

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 -

Astrolabe Marine Inc.
("Astrolabe")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ian Lawson
FILE NO.: 97/377
DATE OF DECISION: November 13, 1997

DECISION

OVERVIEW

This is an appeal by Astrolabe Marine Inc. ("Astrolabe") pursuant to s. 112 of the *Act*. The appeal is from Determination No. CDET 005944, issued by Glen Smale, a delegate of the Director of Employment Standards on April 17, 1997. The Determination found Mr. Hendrik Meinster to be an employee of Astrolabe, and to be entitled to wages and other compensation in the total amount of \$57,893.69. Astrolabe filed an appeal on May 13, 1997, which this Tribunal allowed to be filed beyond the time limit for filing appeals set out in section 112 of the *Act* (BC EST #D304/97).

The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal. An oral hearing was requested by Astrolabe, which sought to present oral evidence from three individuals who would, it was alleged, establish that Mr. Meinster was not an employee but an independent contractor. Affidavits were presented from each of these three individuals, one of whom is Mr. Maurice Gagné, president of Astrolabe. I have considered these affidavits carefully, as well as several submissions filed by the parties. In its Reasons for Appeal filed on May 13, 1997, Astrolabe states:

"The reason Astrolabe is making this Appeal is because the finding made by the Director and/or his delegate was clearly wrong and not based on the facts. The information concerning Mr. Meinster's situation was communicated to the investigating officer."

An appellant seeking an oral hearing should establish a clear connection between the alleged errors made by the Director and the need for an oral hearing. I find there are no facts contained in the affidavits filed in support of the request for an oral hearing, that could not have been in Astrolabe's possession at the time of the Director's investigation. The Reasons for Appeal indicate Astrolabe presented these facts to the investigating officer. The Determination notes that several requests were made of Astrolabe for information regarding its alleged employment of Mr. Meinster.

In my view, Astrolabe does not allege any particular fact-finding error made by the Director; instead, the appeal restates the case made out to the Director. The appeal process under the *Act* should not be used as a second opportunity to present evidence which could and should have been presented to the Director, and the Tribunal should not conduct its own investigation with a view to substituting its findings for those of the Director. The appellant has failed to make a connection between any error allegedly made by the Director and the need for an oral hearing, and so the appeal will be resolved without an oral hearing.

FACTS

Astrolabe is a small company manufacturing marine vessels and Mr. Meinster's role was to sell these vessels. Apart from a dispute as to whether or not Mr. Meinster was an employee or an independent contractor, the undisputed facts appear to be that Mr. Meinster was involved with Astrolabe from January 3, 1995 to January 11, 1996, when his services were terminated upon his return from a holiday. Mr. Meinster alleges he held the position of Vice President, Marketing and Sales, and that he performed the following duties summarized in the Determination:

- "1. responsible for accounts payable and receivable
2. source supplies including applications for credit from new suppliers
3. rent office space
4. marketing, eg. attending boat shows, placing advertisements
5. dealing with banks, credit applications, etc.
6. liaison with Dunwoody regarding feasibility of starting a chartering company
7. completing employee separation papers."

Mr. Meinster also alleges that Astrolabe agreed to pay him a salary of \$1,000.00 per week, which was to include any commission he might earn on boat sales in the amount of 8%. He says Astrolabe declined to put this relationship in writing, and stated that Astrolabe's principal, Mr. Gagné, preferred to conclude the matter with a handshake which was "the ultimate bond of agreement." Mr. Meinster further alleges the parties agreed Mr. Meinster's wages would be converted to "product": in lieu of his salary, Astrolabe would build him a new boat which would be used as a demonstration model for future clients. It is undisputed that Mr. Meinster did not sell any boats for Astrolabe, and he left the company without receiving any salary or the promised boat in lieu thereof.

Astrolabe's response to the investigation appears to have been quite narrow -- in reply to a Demand for Employer Records, Mr. Gagné stated:

Mr. Hendrik Meinster, the relationship between Mr. Meinster and Astrolabe Marine Inc. was based solely on a Mr. Meinster desire to sell Astrolabe Marine Inc. vessels. There was no agreement with Mr. Meinster to engage in any employment whatsoever with Astrolabe Marine Inc. Never has there been any salary promised or provided or earned by Mr. Meinster. No entitlement for salary, vacation or statutory holiday pay or termination, as Mr. Meinster was never hired by Astrolabe Marine Inc. and our records clearly indicate same.

Astrolabe stated that it had no company records of any kind relating to Mr. Meinster, and provided no further information, evidence or submissions to the Director's delegate, who had sent a further letter to the company setting out the definitions of "employer" and "employee" under the *Act* and requesting company records. In its submissions on this appeal, Astrolabe argues that the agreement with Mr. Meinster was not as alleged by him, and that the agreement did not establish an employment relationship. Significantly, however, no real details of Astrolabe's version of this agreement are presented, and no response of any kind is made to Mr. Meinster's allegation that he was to be paid "in product."

I referred earlier to a passage in Astrolabe's Reasons for Appeal which stated that "[t]he information concerning Mr. Meinster's situation was communicated to the investigating officer." It appears, however, that Mr. Gagné's letter was the only attempt to set out the company's position and argument to the Director's delegate.

ISSUE TO BE DECIDED

This appeal requires me to decide whether Mr. Meinster was an employee of Astrolabe and whether the amounts determined to be owing to him by Astrolabe are correct.

ANALYSIS

In deciding whether a person is an employee or an independent contractor, the following factors are generally considered: the degree of control exercised over the worker by the alleged employer; the worker's integration with the alleged employer's operation; the worker's degree of economic dependence on the alleged employer; the worker's ability to experience profit or loss in relation to the work performed; and the degree of discretion that the worker had over his or her time. The Director's delegate reached a conclusion that Mr. Meinster was an employee; the onus is on the appellant to establish errors made in this conclusion.

Astrolabe's submissions do not address these key factors, and instead repeat the initial allegation that Mr. Meinster is an independent contractor by virtue of the oral agreement between the parties as alleged by Astrolabe. Counsel for Mr. Meinster made the following submission in reply to Astrolabe's written submissions:

"It is submitted that the Appellant steadfastly, consistently, consciously and deliberately declined to cooperate with the Director's investigation and specifically declined to provide material, documents, payroll records or other information, orally or in writing. It is essentially from the consequences of this lack of cooperation that the Appellant now Appeals. The Appellant is asking this Tribunal to review the Director's decision as unfounded on the facts when the Appellant consciously and deliberately minimized the facts it provided to the Director. In point of fact, the Respondent submits that the Appellant continues to deprive both the Director and the Tribunal of the so called "facts". Nowhere, in any of the material, and conspicuously absent in the Reasons for Appeal, is there any reference to what evidence the witnesses will provide the Tribunal, or would have provided the Director, had such an opportunity been forced upon them."

There is merit to the points made in this passage. I have read the three affidavits sent to the Tribunal by Astrolabe, all sworn on September 18, 1997 by Maurice Gagné, Manu Khera and Geoffrey Davis. I treat these affidavits as being tendered in support of Astrolabe's request for an oral hearing, and hold that they should not be admitted into evidence on the merits of the appeal, primarily because this appeal will be decided without an oral hearing. In any event, I am not impressed by these affidavits even if I were to admit them and give them weight as evidence filed on the appeal. I find Mr. Gagné's affidavit to be as narrowly and carefully worded as his initial cryptic response to the Director's investigation, and as a whole, his evidence does not cause me to doubt in any way that the Determination is mistaken on the facts. Mr. Khera's affidavit, in fact, confirms Mr. Meinster's assertion that he performed some bookkeeping or accounting tasks for the company. All of these facts, in any event, could and should have been put to the Director's delegate in the course of the investigation.

I find that Astrolabe has failed to establish any reason why the Determination is in error, either in fact or in law.

Finally, Astrolabe submits that it is prejudiced in preparing its case because it has not received the complete file and notes of the Director's delegate. No specific concerns are raised as to why the delegate's notes ought to have been produced. This Tribunal does not customarily order production of handwritten notes or other documents created by the Directors' delegate, and in the absence of any reason why the lack of such information has caused some prejudice to the Appellant, I do not feel I should postpone deciding the appeal until Astrolabe has had access to these documents, if they exist.

ORDER

After carefully considering the evidence and argument, I find that Determination made by Mr. Smale is correct and the appeal should be dismissed. Pursuant to s. 115 of the *Act*, I order that Determination No. CDET 005944 is confirmed.

Ian Lawson
Adjudicator
Employment Standards Tribunal