

An appeal

- by -

Stephen Steinman
(“Mr. Steinman”)

- 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 L. Roberts

FILE No.: 2014A/120

DATE OF DECISION: December 19, 2014

DECISION

SUBMISSIONS

Stephen Steinman	on his own behalf
Daniel Coles	counsel for D.J.N. Wholesale Blind Factory Ltd.
Joe Leblanc	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Stephen Steinman (“Mr. Steinman”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on August 5, 2014. In that Determination, a delegate of the Director determined that the *Act* did not apply to Mr. Steinman’s complaint.
2. Mr. Steinman appeals the Determination contending that the delegate both erred in law and failed to observe the principles of natural justice. Mr. Steinman also says that evidence has become available that was not available at the time the Determination was being made.
3. Mr. Steinman filed his appeal within the statutory time period and the Tribunal granted him an extension of time to file additional material.
4. These reasons are based on the written submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

5. Mr. Steinman filed a complaint with the Employment Standards Branch alleging that D.J.N. Wholesale Blind Factory Ltd. (“DJN”) had contravened the *Act* by failing to pay him regular wages and by misrepresenting the job at the time he was hired.
6. On November 29, 2013, after starting the hearing, the delegate offered the parties a mediator in an attempt to resolve the complaint. Although the parties accepted the offer, they were unsuccessful in resolving the matter. The hearing was reconvened on December 18, 2013. Mr. Steinmann appeared in person and called one witness. Scott Murray appeared on behalf of DJN by telephone.
7. Following the hearing, the Director’s delegate determined that the *Act* did not apply to Mr. Steinman’s complaint because he was an independent contractor, not an employee.
8. The relevant evidence before the delegate may be summarized as follows.
 - Mr. Steinman responded to a Craigslist advertisement placed by DJN, a wholesale blind business, which was seeking sales representatives for the Okanagan. Mr. Steinman met with and was hired by DJN as a sales consultant for the Okanagan. The agreement between DJN and Mr. Steinman provided that Mr. Steinman was to be paid a commission of 10%. DJN’s advertisement referred to a sales consultant without any reference to the employment status of

the individual they were seeking. Mr. Steinman was hired as a consultant. He did not complete any forms typically required of employees, such as a TD1. He worked for DJN from February 12, 2013, until June 12, 2013.

- In February 2013, Mr. Steinman flew to Vancouver for one day of training and met DJN's general manager, Scott Murray. Mr. Steinman asked for an arrangement where DJN would provide him with all the leads. The parties also had a number of discussions regarding advertising. Mr. Steinman, who has 35 years' experience in the window covering business, was of the opinion that television advertising was superior to print media, an opinion that was not shared by DJN. This difference of opinion became a source of tension and Mr. Steinman offered to reduce his commission from 10% to 5% if the difference was put towards television advertising. DJN did not accept Mr. Steinman's offer. After Mr. Steinman continued to press his view that DJN should advertise on television, DJN decided to end their relationship.
 - Mr. Steinman asserted that he ought to have been able to make approximately \$8,500 per month if DJN had provided him with leads, but that DJN "starved him out" by not providing him with any leads. He alleged that DJN had contravened section 8 of the *Act* because there was no position for him, and contended that it was a condition of employment that DJN would provide leads.
 - Mr. Steinman agreed that DJN had not taken any statutory deductions from the money he received, and that he had neither asked for nor received a salary.
 - DJN's evidence was that the issue of Mr. Steinman's employment status did not arise until after the relationship ended, and asserted that all DJN's sales representatives were independent contractors. Mr. Murray said that Mr. Steinman set his own hours of work, and, while he was provided with a price list from which to work, he could bargain up or down from that. Further, Mr. Murray said, Mr. Steinman was free to sell product in any geographical area he wanted.
9. The delegate considered the definitions of employee and employer in the *Act*, as well as the specific results test, the economic reality test and the integration test, which are common law tests used in evaluating whether an individual is an employee or a self-employed contractor. The delegate also considered the Tribunal's decision in *Windy Willows Farm*. (BC EST # D161/05)
 10. The delegate found that Mr. Steinman was not under the control of DJN in the normal course of his duties. He noted that Mr. Steinman worked from his home office and was not required to maintain any specific hours. His hours of work were not recorded and submitted to DJN for payment.
 11. The delegate noted that although Mr. Steinman was based in the Okanagan, he was able to sell product anywhere. The delegate also found that Mr. Steinman used his own tools on the job; that the telephone and computer were paid for and maintained by Mr. Steinman and that DJN did not provide a vehicle or pay travel allowances or expenses. The only items DJN provided to Mr. Steinman were business cards.
 12. The delegate found that Mr. Steinman could determine his own profit and loss by negotiating prices with DJN and that he controlled how much time and effort was devoted to any particular deal.
 13. The delegate concluded that Mr. Steinman was in business for himself and that he was not doing the work of an employee because all DJN sales representatives were independent contractors. The delegate found support for this conclusion in Mr. Steinman's offer to forego some of his commission if it was put into television advertising. The delegate noted that an employee would not subsidize the cost of advertising an employer's product.

14. In light of his conclusion that the *Act* did not apply, the delegate declined to make a determination on Mr. Steinman's allegation that DJN had contravened section 8.

Argument

15. Mr. Steinman asserts that neither Mr. Murray nor Mr. Nell, DJN's Vice-President of Sales and Marketing, testified truthfully at the hearing. He also alleges that Mr. Nell made death threats against him after he notified DJN about the appeal as well as about a parallel Human Rights Tribunal action.
16. Much of Mr. Steinman's appeal submission relates to how badly he was treated by Mr. Nell and DJN and how DJN misrepresented the sales representative position. His submission references the *Competition Act* and asserts that DJN violated the *Human Rights Code*. I have not considered these arguments as I find they are not relevant to the main issue on appeal, which is whether or not Mr. Steinman was an employee of DJN.
17. Much of Mr. Steinman's appeal is a repetition of the arguments made at the hearing before the delegate, including his earning potential, advertising and lead generation.
18. The arguments relevant to this appeal are summarized as follows:
- Mr. Steinman claims that Mr. Murray misled the delegate when he testified that Mr. Steinman was not restricted to any particular territory. He contends that he was in fact restricted to the Okanagan area.
 - Although DJN provided Mr. Steinman with business cards, his home phone number was not on them. He says he had his own new computer so there was no need for DJN to provide him with one. He said that his son owned all the tools necessary to install blinds and shutters. He says that he asked for, and was promised, a cellular telephone but none was provided. He also says that DJN promised to provide him with a fuel allowance, and that it in fact paid one to him, which it later called a commission. Mr. Steinman contends that the delegate believed Mr. Murray's evidence, which he contends had no factual foundation.
19. Mr. Steinman contends that the delegate erred in concluding that he was able to determine his own profit and loss by negotiating a price with DJN. He argues that there was no evidence for this conclusion and says that although dealers are able to negotiate prices, representatives are not. He argues that he had to get price approval from DJN on all jobs. Mr. Steinman questions how the delegate arrived at this conclusion when he was paid a commission.
20. The delegate says that Mr. Nell was never called as a witness at the hearing, although he had initially been identified as one in DJN's preliminary list. The delegate says that Mr. Steinman never asked to call Mr. Nell as a witness and did not object or ask for an adjournment when Mr. Murray stated that he would not be calling any witnesses.
21. The delegate says that the parties were asked in advance to disclose any material they would be relying on at the hearing, and that information was disclosed to the other party in advance of the hearing. He also submits that the law and the process were explained to the parties before the hearing started.
22. The delegate says that Mr. Steinman has blended evidence from a Human Rights Tribunal hearing he was involved in nine months after the Employment Standard hearing with his appeal material as if the hearings were the same. He says that not only were the issues before the respective bodies different, the evidence was

not the same. Furthermore, the delegate contends that the evidence put before the Human Rights Tribunal cannot be considered on appeal as new evidence.

23. Counsel for DJN submits that Mr. Steinman's appeal is frivolous, vexatious and without merit. He says that Mr. Steinman's submission makes extensive reference to evidence and written material DJN submitted to the Human Rights Tribunal in response to a complaint filed by Mr. Steinman as a parallel proceeding to the Employment Standard complaint. Counsel for DJN says that the matter was heard by the Human Rights Tribunal over three days in June and September, 2014, and that the parties are currently awaiting a decision.
24. Counsel for DJN submits that Mr. Steinman has not demonstrated any basis for any of the statutory grounds of appeal, that the appeal submissions are inflammatory and disrespectful, and that the appeal should be dismissed with costs awarded to DJN.
25. Counsel for DJN submits that the delegate correctly decided that Mr. Steinman was not an employee and correctly dismissed the appeal for jurisdictional reasons.
26. Mr. Steinman's reply consisted almost entirely of a repetition of the arguments he advanced on appeal.

ANALYSIS

27. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
28. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
29. I find that Mr. Steinman has not demonstrated either an error of law or a denial of natural justice.

Error of Law

30. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (BCCA) the British Columbia Court of Appeal set out the following elements as constituting an error of law:
 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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 reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.

31. The Tribunal has adopted the analysis of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Ltd.* ([2001] 2 S.C.R. 983) in assessing the legal status of a person performing work. At paragraphs 46-48, the Court said as follows:

[T]here is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor.... [W]hat must always occur is a search for the total relationship of the parties....

...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.

32. I am satisfied that the delegate considered the facts in light of the statutory and common law tests, as the court suggested in *Sagaz* in arriving at his conclusion.
33. As I understand Mr. Steinman's argument, the delegate misinterpreted some evidence, or arrived at conclusions that were not supported by the evidence. While he contends that DJN witnesses "lied", I am satisfied, based on the submissions of the delegate and DJN, that DJN did not call any witnesses. I conclude that Mr. Steinman is either confused about the process or intentionally misleading the Tribunal as to his opportunity to examine witnesses. I accept that after the Director's delegate held the hearing, Mr. Steinman appeared at a Human Rights Tribunal hearing at which other parties were present on DJN's behalf.
34. I find that Mr. Steinman had knowledge of DJN's case in advance of the hearing and was given full opportunity to examine Mr. Murray and present contrary evidence. There is nothing in the record, or indeed in the appeal submission, supporting Mr. Steinman's contention that DJN gave false evidence. I only have Mr. Steinman's own assertions, unsupported by any contrary evidence.
35. The undisputed evidence confirms a number of factors which suggest Mr. Steinman was an independent contractor. Those include the fact that he did not complete any forms required of employees such as a TD1, he established his own hours of work, did not submit any time sheets, and offered to reduce his commissions if DJN paid for television advertising. In addition, Mr. Steinman supplied his own telephone, computer and vehicle. Mr. Steinman says that his son had all the tools necessary to install blinds. In my view, this information supports the delegate's conclusion.
36. Although Mr. Steinman contends that the delegate erred in finding that he could negotiate prices, he does not dispute the delegate's finding that he offered to reduce his commission if DJN advertised on television. I find no error in the delegate's conclusion that this factor supported an inference that Mr. Steinman was a contractor rather than an employee.
37. I find that Mr. Steinman has failed to demonstrate that the Director committed a palpable or overriding error in arriving at his conclusion that he was a contractor. While Mr. Steinman clearly disagrees with that conclusion, in my view there was sufficient evidence before the delegate for him to arrive at the conclusion he did, and I find no basis to interfere with that conclusion.

Natural Justice

38. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
39. Having reviewed the Determination, the record and the submissions, I find that the delegate “heard” Mr. Steinman. Although Mr. Steinman contends that the delegate failed to fully consider all of the material before him, there is no evidence before me to conclude otherwise. Furthermore, although Mr. Steinman asserts that the delegate did not allow him to cross-examine Mr. Nell, the record and the submissions persuade me that Mr. Nell never appeared at the hearing as a witness, and at no time did Mr. Steinman ask to call Mr. Nell as his own witness.
40. I find no basis for this ground of appeal.

New Evidence

41. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.
42. There is nothing in Mr. Steinman’s voluminous submission that persuades me that he has new evidence that would meet the Tribunal’s test on appeal. All of the material was, or could have been available at the time of the hearing. Furthermore, I am not persuaded that any of the material would have led the Director to a different conclusion on the issue of whether or not Mr. Steinman was an employee of an independent contractor.
43. I dismiss the appeal.

ORDER

44. Pursuant to section 115 of the *Act*, I order that the Determination, dated August 5, 2014, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal