

An appeal

- by -

Celerity Digital (Canada) Inc.

- 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

ADJUDICATOR: Norma Edelman

FILE No.: 2001/821

DATE OF DECISION: February 22, 2002

DECISION

OVERVIEW

This is an appeal by Celerity Digital (Canada) Inc. ("Celerity") under Section 112 of the Employment Standards Act (the "Act") against a Determination issued by a delegate of Director of Employment Standards on October 30, 2001. The delegate found that Celerity owed wages to Michelle Demers ("Demers") in the amount of \$17,292.94. Celerity appealed on the ground that Demers was not an employee of the company, but an independent contractor.

This appeal was decided based on the written submissions of the parties. I have concluded that the delegate correctly decided that Demers was an employee of Celerity and is owed wages in the amount of \$17,292.94.

ISSUE TO BE DECIDED

Was Demers an independent contractor or an employee of Celerity and if the latter is she owed any wages?

FACTS AND ARGUMENTS

Demers worked for Celerity as an independent contractor from May 2000 to November 26, 2000.

The key issue in this appeal is whether Demers was an employee or an independent contractor when she worked as an executive editor at the rate of \$70,000 per annum from November 27, 2000 to March 19, 2001.

In the Determination, the delegate stated that Graeme Wright ("Wright"), Chief Financial Controller, of Celerity indicated that Demers was an independent contractor and not an employee. There was a discussion in mid November 2000 about bringing Demers on as an employee but given the tight funding situation that the company found itself in, this never actually came about. The delegate said that Celerity did not respond to him after May 2001. A demand for payroll records sent to the company on May 22, 2001 and a letter sent on August 7, 2001 requesting a meeting were ignored. He stated that since Celerity did not respond to Demers' assertion that she was an employee and owed wages, he relied on the information provided by Demers, which included an email dated November 16, 2000 sent by Fariba Matin ("Matin"), Chief Operating Officer, to staff with regard to Demers coming on board as a full time employee starting November 27, 2000; emails between Demers and George Fleming of Celerity which, he says, show that Demers was an employee; and a witness statement from Matin that Demers was an employee of Celerity. He said the "...mere denials by the company that Demers was not an employee is not sufficient to justify their position." The delegate concluded that Demers was an employee of Celerity and she was owed \$17,292.94.

George Fleming ("Fleming"), on behalf of Celerity, filed an appeal on November 22, 2001. He described himself as the sole officer and director of the company. He stated that Celerity is a defunct company. The documents received from the Ministry were received via the attorneys who represented the company when it was operating. Wright responded initially to the Ministry's request for information but subsequent requests, as noted in the Determination, were never received by him and therefore he was unable to respond.

Fleming stated that Matin was never authorized to provide Demers with a contract. He said it is true that if the company had been funded that all contract employees would have been asked to convert to employee status but in the fall of 2000 the company was financially in trouble and its future prospects were bleak. Kim Elton ("Elton"), another consultant, and Matin discussed the potential of becoming an employee with Demers but only in this context. Fleming posed the following questions. Why would a company that was unable to meet its contract payroll wish to take on the obligation of full-time employees? Why would Demers be the only contract employee to come forward to try to suggest this? Why would Demers want to become an employee if the company had difficulty paying her fees throughout this whole period? Why would an employee continue to bill the company in the same way as a contractor? Why would the delegate make his finding based on hearsay evidence of conversations between him and Demers?

Fleming further said that Demers try to blackmail him when the company was failing so that she could take time off work and pursue her writing career. He said Demers, like all of the contract employees, knew that the company was going to suspend operations and was essentially bankrupt and there was little likelihood that she, as a contractor, would be paid for any outstanding invoices. If she was able to convince the Ministry that she was an employee, however, she knew that he would become personally liable and was using this threat to try and force a settlement. He said Demers knew that unless she became an employee, she would likely not get money that she was owed, which made her highly motivated to make false allegations.

Fleming stated he wanted to provide the Tribunal with further evidence to substantiate that Demers was blackmailing the company, that Matin and Elton had no authority to make Demers an employee and that there was no offer from him to settle with Demers. He further said that emails purported to be from him were from Elton and that employment laws do not state that discussing the potential of becoming employee is equal to becoming one and if Demers was actually an employee she would be able to provide a contract as evidence. Fleming requests that the Determination be either cancelled or referred back for further investigation.

The other parties were invited to reply to Fleming's appeal. Both the delegate and Demers replied to the appeal.

The delegate said that Fleming not only was aware of his investigation, he was also advised of the consequences of failing to cooperate in the investigation. He enclosed letters he sent to Fleming dated April 5, 2001 and May 22, 2001. The first letter advises Fleming of Demers'

complaint and requests a response, including records, if he disputes the claim. The letter also states that failure to respond may adversely affect his ability to successfully appeal a Determination. The second letter included a Demand for Employer Records. The delegate said he never received any records from Celerity. The delegate also stated that initially Celerity appointed Wright to respond to the complaint. He advised Wright of the complaint and sent him letter dated August 7, 2001 requesting a meeting, but he never received response.

The delegate further said that the other arguments put forward by Fleming are irrelevant. Demers provided more than enough evidence to substantiate the amount of wages owing and the reason why she wanted to be an employee rather than a contractor is irrelevant. Further, Fleming's assertions that Demers was blackmailing him and making false allegations are unfounded and without any evidentiary support.

In support of her claim that she was an employee, Demers enclosed a copy of the November 16, 2000 memo from Matin outlining the terms of her employment. She said the memo was sent to senior management, including Fleming, and was never challenged. She also enclosed a copy of an email sent out by Elton 5 days later in which he celebrated her acceptance of the job; a copy of a document titled "Employee Benefits and Policies" that she received on November 16, 2000; and an email from Fleming dated February 15, 2001 to staff saying he expected everyone to follow regular normal office protocols in terms of operating hours.

She said the company saved money when it took her on as an employee. She earned less money per hour as an employee than when she worked as a contractor. Further, Fleming never presented things as bleak in the fall of 2000. She attached various emails from Fleming to support this position. She said she became an employee in November 2000 when Fleming was hyping the company's prospects. Even when things started to look bleak near the end of the year and there were difficulties getting paid, Fleming continued to say things would get better. When she started having doubts Elton reassured her that Fleming would not leave his staff unpaid. This, she said, explains why she stayed on with the company as long as she did even though the company was having difficulty paying the staff.

Demers also said she was not the only contractor to suggest becoming an employee. There were two other persons and they also filed complaints with the Ministry of Labour. Both were deemed to be employees and the matters were resolved. Demers further said she ceased to bill the company when she became an employee. She denied she tried to blackmail Fleming, but rather simply made an offer to him to pay her wages or she would commence a complaint. She said when she resigned, the company had not filed for bankruptcy; in fact Fleming was still pitching new ideas including ideas for expansion. All her invoices were paid by that time and she was just owed wages. She further said she did not threaten Fleming with the possibility of personal liability, this was a given, since she was an employee. She says Fleming's statement that he would provide further evidence to substantiate his allegations is, among other things, a stall tactic. She agreed that one email that the delegate attributed to Fleming was actually from Elton to Fleming regarding wanting to hold on to her during a re-staffing plan. She said it is a

minor error and in no way affects the balance of evidence against Fleming. Finally, she says she repeatedly asked the company for a contract but it was denied to her and the only reason she got a deal memo was because she threatened to quit if the memo was not forthcoming.

Fleming was given an opportunity to reply to the above submissions. The Tribunal received no reply.

ANALYSIS

The burden is on Celerity to show that the Determination is wrong. I am not satisfied that Celerity has met that burden.

I agree with the delegate that Celerity was given an opportunity to respond during his investigation. Fleming admits the Controller of the company and the company's attorneys were aware of Demers' complaint. Further, the delegate's August 7 letter was sent to the same address as the Determination and Fleming received the latter, which suggests he also likely received the August 7 letter. However, even if he did not receive all of the delegate's letters, as the sole officer and director of the company it was his responsibility to follow up with his controller and attorneys about the status of Demers' complaint.

The Tribunal has consistently held that in the absence of a legitimate reason, evidence and information will not be considered on appeal when it could have and should have been presented to the delegate during the investigation process (see Specialty Motor Cars BCEST #D 570/98). In my view, all the information provided by Fleming on the appeal could have and should have been presented to the delegate in the initial investigation. I can find no legitimate reason why Fleming failed to do so and for this reason alone, the appeal is dismissed.

However, even if I consider Fleming's reasons for the appeal, the appeal still fails. Fleming has not shown that Demers was an independent contractor during the period November 27, 2000 to March 19, 2001.

Fleming provides no evidence to substantiate his position that Matin had no authority to provide Demers with a contract. Nor does he deny he received a copy of Matin's November 16 email and did not challenge it at the time, which is supportive of Demers' position that Matin did have the authority to hire her as an employee and negotiate the terms of her employment.

Further, there is absolutely no evidence that Demers billed the company via invoices for work performed after November 27.

As well, the November 16 email from Matin, which specifically states that Demers has been hired as a full time employee and not a full time contractor is compelling evidence that Demers was an employee and not a contractor. Further, this e-mail sets out the terms of Demers' employment contract.

Finally, the following factors indicate that Demers was an employee and not a contractor: she was paid a salary; her contract said she would receive 3 weeks vacation; Fleming set the hours of work; and she was given an "employee" benefits package.

I agree with the delegate that Fleming's statements that Demers was blackmailing the company and that she falsely alleged she was an employee only to secure her wages lacks any evidentiary support. Further, Demers' explanations why the company hired her as an employee and why she stayed on as long as she did are plausible. I also agree with Demers that the issue of the delegate wrongly attributing an email to Fleming is minor and in view does not effect, in any way, the overwhelming evidence in this case that Demers was an employee of Celerity.

Celerity does not dispute that wages are owed to Demers and it does not dispute the amount calculated by the delegate. Therefore, I accept that Demers is owed the amount calculated by the delegate.

ORDER

Pursuant to Section 115 of the Act I order that the Determination be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal