

An appeal

- by -

Kenneth Diamond

- 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:** Alison H. Narod

**FILE No.:** 2004A/107

**DATE OF DECISION:** October 15, 2004

## DECISION

### OVERVIEW

This decision relates to an appeal pursuant to Section 112 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the “*Act*”) brought by Kenneth Diamond (“Diamond”) of a Determination issued by a Delegate of the Director of Employment Standards (the “Delegate”) on February 24, 2004. The Determination dismissed Diamond’s claim against K.T. Auto-Motion Limited for unpaid wages on the basis that Diamond was not an employee.

In his appeal, Diamond submits that the Delegate erred by failing to properly address the question at issue and by disallowing Diamond’s witness.

The Tribunal has reviewed the submissions and the materials on file and has decided that an oral hearing is not required in order to decide this appeal.

### ISSUES

The issues in this appeal are whether the Delegate erred by failing to properly address the question of Diamond’s status and by disallowing Diamond’s witness.

### FACTS

The following is a summary of the facts.

Diamond and Ken Trociuk had previous business experience together as partners in other ventures. They entered into an agreement, signed by both on January 15, 2002, to take over a failing business which they then named “K.T. Auto-Motion Limited. According to the agreement, Trociuk and Diamond were to be partners. Trociuk was to contribute money and Diamond was to run the operation. Initially, Trociuk was to own 60% and Diamond 40% of the operation. Once Trociuk’s investment was repaid, the ownership would be equalized to 50/50. Neither partner was to receive a wage unless the business made a profit in the month. Additionally the written agreement stated that certain of Diamond’s expenses would be covered by the business to help him off-set his living expenses.

According to the documentation that was before the Delegate, which included company records, Trociuk became the President of the company and Diamond became its Secretary. The company issued 60% of its shares to Trociuk and 40% to Diamond.

Trociuk and Diamond opened a joint company bank account under the name of K.T. Auto-Motion Ltd. Each company cheque required two signatures and Trociuk and Diamond were each signing authorities. All cheques were signed by both parties.

Prior to the acquisition of the business, Diamond prepared a monthly income and expense forecast for the business which showed his wages to be \$3,000.00 for the month. Diamond worked for the business from January 2, 2002 until April 4, 2003, but never received wages. However, he received apartment rent payments and car lease payments over the period.

During its active operations, the business employed a shop foreman, who was the former owner, and a technician. Each was regularly paid wages. Additionally, on one occasion, Diamond contributed \$2,000.00 of his personal funds to the company to cover payroll when there were insufficient funds in the company's account.

By late 2002, Diamond became sick and indicated that he would have trouble continuing as the business was not making money. By late March 2003, the business was having trouble meeting its financial obligations and Diamond ceased attending work.

The Delegate held a hearing. At the hearing, the parties disagreed about whether or not Diamond was an employee and how he characterized himself to other parties. Trociuk claimed Diamond represented himself as an owner and Diamond disputed that. Trociuk maintained that Diamond was an employer and Diamond contended he was an employee.

The Delegate concluded that Diamond was not an employee. He based his conclusion on a number of findings. He noted that the January 15, 2002 agreement clearly set out and established a partnership relationship. Diamond did not dispute that it was his signature on the document, but could not remember signing it. Diamond gave evidence that he insisted that both he and Trociuk were required to sign company cheques. The cancelled cheques in evidence were signed by both Diamond and Trociuk. These cheques paid the company's suppliers, as well as its employees. The Delegate noted that Diamond and Trociuk had a history of owning a company together.

The Delegate also noted that Diamond had not demanded wages for thirteen months. The Delegate did not accept that any employee would allow that situation to continue. A reasonable employee would have made a demand for payment of salary shortly after the employer missed the first payment. The Delegate was not satisfied that Diamond had foregone his entitlement to wages as an employee out of concern for the company. Diamond, he found, was an intelligent individual with financial needs and was not taken advantage of by Trociuk in an employment relationship.

Additionally, the Delegate observed that Diamond worked without wages and paid \$2,000.00 into the company's account to cover wages to employees. The Delegate found this to be the actions of a responsible owner of a company, not those of an employee.

## **ARGUMENT**

Counsel for Diamond argues that the Delegate made two errors: he failed to properly address the question at issue and he disallowed Diamond's witness. With respect to the first alleged error, Diamond's counsel says that the Delegate erred by looking at the business as it was proposed by the parties prior to its commencement rather than at the business actually conducted thereafter. He also says the Delegate did not discuss the indicia of an employee, such as control of work hours, decisions regarding investment, control of cash flow, or control of hiring or firing of employees. He says little turns on the fact that both Diamond and Trociuk were signatories to company cheques. What was more relevant was that Trociuk exercised actual control over the company's cash flow.

With respect to the second alleged error, Diamond's counsel says that the Delegate refused to permit one of the business's customers to give evidence that would have shown that Trociuk represented himself as the sole owner of the business. Counsel supplies an e-mail from the witness detailing an interaction he had with Trociuk. Counsel says the failure of the Delegate to allow the witness's testimony constitutes a

breach of Diamond's right to present a complete case and justifies setting aside the Determination and ordering a new hearing.

No submission was made by the Respondent, K.T. Auto-Motion Limited.

The Delegate makes brief submissions in response to the appeal. With respect to the first issue, he notes that Diamond said, during the hearing, that he insisted the company cheques have two signing authorities: himself and Trociuk. Diamond placed \$2,000.00 in the company account when he realized the company could not cover payroll. Diamond stated that he ran the operation and that the former owner was the shop foreman. The company cheques were signed by Trociuk and Diamond. Trociuk supplied evidence that he and Diamond agreed that the prior owner would stay on as an employee and Diamond would run the business.

In short, the Director maintains that Diamond did make the decisions regarding investments such as ordering and purchasing parts, controlling cash flow and paying wages to employees. Moreover, Diamond signed a written contract clearing setting out and establishing a partnership relationship.

With respect to the second alleged error, the Delegate says that Diamond made the decision to dismiss his witnesses; the Delegate did not tell him they were not allowed to testify.

## LAW

The burden is on the Appellant, Diamond, to persuade the Tribunal that the Determination ought to be set aside on the basis of one or more of the statutory grounds set out in subsection 112(1) of the *Act*. Subsection 112(1) states:

- 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.

### *Error of law*

In determining whether there has been an error of law, the British Columbia Court of Appeal, in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12-Coquitlam)* (1998), 62 B.C.L.R. (3d) 354, indicated that the following elements will be considered:

- (a) a misinterpretation or misapplication of a section of the *Act*;
- (b) a misapplication of an applicable principle of general law;
- (c) acting without any evidence;
- (d) acting on a view of the fact which could not reasonably be entertained; and
- (e) exercising discretion in a fashion that is wrong in principle.

### *Natural Justice*

In *CCD Corporate and Career Development Inc.*, [2004] B.C.E.S.T.D. No. 68, I said the following about natural justice at paragraph 23:

The law takes a flexible approach to what constitutes a form of hearing sufficient to meet the requirements of natural justice. The question as to what is required depends on the facts and circumstances of each case and the subject matter under consideration (*Knight v. Indianhead School Division (No. 19)* [1990] 1 S.C.R. 653). For instance, the rules of natural justice do not require that there always be an oral or in-person hearing. An exchange of written materials may suffice (*Mobile Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board* (1998), 21 Admin. L.R. (2d) 248 (S.C.C.)). What is required is that the parties must know the case being made against them and be given an opportunity to reply. They must be given a fair opportunity to correct or controvert any relevant or prejudicial statement (*Emery v. Alberta (Workers' Compensation Board, Appeals Commission)*, 2000 ABQB 704).

### **REASONS**

I have reviewed the Delegate's analysis in the Determination. I can find no error, as alleged. The Delegate correctly noted and considered the definition of "employee" and "employer" in the *Act*.

In my view, there was ample evidence on which the Delegate could conclude that Diamond was an employer and not an employee. This is not a case where the Delegate focused on the business as it was proposed and not as it was actually conducted. Rather, the business as actually conducted was consistent with what was proposed. More specifically, the arrangement set out in the written agreement between the parties dated January 15, 2002 was carried out in practise. Diamond and Trociuk were partners, with Trociuk providing the funding and Diamond the management expertise and labour. In furtherance of that agreement, Diamond received 40% of the company shares. In accordance with that agreement, he did not receive wages, except that he received payments for his accommodation and vehicle.

There was evidence before the Delegate on which he was reasonably able to conclude that Diamond ran the operation on a day-to-day basis. It was Diamond who insisted that all cheques be co-signed. Diamond and Trociuk agreed that the prior owner would stay on as an employee. The fact that Diamond ensured that there was sufficient funding to cover payroll obligations conforms with this.

Additionally, I agree with the Delegate that Diamond's conduct in not seeking payment of wages for thirteen months is more consistent with him being an owner and employer than an employee. The Delegate assessed Diamond's credibility, as he was entitled to do, and found him intelligent, but not credible, with respect to his claims that he was wrongfully deprived of wages.

With respect to the second alleged error, I accept the Delegate's submission that he did not tell Diamond his witnesses were not allowed to testify and that it was Diamond who made the decision to dismiss his witnesses.

In any event, I note that the e-mail supplied by Diamond's counsel relates to an interaction that occurred in May 2003, after the parties' relationship had broken down and after Diamond ceased attending at the shop.

Moreover, in my view, the fact is that the parties disagreed with respect to the issue of how Diamond's status was characterized to others. In my view, even if Mr. Diamond is correct on this point, that fact, when taken into consideration with the whole of the evidence, would not be sufficient to shift the preponderance of the evidence into a finding that favoured Mr. Diamond. In short, the preponderance of the evidence favoured the conclusion reached by the Delegate that Diamond was an owner and an employer and not an employee.

### **SUMMARY**

The Determination is confirmed and the appeal dismissed.

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**Alison H. Narod**  
**Member**  
**Employment Standards Tribunal**