Employment Standards TRIBUNAL

An appeal

- by -

United Specialty Products Ltd.
("USP")

- 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: Shafik Bhalloo

FILE No.: 2012A/45

DATE OF DECISION: July 26, 2012

DECISION

SUBMISSIONS

Roger Repay	on behalf of United Specialty Products Ltd.
Diana Douglas	on her own behalf
Chantal Martel	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the "*Act*") brought by United Specialty Products Ltd. ("USP") of a determination that was issued on March 26, 2012, (the "Determination"). The Determination ordered USP to pay Ms. Douglas $1,991.71, representing wages and accrued interest.

2. The Director, pursuant to Section 29 of the *Employment Standards Regulation*, B.C. Reg. 396/95 (the "*Regulation*"), also imposed two (2) administrative penalties of $500.00 each on USP for contraventions of sections 18 and 64 of the *Act*.

3. USP appeals the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination and asks the Tribunal to cancel the Determination.

4. In its appeal submissions, USP asked for a suspension of the Determination pending the appeal, and the Tribunal, in a Decision dated June 13, 2012, (reported at BC EST # D061/12), granted the suspension request on the condition that USP deposits the amount of $1,991.71 with the Director.

5. I also note that USP requested the appeal proceed by way of an oral hearing and requested the notes of the delegate who conducted the Hearing because USP claimed that there was "a significant disconnect between the evidence presented at the Hearing and the delegate's version of those facts in the Determination". The Tribunal rejected both of these requests in a separate decision reported at BC EST # D057/12.

6. In this decision, I will consider the merits of USP's appeal based on a review of the Determination, the written submissions of the parties, as well as the section 112(5) "record".

ISSUES

7. As indicated, the issues in this appeal are two-fold, namely:

   (i) Did the Director err in law in making the Determination?

   (ii) Did the Director fail to observe the principles of natural justice in making the Determination?

FACTS

8. USP operates a business selling specialty chemicals, solutions and services. USP employed Diana Douglas ("Ms. Douglas") as a Territory Manager commencing March 31, 2010, and terminated her employment for cause on November 17, 2010.

9. On February 7, 2011, Ms. Douglas filed a complaint against USP claiming that the latter contravened the *Act* by failing to pay her compensation for length of service and wages for her last two (2) weeks of employment (the "Complaint"). The delegate of the Director conducted a hearing of the Complaint over the course of two (2) days on June 30 and October 20, 2011, (the "Hearing"). The issues the delegate examined at the Hearing were threefold, namely whether:

(i) Ms. Douglas was an "employee as defined under the *Act*"?

(ii) If so, is Ms. Douglas owed outstanding wages?

(iii) Ms. Douglas was entitled to compensation for length of service?

10. With respect to the first issue, after considering the evidence and submissions of the parties at the Hearing, the delegate went on to conclude, based on the application of the definitions of "employee" and "employer" in the *Act*, as well as the common law "four-fold test" (direction and control, ownership of tools, chance of profit and risk of loss and integration) to the work relationship between USP and Ms. Douglas, that Ms. Douglas was an employee of USP and not an independent contractor. The delegate, in arriving at this decision, noted that although Ms. Douglas was clear that the intent of the agreement presented to her by USP (which she did not sign) was to create an independent contractor relationship between the parties and although she accepted a position with USP as a contractor, the substance of the parties' relationship in practice was one of employer-employee.

11. While I do not think it is necessary to reiterate all of the evidence presented by the parties on this issue at the Hearing and set out in the Reasons for the Determination, I will set out, in part, the reasons or analysis of the delegate which considers the relevant evidence of the parties and makes credibility determinations ultimately leading to the finding that Ms. Douglas was an employee and not an independent contractor. More particularly, in the Reasons, the delegate states with respect to the matter of the degree of direction and control USP exercised over Ms. Douglas:

> The employer is expected to have control and direction over the workplace including all persons performing work. Mr. Repay's [the Director of USP] evidence was that Ms. Douglas was able to set her own hours and determine her own efforts and method of work, facts Ms. Douglas disputed. Ms. Douglas provided evidence she was directed by Mr. Repay to complete errands and other miscellaneous daily tasks. This is significant in light of the fact that the definition of "employee" in the Act includes "a person an employer allows, directly or indirectly to perform work normally performed by an employee". While I believe Ms. Douglas enjoyed some flexibility with her working hours which is normal given her position of Territory Manager, the evidence suggests she nevertheless had to operate within the guidelines established by United. Although Ms. Douglas appears to have some autonomy to decide what days and what hours she worked, she yet reported regularly on what her weekly and upcoming sales activities were; therefore, accounting for her activities. On this point, I prefer Ms. Douglas' evidence regarding the level of control exercised by the Employer.
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> In addition, she was to adhere to the dress code as part of various policies defined in United's Policy and Procedures Manual. The evidence further suggests Ms. Douglas was not the master of how her tasks were carried out. Ms. Douglas was hired to sell a product, the parameters of which were set by United and the clients of United. Without exception, Ms. Douglas had to implement the procedures established

for invoicing and finance approvals for clients. Although, according to Mr. Repay, Ms. Douglas was not constrained in developing ideas as she saw fit to realize a profit, the evidence is that she was to operate within the parameters (such as using the email template) and executed her sales under the terms set out by United.

…

I note the sheer volume of daily emails between the parties submitted for this hearing persuades me that the relationship between the parties is beyond the norm of a "contractor relationship".

As an independent contractor, Ms Douglas would be expected to operate using her own methods or expertise. In reviewing the various emails, it is clear Ms. Douglas did not possess the product knowledge or expertise required to sell many of United's specialty chemical products. Mr. Repay had to regularly instruct Ms. Douglas on what product was more appropriate or what quantities to sell. Since Ms. Douglas did not have the requisite product knowledge, I accept she may have initially required a greater level of guidance until she familiarized herself with the products; however in this case, she received on-going training or coaching. I find the Employer had ample control over what was to be done and the manner it was to be done.

I further find Ms. Douglas was also directed over the manner in which the work was performed as she was told what samples could be given away, discounts and what prices she had to charge for her sales. Ms. Douglas was also provided with a sample of a sale's script outline to coach Ms. Douglas on how to sell for United over the telephone and in person, albeit according to Mr. Repay to help her with her sales. In all, I find there was substantial direction and control from United of Ms. Douglas, which appeared to be ongoing, and is beyond that of an independent contractor. The evidence is Ms. Douglas did not have the level of independence normally exercised by sub-contractors.

In addition, the agreement prepared by United and submitted to Ms. Douglas clearly contains language evidencing an extreme amount of control being exerted by United. For example, clause #9 is a non-compete agreement and Clause #12 requires the sales representative to 'further agree to devote substantial time to learn the Company's products, selling methods.'

As for the issue of whether Ms. Douglas could sub-contract her efforts to someone else and hire her own helpers, Ms. Douglas claimed she could not. On this, both parties lead evidence Ms. Douglas had recruited to hire, subject to Mr. Repay's approval, an additional sales person to assist her with her sales. This proposal was specifically discussed between them and was rejected by Mr. Repay. I accept Ms. Douglas' agreement was for her services alone and find it did not include her ability to sub-contract work if she deemed so necessary.

The fact that Ms. Douglas could not delegate or sub-contract her work to someone else, is, while relevant, not a conclusive factor. However, this is a factor indicative of a person in business for herself as it not only leads to the chance for profit and risk of loss but is reflective of her autonomy and independent decision making which is reflective of someone in business for herself as opposed to being an employee.

12. With respect to the matter of ownership of tools and chance of profit and risk of loss, the delegate states:

With respect to the issue of tools and equipment, it was argued by Mr. Repay, that Ms. Douglas as a contractor provided for her own office and equipment, vehicle, office supplies, etc. However, in carrying out her duties, it was not unusual for Ms. Douglas to work at United's offices and use its tools given the type of work she was doing. The provision of such tools by employees while necessary to perform the work does not necessarily negate the overall employment relationship. However, I find the fact that work was done at the employer's place of business when work could have been performed elsewhere, implies some control by the employer over the person.

Ms. Douglas had no financial investment in the business. Therefore, she had no chance of profit or risk of loss which is largely dependent on the degree of financial investment made by the worker. According to Mr. Repay, Ms. Douglas had a chance of profit because the more she sold the more she would make in

> commissions. As a contractor this is not what a "chance of profit" means. A "chance of profit" means if the company made money the person would also have a share of it. Or, conversely, if it lost money, he would be short his share of the loss. There was no evidence to suggest Ms. Douglas would be sharing in the loss if United lost money. She was paid a weekly wage regardless of her sales or of the company's financial situation.
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> In addition, there is no evidence to suggest there was any risk of loss to Ms. Douglas. Ms Douglas had no authority to approve her client's finance applications and therefore was not required to take any degree of financial risk. More telling in the agreement which United was looking to have Ms. Douglas sign is the non-competition clause. I find this runs contrary to United's contention that Ms. Douglas had a chance of profit through the venture. Further, Mr. Repay states Ms. Douglas was not free to change the price list for items unless it was authorized by United, the parent company. Similarly, it was Mr. Repay who had the final authority on what marketing initiatives would be undertaken and the budget that was to be followed. These factors eliminate Ms. Douglas' chance for profit and risk of loss and thereby are indicative of an employment relationship.
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> …
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> Ms. Douglas received the same amount of her salary or wage weekly and in addition received a bonus and commission on her sales. In reviewing the payroll records, I find there is no evidence the wage was an advance against sales. Despite the Employer not taking off taxes this is not sufficient evidence Ms. Douglas was in fact in business for herself. On this point, I find the July 12, 2010 email from Ms. Douglas to Mr. Repay is significant as Ms. Douglas, after being informed she is to receive commissions only, that she cannot survive on commissions alone and requests the need to renegotiate the initial wage arrangement with United. As Ms. Douglas continued to receive her weekly salary, I find Ms. Douglas was economically dependent on United for her source of income. This suggests the relationship between United and Ms. Douglas was not substantially different than that of an employee. Hence, I find the evidence is clear in that Ms. Douglas received a salary paid weekly and this is indicative of an ongoing employment relationship.

13. With respect to another of the common law tests employed in determining the nature of the parties' relationship, namely, the specific results test which involves consideration of whether the agreement between the parties is for work to be performed leading to a specific objective or result versus an agreement to provide general service on an ongoing basis with no specific objective, the delegate stated:

> Mr. Repay's position is that Ms. Douglas was to generate sales and according to him each sales was a separate, specified result for which she received a commission.
>
> I find the terms of the agreement presented to Ms. Douglas are not particularly helpful in determining whether the relationship was for a specific result. Rather, although the agreement was not signed by the parties, clearly there was a meeting of the minds to continue the relationship after the first month of Ms. Douglas' employment. As such I am persuaded that the parties contemplated an ongoing and lasting relationship whereby Ms. Douglas was engaged to provide her sales expertise to generate sales on an ongoing basis for United. I also find the fact Ms. Douglas continued to receive her salary while on vacation, clearly a benefit not afforded to a contractor, is further indication of an employee relationship and that the relationship was to be on-going.
>
> In addition, I find it difficult to reconcile a finding that she was a contractor in that Ms. Douglas' business cards identified her as Territory Manger for United and her email correspondence was signed as such indicating she was an employee of United. I find the reference to Ms. Douglas in a letter dated June 20, 2010 is also particularly significant in that Mr. Repay on behalf of United thanks Russell Food Equipment Ltd., for the courtesies extended to 'my Territory Manager, Diana Douglas'.

14. The delegate also considered the integration test, which deals with the individual's degree of involvement in the organization. The integration test presupposes that if the services provided by an individual are integral to the organization, then their involvement is one of employee. If the services can be viewed as part of a

separate business of the individual who provides the services, the individual may then be viewed as an independent contractor:

> The work performed by Ms. Douglas was work that one would generally expect an employee in the position of Territory Manager of a distributing business to perform. Her efforts, with minor exceptions, were directly related to the sales and distribution of United's product; work that could be properly characterized as work normally performed by an employee and integral to the company's ongoing business operation. Accordingly, this is not the same as someone coming in to do a specific job and then leaving. Although there is no evidence to suggest United could not carry on its normal business without the services provided by Ms. Douglas, there is no doubt sales represents a substantial part of United's business. Clearly, the services provided by Ms. Douglas were not viewed as part [of] a separate business and therefore integral to the business of United.
>
> Accordingly, the degree of integration was not minimal and I find the work performed was work normally performed by an employee.

15. It is also noteworthy that the delegate did not follow the earlier ruling of Canada Revenue Agency ("CRA") on the issue of whether or not Ms. Douglas was a contractor or an employee in context of Ms. Douglas' application for Employment Insurance. That ruling determined that she was not an employee. USP sought to rely on the CRA ruling but the delegate placed very little if any value in the said ruling stating that she was not bound by the ruling and it was of little probative value in evaluating the nature of the relationship between the parties for the purposes of the *Act*.

16. Having concluded that Ms. Douglas was an employee of USP, the delegate next went on to determine whether or not Ms. Douglas was owed any wages. While USP contended that Ms. Douglas was paid all wages owed to her, Ms. Douglas argued she was not paid her wages for the last two weeks of her employment between November 3 to 17, 2012. The delegate, in concluding that Ms. Douglas was owed $1,000.00 in wages for the said period, said:

> I have reviewed copies of the pay cheques given to Ms. Douglas which make no mention the payment is for commission or an advance against future earnings. Further, my review of the payroll records confirms there were no claw backs taken or applied against her commissions. The payroll records indicate Ms. Douglas was consistently paid, up to the end of November 3, 2010, the weekly amount of $500.00 with no adjustments taken. I find Ms. Douglas received a weekly salary of $500.00.
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> Other than commissions, there is no evidence to suggest Ms. Douglas received any other wages after November 3, 2010. I further note the agreement did not contain wording regarding weekly hours of work nor was there a record of hours worked kept by either party. However, Ms. Douglas indicated on average she worked 9:00 am to 4:00 pm and that her wages were inclusive of all hours worked. There was no disagreement on this issue by Mr. Repay and I accept Ms. Douglas worked on average 40 hours per week. Therefore, I find Ms. Douglas was paid $500.00 per week which equals $12.50 per hour and therefore is more than minimum wage stated in the Act.
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> Ms. Douglas worked until November 17, 2010, but as stated above, was only paid up to November 3, 2010. Therefore it stands [to reason that] she is entitled to additional two weeks wages but note under the Act, allowances or expenses are not considered wages. I find Ms Douglas is entitled to additional wages in the amount of $1,000.00 ($500.00 x 2 weeks). This amount is subject to 4% vacation pay as detailed further in this determination. Since these wages were not paid within the requirements of section 18 of the Act, I find United contravened this section on November 19, 2010 for which a $500.00 penalty is assessed.

17. With respect to Ms. Douglas' claim for compensation for length of service, USP argued that she was dismissed for cause and Ms. Douglas argued to the contrary. In the Reasons, however, the delegate notes

that Ms. Douglas acknowledged that she received "many verbal warnings that her lack of sales could not go on". She also acknowledged that USP threatened to put her on straight commission and on November 8, 2010, advised her in writing that she would no longer receive weekly advances and only commissions. However, when she asked USP, at that time, if she was being let go, she states Mr. Repay told her that "we can make it happen". Subsequently, nine days later, on November 17, 2010, Ms. Douglas received a letter from USP terminating her employment. The letter, which the delegate quoted in part in the Reasons, states:

> There have [sic] not been a single order processed by you in the last 20 days and I have had more than one customer call me directly for assistance in the past week after they could not reach you, not to mention the fact that your tone towards management has been, at best, rather negative lately. Curiously, your voice mail message has been changed and you recently corresponded to me using your personal email. And, although USP (the employer) exercises no control over your time or actions, your request for a letter of recommendation speaks volumes of your own non-confidence with United sales. I have made every concession possible to you in terms of remuneration and support, yet we deeply regret that things have not worked out well for you with USP. Effective immediately, your services will no longer be required …

18. The delegate then delineated the criteria the employer must meet to establish just cause for termination of employment where unsatisfactory performance of an employee is concerned. The delegate stated, in particular, the employer must show that:

> 1. Reasonable standards of performance have been set and communicated to the employee;
> 2. The employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
> 3. A reasonable period of time was given to the employee to meet such standards; and
> 4. The employee did not meet those standards.

19. In concluding that USP failed to discharge the onus to show just cause and breached section 63 of the *Act*, the delegate reasoned as follows:

> As suggested in the letter, this is not a case where an employee can be dismissed for cause on the basis of a single instance of incompetence and although Mr. Repay in the [letter] suggests Ms. Douglas was given 'every concession...in terms of remuneration and support', I find there is no evidence that clear and objective performance standards were provided to Ms. Douglas. Despite the various ongoing email discussions, which I accept suggest Mr. Repay made reasonable efforts to assist Ms. Douglas to achieve her sales, I cannot find any evidence indicating Ms. Douglas was given reasons to suspect her overall performance had to improve and failure to do so would result in her dismissal. In fact, on the heels of a letter of recommendation from Mr. Repay clearly praising Ms. Douglas for her work ethic and passion for sales and new business development and further recommending her as a tremendous company asset, I find the termination letter of November 17, 2010 clearly surprising.
>
> Prior to the November 17, 2010 letter, United did not provide any documentation of warnings given to Ms. Douglas that her job was in jeopardy due to performance concerns prior to terminating her. Nor did Ms. Douglas receive any "working notice" that her employment was coming to an end. I find, Ms. Douglas was terminated effective November 17, 2010 and this termination was without cause and without notice. I further find the Employer owes the Complainant one week's compensation for length of service in the amount of $500.00 and subject to the timeframe requirements of section 18, the Employer has contravened section 63 of the Act for which a mandatory penalty of $500.00 is assessed. This amount is subject to 4% vacation pay as detailed below.

20. The delegate further ordered USP to pay Ms. Douglas vacation pay on all her wages earned, including unpaid wages ordered in the Determination and interest thereon pursuant to section 88 of the *Act*.

SUBMISSIONS OF USP

21. USP's written submissions in support of the natural justice and error of law grounds of appeal are commingled. To the extent I am able to separate or categorize them under separate headings associated with the two (2) grounds of appeal USP invokes I will do so below.

(i) Natural Justice

22. USP advances several arguments in support of the natural justice ground of appeal, starting with the argument that the delegate rejected USP's request to allow for lie detector evidence.

23. USP also argues that the delegate breached the principles of natural justice in rejecting USP's request to adduce evidence of Ms. Douglas working or employment with another company as irrelevant.

24. USP argues under the subheading "The Bias Rule" in its written submissions that the definition of "employee" in the *Act* that includes "a person an employer allows, directly or indirectly to perform work normally performed by the employee" is "biased towards United". USP further contends that the definition of "employer" in the *Act* "can also apply to anyone who hires subcontractors" and submits that the *Act* and the interpretation Guidelines to the *Act* seem to weigh in favour of finding an employment relationship.

25. USP also argues that the delegate's statement that an agreement to create a contractor relationship between the parties does not prevent her from finding that Ms. Douglas was an employee or in an employment relationship "is biased" because the delegate does not acknowledge the converse, namely, that if an aspect of the relationship between the parties resembles an employment relationship the delegate is not prevented from making a finding that Ms. Douglas was a contractor.

26. USP also argues that the hearing process was biased against USB because another delegate of the Director, in advance of the Hearing, made "a strong pitch to United to settle or mediate to avoid penalties" but no such approach was made to Ms. Douglas.

(ii) Error of Law

27. USP, under the error of law ground of appeal, argues that the Director or the delegate erred in law in failing to "rule correctly that the *Act* does not apply to persons who are contractors." USP makes this assertion based on its contention that Ms. Douglas entered into an agreement that said she was an independent contractor and she was set-up to operate as a sub-contractor with her own company.

28. USP, under a subheading entitled "The Evidence Rule" argues that the delegate did not clearly point to the evidence and explain inferences she made in the Determination. USP states the delegate's decision was "not based upon logical proof or evidence material" and proceeds, under separate subheadings corresponding to the subheadings for various common law tests for determining employer-employee relationship the delegate used in assessing the relationship of Ms. Douglas with USP, to challenge the findings and conclusions of fact made by the delegate and the credibility of Ms. Douglas. I note, I have read those submissions very carefully but do not find it necessary to reiterate them here for the reasons I will discuss under the heading analysis.

29. USP also submits that the delegate erred in concluding that the termination of Ms. Douglas' employment was without cause or that UPS contravened section 63 of the *Act*. According to USP, Ms. Douglas admitted she received verbal warnings that her "lack of sales could not go on" and "warned clearly that her 'employment' was in jeopardy". She was afforded a reasonable period to meet the standards of performance set for her and failed to do so and therefore USP had cause to terminate her employment.

30. USP further submits that the delegate ruled that at some point the relationship between Ms. Douglas and USP changed to employer-employee relationship but the delegate failed to prorate her calculation for "wages, vacation pay and compensation for length of service" based on when the change occurred.

(iii) Final Submissions

31. I have also reviewed USP's final submissions, which are in the nature of a re-argument of the points argued by USP in its earlier appeal submissions or at the Hearing of the complaint. While I do not think I need to reiterate those submissions here, I find one of those submissions noteworthy, namely, USP's challenge of the delegate's conclusion that Ms. Douglas received a weekly salary of $500 which amount was not an advance against future earnings. USP has included two emails from Ms. Douglas that it previously adduced at the Hearing. The first is an email dated April 25, 2010, from Ms. Douglas to Mr. Repay enclosing a spreadsheet. In the spreadsheet Ms. Douglas refers to the $500 weekly amount as a "wage". In her second email to Mr. Repay, dated July 10, 2010, she states:

> - Payback of your previous payments to me of $500. per week is basically 'frozen' from April 6 (start date) forward and I don't owe any of that back at this time, and we'll assess terms for repayment from my commissionable sales, in approximately one month (can we set a date to discuss that? Say Aug?)

SUBMISSIONS OF THE DIRECTOR

32. The Director denies that there has been a breach of natural justice or any errors in law on the part of the Director.

33. The Director submits that USP's request to adduce testimony at the hearing by way of a lie detector was made prior to the hearing reconvening on October 20, 2011, and the delegate rejected that request as it would have been inappropriate and prejudicial to the complainant because the facts in the case were largely disputed and credibility appeared to be an issue.

34. As for USP's allegation that the hearing process was biased due to the "strong pitch to settle or mediate to avoid administrative penalties", the Director submits it is a common practice at the beginning of a hearing for the presiding member to present the parties with an opportunity to settle the complaint if they so wish and in this case the parties agreed to so meet the mediator prior to the beginning of the hearing.

35. With respect to USB's submission of materials the delegate refused to consider pertaining to alleged employment of Ms. Douglas as an independent contractor with another company, the Director states that such information was irrelevant to the issue of whether or not there existed an employment relationship between Ms. Douglas and USP and the information was hearsay statements and could not be relied upon in any event.

36. The Director concludes by stating that the delegate reviewed and considered all of the evidence of the parties and based the Determination on the facts as she found them. The Director submits USP is using the appeal

process to merely express its disagreement with the findings and conclusions of fact in the Determination and therefore USP's appeal should be dismissed.

SUBMISSIONS OF MS. DOUGLAS

37. Ms. Douglas contends that USP's appeal should be dismissed, as USP has not established a breach of natural justice or any errors of law on the part of the Director. She further states that simply disagreeing with the findings or "opinions" of the delegate is not a basis for appealing the Determination. She also states that not being allowed to use a lie detector test is also not a basis for USP to appeal.

38. She concludes by stating that she adduced sufficient evidence to show that there was an employer-employee relationship between her and USP and therefore the appeal of USP should not succeed.

ANALYSIS

39. As indicated, USP relies on two (2) grounds of appeal set out in sections 112(1)(a) and (b), namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination. The onus of proof for establishing that the Determination is incorrect based on these two (2) grounds of appeal rests with USP. I will examine each of USP's grounds of appeal under separate headings below.

(i) Error of Law

40. The British Columbia Court of Appeal's decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 is instructive on the subject of what constitutes an error of law. The Court of Appeal, in *Gemex*, defined the following instances as amounting to an error of law:

(1) A misinterpretation or misapplication of a section of the Act;

(2) A miscalculation 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) Exercising discretion in a fashion that is wrong in principle.

41. I also note that in *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal stated that the definition of error of law should not be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact alone, or errors of mixed law and fact, which do not contain extricable errors of law. The Tribunal also added that unless there is an allegation that the delegate erred in interpreting the law or in determining what legal principles are applicable, there couldn't be an allegation that the delegate erred by applying the incorrect legal test to the facts.

42. It is also important to note that The Tribunal has indicated repeatedly in appeal cases that it does not have jurisdiction over questions of fact unless the matter involves errors on findings of fact, which may amount to an error of law (see *Re Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re Kovisto (c.o.b. Finn Custom Luminum)*, BC EST # D006/05). As for the criteria for determining findings of fact which amount to an error of law, the Tribunal explained in *Re Funk*, BC EST # D195/04, that the appellant would have to show that the fact finder made a "palpable and overriding error" or that the finding of fact was "clearly wrong" before an error of law will be found. Where there is no evidence that the delegate "acted without any evidence or on a view of evidence that could not reasonably be entertained" or committed a "palpable or overriding error" or

arrived at a "clearly wrong conclusion of fact", the Tribunal is reluctant to substitute the delegate's findings of facts even if it is inclined to reach a different conclusion on the evidence.

43. Having said this, on the subject of the delegate's finding of an employment relationship between the parties, I find that USP's submission do not establish a misapplication by the delegate of a section of the *Act*, a misapplication of a principle of general law, acting without evidence, acting without supporting evidence, or exercising discretion in a fashion that is wrong in principle. I find that the delegate, particularly in the quoted parts of the Reasons I have delineated under the heading "Facts" in this decision, shows a reasonable basis for her conclusions of fact and particularly her determination that an employment relationship exists between the parties. I find it was open to the delegate, based on the evidence adduced by the parties, to conclude that Ms. Douglas was an employee of USP. I do not agree with USP that the delegate's determination on this issue is "not based upon logical proof or evidence material" or that the delegate did not point to the evidence or explain any inferences she made in the Determination. Granted the delegate preferred the evidence of Ms. Douglas over USP's for the most part, but it is within the delegate's authority as a decision-maker to weigh the evidence and make credibility findings and reach conclusions of fact which of necessity will result in the delegate preferring the evidence of one party over the other. In the result, I find, there is no evidence of "palpable and overriding error" on the part of the delegate in reaching her conclusion on this issue.

44. I also wish to point out that USP's appeal is based, in large part, on its challenge of the delegate's credibility determinations and findings and conclusions of fact. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law as indicated earlier.

45. I also wish to note that I agree with the delegate that she is not bound by the determination of CRA on the issue of the status of Ms. Douglas as CRA's determination was under its governing legislation for a different purpose, although there are similarities in the factors that agency considers with the factors the delegate or the Tribunal considers when examining the question of the nature of the parties relationship.

46. On the matter of the termination of Ms. Douglas' employment, I find that that the delegate did not err in law in concluding that the employment of Ms. Douglas was terminated by USP without cause.

47. Section 63 of the *Act* states:

> **63** (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.
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> (2) The employer's liability for compensation for length of service increases as follows:
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> (a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;
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> (b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.
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> (3) The liability is deemed to be discharged if the employee
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> (a) is given written notice of termination as follows:
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> i. one week's notice after 3 consecutive months of employment;
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> ii. 2 weeks' notice after 12 consecutive months of employment;
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> iii. 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

> (b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or
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> (c) terminates the employment, retires from employment, or is dismissed for just cause.

48. One of the leading cases in British Columbia on 'just cause' is *Silverline Security Locksmith Ltd.*, BC EST # D207/96. At paragraph 11, the Tribunal stated:

> The burden of proof for establishing that there is "just cause" to terminate Davis' employment rests with Silverline. "Just cause" can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, wilful misconduct or a significant breach of the workplace policy.
>
> It can also include minor infractions of workplace rules or unsatisfactory conduct that is repeated despite clear warnings to the contrary and progressive disciplinary measures. In the absence of a fundamental breach of the employment relationship, an employer must be able to demonstrate 'just cause' by proving that:
>
> 1. Reasonable standards of performance have been set and communicated to the employee;
> 2. The employee was warned clearly that his/her continued employment was in jeopardy if such standards were not met;
> 3. 3. A reasonable period of time was given to the employee to meet such standards; and
> 4. The employee did not meet those standards.

49. And at paragraph 15, the Tribunal stated:

> The concept of "just cause" requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in their dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that their work performance is acceptable to the employer.

50. While the delegate notes in the reasons that "both parties acknowledged Ms. Douglas was not generating sales as envisioned", she did not find USP to have delineated "clear and objective performance standards [for] Ms. Douglas". The delegate also did not find that Ms. Douglas was given "reasons to suspect her overall performance had to improve and failure to do so would result in her dismissal", although in the Reasons the delegate notes that Ms. Douglas stated that she received many verbal warnings that her lack of sales could not go on. The delegate also notes in the reasons that when Ms. Douglas queried, in response to USP's letter of November 8, 2010, threatening to put her on straight commission, whether she was being let go, Mr. Repay told her that "we can make it happen".

51. While USP argues that the delegate, in the circumstances, erred in concluding that Ms. Douglas was dismissed without cause, I am not persuaded by USP's submissions on this point. I find that the delegate weighed the evidence of both parties and made a reasonable assessment based on the application of correct principles of law. I find this is not a case where the delegate acted without any evidence or on a view of evidence that could not reasonably be entertained or committed a palpable or overriding error or arrived at a clearly wrong conclusion of fact. It was, in my view, open for the delegate, based on the evidence of the parties, to come to the conclusion she did even if I would have been inclined to reach a different conclusion.

52. With respect to the matter of the outstanding wages, I find the delegate, in part, erred in law in concluding that Ms. Douglas received a weekly salary of $500 which amount was not an advance against future earnings. I do not find that the delegate took into consideration Ms. Douglas' own emails to Mr. Repay dated

April 25, 2010, and July 10, 2010. The first email dated April 25, 2010, from Ms. Douglas to Mr. Repay encloses a spreadsheet in which she refers to the $500 weekly amount as a "wage". In her second email to Mr. Repay, dated July 10, 2010, she states:

> - Payback of your previous payments to me of $500. per week is basically 'frozen' from April 6 (start date) forward and I don't owe any of that back at this time, and we'll assess terms for repayment from my commissionable sales, in approximately one month (can we set a date to discuss that? Say Aug?)

53. In the face of these two emails of Ms. Douglas, I find it difficult how the delegate could have concluded that the $500 weekly payments Ms. Douglas was receiving was not an advance against future earnings or commissions. In the circumstances, I find that the delegate, in concluding that the $500 weekly payment was salary, acted on a view of the facts which could not reasonably be entertained and thus erred in law.

54. Having said this, Section 16 of the *Act* entitles commissioned salespeople to earn at least the equivalent of minimum wage, subject to the exception in Section 37.14 of the *Regulation*. Section 16 states:

> ***Employers required to pay minimum wage***
>
> **16** (1) An employer must pay an employee at least the minimum wage as prescribed in the regulations.
>
> (2) An employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages in a pay period to comply with subsection (1) in relation to any other pay period.

55. Where the commissions do not total at least the minimum wage for the number of hours worked in a pay period, the employer is obligated to pay the difference between the commissions earned and the minimum wage. Further, where the employer makes up a shortfall between commissions actually earned and minimum wage owed for hours worked in a pay period, the employer cannot recover that payment in a subsequent pay period where the employee makes a commission in excess of minimum wage.

56. In the case of Ms. Douglas, the delegate calculated her entitlement for two weeks wages based on her conclusion that Ms. Douglas earned a weekly salary of $500. The delegate also calculated the compensation for length of service pay pursuant to section 63 based on the same premise. Having found that the delegate erred in concluding that Ms. Douglas' was receiving a weekly salary of $500, the calculations for both outstanding wages for the period November 3 to 17, 2010, and compensation for length of service require to be calculated based on Ms. Douglas' minimum wage entitlement for hours worked on a weekly basis. In the Reasons, the delegate states that there was no disagreement between the parties that Ms. Hours worked 40 hours per week on average. In the circumstances, I would, pursuant to Section 115(1)(b) refer the matter back to the Director, with express instructions to calculate outstanding wages as well as compensation for length of service of Ms. Douglas and also vacation pay based on the minimum wage entitlement under the *Act*. Of course this would also entail a recalculation of interest pursuant to Section 88 of the *Act*.

57. I also note that USP contends that the delegate ruled that at some point the relationship between Ms. Douglas and USP changed to employer-employee relationship but the delegate failed to prorate her calculation for "wages, vacation pay and compensation for length of service" based on when the change occurred. I do not find that the delegate determined the relationship between the parties as some point later changed to one of employer-employee. I find that the delegate determined the relationship, based on the facts, was one of employer-employee and therefore I do not think it is appropriate to prorate any of the awards made except to recalculate them based on the instructions above.

(ii) Natural Justice

58. In *Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort), BC EST # D055/05, the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.

59. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST #D050/96.

60. One of the arguments USB advances under the natural justice ground of appeal is that the delegate did not allow USP to adduce evidence using a lie detector. I note that the Supreme Court of Canada has commented several times on the admissibility of lie detector or polygraph evidence in criminal cases. One of the most comprehensive statements of the law on the subject was made in *R. v. Beland and Phillips* [1987] 2 S.C.J. No. 60, where McIntyre J. stated at paragraphs 18 and 19:

> 18. In conclusion, it is my opinion, based upon a consideration of rules of evidence long established and applied in our courts, that the polygraph has no place in the judicial process where it is employed as a tool to determine or test the credibility of witnesses. It is frequently argued that the polygraph represents an application of modern scientific knowledge and experience to the task of determining the veracity of human utterances. It is said that the courts should welcome this device and not cling to the imperfect methods of the past in such an important task. This argument has a superficial appeal but, in my view, it cannot prevail in the face of the realities of court procedures.
>
> 19. I would say at once that this view is not based on a fear of the inaccuracies of the polygraph. On that question we were not supplied with sufficient evidence to reach a conclusion. However, it may be said that even the finding of a significant percentage of errors in its results would not, by itself, be sufficient ground to exclude it as an instrument for use in the courts. Error is inherent in human affairs, scientific or unscientific. It exists within our established court procedures and must always be guarded against. The compelling reason, in my view, for the exclusion of the evidence of polygraph results in judicial proceedings is two-fold. First, the admission of polygraph evidence would run counter to the well established rules of evidence which have been referred to. Second, while there is no reason why the rules of evidence should not be modified where improvement will result, it is my view that the admission of polygraph evidence will serve no purpose which is not already served. It will disrupt proceedings, cause delays, and lead to numerous complications which will result in no greater degree of certainty in the process than that which already exists.

61. Justice McIntyre considered that polygraph evidence should be excluded because it offended several rules of evidence, including the rules against oath helping, past inconsistent statements, expert evidence rules and the character evidence rule. It should be noted that all of these rules, with the exception of the character evidence rule, have a place in civil matters. I am of the view that while the decision in *R. v. Beland and Phillips* is a criminal case, the statement of law of Justice McIntyre applies to civil matters as well.

62. Having said this, currently, while the state of law in regards to the admissibility of polygraph evidence in civil matters is unclear and courts across Canada have adopted a variety of views, ranging from acceptance of such evidence, to partial acceptance and outright rejection, I do not think the delegate's rejection of USP's request to adduce evidence at the hearing using polygraph or lie detector constitutes a breach of natural justice. In my view, the delegate, as a decision-maker, can and must reach her own conclusions as to the credibility of a particular witness and in this case, in my view, she did just that.

63. I also note that USP challenges the *Act* including the definition of "employee" and "employer" in the *Act* as "biased towards United". Whether or not USP has advanced this argument as a natural justice issue, I do not find this to be a meritorious ground of appeal under section 112 of the *Act*. Any issue USP has in terms of the legislated definitions in the *Act* is not within the scope of this Tribunal's decision-making power under the *Act*.

64. With respect to USP's allegation that the hearing process was biased due to the "strong pitch to settle or mediate to avoid administrative penalties", I am not persuaded by USP's submission that the delegate or the Employment Standards Branch did anything here that would show bias or breach of natural justice principles. The Director has a common practice, through its delegates, to canvasses with parties in advance of the hearing the potential for a mediated settlement. There is indeed a mediation process for such purpose and if the mediation process was not utilized in this case, there is nothing wrong in the presiding delegate canvassing settlement possibilities with one or both parties and pointing out the potential consequences of an unsuccessful defence of a complaint.

65. With respect to USP's submission of materials the delegate refused to consider pertaining to alleged employment of Ms. Douglas as an independent contractor with another company, while I do not think such evidence is outright irrelevant, I think it is but only a single factor amongst other factors for the delegate to consider in making her determination on the subject of the nature of the parties' relationship with each other. I do wish to note however that it is a factor that may have marginal relevance relative to other factors that directly pertain to the relationship between the parties. Having said this, I find there is sufficient evidence delineated in the Reasons of the delegate for concluding that the relationship between the parties was one of employer-employee such that the alleged relationship of Ms. Douglas with another company, if proven, would not have resulted in a different determination on this issue.

66. I also find unmeritorious USP's argument that the delegate's statement that an agreement to create a contractor relationship between the parties does not prevent her from finding that Ms. Douglas was an employee or in an employment relationship "is biased" because the delegate does not acknowledge the converse, namely, that if an aspect of the relationship between the parties resembles an employment relationship the delegate is not prevented from making a finding that Ms. Douglas was a contractor. While the Director did not say the latter, I do not find any evidence of bias or a breach of natural justice principles on the part of the delegate in making the said comment or statement. There are many common law and Tribunal decisions on the subject of the nature of relationship of parties engaged in some working relationship expressly recognizing that a written agreement identifying an individual as a contractor does not make her a contractor, if in substance or in practice she is in an employment relationship. The delegate, in my view, was simply pointing out that she is not bound by or the characterization of the relationship in the written agreement or excluded by the latter from examining the relationship between the parties in practice and determining the relationship is otherwise if the facts support such determination.

ORDER

67. Pursuant to Section 115(1)(b) of the *Act* I refer the matter back to the Director, with express instructions to calculate outstanding wages as well as compensation for length of service and vacation pay of Ms. Douglas based on the minimum wage entitlement under the *Act* and further recalculate interest on the total amount pursuant to Section 88 of the *Act*.

68. In all other respects, pursuant to Section 115(1(a), the Determination dated March 26, 2012, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal