

An appeal

- by -

Moon Arc Interiors Co. Ltd.

- 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: Robert Groves

FILE No.: 2004A/169

DATE OF DECISION: November 30, 2004

DECISION

OVERVIEW

This is an appeal by Moon Arc Interiors Co. Ltd. (“Moon Arc”) pursuant to s.112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on September 8, 2004 in favour of one Tony Deon (“Deon”).

Having made a finding in the Determination that Moon Arc had contravened Sections 18 and 58 of the *Act*, the Delegate ordered Moon Arc to pay \$4,161.60 in respect of wages, holiday pay, and interest. In addition, the Delegate imposed administrative penalties of \$1,500.00. The total amount owed by Moon Arc as a result of the Determination, therefore, was \$5,661.60.

Moon Arc appealed the Determination on September 23, 2004.

Thereafter, the Tribunal received the record which was before the Delegate, and a brief written submission. Copies of the record and the submission were forwarded to Moon Arc and Deon on October 18, 2004, together with an invitation to make a final response by November 2, 2004.

No response was received by the Tribunal from either Moon Arc or Deon.

On November 4, 2004, the Tribunal informed the parties that the appeal would be determined on the basis of the written submissions received.

ISSUES TO BE DECIDED

The following are the issues to be decided on this appeal:

- did the Delegate fail to observe the principles of natural justice in making the Determination?
- did the Delegate err in law in determining that Deon was an employee of Moon Arc for the purposes of the *Act*?
- did the Delegate err in law in determining the wages to which Deon was entitled on the basis of insufficient evidence?

FACTS

The material before me reveals the following facts:

- Moon Arc retained the services of Deon as a sales person in its retail upholstery business from November 2002 to October 21, 2003.
- The agreement reached by Moon Arc and Deon provided that Moon Arc would pay Deon 10% commission on all retail sales.

- Deon submitted invoices to Moon Arc on a monthly basis, which Moon Arc would then pay.
- Deon filed a complaint under Section 74 of the *Act* alleging that Moon Arc had failed to pay commissions owed to him.
- Moon Arc took the position in the proceedings that Deon was not an employee for the purposes of the *Act*.
- After a hearing held on July 19, 2004, at which Deon and a representative of Moon Arc appeared and made submissions, the Delegate decided that Deon was an employee for the purposes of the *Act*, and therefore entitled to the sums set out in the Determination.

DISCUSSION

Did the Delegate fail to observe the principles of natural justice in making the Determination?

The Appeal Form delivered by Moon Arc to the Tribunal challenges the Determination on the ground that the Director, through her Delegate, failed to observe the principles of natural justice. Such a challenge normally gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in the appellant's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence.

Here, there is nothing apparent on the record which persuades me that there was any such infringement of the principles of natural justice. Indeed, the Delegate appears to have conducted a hearing at which both Moon Arc and Deon were provided with ample opportunity to tender evidence and make submissions concerning the two substantive issues in dispute, namely: a) whether Deon was an employee of Moon Arc, and if so, b) whether, and if so by how much, Deon had been underpaid for his work.

I am of the view, therefore, that Moon Arc's challenge to the Delegate's Determination relating to these two substantive issues should have been characterized as an appeal on the ground that the Director, through her Delegate, had erred in law, rather than as an appeal on the ground that there was a failure to observe the principles of natural justice.

Having said that, Moon Arc's mischaracterization of its grounds of appeal should not, in this instance, require that its appeal be dismissed. It is in keeping with a purpose of the *Act* to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act* that the Tribunal should take a large and liberal view of an appellant's explanation as to why a determination ought to be varied or cancelled, or why the matter should be referred back to the Director (see *Triple S Transmission Inc.* BC EST #D141/03).

Did the Delegate err in law in determining that Deon was an employee of Moon Arc for the purposes of the Act?

Moon Arc takes issue with the Delegate's Determination that Deon was its "employee", and therefore entitled to "wages" for the purposes of the Act.

The term “employee” is defined broadly in s.1 of the Act, and “includes”, inter alia, a person “receiving or entitled to wages for work performed for another” and a person “an employer allows, directly or indirectly, to perform work normally performed by an employee”.

An “employer” is defined as including a person “who has or had control or direction of an employee”, or “who is or was responsible, directly or indirectly, for the employment of an employee”.

The term “work” is defined to mean “the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere”.

Previous decisions of the Tribunal have made it clear that the definition of “employee” is to be broadly interpreted and that the common law tests for employment developed by the courts are subordinate to the definitions contained in the Act (see Re Trigg BC EST #D040/03).

Still, the common law tests are useful by reason of the fact that they delineate the factors which should be examined when considering whether, in the circumstances, an employment relationship has been created. In 671122 Ontario Ltd. v. Sagaz Industries Canada Inc. [2001] SCJ No.61 the Supreme Court of Canada reviewed the several tests which have been developed and concluded that there is no one conclusive test that should be applied in every instance. Instead, the Court said this:

The central question is whether the person who has 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.

Here, the record discloses that Deon performed work for Moon Arc as a commissioned salesperson within the latter’s retail upholstery business. At the hearing, the Delegate asked Deon and Moon Arc a series of questions designed to assist the Delegate in determining whether Deon was an employee. As a result of the answers obtained, and the documents produced, the Delegate determined that he was. In coming to this conclusion, the Delegate said this:

Though there were no set hours of work and Deon set his own vacation times I am not convinced there was no direction and control from Moon Arc. It was apparent that Moon Arc had certain expectations that Deon attend at the work place on a regular bases (sic). Moon Arc’s evidence was that it supplied all of the tools and equipment, office space, computer and manuals Deon need (sic) to do the job. Moon Arc decided how the work was to be done. Moon Arc decided on the rate of pay, commission only. Moon Arc expected Deon to approach customers in a respectful manner. Moon Arc had the right to end the relationship if they were not happy with Deon’s performance. Deon had no risk of loss or chance of profit. Deon did not operate his own business. The work he did was for Moon Arc and integral to their business.

As can be seen, the Delegate took into account many of the standard indicia of employment as set out in the authorities. Further, there is no evidence that the Delegate misdirected himself with respect to any of them.

In its Appeal Form, Moon Arc makes the bald statement that Deon was not an employee, but provides no arguments supporting that conclusion except to say that Deon did not work for wages. The definition of “wages” in s.1 of the Act, however, specifically includes “commissions” within its ambit. The fact that Deon was paid commissions, rather than ordinary wages, is therefore insufficient to preclude a conclusion that Deon was an employee for the purposes of the Act.

This is Moon Arc’s appeal. The onus is on it to demonstrate that the Delegate erred in law in determining that Deon was its employee. In my opinion, Moon Arc has failed to meet that onus.

Did the Delegate err in law in determining the wages to which Deon was entitled on the basis of insufficient evidence?

Moon Arc further challenges the Delegate’s Determination on the basis that there was no proof of Deon’s hours of work, and accordingly, the Delegate should not have found as a fact that Deon worked 31 hours per week for Moon Arc.

In order to demonstrate an error of law on a finding of fact, Moon Arc must show what has come to be known as “palpable and overriding error”. By “palpable” is meant readily perceived or plainly seen. “Overriding” connotes an error that affects the decision made. Another way of describing the test is to say that the factual conclusions, or inferences drawn from factual conclusions, set out in the Determination are inadequately supported, or are wholly unsupported by the evidentiary record. The burden of proving an error of law on a question of fact is a heavy one. The Tribunal is not entitled to interfere with findings of facts merely because it may take a different view of the evidence (see *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital* (1994) 87 BCLR 2d 1; *Housen v. Nikolaisen* 2002 SCC 33).

In the case before me, neither Moon Arc nor Deon kept a record of the hours worked by Deon. However, in his Reasons for Determination the Delegate points out that Deon gave direct testimony at the hearing to the effect that he worked 5 hours a day 5 days a week and 6 hours per day on the 6th day of the week, with a total of 10 days off, during the last six months of his period of employment with Moon Arc. Importantly, the Delegate in his Reasons for Determination also points out that “Moon Arc did not dispute the hours Deon claims he worked”.

On this appeal, Moon Arc made no submission on this point, except to say, on its Appeal Form, that there was no proof of Deon’s hours of work. Clearly, however, there was such evidence, in the form of Deon’s testimony at the hearing, which Moon Arc did not challenge. While it would have been preferable if there had been documentary support for Deon’s claim concerning the hours he worked, the evidence he gave was entirely plausible, and the Delegate was entitled to give effect to it.

In these circumstances, I am not persuaded that there was error of fact of a kind that would warrant my cancelling the Determination or referring it back to the Director.

ORDER

I order, pursuant to Section 115 of the Act, that the Determination dated September 8, 2004 be confirmed.

Robert Groves
Member
Employment Standards Tribunal