Employment Standards TRIBUNAL

An appeal

- by -

Jane Welch operating as Windy Willows Farm
(the "Appellant")

- 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: Matthew Westphal

FILE No.: 2005A/114

DATE OF DECISION: October 19, 2005

DECISION

OVERVIEW

1. This is an appeal by Jane Welch operating as Windy Willows Farm (the "Appellant") under s. 112 of the Employment Standards Act (the "*Act* ") of Determination ER #128-949, dated May 27, 2005 (the "Determination"), issued by a delegate (the "Delegate") of the Director of Employment Standards. Following an investigation of a complaint by Abelone Edwards (the "Complainant"), the Delegate ordered the Appellant to pay the Complainant regular wages, annual vacation pay, and statutory holiday pay, and imposed two administrative penalties, of $500.00 each, for violations of sections 17 and 18 of the *Act*.

2. The Tribunal has decided that this case can be decided without an oral hearing.

ISSUES

1. Did the Delegate err in law or fail to observe the principles of natural justice in finding that the Complainant was an employee and not an independent contractor?

2. Did the Delegate err in law or fail to observe the principles of natural justice in finding that there had been no written assignment of wages?

BACKGROUND

3. The Appellant operates Windy Willows Farm, which was formerly known as Red Lion Stables, in Aldergrove. Her business consists primarily of boarding and training horses.

4. The Complainant, who had previously been acquainted with the Appellant, approached the Appellant in September 2003 about boarding one of her horses. The Appellant's normal fee for boarding a horse was $350.00 per month, but she had previously boarded horses in exchange for work. The Complainant and the Appellant entered into a contract whereby the Complainant was permitted to board her horse in the Appellant's facilities, in exchange for nine hours of work per week (three hours per day on three days). In January 2004, the Complainant and the Appellant agreed that the Appellant could board her second horse at the farm on the same terms. Thus, the Complainant's total commitment of work to the Appellant in exchange for boarding her two horses was 18 hours of work per week.

5. In March 2004 the Complainant found herself without a place to live, and she agreed with the Appellant that she could park her trailer on the farm, using electricity and water from the farm. The parties agreed that the Complainant would pay for this service—valued at $200.00 per month—by working additional hours for the Appellant. The Complainant lived in her trailer on the Appellant's land from March 2004 to October 2004.

6. The Complainant's work for the Appellant consisted of cleaning the stables and feeding and exercising horses. Although the evidence is not entirely clear on this point, it appears that the Complainant also provided horse training services for the Appellant. During the entire period during which she worked for the Appellant, the Complainant also conducted her own business grooming and training horses as a

mobile horse trainer. She had a business card that read "Abby Edwards, A.C.E. Equine Services, Mobile Horse Trainer." The Complainant also provided riding lessons and horse training services for her own clients, using the Appellant's facilities. One of the Complainant's clients brought his horse to Windy Willows Farm for partial boarding at $150.00 per month, and paid the Complainant $700.00 directly for training and care of his horse for 30 days.

7. On May 31, 2004, the Complainant suffered an injury when a horse at another farm kicked her in the head. Following this injury, the Complainant had difficulty performing her duties for the Appellant, because the horses were kept in paddocks outside at that time of the year and the Complainant was sensitive to direct sunlight. The Complainant offered free riding lessons to students in exchange for the students' performing her duties on the farm.

8. The relationship between the Complainant and the Appellant deteriorated, and on September 3, 2004 the Complainant gave the Appellant one month's notice that she would be leaving. The Complainant's last day of work was October 20, 2004.

9. The Complainant filed a complaint with the Employment Standards Branch alleging that the Appellant had failed to pay her regular wages, statutory holiday pay, annual vacation pay, and compensation for length of service. The Complainant maintained that she had worked long hours for the Appellant without pay, and had been entirely under the Appellant's power while living and working on her farm. In her complaint the Complainant stated that her work as barn cleaner and horse handler was valued at $10.00 per hour, and her work as a horse trainer was valued at $30.00 per hour. She stated that the Appellant paid her cash for the extra work that she performed on top of what she was required to do to cover her horse boarding and RV pad rent costs. In her complaint to the Employment Standards Branch, the Complainant twice referred to receiving $60.00 per week from the Appellant.

10. The Delegate conducted an investigation of the Complainant's complaint. The Delegate found that the Complainant had been an employee of the Appellant, and not an independent contractor. In his reasons for the Determination, the Delegate recorded that the Appellant had stated that there had only been an oral contract, but that the Complainant "remembers signing a contract of some kind, but does not have a copy of it." The Delegate found that "since the employer alleges there was no written contract, there could not have been a written assignment of wages" within the meaning of s. 22(4) of the *Act*. He found, therefore, that the Appellant had not been entitled to deduct charges for horse boarding and RV pad rent from the Complainant's wages.

11. The Delegate, however, did not accept the Complainant's evidence concerning her hours of work, and he found that she had worked no more than18 hours per week during the last six months of her employment. Finding it impossible to determine the Complainant's rate of pay, he determined it to be equal to the minimum wage of $8.00 per hour, and found that the Appellant had failed to pay the Complainant regular wages, vacation pay, and statutory holiday pay. The Delegate found that the Appellant had breached ss. 17 and 18 of the Act, and imposed two administrative penalties of $500.00 each for these contraventions.

12. The Appellant has appealed to the Tribunal from the Determination. The Complainant has not.

SUBMISSIONS

13. The Appellant challenges both the Delegate's finding that the Complainant was her employee, as opposed to an independent contractor, and his finding that there was no written assignment of wages, such that she

was not permitted to deduct from the Complainant's wages the cost of boarding her two horses and parking her trailer on the Appellant's land.

14. The Appellant maintains that the Complainant has always been self-employed, and was not her employee. She notes that the Complainant never provided her with her Social Insurance Number, and that there was no discussion of her work status. The only discussion was what work the Complainant was to perform in lieu of cash payment for the boarding of her two horses and the right to live in her trailer on the Appellant's property.

15. The Appellant argues that since the Complainant never paid her anything for horse boarding or RV pad rent, she must have agreed that the cost of those services could be deducted from her pay. She states that at a meeting with the Delegate the Complainant initially said that she had signed a contract. The Appellant says that she initially told the Delegate that she could not recall whether she and the Complainant had a written contract, but that it was her practice to have a written contract. She points to the example of another person who previously performed work for the Appellant in return for horse board valued at $350.00 per month, and who had had a written contract. The Appellant says that she followed up with a letter to the Delegate dated May 14, 2005, in which she confirmed that there had been a written contract with the Complainant. She claims that the contract was kept in the tack room in the barn, but was not there after the Complainant ceased working for her; she speculates that the Complainant may have taken it. The Appellant claims that since the Delegate found that she owed wages to the Complainant, the Delegate erred in not setting off against those wages the amount the Appellant says the Complainant owes her for horse boarding ($7,700.00) and RV pad rent ($1,600.00). Since the issuance of the Determination, the Appellant has initiated an action against the Complainant in Small Claims Court to collect these amounts.

16. Neither the Delegate nor the Complainant made any submissions concerning the Appellant's appeal.

ANALYSIS

1. Did the Delegate err in finding that the Complainant was an employee and not an independent contractor?

(a) Scope of the Tribunal's jurisdiction to review the Delegate's finding that the Complainant was an employee

17. Before embarking upon an analysis of the Delegate's finding that the Complainant was an employee, I must first consider the extent of my jurisdiction to interfere with such findings on an appeal under the *Act.*

18. Section 112 of the Act sets out the Tribunal's jurisdiction to consider appeals of the Director's determinations:

> **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 being made.

19. Whether a person is an employee or an independent contractor depends on the application of a legal standard to a set of facts, and is thus a question of mixed fact and law: *Housen v. Nikolaisen* , [2002] 2 S.C.R. 235, 2002 S.C.C. 33, at para. 37. However, the question of whether the correct legal standard has been applied is a question of law.

20. The Tribunal has adopted the following factors, set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (C.A.), defining the types of errors of law which are reviewable by the Tribunal under s. 112:

(1) A misinterpretation or misapplication of a section of the *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) Exercising discretion in a fashion that is wrong in principle.

21. See *J.C. Creations Ltd. (c.o.b.) Heavenly Bodies Sport),* BC EST #RD317/03.

22. This formulation of what constitutes an error of law was developed in the context of the *Assessment Act*, R.S.B.C. 1996, c. 20, which permits appeals to the Supreme Court of British Columbia from decisions of the Property Assessment Board in the form of a stated case on questions of law.

23. In *Britco Structures Ltd.*, BC EST #D260/03 the Tribunal considered the application of the *Gemex* test to issues of mixed fact and law, in light of subsequent decisions, both of the Supreme Court of Canada and of British Columbia courts in statutory appeals under the *Assessment Act*. The Tribunal stated the issue in the following manner:

> It is clear from s. 112 of the *Act* that a question of fact, alone, is not within this Tribunal's jurisdiction. The following question appears to me to remain: to what extent, if at all, can a question of mixed law and fact fall within the Tribunals jurisdiction as being an error of law; and in what circumstances, if a at all, can a question of fact be characterized as a question of law?

24. On this issue, the Tribunal concluded that "the definition of error of law in *Gemex* ought not to be applied so broadly as to include errors which are not in fact errors of law, such as errors of fact, alone, or errors of mixed law and fact which do not contain extricable errors of law." However, the Tribunal held that findings of fact were still reviewable as errors of law according to prongs (3) and (4) of the *Gemex* test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal noted that the test for establishing an error of law on this basis is stringent, citing Mr. Justice Hood's reformulation of the third and fourth *Gemex* factors in *Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11- Richmond/Delta)*, [2000] B.C.J. No. 331 (S.C.) at para. 18, namely:

> ...that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could"...

25. Further, in *Britco Structures* the Tribunal also considered the possibility that a failure by the Director to consider relevant evidence could constitute a breach of natural justice, which would be reviewable by the Tribunal under s. 112(1)(b). See also *Flora Faqiri*, BC EST #D107/05. I will return to this point later in this decision.

26. Based on the foregoing authorities, I will approach the Appellant's appeal of the Delegate's finding that she was an employee by considering the following issues:

- Did the Delegate err in law by misinterpreting the *Act* or applying an incorrect legal test?
- Did the Delegate err in law by concluding that the Complainant was an employee based on no evidence, or on evidence that provided no rational basis for his finding?
- Did the Delegate fail to observe the principles of natural justice by failing to consider relevant evidence before concluding that the Complainant was an employee?

(b) The Delegate's reasons

27. The Delegate, after citing the definitions of "employee" and "employer" in the *Act*, provided the following reasons for concluding that the Complainant was an employee:

> To determine whether Edwards was an employee or an independent contractor, the courts have traditionally considered four factors or tests. The four tests that must be considered are control, integration, economic reality and specific result.
>
> The first factor is the **control test**, or simply put, was there a traditional master/servant relationship between Edwards and Welch? The evidence indicates that Welch exercised significant control over how, where and when Edwards conducted her duties. Welch set Edwards' rate of pay. Edwards was told which stalls needed to be cleaned out, which water buckets needed to be filled and which horses needed to be cared for. One of Edwards' witnesses LesCarbeau commented about the fact that Welch would ask Edwards where she was going when LesCarbeau would drive Edwards to the store for groceries.
>
> The **integration test** examines the extent or degree to which an individual interacts with the organization or operation. In applying this test, I considered whether Edwards' work was an integral part of the business operation or whether her role was ancillary to the business. Edwards cleaned out the stalls, filled water buckets and looked after horses for Welch. This is the essence of Welch's business. Edwards really provided nothing more than physical labour.
>
> The **economic reality test** requires that analysis of the entire relationship between the parties in order to determine whether a particular individual is carrying on business for herself or for someone else. Edwards clearly assumed no risk of loss or chance of profit at all when performing duties for Welch. While performing duties for Welch, Edwards took no financial risk, had no liability regarding the business of Welch's and had an on-going, indefinite relationship with Welch that was continuous from September 26, 2003 to October 20, 2004.
>
> The **specific result test** looks at the intent of the parties and whether Edwards was required to provide a single service leading to a specific result or whether she was simply required to provide general efforts on behalf of Welch through the physical labour she provided. Edwards simply agreed to provide physical labour for Welch.
>
> Based upon the evidence provided and on the balance of probabilities, as well as the above analysis, I find that Edwards was an employee, not an independent contractor. Edwards is entitled to the full protection of the Act.
>
> [emphasis in original]

(c) Did the Delegate apply the correct test for determining whether someone is an employee?

28. Section 1(1) of the Act contains the following definitions:

> "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, …
>
> "employer" includes a person:
>
> (a) who has or had control or direction of an employee, or
> (b) who is or was responsible, directly or indirectly, for the employment of an employee.
> …
>
> "wages" includes
>
> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
> (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
> (d) money required to be paid in accordance with
> (i) a determination, other than costs required to be paid under section 79 (1) (f), or
> (ii) a settlement agreement or an order of the tribunal, and
> (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,
>
> but does not include
>
> (f) gratuities,
> (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
> (h) allowances or expenses, and
> (i) penalties;
>
> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

29. The "control, integration, economic reality and specific result" tests the Delegate applied are drawn from court decisions considering this issue at common law, in various legal contexts. As the Tribunal noted in *C.A. Boom Engineering (1985) Ltd.*, BC EST #D129/04,

> 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)

30. Accordingly, while the common law tests remain useful in focusing attention on relevant factors, they must be applied bearing in mind the broad statutory definitions, which must in turn be interpreted in light of the policy objectives of the *Act.* The Supreme Court of Canada made the following statement in *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507, concerning Ontario employment standards legislation, that applies equally to the *Act*:

> ...an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible, is favoured over one that does not.

31. Further, in *Re Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27, at para. 25, the Court held that "the objects of the termination and severance pay provisions are also broadly premised upon the need to protect employees," and interpreted Ontario employment standards legislation broadly to requiring payment of severance and termination pay to employees where termination of employment was a result of bankruptcy.

32. Of course, as the Tribunal noted in *C.A. Boom Engineering, supra*, the statutory definitions are rather circular. Further, although the definitions of "employee" and "employer" in the *Act* are expansive, they are not all-encompassing. The *Act* does not abolish the concept of independent contractors. Thus, there is still a place for the use of common law tests of employee status, provided the *Act*'s remedial purpose is borne in mind.

33. Having reviewed the Delegate's reasons, I am satisfied that the test he applied to the facts directed his analysis to factors relevant to the distinction between an employee and an independent contractor, so the Delegate did not err in law in his interpretation of the statutory definitions or in the legal test he applied to the facts in this case.

(d) Did the Delegate act on no evidence, or on evidence that could not rationally support his finding that the Complainant was an employee?

34. As the excerpt from his reasons set out above indicates, the Delegate relied on the following evidence in support of his finding that the Complainant was an employee, rather than an independent contractor:

- The Appellant set the Complainant's rate of pay;
- The Complainant was told which stalls needed to be cleaned out, which water buckets needed to be filled, and which horses needed to be cared for;

- The Appellant would ask the Complainant where she was going when a friend drove her to the store for groceries;
- The Complainant's duties (cleaning stalls, filling water buckets, and looking after horses) were the essence of the Appellant's business; and
- The Appellant assumed no risk of loss or chance of profit when performing her duties, because she assumed no financial risk and no liability for the Appellant's business.

35. The analysis of whether a person was an employee or an independent contractor is typically very fact-specific, and it is not unusual that some facts will support a finding that the person was an employee, and others will point toward a finding that he or she was an independent contractor. The often difficult task of the decision maker is to consider all of the facts in this framework, and decide on what side of the line the relationship fell. The Delegate's reasons demonstrate that in this case there were facts that can support a finding that the Complainant was an employee: for example, the Appellant's control over the tasks the Complainant was to perform, at least one instance of her questioning of the Complainants comings and goings from the farm, the integration of the Complainant's work into the Appellant's business, and the fact that the Complainant assumed no risk of loss in performing work for the Appellant.

36. Although, as I will discuss in the next section of this decision, I find that the Delegate failed to consider facts that could support a finding that the Complainant was an independent contractor, my focus on this point is on whether there was evidence to support the finding the Delegate did make. Having reviewed the record, I am satisfied that there was evidence before the Delegate to support his finding that the Complainant was the Appellant's employee. Further, I cannot say that this finding was perverse, in the sense that no reasonable person, acting judicially and properly instructed as to the relevant law, could have concluded that the Complainant was an employee. Accordingly, the Delegate made no error of law within the meaning of the *Gemex* test.

(e) Did the Delegate breach the principles of natural justice by failing to consider relevant evidence?

37. As I have noted above, the Tribunal has held that there is authority for the proposition that a failure to consider relevant evidence can constitute a breach of the principles of natural justice that the Tribunal would have jurisdiction to reverse: *Britco*, *supra,* and *Faqiri, supra*. I am not, however, aware of a case in which the Tribunal has allowed an appeal on this basis. For that reason, it is useful to consider some of the principles that apply to review of administrative decisions on this basis.

38. Courts on judicial review have intervened in the fact-finding process if they conclude that the decision maker did not consider all of the evidence. While it has been aptly noted that one should not automatically apply principles developed in the context of judicial review or statutory appeals to courts to the different context of appeals to an appellate administrative tribunal, such as the Employment Standards Tribunal (see Frank A.V. Falzon, "Appeals to Administrative Tribunals" (2005), 18 C.J.A.L.P. 1), in my view judicial review decisions can provide useful guidance where issues of natural justice are concerned. Courts on applications for judicial review, and the Tribunal on appeals under s. 112 of the *Act*, equally have jurisdiction to set aside an impugned decision on the basis that it was arrived at in breach of the principles of natural justice or procedural fairness.

39. A failure to consider relevant evidence is generally treated as a breach of natural justice. As the New Brunswick Court of Appeal held in *Francis v. I.B.E.W., Local 502* (1979), 101 D.L.R. (3d) 678 at 681-82:

"The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the Court to set aside his award. I can see no difference where an arbitrator ignores uncontradicted evidence which he has accepted as truthful and relevant…" See also, for example, *Jagoo v. College of Physicians and Surgeons of Ontario* (2000), 131 O.A.C. 1215 (Div. Ct.), aff'd (2001), 142 O.A.C. (C.A.); *Kabir v. Canada (Minister of Citizenship and Immigration)*, [2002] 2 F.C. 564 (T.D.); and *Johnston v. Canada (Minister of Veterans Affairs)* (1990), 108 N.R. 306 (Fed. C.A.).

40. However, there are good reasons for the Tribunal to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. First, as pointed out by D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at paragraph 12:3700,

> …any attempt to determine whether an administrative decision-maker has considered "all of the evidence" as a matter of procedural fairness, can come very close to the reassessment of the actual findings of fact, which would be inconsistent with the usual deferential approach to review of findings of fact.

41. Second, the Tribunal should not lightly find that a delegate has failed to consider relevant evidence. Although the Director and his delegates have a duty, both under the *Act* and at common law, to provide reasons for their determinations, "[i]t is trite law that an administrative tribunal does not have to recite all of the evidence before it in its reasons for decision": *International Longshore & Warehouse Union (Marine Section), Local 400 v. Oster*, [2002] 212 F.T.R. 111, 2001 FCT 1115, at para. 46; see also *Manuel D. Gutierrez*, BC EST #D108/05, at para. 56. Thus, that a delegate does not mention particular relevant evidence in his or her reasons does not, in and of itself, demonstrate a failure to consider that evidence in making the determination. That said, the more relevant and probative the evidence is, the greater the expectation that this evidence will be considered expressly in the delegate's reasons.

42. Third, even if an appellant establishes that a delegate failed to consider relevant evidence, it does not automatically follow that the delegate failed to observe the principles of natural justice in making the determination. In *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471 at 491-92, Lamer C.J. held that the rejection of relevant evidence is not automatically a breach of natural justice; rather, whether it constitutes a breach of natural justice depends on the impact of the rejection of the evidence on the fairness of the proceeding:

> For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. A grievance arbitrator is in a privileged position to assess the relevance of evidence presented to him and I do not think it is desirable for the courts, in the guise of protecting the right of parties to be heard, to substitute their own assessment of the evidence for that of the grievance arbitrator. It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.

43. Relevant factors include the importance to the case of the issue upon which the evidence was sought to be introduced, and the other evidence that was available on that issue. Although *Université du Québec à Trois-Rivières* involved a refusal to permit a party to adduce relevant evidence, this reasoning applies with equal force to the question of whether a failure to consider relevant evidence denied a party a fair hearing. Thus, whether a failure to consider relevant evidence amounts to a breach of the principles of natural justice will depend on the particular circumstances of each case.

44. A determination that a delegate has failed to consider relevant evidence involves an assessment of both the reasons given by the delegate for making a determination, and an analysis of the issue to which the evidence is relevant.

45. As I noted in my discussion in the previous section, there was evidence that the Delegate relied upon as indicating that the Appellant exercised significant control over what tasks the Complainant was to perform and when, and that there was no scope for profit or loss in her performance of her duties. The Delegate, however, makes no mention in his reasons of uncontested evidence relating to two points:

- The Complainant had the ability to sub-delegate her work for the Appellant to others, without seeking the Appellant's consent, and in fact did so by providing lessons to students in exchange for their performing her duties on the farm. In her Request for Pay Form, dated October 26, 2004, the Complainant stated "I had many assistants who performed farm labour duties @ Red Lion Stables in exchange for riding lessons taught by me." In a written statement dated October 20, 2004, the Complainant stated that after her head injury, "I offered free lessons to people who could work in direct sunlight to perform some of my duties."

- Part of what the Complainant received under her arrangement with the Appellant was the ability to provide riding lessons and horse training to her own clients, using the Appellant's facilities, and the Complainant performed extra work for the Appellant for cash.

46. I will address these points in turn.

47. The existence or not of a right to sub-delegate work to another is highly relevant to the classification of a person as an employee or independent contractor. This issue was considered in *Joey's Delivery Service v. New Brunswick (Workplace Health, Safety and Compensation Commission)* (2000), 201 D.L.R. (4th) 450, 2001 NBCA 17, which was an appeal from the finding of the Appeals Tribunal of the New Brunswick Workplace Health, Safety and Compensation Commission that part-time drivers working for a delivery service were employees. The drivers did not work exclusively for the service, had the right to accept or turn down a shift, used their own vehicles, and were able to use substitute drivers without authorization. Robertson J.A., for the majority, held that the Commission had erred in finding the drivers to be employees, and he placed considerable weight on the issue of sub-delegation, writing as follows at paras. 93-95:

> One of the relevant factors that is consistently identified in the jurisprudence is the ability of workers to sub-delegate assigned work by retaining, for example, a substitute driver. It is an inherent right of an independent contractor to delegate performance of the work to others. By contrast, it is an accepted and essential feature of any employment relationship that work assigned to an employee requires personal performance. This is not to say that the law has developed to the point that the right to sub-delegate work automatically excludes classification as an employment relationship. There are exceptions, but they are not plentiful and, as best I can see, have no application to cases such as that under consideration: see *Employment Law in Canada*, *supra,* at Chapter 2, para. 2.20 and cases cited therein.
>
> If the agreement between a driver [*sic*] is such that there is an express prohibition against sub-delegation of work, the proper inference is that it must be an employment relationship. Once again, the notion of "control" comes into play. However, if it is agreed that the worker has an

> unfettered right to use a replacement or substitute worker, the proper inference shifts to the understanding that he or she is an independent contractor. Lack of control is expressed in the indifference as to who actually does the work so long as it is completed. Furthermore, I would go so far as to say that it would take compelling reasons to override that inference. The belief that an employee may be granted the right to substitute a replacement worker, not approved by the employer, flies in the face of accepted principles.
>
> Finally, there is an indeterminate group of cases in which the parties agree that a worker's right of substitution is subject to the other party's approval. The fact that approval is required is evidence of employer control. The fact that the worker can effect a substitution is consistent with an independent contractor relationship.

48. Courts in British Columbia have also considered the issue of sub-delegation. In *Truong v. British Columbia* (1999), 67 B.C.L.R. (3d) 234 (C.A.), one factor relied upon by the Court of Appeal in finding that a court interpreter had been an employee was that she was required to follow a policy that expressly prohibited her from assigning or attempting to assign her work to another interpreter if she were unable to keep an appointment. Hinds J.A., writing for the majority, stated, at para. 30:

> The power to sub-delegate work to others has been held to be an indicia of an individual being an independent contractor: see *Castlegar Taxi (1988) Ltd. v. British Columbia (Director of Employment Standards)* (1991), 58 B.C.L.R. (2d) 341 (S.C.) at 345, para. 17. Conversely, the prohibition against the power to sub-delegate is an indicia of an employer-employee relationship.

49. As Robertson J.A. noted in *Joey's Delivery, supra*, the ability to sub-delegate the work to be performed indicates that the putative employer lacks control over how the work is performed, and it militates powerfully against a finding of an employment relationship. Although I am not aware of any absolute rule that a person who may sub-delegate his or her work without obtaining consent cannot be an employee, in my view it is a factor that, if present, must be expressly considered and weighed in the balance in assessing whether a person is an employee or an independent contractor.

50. In my respectful view, the Delegate did not consider this evidence in his analysis of whether the Complainant was an employee. Although the Delegate was not required to advert to every piece of evidence before him, and a lack of mention of evidence does not necessarily mean that the evidence was not considered, some evidence is sufficiently probative that it must be expressly considered in the reasons. In other words, I believe that if the Delegate had considered the evidence of the Complainant's ability to sub-delegate her work (or, if he did consider it, appreciated its potential significance) he would have mentioned it. The Delegate found that the evidence indicated "that Welch exercised significant control over how, where and when Edwards conducted her duties," and cited the Appellant's instructing the Complainant about the performance of various tasks, and her questioning the Complainant's leaving the farm to buy groceries. The uncontested evidence of the Complainant that she was able to have students perform her duties for her, without seeking the Appellant's consent, is highly relevant and material to the assessment of the degree of control the Appellant exercised over how the Complainant performed her duties. I would expect that this factor at least be mentioned and expressly considered, to determine whether (to cite the analysis of Robertson J.A., which, although not binding on the Tribunal or the Director, I find persuasive), there are "compelling reasons" to override an inference that the Complainant was an independent contractor.

