

An appeal

- by -

Home-Smart Window Systems Ltd.  
("Home-Smart")

- 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:** Ib S. Petersen

**FILE No.:** 2001/244

**DATE OF HEARING:** June 20, 2001

**DATE OF DECISION:** August 29, 2001



## ISSUES

Home-Smart take issue with the Determination and says that Cisecki was, in fact, an independent contractor. That is one issue to be decided. Home-Smart also says that the Delegate indicated that the investigation would follow a two step process: first, there would be a determination of Cisecki's employee status; second, if he was found to be an employee, Home-Smart would be allowed an opportunity to have input with respect to quantum. Home-Smart says it was denied an opportunity to participate in the second step. It takes issue with the award and, says that, at the very least issues related to quantum should be referred back for further investigation.

## FACTS AND ANALYSIS

The appellant has the burden to persuade me that the Determination is wrong. For the reasons set out below, I am persuaded that it has met that burden.

The application of the statutory definitions of "employee" and "employer" is not as easy or simple as one might have expected. As I noted in *Knight Piesold Ltd.*, BCEST #D093/99:

"Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools, chance of profit, risk of loss and "integration" (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2<sup>nd</sup> ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of "whose business is it"."

In my view the Determination must be set aside.

On the question of the credibility of the witnesses, I adopt the words of the B.C. Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, at 357:

"... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

Based on that test, I prefer the testimony of Christopher over that of Cisecki's where there is a conflict. I found Cisecki to be evasive on material points, including, with respect to his relationship, with his brother, the other (former) principal of Home-Smart.

Typically the determination of employee vs. independent contractor status is not a matter of “black and white.” Sometimes the arrangement between companies and independent contractors contain elements which support a finding that they are employees. This case is not different. On my view of the statute, the common law tests and all of the evidence, and on balance, I agree with Home-Smart’s submission that Cisecki was an independent contractor. In my view, the following in particular favours that conclusion.

First, Cisecki negotiated his arrangement with Home-Smart, or J & L Contracting Ltd., through his brother. The relationship was intended to be an independent contractor relationship, based on a 10% gross commission (in some instances 9%) and Cisecki carried his own expenses. In the circumstances, I place less weight on the fact that Cisecki on one occasion “baby-sat” the office while the principals were on vacation and may have paid for some courses put on by BC Hydro. By agreement, Cisecki generally paid his own office expenses, automobile expenses, telephone, fax, fuel etc. I accept, Christopher’s evidence that Cisecki was paid in 1998 for income generated in 1997 for tax reasons. I do not accept Cisecki’s testimony that this happened because his brother told him that the company was behind in its bills. As well, at his request, Home-Smart did not take statutory deductions and obtained a ruling from Revenue Canada with respect to his status. (I pause to note that Revenue Canada’s determination is not binding on me).

Second, I accept Home-Smart’s evidence that it did not exercise control over Cisecki’s hours of work or limited the products he could sell. Christopher stated that Cisecki also sold for other home improvement companies and was able to point to one instance where that had occurred. He largely decided when to work and which hours to work. Sales meetings, for example, were infrequent. It is important, in my view, that Cisecki at the material time was a licensed real estate agent working for a real estate company. “Exclusivity was not part of the deal.” Cisecki also, to a large extent decided which area he was willing to serve.

I add, as well, that I have some difficulties with the delegate’s application of the various common law tests. For example, while the delegate identified and sought to consider various tests, in light of the statutory definitions, he erred in law when he relied on a test referred to as an “ordinary man test”--*i.e.*, would an ordinary person view the relationship as an employer-employee relationship. In my opinion, there is no foundation in law for this test. While, in all fairness, the Delegate appeared to consider the relationship as a whole, it is not clear to me what weight he gave to this test.

Moreover, his reasoning is, in some instances, partly based on presumptions without foundations in the evidence. One example may be found at page 5 of the Determination where the delegate--under the heading “chance of profit and risk of loss”--contrasts compensation for independent contractors with that of employees. The former “would normally be “paid at the completion of the prescribed work and by way of a fixed amount;” the latter, on the other hand, will generally receive a “salary, wage or commission based on a time period....An employee’s earnings are not dependent on whether or not the employer makes a profit or not(sic.)” In my view, these

considerations are largely irrelevant and may well be factually incorrect. In this case, Cisecki was not paid his commission earnings on his sales until the sales had been completed, i.e., the payment had been received and the work completed.

In my opinion, the delegate's analysis and, thus, his conclusions contain both factual and legal errors, and the appeal is granted.

### **ORDER**

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated March 1, 2001 be cancelled.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**