

An appeal

- by -

Mickey Transport Ltd.
("MTL")

- 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: David B. Stevenson

FILE No.: 2009A/142

DATE OF DECISION: January 13, 2010

DECISION

SUBMISSIONS

Gerhard A. Pyper	Counsel for Mickey Transport Ltd.
Jagtar S. Sandhu	on his own behalf
Jim Dunne	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Mickey Transport Ltd. (“MTL”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 16, 2009.
2. The Determination was made by the Director on a complaint filed by Jagtar S. Sandhu (“Mr. Sandhu”), who alleged MTL had contravened the *Act* by failing to pay regular wages. The Determination found that MTL had contravened Part 3, sections 17 and 18 and Part 7, section 58 of the *Act* and ordered MTL to pay Mr. Sandhu an amount of \$5,049.48, an amount which included wages and interest.
3. The Director also imposed administrative penalties on MTL under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00.
4. The total amount of the Determination is \$6,049.48.
5. MTL has appealed the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.
6. MTL also appeals the administrative penalties imposed under section 29(1) of the *Regulation* on the grounds that the administrative penalties were “unreasonable, shocking, and demonstrably unfit”, they were discriminatory and motivated by bias against MTL, and that the imposition of the administrative penalties infringed MTL’s rights under section 7 of the Charter.
7. None of the parties to this appeal seeks an oral hearing before the Tribunal and while we have a 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 reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and have decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

8. The issues in this appeal are whether MTL has shown the Director erred in law in deciding Mr. Sandhu was an employee under the *Act* or failed to observe principles of natural justice in making the Determination and whether the administrative penalties were correctly imposed and were appropriate in the circumstances.

THE FACTS

9. The Determination sets out the following background, which are identified in the Determination as being facts not in dispute:

Mickey operates a transportation company, which falls within the jurisdiction of the Act. Mr. Sandhu was hired as an owner operator in January 2008 to deliver freight using his own truck. Mr. Sandhu worked for Mickey's until June 11, 2008 at which time he quit. Mr. Sandhu was paid a percentage of the gross amount Mickey received from their clients for the delivery of the freight. The complaint was filed on November 5, 2008, within the time period allowed under the Act.

Mr. Sandhu provided direct affirmed testimony on his own behalf and was assisted in translation by Mr. Langit Dhimas who was also affirmed. Mr. Aslam Hayat provided affirmed testimony on behalf of Mickey.

At the start of the hearing both parties agreed that the quantum in dispute is the amount reflected in the "owner operator expense" forms for the period May 16-31, 2008 and June 1-15, 2008. The amount of these two forms equals \$4,060.27 and is an accurate reflection of the waybills for these two periods and is the amount of regular wages in dispute.

10. The Determination identifies the issues as being whether Mr. Sandhu was an employee under the *Act* during the period he worked for MTL and, if so, what wages were owed to him. On the issue of Mr. Sandhu's status under the *Act*, the Determination contains the following findings of fact:

- The employment application completed by Mr. Sandhu refers to him applying for a position as an owner operator;
- Mr. Sandhu owned the truck which he used in the pick up and delivery of freight;
- As well, Mr. Sandhu owned another truck which was driven by his son;
- Mr. Sandhu did not have set hours of work;
- Mr. Sandhu paid for his own fuel, insurance maintenance and repairs on the trucks and had his own Worksafe B.C. account.
- MTL exercised considerable direction and control over Mr. Sandhu in performing the work;
- MTL had effective, if not complete, control over what, where and when Mr. Sandhu performed the work;
- MTL provided the clients, dispatcher and means of communication (cell phone);
- Mr. Sandhu had no independent opportunity to build relationships with customers;
- The compensation paid to Mr. Sandhu was totally dependent on him doing as he was instructed by MTL;
- Mr. Sandhu could not operate a business on the side using his truck; he could only work for MTL and, as such, derived his only means of income from work he performed for MTL;
- MTL unilaterally set the rate of pay for Mr. Sandhu;
- Mr. Sandhu was not free to hire other drivers to perform his work; any drivers filling in for Mr. Sandhu had to be approved in advance by MTL's management;
- There was no evidence of any driver working for Mr. Sandhu;

- Mr. Sandhu was not free to turn down work he was instructed to do by MTL¹;
 - MTL treated Mr. Sandhu as an employee in the sense that he had to comply with company policies and procedures or face discipline, up to and including termination;
 - Mr. Sandhu had no chance of profit in his relationship with MTL;
 - Mr. Sandhu was not required to bid on any work he performed for MTL, set a fee for his services or provide an invoice to MTL in order to receive payment for the work he performed;
 - Mr. Sandhu was paid on a commission basis, based on a percentage of an amount which was unilaterally set by MTL;
 - The only way Mr. Sandhu could increase his earnings was by working longer hours and doing more deliveries;
 - Mr. Sandhu had some risk of loss reflected in the investment in his trucks, which would not earn income for him if they did not work;
 - Mr. Sandhu had no investment in MTL's business;
 - Mr. Sandhu was not operating his own business; he was not permitted to work for anyone else and derived his income only through the business of MTL;
 - Mr. Sandhu was an integral part of MTL's business;
 - The relationship between Mr. Sandhu and MTL was ongoing and had no foreseeable end point;
 - Both trucks owned by Mr. Sandhu operated under an operating authority registered to MTL.
11. The findings of fact were reached following a complaint hearing conducted over two days, during which the Director heard evidence from Mr. Sandhu and Mr. Hayat and received documents provided by each of them.

ARGUMENT

12. I shall assemble the arguments of counsel for MTL under three general headings: failure to observe principles of natural justice; errors of law that do not engage natural justice considerations; and the administrative penalties.
13. The appeal form and the appeal submission set out the grounds on which MTL challenges the Determination. It is worthwhile, before addressing the grounds of appeal, to set out the particular aspects of the Determination that MTL has identified in their submission.
14. The appeal submission identifies the following matters as raising natural justice concerns:
- a. The Director conducted the hearing in such a fashion as to lead any reasonable person to conclude that the Employment Standards Branch was biased *vis a vis* the Appellant.
 - b. The Director contravened the law and rules of evidence by prohibiting MTL from introducing or cross-examining witnesses about the complaint;

¹ This finding was reached following an analysis of contradictory evidence provided by Mr. Sandhu and Mr. Hayat, which included reference to conditions in the "Policy and Agreement" form signed by Mr. Sandhu when he was hired by MTL.

- c. The Director prohibited MTL from calling witnesses in support of their defence with specific reference to the following issues:
 - i. whether the complainant was or was not an independent contractor; and
 - ii. bias *vis a vis* MTL;
 - d. The Director failed to allow MTL to introduce evidence pursuant to section 46 of the *Canada Evidence Act*, RSC 1995, c.C-5;
 - e. The Director refused to admit relevant evidence;
15. The appeal submission identifies the following matters as errors of law:
- a. The Director failed to exercise or properly exercising its jurisdiction under the Employment Standards Act;
 - b. The Director failed to receive or adequately review the evidence presented during the course of the hearing; and
 - c. The Director failed to furnish appropriate and sufficient reasons to support the finding of employee status in respect of the aforementioned charges;
16. The appeal submission also indicates MTL has reserved the right to raise additional grounds during the appeal process. I do not need to consider the propriety of effectiveness of engaging in that kind of tactic, as no additional grounds or arguments beyond those set out in the initial appeal submission have been raised.
17. Generally, counsel for MTL says the complaint hearing was conducted in an unfair fashion, in breach of principles of natural justice and not in accordance with required standard of proof in such matters.
18. As indicated above, the appeal also challenges the administrative penalties imposed on MTL under section 29(1) of the *Regulation*.

1. Breach of Natural Justice

19. Counsel for MTL has really provided no argument on the natural justice ground. While the appeal submission makes reference to several areas in which it is alleged the Director failed to observe principles of natural justice, it provides no particulars or evidence relating to these allegations nor any analysis on how any of these matters, in the circumstances, might be found to be breaches of the principles of natural justice.
20. Neither the Determination nor the material in the section 112(5) Record provides any assistance in this regard. There is nothing on the face of the Determination or in the Record which suggests, for example, that MTL sought to call witnesses in addition to Mr. Hayat and was denied that opportunity by the Director, that the Director prohibited the cross-examination of Mr. Sandhu on matters relevant to the issues raised in the complaint or that MTL sought to introduce relevant evidence and was prohibited from doing so by the Director.
21. Additionally, there is no evidence provided in support of the bias allegation. There are simply bald assertions of bias.
22. The Director has provided a response to appeal. In response to the natural justice allegations, the Director says MTL was informed, well ahead of the complaint hearing, of how the complaint hearing process would work, including the Director's requirement on each party to provide a list of witnesses they intended to call

and a brief summary of the evidence each witness intended to give. The Director says MTL provided no such list or made any request during the complaint hearing to call a witness other than Mr. Hayat. The Director says MTL was not denied the opportunity to call witnesses and they had sufficient opportunity to submit its evidence on the complaint, to call witnesses, to cross-examine Mr. Sandhu and to make its argument. The Director says all relevant evidence presented at the complaint hearing was considered in making the Determination.

23. Mr. Sandhu has provided a response that does not specifically address the issues raised in the appeal.

2. Error of Law

24. Counsel for MTL challenges the conclusion of the Director of Mr. Sandhu's status under the *Act*. Counsel says the tests applied by the Director should have resulted in a finding that Mr. Sandhu was an independent contractor and the finding made was an error of law.
25. Counsel for MTL says the Director erred in finding that MTL unilaterally setting the rate of pay for Mr. Sandhu was relevant to the issue of control. Counsel relies on comments from the New Brunswick Court of Appeal in *Joey's delivery Service v. New Brunswick (Workplace health, Safety and Compensation Commission)*, 2001 NBCA 17, at para. 105, in support of that proposition. Counsel also argues that even if such a factor could be considered, the factual conclusion in the Determination that MTL was responsible for setting the rate is wrong, as was the finding that Mr. Sandhu was not free to hire other drivers to perform his work.
26. Counsel also argues the Director failed to give proper effect to the fact that Mr. Sandhu did not have any set hours and was free to set his own hours of work. He relies on comments made by the Court in *Joey's Delivery Service Ltd., supra*, at para. 110 for this argument.
27. MTL challenges the conclusions reached by the Director on the analysis of "chance of profit/risk of loss", arguing the Director was wrong to minimize the relevance of the capital investment made by Mr. Sandhu and the investment and management of his time in performing the work as loss factors.
28. Counsel for MTL argues the Director was wrong to consider the integration of Mr. Sandhu into the business of MTL as a relevant factor in deciding whether there was an employment relationship. Counsel relies on comments made by the Federal Court of Appeal in *Wiebe Door Services v. Minister of National Revenue*, [1986] 2C.T.C. 200, at para. 14 as support for this argument.
29. MTL has submitted some documents with the appeal that were not provided to the Director during the complaint process.
30. The Director has provided a response on this issue. The Director relies on the factual findings and analysis set out in the Determination and has limited the response to specific points raised in MTL's appeal submission.
31. The Director notes that the *Act* is remedial legislation which should be given a large and liberal interpretation; that the evidence presented by the parties in the complaint process was evaluated and weighed in the context of the objects and purposes of the *Act* and the definitions of employer and employee found in the *Act*. The Director says that while common law tests have been used to assist in exploring the relationship between Mr. Sandhu and MTL, those tests are subordinate to the definitions contained in the *Act*.
32. Once again, the comments of Mr. Sandhu in his response do not assist in deciding this aspect of the appeal.

3. The Administrative Penalties

33. Counsel for MTL challenges the administrative penalties imposed under the *Regulation*, arguing the penalties were discriminatory, motivated by bias and contrary to MTL's rights under section 7 of the *Canadian Charter of Rights and Freedoms*.
34. The Director has responded on this point, noting that administrative penalties are mandatory once a contravention of the *Act* is found. The Director also notes that under section 103 of the *Act* and section 45 of the *Administrative Tribunals Act*, SBC 2004 ch. 45 (the "*ATA*"), the Tribunal has no jurisdiction over constitutional questions relating to the *Charter*.

ANALYSIS

35. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those 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.
36. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
37. The *Act* does not provide for an appeal based on errors of fact and 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.
38. If a party attempts to introduce new evidence in an appeal, the Tribunal has discretion to allow such evidence, but has consistently taken a relatively strict approach to what will be accepted. The Tribunal considers whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 and *Senor Rana's Cantina Ltd.*, BC EST # D017/05.
39. MTL has not grounded this appeal in new evidence coming available – subsection 112(1)(c) – but has included evidence with the appeal that was not provided to the Director during the complaint process. I am unable to determine whether the inclusion of this evidence was intentional or accidental since counsel for MTL makes no reference to this new material in the appeal submission. It is apparent that all of this evidence was available when the Determination was made. On that basis, and in the absence of compelling reason for its inclusion, I exercise my discretion against accepting it and therefore will not consider it. I will address the grounds of appeal in the order I have set out the arguments relating to them.

1. Breach of Natural Justice

40. As indicated above, there is a burden on a party alleging a denial of natural justice to provide some evidence in support of that allegation.
41. The allegation of bias, for example, is serious and should not be made speculatively or on anything less than clear and cogent evidence: see *Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.), *Vancouver Stock Exchange v. British Columbia (Securities Commission)* (B.C.C.A.), September 28, 1999 and *R. v. R.D.S.*, [1997] 3 S.C.R. 484. There has been no evidence provided in this appeal in support of the bias allegation, let alone the required “clear and cogent” evidence.
42. In respect of the other allegations by MTL that the Director failed to observe principles of natural justice in making the Determination, the Tribunal, in *Imperial Limousine Service Ltd.*, BC EST # D014/05, has briefly summarized the natural justice concerns that typically operate in this context:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the 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 to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.
43. MTL's burden in alleging a failure by the Director to observe principles of natural justice is to provide facts which show they have been denied the procedural rights described above.
44. MTL has not met this burden. The appeal submission on this ground simply states the allegations without reference to a proven set of facts that would, when considered against the evidentiary requirements imposed at law, demonstrate the breaches of natural justice alleged. MTL has failed to either identify any particular failure by the Director to observe principles of natural justice in this case or provide any evidence to support an allegation of breach of natural justice. In fact, the material in the section 112(5) Record clearly demonstrates there was no denial of the procedural rights as they are described in *Imperial Limousine Service Ltd.*, *supra*. Rather, the material indicates that in every respect MTL was provided with the opportunity required by section 77 of the *Act* and the principles of natural justice to know the case they had to meet, present their position and to respond to the position presented by the complainant.
45. In sum, MTL has failed to show there was a failure by the Director to observe principles of natural justice in making the Determination and, accordingly, this part of the appeal is rejected.

2. Error of Law

46. The primary focus of this ground of appeal is the finding by the Director that Mr. Sandhu was an employee for the purposes of the *Act*. Before addressing this matter, I will consider other elements of this ground of appeal that are raised by counsel for MTL.
47. First, counsel for MTL says the Director had no jurisdiction to hear the complaint filed by Mr. Sandhu and, alternatively (I presume), failed to exercise, or properly exercise, its jurisdiction. Once again the assertions made on this argument are unaccompanied by any analysis that focuses the particular basis for it. Notwithstanding, I find no merit in this argument. The Director clearly had jurisdiction to “receive and

review” the complaint made by Mr. Sandhu under the *Act*, investigate his complaint, decide whether the *Act* applied to his complaint and decide whether the *Act* has been contravened. All of these powers are found in section 76 of the *Act*. The authority to investigate and make a Determination necessarily involves the authority to interpret and apply provisions of the *Act* and make findings of fact relating to the complaint. In the context of this case, the Director had the jurisdiction to investigate Mr. Sandhu’s complaint, interpret the *Act*, including those provisions that define employee and employer, and make a finding whether the relationship between Mr. Sandhu and MTL was an employment relationship – and covered by the *Act* – or one between two independent contracting parties.

48. Counsel for MTL also argues the Director committed an error of law in failing to receive and/or adequately consider relevant evidence and failing to “furnish appropriate and sufficient reasons”.
49. In considering these arguments, it is helpful to appreciate what is accepted by the Tribunal as an error of law. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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.
50. While both of the alleged errors of law referred to above may, if revealed on the facts and in the analysis, amount to errors of law, the appeal does not establish the assertions made in the argument. Nothing in the material, or in the appeal, establishes the Director failed to receive relevant evidence or failed to consider the evidence that was provided by the parties during the complaint process. This argument fails.
51. In *Hilliard*, BC EST # D296/97, the Tribunal endorsed a functional approach to assessing the sufficiency of reasons in a Determination, indicating the reasons are adequate if, read as a whole in context of all the evidence and submissions of the parties, they are sufficient to inform the parties of the basis for the Determination and allow the parties to appreciate the case to be met if there is an appeal or a reconsideration application.
52. In the Determination, the Director reviewed the evidence, made findings of fact on that evidence, stated the provisions of the *Act* and the relevant statutory principles at play, stated and considered common law principles in assessing the relationship and reached a conclusion on the complaint, explaining why and how that conclusion was reached. The reasons expressed in the Determination, read as a whole, in the context of all the evidence, are sufficient and adequate to fulfill their function, namely to inform the parties of the basis of the Determination and provide an understanding of the case for the purposes of an appeal. While MTL may disagree with the Determination they have not shown that the reasons provided in it have in any way affected their ability to appeal the Director’s decision.
53. In sum, I find that there is no error of law shown and this argument also fails.

54. In respect of the decision of the Director that Mr. Sandhu was an employee under the *Act*, the findings made in this case are legally consistent with the definitions of employee and employer contained in the *Act*, the relevant portions of which state:

“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, . . .

“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;

55. There are two considerations that arise from the above definitions as they are interpreted and applied to a complaint under the *Act*. First, the definitions of employee and employer are inclusive, not exclusive. The Tribunal has embraced the comments of the Court of Appeal in *Fenton v. Forensic Psychiatric Services Commission* (1991) 56 BCLR (2d) 170:

. . . the definitions in the statute of “employee” and “employer” use the word “includes” rather than “means”. The word “includes” connotes a definition which is not exhaustive. Its use indicates that the legislature casts a wide net to cover a variety of circumstances.

56. Second, the *Act* is remedial legislation and should be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects, see *Machtiger v. HOJ Industries Ltd.* (1992) 91 D.L.R. (4th) 491 (S.C.C.), *Rizzo & Rizzo Shoes Ltd.* (1998) 154 D.L.R. (4th) 193 and *Helping Hands v. Director of Employment Standards* (1995) 131 D.L.R. (4th) 336 (B.C.C.A.). I adopt with the following comment from *Machtiger v. HOJ Industries Ltd.*, supra, that:

. . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many employees as possible is favoured over one that does not.

57. On the facts, the complainant and MTL quite comfortably fit within the definitions of employee and employer, respectively, for the work Mr. Sandhu performed and the conclusion by the Director that they were employee and employer under the *Act* is consistent with those definitions and with the policy objectives of the legislation.

58. Counsel for MTL has focused his arguments in this part of the appeal on the consideration by the Director of common law tests in assessing the relationship between Mr. Sandhu and MTL. I make two points before specifically addressing the arguments. First, the Director correctly noted that the common law tests are subordinate to the provisions of the *Act*. That statement is reflected in many decisions of the Tribunal, including *F.O.R.E. Marketing Canada Inc.*, BC EST # D333/99, where the Tribunal said:

An analysis of whether a person is an employee under the Act starts with the language of the Act. Also, when considering whether a person is an employee, the remedial nature of the Act and the purposes of the Act are proper considerations. While ultimately it is the language, the remedial nature and the purposes of the Act that will be determinative, there are several common law tests that provide a helpful guide because these they [sic] identify factors within the relationship that help to characterize it as an employer/employee relationship or one of independent contractor/client. In this case, factors such as control, ownership of tools, chance of profit, risk of loss and the degree of integration of the work being

performed by Hamilton into the business of FORE all strongly point to a conclusion that, at law, Hamilton would be considered to be an employee, not an independent contractor.

59. If there is a deficiency in the Determination, it is in not addressing the question primarily from the perspective of the language in the legislation. As the Tribunal stated in *Kimberly Dawn Kopchuk*, BC EST # D049/05:

The common law tests of employment status . . . have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant “performed work normally performed by an employee” or “performed work for another” (*Web Reflex Internet Inc.*, BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them . . . provide a useful framework for analyzing the issue.

60. Second, the Determination makes reference to the comments of the Supreme Court of Canada in *671122 Ontario Ltd. V. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 which describes the limitations of any specific common law test and indicates that the final result at common law in any case will evolve from a weighing of many factors and “will depend on the particular facts and circumstances of the case” as a whole and that the: “central question is whether the person who has been engaged to perform the services performs them as a person in business on his own account.” This approach is consistent with the approach endorsed by the Tribunal, as reflected in the following statement from *Kelsey Trigg, supra*:

In determining the nature of a relationship, courts, and this Tribunal, have typically assessed the nature of the relationship, looking beyond the language used by the parties. While there is no magic test, the total relationship of the contracting parties must be examined, with a view to determining “whose business is it?”

61. The Tribunal has said that it will consider any factor that is relevant: see *Larry Leuwen*, BC EST # D136/96. In the *Leuwen* case, the Tribunal also listed several factors as having potential relevance to the issue of employment status.
62. Whichever of the various common law factors are employed to assist in the analysis of the relationship between Mr. Sandhu and MTL, I am satisfied the evidence indicates the Director did not err in law in finding Mr. Sandhu was an employee of MTL for the purposes of the *Act*.
63. The Director found MTL exercised a considerable degree of control and direction over Mr. Sandhu. The relative importance of this factor is not only reflected in the common law approach to the question of employee status, but in Section 1 of the *Act*, which defines an employer to include a person “*who has or had control or direction of an employee*”. The elements of that control and direction are set out in the Determination. Included in this finding is the reference by the Director to the fact that MTL “unilaterally set the rate of pay Mr. Sandhu received”. Counsel for MTL says that finding is inconsistent with the decision of the New Brunswick Court of Appeal in the *Joey’s Delivery Service* case, where it stated “the method and calculation of payment for services rendered is irrelevant to the control issue”.
64. In my view, that statement does not assist MTL in this appeal. The Determination does not rely on either the method or the calculation of payment for services in its consideration of the elements of control. Rather, the Determination relates the payment for services to the control factor from the perspective that MTL “unilaterally set the rates” – simply advising Mr. Sandhu how much the load was worth when he was dispatched to deliver it – and that Mr. Sandhu’s compensation was “totally dependent” on him doing as he was directed by MTL, at the time and place determined by MTL.

65. As an alternative to the above argument, MTL challenges the Director's finding that MTL was responsible for setting the rate. That finding was one of fact. The submission of MTL does not demonstrate this factual finding by the Director raises an error of law. An appeal on a finding of fact, *simpliciter*, is a matter over which the Tribunal has no authority under section 112.
66. The same response applies to the argument by MTL that the Director erred in finding Mr. Sandhu was not free to hire other drivers to perform his work. That conclusion is expressly stated in the Determination, is a finding of fact and is not reviewable under section 112 unless it is shown to raise an error of law. No error of law relating to this finding is shown.
67. Counsel for MTL points to the reference by the Court in *Joey's Delivery Service, supra*, to the effect that the fact an owner operator does not have set hours or any obligation to fill a shift is evidence of a lack of control. The problem for MTL with this part of its submission is that both matters were considered by the Director in deciding Mr. Sandhu's status under the *Act* and the conclusions reached by the Director on each of them do not support this argument.
68. The first matter – no set hours of work – was considered to be a factor pointing toward Mr. Sandhu being an independent contractor, but that factor was outweighed by other factors pointing to an employment relationship. In other words, the Director did consider that fact to be evidence of a lack of control.
69. The other matter was the focus of a factual dispute between Mr. Sandhu and MTL during the complaint hearing. MTL said Mr. Sandhu was free to turn down work; Mr. Sandhu said he wasn't. The Director accepted Mr. Sandhu's evidence and found that Mr. Sandhu was not free to turn down work he was instructed by MTL to do. In other words, the Director found, on the facts, the kind of obligation in this case that the Court apparently did not have on the facts of the *Joey's Delivery Service* case.
70. I will also address the possibility that the argument made by MTL on the matter of Mr. Sandhu's obligation draws some distinction between an obligation to fill a shift – which was not specifically raised or considered in the Determination – and being free to refuse assigned work – which was the subject of the finding referred to above. If the argument intends to draw that kind of distinction, I have two responses for refusing to accept the argument.
71. First, there is no indication this argument was raised to the Director at any time during the complaint process or that any evidence relating to it was submitted. As such, the factual assertion on which the argument is premised is new evidence which clearly was available to MTL, could have been provided to the Director before the Determination was made and is not submitted to this Tribunal under subsection 112(1)(c) for consideration under the factors applied to the admission of new evidence on an appeal. That is sufficient enough basis for rejecting both the suggestion that any such a distinction exists and the argument being made here. Second, and in any event, I would not accept there is any such distinction. If Mr. Sandhu was not free to refuse work assigned to him, then logically he was not free to be unavailable for work which MTL wanted to assign to him.
72. Counsel for MTL challenges the findings of the Director on the “chance of profit/risk of loss” factors. I am not persuaded there is any error of law in the Director's analysis of these factors as it relates to the issue being decided, which was whether Mr. Sandhu was an employee under the *Act*. The argument by MTL on the “chance of profit” analysis ignores the findings made by the Director related to this question: that MTL had complete control over the available work; that Mr. Sandhu's compensation was based solely on and totally dependent upon performing work that MTL controlled; and that Mr. Sandhu had no opportunity to build any kind of relationship with customers.

73. On the argument by MTL that the “risk of loss” analysis in the Determination has failed to take into account the investment of time by Mr. Sandhu and the potential risk of lost time, I am not persuaded the Director committed any error of law in stating there was no risk to Mr. Sandhu in supplying his own time and MTL has not provided any legal or logical basis for deciding otherwise.
74. The final error of law alleged in the Determination relates to the Director’s analysis of the integration factor. Counsel for MTL says this factor should not have been weighed in the analysis. I do not agree that the matter of the degree of integration between the services being provided by Mr. Sandhu and the business of MTL was irrelevant to Mr. Sandhu’s status under the *Act* and should not have been considered. The Tribunal has long considered this factor to be a proper consideration in deciding the employment status of an individual under the *Act*, as such a consideration is obviously relevant to determining “whose business is it?”
75. Included in the appeal submission is an assertion that the documents provided by MTL indicated the relationship between Mr. Sandhu and MTL was intended by the parties to be a business relationship between independent contractor/client. The assertion infers the Director erred in interpreting the documents. I disagree with this assertion, and with the inference that the Director erred in his interpretation of the documents. At best, the documents are ambiguous as an indication of what kind of relationship the parties intended to establish. There is no doubt Mr. Sandhu applied for the position of owner operator. The Determination notes that. What is less clear is that his application should be viewed as an intention to establish an independent contractor/client relationship, since the Determination also notes that the terms and conditions of his employment, including those contained in the Policy and Agreement form which Mr. Sandhu was required to sign, possessed “all the hallmarks of an employer and employee” relationship.
76. MTL does not submit the Director failed to consider the documents and does not provide any compelling argument for the Tribunal finding the only possible conclusion available from a reading of this material was that the parties intended an independent contractor/client relationship. In the face of the ambiguity, it is improbable that any consideration or weight could be given to the “intention of the parties” as a factor. Additionally, the weight typically accorded to this factor, when it is present, is minimal as indicated in the following statement from *Knight Piesold Ltd.*, BC EST # D099/99:

While the parties intent is relevant in an action for wrongful dismissal, *i.e.*, an action founded in contract, and may be a relevant factor before the Tribunal, I do not agree, in view of the remedial nature of the statute, that much weight should be placed on this factor. It is well established that the basic purpose of the *Act* is the protection of employees through minimum standards of employment and that an interpretation which extends that protection is to be preferred over one which does not (see, for example, *Machtinger v. HOJ Industries Ltd.*, (1992) 1 S.C.R. 986). As well, Section 4 of the *Act* specifically provides that an agreement to waive any of the requirements is of no effect.

77. It is improbable this factor, even if found to exist, would have affected the final result.
78. In the final analysis, MTL may not agree that the relationship between it and Mr. Sandhu should be found to be an employment relationship, but the appeal does not show that conclusion was an error of law.

3. The Administrative Penalties

79. MTL has challenged the administrative penalties imposed by the Director, alleging they are “unreasonable, shocking and demonstrably unfit” and “discriminatory and motivated by bias”.
80. It is unnecessary to deal with each component of the challenge made, as the Tribunal has consistently noted that administrative penalties are mandatory, are part of a larger scheme regulating employment relationships

in the non-union sector and are generally consistent with the purposes of the *Act*. Particularly, the design of the penalty scheme established under section 29 meets the statutory purpose of providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*: see *Summit Security Group Ltd.*, BC EST # D059/04, (Reconsidered in BC EST # D133/04) and *Marana Management Services Inc. operating as Brother's Restaurant*, BC EST # D160/04.

81. The latter case includes the following statement:

Once the delegate finds a contravention, there is no discretion as to whether an administrative penalty can be imposed. Furthermore, the amount of the penalty is fixed by Regulation. Penalty assessments are mandatory and are thus not subject to mediation. . . .

82. The facts which were before the Director relating to the administrative penalties justified, and required, the amounts that were imposed. There is no authority for the Tribunal to ignore the facts and no basis upon which the Tribunal may substitute its own view of the amount of the administrative penalties over that chosen by the legislature and fixed in the *Regulation*.

83. In respect of the *Charter* argument, the Director has correctly pointed out that the Tribunal has no jurisdiction over constitutional question relating to the *Charter*: see *Rose Miller, Notary Public*, BC EST # D062/07. Even if the Tribunal did have jurisdiction, I would find section 7 of the *Charter* is not invoked in respect of the administrative penalty scheme under the *Act*: see *Kimberly Dawn Kopchuk*, BC EST # D049/05.

84. For all of the above reasons, the appeal is dismissed.

ORDER

85. Pursuant to Section 115, I order the Determination dated September 16, 2009, be confirmed in the amount of \$6,049.48, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal