

An appeal

- by -

J. Aaron Sigurgjerson

- 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

**ADJUDICATOR:** John M. Orr

**FILE No.:** 2001/778

**DATE OF HEARING:** April 12, 2002

**DATE OF DECISION:** April 29, 2002

## DECISION

### APPEARANCES:

J. Aaron Sigurgjerson

On his own behalf

Andrew Davis

Counsel on behalf of 595485 BC Ltd.

### OVERVIEW

This is an appeal by J. Aaron Sigurgjerson (“Sigurgjerson”) pursuant to section 112 of the *Employment Standards Act* (“the *Act*”) from a determination dated October 15, 2001 by the Director of Employment Standards (“the Director”).

Sigurgjerson is a computer technician and in the spring of 2001 was living and working in Scotland. He is married with a young family. He claims that the president of 595285 BC Ltd., Lisa Wilson (“Wilson”) contacted him in Scotland from Saltspring Island and induced him to leave his employment in Scotland to come to work for the company which operated an “on-line” business known as Regency Apartments and Villas (“Regency”). He claims that the position was misrepresented to him and claims that the employer was in breach of section 8 of the *Act* and seeks compensation pursuant to section 79(4) of the *Act*.

The misrepresentation that Sigurgjerson claimed was that the position he was accepting was represented to him as a position of “employment” with some expectation of some significant longevity. But subsequent to his acceptance of the position and undertaking a move to Canada he was required to work as an independent contractor and not an employee.

The Director found that the employer had not contravened section 8. The Director found that there was ample evidence that the issue of independent contractor status had been discussed before Sigurgjerson made the commitment to move to Canada and in any case that during the period that he worked for Regency Sigurgjerson was actually paid more than had been promised prior to his move.

### ISSUES

During his opening remarks at the hearing of the appeal Sigurgjerson restructured the basis for his claim of misrepresentation to allege that, when he arrived in Canada to take up his new position, the position was filled by another person and he was relegated to a lesser position. This was quite a different allegation than that made in his original claim. This aspect of his employment situation had not been the focus of the Director’s investigation.

Counsel for the respondent submitted that it was inappropriate for the appellant to allege a totally separate misrepresentation at this late stage in the process. However, counsel agreed that I should proceed to hear the appeal in total, subject to submissions on this point.

Accordingly, there were two issues to address in the appeal. Firstly, whether the employer had breached section 8 of the *Act* by misrepresenting that the position would be that of an employee and not an

independent contractor. Secondly, whether the employer had filled the position promised to Sigurgierison with a different person and relegated Sigurgierison to a lesser position.

## ANALYSIS

The onus on an appeal is on the appellant to satisfy the Tribunal that the Director's determination is wrong. I am not satisfied that the appellant has met that onus in this case.

There was ample evidence for the Director to find that Sigurgierison had contemplated, investigated and acted upon a decision to arrange his employment affairs in such a manner that he would be an independent contractor. Prior to leaving Scotland there was an exchange of correspondence that confirmed his intention to act through the auspices of his own business and he had sent the name of his business to Regency. It is completely inconsistent with the correspondence to suggest that Regency had in any manner misrepresented the nature of the relationship. It was openly and freely discussed and negotiated before Sigurgierison left his employment in Scotland.

I also agree with the Director's conclusion that Sigurgierison was paid more than he had initially bargained for. The biggest problem was that the relationship did not work out and ended far sooner than Sigurgierison had hoped. This is not an aspect of employment contemplated by section 8. Section 8 concerns misrepresentations that are alleged to have occurred before an employee is hired. I am not persuaded that there was any binding representation made about the length of employment.

I am also not persuaded that the position promised to Sigurgierison was filled by another person. There was certainly evidence that Regency had brought on board a part-time consultant to oversee the macro development of their business venture. Although there is some overlap in the job descriptions it is clear to me that the consultant was engaged in a supervisory position. The position offered to Sigurgierison still existed as generally described in the correspondence.

In light of my conclusions on both of these issues I do not intend to deal with the preliminary issue about the propriety of alleging at the hearing a different basis for the claim of misrepresentation. I took it from counsel's position that there was some conditional consent to me hearing both issues and based on my conclusions it is not then necessary to address this fundamental point. However, I wish to note that it is not my intention that this adjudication be seen as a precedent for the manner in which this type of problem be addressed in the future. It may well have been more appropriate to have declined to hear the argument raised for the first time during the appeal hearing. I did so in this case because the appellant was not represented by counsel and counsel for the respondent consented.

I am satisfied that the Director's delegate made a careful and reasoned determination. He applied the proper provisions of the *Act* and applied the jurisprudence from the Tribunal in an appropriate manner. The delegate decided that the employee had not breached section 8 of the *Act*. I agree.

The onus on an appeal is on the appellant, in this case Mr. Sigurgierison, to persuade me that the determination was wrong in its findings of fact or the application of the *Act* or jurisprudence. I am not satisfied that Mr. Sigurgierison has met that onus. I conclude that the determination should be confirmed.

**ORDER**

Pursuant to section 115 of the Act I order that the determination herein is confirmed.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**