Employment Standards TRIBUNAL

An application for Reconsideration

- by -

Vantage Equipment Company Ltd.
("Vantage")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2005A/177

DATE OF DECISION: December 6, 2005

DECISION

SUBMISSIONS

Graham N. Rudyk	for Vantage Equipment Company Ltd.
Ian MacNeill	for the Director of Employment Standards

INTRODUCTION

1. This is a timely application filed by Vantage Equipment Company Ltd. ("Vantage") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal Member's decision issued on August 5th, 2005 (B.C.E.S.T. Decision No. D121/05). The Tribunal Member confirmed a Determination that was issued by a delegate of the Director of Employment Standards on April 12th, 2005 (the "Determination"). By way of the Determination, Vantage was ordered to pay its former employee, Gordon C. Ballard ("Ballard"), the sum of $7,040.90 on account of unpaid wages and section 88 interest. In addition, Vantage was also ordered to pay a further $500 administrative penalty [see section 29(1)) of the *Employment Standards Regulation*] for having contravened section 18 of the *Act.*

2. This application is being adjudicated based on the parties' written submissions. I have before me counsel for Vantage's submissions dated September 29th and November 4th, 2005 and the delegate's submission dated October 27th, 2005. Mr. Ballard did not file a submission. I have also reviewed and considered the Tribunal Member's reasons for decision, the delegate's written reasons and the "record" that was filed with the Tribunal pursuant to section 112(5) of the *Act.*

PREVIOUS PROCEEDINGS

Proceedings before the Employment Standards Branch

3. Vantage carries on business in Duncan as a vendor of used mining and construction equipment. Vantage purchases used equipment, ensures that such equipment is in good repair, and then re-sells it. On November 4th, 2004, Mr. Ballard filed a complaint against Vantage alleging that he had been employed as a mechanic and was owed over $10,800 in unpaid wages. The delegate held a "complaint hearing" on February 28th, 2005 and subsequently issued the Determination and accompanying "Reasons for the Determination" on April 12th, 2005.

4. A central issue before the delegate was Mr. Ballard's status—was he an "employee" or an "independent contractor"? After hearing the testimony of Mr. Hal Neumann (Vantage's principal), Mr. Ballard and Vantage's office administrator, Ms. Chartrand, the delegate concluded that Mr. Ballard was an "employee" and thus entitled to the benefit of the wage protection provisions of the *Act.* Based on the parties' time records, the delegate concluded that Mr. Ballard was entitled to overtime pay, vacation pay and statutory holiday pay. The delegate did not award any compensation for length of service since Mr. Ballard voluntarily quit his employment [section 63(3)(c)].

The Appeal Proceedings

5. Vantage appealed the Determination on the ground that the delegate "erred in law" [section 112(1)(a)]. In essence, Vantage alleged that the delegate misinterpreted or otherwise failed to properly weigh the evidence before him and thus came to an erroneous conclusion that Mr. Ballard was an "employee". The delegate's unpaid wage calculations were not challenged.

6. The appeal was adjudicated based on the parties' written submissions. The Tribunal Member noted that the statutory definition of "employee" (section 1) must be interpreted broadly and that on a fair consideration of the evidence before the delegate one could readily conclude that the parties were in an employment relationship. Among other things, both the delegate and the Tribunal Member noted:

- Although Mr. Ballard could do other mechanical work for his own customers (using Vantage's shop and equipment as well as his own personal tools), the vast majority—87% to 90%—of his work was undertaken for Vantage's customers;

- Vantage directed and controlled Mr. Ballard's work by requiring him to give priority to work for Vantage's customers and work for Mr. Neumann's family;

- Mr. Ballard had a key to Vantage's premises and was directed to do other "non-mechanical" work when there was no mechanical work to be done;

- Mr. Ballard was instructed to keep detailed time records of his activities on behalf of Vantage;

- Although Mr. Ballard owned his own basic tools, he also used specialized tools that Vantage acquired (either by purchase or rental) for Mr. Ballard's use and Vantage allowed Mr. Ballard to use Vantage's tools and premises without charge;

- All necessary parts were acquired and paid for by Vantage; and

- Over time, Mr. Ballard came to be an integral person within Vantage's business operations—he inspected, maintained, serviced and painted equipment; he demonstrated equipment for potential buyers; he also traveled to other locations to do work for Vantage's customers; he occasionally acted as a shipper/receiver and answered the telephone.

7. The Tribunal Member concluded (at page 7 of her Reasons):

> It is not appropriate for the Tribunal to interfere with the findings of fact made by the Director if they do not amount to an error of law, as contemplated by s. 112 of the *Act*, even if the Tribunal might not have reached the same findings of fact. The argument that Mr. Ballard was an independent contractor was presented to the delegate and was considered carefully. The Determination and the Record show that there was evidence to support the findings and conclusions reached by the delegate for the Director.
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> Based on the evidence before me, I find that Mr. Ballard was properly characterized as an "employee", and there is no evidence to support an error in law. I deny the appeal and confirm the Determination.

THE APPLICATION FOR RECONSIDERATION

8. Counsel for Vantage submits that the Tribunal Member's decision should be set aside because the Member made a "serious mistake in applying the law". In particular counsel says that both the delegate and the Tribunal Member were overly focused on the "nature" of the services provided by Mr. Ballard rather than the "manner" in which those services were provided.

9. Counsel notes that Mr. Ballard had at least 6 other customers, did not always attend the workplace and would leave to attend to personal errands, billed Vantage for his services and charged G.S.T., (counsel asserts that "collection of GST for services rendered and status as an employee are incompatible"), owned many of his own tools (including a van), enlisted the help of two other persons on one job, and purported to unilaterally increase his hourly rate. Counsel also submits "there is no basis at law for a finding that an independent contractor can evolve into an employee over time in the absence of an agreement, express or implied, that his status change".

THE RESPONDENTS' SUBMISSIONS

10. As noted above, Mr. Ballard did not file a submission; the Director's delegate, in a brief submission dated October 27th, 2005, simply stated that the application is yet another attempt to re-argue points that have previously been fully aired and considered.

ANALYSIS

11. I consider this application to be wholly devoid of merit. This application simply asks the Tribunal to take a *third* look at the uncontradicted evidence and then reach a different conclusion. This application does not establish a proper basis for the exercise of the Tribunal's discretionary reconsideration power. Not only am I not prepared to revisit the delegate and Tribunal Member's findings of fact and law, in my view, both the delegate and the Tribunal Member came to the only proper conclusion open to them on the facts of this case.

12. Undoubtedly, there was some evidence supporting the notion that Mr. Ballard was an independent contractor—he owned some of his own tools, he had some of his own customers, and he billed Vantage for his services as if he were a self-employed businessman. All of these latter matters were fully (and, in my view, correctly) addressed in the previous decisions. However, on balance the evidence clearly shows that Mr. Ballard was an employee during the period in question.

13. I am unable to accept counsel for Vantage's submission that the submissions of invoices and billing G.S.T. conclusively proves Mr. Ballard's independent contactor status—the courts and this Tribunal have long held that the "form" of the parties' relationship must always give way to the underlying substance. The fact that a person invoices for services rendered (including G.S.T.) can support the assertion that the person is a contractor, but this one fact is hardly conclusive. Ultimately, the decision-maker must consider all of the relevant facts and circumstances without giving undue weight to any one fact or circumstance.

14. Nor am I satisfied that an independent contractor cannot "evolve" into an employee over time in the absence of some express or implied agreement between the parties. A person's status flows from the nature and substance of the parties' relationship rather than the form their contractual agreement may

take. However, this latter issue is not before me since we are not concerned in this case with the parties' entire relationship, only the 6-month period in question (February 1st to July 31st, 2004)—during that time frame the evidence clearly shows that the parties were in an employment relationship. Further, I am not satisfied that there is any merit to the notion that Mr. Ballard "evolved" from a contractor to an employee—the delegate made no such finding and I am not satisfied such a finding would have been justified in any event.

ORDER

15. The application to vary or cancel the decision of the adjudicator in this matter is **refused.**

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal