence. In response to the Delegate's query whether she required more time to make further submissions, Ms. Girard stated that she had nothing to offer apart from what she had previously delivered. Ms. Girard expressed her disappointment with the preliminary finding, and stated to the Delegate that she would pursue her claim in another forum. The Delegate advised Ms. Girard that she would extend the time for further submissions from her to November 21, 2005. Nothing further was received from Ms. Girard.
9. After the Delegate issued her Determination on December 16, 2005, Ms. Girard filed an appeal with the Tribunal, alleging that the Delegate had failed to observe the principles of natural justice.

ISSUE

10. Did the Delegate fail to observe the principles of natural justice in making the Determination?

ANALYSIS

11. A reading of the material filed by Ms. Girard in support of her appeal makes it clear that while she is unhappy with the Delegate's finding that she was not an employee of Oakridge, she is prepared to accept it. For my part, I have reviewed the Determination, the record, and the submissions of the parties, and I am persuaded that there was ample evidence on the basis of which the Delegate could have concluded that Ms. Girard provided set decoration services to Oakridge on the Film through Girard Productions in its capacity as an independent contractor, and not as an employee.
12. In this regard, the Delegate reviewed in detail the definitions of "employee" and "employer" contained in the *Act*, and the several tests developed in the legal authorities which, cumulatively, have been applied to resolve the often vexing question whether a person performing work for another in a particular context is an employee rather than an independent contractor, with the result that the work performed is work that engages the protections afforded by the legislative scheme.
13. But this is not the end of the matter. The substance of Ms. Girard's challenge to the Determination is grounded in an alleged failure of the Delegate to observe the principles of natural justice. Such a challenge normally gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in an appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence (see *Moon Arc Interiors Co. Ltd.* BC EST #D200/04). A combination of section 112(1)(b) and section 115 of the *Act* entitles the Tribunal to cancel or vary a determination, or refer the matter back to the Director, if there has been a failure to observe those principles.

14. Ms. Girard says there has been such a failure. She objects in particular to the fact that the Delegate appears to have relied on evidence from one Deb Harper, Oakridge's Production Co-ordinator, to the effect that Ms. Girard worked largely independently, with limited direction and supervision. This was evidence that was clearly relevant to a consideration of the amount of control exercised by Oakridge over Ms. Girard, a matter that the Delegate would be expected to investigate as it is one of the established indicia for determining whether a person is to be characterized as an employee or an independent contractor.
15. Ms. Girard argues vigorously that Ms. Harper's evidence is erroneous, if not untruthful. The difficulty I have with this submission, however, is that, apart from one incident which I will discuss in a moment, it is not clear to me from the material Ms. Girard has supplied in support of her appeal that the substance of Ms. Harper's evidence was not drawn to her attention prior to the Determination being made. I do not know, therefore, whether Ms. Girard's complaint is directed to the fact that the Delegate relied on the evidence without giving Ms. Girard a reasonable opportunity to respond to it, or apart from this, the mere fact that the Delegate relied on it in coming to the conclusion that Ms. Girard was not an employee. If it is the latter, then Ms. Girard would not be complaining about a failure to observe the principles of natural justice, but rather would be alleging that the Delegate committed an error of law in relying on Ms. Harper's disputed evidence. The Tribunal will always be reluctant to question a delegate's findings of fact, and I am not persuaded that the Delegate here committed any error of fact, let alone the type of palpable and overriding error of fact that would entitle the Tribunal to set aside the Determination for that reason.
16. The one aspect of Ms. Harper's evidence Ms. Girard clearly identifies she was not given an opportunity to refute relates to the "Wedding Scene" incident during the production of the Film. In the Determination, the Delegate referred to Ms. Harper's reporting to her that Ms. Girard and Mr. Bottieri, who was the Production Designer on the project, designed a set for a wedding scene without the full consultation of the Director of the Film. When the Director and the production crew arrived at the set for filming they discovered that it was not what they were looking for, but they nevertheless made use of the set due to shooting and site rental considerations. Ms. Girard objects to the Delegate's reference to this evidence of Ms. Harper's in the Determination, and claims it misrepresents what actually occurred. The inference to be drawn is that if Ms. Girard had been apprised of this evidence prior to the issuance of the Determination she would have refuted it.
17. Previous decisions of the Tribunal have made it clear that it is not all documents and information which a delegate is obliged to share with other parties during the course of an investigation in order to comply with the principles of natural justice within the context of proceedings under the *Act*. The obligation to disclose is not absolute. What section 77 of the *Act* requires is that a delegate make reasonable efforts to give a party an opportunity to respond. This is so at least because one of the legislative purposes of the *Act* is also to provide an inexpensive and speedy resolution to complaints (see *Lacroix* BC EST #D267/96; *Argenti* BC EST #D332/00; *Insulpro Industries Inc.* BC EST #D405/98).
18. In order for me to decide that the Determination must be cancelled, varied, or referred back to the Director because of a failure on the part of the Delegate to provide a reasonable opportunity to Ms. Girard to respond to Ms. Harper's version of the wedding scene incident, I am of the view that I must consider the significance of the evidence, and the incident itself, in relation to the entirety of the evidence the Delegate relied on in coming to the conclusion that Ms. Girard was not an employee. Since the incident can be said to be an example of how Ms. Harper felt Ms. Girard acted on her own, when she should have consulted with, and sought the direction of, other production staff, it tends, if anything, to support the

other evidence of Ms. Girard that she was not intended to be the independent operator on the project that Oakridge said she was. Since the evidence could be viewed as being devoid of any prejudice to Ms. Girard on the issue of her employment status, which was, after all, the issue that was before the Delegate, it may be that the Delegate decided it was unnecessary to raise it squarely with Ms. Girard. Whatever the reason, I am of the view that there was no failure to observe the principles of natural justice when the Delegate failed to inform Ms. Girard about Ms. Harper's version of the wedding scene incident prior to the issuance of the Determination.

19. The October 28, 2005 letter the Delegate sent to Ms. Girard provides compelling evidence in support of a conclusion that Ms. Girard was accorded a reasonable opportunity to respond to all the important findings of fact the Delegate stated she had made on a preliminary basis, and which subsequently formed the basis for the ensuing Determination. One of the findings in the letter in respect of which Ms. Girard was invited to provide a response read as follows:

It appears LaVonne Girard received minimal direction and control in the provision of set decoration services to Oakridge Productions Ltd. as referenced by:

- a) your authority, provision and direction of crew to assist in set decoration services
- b) while working within basic guidelines set by Oakridge Productions Ltd. your control of the method, style and level of delivery of services
- c) your control and authority in the purchase of items required for the provision of your services

20. The issue of the extent to which Ms. Girard was subject to direction and control by Oakridge was, therefore, squarely raised with her prior to the issuance of the Determination, at a time when she could have made further submissions had she wished. However, she declined to do so. Notwithstanding this, the Delegate did acknowledge in her Reasons for Determination that Ms. Girard did receive some direction from Oakridge, and was required to consult with the Director and the Art Department concerning matters of design, a finding that was not significantly dissimilar to the position argued by Ms. Girard on this appeal.

21. In reading Ms. Girard's submissions on this appeal, it appears that her discomfort with the Determination is based more on what she perceives to have been the Delegate's intention to malign her character and ability, and not on the actual result. She interprets the Delegate's including in the Determination references to Ms. Harper's evidence concerning the wedding scene, Ms. Harper's statements to the effect that Ms. Girard was not often on set and that her whereabouts were frequently unknown, the fact that Ms. Girard delegated many of the set decoration tasks to her crew, and the fact that Ms. Girard continued to advertise her services as a decorator during production of the Film, as personal attacks. I do not read the Delegate's references to these items in the Determination in that way. Nor do I consider that the Delegate, in fashioning the Determination in the manner that she did, has made negative, personal judgments about Ms. Girard, her ethics, or the quality of her work. Rather, I am of the view that the Delegate was merely reporting the facts as they had been described to her, or as she had discovered them to be, all in aid of her making her Determination that Ms. Girard was not an employee of Oakridge, with the result that her complaint did not come within the purview of the *Act*.

ORDER

22. Pursuant to section 115 of the *Act*, I order that the Determination dated December 16, 2005 be confirmed.

Robert Groves
Member
Employment Standards Tribunal