

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Vanacc Consultants Ltd.
("Vanacc")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Mark Thompson

FILE No.: 1999/756

DATE OF HEARING: March 10 and April 17, 2000

DATE OF DECISION: Jun 28, 2000

DECISION

APPEARANCES

Andrew Ligget, Hossein Seifi: for Vanacc Consultants Ltd.

David Stoller: for Arezou Nazeri

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *Act* by Vanacc Consultants (“Vanacc”) against a Determination issued by a delegate of the Director of the Director of Employment Standards (the “Director”) on November 24, 1999. The Determination found that Vanacc owed a former employee, Arezou Nazeri (“Nazeri”), \$8,621.27 for unpaid commissions pursuant to a contract of employment, plus vacation pay and interest. Vanacc had agreed to pay her a monthly salary, plus commissions for accounting work, immigration applications completed and financial reports.

Vanacc appealed on the grounds that Nazeri was a partner in the business and not an employee. It further disputed the schedule of commissions presented by Nazeri and other facts on which the Director’s delegate relied. Finally, Nazeri had signed a release from further payments by Vanacc on February 27, 1999.

ISSUE TO BE DECIDED

The principal issue to be decided in this case is whether Nazeri was an employee under the *Act* during 1998-1999, the contents of her compensation agreement and the significance of a statement signed February 27, 1999 essentially releasing the firm from future financial claims.

FACTS

Nazeri worked for Vanacc from August 12, 1998 until February 27, 1999. In support of her complaint, Nazeri told the Director’s delegate that she had originally worked for Vanacc International Financial Services Ltd. (“Vanacc International”) from February to July 1998. The principal of Vanacc International and Vanacc was Hossein Seifi (“Seifi”). At the end of July 1998, Nazeri moved from Vanacc International to Vanacc when Seifi offered her a better position with Vanacc. Nazeri’s complaint covered only her period of employment with Vanacc.

The exact nature of her duties was in dispute, but the parties agreed that she did accounting work and assisted in the completion of forms required by the Federal Government. Vanacc is an immigration and financial consulting business that assists potential business immigrants, principally from Iran, who wish to locate in Canada. Vanacc also provides advice to clients who must establish businesses in Canada as a condition of their immigration. Nazeri stated, without contradiction, that she did not do the accounting for Vanacc and did not complete taxation forms for Revenue Canada on behalf of Vanacc. Her accounting work was for clients, not Vanacc.

Seifi's evidence was that he met Nazeri in February 1997, and she asked to work for him to gain accounting experience in Canada. According to Seifi, he agreed to give Nazeri work based on a division of commissions, initially 25 per cent to her and 75 per cent to the company. Seifi testified that this arrangement was changed over time, ultimately increasing Nazeri's share of revenues to 50 per cent. In her complaint, Nazeri stated that she agreed to work for 30 per cent of gross billing income, plus a schedule of fees for completion of immigration forms and a monthly salary of \$600 for secretarial work. No other evidence of the contractual arrangements between Vanacc and Nazeri was available to the delegate or the Tribunal.

Seifi presented evidence of money he paid Nazeri in 1977. In an affidavit presented to the Tribunal, she described the payments as loan repayments. Seifi testified that the cheques were her shares of revenues received by Vanacc. Because these payments were made prior to the period when the delegate found that Nazeri's employment began, it is not necessary to decide the status and meaning of the cheques in light of other evidence available.

Seifi also presented cheques signed by Nazeri on behalf of Vanacc for goods and services provided to the company and a number of cheques payable to Nazeri. He testified that cheques payable to third parties were evidence of the independent action Nazeri exercised on behalf of the company. Cheques payable to Nazeri were usually in the amount of \$1,000 and occasionally for other amounts, never for \$800 or any multiple of that amount. The notation on some cheques referred to "contract work". Seifi presented a cheque to illustrate that Nazeri's assertion that her compensation was based on immigration forms completed was incorrect. According to Seifi, clients would not pay Vanacc for completing applications if the government of Canada did not accept the applications. Seifi also presented cheques he had written to Nazeri for services performed for Vanacc. He testified that cheques were not issued according to a fixed schedule because she was not an employee. Instead Nazeri was paid as the company received money. According to Seifi, he and Nazeri met every two or three months and determined the amounts owed to her based on the company's revenues and expenses. As explained below, Nazeri did not testify before the Tribunal. In her statement to the delegate she described her compensation agreement, and the delegate accepted her evidence.

Nazeri submitted written notice of resignation on January 11, 1999, effective February 11, 1999. Nazeri told the Director's delegate that she resigned because Vanacc had not paid all of her salary. She left the office on February 12, still not having been paid fully, in her opinion. On or about February 27, 1999, Nazeri met with Seifi to discuss any wages and commissions owed to her. At the conclusion of that meeting, Nazeri signed a memo stating that she had received \$1398.00 from Vanacc "for the job (sic) that I've done base (sic) on commission for Vanacc Consultants Ltd. up to February 12, 1999. I don't have any claims money wise from them." In support of her complaint, Nazeri stated that Seifi made her write the letter. In an affidavit filed with the Tribunal, she stated that she had signed the letter under duress because Seifi still owed her money from a personal loan.

Seifi denied exerting any pressure on Nazeri to sign the memorandum. In support of its position, Vanacc submitted a sworn statement from Mohammad Tavakoli ("Tavakoli"), a client of Seifi. Tavakoli stated that he witnessed the final meeting between Nazeri and Seifi and did not observe any indications of pressure on Nazeri from Seifi. On the contrary, they parted on friendly terms, and Seifi assisted Nazeri in removing her personal effects from the Vanacc offices.

Seifi stated that he was the co-owner of Vanacc International. He agreed that Nazeri was an employee of this firm in 1997 and he presented her 1997 T4 and Record of Employment for Vanacc International. No such forms were completed for Vanacc, although Nazeri clearly understood the legal requirements of the employment relationship. He presented other evidence about the affairs of Vanacc International through affidavit. No evidence concerning this company was presented at the Tribunal hearing.

Vanacc argued that Nazeri was Seifi's partner in Vanacc. On cross-examination, Seifi acknowledged that Vanacc had never obtained a GST number as a partnership. No bank account existed for the partnership. A partnership agreement for Nazeri and Seifi was completed on February 1, 1999, but never filed with the Ministry of Finance. No other written partnership agreement existed. On August 18, 1998, Seifi signed a form for the company's bank naming Nazeri as an officer and director of the company, in effect giving her signing authority over the company's account. Seifi testified that he did this shortly before leaving on a long trip to Iran on company business.

Abbas Sadaghzadeh ("Sadaghzadeh") was a Vanacc client since 1997. In 1998 he came to the Vanacc offices to incorporate a business and met Nazeri. She told him that Seifi was out of the country, so she was in charge. Nazeri was sitting at Seifi's desk. Sadaghzadeh was dissatisfied with the advice he received and did not see Seifi again until 1999.

At the conclusion of Vanacc's evidence, counsel for Nazeri applied for a dismissal of the appeal on the grounds that Vanacc had failed to meet the burden of demonstrating that the Determination contained an error of fact or law. The appeal was based on Vanacc's allegation that Nazeri was Seifi's partner in Vanacc, an argument not raised in Vanacc's response to Nazeri's complaint. Mr. Stoller argued that Vanacc failed to present any evidence that Seifi and Nazeri operated as a partnership. An appellant should not be able to base an appeal on grounds not raised in the proceeding leading to a determination. Moreover, Vanacc was obliged to keep records of Nazeri's employment. Because it failed to meet that obligation, there was no evidence to determine what wages Vanacc owed to her.

When Mr. Stoller made his application on behalf of Nazeri, counsel did not represent Vanacc. I therefore denied the application and gave Nazeri the opportunity to present evidence in support of her case. Mr. Stoller decided not to present evidence on Nazeri's behalf beyond sworn affidavits submitted to the Tribunal prior to the hearing. Seifi then presented his argument on behalf of Vanacc.

ANALYSIS

The appellant in these proceedings bears the burden of demonstrating that the determination in question contains error of law or fact. *Re World Project Management Inc.* BC EST #D134/97; *Re Gasper*, BC EST #D372/97. A determination itself is the result of a finding that the *Act* has been violated, so the party challenging that conclusion must convince the Tribunal that the conclusions it contains are incorrect.

The legal question raised by the appeal is Nazeri's employment status. The *Act* defines an employee as follows:

'employee' includes . . .

(b) *a person an employer allows, directly or indirectly, to perform work normally performed by an employee,*

In response to Nazeri's complaint, Vanacc originally argued that she was an independent contractor, not an employee, and that she had not completed all of the work assigned to her before resigning her position. The Director's delegate found that Nazeri was an employee under the *Act* and accepted Nazeri's evidence regarding the basis of her compensation.

In its appeal Vanacc argued that Nazeri was an independent contractor in 1997 and then became a partner in the company in 1998. She was never an employee, but had agreed with Seifi, president of the company, to share in net revenues after expenses had been paid. This argument was raised for the first time in the appeal.

Clearly, the working relationship between Seifi and Nazeri was relatively informal. However, Vanacc did not present any document to prove the existence of a partnership agreement with Nazeri covering her services. No other indicators of a partnership, such as a bank account, tax return, GST number or the like were produced. Vanacc did introduce statements that Nazeri seemed to be in charge of the office in Seifi's absence, but these observations, not subject to cross-examination, did not provide sufficient proof that a partnership existed. Nazeri's signing authority for Vanacc's bank account did not prove the existence of a partnership. Such responsibility is not inconsistent with an employment relationship, especially in a small firm such as Vanacc.

The Tribunal has held in numerous cases that an appellant cannot rely on evidence in appeal that it could have produced in response to the original complaint. See *Re Tri-West Tractor Ltd.* BC EST #D268/96; *Re Kaiser Stables Ltd.*, BC EST #D058/97. In this case, Vanacc advanced the argument that Nazeri was a partner for the first time in the appeal, using some of the same facts and arguments made previously to the Director's delegate in support of the position that Nazeri was an independent contractor.

The financial relationship between Nazeri and companies controlled by Seifi was complex. Seifi argued that Nazeri had been untruthful when she stated that she was not paid in 1997. Nazeri did receive cheques from Seifi in 1997. She argued that they were either from Vanacc International or connected with the repayment of a loan. The mere fact that an employer paid money to a person who was performing services does not constitute evidence of any particular type of employment relationship, be it a contractor, partner or employee. Vanacc did not present payroll records, including the basis for payments made to Nazeri, for any of the period when she worked for the firm.

In short, Vanacc did not produce evidence to contradict the delegate's original conclusion that Nazeri was an employee of Vanacc as defined in the *Act* and entitled to the protections the *Act* provides.

Vanacc placed considerable weight on Nazeri's memo of February 27, 1999. While the evidence of the circumstances under which Nazeri signed the memo is not clear, the memo was not a receipt for all money owed to Nazeri. I concur with the Director's delegate that on the balance of

probabilities the statement covered only commissions owed to Nazeri. The delegate based his calculations on that conclusion. Again Vanacc presented no new evidence on the intent of this memo to the Tribunal, merely that duress was not apparent to a third party.

Apart from Seifi's testimony, which Nazeri contradicted in written statements, and cheques paid to Nazeri at various times in 1998 and 1999, Vanacc did not present any evidence of the basis for Nazeri's compensation.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, the Determination dated November 24, 1999 is confirmed. Nazeri should receive \$8,621.27 as required by the Determination, plus additional interest accrued under Section 88 of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal