Employment Standards TRIBUNAL

An appeal

- by -

Roger Wayne Andres and Tamara Leanne Andres carrying on business as Andres Project Management

("Andres")

- 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: Margaret Ostrowski, Q.C.

FILE No.: 2009A/105

DATE OF DECISION: October 20, 2009

DECISION

SUBMISSIONS

Roger Andres	on behalf of himself and Tamara Leanne Andres
Kenton Lepp ("K. Lepp") and Raymond Lepp ("R. Lepp") (jointly "the Lepps")	on their own behalf
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Andres pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by a delegate of the Director of Employment Standards on July 10, 2009. In that decision, the Director found that Andres had contravened the *Act* by failing to pay wages in the amount of $13,717.63 (K. Lepp) and $6,887.51 (R. Lepp) (as required in section 18 and 40 of the *Act*), statutory holiday pay in the amount of $1,549.64 (K. Lepp) and $481.25 (R. Lepp) (section 45 of the *Act*), annual vacation pay in the amount of $3,464.39 (K. Lepp) and $701.39 (R. Lepp) (section 58 of the *Act*), business costs in the amount of $58.90 (K. Lepp) (section 21 of the *Act*) and accrued interest in the amount of $897.57 (K. Lepp) and $386.65 (R. Lepp) (section 88 of the *Act*). Administrative penalties totalling $2,000.00 were imposed by the Director in the amount of $500 for each contravention in regards to sections 17, 18, 27 and 46 of the *Act*. The total amount ordered in the Determination to be paid by Andres is the sum of $30,144.93.

2. The Tribunal has reviewed the Determination, the submissions of the parties and the section 112(5) Record and has determined that a decision can be made without an oral hearing as there are written submissions from the parties setting out their respective positions.1

3. Andres has appealed the Determination of the Director on the grounds that the Director erred in law and has asked that the Determination be cancelled. In his appeal dated August 17, 2009, Andres stated that the Director erred in law when the Director found the Lepps to be employees even though they had GST numbers and filed GST payments. He further alleges that the Director erred in awarding them wages past the April 3, 2008 date as the contractual agreement was terminated on that date, the Director incorrectly calculated the pay as the rate was $35.00 per hour and $500 bi-weekly, and lastly, the Director erred in finding the "weekend incentive" work to be an arrangement with Andres and not with the project management team at Metrocan Construction.

ISSUE

4. The issue to be determined by the Tribunal is: did the Director err in law?

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[1] The Employment Standards Tribunal has discretion whether to hold a hearing on appeal and in the case where a hearing is considered necessary, it may hold any combination of written, electronic and oral hearings pursuant to section 36 of the Administrative Tribunals Act (which is incorporated into the *Act* in section 103). See also 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.

BACKGROUND

5. The Determination deals with two complaints received by the Employment Standards Branch against Andres – one from K. Lepp and one from R. Lepp. Each complainant received their own individual Determination reasons though various matters in the Determination were dealt with jointly. The grounds for appeal by Andres referred jointly to both complaints and I will deal with matters jointly unless the facts dictate otherwise.

6. Andres operates a construction business that hires sub-trades to work on construction projects. Andres does not dispute that the Lepps were owed monies up to April 3, 2008. However it is Andres' position that the Lepps were independent contractors and accordingly their complaint is outside the jurisdiction of the *Act*.

7. K. Lepp alleged that he worked for Andres from April 1, 2007 to May 3, 2008 and that he was hired at the rate of $35.00 per hour plus $500.00 bi-weekly supervisors pay. At the Employment Standards Branch hearing, K. Lepp provided oral evidence in support of his employee status that: he did not have authority to make any final decisions and reported on all work on the site to Roger Andres for instructions and approval, he was paid at an hourly rate and never had any opportunity for profit or loss, and he provided receipts for the purchase of any supplies used at the project sites. E-mails were submitted by him to substantiate some of the facts presented in testimony. Andres submitted that K. Lepp was hired as an independent contractor and there was a verbal contract by Andres and K. Lepp that he would be paid $1,000 per month, a fee for time spent, and all materials were to be charged with a 10% profit and applicable GST. Andres further submitted, *inter alia*, that K. Lepp was not supervised, K. Lepp sent regular invoices which included GST and he used tools supplied mainly by K. Lepp. He further submitted at that hearing that K. Lepp was informed verbally and in writing that Andres was not responsible to pay K. Lepp after April 3, 2008 as Andres was not being paid by Maji Enterprises (Andres subsequently filed a lien under the Builders Lien Act on the project). Maji Enterprises is the sub-contractor and Metrocan, the general contractor, had the contract to complete the tower project. Andres presented various documents in support of his position.

8. R. Lepp is the father of K. Lepp. R. Lepp alleged that he was hired by Andres as a finishing carpenter for the Tower project from February 1, 2008 to May 3, 2008 at the rate of $25.00 per hour. He said, *inter alia*, that there was no contract or quote between him and Andres, he submitted invoices and charged GST for the hours he worked as requested by Andres, Andres supplied most of the tools, and his work was directed and supervised. He submitted various documents in support of his position that he was an employee of Andres. Andres submitted that R. Lepp was hired as an independent contractor and R. Lepp did not provide any services to Andres after April 3, 2008. At the hearing, evidence was given in support of this position.

9. The Director in his analysis in the Determination stated that the "central question to ask when assessing whether a person is an employee or independent contractor is "whose business is this?". The Director further states that in looking at the various tests to answer that question, it must be borne in mind that the *Act* is a benefit conferring legislation and accordingly the definition of "employee" and "employer" must be given a broad interpretation. As a result of his review of the entire relationship between the parties, the Director found both in the case of K. Lepp and R. Lepp that it was consistent with an employee and employer relationship using the definitions of those terms as in section 1 of the *Act*.

10. The Director further found both K. Lepp and R. Lepp entitled to be paid regular wages and overtime, statutory holiday pay, annual vacation pay, and interest and that K. Lepp was entitled to be reimbursed a business cost. Based on his review of the e-mails between K. Lepp and Andres, the letter sent by Andres to Maji Enterprises at the end of April or early May 2008 and the registered lien, he found that the Lepps continued to work for Andres after April 3, 2008 until their resignation on May 3, 2008.

ANALYSIS

11. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1) of the *Act* which reads as follows:

> 112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (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.

12. Andres has appealed on ground (a) and has listed the various errors in his grounds for appeal which are set out in paragraph 3 above.

13. The burden of proof in an appeal to the Employment Standards Tribunal is on the appellant who must persuade the tribunal that there is an error in the Determination under one of the statutory grounds.

Error of Law

14. The *Act* does not provide for an appeal based on errors of fact unless such findings raise an error of law (*Britco Structures Ltd.*, BC EST # D260/03). The Tribunal has adopted the following definition of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C. A) to be:

> 1. a misinterpretation or misapplication of a section of the Act;
>
> *2.* a misapplication of an applicable principle of general law;
>
> *3.* acting without any evidence;
>
> *4.* acting on a view of the facts which could not be reasonable be entertained; and
>
> *5.* adopting a method of assessment which is wrong in principle.

(a) Is having a GST number and filing GST payments determinative that a worker is an independent contractor?

15. Andres alleges that the Director erred in law when the Director failed to consider in his analysis that the Lepps each have GST numbers and filed GST payments – that "according to law, an employee is not required to have a GST number and file GST payments". Andres did not set out what law he was referring to. In each of the Determinations sent out to K. Lepp and R. Lepp, the Director set out comprehensive analysis and reasons with respect to his conclusion that the Lepps were not independent contractors. He set out the definitions of "employee", "employer" and "work" from the *Act*, and noted that the *Act* had "an overall purpose to provide protection to employees through minimum standards of employment" as it is an *Act* conferring benefits. He referred to several common law tests and cited some cases that discussed tests that been applied by various courts and the Employment Standards Tribunal to assist in distinguishing between an employee and an independent contractor. In sum, the Director used a "control" test - he set out

in the Determination that the "central question to ask when assessing whether a person is an employee or independent contractor is "whose business is this" and "in this case, in answering the question as to whose business it is, the issue of control is central". He then proceeded to examine the particulars of the relationship between the Lepps and Andres. The GST issue was considered.

16. The Director's analysis in the Determination (which is the same for each of the Lepps) specifically regarding the relevance of GST to the question as to whether the Lepps were employees or independent contractors is as follows:

> It is irrelevant whether APM intended for there to be an independent contractor relationship. The fact that Mr. Kenton Lepp issued invoices to claim his wages or that he received GST payments does not, in itself, change the relationship that existed between the parties which was consistent with the definition of an employer and employee in the Act. Pursuant to Section 4 of the Act, any agreement between the parties to waive any of the minimum requirements in the Act has no effect. Accordingly, I find that Mr. Kenton Lepp, as an employee of APM, is entitled to minimum standards in the Act.

17. In submissions to this tribunal, the Director stated that GST is a matter under federal jurisdiction relating to taxation and that the *Act* and its regulations does not address GST. It was further submitted that the findings in the Determination were based on the relationship that existed between the Lepps and Andres.

18. The question for this tribunal is whether using a GST number and charging GST on regular invoices is determinative of whether a person is an independent contractor.

19. Traditional common law tests as referred to by the Director in the Determination, more specifically, the control test, the four-fold test, the organizational or integration test, and the permanency test, have been relied on in the past in various courts and tribunals. However the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 (S.C.C.) has stated that there is no one conclusive test that can be universally applied at common law to determine whether a person is an employee or an independent contractor. Instead,

> …Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra.*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case. (paragraphs 47 and 48)

The Director in the Determination relied on this Supreme Court of Canada case in crafting how he was to analyze the evidence before him.

20. The common law tests of employment, however, are subordinate to the statutory definitions. This was acknowledged by the Director in the Determination. It was stated there that:

> . . . in *Jane Welch operating as Windy Willows Farm* (BC EST # D161/05), the Employment Standards Tribunal held that while the common law tests remain useful in focusing attention on relevant factors, they must be applied bearing in mind the broad statutory definitions, which must in turn be interpreted in light of the policy objectives of the Act.

21. The relevant portions of the definitions in the *Act* of "employee" and "employer" are:

> 1.(1) "employee" includes (a) a person …receiving or entitled to wages for work performed for another; (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee…
>
> "employer" includes a person (a) who has or had control or direction of an employee, or (b) who is or was responsible, directly or indirectly, for the employment of an employee.

22. I note that although the statutory definitions are expansive, the *Act* does not abolish the concept of independent contractors and there is a place for the use of common law tests of employee status as long as the *Act* and its purpose is kept in mind. The Director attempts to do this by examining the totality of the relationship between the parties.

23. The definition of "employee" in the *Act* is meant to be given a broad and liberal interpretation and this was referred to in the Determination. In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R.986 at 1003, about the Ontario *Employment Standards Act* , it was stated by the Supreme Court of Canada that:

> . . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible, is favoured over one that does not.

Additionally, the *Interpretation Act* [RSBC 1996] section 8 states:

> 8. Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

24. I further note that the Director acknowledged that "the overall purpose of the Act is to provide protection to employees through minimum standards of employment" and favoured an interpretation of the *Act* that extends the protection of the *Act* over one that does not.

25. In summary, my analysis of the law that should be applied to determine if a worker is an independent contractor or an employee is consistent with the law outlined by the Director in the Determination. Accordingly, I find no error in the selection and analysis of the law in the Determination that the Director uses as a basis to review the evidence.

26. However, did the Director act on evidence that could not rationally support his finding that the Lepps were employees?

27. In order to assess the fit of the statutory definitions of "employee" and "employer" in the *Act* to the evidence, it is incumbent on the decision-maker to look closely at the facts. The Director in the Determination set out no fewer that thirteen reasons for K. Lepp and eleven reasons for R. Lepp in finding that on a balance of probabilities that they are employees. I can understand Andres taking issue with the fact that the Lepps were found to be employees even though there is unrebutted evidence of regular invoices to Andres charging GST and citing GST numbers. I agree that that particular fact is evidence on the side of a finding that they were independent contractors. However, there is no law, either common law or statutory,

that says that that fact in itself is determinative of the issue. There were many facts looked at and weighed by the Director that obviously offset the weight of the evidence in favour of an independent contractor finding. He did specifically address the issue of GST in his reasons and found that though the Lepps used GST numbers on their invoices and received GST payments, that did not in itself change the relationship that existed between the parties and further stated that an agreement to waive the minimum requirements of the *Act* is contrary to section 4 of the *Act*. I do note that Andres' statement in the grounds for appeal that "according to the law an employee is not required to have a GST number and file GST payments" is correct. However there is no law in regards to employment law that forbids one characterized as an employee in the *Act* from using a GST number. In conclusion, I therefore find no error that would indicate that the weight given by the Director in the Determination to the use of GST by the Lepps was inappropriate in that it was not in itself determinative of whether the Lepps were independent contractors or employees and there were many other factors outlined in the decision. There was no argument that any of those factors were inappropriate. I confirm his finding.

(b) Was there an error in the finding that the contractual agreement was not terminated on April 3?

28. The appellant gives no submissions on this ground for appeal. Therefore I am not persuaded to consider this other than an allegation of a mistake of fact by the Director in the Determination. As stated above in paragraph 14, the *Act* does not provide for an appeal based on errors of fact unless such findings raise an error of law and I see no error of law in that there was a review of the evidence in this regard by the Director and a finding on the facts that could be reasonably entertained.

(c) Were the calculations for the pay periods incorrect?

29. Andres alleges that the calculation for the pay periods was incorrect as the agreed rate of compensation was the rate of $35 per hour and $500 bi-weekly fee for the coordination of site activities. Andres must be referring only to K. Lepp's pay calculation because there was no managerial fee agreed to for R. Lepp.

30. I have considered the calculated wages for K. Lepp set out on pages 14 to 16 of the Determination to ascertain if there was a finding of fact that could not be reasonably entertained. In that calculation, there are varying hourly rates referred to. For instance, for December 1 to December 15, 2007, the hourly rate is $40.54. The corresponding invoice in the Record (dated December 25, 2007) shows that for this pay period, there were 90.25 hours worked and at $35.00 per hour, this amounted to $3,158.75. There was also a supervision fee of $500.00 to make a total of $3,658.75. With the supervision fee calculated into the wage calculation, the hourly rate would be $40.54 as set out in the Determination. A footnote on page 15 of the Determination clearly states that the hourly rate is based on the total paid, that is, the regular hours pay (at $35 per hour) plus overtime plus supervision pay. Perhaps it could have been set out more clearly on that chart that the overtime and supervision pay was included in calculating the hourly pay but I see no error in the calculations for the pay periods.

(d) Was the "weekend incentive" work made by K. Lepp and the project management team at Metrocan Construction a separate contract?

31. The Director in his submissions on this point states that there was no evidence of a separate contract agreement between K. Lepp and Metrocan Construction. He further states that "evidence provided to the delegate by APM (invoice for pay period from March 1 to 15, 2008 and cheque #0394) showed that it was APM and not Metrocan Construction that paid the complainant for the "weekend incentive" work (March 8 and 9, 2008).

32. Andres has provided no further convincing argument or evidence for me to conclude that the finding of the Director in the Determination was a view of the facts which could not be reasonably entertained.

ORDER

33. Pursuant to section 115 of the *Act*, I order that the Determination dated July 10, 2009, be confirmed.

Margaret Ostrowski, Q.C.
Member
Employment Standards Tribunal