Employment Standards TRIBUNAL

An appeal

- by -

Automation One Business Systems Inc.
("Automation")

- 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: David B. Stevenson

FILE No.: 2009A/076

DATE OF DECISION: July 29, 2009

DECISION

SUBMISSIONS

Neil Achtem	on behalf of Automation One Business Systems Inc.
Gerry Brainard	on his own behalf
Andres Barker	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 Automation One Business Systems Inc. ("Automation") of a Determination that was issued on April 28, 2009, by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Automation had contravened Part 3, Sections 18 and 28 of the *Act* in respect of the employment of Gerry Brainard ("Brainard") and ordered Automation to pay Brainard an amount of $5,882.43, an amount which included wages and interest.

2. The Director also imposed an administrative penalty on Automation under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulation"*) in the amount of $1000.00.

3. The total amount of the Determination is $6,882.43.

4. In this appeal, Automation submits the Director erred in law in making the Determination.

5. Automation also requested a suspension of the Determination under section 113 of the *Act* and Rule 31 of the Tribunal's *Rules of Practice and Procedure*. After receiving confirmation from the delegate of the Director of Employment Standards of receipt of payment to be held in trust, the Tribunal issued an order suspending the Determination pending the outcome of the appeal.

6. The Tribunal has a discretion whether to hold a hearing on an appeal and, if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

7. The sole issue in this appeal is whether the Director erred in law in finding Brainard was an employee of Automation for the purposes of the *Act*.

FACTS

8. The Determination contains an extensive overview of the facts relating to the issue raised in this appeal. The Director applied what were felt to be relevant statutory considerations, including the definitions of employee

and employer in the *Act*, the legislative policy considerations of the *Act* and the specific statutory purposes of the *Act*, to the factual findings concerning the relationship between Automation and Brainard and concluded Brainard was an employee.

9. Since the issue is whether the Director erred in law in finding Brainard was an employee of Automation under the *Act*, one might expect this appeal would adopt the facts as found by the Director and argue the resulting conclusion was legally wrong. That is not, however, how Automation has framed this appeal. Rather, Automation has framed the appeal as a question of "why the Director was wrong", has adopted the general premise that the Director was wrong because, "Gerry Brainard's role was very different than our regular salaried employees" and has provide eight statements of fact to support that general premise. Those statements of fact are, in summary form:

1. all employees of Automation report in to work in the morning and late afternoon virtually every day; Brainard might have been seen by Neil Achtem twice a month;

2. Automation's regular employees are required to work 37.5 hours a week; there was no requirement that Brainard work even one hour and there was no control over his hours of work;

3. Automation's sales employees had sales quotas; Brainard had none;

4. Automation's employees cannot take employment elsewhere during business hours; Brainard could have gotten another job and continued to sell for Automation; there are other people who provide sales material and sell for Automation while holding other jobs;

5. neither Neil or John Achtem were aware that Brainard had an Automation "multi function" for his own use;

6. Automation never gave Brainard any letterhead nor did they do any proposals for him, as they did for regular sales employees;

7. regular sales staff earn less than 50% of their sales margin, whereas Brainard was paid 70% of the margin; and

8. Automation did not control how or for how much Brainard sold the product as long as there was a profit.

10. The Determination recognized there were differences between Brainard and other persons employed by Automation as salespersons, including the absence of any monitoring by Automation of Brainard's attendance at the office and in the method of paying Brainard on sales made. Both of those matters are referenced above in support of this appeal.

11. There was agreement among the parties that Brainard was a salaried/commissioned employee for Automation until February 2006. The Director found, notwithstanding an agreement to convert his relationship to that of an independent contractor, that Brainard continued to perform the same work he had normally performed as an employee of Automation and that Automation continued to "control" that work in several keys respects.

12. Brainard has filed a response to the appeal. Not surprisingly, he disagrees with several of the factual assertions made in support of the appeal.

13. The Director has filed a brief response and provided the section 112(5) record.

ARGUMENT

14. Automation's appeal is not focussed on any identifiable error of law in the Determination. Rather, it appears to rely on the general premise described above, and the assertions of fact supporting the general premise, as demonstrating an error of law. This point is noted in the response of the Director.

ANALYSIS

15. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

16. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. Specifically as it applies to this appeal, Automation has the burden of showing there is an error of law in the Determination.

17. 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: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal has adopted the definition of error of law as that described 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.).

18. As indicated above, the appeal does not identify any particular error of law in the Determination. It is obvious that Automation does not agree with the conclusion that Brainard was an employee for the purposes of the *Act*, but such a finding is consistent with the provisions, purpose and intent of the *Act* and was reasonably grounded in an assessment of the particulars of the relationship between Automation and Brainard.

19. An appeal under the *Act* is intended to be an error correction process; it is not intended to be an opportunity for a dissatisfied party to have the Tribunal review a Determination and, in the absence of a demonstrated error on one of the grounds in subsection 112(1), arrive at a different conclusion.

20. Automation has not met its burden in this case of demonstrating an error of law and, accordingly, the appeal is dismissed.

21. Based on the result of this appeal, the suspension order is no longer in effect.

ORDER

22. Pursuant to Section 115, I order the Determination dated April 28, 2009, be confirmed in the amount of $6,882.43, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal