Employment Standards TRIBUNAL

An appeal

- by -

Marvin Lentz

- 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: John Savage

FILE No.: 2007A/58

DATE OF DECISION: August 27, 2007

DECISION

SUBMISSIONS

Marvin Lentz for himself

Cory Schmidtz for himself

Amanda Clark Welder, for the Director

INTRODUCTION

1. The Delegate of the Director ("Delegate") in her Determination dated May 18, 2007 (the "Determination") found that Marvin Lentz ("Lentz") employed Cory Schmidtz ("Schmidtz").

2. The Delegate determined that wages were owed in the amount of $2,495.68. Further, there had been two breaches of the *Employment Standards Act* so that administrative penalties were levied in the total amount of $1,000.00.

3. The central issue in the complaint before the Delegate was whether Schmidtz was an employee, a partner or an independent contractor.

4. In the appeal before me, Lentz argues that the Delegate breached the principles of natural justice and erred in law in making the Determination. With respect to breaching the principles of natural justice, Lentz argues that there is bias shown by the Delegate and that he did not have a proper opportunity to be heard. The errors of law alleged concern the conclusions reached by the Delegate.

ISSUES

5. The issues are:

(1) Did the Delegate err in law in determining that Schmidtz was an employee?

(2) Did the Delegate breach the principles of natural justice in making the Determination?

APPEAL PROVISION

6. Appeals to this tribunal are made pursuant to section 112 of the *Employment Standards Act* which reads as follows:

> 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 being made.

7. As this is a statutory right of appeal, the appeal provision is a code and strictly limits the basis of the appeal.

8. In this case the appeal is based on the grounds enumerated in section 112(1)(a), errors in law, and section 112(1)(b), a failure to observe the principles of natural justice.

ERROR OF LAW

9. With an appeal based on an error of law, section 112(1)(a), it is not open to an appellant to appeal findings of fact or mixed findings of fact and law.

10. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.).

11. The *Gemex* case describes an error of law as occurring where the adjudicator:

1. misinterprets or misapplies a section of a statute;

2. misinterprets or misapplies an applicable principle of general law;

3. acts without any evidence;

4. acts on a view of the facts which could not reasonably be entertained; or

5. adopts a methodology that is wrong in principle.

12. Errors of law are to be contrasted with findings of fact and findings of mixed fact and law. An error of law typically arises where a statutory provision is misinterpreted, or there is an error in legal principle.

13. For example, the meaning of the term "employee" under the *Employment Standards Act* is a question of law and a misinterpretation of that meaning is an error of law. The question of whether a thing falls within the definition of its term, however, is typically a question of mixed fact and law. Thus whether a person is an employee is generally not a pure question of law.

14. The limiting case, however, is where there is no evidence to support a finding, or where the facts are such that no person reasonably instructed as to the law, could make a particular finding. In such a case the conclusion that a person was an employee can be attacked since it involves an error of law, even where the adjudicator has properly instructed his or her self on the proper meaning of the term "employee".

15. Since the permitted grounds of appeal under the *Employment Standards Act* are limited in this way, it is not open to an appellant to simply re-argue the case to seek a different conclusion from this Tribunal on matters of mixed fact and law: *Re Masev Communications*, BCEST #D205/04, *Re Webster*, BCEST #D184/04.

BREACHES OF NATURAL JUSTICE AS GROUNDS OF APPEAL

Bias

16. In this case Lentz argues that the decision of the Delegate shows bias. With respect to bias, he asserts that "Throughout the entire Determination there is a definite bias towards Mr. Schmidtz" and "In the Determination statements are made under Facts and Evidence that are not true and are presented in a very slanted way against myself" such that "…every page contains a bias for Mr. Schmidtz and against myself".

17. The common law duty of fairness obliges adjudicators to perform their functions free of material interest in the outcome and from bias or a reasonable apprehension of bias. The rules against interest and bias are to ensure that statutory decision makers are not subject to improper influences and base their decisions on the evidence before them. The rules are intended to impart public confidence in the integrity of the decision making process.

18. Delegates therefore must not only be impartial in fact, but must appear to be impartial, so that the parties can have confidence in the process, which in turn enhances the acceptance of the result.

19. The rule against bias does not require a subjective analysis of the state of mind of the decision maker, but rather focuses on the question of whether, in all the circumstances, an inference can be drawn that there was a reasonable apprehension of bias. The test requires that "the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information": *Committee for Justice & Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R.369 at 394.

20. An allegation of bias against a decision maker is a serious allegation. It should not be made speculatively or on frivolous grounds: *Re: Zadehmoghani*, BCEST #D171/05. To succeed on this ground there must be evidence to demonstrate to a reasonable person an apprehension that the adjudicator may not or did not impartially determine the issues before them. If a reasonable apprehension of bias is shown, then the Determination will be set aside.

Opportunity to Be Heard

21. The second breach of natural justice alleged by Lentz arises because he says that he "…was not given another opportunity at a hearing to provide clarification of evidence" and the Delegate "…had opportunity to reconvene a hearing prior to making a decision and she didn't".

22. There is, in general, a duty of procedural fairness lying on every public authority making an administrative decision or judicial decision which affects the rights, privileges or interests of a person: *Cardinal v. Kent Institution,* [1985] S.C.R. 643 at 653. Natural justice requires that an affected person must be given a reasonable opportunity to hear and respond to evidence against his or her interest. In short, an affected person, such as Lentz, has a right to be heard.

23. If breaches of natural justice are found the Determination must be set aside. It is therefore appropriate to deal with those issues first before considering whether the Delegate made errors of law in the Determination.

ANALYSIS

A. Bias

24. As I have noted, Lentz says that the Determination of the Delegate exhibits bias against him.

25. Reviewing his submission in detail the examples that he gives of such bias are as follows:

> (1) on page 2 of the Determination the statement of the Delegate that "The only tools Mr. Schmidtz provided were his hoc and trowel";
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> (2) on page 4 of the Determination where the Delegate states "However Mr. Lentz had been in the general construction business for several years" and on page 1 of the Determination where a similar statement is made;
>
> (3) on page 1 of the Determination where the Delegate states "In fact, Mr. Lentz was looking for someone to stucco a cabin and out-building/ barn that was being converted into a residence on his property". Mr. Lentz says he was slighted by this statement;
>
> (4) on page 1 of the Determination where he asserts that "I did not state that there was an abundance of stucco work in this area. I said something more like it was difficult to get someone to stucco as the housing industry is so busy".

(1) The hoc and trowel

26. Lentz says that the statement made by the Delegate that the "The only tools Mr. Shmidtz provide were his hoc and trowel" exhibits bias. He said that this statement cannot be verified as true nor did Schmidtz say it. In his submission Schmidtz says that he did give that evidence before the Delegate. The Delegate says that Schmidtz did give that evidence and that Lentz did not dispute it at the hearing.

27. In this case there is a conflict of evidence. In the circumstances the difference in recollections does not support a finding that the statement was not made. Nor does the Delegate accepting the evidence of Schmidtz indicate bias on the part of the Delegate.

(2) Lentz in the general construction business

28. Lentz says that the statement in the Determination that he had been in the general construction business for several years was made without evidence. I do not have a record of all of the evidence that was given, in particular, I do not have any transcript of the oral evidence.

29. There are, however, other statements in evidence that bear on this matter. For example, there is a letter filed by Schmidtz saying that Lentz "…represented himself as a well established company…" as well as a written submission where Schmidtz says that, at the time they were introduced, "…Marvin told me he had a well-established construction company with lots of work".

30. One of the points that Schmidtz made in his submissions was that Lentz exaggerated his construction experience. In fact, Lentz had placed an ad in the Morning Star on August 30, 2006 saying "25 years in

the industry". Schmidtz says that while Lentz may have had 25 years experience in the construction industry he did not have 25 years experience in stucco work.

31. Moreover, Lentz's own evidence supports the fact that he had worked as a general contractor in the construction industry for some years. The issue that he took was whether the persons he had working for him currently, Mr. Manning, Mr. Brundulla, Mr. Prince and Schmidtz were independent contractors or employees.

32. As I view the evidence, it supports a finding that Lentz had been and represented himself as having been in the construction industry for many years. The statement in the Determination does not indicate bias on the part of the Delegate.

(3) Lentz looking to have buildings stuccoed

33. Lentz says he was slighted by the Delegate's statement that "In fact, Mr. Lentz was looking for someone to stucco a cabin and out-building/ barn that was being converted into a residence on his property". He says the statement should read "…Mr. Lentz as a homeowner was constructing an 800 sq ft house to live in and was looking for someone to stucco the house at that very time".

34. This submission is perplexing. As I read the two statements they convey similar information, although the statement of the Delegate contains some more detail. The statement made by the Delegate, when compared to the statement Lentz would have preferred the Delegate to make, does not show bias on the part of the Delegate.

(4) Stucco work in the area

35. Mr. Lentz says that he did not make the statement that there was an abundance of stucco work in the area. Instead he said "I said something more like it was difficult to get someone to stucco as the housing industry is so busy". It is clear from the submissions of Schmidtz, however, that he gave evidence before the Delegate that Lentz made the first statement.

36. The difference in meaning between the two statements is subtle. However, as I view the record, there was evidence before the Delegate, namely that of Schmidtz, that Lentz had made the statement to which he refers.

37. In all of these instances Lentz and Schmidtz gave slightly differing versions of events. The Delegate accepted the evidence of Schmidtz on these points. Accepting the evidence of one party over that of another is not an indication of bias. In every case of a conflict in evidence, or a variation in evidence, an adjudicator must determine what evidence to accept, or what description best suits the evidence received.

38. In reviewing the Determination on these particular points raised by Lentz and reading the reasons as a whole there is, in my opinion, no basis to the claim that there was bias or that Lentz could hold a reasonable apprehension of bias.

39. This ground of appeal therefore fails.

B. Additional In-Person Evidence

40. Lentz asserts that there is also a breach of natural justice because the Delegate failed to allow for additional in-person evidence following the first hearing date. The situation arises in two contexts. The Delegate at the conclusion of the hearing invited the parties to provide further documentary evidence. Lentz argues that the hearing should have been reconvened to allow for oral evidence. Also, during the course of the hearing Lentz filed a letter from Mr. Rick Manning. Lentz argues that the hearing should have been reconvened to allow Manning to testify.

(1) Further documentary evidence

41. Before the oral hearing concluded the Delegate decided to provide the parties with an opportunity to provide additional evidence by means of a submission on certain specified points. These were items in dispute and the parties did not come to the hearing prepared to provide evidence. The Delegate explains that "…I gave both parties specific instructions as to the limited scope of the submissions and explained that once the submissions were received I would determine whether it was necessary to reconvene the oral hearing".

42. Part of the record is a letter dated March 9, 2007 from the Delegate to the parties. The letter refers to three specific items.

43. The first item concerns the dates Lentz traveled to Calgary to see his mother. The relevance of this is because Lentz signed a letter for Schmidtz as follows:

> BC Interest Relief Program
>
> My name is Marvin Lentz, I am currently employing Cory Schmidtz. During the month of September his gross wages were 2046.00. For October they are expected to be somewhere between 2500 and 3300.
>
> Marvin Lentz
>
> DadsArtisticDesignhomes.com

44. It was Lentz' evidence that he did not know what he was signing. He admitted signing the letter but said his mind was on other matters because he was about to travel to visit a sick relative and did not read the letter.

45. The second item required Schmidtz to provide a copy of his original calendar on which he recorded his daily hours of work. Schmidtz was also to provide evidence on when he faxed his interest relief request to the student loan office.

46. The relevance of the original calendar was clearly to test the evidence of Schmidtz. The relevance of when Schmidtz faxed his interest relief request to the student loan office concerns Lentz' assertion that Schmidtz gave him this letter to sign on a Friday morning as he was leaving to see his sick mother in Alberta. Schmidtz produced evidence that showed he faxed the letter on October 24, 2006, the day after it was created and signed. Thus the letter was created at least three full days before Lentz went to Alberta on October 27, 2006.

47. Both parties were asked to provide evidence concerning when the advertisement for Dad's Stucco was first run in the Vernon paper. The relevance of this date concerns Lentz's assertion that he and Schmidtz had put an advertisement in the local Vernon paper, The Morning Star, for Dad's Stucco after he returned from Europe and after they had discussed becoming partners. Lentz had gone to Europe in September, 2006. The discussion concerning partnership had taken place later that month. Schmidtz produced an advertisement in a paper dated August 30, 2006, well prior to Lentz's trip to Europe and the partnership discussion.

48. In my view it is clear from the Delegate's letter request that he was seeking to determine if there was any documentary evidence that corroborated the evidence of the parties where it was in conflict.

49. In any event, Mr. Schmidtz supplied the documents noted, and then the Delegate wrote to the parties, enclosing copies of the documents, and inviting them to comment on the documents. The Delegate's letter of March 28, 2007 is part of the record. The Delegate says "I have decided to conclude these proceedings by written submission" and that "I am disclosing this documentation and providing the parties with a final opportunity to respond to this documentation".

50. A final submission was received from Schmidtz. An illegible fax was received on April 11 which the office assumed was sent from Lentz. A message was left with him and on the following day another fax was received from Lentz with no cover including a ruling by CRA. Lentz refers to this ruling in his submissions here.

51. During this process the Delegate noted that at no time did Lentz request that the oral hearing be reconvened, nor did he assert that he was unable to participate in the proceedings because of family illness.

52. In his submissions before me Lentz asserts that the Delegate, in declining to reconvene the hearing and accept oral evidence, committed a breach of natural justice. I disagree.

53. The Delegate concluded the oral hearing and gave the parties a further opportunity to be heard on specific points. Those points concerned the provision of documentary evidence. The Delegate provided the parties with the documents that were supplied pursuant to his request and then gave the parties a further opportunity to respond to such evidence by written submission. The Delegate made it clear that further submissions on the specific evidence supplied were to be in writing.

54. I can find no fault in the procedure adopted by the Delegate. The procedure was clear. The receipt of additional information was there to allow the parties to corroborate their oral testimony by documentary evidence. Both parties were given an opportunity to provide documents and both parties were given a further opportunity to make submissions concerning such documents.

55. In my opinion there is no merit to the position that the Delegate breached the rules of natural justice by failing to reconvene an oral hearing.

(2) Evidence of Rick Manning

56. Lentz also asserts that the Delegate breached natural justice by failing to allow him to call as a witness Rick Manning ("Manning"). Manning provided a brief letter that was of limited help to the Delegate.

57. Lentz says that "if natural justice were to prevail Mr. Manning who was on another job at that time did not want to take time off unless necessary" and "The Director could have requested further evidence in person from Mr. Manning….".

58. The Delegate says, however, that during the course of the hearing, when Lentz filed the letter from Manning, she provided Lentz with an opportunity to make arrangements to call Manning as a witness. The Delegate "explained that when considering or weighing evidence, a written statement could not be given as much weight as oral testimony". Lentz was invited to but declined to call Manning as a witness, and at no time after the oral hearing did Lentz request that the hearing be reconvened to provide Manning an opportunity to testify in person.

59. At a hearing before the Director a party must come prepared to present their case. That involves the filing of documents, oral testimony, and, if considered necessary, the calling of third party witnesses. A written statement from a third party while it might prove helpful, does not provide the opposite party an opportunity to test the statement by cross-examination. So, in my view, the Delegate was quite right to warn Lentz that such a statement may be of limited weight.

60. It is clear from the submission of the Delegate that Lentz was given an opportunity to call Manning as a witness. He declined the opportunity. Having declined the opportunity to call Manning as a witness he cannot, having received an adverse decision, complain that the witness should have been called in person.

61. A hearing before a Delegate is intended to be a complete hearing on the issues. An appeal from a Determination is a limited form of appeal. The *Employment Standards Act* makes it clear that it is not a new hearing but is a limited form of review restricted to examining the legal issues, procedures, and, in exceptional cases, examining the issues in light of new evidence that was not available at the time of the hearing.

62. A party appearing before the Delegate must make choices as to how they are going to present their case. They cannot complain later regarding those choices simply because they have received an adverse result.

63. Lentz was given the opportunity to call Manning as a witness. Having declined that opportunity he cannot, after receiving an adverse decision, complain that his choice gives rise to a breach in natural justice.

C. Employee, Contractor

64. Lentz argues that Schmidtz was an independent contractor and latterly a partner and not an employee.

65. All of the arguments presented by Lentz involve him re-examining the evidence and urging that this Tribunal come to a different conclusion than that of the Delegate. None of the submission takes issue with the legal tests employed by the Delegate in coming to her Determination.

66. With respect to the question of whether Lentz was an employee or independent contractor, the Delegate noted that while various tests might be used, no one test can be universally applied, citing the decision of the Supreme Court of Canada in *67112 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983. The Delegate noted that all elements of the relationship must be examined, and proceeded to examine the various factors in the context of the relationship.

67. The Delegate also referred to a CRA ruling that Schmidtz was not an employee. The CRA ruling was submitted by Lentz following the oral hearing and written submissions. As the Delegate noted, it is not known what evidence was presented to the CRA investigator or even whether there was a hearing. The ruling contains no analysis. Moreover, the Delegate here is required to come to a conclusion based on the evidence before her.

68. The Delegate considered and analyzed relevant factors. The factors considered by the Delegate included Schmidtz's hourly wage and mode of payment, the chance of profit or risk of loss, who supplied the materials, the financial investment in the business, who arranged and the form of business advertising, and the organization of the business. In considering these and other factors Lentz has not shown that the Delegate erred in law.

D. Employee, Partner

69. While Lentz asserts that he and Schmidtz became partners after Lentz returned from Europe, there is simply no evidence that such a relationship was established, nor is the evidence of the relationship between Schmidtz and Lentz consistent with that of a partnership.

ORDER

70. I order, pursuant to section 116 of the *Employment Standards Act*, that the appeal is dismissed and the Determination of the Director is confirmed.

John Savage
Member
Employment Standards Tribunal