51. Given the importance of the Complainant's ability to sub-delegate her work to the issue of whether she was an employee, I am satisfied that the Delegate's failure to consider this evidence in making the

Determination compromised the fairness of the hearing, and that the Delegate therefore failed to observe the principles of natural justice. I do not purport to say whether considering and weighing the factor of sub-delegation would necessarily have changed the outcome of the analysis, and resulted in a finding that the Complainant was an independent contractor, but the Delegate was required at least to consider it.

52. I find that the Delegate also failed to consider all the relevant evidence on the issue of whether the Complainant had any prospect of profit in her arrangement with the Appellant. The record indicates that the Complainant provided evidence that she performed services for her own clients use the Appellant's facilities. For example, one of the Complainant's clients began boarding his horse at Windy Willows Farm, and paid the applicable fee to the Appellant for this service. However, he also paid the Complainant directly in return for her providing horse training services to him. In other words, what the Complainant received in exchange for her work for the Appellant was not only full board for her horses, and later, the right to live in her trailer on the Appellant's land using her water and electrical power, but also the right to use the Appellant's facilities for her own horse training business. Further, there was also evidence that the Complainant performed additional work for the Appellant in exchange for cash.

53. The "economic reality" test applied by the Delegate requires an assessment of the entire relationship between the parties. In this case, the Complainant's economic relationship with the Appellant had three aspects: (1) she performed work, primarily but not exclusively physical labour, in exchange for horse boarding and RV pad rent; (2) she performed additional work for the Appellant for cash; and (3) she performed horse grooming and training work for her own clients, both off the farm and using the Appellant's facilities. It is possible that if the Complainant was efficient in performing her tasks around the farm (or, as happened, was able to have others perform those tasks for her in exchange for riding lessons), she would have had greater opportunity to perform her more specialized and profitable work of training horses and teaching riding lessons. In his reasons, the Delegate focused only on the discrete tasks performed by the Complainant, and did not advert to her ability to use the Appellant's facilities for her own business. Considering all of this evidence might, or might not, lead to a conclusion that the Complainant did have some scope for profit in her relationship with the Appellant, but in light of the failure to consider evidence relating the Complainant's own business, this is a further reason why the Delegate did not consider all of the relevant evidence in finding that the Complainant was an employee. Since the Delegate placed considerable weight on the proposition that the Complainant had no scope for profit in her work for the Appellant, I find that the failure to consider this evidence also resulted in a breach of natural justice.

54. Since I am satisfied that the Delegate failed to observe the principles of natural justice by reason of his failure to consider certain evidence in finding that the Complainant was an employee, I must decide what is the appropriate remedy. I could either decide these issues myself based on the record before me, or cancel the Determination and remit this matter back to the Director for a new hearing. In my view, the appropriate remedy in this case is to remit the matter back. At present, the factual record may not be sufficient for a proper assessment of the profit issue, so I am not in a position to make this determination myself. Further, given the limited grounds of appeal under the *Act*, it is more in keeping with the Tribunal's role to remit this case back to the Director to provide him with an opportunity to conduct a new hearing.

2. Did the Delegate err in law or fail to observe the principles of natural justice in finding that there was no written contract?

55. Although I have decided that this matter must be remitted back to the Director for a new hearing, the Appellant has also appealed the Delegate's finding that there was no written contract between her and the Complainant. This issue was important below because the basis for the Delegate's finding that the Appellant owed the Complainant wages was not that the Appellant had not provided the Complainant with what she had agreed to provide her under their contract (since he did not accept the Complaint's evidence about how many hours she had worked), but rather, that the deduction of wages to pay for horse board and RV pad rent violated s. 22(4) of the *Act*, which only permits an employer to deduct an employee's wages for a credit obligation where the employee has clearly agreed to the assignment in writing.

56. In her appeal form, the Appellant requests that the Tribunal vary the Determination by setting off the debt she says that the Complainant owes her. Neither the Tribunal nor the Director has jurisdiction to set off debts owed by an employee against wages owing to him or her by an employer. The Tribunal and the Director do, however, have jurisdiction to enforce a written assignment of wages. The Tribunal has held that a written contract that provided that a specific amount of an employee's compensation would be allocated to rent constituted a "written assignment of wages to meet a credit obligation": *Sophie Investments Inc.*, BC EST #D527/97 and #D528/97 (reconsidered in *The Director of Employment Standards* BC EST #D447/98). The Delegate found that there was no written assignment of wages because there was no written contract. The issue, therefore, is whether the Appellant has established that the Delegate erred in law or failed to observe the principles of natural justice in so finding.

57. In his reasons the Delegate records that the evidence before him was equivocal on the question of whether there had been a written contract. According to the Delegate, the Complainant "remembers signing a contract of some kind, but does not have a copy of it," while the Appellant told him that there had only been an oral contract. However, earlier in his reasons the Delegate states that the Complainant said that she had an oral agreement with the Appellant. In her submissions to the Tribunal, the Appellant states that although she did initially tell the Delegate that she did not recall signing a contract with the Complainant (but that her past practice had been to have written contracts), she later wrote the Delegate a letter dated May 14, 2005 in which she confirmed that there had been a written contract.

58. The record before me does not indicate that the Appellant, as she claims, stated to the Delegate during his investigation that there had been a written contract. In one undated statement, the Appellant writes that "There was no contract <u>of employment</u> written or oral" (emphasis added), but this statement is not an admission that there was no written contract for services. The record does not appear to contain any letter (dated May 14, 2005 or otherwise) in which the Appellant states that she and the Complainant had a written contract.

59. However, since the record provided to me by the Delegate does not include any notes of conversations with the parties and other witnesses, it is difficult to assess what, precisely, the evidence before the Delegate on this point actually was. In *Super Save Disposal Inc. -and- Actton Transport Ltd.*, BC EST #D100/04, reconsidered in *Director of Employment Standards*, BC EST #RD172/04, the Tribunal considered the scope of the Director's obligation to provide the record to the Tribunal on an appeal. Although it appears from *Super Save* that the Director has a policy of not including investigation notes, the Tribunal in that case held that such a policy did not bind the Tribunal, and that, at least in the circumstances of that case, the record presumptively should have included the notes of all delegates who

had been involved in the investigation. The reconsideration panel of the Tribunal agreed with the interpretation in *Super Save* of what constitutes the "record". In my view, given that the Delegate relies in his reasons on statements by the parties, the record in this case should also have included at least the Delegate's notes of conversations with the parties and their witnesses.

60. If the Appellant really did inform the Delegate during the course of his investigation that there had been a written contract—and I am not in a position to say whether she did—then if the Complainant informed the Delegate that she had signed a contract of some kind, the only evidence to support the Delegate's finding that there was no written contract would have been the Appellant's initial statement to him that she did not think there had been one—a statement that the Appellant later amended. The Delegate, however, did not resolve conflicts in the evidence (including his contradictory statements in his reasons about whether the Complainant recalled signing a contract) on the issue of whether there was a written contract, finding instead that "since the employer alleges there was no written contract, there could not have been a written assignment of wages" within the meaning of s. 22(4) of the *Act*. Of course, if he had found that there had been a written contract, it would not necessarily have followed that the Appellant owed the Complainant no wages, because the Delegate would still have had to determine what the terms of that written contract were, and whether it constituted a written assignment of wages within the meaning of s. 22(4) of the *Act*. That exercise might not have been easy in the absence of a copy of a written contract, but that would not have relieved the Delegate from his obligation to do his best with the evidence available. As Saunders J. (as she then was) noted in a slightly different context in *Smith v. Reid* (1994), 91 B.C.L.R. (2d) 278 at para. 49 (S.C.), "Although the evidence of the value of the goods is poor, I must assess the damages as best I can on this poor foundation."

61. I have already decided to remit this file back to the Director for a new hearing based on the Delegate's failure to consider all of the relevant evidence on the issue of whether the Complainant was an employee or an independent contractor. Given the conflicts in the evidence on the face of the Determination about whether the Complainant did or did not recall signing a contract, and the Appellant's claim that she did state to the Delegate that there had been a written contract, I respectfully recommend that, at the new hearing, there also should be a clear finding of fact, based on all the evidence, of whether there was a written contract and, if so, whether that contract contained sufficiently clear language to constitute a written assignment of wages.

ORDER

62. I order, pursuant to s. 115 of the *Act*, that the Determination be cancelled and that this matter be referred back to the Director for a new hearing.

Matthew Westphal
Member
Employment Standards Tribunal