

An appeal

- by -

Ursidae Manufacturing Ltd.
(the "Appellant")

- 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: E. Casey McCabe

FILE No.: 2000/628

DATE OF HEARING: January 15, 2001

DATE OF DECISION: March 5, 2001

DECISION

APPEARANCES:

Murray Lookman	for the employer
Sandra Lookman	for the employer
Egon Frank	for himself
No one	for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Ursidae Manufacturing Ltd. from a Determination dated August 22, 2000. That Determination found that Mr. Egon Frank was an employee who was entitled to payment of wages for the period August 23 to 30, 1999; termination pay; vacation pay of 4% on gross earnings; expenses; and, interest on the aforementioned sum totalling \$4,102.87. The Director’s Delegate ordered Ursidae to cease contravening Sections 17, 18, 58 and 63 of the *Act* and to comply with all requirements of the *Act* and Regulations.

ISSUE(S) TO BE DECIDED

1. Is Mr. Frank an employee?
2. If Mr. Frank is an employee was he terminated without just cause?
3. Is Mr. Frank entitled to 6 days wages, termination pay, vacation pay and to reimbursement for expenses incurred while conducting business for his employer?

FACTS

Ursidae Manufacturing Ltd. (“Ursidae”) is a B.C. registered company subject to the provisions of the *Act*. The company was in the business of developing and marketing a type of small heavy duty truck. Egon Frank (“Frank”) worked for Ursidae in sales and marketing from June 1, 1998 to August 31, 1999. His rate of pay was set at \$1,875.00 bi-weekly.

The Director’s Delegate made the following findings of fact which are found at pages 8 to 11 of the Determination:

1. Mr. Frank began a working relationship with Ursidae in June 1999. It was the evidence of both Mr. Frank and Mr. Lookman that they discussed a business relationship in March when their mutual friend died, but that Mr. Frank did not begin working for Ursidae on a regular basis until June. Mr. Frank has provided copies of all his invoices from June 1, 1998 to August 21, 1999. They are all very similar, requesting payments of \$1875 for work completed every two weeks.

Mr. Lookman provided an earlier invoice dating back to March 1998 as evidence that Mr. Frank was an independent contractor. This invoice was in the name of Global Marketing and Consulting, and Mr. Lookman's position was that this established Mr. Frank's status as an independent contractor.

In my opinion, this invoice relates to a different phase in the relationship between the parties when, according to the evidence of both Mr. Frank and Mr. Lookman, they were discussing Mr. Frank's possible participation in Inca's work. After June 1999, the relationship was much more clearly between Mr. Frank as an individual and Ursidae. One piece of evidence which supports this conclusion is that the invoices from June 1999 onwards were in Egon Frank's personal name. The consistency in hours worked and payment claimed also indicates that the relationship changed around June.

Finally, Mr. Lookman's own evidence was that he and Mr. Frank agreed verbally that Ursidae would pay Mr. Frank about \$4,000.00 per month, starting in June 1999.

2. Mr. Frank was paid \$1875 every two weeks. The invoices and cancelled cheques provided by both Mr. Frank and Mr. Lookman verify this fact, and Mr. Lookman also indicated that he agreed to pay Mr. Frank about \$4,000 per month.
3. No deductions were made for income taxes, Employment Insurance, or Canada Pension Plan contributions.
4. Payment was for 40 hours of work per week, although Mr. Lookman did not keep track of Mr. Frank's hours and Mr. Frank was not required to account for those 40 hours.
5. Invoices were made out to Ursidae, but generally paid out of Inca accounts.
6. Ursidae, through Inca accounts, reimbursed all business expenses incurred by Mr. Frank.
7. Mr. Frank held himself out as the Vice President of Ursidae with the approval of Mr. Lookman.
8. There was no contract governing the relationship between Ursidae and Mr. Frank.
9. There was not a fixed term for Mr. Frank's relationship with Ursidae.

10. Mr. Frank was granted 3,000 shares in Ursidae, but did not receive control of these shares during his employment. Instead they were (and are) held in trust by Ursidae. The shares are Class B, non-voting shares.
11. Mr. Frank was not an officer or director of Ursidae or Inca.
12. Mr. Frank was employed to do a number of general tasks for Ursidae, rather than a distinct task with a clear goal. These tasks included the following:
 - Gathering information about component products
 - Gathering samples of component products
 - Office coordination
 - Investigating potential government funding
 - Investigating financing options
 - Developing a business plan
 - Applying to regulatory bodies for compliance approvals
 - Preparing the prototype truck for an exposition
 - Developing a web page
 - Meeting with prospective buyers
 - Meeting with the media for publicity
 - Responding to inquiries
 - Sending mail-outs
 - Attending a software seminar on behalf of Inca Metal
13. Mr. Frank reported to Mr. Lookman on a regular basis. Although he enjoyed a degree of autonomy in his work with Ursidae, all final decisions were subject to the approval of Mr. Lookman. This was the evidence of both parties.
14. Mr. Frank was not permitted to subcontract his work to other individuals or corporations.
15. Mr. Frank worked from offices provided by Ursidae.
16. Mr. Frank's office equipment was provided by Ursidae.
17. Mr. Frank was provided with a car by Ursidae as part of his compensation package.
18. During his relationship with Ursidae, Mr. Frank was paid from Inca accounts.

19. During his relationship with Ursidae, Mr. Frank also worked for Inca Metal Cutting Ltd. on an ongoing basis.
20. In approximately June 1999 the relationship between Mr. Frank and Ursidae changed. Mr. Frank continued to invoice for \$1875 every two weeks, but was paid only \$461.50. The balance of \$1,423.50 was held against the \$34,000 that Mr. Frank owed for his 3,000 class B shares in Ursidae. This change was mutually agreed to by both parties.
21. During his final two months at Ursidae, Mr. Frank worked less than full time hours. From June 30 onwards, his invoices no longer indicate 80 hours of work for the two-week pay period. Both parties indicated an agreement that, in return for receiving less of a payment, Mr. Frank would provide fewer hours of service. In addition, Mr. Durbridge has confirmed that Mr. Frank did not work full-time hours from late July onwards.
22. During his final two months with Ursidae, Mr. Frank worked on other projects. This work was minimal and generally unrelated to the sales, marketing and other tasks that he performed for Ursidae and Inca.
23. On August 30, Mr. Lookman provided Mr. Frank with a change in the terms of his relationship with Ursidae which were unreasonable. Mr. Frank could not meet the requirement to infuse \$34,000 into Ursidae within the one-day deadline; in Mr. Lookman's own words "thereby terminating [his] employment as of August 31st, 1999."
24. The notice of August 30 was a decision of the board of directors of Ursidae. Mr. Frank was not part of the board and did not take part in the discussions leading to this decision.
25. There was no previous written notice of the potential termination of Mr. Frank's relationship with Ursidae.
26. Ursidae has carried on a contractual relationship with David Durbridge which is different in nature than the relationship between Ursidae and Mr. Frank. Unlike Mr. Frank, Mr. Durbridge charged an hourly rate and his invoices correlated directly to the number of hours he actually worked. Each invoice was for a different amount and the hours claimed were accounted for.
27. With respect to the XEC Consulting expense claim, I find that this was a legitimate business expense. Both parties agreed that Ursidae's web page required changed due to a trademark issue. The disagreement was with respect to the quantum for that change. The evidence is that XEC invoiced Ursidae for the work, Mr. Frank paid the invoice on behalf of Ursidae, Ursidae benefited from the work, and Ursidae did not reimburse Mr. Frank as it customarily did for office/business expenses. For reference, see section 21(2) of the Act, which states:

An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

28. With respect to the diesel fuel expense claim, I accept Mr. Frank's position that this was related to his work with Ursidae and was not part of his personal car expenses.

The Director's Delegate then applied a four factor test to this fact pattern. The Director's Delegate examined the factors of control, integration, economic reality and the specific result test. Turning to the control factor the Director's Delegate asked whether there was a traditional master servant relationship. He found that Ursidae, through Murray Lookman ("Lookman"), had offered Frank work and that Lookman had terminated the relationship between Frank and Ursidae. He found that Ursidae set the broad parameters of the work to be performed and, although Frank enjoyed a large degree of independence in the performance of his duties, it was clear that Lookman exercised control over the way in which the work was performed. It was consistent with what one might expect from the owner of a business directing a vice president. The Director's Delegate found that the parties had negotiated a salary which was consistently paid regardless of the amount of time Mr. Frank worked. The Director's Delegate found that the remuneration had the characteristics of salary although invoices were rendered.

Turning to the integration test the Director's Delegate examined the degree to which Frank interacted with the organization and operation of Ursidae. He asked whether Frank as an individual was an integral part of the operation or merely ancillary to it. He asked "would an ordinary person view the relationship between Mr. Frank and Ursidae as one of employee/employer?" The Director's Delegate found that the perception of an ordinary man would be that the relationship was one of employee/employer and relied on the example of the business cards as proof.

The Director's Delegate also applied the economic reality test and asked whether the entire relationship, when viewed objectively, would lead one to the conclusion that Frank was in business for himself or working for Ursidae. The Director's Delegate asked whether Frank bore any risk of loss or chance of profit; whether Mr. Frank had ownership of machinery and equipment and if so how substantial was the investment; whether there was an ongoing relationship between Frank and Ursidae; and, finally, whether Frank was permitted to provide the same or similar services to other parties and if so was he actively searching out other business opportunities.

The Director's Delegate found that Frank bore a minimal risk of loss or possibility of profit. He noted that although Frank was a shareholder he provided no capital for the shares and that the shares were non-voting. He noted that Frank received a predictable income regardless of the performance of Ursidae and that the relationship was indefinite as opposed to being governed by a specific term. He noted that Frank was provided a vehicle, office space and office equipment. Towards the end of the relationship Frank did take on other work. However this work was not related to the work he was doing for Ursidae.

The Director's Delegate also applied the specific result test. He looked at the intent of the parties and asked whether Frank was expected to provide a single service leading to a specific result or

to make general efforts on behalf of the organization. He looked at the specific work that Frank performed and the personal service that Frank rendered to the company. The Director's Delegate looked at the range of duties and tasks performed by Frank. Those tasks were required for the day to day operation of Ursidae and Frank was not in a position to sub-contract any of those duties. The Director's Delegate noted that Frank's employment contract was verbal, for an indefinite term and related to the promotion and sale of Ursidae's product.

In making his determination the Director's Delegate had to consider two mitigating factors. Firstly, Frank's salary had been reduced from \$1875 bi-weekly to \$461.50 bi-weekly. This reduction in salary occurred during the final eight weeks' of his employment and was agreed to by Ursidae and Frank. Secondly, an issue arose with respect to two expense items claimed by Frank as being business costs that he paid for. The first, in the amount of \$973.70 was to a computer consulting firm for modifications to a web page. The second expense, for \$33.05, was for diesel fuel for one of the trucks. The Director's Delegate allowed the business expense claim.

Finally, the Director's Delegate determined that the wages owing for the period of August 23 to 30, 1999 amounted to \$276.90. Likewise, the termination pay, which was calculated on the \$461.50 bi-weekly pay, was determined to be \$461.50.

ANALYSIS

On appeal Ursidae challenged some of the findings of fact in the Determination but mostly took exception to the legal conclusions drawn from the findings. In its appeal submission the employer stated:

“Ursidae maintains the company did not employ Mr. Frank. Mr. Frank was sub-contracted as an independently self employed Sales & Marketing Consultant to complete a survey of the viable market places for a heavy duty truck kit, to approach the Government for funding, to develop a viable business plan and to obtain sales.”

Ursidae took the position that Frank had been contracted as an independent contractor and that this is what he (Frank) and Ursidae wanted. Ursidae called two witnesses who testified respectively to Frank's status as a contractor. The first witness, Maureen Freeman, who was employed by another of Lookman's companies (Inca Metal Cutting Ltd. (“Inca”)) but also kept the books for Ursidae, testified that she had no recollection of Frank ever asking to go on payroll. She testified that there would be no reason not to put someone on payroll who wanted to be on payroll. She testified that even as a sub-contractor a person could still be on Inca's medical plan.

Mr. David Durbridge also testified. He testified that he did not work on payroll but was hired as a consultant to work on design problems with the trucks. He testified that he had a conversation with Frank in the office at the commencement of Frank's employment in which the two

discussed remuneration. Mr. Durbridge testified that he told Frank that he was billing Ursidae through one of his two companies. He testified that Frank responded that he (Frank) had the same arrangement. He testified that he and Murray Lookman could find no data in the computer on sales calls when Frank left the company. He also testified that Frank had said that “he had the info” but if Lookman wanted it he would have to pay for it. He further testified that some incomplete Government documents were found on the computer but there were no back up discs.

Murray Lookman also testified that Frank had declared, at a shareholders meeting, that he would come on board Ursidae as an independent consultant for sales and marketing and that he would not be an employee of the company. He also indicated that initially Frank supplied Ursidae with invoices from a company called Global Marketing but that eventually the invoices were changed to personal invoices. Lookman also testified that he supplied the car and computer to Frank although he states it was neither Ursidae nor Inca Metals Inc. that supplied the office space but rather a company called Ardic Developments Ltd.

Mr. Lookman further testified that he had refused to pay the computer consultants fee for the work done to the web site. Lookman did agree that it was necessary to do work on the web site due to a trademark infringement dispute. However, Lookman took the position that Frank was not authorized to spend that amount of money and order the changes to the web site that were done by the private consultant. He testified that he had authorized a change to the name and logo but not the extensive changes that were made.

Finally, Mr. Lookman acknowledged that Frank was entitled to pay for the last six days that he worked. However, he argued that Frank had incurred two speeding tickets in the vehicle that was provided to him and that Ursidae was therefore entitled to offset the speeding fines against the wages owing.

Ursidae, through Lookman, maintained its position that Frank was not entitled to termination pay or vacation pay on gross earnings since June 1998 because Frank was an independent contractor rather than an employee of Ursidae. Alternatively Ursidae argued that it had just cause to terminate Frank due to his failure to fulfill his employment obligations regarding the marketing, financing and promotion of the vehicles.

Mr. Lookman ably presented his case and strongly believed in its merits. Mr. Lookman is a businessman and viewed Ursidae’s relationship with Frank as a contract that should be respected by the Director’s Delegate and this Tribunal. However, I cannot agree with Mr. Lookman’s position. The Director’s Delegate did a thorough investigation and made the findings of fact that were outlined in the above paragraphs. He correctly applied the four fold test of control, integration, economic reality and specific result. He did this against the background of the definition of employee in the *Act* which includes a person “. . . receiving or entitled to wages for work performed for another and a person an employer allows, directly or indirectly, to perform work normally performed by an employee.” For these reasons I am not prepared to disturb the

Delegate's finding or conclusion that Egon Frank was an employee of Ursidae Manufacturing Ltd.

Furthermore, Section 4 of the *Act* is relevant in these circumstances. Section 4 reads:

Requirements of this Act cannot be waived – The requirements of this Act or the Regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to Sections 43, 49, 61 and 69.

Sections 43, 49, 61 and 69 are not relevant to the issues between Egon Frank and Ursidae Manufacturing Ltd. What is relevant is the statutory prohibition against parties agreeing to waive any of the requirements of the *Act*. In other words, parties cannot contract out of the minimum provisions of the *Act*. This would apply to Egon Frank's employment status and particularly to the definition of "employee". An employer and an employee cannot agree between themselves that a person is an independent contractor. The Director's Delegate applied the relevant test to determine employment status. I agree with his conclusion that Egon Frank was an employee of Ursidae.

Ursidae argues that if Frank is found to be an employee that it should be relieved from paying termination pay because he was terminated for cause. I cannot agree that Mr. Frank was terminated for cause. Egon Frank was essentially a one man show for Ursidae. He was charged with developing a business plan, a marketing plan, soliciting bids from suppliers and arranging financing and grants from Government amongst other duties. It is true that he was unable to secure the seven figure financing from the Federal Government that had been hoped for by Ursidae but he was successful in securing a much smaller amount from a Provincial Government program. Furthermore, negotiations, particularly one with a representative of the Republic of Congo, did not produce any sales. However, I do not feel that that can be laid entirely at Egon Frank's feet. I am more inclined to view the situation as a highly speculative business venture where expectations exceeded revenue. Mr. Lookman and the shareholders of Ursidae made a tough but understandable business decision to cease operations. Mr. Frank's termination flowed from that business decision rather than culpable behavior by him.

I believe that Mr. Frank had Ursidae's best interest at heart. I believe that the efforts that he made on Ursidae's behalf were genuine and bonafide. At the stage of development that Ursidae was at in the final 6 to 8 months of its existence Mr. Frank may not have been the best person for the job; however, that does not mean that he committed culpable conduct worthy of termination for cause.

Ursidae argues that it should not be liable for the expenditure that Frank authorized to resolve the trade mark dispute over the web page. Ursidae argues that Frank exceeded his authority in authorizing the changes. However, Ursidae operated with that changed web site for approximately ten months according to Mr. Lookman. Therefore it had the benefit of the work that was performed.

Section 21 of the *Act* prohibits an employer, except as required by the *Act*, from directly or indirectly withholding, deducting or requiring payment of all or part of an employees' wages for any purpose. The purpose of the section is to prevent employers from unilaterally seeking contribution from the employees to the cost of doing business. I view the changes to the web site as a cost of doing business. As stated previously Ursidae had the benefit of those changes for a lengthy period of time. Withholding of this payment does not qualify as an exception under the regulations or the *Act*. I agree with the Determination that Frank is entitled to be reimbursed for this expense. Likewise I agree that Frank is entitled to be reimbursed for the monies spent on the diesel fuel.

Finally, I turn to the claim by Ursidae that it should be entitled to offset the amount of the fines that it had paid because Mr. Frank had incurred two speeding tickets while driving the vehicle that was provided for him. Notwithstanding any moral obligation Mr. Frank may have to pay his own speeding tickets the precise issue has been before this Tribunal previously. In Pacific Forest Maintenance #D202/96 the then Chairman of the Employment Standards Tribunal, Mr. Geoff Crampton, decided that speeding tickets incurred by an employee while operating the employer's vehicle for the purposes of employment were a business expense. As stated previously business expenses are not allowable deductions under Sections 21 and 22 of the *Act*. Ursidae's remedy in this matter is to pursue Mr. Frank in the civil courts.

ORDER

I confirm the Determination dated August 22, 2000 with interest to date.

E. CASEY MCCABE

E. Casey McCabe
Adjudicator
Employment Standards Tribunal