

An appeal

- by -

Valcon Drywall Ltd.
(“Valcon”)

- 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.: 2009A/157

DATE OF DECISION: January 26, 2010

DECISION

SUBMISSIONS

Jerome Zuchotzki	on behalf of Valcon Drywall Ltd.
Lawrence Ernst	on his own behalf
Lori Ernst	on her own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Valcon Drywall Ltd. (“Valcon”) of a Determination of a delegate (“delegate”) of the Director of Employment Standards (“Director”) issued on November 20, 2009. The Determination ordered Valcon to pay two former employees, namely, Lawrence Ernst (“Mr. Ernst”) and Lori Ernst (“Ms. Ernst”) (collectively the “Complainants”) a total of \$932.88, representing unpaid wages and accrued interest.
2. The Determination also imposed on Valcon an administrative penalty of \$500.00 pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for breach of section 18 of the *Act*.
3. Valcon’s sole basis for appealing the Determination is that the Director failed to observe the principles of natural justice in making the Determination.
4. Valcon is seeking the Tribunal to refer the matter back to the Director but does not provide any explanation why it should be referred back to the Director.
5. Pursuant to Section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in the *Act* (s.103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I note that Valcon is not seeking an oral hearing 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

6. Did the Director fail to observe the principles of natural justice in making the Determination?

FACTS

7. In June, 2009, the Complainants, Mr. Ernst and Ms. Ernst, filed their separate complaints (the “Complaints”) under section 74 of the *Act* alleging they were employees of Valcon and had not been paid for work they performed for Valcon on a construction project at the University of British Columbia Okanagan (UBCO) Student Services building where Valcon was retained to do drywalling work.
8. The delegate of the Director conducted an investigation of the Complaints and in that investigation she contacted and received submissions from both Complainants as well as Valcon. While I have reviewed very

carefully the entire record adduced by the Director including the Determination, I do not propose to highlight in this decision all of the facts and evidence obtained by the delegate in her investigation or summarized in the Determination but instead I will focus on those facts and matters that are relevant and pertain to the “natural justice” ground of appeal advanced by Valcon in its appeal.

9. In this regard, with respect to the delegate’s contacts with Valcon, based on the record adduced by the Director, I note that the delegate sent a letter dated June 26, 2009, to Valcon’s president, Jerome Zuchotzki (“Mr. Zuchotzki”), referencing a previous discussion with him regarding the Complaints and requesting, in 14 numbered paragraphs, all information she required from Valcon to properly assess the Complaints. I further note that in the said letter, the delegate delineates the matters in issue or dispute which she intended to focus on in her investigation, namely, the Complainants’ status as employees or independent contractors and pending that determination, the question of what, if any, wages were owed to the Complainants.
10. Subsequently, in a fax dated July 24, 2009, from Mr. Zuchotzki to the delegate, Mr. Zuchotzki appears to have responded to the delegate’s correspondence of June 26 in corresponding numbered paragraphs. The submissions of Mr. Zuchotzki in his fax include submissions on the very issues identified by the delegate in her earlier correspondence, namely, the status of the Complainants and what, if any, wages they were owed.
11. Subsequently, on September 9, 2009, the delegate issued a preliminary assessment (the “Assessment”) based on the submissions of the parties and sent Mr. Zuchotzki the Assessment together with copies of the submissions and supporting documentation supplied by the Complainants to her and invited Mr. Zuchotzki to review all of the said materials and to respond or contact her with any further submissions or response by September 23, 2009.
12. In the Assessment, it should be noted, the delegate appears to have meticulously reviewed the submissions of both parties and concluded preliminarily that Mr. Ernst and Ms. Ernst were both employees of Valcon based on her review of the nature of their work and relationship with Valcon.
13. With respect to the matter of what if any wages were owed to the Complainants, the delegate, based on the evidence before her, concluded that Mr. Ernst appeared to be owed \$579.53 on account of unpaid wages by Valcon and in the case of Ms. Ernst, she appeared to be owed \$332.80 and asked Mr. Zuchotzki to review the preliminary assessment and the submissions and documents of the Complainants she sent to him and invited him to provide any information or to contact her if he was taking any issue with the Assessment. There appears not to be any further response from Mr. Zuchotzki or Valcon to the Assessment. I note, however, that the appeal submissions of the Director notes that the delegate discussed the contents of the Assessment with Mr. Zuchotzki on September 30, 2009, and that Mr. Zuchotzki asked the delegate to speak with Sawchuk Developments (“Sawchuk”), the general contractor on the project. The delegate did speak with Sawchuk during her investigation and before making the Determination.
14. Subsequently, on November 20, 2009, the delegate made the Determination on substantially similar terms to the Assessment except for some small adjustments to the amount owed to each of the Complainants on account of accrued interest.
15. In the Determination, I note that the delegate devoted a fair portion of her analysis on the issue of whether or not the Complainants were employees of Valcon. The delegate, after taking into consideration the definitions of “employer” and “employee” in the *Act* and the common law tests for determining employee status, confirmed her previous conclusion in the Assessment that the Complainants were employees of Valcon stating:

I am satisfied that both Valcon's employees and the complainants did similar work; insulating and drywalling. A reasonable person would typically expect an employee of a drywalling business to perform this type of work; furthermore, it is work that is clearly integral to Valcon's business. These factors must be given substantive weight in light of the fact that the definition of "employee" includes "a person an employer allows, directly or indirectly, to perform work normally performed by an employee".

Also significant is the fact Valcon directed the complainants' work; it established what work was to be done and the timeframes for completing the work. Valcon supervised the work; it specified that one block be completed prior to work starting on the next block. Valcon told Mr. Ernst not to work over the Christmas shut down because there were no safety officers or supervisors on site. The level of control and direction exercised by Valcon over the work that was done is important because the definition of "employer" specifically refers to a person who has control and direction.

The nature of the work performed by the complainants and the level of control and direction exercised by Valcon support a finding the complainants were employees for the purposes of the Act.

With respect to Valcon's argument that the method of paying for the work performed on a piece rate differentiates between an employment and contractual relationship, I note that while this method of remuneration inherently provides for an incentive to the worker to perform the work more efficiently, it does not conclusively demonstrate the worker was self-employed. In fact, the Act contemplates minimum wages based on piece rates for certain types of work. When evaluating the method of remuneration the central issue to be considered is whether the person doing the work has a chance of profit or risk of loss. This is largely dependent on the degree of financial investment made by the worker, as well as whether the worker is able to determine how the work is done and who does the work.

Lawrence Ernst and Lori Ernst had no financial investment in the business. As noted by Greg Schneuker, Valcon was ultimately responsible for the completion of the work to the specifications set out by the general contractor. Valcon provided the supplies and materials used such as the drywall, insulation, screws, scaffolding, while the complainants provided their own hand tools, which is customary in this industry. Furthermore, as already outlined, Valcon controlled how the work was to be done. These factors severely limit the complainants' chance for profit and risk of loss and are thereby indicative of an employment relationship.

16. The delegate then went on to consider the matter of wages, if any, owed to the Complainants. Here the delegate noted that the Complainants claimed they completed a total of 8,304 square feet of boarding which involved 84 pieces of 9-foot board and 110 pieces of 12-foot board. She also noted that the Complainants claimed that they performed 530 square feet of insulation work and invoiced Valcon on January 9, 2009, for \$2,544.20.
17. The delegate further noted that she accepted the terms of the agreement between the parties required the Complainants to complete the work satisfactorily in order to receive the agreed upon piece rate and that she preferred the evidence of Valcon or its witness, the general contractor, that the work performed by the Complainants was deficient and not done to specification and the Complainants did not return to the worksite once the deficiencies were identified. As a result, according to the delegate, the Complainants were not entitled to be paid the piece rate for the work they performed but this does not mean that the Complainants were not owed any wages for the work they performed. According to the delegate, under the *Act*, in such case, they would be entitled to be paid based on the minimum wage rate of \$8.00 per hour. The delegate then went on to calculate what each of the Complainants was owed as follows:

Mr. Ernst claimed he worked 8 hours each day on January 2, 3, 5 to 9 (inclusive), 12 and 13, 2009, while Lori Ernst claims she worked 8 hours each day on January 2 and 5 to 9, 2009 (inclusive). Though both complainants claim they worked on January 2, 2009 I am not persuaded work was performed on this day based on the fact that Mr. Ernst's notepad does not indicate any work was done on this date.

Furthermore, Mr. Ernst claims to have worked on January 3, 2009, but again his notepad does not reflect this and I am not persuaded based on the evidence before me that he has proven this aspect of his claim. Valcon did not dispute the hours claimed by the complainants stating it had not kept track of their hours because they were not employees. I accept it is reasonable the complainants worked eight hours per day given the amount of work they recorded to have completed,

I have determined Mr. Ernst worked a total of 7 days at 8 hours per day amounting to 56 hours, which at minimum wage equates to earnings of \$448.00. He is also entitled to receive annual vacation pay in the amount of 4% of his gross earnings as required by Section 58 of the Act, which amounts to \$17.92. Vacation pay of 4% would also be payable on his gross earnings from the previous invoice which was paid to him of \$2,840.20 amounting to \$113.61. Accordingly, Lawrence Ernst is owed \$579.53, plus interest in the amount of \$13.05 as required by Section 88 of the Act bringing the total amount owed to \$592.58.

I have also determined Lori Ernst worked a total of 5 days at 8 hours per day amounting to 40 hours, which at minimum wage equates to earnings of \$320.00. She is also entitled to receive 4% annual vacation pay calculated thereon in the amount of \$12.80, as required by Section 58 of the Act. Accordingly, Lori Ernst is owed \$332.80, plus interest in the amount of \$7.50 as required by Section 88 of the Act bringing the total amount owed to \$340.30.

18. The delegate then went on to conclude in the Determination that Valcon breached section 18 of the *Act* in respect of the employment of the Complainants for failing to pay the Complainants wages within 6 days after the Complainants' employment ended and imposed on Valcon an administrative penalty of \$500 pursuant to section 29 of the *Regulation*.

VALCON'S SUBMISSIONS

19. On behalf of Valcon, Mr. Zuchotzki makes very brief submissions stating that Mr. Ernst was never an employee of Valcon and he failed to follow instructions and his work was "incomplete" requiring Valcon to complete it.
20. Mr. Zuchotzki further states that the construction project was shut down and Mr. Ernst was told not to work from December 24, 2008 to January 4, 2009 and produces two time cards for Mr Ernst for the period December 29, 2008 to January 25, 2009 purportedly prepared by his project supervisor, Rick Zuchotzki.
21. The time cards show that Mr. Ernst worked on January 29, 30, and 31 for 5 ½, 5, and 4 hours respectively and there is an entry of 8 hours for January 1 with the notation "holiday". For January 2 there is a notation "off" on the time card.
22. With respect to the balance of the dates for wages claimed by Mr. Ernst, the time cards show no hours for January 3, 6 ½ hours for January 5, 7 hours for January 6, 5 hours for January 7, 4 hours for January 8, 3 ½ hours for January 9, 6 ½ hours for January 12, and 6 hours for January 13.
23. Finally, Mr. Zuchotzki submits that Mr. Ernst was never paid an hourly rate nor were deductions made from his pay.
24. There are no submissions pertaining to Ms. Ernst in Mr. Zuchotzki's written submissions.

DIRECTOR'S SUBMISSIONS

25. The Director submits that Valcon has made no submission to support the natural justice ground of appeal and that Valcon's appeal is merely a challenge to the findings of facts pertaining to findings in the

Determination relating to Mr. Ernst. According to the Director, Valcon's appeal is an attempt to reargue the matter and an appeal is not a proper forum for re-argument.

26. As for the time cards adduced by Valcon in its appeal, the Director notes that Valcon did not produce these time cards previously in the investigation of the Complaints and in any event, they do not satisfy the test for adducing new evidence on appeal and therefore should not be allowed or considered on appeal.
27. As for Mr. Zuchotzki's contention that Mr. Ernst was never paid an hourly rate, the Director notes that the delegate made a finding of fact that Mr. Ernst was indeed paid an hourly rate based on a recording of an hourly rate on an invoice dated December 2, 2008, which was submitted to Valcon for work Mr. Ernst performed together with one other, Mr. Griffin.
28. The Director also notes that in the Determination the matter of the incomplete or deficient work performed by Mr. Ernst was considered and also the representation of Valcon that the job site was closed from December 24, 2008, to January 4, 2009. Finally, the Director notes that while the delegate did not specifically address the matter of the statutory deductions Valcon did not make in the payments made to Mr. Ernst, this point is not probative in the ultimate decision on the matter of whether or not Mr. Ernst was an employee of Valcon.

SUBMISSIONS OF THE COMPLAINANTS

29. The brief submissions of the Complainants on appeal are mainly reiteration of the evidence they presented in the investigation of the Complaints and I do not find them helpful or useful to restate them in light of my decision.

ANALYSIS

30. Valcon, as indicated, has appealed the Determination on the basis that the Director breached the principles of natural justice in making the Determination. Principles of natural justice are essentially procedural rights ensuring that 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.
31. 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; 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.

32. In this case, I agree with the Director that Valcon has not provided any evidence in support of its allegation that the Director breached the principles of natural justice in making the Determination. There is, in my view, ample evidence in the record adduced by the Director in the appeal that shows that the delegate meticulously complied with Valcon's natural justice or procedural rights. Valcon, from the onset of the investigation of the Complaints, was aware of the Complaints and availed itself, through its president, Mr. Zuchotzki, to make both written and oral submissions in response. The Delegate also contacted the general

contractor on the project pursuant to Mr. Zuchotzki's suggestion after the Assessment was made but before the Determination. There is, in my view, no evidence and no basis that Valcon was denied procedural fairness during the investigation stage or at any other time leading to the Determination.

33. It is clear to me that Valcon, understandably, is displeased with the outcome in the Determination and is challenging the findings of facts made by the delegate in the Determination. I agree with the Director that the Tribunal has repeatedly stated in previous cases that an appeal is not a further opportunity to reargue one's case and I add as well that a dispute with the findings of facts in the Determination is not a proper ground of appeal under section 112 of the *Act*.
34. With respect to the purported new evidence adduced by Valcon in the form of time cards pertaining to Mr. Ernst, I note that in *Re: Merilus Technologies Inc.*, [2003] B.C.E.S.T.D. No. 171 (QL), (27 May 2003), BC EST # D171/03, the Tribunal resolved that in deciding whether or not to accept fresh evidence on appeal of a determination, it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is a four-fold test as follows:
- (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) The evidence must be relevant to a material issue arising from the complaint;
 - (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) The evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue."
35. This Tribunal has indicated previously that the four-fold criterion above are a conjunctive requirement and therefore any party requesting the Tribunal to admit new evidence must satisfy each of the criteria before the Tribunal will admit the new evidence. I find in this case that Valcon fails on the first of the four-fold criterion. That is, Valcon has not provided any evidence to show that it could not, with the exercise of due diligence, have discovered the said timecards and presented them to the delegate during the investigation or adjudication of the Complaints and prior to the Determination being made.
36. I also find it curious that Valcon is now adducing the timecards in question when in the investigation, as noted by the delegate in the Determination, Valcon did not dispute the hours claimed by either of the complainants because it had not kept track of their hours because they were not employees.
37. Accordingly, I reject the timecards as new evidence.
38. I also find myself in agreement with the Director that as concerns the value of the evidence of Valcon that it did not make any statutory deductions from payments made to Mr. Ernst, this factor alone does not give rise to a substantial challenge to the delegate's determination that Mr. Ernst was an employee. The determination that Mr. Ernst (as well as Ms. Ernst) was an employee of Valcon was based on a number of factors the delegate considered which I have produced verbatim earlier in the decision. I find that on the whole, the delegate correctly concluded, based on all the evidence before her, and her consideration of the statutory definitions of "employee" and "employer" as well as the common law tests governing the matter that Mr. Ernst and Ms. Ernst were both employees of Valcon.

39. Finally, the Director notes that while the delegate did not specifically address the matter of the statutory deductions Valcon did not make in the payments made to Mr. Ernst, this point is not probative in the ultimate decision on the matter of whether or not Mr. Ernst was an employee of Valcon.

ORDER

40. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued together with whatever additional interest that may have accrued, pursuant to Section 88 of the *Act* since the issuance of the Determination.

Shafik Bhalloo
Member
Employment Standards Tribunal