Employment Standards TRIBUNAL

An appeal

- by -

Jerry Pedneault
("Pedneault")

- 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: David B. Stevenson

FILE No.: 2004A/19

DATE OF DECISION: May 12, 2004

DECISION

SUBMISSIONS

Jerry Pedneault	on his own behalf
Michael Yawney	on behalf of Bruce Coach Inc.
Joe LeBlanc	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Jerry Pedneault ("Pedneault") of a Determination that was issued on January 12, 2004 by a delegate of the Director of Employment Standards (the "Director").

Pedneault had filed a complaint with the Director alleging Bruce Coach Inc. (BCI) had contravened the *Act* by failing to pay commissions owed and by requiring him to pay some of BCI's business costs.

Following an oral hearing over four days, the Director found the *Act* had not been contravened. The basis for this finding was a conclusion by the Director that Pedneault was not an employee for the purposes of the *Act*, but rather was an independent contractor in a business relationship with BCI.

Pedneault says that conclusion was wrong. The appeal is grounded in error of law and denial of natural justice.

PRELIMINARY ISSUE

The Director and counsel for BCI have filed responses to the appeal. In his reply to the response from counsel for BCI, Pedneault objects to continued involvement of Mr. Yawney, and his law firm, in this appeal because of a conflict of interest.

Pedneault had raised the same objection, based on different circumstances, during the investigation and hearing process before the Director. That objection, quite properly in my view, was not accepted by the Director and there is no reason to revisit it.

The objection raised in this appeal is based on different circumstances however. Pedneault says that effective March 1, 2004, approximately two months after the Determination was issued, counsel who had represented Pedneault during the investigation and hearing process transferred to the law firm with whom Mr. Yawney is associated. That assertion is not contradicted by Mr. Yawney.

This circumstance is clearly caught by Rules 7.2 and 7.4 of the Professional Conduct Handbook for the guidance of members of the Law Society of British Columbia. The relevant provisions of these Rules state:

> *7.2 Rules 7.1 to 7.9 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer, or later discovers that:*
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> *(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client") . . .*
>
> *7.4 If the transferring lawyer actually possesses confidential information relevant to a matter referred to in paragraph 7.2(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:*
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> *(a) the former client consents to the new law firm's continued representation of its client, or*
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> *(b) the new law firm establishes, in accordance with Rule 7.8, that:*
>
> *(i) it is in the interests of justice that its representation of its client in the matter continue, having regard to all the relevant circumstances, including: . . . and*
>
> *(ii) it has taken reasonable steps to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm.*

Pedneault says counsel who had represented him during the investigation and hearing process has advised him she perceives there to be a conflict of interest with her continuing representation of him and has, in Pedneault's words, "resigned her involvement". Based on the information provided by Pedneault and in the absence of any assurance to the contrary, I am entitled to infer that confidential information was imparted by him to his former lawyer (see *McDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at para. 46). Pedneault has obviously not consented to Mr. Yawney's law firm continuing to represent BCI. Mr. Yawney has not responded to the objection and, more precisely, has not indicated any of the steps contemplated in subparagraph 7.4(b)(i) or (ii) have been taken.

I find there is a conflict of interest involving Mr. Yawney 's law firm that precludes him from continuing to represent BCI in this appeal. As a result, I must uphold the objection. The response from Mr. Yawney will be disregarded.

Effectively, this means BCI has filed no response to the appeal. I may have to give further consideration to the effect of this decision later in these reasons, depending on my view of the merits of the substantive issue raised by Pedneault in this appeal.

ISSUE

The substantive issue in this appeal is whether Pedneault has shown the Director erred in concluding he was not an employee for the purposes of the *Act*.

THE FACTS

The Determination set out the following background facts:

> BCI designs and builds high-end motor coaches in Salmon Arm, B.C. It is not uncommon that such coaches reach a cost of more than a million dollars. The two principals of BCI are Bruce Ingebrigston (Bruce) and Cathy Ingebrigston (Cathy).

> The initial meeting of Jerry (Pedneault), Bruce and Cathy came about from previous business dealings. Jerry operated a supply company from which BCI would purchase products. A friendship grew from this, both business and social in nature. For a time Cathy even worked for Jerry in one of two businesses that Jerry operated.
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> In the mid 1990's situations occurred that brought Jerry, Bruce and Cathy into closer contact and involvement. BCI, in conjunction with a third party, Cabrilla Investments Inc. (Cabrilla), was having a new facility built. Jerry approached Bruce and Cathy to be involved in this project. Jerry was employed as what could be described as a project manager and paid by Cabrilla as they were funding the project and would be the owners of the property. Cabrilla, at this time, had entered into an arrangement with BCI to do the marketing and sales of BCI products.
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> By the time the building was completed, Jerry had arranged with Bruce and Cathy to use one of the extra offices in the new facility to run his various businesses. Jerry moved his base of operations to the new location. Because of their friendship and close proximity, Jerry was consulted on various aspects of BCI's business by Bruce and Cathy. As time passed this consultative process grew in frequency to the point where Jerry was devoting much of his time and efforts in advancing BCI products. In September 1996 Bruce and Cathy commenced paying Jerry for his assistance, but they had an understanding that Jerry would continue to nurture his own business ventures at the same time.
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> When it became apparent that Cabrilla was not having the kind of success doing the sales and marketing that would allow BCI to grow, Jerry became involved in that part of the operations. The arrangement was such that Jerry could still operate his own business ventures from the same location.
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> As time progressed it was evident that Jerry was having far more success in the marketing and sales of BCI products so he (Jerry) through a company named Sareen Developments took over that part of the operation. Sareen Developments was a wholly owned subsidiary of Salmon Arm Auto Parts Ltd. (Salmon Arm), which was also owned by Jerry.
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> The commission earned via the marketing and sales of BCI products were invoiced by and paid to Sareen. Jerry was also paid a salary, part of which was treated as an advance on Sareen's commissions. This arrangement was committed to a written contract in August of 1999 and was the basis of the relationship from that time until there was a parting of the ways on February 26, 2003.

The Determination identified the primary issue as being whether Pedneault was, *vis* BCI, an employee for the purposes of the *Act* or was an independent contractor. The findings of fact made by the Director on that issue can be summarized in the following points:

- Pedneault was the controlling mind of Sareen and the sole director of Salmon Arm, the entity through which Sareen was doing business until January 2003 when Salmon Arm changed its name to Sareen Developments Ltd., a company of which Pedneault was the sole director.

- While accepting Pedneault and Sareen were essentially indistinguishable, the employment contract did not reflect an intention by the parties that Pedneault and Sareen were to be considered as one entity but rather that they were to be treated as having distinctly different responsibilities with BCI. The document outlining the agreement between Pedneault and BCI spoke against such an intention in several respects.

- It was Pedneault's responsibility, acting through Sareen, to generate ongoing sales contacts and contracts for BCI products and, more generally, to promote the business of BCI.

- In carrying out this responsibility, Pedneault, acting through Sareen, was predominantly left to apply his own abilities to formulate sales plans and develop leads, he set his own hours and had some authority to "work the numbers" on a sale price in order to "make the deal work".

- BCI did not control, or restrict, Pedneault's ability to operate other business concerns out of the same office from which he ran Sareen.

- Sareen was responsible for providing a workplace and the equipment necessary to carry out its responsibilities to BCI.

- Pedneault, operating Sareen, stood to profit and risked loss through the way their arrangement with BCI was structured.

- The business of Sareen was never integrated into the business of BCI. The function of selling the coaches had always been separate from the function of building the coaches. BCI had never been engaged in the function of selling the coaches. Sareen invoiced for the services performed.

- Sareen was a separate business, carrying on and developing its own business independently of its responsibilities to BCI.

- Pedneault was the controlling mind of Sareen and Salmon Arm

ARGUMENT AND ANALYSIS

The burden is on Pedneault, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. Placing the burden on the appellant is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law, and with the objects and purposes of the *Act*, in the sense that it would it be neither fair nor efficient to ignore the initial work of the Director (see *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96)). An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation.

The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

> *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:*
>
> *(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.*

Pedneault has identified two grounds of appeal: first, that the Director erred in law in finding he was not an employee for the purposes of the *Act*; and second, that the Director failed to observe principles of natural justice in making the Determination. There is no basis in any of the material or in the appeal for the latter ground of appeal and I dismiss it summarily.

On the question of whether the Director erred in law, Pedneault has arranged this part of the appeal under two main headings, errors in findings and conclusions of fact and errors in the analysis.

Relating to the first heading, the appeal submission states:

> Although Mr. LeBlanc was thorough in his gathering of the facts that supported the initial submission, the concise understanding of these facts has not been reflected in Mr. LeBlanc's determination rendered January 12, 2004. The following points have been either misquoted or misstated in Mr. LeBlanc's decision.

Thereafter, the appeal under this heading does little more than restate Pedneault's version of the facts and the conclusions which he asserts should flow from those facts. The second part of the appeal contains little critical examination of the analysis done by the Director. Instead, it presents Pedneault's perspective on the factors considered by the Director in examining whether Pedneault was an employee of BCI and does so in the context of facts and conclusions of fact which Pedneault says the Director should have reached on the evidence presented.

As the Tribunal noted in *J.C. Creations o/a Heavenly Bodies Sport*, BC EST #RD317/03 (Reconsideration of BC EST #D132/03), it is important that the substance, not the form, of the appeal be addressed by the Tribunal. It is apparent that the substance of this appeal is essentially about the correctness of findings and conclusions of fact made by the Director.

There is no argument by Pedneault that could support a conclusion the Director applied the wrong legal test to the employee/independent contractor issue. The Director correctly noted, and considered, the definition of employee in Section 1 of the *Act*, considered other relevant statutory provisions and found assistance and direction in other jurisprudence and in some of the traditional common law tests.

The Tribunal has accepted that in some circumstances errors on findings or conclusions of fact can amount to error of law. In that context, however, the appellant must show either there was no evidence to support the findings of fact made or that a view of the facts was taken by the Director that could not reasonably be entertained based on the evidence that was before the Director (see *Gemex Developments Corp. -and- Assessor of Area #12 - Coquitlam,* [1998] B.C.J. No. 2275 (BCCA). In this appeal, the Determination and the material on record, which is extensive, show there was some evidence to support the findings and conclusions of fact made by the Director and I cannot conclude the view of the facts taken by the Director was one that could not be reasonably entertained based on the evidence that is found in the record and which was presented to the Director through four days of oral hearing.

Pedneault has not shown any error of law, and this part of the appeal is also dismissed.

Pedneault has indicated in his appeal that the Director failed to consider his claim for unpaid expenses was not limited to unpaid travel expenses, but also included other general expenses that were incurred on behalf of BCI. The merit of any claim for expenses allegedly incurred on behalf of BCI depends on Pedneault being found to be an employee under the *Act*. In light of my decision to dismiss the appeal, it is unnecessary to consider that matter.

Pedneault will have to use legal avenues other than the *Act* to realize the amounts he considers is owing to him by BCI.

Finally, I do not need to consider whether my decision on the conflict of interest objection requires the Tribunal to extend any further opportunity to BCI to respond to the appeal.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 12, 2004 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal