Employment Standards TRIBUNAL

An appeal

- by -

Vantage Equipment Company Ltd.
("Vantage")

- 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 Ann Hart

FILE No.: 2005A/89

DATE OF DECISION: August 5, 2005

DECISION

SUBMISSIONS

Gordon (Chuck) Ballard	on his own behalf
Hal Neumann	on behalf of Vantage Equipment Company Ltd.
Ian Mac Neill	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Vantage Equipment Company Ltd. ("Vantage") pursuant to section 112 of the *Employment Standards Act* (the "*Act*") of a Determination issued on April 12, 2005 (the "Determination") by a delegate of the Director of Employment Standards (the "Director").

2. The appeal is brought on the grounds that the Director erred in law in making the Determination.

3. Hal Neumann, who provided submissions on behalf of Vantage, wrote to the Tribunal on May 24, 2005 to request an oral hearing. Mr. Neumann maintained that some of the information in the Determination was inaccurate and incomplete, and could only be addressed in an oral hearing.

4. The parties were given the opportunity to present their concerns with respect to the Determination in their written submissions for the appeal. The Tribunal has determined that this appeal may be properly addressed by way of written submissions.

ISSUE

5. The issue in this case is whether the Director made an error in law in determining that Gordon (Chuck) Ballard was an employee of Vantage, and not an independent contractor.

THE FACTS

6. Vantage operates a business involving the purchase and sale of used mining and construction equipment. Gordon (Chuck) Ballard worked as a mechanic for Vantage from 4 April 2003 to October 12, 2004, and was paid between $32.00 and $40.00 per hour.

7. A complaint under section 74 of the *Employment Standards Act* was filed by Gordon Ballard alleging that Vantage had contravened the *Act* because it had failed to pay him regular wages, overtime, annual vacation pay, and statutory holiday pay; and had terminated him without notice or compensation for his length of service.

8. The delegate for the Director (the Delegate) held a hearing on February 28, 2005. In the Determination the Delegate found that the *Act* had been contravened, and awarded Gordon Ballard the sum of $6848.49 in wages under section 18 of the *Act*, and $192.41 in accrued interest under section 88 of the *Act*. The

Delegate also ordered that Vantage pay an administrative penalty of $500.00 for its contravention of the *Act*.

ARGUMENT

Submissions of Vantage

9. The appellants argued that the Delegate erred in a number of findings of fact, and in his conclusions that Vantage exercised control and supervision over Mr. Ballard. The Delegate had also erred in determining that Vantage had purchased equipment to use in the shop. No tools or equipment were purchased for Mr. Ballard's use in his relationship with Vantage.

10. The conclusion of the Delegate that Mr. Ballard worked for others and make a profit on a very limited basis was also in error. The evidence clearly demonstrated that Mr. Ballard had ample time to work for others, and had plenty of opportunity to use Vantage's shop facilities to do work for others, and make a profit.

11. It was Mr. Neumann's contention that the Delegate had erred in suggesting that Mr. Ballard was responsible for showing equipment in the yard, inferring that it occurred regularly. In fact, this had seldom taken place. The Delegate had also incorrectly found that Mr. Ballard had regular work, such as keeping batteries charged, shipping, receiving, etc.

12. Mr. Ballard set his own rate, as a contractor would do, and was paid a high rate of up to $40.00 per hour. According to Mr. Neumann, this was $12.00 more per hour than the average wage for a mechanic.

13. The appellants maintained that Mr. Ballard had been dishonest regarding the length of his "employment". It was submitted that the invoices demonstrated that no work was done after August 25, 2004, and that this called into question the integrity of the rest of the claim.

Submissions of Mr.Ballard

14. Mr. Ballard took issue with some of the submissions made by the appellants concerning the findings of fact made by the Delegate. He wrote that he considered himself to be an employee of Vantage because of promises made to him by Hal Neumann that he could become a full-time employee and manage the shop. In addition, Vantage had given him a list of the required repairs to be done, and had indicated when the work should be done.

15. Mr. Ballard wrote that he was usually consulted about the purchase of equipment and tools by Vantage, and had often ordered the equipment and tools himself. Some of the tools, including a paint sprayer used to paint all repaired equipment in Vantage colours, were specialty tools used exclusively for Vantage.

16. With regard to the hours worked for Vantage, Mr. Ballard provided a photocopy of a document prepared by Vantage entitled *Monthly Hours Worked by Chuck Ballard Repair for Vantage Equipment Company Ltd.*. Mr. Ballard noted that the hours listed did not correspond to the list of hours that Mr. Neumann provided.

Submissions of the Delegate

17. The Delegate submitted that some of the comments made by the appellants appeared to be "*little more than a re-hash of evidence that has already been considered in the Determination*". The Delegate pointed out that an appeal was not an opportunity to have the evidence re-heard.

18. The evidence Mr. Ballard had provided (that tools were purchased or upgraded during the time he was there, and he had been consulted, or had made recommendations on the purchases) was not challenged or refuted by Mr. Neumann at the hearing. Consequently, the appeal should not be allowed on these grounds.

19. The Delegate submitted that the list of hours which Mr. Neumann had provided with the appeal was misleading, as it contained different information to that which had been submitted by Mr. Neumann at the hearing, and marked as Exhibit #7 in the Record.

20. The evidence concerning the additional duties Mr. Ballard had performed for Vantage was not challenged by the appellants on cross-examination, and was not refuted in the evidence presented by the appellants in the hearing.

21. The appellants had raised issues regarding work after 31 July 2004. This part of Mr. Ballard's complaint had been withdrawn at the hearing.

ANALYSIS

22. The onus of proving that the Director has erred in law in the Determination is on the appellant.

23. The Delegate considered the definitions of "employee" and "employer" in the *Act*, and correctly noted that the definitions in the legislation are to be given broad interpretation. (see s. 8, *Interpretation Act*, R.S.B.C., *Machtinger v. HOJ Industries Ltd.* , [1992] 1 S.C.R. 986, and *Kelsy Trigg*, BC EST #D040/03).

24. Section 1(1) of the *Act* contains the following definitions:

> "**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…
>
> "**work**" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere…

25. The Delegate also considered previous decisions of the Tribunal, and the various common law tests which have been traditionally used to determine whether a person is an independent contractor or an employee. He noted that the *Act* provides protection for employees, but not for independent contractors.

26. The Supreme Court of Canada in *671122Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, decided that there is no single, conclusive test that can be applied to determine whether a person is an employee or an independent contractor. Rather, the Court held:

> 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 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 own 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. (at paras. 47 and 48).

27. The Tribunal has held that the common law tests of employment are subordinate to the statutory definition (*Christopher Sin* BC EST #D015/96, Kelsy Trigg, BC EST #D040/03).

28. The Delegate relied on the factors of degree of direction and control exercised; ownership of tools; chance of profit, and risk of loss; and the degree to which the person was integrated into and became part of the business. After examining the evidence in light of those factors, the Delegate concluded that Mr. Ballard was an employee, and was not in business for himself.

29. The Determination listed a number of criteria that pointed to the existence of an employment relationship. I will briefly refer to those criteria, and address the arguments raised on appeal concerning those factors below.

Level of Control

30. The Delegate determined, based on the evidence presented at the hearing, that Vantage controlled most of Mr. Ballard's time. It was the conclusion of the Delegate that Mr. Ballard spent between 87% and 89% of his hours working for Vantage, and as a result, could only have provided mechanical services to others on a very limited basis.

31. The information showing the hours worked by Mr. Ballard for Vantage and the time left to work for others which was presented by Mr. Neumann in his submissions for the appeal was different than the evidence which was before the Delegate. An appeal is not an opportunity to present new evidence which could have been presented to the Delegate. The Delegate reached his conclusions based on the evidence of both parties which was submitted at the hearing.

32. The evidence was that Vantage exercised control and direction over Ballard's activities by requiring him to work on machinery owned by Vantage, and equipment brought in for repair by customers of Vantage, and Hal Neumann's family. Mr. Ballard was given a key to the premises; ensured that batteries in the

equipment were charged; cleaned up the yard; showed equipment to prospective buyers; and directed work in the shop, and at other locations for Vantage.

33. Mr. Neumann submitted that Vantage could have hired "*any other contractor*" to do the work done by Mr. Ballard. While this may have been true, it was Mr. Ballard that Vantage had chosen to do the work.

34. The Delegate further found that Vantage determined the order in which the work was to be done, and had Mr. Ballard complete time sheets showing details of the time spent working on each job.

Ownership of Tools

35. The issues Mr. Neumann has brought forward on appeal concerning ownership of tools and equipment were apparently not raised with the Delegate during the hearing. An appeal to the Tribunal is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination.

36. The Delegate determined based on the evidence before him that while Mr. Ballard owned the tools required for the work of a mechanic, the work was done in the shop owned by Vantage, and the specialized or heavy equipment and tools in the shop were owned by Vantage. In addition, Vantage had rented equipment for Ballard to use when there was a heavy or difficult job to do. It was open to the Delegate to reach these conclusions based on the information presented at the hearing.

Degree of Opportunity for Profit and Risk of Loss

37. The evidence was that Mr. Ballard provided no parts for the work done for Vantage, and therefore had no chance to profit from that work, other than being paid for the hours worked at the rate set for his labour. The Delegate found that while Mr. Ballard may have been able to profit from the work he did for others, that other work made up such a small part of his time spent working that it was insufficient to influence this aspect of the test. In assessing the risk of loss, it was the Delegate's conclusion that Mr. Ballard had not been held responsible for deficiencies in his workmanship.

Degree of Integration in the Business

38. Mr. Ballard worked less for other customers and more for Vantage, as time went on. He became increasingly integrated in the operations of Vantage. Mr. Ballard was given a key to the gate and premises so he could come and go as he wished, and was available at night and on weekends to open the gate for shipping and receiving of parts and equipment. He inspected, maintained, serviced, and painted equipment, and showed and demonstrated equipment to prospective buyers. Mr. Ballard also traveled to other locations to work on behalf of Vantage.

39. The Delegate concluded that Mr. Ballard's work was integral to the operations of Vantage, as it was in the business of buying, selling and servicing heavy equipment; and this was work which would normally be done by an employee. For a period of 16 months, Ballard had worked with Vantage, in an on-going, indefinite relationship.

40. The Determination reflects that the claim for hours worked in August 2004 was withdrawn by Mr. Ballard, and the records were amended to show that July 31, 2004 was his last day of employment.

41. Mr. Neumann argued that Mr. Ballard set his own rate, and was paid $40.00 per hour for some of his work (which was more than the average wage for a mechanic), and "*no sensible employer would be so foolish as to pay such a high wage*". It does not appear from the Record or the Determination that this argument was raised with the Delegate. However, it was noted in the Determination that Mr. Ballard said that he was reprimanded by Mr. Neumann after he enlisted the help of two other individuals on a job, and they billed Vantage for their time at $60.00 per hour.

42. It is not appropriate for the Tribunal to interfere with the findings of fact made by the Director if they do not amount to an error of law, as contemplated by s.112 of the *Act*, even if the Tribunal might not have reached the same findings of fact. The argument that Mr. Ballard was an independent contractor was presented to the Delegate and was considered carefully. The Determination and the Record show that there was evidence to support the findings and conclusions reached by the delegate for the Director.

43. Based on the evidence before me, I find that Mr. Ballard was properly characterized as an "employee", and there is no evidence to support an error in law. I deny the appeal and confirm the Determination.

ORDER

44. Pursuant to Section 115 of the *Act*, I ORDER that the Determination dated April 12, 2004 is confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal