

An appeal

- by -

David A. Gillies carrying on business as Tru-Line Painting

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**PANEL:** Maia Tsurumi

**FILE NO.:** 2019A/1

**DATE OF DECISION:** March 25, 2019

## DECISION

### SUBMISSIONS

David A. Gillies on his own behalf carrying on business as Tru-Line Painting

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), David A. Gillies carrying on business as Tru-Line Painting (“Tru-Line”) has filed an appeal of a determination (the “Determination”) issued by Elaine Ullrich, a delegate (the “Delegate”) of the Director of Employment Standards, on December 13, 2018. In the Determination, the Delegate found that Tru-Line contravened sections 18, 21, 45, and 58 of the *ESA*. In the result, she ordered Tru-Line to cease contravening the *ESA* and to pay \$2,488.88 to Steven Dundass (the “Complainant”) and to pay \$2,000 in administrative penalties.
2. Tru-Line appeals the Determination on the grounds that: (1) the Delegate failed to observe the principles of natural justice in making the Determination; and (2) evidence has become available that was not available at the time the Determination was made. Tru-Line seeks to have the Determination varied and/or cancelled.
3. I have decided that this appeal is appropriate for consideration under sub-section 114(1) of the *ESA*. Under sub-section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without hearing, for any of the following reasons:
  - a. the appeal is not within the jurisdiction of the tribunal;
  - b. the appeal was not filed within the applicable time limit;
  - c. the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
  - d. the appeal was made in bad faith or filed for an improper purpose or motive;
  - e. the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
  - f. there is no reasonable prospect that the appeal will succeed;
  - g. the substance of the appeal has been appropriately dealt with in another proceeding;
  - h. one or more of the requirements of section 112(2) have not been met.
4. Pursuant to sub-section 114(1)(f), I dismiss the appeal and confirm the Delegate’s Determination.
5. This decision is based on the submissions made by Tru-Line in its Appeal Form, the sub-section 112(5) record (the “Record”), the Determination, and the Reasons for the Determination (the “Reasons”).

### ISSUE

6. The issue before the Employment Standards Tribunal is whether all or part of this appeal should be allowed to proceed or be dismissed under sub-section 114(1) of the *ESA*.

## ARGUMENT

7. Tru-Line submits that the Delegate failed to observe principles of natural justice in making her Determination and also says that evidence has become available that was not available at the time the Determination was made. Specifically, Tru-Line says that:
  - a. The Complainant agreed to work for Tru-Line as a sub-contractor; and
  - b. Tru-Line has a witness who will testify that the Complainant agreed to work as a sub-contractor.
8. Tru-Line wants the Tribunal to vary and/or cancel the Determination.

## THE FACTS AND ANALYSIS

### Background

9. David A. Gillies carrying on business as Tru-Line Painting is a registered proprietorship. It was registered as of June 3, 2018, and Mr. Gillies is the sole proprietor. Tru-Line operates a commercial and residential painting business.
10. The Complainant worked as a painter for Tru-Line from May 28 to August 8, 2018, at a rate of pay of \$22.00 per hour. He filed his complaint on August 31, 2018.
11. The Delegate held a hearing on November 26, 2018, and issued her Determination on December 13, 2018.

### Issues Before the Delegate

12. The issues before the Delegate were: (1) whether the Complainant was an employee as defined by the *ESA*; and (2) if so, was the Complainant owed any wages?

### Evidence and Submissions at the Hearing

13. The Complainant said that he responded to an advertisement for a painter which Mr. Gillies had posted on a job search website. On May 28, 2018, the Complainant met Mr. Gillies at a Tim Horton's parking lot and had a 10-minute interview. Mr. Gillies offered \$22.00 per hour, 40 hours per week, and told the Complainant that he would be working as a sub-contractor. The Complainant accepted those terms and started work immediately.
14. Although the Complainant agreed to work as a sub-contractor, he said that he could not do other work because he worked full-time for Tru-Line.
15. Mr. Gillies told the Complainant that if he wanted to quit, he had to give two weeks' notice.
16. The Complainant produced text messages that showed Mr. Gillies regularly gave him direction on how to do his work. The Complainant was told, either the night before or the morning of, via text message, phone, or in-person, where he would be working each day. Tru-Line provided paint brushes, roller cages

and sleeves, poles, putty for filling holes, and drop sheets. However, the Complainant preferred to use his own brushes for interior work because they were of better quality and easier to use for the finer detail work.

17. The Complainant regularly started work at 8:00 a.m. and finished around 4:00 p.m. Mr. Gillies told the Complainant to track his hours and issue an invoice using his own name. For the hearing, the Complainant provided a daily record of hours showing the sites he worked, the type of work he performed, the start and end times of each day, and when he took his breaks. On a semi-monthly basis, the Complainant attached his daily records of hours with his invoice and submitted it to Tru-Line for payment. Tru-Line paid all of his invoices, except for his final pay period of July 25 to August 8, 2018.
18. The Complainant never received any money for the July 25 to August 9, 2018, pay period. He provided a daily record of hours and an invoice to show his request for unpaid work of 70.25 hours for this period. The Complainant produced a text message from August 20, 2018, in which he asked Mr. Gillies about his pay cheque for the July 25 to August 9, 2018, period. Mr. Gillies responded that he was waiting for money from the builder and that Tru-Line would be “back charging” the Complainant for his portion of 16 hours of work on wainscoting that had to be redone.
19. On June 15, 2018, the Complainant asked Mr. Gillies why he was not paid the full amount of his invoice. Mr. Gillies replied that he deducted the amount for WorkSafeBC insurance. The evidence was that Tru-Line made deductions in varying amounts on each of the Complainant’s pay cheques for Tru-Line’s WorkSafeBC coverage totalling \$237.03.
20. Shortly after the hearing began, Mr. Gillies became upset with the Complainant’s evidence. He interrupted the Complainant’s testimony and disagreed with the Complainant’s statements about why he (the Complainant) thought he was an employee of Tru-Line. Mr. Gillies’s anger escalated, and he swore at and threatened the Complainant before leaving the hearing at about 9:15 a.m.
21. Before Mr. Gillies left the hearing, he said that the Complainant agreed to work as a sub-contractor and therefore Tru-Line did not make any tax deductions from the Complainant’s pay cheques; only deductions for WorkSafeBC insurance were made. The Complainant worked under Tru-Line’s WorkSafeBC insurance because he did not have his own coverage. Mr. Gillies agreed that the amount of \$237.03 deducted was probably close to the total amount deducted.
22. Mr. Gillies submitted the same daily record of hours and invoices as the Complainant, with the exception of the invoice for the final pay period of July 25 to August 8, 2018.

### Delegate’s Findings and Analysis

#### *Employment status*

23. The first question the Delegate addressed was whether the Complainant was an employee, as defined by the *ESA*, or an independent contractor.

24. The Delegate considered the definitions of “employee”, “employer”, and “work” in section 1 of the *ESA*:
- “**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 who has a 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;
- “**work**” means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
25. She noted that the *ESA* is remedial and benefits-conferring. It is to be given a broad and liberal interpretation, as are its definitions. This requires an interpretation of the *ESA* that extends its protections to as many persons as possible and encourages employers to comply with the minimum requirements of the *ESA*.
26. Section 4 of the *ESA* says that the requirements of the *ESA* cannot be waived or circumvented by agreement. Thus, the fact that a business may treat a person as an independent contractor (as Tru-Line did) or a worker may agree to be an independent contractor (as the Complainant did) does not prevent a finding that the person was in fact an employee under the *ESA*.
27. In order to decide whether a person was an employee or not, the substantive nature of the relationship must be evaluated. The definition of “employer” in the *ESA* indicates that the degree of control and direction exerted by the alleged employer over the alleged employee are important factors in determining whether there is an employment relationship.
28. The Delegate found that the work done by the Complainant was largely controlled by Tru-Line. Tru-Line decided the Complainant's wage rate and hours of work. It set the expectation for the work scheduling of 8:00 a.m. to about 4:00 p.m. Tru-Line exerted control when Mr. Gillies texted the Complainant about deducting WorkSafe costs from his pay. The evidence also showed that Tru-Line decided what work the Complainant would do and where it would be done.
29. The Delegate considered the question of “whose business is it” in assessing whether the Complainant was an employee. Mr. Gillies owned Tru-Line and contracted its services to do residential painting. Tru-Line was the entity that risked losing money on the painting venture. When work was done poorly, it was Mr. Gillies who took care of correcting the work and Tru-Line that suffered the loss. The Complainant was paid the same hourly rate for all hours worked, regardless of how he worked and evidenced by his regular semi-monthly payments.

30. If a person is performing work integral to the business, the person is more likely an employee. Tru-Line's business was painting commercial and residential properties. Painters are essential to this work and therefore the Delegate assigned considerable weight to the fact that the Complainant's position as a painter was highly integrated into Tru-Line's business.
31. Furthermore, Tru-Line provided all of the tools required to do the work. The Complainant used his own paint brushes for interior painting, but he was not required to do so.
32. There was no evidence that the Complainant was in business for himself, other than the fact that the parties had agreed that the Complainant would be an independent contractor.
33. In the result, the Delegate found that the Complainant was an employee under the *ESA*: Tru-Line directed and controlled the work relationship as an employer and the work done was for the direct benefit of Tru-Line and was fundamentally integrated into Tru-Line's business.

#### *Regular wages*

34. Having found that the Complainant was an employee, the undisputed fact that he was not paid for the July 25 to August 8, 2018, period, meant that Tru-Line violated section 18 of the *ESA*. Section 18 requires payment of all wages owed to an employee within 48 hours of termination of employment.
35. In terms of the amount of regular wages owing, the Delegate accepted the Complainant's evidence that he worked 70.25 hours in the July 25 to August 8, 2018, period and so was owed a total of \$1,545.50 (70.25 hours x \$22.00 per hour). While the evidence indicated that Tru-Line had intended to "back charge" the Complainant for his portion of the cost to fix deficient wainscoting work, as the Delegate had found that the Complainant was an employee under the *ESA*, such a deduction was impermissible. An employee must be paid wages for all work or services performed for another.
36. Tru-Line's contravention of section 18 of the *ESA* for unpaid wages was subject to a mandatory \$500 administrative penalty.

#### *Business expense*

37. The *ESA* requires the cost of doing business to be borne by employers, not employees: section 21. If an employer deducts money from an employee's wages or requires an employee to make payments for any business costs, these amounts are considered wages and can be recovered under the *ESA*.
38. Tru-Line deducted \$237.03 from the Complainant's wages for WorkSafeBC premiums. This was a Tru-Line business cost. While the deduction was made with the Complainant's agreement, the *ESA* does not allow anyone to waive or agree to circumvent its requirements: section 4. Thus, the Complainant was owed \$237.03 in outstanding wages under section 21 of the *ESA*.
39. Tru-Line's contravention of section 21 of the *ESA* for deducting a business cost was subject to a mandatory \$500 administrative penalty.

### *Statutory holiday pay*

40. The Delegate found that the Complainant qualified for statutory holiday pay for Canada Day (July 2, 2018) and B.C. Day (August 6, 2018). While the Complainant did not work either of those holidays, he worked at least 15 of the previous 30 days prior to them and was employed for at least 30 days prior to the statutory holiday. Therefore, he was entitled to an average day's pay for each of those holidays: *ESA*, sections 44-46.
41. The average day's pay for each of July 2 and August 6, 2018, was calculated as follows:
- a. Canada Day (July 2, 2018): 7.80 average hours x \$22.00 per hour = \$171.60; and
  - b. B.C. Day (August 6, 2018): 7.44 average hours x \$22.00 per hour = \$163.68.
42. The total amount of statutory holiday pay owing was \$335.28.
43. Tru-Line's contravention of section 45 of the *ESA* for failing to pay statutory holiday pay was subject to a mandatory \$500 administrative penalty.

### *Annual vacation pay*

44. Annual vacation pay is payable on termination of employment: section 58. The Delegate found that the Complainant was owed vacation pay on his total gross wages paid to him during the course of his employment in the amount of \$340.55. This was calculated as 4% of the total following amounts:
- a. Regular wages owed July 25 to August 8, 2018: \$1,545.50;
  - b. Regular wages paid May 29 to July 24, 2018: \$6,633.00; and
  - c. Statutory holiday pay owed: \$355.28.
45. Tru-Line's contravention of section 58 of the *ESA* for failing to pay annual vacation pay was subject to a mandatory \$500 administrative penalty.

### *Accrued interest*

46. The Complainant was entitled to interest pursuant to section 88 of the *ESA*.

### Analysis

47. Tru-Line submits that the Delegate failed to observe principles of natural justice because the Complainant agreed to work as a sub-contractor and not as an employee. Tru-Line also submits that it now has a witness who will testify that the Complainant made this agreement.
48. Tru-Line asks me to review the same evidence that was before the Delegate and come to the opposite conclusion as her – that the Complainant was not an employee.

49. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- a. the director erred in law;
  - b. the director failed to observe the principles of natural justice in making the determination;
  - c. evidence has become available that was not available at the time the determination was being made.

50. Below, I first consider the two grounds raised by Tru-Line in this Appeal. I then consider whether the Delegate made an error of law.

*Breach of natural justice*

51. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure that parties know the case made against them, are given an opportunity to reply to the case against them and have its case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.
52. There is nothing in the Appeal Form, Record, Determination, or Reasons that indicates there was a breach of natural justice. Tru-Line knew the complaint against it, had an opportunity to reply to this complaint, and had their case heard by an impartial decision-maker.
53. I note that while Tru-Line may not have taken full advantage of its opportunity to reply to the complaint against it, as Mr. Gillies left the hearing shortly after it began, that was not a breach of procedural fairness by the Delegate. The hearing was Tru-Line's opportunity to respond fully to the case against it. Tru-Line does not get another chance to tell its version of events on appeal. This point is addressed further below in relation to Tru-Line's submissions about new evidence.

*New evidence*

54. In its Appeal Form, Tru-Line made further evidentiary submissions. For example, that the Complainant provided all of his own tools. I cannot take these submissions as evidence.
55. An appeal is decided on the record before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c).
56. The Tribunal in *Bruce Davies et al.* provided guidance on how the Tribunal applies sub-section 112(1)(c):
- This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence ... [The evidence] must meet four conditions:



- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably culpable of belief; and
- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue:

*Bruce Davies et al.*, BC EST # D171/03 at p. 3.

57. None of Tru-Line's submissions in its Appeal Form meets the Tribunal's test for admitting fresh evidence. Tru-Line's submissions reiterate what it said at the hearing—i.e., that the Complainant agreed to be a sub-contractor—and attempt to expand on Tru-Line's version of events. Tru-Line had the opportunity to put this evidence, including the witness it says was present when the Complainant agreed to work as a sub-contractor, before the Delegate at the hearing, but it did not do so. With an exercise of due diligence, this witness could have been asked to testify prior to the Determination being made. In any event, the evidence of this witness could not change the result because it goes to a fact that the Delegate accepted: that the Complainant had agreed to work as a sub-contractor. Based on all of the other evidence, the Delegate found that the Complainant was an employee.

#### *Error of law*

58. Even though Tru-Line did not rely on an error in law in this appeal, I have considered whether there was any such error.
59. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:
- a. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
  - b. a misapplication by the decision-maker of an applicable principle of general law;
  - c. where a decision-maker acts without any evidence;
  - d. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
  - e. where the decision-maker is wrong in principle.
60. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 Bcest 5 at para. 36.
61. The *ESA* does not allow appeals based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors of factual findings unless such findings raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing an error of law because of factual error is

stringent, requiring the appellant to show that the findings are perverse and inexplicable in the sense that they were made without any evidence, that they were inconsistent with, and contradictory to, the evidence or they were without any rational foundation: *Britco Structures Ltd.*, BC EST # D260/03 at p. 17.

62. For the reasons that follow, I find that the Delegate did not err in law in determining that the Complainant was an employee of Tru-Line.
63. The Delegate considered the applicable provisions in the *ESA* that are used to determine if someone is an “employee” under the *ESA*. She correctly noted that assessment of a person’s employment status is grounded in an application of these provisions of the *ESA*. She explained that the *ESA* must be given a liberal interpretation as it aims to encourage employers to comply with minimum requirements of the legislation and to extend its protection to as many employees as possible: *Regent Christian Academy Society*, BC EST # D011/14 at para. 41, citing *Machtinger v HOJ Industries Ltd.*, [1992] 1 SCR 986 at p. 1003.
64. Although the *ESA* casts a wider net as to who is an “employee” than the common law, common law tests of employment status can assist in determining status: see e.g. *Regent Christian Academy Society*, *supra*, at paras. 43 – 44; *Zip Cartage*, BC EST # D109/14, reconsideration refused BC EST # RD005/15. While there is no single, conclusive test, the Supreme Court of Canada has identified the following factors as potentially relevant:
- a. The level of control over the worker’s activities exercised by the employer;
  - b. Whether the worker or the employer supplies the tools;
  - c. The worker’s degree of financial risk;
  - d. The worker’s degree of responsibility for investment and management; and
  - e. The worker’s opportunity for profit or loss arising from the work:
- 671122 Ontario Ltd v Sagaz Industries Canada Inc.*, [2001] 2 SCR 983 at para. 47.
65. Also, in *Cove Yachts (1979) Ltd.*, BC EST # D421/99 at p. 5, the Tribunal listed a number of factors as being potentially relevant to determining whether a person is an employee or an independent contractor:
- a. The actual language of the employment contract;
  - b. Control by the employer over the “what and how” of the work;
  - c. Ownership of the means of performing the work (e.g. tools);
  - d. Chance of profit/risk of loss;
  - e. Remuneration of staff;
  - f. Right to delegate;
  - g. Discipline/dismissal/hiring;
  - h. Right to work for more than one “employer”;
  - i. Perception of the relationship;
  - j. Integration into the business;

- k. Intention of the parties; and
- l. Whether the work is for a specific task or turn.

66. The Delegate found that the work done by the Complainant was largely controlled and directed by Tru-Line. As stated by the Delegate, the definition of “employer” in the *ESA* indicates that the degree of control and direction exerted by the alleged employer over the alleged employee are important factors in determining whether there is an employment relationship.
67. The Delegate found that Tru-Line provided all of the tools required to do the work.
68. She also found that Tru-Line was the entity that risked losing money on the painting venture. When work was done poorly, Tru-Line took care of correcting the work and Tru-Line suffered the loss. The Complainant was paid the same hourly rate for all hours worked, regardless of how he worked. I note that while there was evidence that Mr. Gillies told the Complainant that he would be “back charging” the Complainant for his portion of wainscoting work completed during the July 25 to August 8, 2018, period that had to be redone, there was no evidence before the Delegate that this actually occurred as Mr. Gillies did not pay the Complainant at all for this period. In any event, even if the evidence had shown that there was some back charging for the wainscoting work, at no other time did the Complainant ever bear any loss incurred by Tru-Line because of the Complainant’s work.
69. The Delegate also considered whether the work performed by the Complainant was integral to Tru-Line’s business. She found that the Complainant’s work (painting) was essential to Tru-Line’s business and assigned considerable weight to the fact that the Complainant’s position as a painter was highly integrated into Tru-Line’s business.
70. There was no evidence that the Complainant was in business for himself other than the fact that the parties had agreed that the Complainant would be an independent contractor. While Tru-Line submits that it did not supply the work tools, as explained above, that evidence is inadmissible on appeal. In any event, even if it were admissible and credible, this would not make the Delegate’s Determination unreasonable. There was evidence on which she could conclude that the Complainant was an employee.
71. On a fair and reasonable reading of the Determination, it is apparent that the Delegate identified and considered the important factors from the *ESA*, as well as a number of the factors from common law tests that the Tribunal has identified as being potentially relevant. The Delegate thus approached the issue in the manner required by the *ESA* and endorsed by the Tribunal.
72. In summary, the Delegate’s Determination was reasonable: she applied the appropriate legal tests to her findings of fact and these facts were grounded on the evidence before her.

### *Summary*

73. In summary, I find that Tru-Line’s appeal has no reasonable prospect of succeeding and therefore I dismiss it under sub-section 114(1)(f) of the *ESA*.

**ORDER**

- <sup>74.</sup> Pursuant to sub-section 115(1) of the *ESA*, I order the Determination, dated December 13, 2018, confirmed in the amount of \$4,488.88, together with any interest that has accrued under section 88 of the *ESA*.

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**Maia Tsurumi**  
**Member**  
**Employment Standards Tribunal**