Employment Standards TRIBUNAL

An appeal

- by -

C.A. Boom Engineering (1985) Ltd.
("Boom")

- 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

TRIBUNAL MEMBER: Ian Lawson

FILE No.: 2004A/79

DATE OF DECISION: July 23, 2004

DECISION

SUBMISSIONS

Boris Klarich	On behalf of C.A. Boom Engineering (1985) Ltd.
Murray N. Superle	On behalf of the Director
Norman Robertson	On his own behalf

OVERVIEW

This is an appeal by C.A. Boom Engineering (1985) Ltd. ("Boom") pursuant to section 112 of the *Act*. The appeal is from Determination ER#122-398 issued by Murray N. Superle, a delegate of the Director of Employment Standards, on March 26, 2004. The Determination found that Norman Robertson ("Robertson") was an employee of Boom, and not an independent contractor, and that Robertson was owed wages, holiday pay and vacation pay in the total amount of $20,034.28. Boom filed an appeal on May 4, 2004. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Boom is a firm of structural engineers in North Vancouver, B.C. Robertson was engaged as a draftsman with Boom between November, 1992 and August 8, 2003. The parties operated on the basis that Robertson was an independent contractor and not an employee: throughout their relationship, Robertson presented invoices to Boom every two weeks indicating the number of hours worked. Invoices from 2002 and 2001 indicate a range of hours between 15 and 38 were worked each week, but the most common figure was 37.5. Robertson charged an hourly rate, but he also charged GST. When Boom failed to pay invoices in 2003, Robertson continued working but increased the hourly rate charged on account of the default. By August 8, 2003, Boom owed Robertson $20,034.37 and Robertson wrote the following letter to Boom on August 18, 2003:

> In accordance with my previously advised credit watch on your account (June 01/03), I note that the outstanding balance owing continues at an excessively high figure (currently $20,034.37 to August 08/03).
> In an attempt to recover some of the cost of maintaining this large outstanding, and long-term balance, for contracted drafting services, the hourly rate is again adjusted to reflect the lost investment activity that this sum represents.
> As previously noted, it is my intention to review this hourly premium on a regular basis until the outstanding balance is reduced to $5,000.00, or preferably less, over any bi-weekly billing period.
> Your prompt attention to this matter would be appreciated.
> The new current rate, as reflected in the enclosed invoice, stands at $29.50/hr. This is an increase of $0.50 over the previous rate of $29.00/hr.

The relationship between Boom and Robertson came to an end shortly after this letter was sent. Canada Customs and Revenue Agency (CCRA) conducted an audit of Robertson, and concluded he was an employee of Boom and not an independent contractor. Robertson then filed a complaint with the Director

alleging he was an employee of Boom and was owed wages, holiday pay, vacation pay and compensation for length of service. By November, 2003, Boom had gone into receivership.

The Director's delegate conducted an investigation, in the course of which documents and submissions were received from Robertson and Boom. The delegate heard from Robertson that: he was expected to work at Boom's premises for 7.5 hours per day, 5 days per week; Boom's principal Boris Klarich ("Klarich") assigned projects and deadlines to Robertson; there was no termination date for this working relationship; all of the equipment Robertson needed to perform his services was supplied by Boom (save only for a calculator, pencils and a journal); and Robertson did not have an opportunity to share in any profits made as a result of his work, nor did he have a risk of any loss (other than his hourly fee).

The delegate heard from Boom that: Boom never controlled Robertson's hours of work, and he worked on his own with no supervision; Robertson assigned his own rate of pay, and charged GST to Boom; Robertson could have worked in his home if he wanted, but chose instead to work at Boom's premises; Boom has other individuals like Robertson who are considered to be independent contractors, and Robertson has always worked as such; Robertson raised his hourly rate without consultation with Boom.

The delegate applied the standard four-fold test to determine whether Robertson was an employee, and concluded in Robertson's favour. The delegate rejected, however, Robertson's complaint that he had been constructively dismissed as a result of Boom non-payment of wages, because Robertson continue to work for five months and thereby condoned that significant change to his conditions of employment.

Boom's notice of appeal seeks to have the Determination reversed and advances as grounds for appeal that the Director erred in law, that the Director failed to observe the principles of natural justice, and that evidence has become available that was not available at the time the Determination was being made.

ISSUE

Was Robertson an employee or an independent contractor?

ANALYSIS

The word "employee" is defined in the *Act* as follows:

> "**employee**" includes
>
> (a) a person, including a deceased 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,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall.

This definition must be given a broad and liberal interpretation, reflecting the remedial nature of this legislation (see *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 B.C.L.R. (2d) 170 (C.A.), and *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986).

The delegate applied, as the Director customarily does, the four-fold common law test for determining whether an individual is an employee: whether the individual was under the direction or control of another regarding the way in which work was done; whether the individual used tools, space, supplies or equipment owned by another person; whether the individual had a chance of making a profit in doing the work; and whether the individual had a risk of loss if the cost of doing the work is more than the price charged for it. The delegate further applied what is known as the "specific result test" regarding whether the contract in question is to provide for a single service leading to a specific result, or whether the individual is simply required to provide general efforts on behalf of the other party. The delegate then applied the "organizational or integration test" regarding whether the work performed by the individual is integral to, or contributes to, the operation of the other party's business (the more integrated the work is with the business, the more likely the individual is an employee). Finally, the delegate applied the "permanency test" regarding the duration of the relationship between the parties (the longer and more continuous the relationship, the more likely the individual is an employee). In his analysis of all of these tests, the delegate concluded Robertson was an employee.

In its submission in support of this appeal, Boom makes the following points:

1. Robertson worked on his own very well, and Klarich would not have contact with him for a week at a time.

2. Boom has never had employees, and all workers there were on contract. This was because of the nature of the business – Boom never knew how much work it would have.

3. Klarich never told Robertson how many hours to put in, or when to show up for work, and Robertson took time off without asking.

4. Robertson determined his own rate of pay, and charged GST.

5. Robertson had his own tools ("including books and computer") at home and "it was understood (not written) that he would not charge commute time and expenses related to it for no charge of office space and tools (he sat in the film room)."

6. Boom did not prohibit Robertson to hire someone else to do the work.

In its submission, Boom does not identify evidence that it says has become available that was not previously available, nor does it say how the Director failed to observe the principles of natural justice in making the Determination. I therefore dismiss Boom's appeal as it relates to those two grounds.

I now review whether any error of law is apparent in the Determination. This Tribunal has consistently treated with caution the traditional "common law" tests for determining whether an individual is an employee. This is because in making that determination, the Director must apply the statutory definition set out above. This Tribunal made the following comment in *Project Headstart Marketing Ltd.*, BC EST #D164/98:

> I need not concern myself with the question of the status of the individuals in question under the common law in the face of the statutory definitions contained in section 1 of the *Act*. The *Act* casts a somewhat wider net than does the common law in terms of defining an "employee."

In *Re Kelsey Trigg*, BC EST #D040/03, the Tribunal stated:

> The fourfold test and the other traditional common law tests are becoming less helpful in determining the role of master and servant in modern workplaces. Courts and the Tribunal have typically assessed the nature of the relationship, looking beyond the language used by the parties. While there is no magic test, the total relationship of the parties must be examined, with a view of determining "whose business is it?" Thus, the overriding test is whether the complainant "performed work for another". The definition of "employee" is to be broadly interpreted and the common law tests of employment are subordinate to the statutory definition.

The common law tests originated chiefly for the purpose of determining whether an employer could be held vicariously liable for wrongs done by its employee, and not for the purpose of determining whether an employee is entitled to the minimum protections of the *Act*. The inadequacies of the common law tests have been noted by the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, and by the Federal Court of Appeal in *Wolf v. Canada*, 2002 F.C.A. 96. The Supreme Court held 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. Rather,

> … 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. (paras. 47 and 48)

In the course of his analysis, the delegate made the following findings:

1. Robertson was under the direction of Klarich, who was the engineer with final say on Robertson's work and who controlled the projects on which Robertson worked.
2. Robertson worked on Boom's premises and used Boom's equipment to perform his work. Had Boom not wanted Robertson to work on its premises, it could have told him to work elsewhere.
3. Even though Robertson had increased his hourly rate during the last months of the relationship, Boom did not have to accept the increases or continue to have Robertson perform the work.
4. Robertson had no financial investment in Boom, and instead of bidding for the projects on which he worked, he was paid an hourly rate for his work. Robertson had no chance of profit or risk of loss.
5. The work Robertson performed was specific to Boom's business and not ancillary to it, and no one else in Boom could have done Robertson's work.
6. The work Robertson performed was integral to Boom's business, as he produced drawings to the specification of its engineers.
7. The parties had a nearly continuous relationship since 1992.

I see nothing in Boom's submissions on this appeal that casts doubt on the soundness of these findings, or that suggests the delegate erred in applying the law in this area. The delegate applied a multitude of tests used at common law, and his findings amply support a conclusion that Robertson falls within the definition of "employee" in section 1 of the *Act* as interpreted by this Tribunal. It would be difficult indeed to conclude Robertson was engaged in business on his own account, or stood to gain or lose anything in his work apart from what any employee stands to gain or lose: to be paid for the services he performed at his employer's direction. Boom's appeal must therefore be dismissed.

ORDER

Pursuant to section 115(1) of the Act, the appeal is dismissed and Determination ER#122-398 issued on March 26, 2004 is confirmed, together with interest pursuant to section 88 of the Act.

Ian Lawson
Member
Employment Standards Tribunal