Employment Standards TRIBUNAL

An appeal

- by -

Cambie Roofing Contractors Ltd. o/a Cambie Roofing & Drainage Contractors
(the "Appellant" or "Cambie Roofing")

- 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.: 2002/385

DATE OF DECISION: December 17, 2002

DECISION

OVERVIEW

This is an appeal by the Appellant, pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director's Delegate issued on May 29, 2002 (the "Determination"). In the Determination, the Delegate concluded that Mr. Rudy Hernandez ("Hernandez") and Mr. Nelson Osborne ("Osborne"), who had performed work for the Appellant from November 2000 to June 26, 2001, and September 2000 to June 25, 2001, respectively, were employees, not independent contractors, and were owed $1,366.20 and $2,685.15, respectively, on account of unauthorized deductions. The deductions were on account of workers' compensation premiums.

Hernandez and Osborne performed work as roofers for the Appellant. They were paid on the basis of the work done, either by the square foot or by the roll. Osborne provided his own vehicle. Hernandez and Osborne provided most of their own equipment, while the Appellant provided specialized equipment. The Appellant withheld and remitted statutory deductions. It also issued annual T-4 statements.

ISSUE

The basic issue to be resolved is whether the Delegate erred in his conclusion that Hernandez and Osborne were independent contractors.

FACTS AND ANALYSIS

The Appellant has the burden to persuade me that the Determination is wrong. For the reasons that follow, I am of the view that it has met that burden.

Section 1 defines "employee" and "employer," in fairly broad language, as follows:

> "employee" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person, an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person whoo has the right of recall;
>
> "employer" includes a person
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;

The application of the statutory definitions of "employee" and "employer" is not as easy or simple as one might have expected. A useful summary is set out 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* (2nd 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"."

The following observations from that case are also relevant:

> While the party's intent is relevant in an action for wrongful dismissal, *i.e.*, an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor. It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (see, for example, *Machtinger v. HOJ Industries Ltd*., [1992] 1 S.C.R. 986). As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

The Appellant, as mentioned, is of the view that Hernandez and Osborne were independent contractors and, as such, the deductions for workers' compensation were proper.

The Appellant generally argues that the Delegate applied the "wrong test." The Appellant also takes issue with specific elements of the tests applied by the Delegate. The Appellant argues that the Delegate "misconstrued" the "control" test, and erred in his application of the so-called "integration" test and the "economic reality test." The Appellant says that the Delegate erred in his finding that Hernandez and Osborne were "integral" to the operations of Cambie Roofing and that an "ordinary person" would consider them to be employees. The Delegate, says the Appellant, overlooked the facts that Hernandez and Osborne

> "were free to set their own hours, did not report to its office, and did not maintain any equipment or presence there, in contrast to the actual employees...."

The Delegate also overlooked the facts that the two were "free to work for other roofing companies, and did so" and was incorrect in finding that Hernandez and Osborne provided services to it on an "ongoing basis."

The Delegate considered the statutory definitions of "employee," "employer" and various relevant common law tests--including the "control" test, the "integration" test, the "economic reality" test, and the "specific result" test--often used to give meaning to these definitions. These tests, considered in light of the statute and its purposes, are commonly utilized by the Director's delegates, and, indeed, courts and this Tribunal, to assists in the determination of employee status. In the view of some legal scholars, these tests really boils down to asking "whose business is it?" (See Christie et al., *Employment Law in Canada*,

Toronto: Butterworth, 1998, at para. 2.11). I agree with those comments. Broadly speaking, that was, as well, the focus of the Delegate's analysis.

While I may have concerns about specific tests, and their application to specific fact patterns, I am not persuaded that there is any merit to this general argument that the Delegate applied the "wrong test" generally. Even if it can be shown that there is an error in the application of a particular aspect of a particular test, that may not be fatal to the Determination. It depends of the seriousness of the mistake.

The Delegate concluded, as noted by the Appellant, that "an ordinary person" would be of the view that they were employees. I agree with the Appellant's argument that the "ordinary person's" view of the relation between it and Mr. Hernandez and Mr. Osborne is irrelevant and, indeed, wrong. There is, as far as I am aware, no legal foundation for this test. There is, as well, no factual basis or evidence for the Delegate's assertion of this "ordinary" person's view. In my view, this is a serious legal error. While this is only one part of the analysis, I am sufficiently concerned that the Determination cannot stand.

In any event, on the facts before me, I am persuaded that the Delegate was, indeed, wrong in his conclusion that Mr. Hernandez and Mr. Osborne were employees, looking at their relationship with the Appellant as a whole in light of the statute and tests.

Hernandez and Osborne performed work as roofers for the Appellant. They were paid on the basis of the work done, either by the square foot or by the roll. Osborne provided his own vehicle. Hernandez and Osborne provided most of their own equipment, while the Appellant provided specialized equipment.

The Appellant withheld and remitted statutory deductions. It also issued an annual T-4 statement. Certainly, the deductions and remittance of taxes, E.I. and C.P.P. is typical for the employment relationship. That is the case, as well, for T-4s. The Appellant correctly concedes that the deductions are consistent with an employee relationship, rather than that of independent contractors, but says that this was

> "not done because they were employees. Instead, this was done simply to protect Cambie Roofing from any possible exposure of risk and to avoid any possibility of subsequently being faced with demands for these payments. This was discussed with Hernandez and Osborne beforehand, and they agreed to it willingly, as it spared them the administrative cost and effort of calculating their own deductions."

Nevertheless, says the Appellant, all the circumstances point to Osborne and Hernandez being independent contractors.

A letter from the Delegate to the Appellant, attached to the appeal, confirms that

> "You have provided complete payroll records for both Hernandez and Osborne. These records indicate gross earnings including regular wages, vacation pay, statutory holiday pay and all statutory deductions. It does not appear that Hernandez and Osborne are owed any additional wages. However, your records also indicate that 8% was deducted from each gross pay for workers' compensation payments in the following amounts:
>
> ....Hernandez 1,306.45
>
> ....Osborne 2,567.27

The Appellant responded in writing to this, before the Determination was issued, and denied that Osborne and Hernandez received regular wages, statutory holiday pay and statutory holiday deductions. No documents are attached to the appeal to support this.

Unfortunately, the Respondent Complainants, Osborne and Hernandez, did not participate in this appeal. It appears from the Determination that they, while agreeing on some facts, disagreed with others. The Delegate, obviously, seeks to uphold the Determination and argues:

> "The appellant has not provided any new information to show how these tests were "misconstrued" or that there was an error in the facts, an error in interpreting the law, or that there were other facts that weren't considered during the investigation. The appellant merely states that the Delegate erred in her findings without detailing how she erred. All information provided in the appeal has been addressed in the Determination."

As suggested above, this is not entirely correct. Moreover, it is not helpful. For the purposes of this appeal, therefore, I am largely left with the facts asserted by the Appellant.

The Appellant questions the factual basis for the Delegate's analysis:

- Osborne and Hernandez did not have an ongoing relationship with Cambie Roofing. They were hired on a "job by job basis, on specific projects." They were never engaged on a basis that extended beyond a specific project.
- They bid for work. They were paid on a "piece rate basis," by the roll. The rate per roll varied from $18.00 to $26.00.
- They owed an supplied their own equipment, propane torches, cutting tools, safety equipment and vehicle.
- Osborne and Hernandez were free to hire their own employees to assist them in the work. These workers were paid by them, and not Cambie Roofing. Osborne and Hernandez were not paid extra for the work, they were, as mentioned by the roll.
- They were free to work for other roofing companies. The Appellant's understanding is that they did so.
- They invoiced Cambie Roofing, with draws at intervals before the completion of each project.
- They set their own days and hours of work.
- They were not supervised by Cambie Roofing.
- Osborne and Hernandez did not report to the Appellant's office

In the circumstances, I am persuaded that the Delegate erred. In particular, I am persuaded by the fact that there was no "ongoing" relationship between Mr. Hernandez and Mr. Osborne and the Appellant, rather they bid for work on projects. That, in my mind, is different from a typical employment relationship. The fact that they provided their own tools can point towards an independent contractor

relationship, although the provision of tools is also found in employment relationships. The fact they were free to work for others and, especially, that they could hire employees (and did so) to do the Appellant's work carry significant weight in my judgement. The obligation to provide personal service is one of the hallmarks of the employment relationship.

The appeal succeeds.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determinations in this matter, dated May 29, 2002 is cancelled.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal