

An appeal

- by -

Opportunities for the Disabled Foundation  
("ODF")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C.113* (as amended)

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2006A/66

**DATE OF DECISION:** July 18, 2006

## DECISION

### SUBMISSIONS

Sean Stone, Executive Director	on behalf of Opportunities for the Disabled Foundation
Ken MacLean	on behalf of the Director of Employment Standards
Mark Clermont	on his own behalf

### OVERVIEW

1. This is an appeal by Opportunities for the Disabled Foundation. ("ODF"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued May 5, 2006.
2. Steven M. Clermont aka Mark Clermont worked as an Equipment Technician for ODF, a non profit society providing programs and services for people with disabilities, from January 6, 2005 until April 30, 2005. Mr. Clermont filed a complaint alleging that he was owed an honorarium for April.
3. ODF declined to participate in mediation offered by the Branch, and the Director's delegate held a hearing into the complaint on December 22, 2005.
4. The delegate determined that ODF had contravened Sections 16, 17, 58 and 63 of the *Employment Standards Act*, in failing to pay Mr. Clermont wages, annual vacation pay and compensation for length of service. He concluded that Mr. Clermont was entitled to wages and interest in the total amount of \$1,618.03. The delegate also imposed a \$2,500 penalty on ODF for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. The grounds of ODF's appeal are that the delegate failed to observe the principles of natural justice in making the determination, and that new evidence has become available that was not available at the time the Determination was being made. Notwithstanding these grounds of appeal, ODF does not specify how it was denied natural justice, what the "new evidence" consists of, or why that new evidence should be considered in light of the Tribunal's guidelines for the introduction of new evidence. Rather, in its written submission, ODF says that the delegate made a number of factual errors, and that the decision is "wrong" and "inconsistent with the operating policies and procedures" of ODF.
6. This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

### ISSUES

7. As noted above, although ODF has checked off two of the statutory grounds of appeal on the appeal form, the arguments set out in the written submission do not relate to those grounds. At issue appears to be whether the delegate erred in finding Mr. Clermont to be an employee of ODF, rather than an independent contractor or a volunteer.

## ARGUMENT

8. ODF says that Mr. Clermont did not work at ODF's premises, did not produce any ODF time cards, was paid only by invoice, and never worked 80 hours per month. It submits that the delegate failed to consider these facts, thereby arriving at an incorrect conclusion about Mr. Clermont's employment status.
9. ODF says that Mr. Clermont represented that he could only be in receipt of funds in the amount of \$400 per month because he received welfare benefits, and because his health prevented him from working a normal work schedule. Mr. Stone says that ODF agreed to provide Mr. Clermont with an "honorary/Volunteer" reimbursement of \$400 per month regardless of [the] hours [he] worked. (my emphasis)
10. ODF submits that Mr. Clermont was not an employee because he was not under the direction or control of ODF, no time cards or time schedules were prepared, and he did not sign a standard employment acceptance letter. It also says that Mr. Clermont used his own tools, and worked how, when and where he wanted to. ODF says that Mr. Clermont provided services to other agencies as well as ODF.
11. ODF contends that Mr. Clermont faced a risk of loss in that his invoice amounts varied, he did not have an ongoing job function, and that ODF was not dependent on Mr. Clermont's position.
12. Mr. Stone argues that the delegate did not receive or review all the facts surrounding Mr. Clermont's employment, and that the Determination should be cancelled.
13. The delegate submits that ODF provided no documentation in support of the two grounds of appeal. He says that while ODF appears to be arguing that the Determination is wrong, it has not discharged the onus of demonstrating what that error is. He submits that ODF is making the same arguments that were made at the appeal hearing, and that the appeal should be dismissed.
14. Mr. Clermont submits that he was never asked to work at ODF's offices, as there was no physical space available for him to do so, nor was he ever asked to provide a time card. He says that he had no knowledge one existed prior to reading Mr. Stone's submission.

## FACTS

15. Although the Determination suggests that ODF was represented at the hearing by George Metrakos, in the body of the Determination it states that Mr. Stone appeared on ODF's behalf. Nevertheless, ODF took the position before the delegate that the Branch had no jurisdiction to hear the complaint, that Mr. Clermont was not an employee of ODF, and that his complaint was frivolous and vexatious.
16. Mr. Stone testified that Mr. Clermont approached ODF in December and offered to volunteer his time refurbishing computers. After consulting with ODF's Board, Mr. Stone said that ODF agreed to assist Mr. Clermont in building credibility in his computer consulting business, Weymar Consulting. It also agreed to give him an honorarium in the amount of \$400, which was the maximum he could receive according to the terms of his welfare benefits. Mr. Stone testified that Mr. Clermont did not do much during the months he was engaged by ODF, and that he fabricated his invoices. He asserted that Mr. Clermont delegated work to others, as he could not perform the work personally, contrary to his representations.

17. Mr. Clermont 's evidence was that he was interviewed for his position by Mr. Stone, following which the parties entered into a written agreement. The document, dated January 14, 2005, indicated that Mr. Clermont had “accepted the position of ‘Equipment Technician’ with the Foundation”, that his duties included repair of computer equipment. Mr. Clermont was to “report directly” to Mr. Stone and the President of the Foundation, to provide Mr. Stone with a “cost-benefit analysis in writing” of any expenditure, which were not to be undertaken without Mr. Stone’s written permission. Mr. Clermont agreed to “attend and work at the Burnaby office for a minimum of 80 hours per month”. The agreement provided that it “may be necessary ...that Clermont work additional hours as required to complete tasks assigned, at no additional honorarium amount”, tools were to be provided by Mr. Clermont although OLF might loan tools where necessary, and that Mr. Clermont would hold the Foundation harmless in the event of any injury sustained while working on the equipment or when on Foundation property. ODF also provided Mr. Clermont with business cards identifying him as the Foundation’s “Computer Technician”.
18. Mr. Clermont testified that there was no discussion as to his being a volunteer or independent contractor during his interview, but did agree that he volunteered to forego payment for work over 80 hours per month. Mr. Clermont acknowledged that he had considered starting a small business called Waymar Consulting but said that the business was never established, and that he never performed work under that name before or during his work with ODF. Mr. Clermont said that Mr. Metrakos filled out his invoices for the first two months of his work, and completed his own for the last two months, as instructed.
19. Mr. Clermont was involved in an accident with the Foundation’s van in April, 2005. He said that after the incident ODF told him that their relationship had been irretrievably broken due to his “inability to tell the truth concerning damage to the van”. Mr. Clermont asked Mr. Stone whether he wanted him to continue repairing computers, to which Mr. Stone replied that he did but that the parties would have to “change the arrangement”. Although the Foundation made repeated requests to Mr. Clermont to pay the insurance deductible, no change to the working relationship was ever proposed.
20. Mr. Clermont testified that ODF did not provide computers for him to repair for several weeks during April, and his time was largely spent visiting computer sales outlets attempting to solicit donations for ODF.
21. When Mr. Clermont provided ODF with his April invoice, ODF advised him by way of a letter dated May 5, 2005, that “due to the ongoing dispute concerning the damages to the Foundation van and your reluctance to come forward and negotiate payment options for repair, we find that we may be unable to fulfill your request for honorarium for the month of April 2005.” The letter further advised Mr. Clermont that “there is no evidence of special service performed or that recognition is or should be warranted”. Mr. Stone also advised Mr. Clermont not to represent ODF’s interests in any way, and to return any ODF property without delay. Mr. Clermont stated that this was the first he heard that he was no longer ODF’s Equipment Technician.
22. The delegate considered *West Vancouver Notes & Crafts Society* (BC EST #D447/97) in which the Tribunal noted that the employer had the burden of establishing that the complainant’s services were not rendered in the context of an employment relationship.
23. The delegate then considered the statutory definitions of employer, employee, work and wages, as well as the statutory purposes of the *Act*. He also considered the common law tests of an employment relationship. After analyzing the facts in light of the law, the delegate concluded that Mr. Clermont was

an employee. He noted the terms of the written agreement requiring Mr. Clermont to seek written approval for purchases, after a cost-benefit analysis. He noted ODF's agreement to provide physical space from which Mr. Clermont would work. He noted that Mr. Clermont was to report to the Executive Director and President of ODF, and was instructed on how to report his activities to ODF on an invoice. He noted that Mr. Clermont had no chance of profit, rather, he received an honorarium of \$400 per month and no risk of loss. He determined that Mr. Clermont was an integral part of ODF's operations as it could not operate the computer donation program without his expertise. The delegate also noted that because the agreement between the parties had no end date, they had an indefinite relationship. He further concluded that Mr. Clermont's work was for ODF's benefit.

24. The delegate further noted the written agreement which described Mr. Clermont's "position" as the ODF's "Equipment Technician" and that his work was not unlike many computer repair personnel employed in the workforce, the requirement that Mr. Clermont work 80 hours per month, that the work could not be delegated, and that the agreement made no reference to an independent contractor status. The delegate also noted that Mr. Clermont expected compensation, which distinguished him from a volunteer. The delegate concluded that ODF had failed to demonstrate that Mr. Clermont was not an employee.
25. The delegate found no evidence of Mr. Clermont's hours of work other than the written agreement and the fact that it had paid him for 80 hours of work per month until April. Therefore, he concluded Mr. Clermont was entitled to minimum wage for those 80 hours. He found ODF in contravention of the Act in failing to pay those wages, and for failing to pay them within 8 days after the end of the pay period as required by section 17 of the Act.
26. The delegate also found that Mr. Clermont's employment had been terminated on April 30, 2005 by Mr. Stone's letter of May 5, and that ODF had not provided any evidence it had just cause to do so. The delegate found that Mr. Clermont's April wages were owed, and had not been paid 48 hours following termination, contrary to section 18. The delegate also found Mr. Clermont entitled to compensation for length of service, pursuant to section 63.
27. Finally, the delegate noted that ODF had failed to produce payroll records in response to a Demand issued November 2, 2005 and assessed an administrative penalty for its failure to do so.

## ANALYSIS

28. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
  - (a) the director erred in law
  - (b) the director failed to observe the principles of natural justice in making the determination;  
or
  - (c) evidence has become available that was not available at the time the determination was being made
29. As noted by the Tribunal in *Triple S Transmission Inc.* (BC EST #D141/03), although most lawyers generally understand the fundamental principles underlying the "rules of natural justice" and the other grounds identified under the Act, the grounds for an appeal "are often an opaque mystery to someone who is untrained

in the law.” The Tribunal found that appeals should not be “mechanically adjudicate[d]... based solely on the particular “box” that an appellant has – often without a full, or even any, understanding – simply checked off.” Although ODF checked off the second and third grounds of appeal and made no substantive submissions on those grounds, I have considered the appeal submissions in light of the three statutory grounds of appeal.

30. The burden of establishing the grounds for an appeal rests with an Appellant. ODF must provide persuasive and compelling evidence that there were errors of law in the Determination, that the delegate failed to observe the principles of natural justice, or that there is new evidence. For the following reasons, I find that ODF has failed to discharge that burden.

### *Natural justice*

31. Principles of natural justice are, in essence, procedural rights that ensure parties a right to know the case against them, to respond fully, and to have the case heard and decided by an independent decision maker.
32. ODF was offered an opportunity to mediate the complaint which it declined. It was represented at the hearing, and there is no evidence its representative was denied full opportunity to present its case and make submissions to the delegate. The delegate considered the evidence of the parties and decided the complaint in light of the law and evidence before him. Although ODF disagrees with the decision, I am unable to find that the delegate denied ODF a fair hearing.

### *New Evidence*

33. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - the evidence must be relevant to a material issue arising from the complaint;
  - the evidence must be credible in the sense that it is reasonably capable of belief; and
  - the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
34. ODF’s appeal submission does not specify what new evidence they are seeking to introduce, nor does it specify how the “new evidence” would have led the delegate to a different conclusion. I find no merit to this ground of appeal.

***Errors of law***

35. ODF's submission suggests that the delegate made factual errors, and that he overlooked some evidence. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
36. In essence, ODF's appeal submission is that the delegate was wrong in concluding that Mr. Clermont was an employee. The issue of Mr. Clermont's employment status is a question of law, which is a ground of appeal.
37. Having reviewed the record and the submissions, I am satisfied that the conclusions arrived at by the delegate were rationally supported by both the law and the evidence. The delegate properly placed the burden of establishing that Mr. Clermont was a volunteer or an independent contractor on ODF. It failed to discharge that burden.
38. The delegate considered all of the factual questions raised in the appeal submissions, and I find no error of law in his conclusions. In my view, the evidence before the delegate clearly shows an employment relationship, and shows Mr. Clermont to be an employee under the *Act*.
39. ODF cannot rely on its failure to require Mr. Clermont to complete time cards or complete a "standard acceptance letter" to argue that Mr. Clermont was not an employee. Furthermore, the delegate was not obliged to place any weight on ODF's operating policies and procedures, as it is the law that must guide his analysis. While it is clear that ODF does not agree with those conclusions, an appeal is not an opportunity to re-argue a case that has already been made before the delegate.
40. The appeal is dismissed.

**ORDER**

41. I Order, pursuant to Section 115 of the Act, that the Determination, dated May 5, 2006, be confirmed in the amount of \$4,118.03, plus whatever interest might have accrued since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**