

An appeal

- by -

Xanthous Services Corp. carrying on business as
Pinnacle Building Maintenance
("Pinnacle")

- 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2010A/153

DATE OF DECISION: January 6, 2011

DECISION

SUBMISSIONS

Jose N. Gallardo	on his own behalf
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

1. Xanthous Services Corp., carrying on business as Pinnacle Building Maintenance (“Pinnacle”), appeals a Determination of the Director of Employment Standards dated September 21, 2010 (the “Determination”). In the Determination, a Delegate of the Director (the “Delegate”) found that Pinnacle contravened sections 17, 21 and 58 of the *Employment Standards Act* (the “*Act*”) with respect to the employment of Jose N. Gallardo (“Mr. Gallardo”). The Delegate ordered Pinnacle to pay \$6,368.48, representing unpaid wages, vacation pay and accrued interest. The Delegate also levied three administrative penalties totalling \$1,500.00 for breaches of sections 17, 21 and 58 of the *Act*.
2. Pinnacle appeals the Determination on the sole ground that the Director of Employment Standards (the “Director”) failed to observe the principles of natural justice in making the Determination.
3. By way of remedy, Pinnacle is seeking the Tribunal to change or vary the Determination. While Pinnacle has not clearly set out the change or variation it is seeking, the written submissions of Pinnacle appear to suggest that Pinnacle is disputing the award of holiday pay in the Determination which Pinnacle argues is incorrect and falls outside of the limitation period in the *Act* for making a claim.
4. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedures*, the Tribunal may hold any combination of written, electronic and oral hearings. I note that none of the parties are seeking an oral hearing on this appeal and, in my view, this appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUE

5. The issue in this appeal is whether the Director failed to observe the principles of natural justice in making the Determination.

FACTS

6. Pinnacle operates a business providing janitorial and building and property maintenance services in British Columbia.
7. On April 16, 2010, Mr. Gallardo filed a complaint against Pinnacle alleging that he was engaged by Pinnacle to provide janitorial services to Pinnacle’s clients since September 2005 and Pinnacle contravened the *Act* by failing to pay him regular wages and making unauthorized deductions from his wages. More particularly, in his complaint, Mr. Gallardo listed twelve (12) items in respect of which he was seeking recompense. For the purposes of this appeal, I will list only those items that are relevant for this appeal, namely:

- (i) Deductions totalling \$1,178.32 by Pinnacle from Mr. Gallardo's paycheque for franchisee fees;
 - (ii) WCB deductions, on a monthly basis, by Pinnacle from Mr. Gallardo's paycheque;
 - (iii) Stop payment by Pinnacle on a cheque dated November 25, 2009, for \$2,124.74 (the "Bounced Cheque"), issued to Mr. Gallardo; and
 - (iv) Failure by Pinnacle to pay Mr. Gallardo \$1,470.00 for a cleaning contract at the Georgia Straight for the month of November 2009.
8. On July 20, 2010, the Delegate conducted a hearing into Mr. Gallardo's complaint (the "Hearing"). Mr. Gallardo attended on his own behalf at the Hearing and Ms. Susanne Wong ("Ms. Wong") attended on behalf of Pinnacle.
9. As Pinnacle has invoked the "natural justice" ground of appeal, it is important to note that in the section 112(5) "record" produced by the Director in the appeal, there is correspondence between the Delegate and both parties in advance of the Hearing evidencing that Pinnacle was aware of Mr. Gallardo's complaint and participated in the pre-hearing process. The pre-hearing correspondence includes delivery of registered mail and faxes to Pinnacle containing documents Mr. Gallardo presented with his complaint. It also includes the Director's demand for employer records (the "Demand") to Pinnacle. According to the Delegate, Pinnacle did not provide any records in response to the Demand as Pinnacle claimed that Mr. Gallardo was an independent contractor.
10. At the Hearing, the Delegate notes in the Reasons for the Determination, Ms. Wong gave evidence on behalf of Pinnacle. She submitted that she met with Mr. Gallardo in 2005 and offered him a franchisee agreement and informed him that he would be self-employed and not an employee of Pinnacle. She said also that she advised him that he would need to provide his own cleaning supplies, materials, uniforms, ID badges, and obtain a GST number and be responsible for his own WCB coverage. Mr. Gallardo, she said, agreed to then enter into a franchisee agreement with Pinnacle and to have royalty fees deducted from monthly payments due to him.
11. According to the evidence of the parties at the Hearing, it appears that Pinnacle contracts with clients to provide janitorial and building and property maintenance services for a negotiated rate and then offers the opportunity to service these clients to individuals it refers to as franchisees who enter into agreements with Pinnacle to be paid a negotiated rate for the duration of Pinnacle's contract with the clients. Pinnacle charges the franchisee an initial fee, together with monthly royalty fees, in exchange for the opportunity to provide services to Pinnacle's clients. In the case at hand, Mr. Gallardo signed an agreement with Pinnacle and, as part of that agreement, received the opportunity to service Pinnacle's client, Georgia Straight, for a term of five (5) years.
12. As Pinnacle disputed Mr. Gallardo's claim that he was an employee of Pinnacle, the Delegate reviewed the nature of the relationship between Pinnacle and Mr. Gallardo in this instance and further reviewed the agreement Mr. Gallardo signed with Pinnacle which contained, among other terms, the following:
 - We will provide a supervisor to help you get confident at your account for up to 3 shifts.
 - You are required to attend seminars and information sessions that are provided by the company.
 - When your supervisor gives you instructions, you must follow them. Our goal is to help you keep the customer happy and be as efficient as possible with time.
 - You must use the equipment and chemical package authorized by Pinnacle. No other chemicals are allowed on site.
 - You must always have your fax machine on and supplied with paper. As well you need to check it for messages on a daily basis.

- You must have a cell phone with you when you are cleaning.
- You must not contact the customer about challenges you are having at your account. Phone your supervisor first to find out what you are supposed to do.
- If you plan a holiday, you are responsible to find a temporary replacement and training them for while you are away. The replacement person must be pre-approved by Pinnacle 2 weeks prior to your holiday...
- If we feel there are too many complaints or that the quality of cleaning does not meet our standards, you will be put on Probation. This means that we will be inspecting your account more frequently and if there are further complaints or poor performance you may lose your account with no chance of being eligible for another account with Pinnacle.
- You must always wear your uniform and Pinnacle ID badge. Failure to do so will result in a fine of \$50 per person per incident. It is important to provide a professional image when at your account.

13. The Delegate also afforded Pinnacle the opportunity to make further written submissions after the Hearing concluded and Pinnacle took up that opportunity by having Ms. Wong submit written submissions dated August 4, 2010, on the issue of the status of Mr. Gallardo as well as some of the claims the latter was advancing.

14. The Delegate, in determining that Mr. Gallardo was an employee of Pinnacle and not an independent contractor, reviewed the definitions of “employee” and “employer” under the *Act* as well as the common law tests for determining employment relationship. While there were various aspects of Mr. Gallardo’s relationship with Pinnacle that contained indicia of an independent contractor relationship, there were numerous other factors that weighed in favour of an employer/employee relationship. On the balance, what appears to have been determinative on this issue for the Delegate is the latter’s conclusion that Mr. Gallardo was not in business for himself but instead working for Pinnacle’s business: More specifically, the Delegate reasoned:

Pinnacle secures the contract with the client. Pinnacle negotiates the price of the contract, the specific duties that will be performed along with the conditions under which either party can cancel the contract. The franchisee has no control over this. At any time either Pinnacle or the client can cancel the contract and the franchisee’s agreement is cancelled.

- In the letter dated September 26, 2006 Mr. Gallardo was specifically forbidden by Geri Patz [of Pinnacle] from contacting the client. If this was truly Mr. Gallardo’s business he would be free to contact the client whenever he chose to do so. Instead the two parties communicated with each other through Pinnacle.

There is no evidence to suggest the client even knew the janitorial services were not being provided by an employee of Pinnacle. Clients negotiated with Pinnacle, paid Pinnacle and communicated with Pinnacle. While working as a franchisee of the company Mr. Gallardo was required to wear a uniform and ID badge that identified him as a representative of Pinnacle.

It is also clear from the documentation provided by Mr. Gallardo that Pinnacle wields a significant amount of control and direction over the franchisee. The information package lays out a number of different requirements for its franchisees. For example, it indicates the ‘franchisee’ is required to follow directions given by a supervisor (the supervisor being an employee of Pinnacle). It also forbids a franchisee from discussing issues regarding the account with the client. Further it states directives such as ‘you are required to attend seminars...’ and ‘you must use the equipment and chemical package authorized by Pinnacle.’

...

If Mr. Gallardo was running his own business and sourced new customers, there should be no requirement for him to pay a franchisee fee and royalties to Pinnacle.

15. The Delegate, having determined that Mr. Gallardo was an employee of Pinnacle, proceeded to the next question, namely, whether Mr. Gallardo was owed any wages. While Mr. Gallardo itemized twelve (12) claims in his complaint as previously indicated, the Delegate dismissed all but four (4) claims and ordered Pinnacle to pay Mr. Gallardo the following:
- (i) \$3,591.74 consisting of \$2,121.74 for the “Bounced Cheque” and \$1,470.00 representing the wages owing to Mr. Gallardo in relation to the Georgia Straight contract (both of which Pinnacle acknowledged as owing to Mr. Gallardo according to the Delegate);
 - (ii) \$125.76 for reimbursement for the total deductions made by Pinnacle from the wages of Mr. Gallardo for the Workers’ Compensation coverage contrary to section 21 of the *Act*;
 - (iii) \$1,451.84 for reimbursement of the royalty fees from Mr. Gallardo’s wages from October 2009 to March 2010 in contravention of section 21 of the *Act*.

16. The Delegate also made a further order requiring Pinnacle to pay \$1,133.78 to Mr. Gallardo on account of vacation pay for the period 2008 to August 31, 2010, pursuant to section 58 of the *Act* based on the following reasoning:

As stated above the Act limits the collection of wages to those that became payable within 6 months of the date the complaint was filed. As Mr. Gallardo’s anniversary date falls on September 1st, Mr. Gallardo’s vacation pay for the year 2007 would have been payable on August 31, 2009. This falls outside of the wage recovery period. The vacation pay earned from 2008 was payable on August 31, 2010. The statements of earnings provided by Mr. Gallardo show he earned \$28,344.50 during this period. I find Mr. Gallardo is entitled to \$1,133.78 ($\$28,344.50 \times .04$) in annual vacation pay to date. I find the employer contravened section 58 of the Act on September 1, 2010.

SUBMISSIONS OF PINNACLE

17. Ms. Wong, on behalf of Pinnacle, makes very brief submissions in support of Pinnacle’s natural justice ground of appeal. I propose to set out those submissions verbatim below:

Pinnacle has agreed to pay for [sic] amount of \$2,121.74 for November 2009.

The contract for the Georgia Straight was no longer being cleaned as of November 2009. The last payment would be the cheque for \$2,121.74. Therefore, the calculation of holiday pay of 4% is also incorrect as wages earned in 2008 falls outside the period of 6 months [sic].

If, in fact, the determination deems that Jose Gallardo is an employee, does Pinnacle then deduct the source deductions off Jose Gallardo’s payment?

SUBMISSIONS OF THE DIRECTOR

18. The Director submits that while Pinnacle has appealed the Determination based on its allegation that the Director has failed to observe the principles of natural justice in making the Determination, Pinnacle has not provided any evidence to show how the Director failed to observe the principles of natural justice and, therefore, the Director is unable to respond to Pinnacle’s ground of appeal.
19. With respect to the allegation of Pinnacle pertaining to the calculation and award of vacation pay in the Determination, the Director states:

It appears from the fourth page of its submission the appellant is also alleging the Director erred in law by requiring it to pay the complainant vacation pay on the wages he earned in 2009. I have explained my reasons for this in the 4th paragraph on page R12. [I have set out that paragraph verbatim under the heading “Facts” earlier].

SUBMISSIONS OF MR. GALLARDO

20. I have reviewed Mr. Gallardo’s submissions which are in the nature of re-argument of his case, particularly with respect to those claims he advanced in his complaint which the Delegate rejected. He has attached some of the same documents he submitted to the Employment Standards Branch when he lodged his complaint against Pinnacle for reconsideration in Pinnacle’s appeal. I do not find it necessary to reiterate Mr. Gallardo’s submissions here except to say that if Mr. Gallardo was dissatisfied with the Determination with respect to those claims in his complaint the Delegate rejected, he had a right to appeal the Delegate’s Determination in a timely fashion, but chose not to do so. It is inappropriate for him to now re-argue his complaint in response to the appeal of Pinnacle.

ANALYSIS

21. Pinnacle’s appeal is rather limited. While in the Appeal Form, Pinnacle bases its appeal on the natural justice ground of appeal, I agree with the Director that Pinnacle has not provided any evidence to substantiate or support its allegation that the Director breached the principles of natural justice in making the Determination. Principles of natural justice are procedural rights that ensure that parties, particularly in administrative or adjudicative proceedings such as the Hearing in this case, are allowed an opportunity to learn the case against them, to present their evidence, and be heard by an independent decision maker.
22. In my review of the section 112(5) “record” adduced by the Director, as well as the submissions of Pinnacle and the Reasons for the Determination, I found no evidence of breach of natural justice on the part of the Director. Pinnacle was, in my view, properly informed of the case against it and allowed ample opportunity to respond to Mr. Gallardo’s complaint and did so. Further, the Delegate involved in conducting the Hearing appears to have acted impartially and there is no suggestion of bias on her part by Pinnacle. There is, in my view, absolutely no evidence of any unfairness in the conduct of the investigation and the Hearing in this case leading to the Determination. To the contrary, I find the Delegate, even after completing the Hearing, afforded Pinnacle to make further written submissions before the Determination was made and Pinnacle took advantage of that opportunity. Therefore, I reject Pinnacle’s natural justice ground of appeal.
23. I also note that while Pinnacle, in its written submissions on appeal, indicates that it has agreed to pay \$2,121.74 for November 2009, Pinnacle does not dispute the Determination insofar as the Director’s conclusion that Pinnacle also agreed that Mr. Gallardo was owed \$1,470.00 for work completed in the month of November pertaining to its client, Georgia Straight. The \$2,121.74 payment, which Pinnacle in its appeal confirms it has agreed to pay, relates to the cheque it issued to Mr. Gallardo in November 2009 for work performed by him in October 2009, but on which cheque Pinnacle stopped payment. Having said this, I also note that there does not appear to be any dispute with respect to any other awards in the Determination with the exception of the Delegate’s calculation of holiday pay pertaining to “wages earned in 2008”.
24. Pinnacle argues that vacation pay on wages earned in 2008 “falls outside the period of 6 months” limitation under the *Act*. In this regard, I note that section 58(1)(a) of the *Act* directs that vacation pay must be paid at a rate of “4% of the employee’s total wages during the year of employment entitling the employee to the vacation pay”. I also note that pursuant to section 57(2) of the *Act*, “an employer must ensure that an employee takes an annual vacation within 12 months after completing the year of employment entitling the employee to the vacation”.

Having said this, it should be noted that section 80 of the *Act*, which delineates the Director's jurisdiction to recover unpaid wages, does not limit the Director to the collection of vacation pay earned in the last 6 months of employment, but allows the collection of all vacation pay which is payable in that period (see *Re Creative Screens Arts Ltd.*, [1998] B.C.E.S.T.D. No. 52 (QL); *Re Khalsa Divan Society*, [1996] B.C.E.S.T.D. No. 101 (QL) reconsideration dismissed, [1996] B.C.E.S.T.D. No. 170 (QL)). In this case, pursuant to section 57(2) of the *Act*, Mr. Gallardo was entitled to vacation earned in 2008 within 12 months thereafter. In my view, when Mr. Gallardo filed his complaint on April 16, 2010, the vacation pay he earned outside the limitation period of section 80, but that was payable to him within that limitation period, was validly claimed by him and the Delegate, therefore, properly awarded the vacation earned by Mr. Gallardo in 2008 in his award. Therefore, I reject Pinnacle's request to vary or change the vacation pay awarded in the Determination.

25. Finally, I note that in the appeal submissions of Pinnacle, Ms. Wong, while not disputing the Delegate's conclusion that Mr. Gallardo was an employee of Pinnacle, asks whether Pinnacle is to "deduct the source deductions of Jose Gallardo's payment". The Delegate has not responded to that inquiry in her appeal submissions; however, I note that in the second paragraph of page 2 of the Determination, the Delegate provides Pinnacle with clear direction that "If statutory deductions are withheld from the wages payable to the employee...include a statement indicating the individual amounts remitted to Canada Revenue Agency." Therefore, Pinnacle, I would think, has the option to either submit the gross amount of the award made to Mr. Gallardo to the Director or, alternatively, if Pinnacle wishes to withhold any amounts on account of tax withholdings, then it should provide a statement to the Director indicating the amounts remitted to Canada Revenue Agency.

ORDER

26. Pursuant to section 115 of the *Act*, I order that the Determination dated September 21, 2010, be confirmed in all respects, together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal