

An appeal

- by -

NICO Industries Inc.
(“NICO”)

- 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/166

DATE OF DECISION: January 25, 2011

DECISION

SUBMISSIONS

John Dafoe

on behalf of the Director of Employment Standards

OVERVIEW

1. NICO Industries Inc. (“NICO”), through its Directors and Officers, Gary Nikolai (“Mr. Nikolai”) and Nancy Nikolai (“Ms. Nikolai”) (collectively the “Nikolais”), appeals, pursuant to section 112(1) of the *Employment Standards Act* (the “*Act*”), a Determination issued by a delegate of the Director of Employment Standards (the “delegate”) on October 4, 2010, ordering NIKO to pay Raimo Pasanen (“Mr. Pasanen”) the sum of \$7,797.10 on account of unpaid wages consisting of statutory holiday pay (s. 45), annual vacation pay (s. 58), compensation for length of service (s. 63), and section 88 interest (the “Determination”). By way of the Determination, NICO was also ordered to pay three separate \$500 monetary penalties for the said contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”). The total amount payable under the Determination is \$9,297.10. The Determination was issued following an oral hearing held on June 7, 2010, that was attended by both parties and subsequent written submissions by both parties.
2. NICO’s appeal is based on two grounds. The first ground of appeal is that the delegate erred in law in finding that Mr. Pasanen was an employee rather than an independent contractor, and that he was owed compensation for length of service on the basis that NICO failed to prove that it had just cause to terminate his employment. The second ground is that the delegate failed to observe the principles of natural justice in making the Determination.
3. NICO seeks an order cancelling the Determination.
4. NICO does not seek an oral hearing before the Tribunal and while the Tribunal has discretion whether to hold an oral hearing on an appeal - see Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575 – I have decided an oral hearing is not necessary in order to decide this appeal. Instead, I will decide the appeal based on the section 112(5) “record” submitted by the Director, the written submissions of the parties and the Reasons for the Determination.

ISSUES

5. Did the delegate err in law in finding that Mr. Pasanen was an employee rather than an independent contractor and entitled to compensation for length of service because NICO failed to prove it had cause to terminate his employment?
6. Did the delegate fail to observe the principles of natural justice?

FACTS

7. NICO operates a fabricating and construction business and Mr. Pasanen worked in various capacities for NICO starting in March 2004 and ending in November 2009 when NICO terminated its relationship with Mr. Pasanen.

8. In December 30, 2009, Mr. Pasanen filed a complaint under s. 74 of the *Act* alleging that NICO contravened the *Act* by failing to pay him annual vacation pay, statutory holiday pay, and compensation for length of service (“termination pay”).
9. The delegate, by way of a conference call, conducted a hearing on June 7, 2010 (the “Hearing”). At the Hearing, Mr. Nikolai, representing NICO, indicated that he was unable to proceed because none of the witnesses he intended to call were available at the time. He requested an adjournment to another date. The delegate, after listening to both Mr. Nikolai and Mr. Pasanen, concluded an agreement between the parties to provide him, by June 14, 2010, their written submissions and telephone contact information of all witnesses they intended to call, and what evidence each witness was expected to provide. The witnesses were to be contacted by the delegate and parties were to be given an opportunity to respond to any witness evidence including any additional evidence.
10. Subsequently, the parties, between June 14 and 21, 2010, inclusive, made written submissions to the delegate and relied on a single witness, Jim Perry (“Mr. Perry”), a former Project Manager for NICO, whom the delegate interviewed. The delegate summarized the evidence of Mr. Perry in his July 2, 2010, Preliminary Assessment and attached his interview notes to the said document which he provided to both parties in advance of the Determination.
11. In the Preliminary Assessment, the delegate considered the following questions:
 - Was Mr. Pasanen an employee of NICO or was he, as the Employer asserts, an independent contractor?
 - If he was an employee, do the payroll records show that he is owed annual vacation pay which was payable during the last 6 months of his employment?
 - If he was an employee, do the payroll records show that he is owed statutory holiday pay which was payable during the last 6 months of his employment?
 - If he was an employee, was he employed on one or more construction sites by an employer whose principal business is construction and, therefore, exempted from entitlement to termination pay?
 - If he was an employee and not exempted from entitlement to termination pay, did the employer have cause to terminate Mr. Pasanen’s employment?
12. The delegate analyzed the evidence adduced by both parties and after delineating both the definitions of “employer” and “employee” in the *Act* and the common law tests for determining whether an employer/employee relationship exists, concluded that Mr. Pasanen was an employee. In arriving at this conclusion, the delegate reasoned as follows:

Mr. Pasanen, over the course of his association with NICO, performed a number of roles. He was first hired as an installer, but worked in the shop fabricating cabinetry and performed the role of shop foreman. He was paid by the hour and the records indicate some instances where he was paid time and a half for hours worked in excess of 8 hours per day. Based on the pay records he was reimbursed for his parking when it was required for site jobs. Over the final 5 months of his work for NICO, the vast majority of his hours appear to have been shop hours.

In determining whether an individual is an employee or an independent contractor, I must consider the broad definitions of “employee” and “employer” under the Act, but also the common law test for an employment relationship. Some of the factors that the common law tests consider include, the question of who had control over how the work was performed, who owned the tools required to do the work, who had the chance of profit and risk of loss from the enterprise, whether the work was ancillary to the work of the employer or part of the core work performed by the employer. In the present case it would appear that

NICO was fully in control of the work, that only NICO had the chance of maximizing profit or the risk of loss from the enterprise and that the work was part of the core work done by NICO. While Mr. Pasanen provided some of his own tools, it is standard for a carpenter to provide some basic hand tools. I do not have any information as to whether Mr. Pasanen provided any larger equipment for use in the work, but I am satisfied that, when looking at the relationship in all its aspects, that Mr. Pasanen was an employee of NICO and, therefore, entitled to the protections of the Employment Standards Act.

13. The delegate then went on to find that the records NICO submitted did not provide any indication that any vacation pay was paid to Mr. Pasanen at any time. The delegate then went on to determine that Mr. Pasanen's income, during the relevant period covering his vacation pay claim, totalled \$112,935.05 and Mr. Pasanen therefore was entitled to 4% of that amount for vacation pay for a total of \$4,517.40.
14. Next, the delegate considered Mr. Pasanen's claim for statutory holiday stating that NICO's records did not show any statutory holiday payment to Mr. Pasanen for the last 6 months period of his employment. The delegate calculated holiday pay owing to Mr. Pasanen, for the said period, at \$1,166.22.
15. With respect to the question of Mr. Pasanen's entitlement to termination pay, the delegate, prior to delving into the question of whether or not NICO had cause to terminate Mr. Pasanen's employment, considered whether or not section 65(1)(e) of the *Act* exempted Mr. Pasanen from entitlement to termination notice under section 63. Section 65(1)(e) provides that sections 63 and 64 of the *Act* do not apply to an employee "employed at one or more construction sites by an employer whose principal place of business is construction". In this case, the delegate noted that while a significant period of Mr. Pasanen's employment with NICO would come within the meaning of section 65(1)(e) since he worked at one or more construction sites for NICO (who is in the construction business), in the last 5 months of his final period of employment with NICO the nature of Mr. Pasanen's employment changed as he was largely working in NICO's workshop. As a result, the delegate held that section 65(1)(e) would not have the effect of exempting Mr. Pasanen from entitlement to termination pay, if he was otherwise entitled to termination pay under section 63.
16. With respect to the final question in the delegate's Preliminary Assessment - that is, if Mr. Pasanen is an employee and not exempted from entitlement to termination pay, did NICO have just cause to terminate his employment - the delegate noted that the onus was on NICO to prove just cause for the termination of Mr. Pasanen's employment. While NICO asserted that Mr. Pasanen was terminated for just cause for harassing another employee of NICO, Babs Link ("Ms. Link"), by making some inappropriate comments about her, Ms. Link was not available to testify or unwilling to participate in the investigation. However, according to Mr. Perry, NICO asked him to investigate the matter and he determined that it was another employee and not Mr. Pasanen who made inappropriate remarks. Mr. Perry also shared this conclusion with the Nikolais but they proceeded with their decision to terminate Mr. Pasanen's employment. According to the delegate, based on these circumstances, Mr. Pasanen's employment was not terminated for cause and he was, therefore, entitled to termination pay of 2 weeks' wages, which the delegate calculated at \$1,952.31.
17. After the delegate sent his Preliminary Assessment to both parties for their review, Mr. Nikolai, on behalf of NICO, responded with further written submissions to the delegate by way of a letter dated July 6, 2010 (the "July Submissions"). Since the July Submissions are brief and largely repeated by NICO in its appeal of the Determination, I propose to set them out verbatim below:

This is NICO's written submission and responses with regards to the following:

1. Mr. Pasanen was hired as an independent contractor to do both contract work on-site and in NICO's shop. Some of the attached invoices from Mr. Pasanen show that as of November 2009 he was paid \$34.00/HR. for work in the shop, \$38.00/HR. for on-site work and \$57.00/HR (or time and ½) for overtime work. They also show that Mr. Pasanen was paid out for any parking

expenses incurred while working on-site as well as any monies that he paid out for materials. NICO made it very clear from the start of Mr. Pasanen's self-employment that the hourly rates paid to him included all stat. And annual holiday pay. NICO also was very clear about the fact that Mr. Pasanen would be responsible for all his own tax submissions, this was further re-iterated on every cheque stub. NOTE: Actual union rates for installers are in-shop from between \$19.00 to \$25.00 per hour and on-site from between \$24.00 to \$28.00 per hour. From this fact you can see that NICO paid Mr. Pasanen much more than union rates because he was an independent contractor. NICO has used other installation companies for some projects whom we pay an average hourly rate of between \$30.00 to \$36.00 which again is all inclusive. Mr. Pasanen has never disagreed with the fact that he would be responsible for all his own taxes as well as his hourly rate including holiday pay etc. up until now.

2. Mr. Pasanen was terminated from NICO with just cause and therefore not entitled to termination pay. At the time Mr. Pasanen was terminated NICO was aware of the fact that he denied making the remarks which gave rise to the allegations of harassment however, there was 1 other contractor in the shop whom said that he personally witnessed hearing other inappropriate remarks made by Mr. Pasanen regarding Ms. Link. Also at the time of allegations NICO wished to speak to Mr. Pasanen in person before coming to any final decisions and agreed on a time to discuss all at the shop. When myself and my wife (Nancy Nikolai) went to the shop to speak to Mr. Pasanen not only was he very rude and would not discuss anything in a reasonable manner but he also made threats to us stating that he would make sure that he not only put NICO out of business but that he would come back to the shop and destroy all of the equipment and materials there. Both my wife and myself felt that he was very serious and would do anything he could to hurt NICO and follow through on all his threats. My wife felt that our personal safety was threatened as well and asked me to make sure and not meet with him alone after this.
3. The fact that Mr. Pasanen made verbal threats about doing anything to put NICO out of business including destroying the shop and its contents is enough of a reason to terminate him. NICO feels that we do not owe Mr. Pasanen any further monies either for holidays or termination pay.

We appreciate the opportunity to provide our side of the story as well as explaining our position regarding the above matters, thank you.

18. After taking into consideration NICO's July Submissions, which the delegate found unpersuasive, the delegate went on to confirm in the Determination his earlier Preliminary Assessment and, imposed three administrative penalties on NICO pursuant to section 29(1) of the *Regulation* for contraventions under the *Act*. In so doing, it should be noted that the delegate also addressed the additional allegation of NICO in the July Submissions that Mr. Pasanen threatened to come back to NICO's shop and destroy all the equipment and materials. The delegate found that the said allegation of NICO was without any supporting evidence and gave it no weight in the Determination.

NICO'S SUBMISSIONS

19. Mr. Nikolai, in his appeal submissions on behalf of NICO, rather than demonstrating how the delegate erred in law, largely repeats verbatim the July Submissions and encloses the same invoices Mr. Pasanen presented to NICO which NICO previously submitted to the delegate before the Determination was made.
20. Further, noticeably absent in the appeal submissions of Mr. Nikolai is any arguments or evidence of any breach by the delegate of the principles of natural justice.

DIRECTOR'S SUBMISSIONS

21. The Director submits that NICO, with respect to the error of law ground of appeal, is simply reiterating

submissions previously made and considered in the Determination.

22. With respect to the natural justice ground of appeal, the Director argues that NICO has not adduced any evidence to substantiate this ground of appeal. Therefore, NICO's appeal should be dismissed, according to the Director.

ANALYSIS

Natural Justice

23. In *Re: 607730 B.C. Ltd. operating as English Inn & Resort*, BC EST # D055/05, the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.
24. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST # D050/96.

25. Having reviewed the Determination including the section 112(5) "record" and the submissions of the parties, I find there is no basis whatsoever for the natural justice ground of appeal advanced by NICO. I find in this case that NICO not only knew the case against it but the delegate accommodated NICO to present its position in response by allowing the parties, after the Hearing date, to make written submissions as NICO was not ready to proceed on the Hearing date as it was unable to secure attendance of its witnesses. Further, the delegate also afforded NICO, as well Mr. Pasanen, an opportunity to respond to his Preliminary Assessment and considered further written submissions of NICO in response to the Preliminary Assessment, namely, the July Submissions, before making the Determination. In the circumstances, I find NICO's appeal under the natural justice ground of appeal lacking any basis and I reject it.

Error of Law

26. The *Act*, in section 112, limits the grounds of appeal to three, namely, error of law, denial of natural justice and availability of new evidence. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST # D260/03).
27. Having said this, the question of whether a person is an employee or an independent contractor involves the application of a legal standard to a set of facts, and therefore is a question of mixed fact and law (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 S.C.C. 33, at para. 37). However, the question of whether the correct legal standard has been applied by the delegate is a question of law.
28. In considering what types of errors of law are reviewable under section 112 of the *Act*, the Tribunal has consistently adopted the definition of error of law delineated in the decision of the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275:

1. a misinterpretation or misapplication of a section of the *Act*;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

29. Since NICO, in its appeal, disputes the delegate's conclusion that Mr. Pasanen was an employee, it would appear that this raises the question of the application of facts to a legal test. More specifically, the question is whether the delegate erred in law in concluding that Mr. Pasanen was an employee based on no evidence, or on evidence that provided no rational basis for his finding. While NICO submits in its appeal that Mr. Pasanen was "hired as an independent contractor" and so informed at the outset of his employment and paid remuneration at far higher rates for work he did than an employee would garner, this is not determinative of the status of Mr. Pasanen. The delegate considered the whole of the relationship between NICO and Mr. Pasanen and analyzed it in context of the statutory definitions of "employee" and "employer" and common law tests for determining an employment relationship and concluded:

In the present case it would appear that NICO was fully in control of the work [performed by Mr. Pasanen], that only NICO had the chance of maximizing profit or the risk of loss from the enterprise and that the work was part of the core work done by NICO. While Mr. Pasanen provided some of his own tools, it is standard for a carpenter to provide some basic hand tools. I do not have any information as to whether Mr. Pasanen provided any larger equipment for use in the work, but I am satisfied and accordingly find that, when looking at the relationship in all its aspects, that Mr. Pasanen was an employee of NICO and therefore, entitled to the protections of the Employment Standards Act.

30. Based on my review of the record, the Reasons for the Determination and the submissions of the parties, I find that the delegate properly considered the statutory provisions and the common law tests for determining the existence of an employment relationship in this case and his conclusion above that Mr. Pasanen was an employee of NICO is both rationally or reasonably supported in the law and the evidence. Therefore I would not interfere with the delegate's finding on this question.

31. Having said this, on the matter of the dismissal of Mr. Pasanen for cause for harassing or making inappropriate comments about Ms. Link, I find that the delegate had the discretion to prefer the evidence of Mr. Perry whose investigation of the matter on behalf of NICO revealed that another employee, and not Mr. Pasanen, had made the inappropriate remarks about Ms. Link. Further, it was also within the discretion of the delegate to conclude reasonably that the allegation of NICO that Mr. Pasanen made threats against NICO were unsupported. In the circumstances, neither allegation of NICO supported its termination of Mr. Pasanen's employment for just cause and the delegate, in my view, acted on a view of facts which could be reasonably entertained and correctly determined that NICO failed to discharge its onus to show that it had just cause to terminate Mr. Pasanen's employment.

32. Having concluded that NICO has failed to substantiate any of its grounds for appeal, it is not lost upon me that NICO, as argued by the Director, is simply reiterating the submissions it made to the delegate before the Determination. In this regard, I note that the July Submissions of NICO are identical in substance and form to NICO's appeal submissions. It would appear that Mr. Nikolai cut and pasted the July Submissions in the appeal. The purpose of an appeal is not to provide another opportunity to a party dissatisfied with a determination to have its case reheard and reweighed by a different panel or adjudicator. To allow an appellant, in this case NICO, to do that would run counter to the stated purpose of the *Act* in section 2(d), namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the] Act".

ORDER

33. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated October 4, 2010, be confirmed in all respects, plus whatever interest might have accrued since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal