Employment Standards TRIBUNAL

An appeal

- by -

Douglas R. Day and Danielle Alie
(jointly referred to as the "Employers")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2004A/102

DATE OF DECISION: August 11, 2004

DECISION

SUBMISSIONS

Danielle Alie	on her own behalf and on behalf of Douglas R. Day
Anna F.V. De Vries	on her own behalf
Lynne L. Egan	for the Director of Employment Standards

INTRODUCTION

This is an appeal filed by Danielle Alie and Douglas Day (jointly referred to as the "Employers") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). The Employers appeal a Determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on May 11th, 2004 pursuant to which the Employers were ordered to pay their former employee, Ms. Anna F.V. De Vries ("De Vries"), $455.11 on account of unpaid wages and section 88 interest (the "Determination").

By way of the Determination, the Director's delegate also levied an additional $2,000 in administrative penalties based on four separate contraventions of, respectively, sections 14, 15, 18 and 58 of the *Act.*

In a letter dated August 3rd, 2004 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

In addition to the section 112(5) record, I have before me the Employers' submissions dated June 17th (appended to the notice of appeal), July 13th and July 30th, 2004; Ms. De Vries' submission dated July 8th, 2004 and the delegate's submission dated July 16th, 2004.

THE DETERMINATION

Following an investigation into Ms. De Vries' section 74 complaint, the delegate determined that Ms. De Vries was employed by the Employers as a "domestic" [for a definition of this latter term see section 1 of the *Act*] at a *per diem* wage rate of $100. The delegate further determined that Ms. De Vries worked for 11 days (during the period from July 20th to August 7th, 2003), received $704 in wages and thus was entitled to a further $396 plus concomitant vacation pay and interest.

The delegate rejected the Employers' assertion that Ms. De Vries was an "independent contractor" and that, accordingly, her complaint was outside the ambit of the *Act.* The delegate noted that the Employers failed to provide Ms. De Vries with a written employment contract contrary to section 14 of the *Act* and also failed to submit to the Director the requisite information mandated by section 15 of the *Act* and section 13 of the *Employment Standards Regulation.* In light of these omissions, four separate $500 administrative penalties were levied [see section 98 of the *Act* and section 29(1)(a) of the *Regulation*]

based on the Employers' contraventions of sections 14, 15, 18 (payment of wages after termination of employment) and 58(1)(a) (vacation pay) of the *Act.*

REASONS FOR APPEAL

The Employers appeal the Determination, and request that it be cancelled, on the grounds that:

- the Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b) of the *Act*]; and

- Evidence has become available that was not available at the time the Determination was being made [section 112(1)(c) of the *Act*].

In a letter dated June 17th, 2004 (appended to the notice of appeal), the appellant, Ms. Alie, further particularized the Employers' position as follows:

- "We did not have an opportunity to reply to [the delegate's] offer to supply more information as we did not receive her fax of March 18th, 2004".

Ms. Alie further stated that her fax machine's ink cartridge had emptied and that her fax machine was printing "blank pages" for about one week before she realized the situation; she says that she failed to attend to this latter problem due to her having been injured in a motor vehicle accident on March 15th, 2004.

The Employers' second ground of appeal is set out below:

- "Second, I still maintain that Ms. De Vries worked for me as **an independent contractor** and did not fulfill the requirement [sic] as outlined in the 'work required' (see attached)".

Ms. Alie then set out several assertions that she says support her position that Ms. De Vries was an independent contractor rather than an employee.

Ms. Alie did not provide, in her originating appeal documents, any further particulars regarding the Employers' ground of appeal based on "new evidence" nor did she speak to that issue in her July 30th, 2004 submission, however, this issue is raised in her July 13th submission.

I shall now review each ground of appeal in turn.

FINDINGS AND ANALYSIS

Natural Justice

The delegate noted, at page 3 of the "Reasons for the Determination", that an initial letter dated February 27th, 2004 was forwarded to the Employers advising them about Ms. De Vries' complaint and asking them to provide certain employment information relating to Ms. De Vries. Ms. Alie replied by way of a 1-page letter dated March 12th, 2004 in which she stated that Ms. De Vries was an "independent contractor" and thus "I do not have employment records for her as she was never an employee of mine".

The delegate's Reasons, also at page 3, continue:

> Correspondence sent to Day and Alie by fax on March 18, 2004 included the Employment Standards Branch Factsheet entitled "Employee or Independent Contractor?" along with a summary of the investigation and preliminary findings. This correspondence invited further information from Day and Alie which would be considered prior to final findings being made. It was noted that if Day and Alie did not provide further information by March 26, 2004, a determination would be issued for unpaid wages and administrative penalties. *There was no response from Day and Alie to this correspondence.* (my *italics*)

The *italicized* portion in the Determination (see above) is the basis for the Employers' present assertion that the delegate failed to observe the principles of natural justice in this case. However, even if I accepted the Employers' assertion that they did not receive the delegate's March 18th communication due to their fax printer cartridge having "run out of ink", I do not consider that circumstance to amount to a breach of the rules of natural justice.

The right to participate in an investigation regarding an unpaid wage complaint is guaranteed and codified in section 77 of the *Act:* "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." The delegate's initial February 27th letter clearly invited the Employers to participate in the investigation and to provide full particulars regarding their position together with any corroborating documents. The Employers then availed themselves of the opportunity given to them by way of Ms. Alie's letter dated March 12th in which she set out the Employers' position.

The Employers' position has been more or less constant and unwavering since the outset of this entire matter, namely: Ms. De Vries was not an employee but, rather, an independent contractor. This position was communicated to the delegate by way of Ms. Alie's March 12th letter and I do not see that any prejudice ensued as a result of Ms. Alie not having repeated her position in response to the delegate's March 18th letter. Further, to the extent that there was any prejudice, I would consider it to have been cured by these appeal proceedings since the Employers have been given a full and fair opportunity to make submissions to this Tribunal with respect to the matter of Ms. De Vries' status.

Was Ms. De Vries an Employee or an Independent Contractor?

The matter of Ms. De Vries' status is a question of mixed fact and law and thus, if the delegate erred in finding an employment relationship, the Employers ought to have specifically raised this issue as an alleged "error of law" [see section 112(1)(a)]. However, in my view, since the Employers' appeal documents clearly raise this issue, I propose to deal with it directly as an alleged error of law (see *Triple S Transmissions Inc.*, B.C.E.S.T. Decision No. D141/03).

In my view, the Employers' position that Ms. De Vries was an independent contractor is wholly untenable. Indeed, the *Employers' own documents* corroborate the delegate's determination that Ms. De Vries was both an "employee" and a "domestic". For example, in her September 5th, 2003 memorandum (supplied to the delegate by way of Ms. Alie's March 12th letter), Ms. Alie states, among other things:

- "Ms. De Vries, *you accepted a summer employment* with us through *"Hire a student"* program out of the Powell River HRDC office.";

- "You were *interviewed and selected* among 4 candidates by the HRDC *summer employment* office staff...";

- "Ms. De Vries, you *started to work* for us on July 20th, 2003 and **were expected to *perform the job* as described by HRDC and expected *to work* for the remainder of the summer**.";

- "We were prepared to offer a generous bonus plus free room and board for a student who would *be willing to work* more than the basic 5 days a week and would be willing to stay on the property *throughout the period of employment*...";

- "On August 5, after 4 days off, you announced that *you would only work for another 3 days*...";

- "**From July 20th to August 9, a 21-day period, *you worked 11 days***...";

- "You did not perform the tasks as described in the *HRDC job description* and *everything you did required 100% supervision*";

- "During these 11 days, *you worked in* [sic] *average 8 hours per day* and *performed more the role of a nanny than the job* as described by HRDC."

(**boldface** and **underlining** in original text; my *italics*)

I also note that the HRDC job order document (contained in the record) refers to Ms. Alie as the "employer" and that she was seeking someone for a "full-time position".

Further, it is clear that during the short duration of Ms. De Vries' employment she was under the direct supervision and control of the Employers, used their tools and equipment and had absolutely no ability to profit (other than by way of the payment of her wages), nor did she face any risk of loss, as a result of her work for the Employers.

Ms. Alie's fundamental complaint appears to be that Ms. De Vries was an unsatisfactory employee--if that were so, Ms. Alie, as can all employers, might have taken the appropriate action to ensure that Ms. De Vries' poor performance, insubordination or other misconduct did not continue. However, the fact that someone is a poor employee (and I am not suggesting that Ms. De Vries falls into this category) does not create a situation whereby that person's status is thus transformed to that of an independent contractor.

New Evidence

The so-called "new evidence" is attached to Ms. Alie's July 13th, 2004 submission. This latter evidence is described as "additional information on our property and how we got to use the Hire a student office". None of this information is "new" and all of it was "available" at the time the Determination was being made.

In light of the foregoing, this appeal must be dismissed.

ORDER

Pursuant to section 115(1)(a) of the *Act,* I order that the Determination be confirmed as issued in the amount of **$2,455.11** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal