

An appeal

- by -

Anna-Liisa Koivisto operating as Finn Custom Aluminum  
("Finn")

- 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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2004A/190

**DATE OF DECISION:** January 7, 2005

## DECISION

### SUBMISSIONS

Anna-Liisa Koivisto	on her own behalf
Cary Jarvis	on his own behalf
Rod Bianchini	on behalf of the Director

### OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Anna-Liisa Koivisto operating as Finn Custom Aluminium (“Finn”) of a Determination that was issued on October 12, 2004 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Finn had contravened Part 3, Section 18 of the *Act* in respect of the employment of Cary Jarvis (“Jarvis”) and ordered Finn to pay Jarvis an amount of \$3,494.88.

The Director also imposed an administrative penalty on Finn under Section 29(1) of the *Employment Standards Regulation* (the “*Regulations*”) in the amount of \$500.00. The total amount of the Determination is \$3,994.88.

Finn says the Director erred in finding Jarvis was an employee of Finn under the *Act*. The Appeal Form identifies the ground of appeal as being a failure by the Director to observe principles of natural justice in making the Determination, but the submission accompanying the appeal clearly identifies the substance of the appeal as being a more general disagreement by Finn with the Director’s conclusion that Jarvis was an employee under the *Act*. As Finn states in the opening line of the appeal submission:

The issue here is - Is Mr. Gary [sic] Jarvis employee of Finn Custom Aluminium or is he self employed subcontractor.

The substance of the appeal as it is set out in the appeal submission will be addressed in this decision (see *J.C. Creations Ltd.*, BC EST #RD317/03 (Reconsideration of BC EST #D132/03)).

### ISSUE

The issue raised in this appeal is whether the Director erred in concluding Jarvis was an employee of Finn under the *Act*.

### THE FACTS

Finn operates a siding business. Jarvis worked for that business from September 10, 2003 to February 26, 2004 as a siding applicator. He was paid a piece rate or an hourly rate, depending on the job.

Jarvis filed a complaint with the Director claiming he was owed wages by Finn.

In response to the claim made by Jarvis, Finn took the position no wages were owed as Jarvis was not an employee, but an independent contractor.

The Director received and reviewed the complaint, unsuccessfully attempted to mediate the dispute and ordered the parties to attend a hearing to present their respective positions on the claim being made.

Both parties were given an opportunity to present evidence and argument to the Director in support of their respective positions.

The Director found that Jarvis was an employee as defined in the *Act* and was entitled to be paid wages in accordance with its provisions. In making this finding, the Director noted several aspects of the relationship between Finn and Jarvis, including:

- The work performed by Jarvis for Finn was work normally performed by an employee;
- There were elements of control and direction by Finn of the work done by Jarvis, with Finn securing the work and telling Jarvis where to work and what to do;
- Finn hired other workers to assist Jarvis;
- Jarvis had no chance of profit or risk of loss beyond that normally associated with general employment; and
- Jarvis was not in business for himself, but was an integral part of Finn's business.

## ARGUMENT AND ANALYSIS

The burden is on Finn, as the appellant, to persuade the Tribunal that the Director committed some error in making the Determination such that the Tribunal should intervene. An appeal to the Tribunal is not intended to be simply an opportunity to re-argue positions that were taken during the complaint process or, in the absence of a reviewable error, to request the Tribunal take a different view of the facts than that taken by the Director. The grounds upon which an appeal may be made are found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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 made.*

On analysis, Finn has not shown there is any reviewable error in the Determination.

Finn has included documents in support of the appeal that were not presented to the Director during the complaint process. Where new, or additional, evidence is presented to the Tribunal with an appeal, the Tribunal uses the following considerations to determine whether it will be accepted:

- could the new evidence, with the exercise of due diligence, have been discovered and presented to the Director during the complaint process and prior to the Determination being made;
- is the new evidence relevant to a material issue arising from the complaint;
- is the new evidence credible, in the sense that it is reasonably capable of belief; and
- does the evidence have probative value, in the sense that if believed it could, on its own or in combination with other evidence, have led the Director to a different conclusion on the material issue.

It is clear all of the new evidence included with the appeal was reasonably available to Finn at the time of the Director's hearing but for reasons known only to Finn were not provided to the Director. As well, the relevance and the probative value of the new evidence is not apparent. In such circumstances, the Tribunal will not accept or consider the new, or additional, documents (see *Bruce Davies and others, Directors and Officers of Merilus Technologies Inc.*, BC EST #D171/03).

There is no basis for a suggestion that the Director failed to observe principles of natural justice in making the Determination. Finn was given opportunity to present its position on the status of Jarvis under the *Act* and an opportunity to respond to the position taken by Jarvis. I note again that while Finn raises the issue of natural justice on the Appeal Form, their submission does not raise or address any natural justice concerns.

There is a suggestion by Finn in the appeal submission that the Director ought to have been guided in deciding the status of Jarvis under the *Act* by a Canada Customs and Revenue Agency ("CCRA") ruling that found Jarvis was not an employee for the purposes of the Canada Pension Plan. While it would have been appropriate for the Director to have explained that rulings made by CCRA are not determinative of an individual's status under the *Act*, such omission does not affect the merits of the Determination. The Determination clearly indicates the decision on Jarvis' status under the *Act* was being decided on definitions found in the *Act* applied to the facts and assisted by reference to traditional common law tests.

In the same context, the Tribunal has consistently indicated that decisions made by CCRA under federal tax legislation have absolutely no bearing on an individual's status under the *Act*. The statutory definitions and purposes in the *Act* and the federal legislation are quite different and it is the application of the definitions and purposes of the *Act* which determines an individual's status for the purposes of a complaint under the *Act*.

Nothing in the appeal suggests the Director committed an error of law in deciding Jarvis' status under the *Act*. While a finding relating to an individual's status under the *Act* is a question of mixed fact and law, Finn has not argued, and I cannot conclude, that the Director erred in the legal analysis applied to the facts as found. The appeal does little more than argue the findings of fact made by the Director are all wrong and the conclusion is completely wrong. As the Tribunal stated in *Britco Structures Ltd.* BC EST #D260/03, that kind of circumstance does not raise an error of law, but rather a challenge to findings of fact and the Tribunal has no jurisdiction over questions of fact.

Finn says the Director failed to take into account how the exterior siding business works. With respect, even if such a consideration is relevant, there is no support for that statement. There is considerable commentary in the Determination indicating the Director was alert to the question of whether Jarvis was in business for himself operating as a subcontractor to Finn, like the two witnesses presented by Finn, but found on the evidence that he was not. The Director states:

I find Jarvis performed work of an ongoing general nature typical of the industry he was employed in.

The assertion by Finn that there is a “pool of independent contractors who install materials” that Finn supplies simply presupposes Jarvis was one such “independent contractor”, an assertion not accepted by the Director. Finn has not shown the Director committed a reviewable error in reaching that conclusion.

For the above reasons, I find the appeal to be without merit and dismiss it.

## **ORDER**

Pursuant to Section 115 of the *Act*, I order the Determination, dated October 12, 2004, be confirmed in the amount of \$3,994.88, together with any interest that has accrued under Section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**