

An appeal

- by -

Alma Calderoni
("Calderoni")

- 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: David B. Stevenson

FILE No.: 2004A/106

DATE OF DECISION: August 26, 2004

DECISION

SUBMISSIONS

Alma Calderoni	on her own behalf
Robert W. Maroney	on behalf of Key Fund Raising Ltd.
J. Ross Gould	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Alma Calderoni (“Calderoni”) of a Determination that was issued on February 13, 2004 by a delegate of the Director of Employment Standards (the “Director”).

Calderoni had filed a complaint with the Director claiming she was owed wages by Key Fund Raising Ltd. (“Key”). Following a hearing on December 29, 2003, the Director issued the Determination, which found Calderoni was not an employee of Key, no wages under the *Act* were owing and that no further action would be taken on her claim.

Calderoni has appealed the Determination on two grounds. She says the Director erred in law in concluding she was not an employee of Key and was not owed wages under the *Act* and says the Director failed to observe principles of natural justice in making the Determination.

The Tribunal has carefully reviewed the appeal and finds an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether Calderoni has shown the Director either erred in law in concluding she was not an employee and not owed wages under the *Act* or failed to observe principles of natural justice in making the Determination.

THE FACTS

The Determination contains the following background information, also indicating this information was not in dispute:

- Key raises money by soliciting donations on behalf of clients.
- Key needed to conduct fund raising in the Kamloops area so they placed an ad in the local newspaper, seeking interested parties to coordinate the fund raising drives.
- Calderoni responded to the ad by mailing a resume to Key, in Ontario.

- Marooney [sic] contacted Calderoni by telephone and they discussed the fund-raising campaigns Key wished to conduct.
- Marooney [sic] and Calderoni agreed she would coordinate the fund-raising drives.

The Director conducted a hearing on December 29, 2003 by teleconference. The reasons for Determination indicate that at the commencement of the hearing Calderoni stated an intention to call her husband as a witness. Calderoni's husband was at another location and his participation would have required the Director to arrange another phone connection. Calderoni had not previously indicated to the Director her intention to call her husband as a witness or of the need for another telephone connection to the hearing. The Director did not allow Calderoni to call her husband, "... because of the lateness of the request to have him participate and because most of his evidence about a series of telephone messages from Marooney [sic] is not really in question. What Marooney [sic] said in his telephone messages can be read from the transcripts provided as evidence by the Complainant."

The Determination sets out the evidence and position of Calderoni and Key and analyzed the evidence and respective positions against the definitions of "employee", "employer" and "work", found in Section 1 of the *Act*, and considered elements of several common law tests frequently used to decide the legal character of the relationship between an individual and a potential employer. The Director found that Calderoni had not shown she had an employment relationship with Key. In the Determination, the Director identified the following matters as being relevant:

- the evidence indicated that Calderoni had total say in how her role, as a fund-raising crew manager, was to be carried out;
- Calderoni was engaged to perform a service to Key in accordance with a "loose set of guidelines" provided by Key and Key's clients;
- Calderoni was part of a "team" whose purpose was to develop a portion of the "final service – that being an over-all successful campaign";
- despite some language in communications to Calderoni by Mr. Maroney, who appears to be the principal of Key, that he was "the boss – the one in charge", he did not appear to be setting any deadlines or dictating any method of running the fund-raising campaigns, but appeared only to be acting as a "project manager";
- Calderoni hired the 12 employees over whom she, and not Key, had direction and control; she decided what work would be done, and where, when and how the work would be done; she was responsible for paying those employees' wages and ensuring proper deductions at source for those employees; and she was responsible to train and instruct the employees;
- Key was not involved at any level with those employees, except to direct which campaigns Calderoni would conduct and that she would do so legally and within certain time lines;
- there was no evidence presented indicating Calderoni was not free to work for other organizations while conducting Key's campaigns;
- even though Calderoni had no financial investment in tools, equipment, supplies and so on, she did accept a significant financial risk for the wages of her employees and for other (unspecified) costs of doing business;
- apart from providing official fund raising literature and receipt books, Key provided no other "tools" to Calderoni, such as a vehicle, office space, furniture and supplies;

- Key provided no telephone, facsimile machine, computer or anything else an employee might need for support;
- there was no evidence that Key was required to set up Calderoni with any tools or equipment in order for her to meet her mandate.
- Calderoni agreed to perform a single service for Key, leading to a result that was not ancillary to Key's business, but she was not bound to place her own services at the disposal of Key;
- the only obligation Calderoni had to Key was to ensure fund-raising campaigns were completed within agreed upon targets;
- Calderoni was more akin to being in business for herself than employed by Key because she personally took some financial risks and incurred significant liabilities;
- by virtue of the amount of money collected by her canvassers, Calderoni could affect her profit and loss;
- during her association with Key, Calderoni appeared to be free to look for or engage in other contractual or remunerative work;
- there was no evidence to suggest the parties intended the relationship to be other than a short term, temporary one.

The Director also considered the impact of the considerable number of telephone messages left by Mr. Maroney, concluding that the messages related to general matters of concern, such as the progress being made by her, money and receipt books. There was no specific discussion about how Calderoni was doing in coordinating the campaigns.

The Determination noted Mr. Maroney gave evidence that he had faxed a contract form to Calderoni for her signature. Calderoni denied receiving it. The Director found no real value in this evidence, correctly pointing out that even if there was a signed contract, it would not decide her status under the *Act* as such agreements cannot supersede the requirements of the *Act*.

ARGUMENT AND ANALYSIS

The burden is on Calderoni, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention. An appeal to the Tribunal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the investigation. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
 - (b) *the director failed to observe the principles of natural justice in making the determination;*
 - (c) *evidence has become available that was not available at the time the determination was made.*

The amount of material and commentary that has been filed by Calderoni on this appeal is considerable. It consists of the following:

- a three page submission, received by the Tribunal on April 5 which speaks to the failure of the Director to issue the Determination and deliver it to the correct address in a timely manner, aspects of the conduct and decision making of the Director at the December 29, 2003 hearing and errors in the Determination, both factual and legal;
- an annotated version of the standard Tribunal appeal form;
- two pages of e-mail communications that appear to be unrelated to any matter raised in the appeal;
- an annotated version of the Determination and reasons;
- several pages of information that was provided to the Director during the complaint process;
- annotated versions of several pieces of evidence; and
- a copy of a covering letter to Key, attaching information which Calderoni indicated in the cover letter related to the Director's hearing.

On April 5, 2004, the Tribunal communicated with Calderoni and asked her to re-organize and re-submit her appeal, as it was difficult to understand in the format in which it was originally filed. The communication from the Tribunal stated, in part:

Your handwritten notes, which are spread throughout the appeal form, the Determination and the attachments, are hard to read, and in some places, have been partially cut off.

In order to understand your appeal, the Tribunal will require a clean copy of your reasons and a clean copy of the Determination. It would also help to organize your submission to explain clearly your argument and what you wish the Tribunal to do about the Determination.

On April 19, 2004, Calderoni re-submitted the appeal and supporting documents. The re-submission essentially reproduced the original appeal submission, added some commentary to it, enlarged some of the attachments and included an additional two page submission, in part explaining an apparent failure to file the appeal within the time allowed under the *Act*. Nothing was done to attempt to address the Tribunal's concern with the format and organization of the appeal except to enlarge certain pages of it. In a notation placed on the original three page appeal submission, Calderoni suggests the Tribunal could have enlarged the pages, as she did, or used a magnifying glass if there was difficulty reading the annotations.

On May 13, 2004 the Director filed a submission on the appeal and provided the record. The submission of the Director addressed a concern about the timeliness of the appeal. Calderoni provided further submissions to the Tribunal dated May 20, 2004, May 26, 2004. Those submissions addressed both the timeliness and the substance of the appeal. The Tribunal decided, in *Alma Calderoni*, BC EST #D107/04, that the appeal was timely.

At the request of the Tribunal, further submissions on the appeal were sought. Calderoni filed further submissions July 5, 2004 and August 17, 2004. The last submission is a response to a submission filed by Key on August 4, 2004 and adds nothing to the appeal or the information that had been previously provided to the Tribunal. It has not been distributed.

I will summarize the submissions on this appeal.

The April 5, 2004 and April 19, 2004 submissions criticize the Director for failing to issue and deliver the Determination in a timely way, criticizes the hearing process and the conduct of the delegate holding the hearing and raises what Calderoni perceives to be errors and inconsistencies in the Determination. The May 20, 2004 submission comprises a reply to the Director's May 13, 2004, including commentary on many of the documents found in the record, and approximately 92 pages of attachments, all of which had previously been provided to the Tribunal by either Calderoni or the Director, with some new annotations on them made by Calderoni. The substance of the reply includes the following matters:

- a disagreement with the assertion of the Director that no notice had been provided by Calderoni of an intention to call her husband as a witness at the hearing;
- a submission that the evidence, and particularly the transcripts of the taped telephone messages, show that Key was her employer;
- a statement that she was going to have her witness "verify other conversations and other experiences with Key Fund";
- disagreement with specific aspects of the Determination, primarily relating to comments about the process – that Calderoni never asked for an adjournment, that the hearing was done by noon on December 29, 2003 and that Calderoni was provided enough time to present her case; and
- A disagreement with the assertion of the Director about when the Determination was received by Calderoni.

I should note at this point, in respect of the third point above, that the record does include a written statement from Mr. Calderoni, which was accepted and considered by the Director in making the Determination.

The May 26, 2004 submission comprises what Calderoni refers to as "some new info" about one of the charities for which Calderoni was to have canvassed and further submissions on a file document. The July 5, 2004 communication provides the Tribunal with approximately 30 pages of material. Included in the covering letter is the following:

Just want to be sure you have the attached pages. Had intended to expand at the Dec 29 hearing & was constantly cut off so this is at least part of the intensions [sic].

In its reply to the appeal, Key says Calderoni was never hired as an employee, but as an independent, self employed, sub-contractor crew manager for the Kamloops area. Key acknowledges that no "Crew Manager" contract was ever signed by Calderoni, although one was sent to her for her signature (Calderoni has consistently denied receiving any such contract for her signature).

As indicated at the outset, Calderoni has raised two grounds of appeal – error of law and failure by the Director to observe principles of natural justice in making the Determination. In respect of the latter ground, I am not convinced there was any failure by the Director to observe principles of natural justice. Calderoni was given a reasonable opportunity to assert her position and to respond to the position asserted by Key. Specifically, I do not accept that the refusal by the Director to allow Calderoni's husband to be called as a witness was, in the circumstances, a failure by the Director to observe principles of natural justice.

Nothing in the appeal, or in the materials generally, indicates the refusal to allow Mr. Calderoni to be called as a witness generally affected her ability to make her case. Having reviewed the record, the Determination, the appeal and the attachments to the appeal, I agree with the view of the Director

expressed in the Determination that, on its face, Mr. Calderoni's evidence related to matters that were "not really in question" – the content of telephone messages, in respect of which Calderoni gave evidence and had submitted a transcript, and some work which Calderoni had done. In making this assessment, I have given regard to the indication by Calderoni that Mr. Calderoni could also have verified other conversations and experiences. There is, however, nothing in the appeal stating what these other conversations and experiences were, what that evidence relating to these other conversations and experiences would have been, how that evidence would have differed from, or added to, his written statement and how that evidence related to the issue of whether Calderoni was an employee of Key for the purposes of the *Act*. There is an obligation on Calderoni to ensure all relevant information and material supporting this ground of appeal be included with her appeal. If there was evidence critical to her case that she was not allowed to call, a statement of that evidence should have been included in the appeal as well as an analysis of its importance to her case. The written statement of Mr. Calderoni which is found in the record was accepted and considered by the Director. There is no suggestion he had more than that to contribute to the factual framework of the issue before the Director.

In the May 20, 2004 appeal submission, Calderoni asks how the Director would know whether the evidence of Mr. Calderoni was important without hearing it. While that might have been a valid question for the Director to consider before the decision was made to not allow Mr. Calderoni to give his evidence, the burden on Calderoni in this appeal is to show that decision was a denial of natural justice or, more specifically, that it denied her an opportunity to present relevant and cogent evidence. That has not been done.

I have also considered that Mr. Calderoni's evidence spoke primarily to the telephone messages and have noted the comment in the Determination about Calderoni's over-reliance on the telephone messages and her being encouraged to "try to prove her point with applicable evidence".

In respect of the argument that the Director erred in law in deciding Calderoni was not an employee for the purposes of the *Act*, once again I find that she has not met the burden on her in this appeal. It is apparent from the appeal, the submissions and the annotations on the attachments that Calderoni disagrees with the conclusion reached by the Director. At its root, however, her disagreement is predominantly related to conclusions made by the Director based on findings of fact.

The central points to which Calderoni keeps returning are that Key gave her orders, as an employer would, and there was no signed contract saying she was an independent contractor. In her May 20, 2004 submission, for example, Calderoni addresses the Director's analysis and findings. The following submissions are included:

- THERE IS NO CONTRACT NOR EVER WAS. The first one I saw was in Al's hand.
- Again never did receive a contract form & did discuss wages & kilometres.
- Messages on machine were not as stated here but more threats, orders & stating Marooney [sic] was boss & I was not more than once.
- Clear to me that work is what is doled out in this case as orders.
- In this case work includes hiring then firing canvassers for Key who hired them under their contract under their alternate name as National Charities, which was most of the time taken working. Also time taken doing mail clerk work.
- Under control test. Wrong again. Key fund required use of a certain shipper, calls to them at convenient time for them BUT each evening after the 6 – 9 pm pacific canvassing.

- Gould claims I had total control of how the job was done. Totally wrong. . . . As already said, Key/National decided where when how & in spite of the state of emergency here hounded to get it all done with unreasonable demands.
- I did not risk loss, the canvassers contracted with National/Key not with me. I was the employee, office person if you like who did the coordinating.
- Marooney [sic] stated times to call what courier to use & forms to fill out for him. He stated precise when where & how right down to the wording to use.
- Also the original submission if read by Gould would show a lot more than he seems to consider such as for just one thing the Demanding by Marooney [sic]. Demanding when to call Demanding shipping ETC.

I do not mean to suggest Calderoni has not made other submissions on what she perceives to be errors in the Determination, but it is fair to characterize these other submissions, with one exception, as being unrelated to the conclusion on whether, in the circumstances, she was an employee of Key. The one exception relates to the several assertions made by Calderoni that the Director erred in finding she hired 12 employees to canvass for her. While not denying that she hired and fired these persons or that she had direction and control over them, Calderoni says they were not hired for herself, but were hired for Key/National Charities. The problem with Calderoni's submission in this regard is that the finding made by the Director is clearly one of fact for which there was some evidence and in respect of which the *Act* allows no appeal.

The above problem also applies to the first of what I have described as the two main points which arise in this aspect of the appeal. While a finding relating to one's status as an employee under the *Act* is a question of mixed fact and law, Calderoni has not argued, and I cannot conclude, that the Director erred in the legal analysis applied to the facts as found. In reality, this appeal contends the Director erred in the findings of fact against which the legal analysis was applied. Simply put, Calderoni asserts the facts are as she characterizes them, rather than as the Director found them. As the Tribunal stated in *Britco Structures Ltd.* BC EST #D260/03, that kind of circumstance does not raise an error of law, but rather a challenge to findings of fact. The Tribunal has no jurisdiction over questions of fact.

On the matter of the contract, the Director did not consider the existence or absence of a contract to be a relevant consideration. I agree on that matter.

In sum, Calderoni has not shown the Director erred in law or failed to observe principles of natural justice in making the Determination and the appeal must be dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 13, 2004 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal