Employment Standards TRIBUNAL

An appeal

- by -

Kranz Investments Ltd.
("Kranz Investments")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2015A/141

DATE OF DECISION: February 5, 2016

BRITISH COLUMBIA

DECISION

SUBMISSIONS

Oscar Miklos	counsel for Kranz Investments Ltd.
Jonathan M. Aiyadurai	counsel for David More
Guy Massey	on behalf of the Director of Employment Standards

INTRODUCTION

1. Kranz Investments Ltd. ("Kranz Investments") appeals, pursuant to subsection 112(1)(a) of the *Employment Standards Act* (the "*Act*"), a Determination issued against it on September 23, 2015, by a delegate of the Director of Employment Standards (the "delegate"). By way of the Determination, Kranz Investments was ordered to pay $9,418.90 on account of unpaid wages and section 88 interest owed to David More ("Mr. More"). Further, and also by way of the Determination, the delegate levied four separate $500 monetary penalties against Kranz Investments (see section 98 of the *Act*) and thus the total amount of the Determination is $11,418.90.

2. Kranz Investments appeals the Determination on the ground that the delegate erred in law – this was the only ground identified on its Appeal Form. However, the appellant's written submission appended to its Appeal Form also includes documents, and other information, that were not before the delegate and, accordingly, I must also consider the so-called "new evidence" ground of appeal (see subsection 112(1)(c) of the *Act*: "...evidence has become available that was not available at the time the determination was being made"). Further, Kranz Investments' submission, at least in one respect, arguably raises a natural justice issue (see subsection 112(1)(b) of the *Act*) and so I will also address that matter in these reasons for decision.

3. In adjudicating this appeal, I have reviewed the submissions filed by legal counsel for Kranz Investments, legal counsel for Mr. More, and by the delegate. I have also reviewed the subsection 112(5) record that the delegate provided to the Tribunal.

THE DETERMINATION

4. On June 5, 2014, Mr. More filed an unpaid wage complaint against Kranz Investments seeking over $19,600 in unpaid wages. In his complaint, Mr. More asserted that he was employed by Kranz Investments as a "resident caretaker" from November 1, 2012, to December 31, 2013, and that his supervisor was "Art Corrigan".

5. Mr. More also filed a complaint against Mr. Corrigan but later, at the delegate's behest, withdrew that complaint. The record shows that this withdrawal was precipitated by a May 12, 2015, e-mail from the delegate to Mr. More's legal counsel (before the issuance of the Determination). The delegate indicated he had made a "preliminary finding" that "Mr. Kranz" was the employer and he requested the withdrawal of the complaint against Mr. Corrigan so "[a]s not to muddy the waters". Of course, when the Determination was issued over four months later, Kranz Investments, not Mr. Kranz personally, was named as the employer.

6. The delegate determined that Mr. More was, and ought to have been paid as, a "resident caretaker" as defined in subsection 1(1) of the *Employment Standards Regulation* (the "*Regulation*"):

> "resident caretaker" means a person who
>
> (a) lives in an apartment building that has more than 8 residential suites, and
>
> (b) is employed as a caretaker, custodian, janitor or manager of that building...

7. A resident caretaker's minimum wage is fixed by section 17 of the *Regulation*:

> The minimum wage for a resident caretaker is,
>
> (a) for an apartment building containing 9 to 60 residential suites, $615.00 a month plus $24.65 for each suite, and
>
> (b) for an apartment building containing 61 or more residential suites, $2,094.84.

8. The delegate investigated Mr. More's complaint and subsequently issued the Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") on September 23, 2015. In the "Background" section of his reasons, the delegate set out the following facts (I should note that some of these facts are challenged in this appeal):

- Kranz Investments is a BC corporation and Mr. Fred Kranz is its sole director and officer as recorded in the B.C. Corporate Registry;
- Kranz Investments owns and operates a residential apartment building, "Alexander Manor", in Duncan, British Columbia and that this building has 42 suites (as will be seen, this finding as to ownership was incorrect);
- "Mr. More was hired by Mr. Corrigan, and worked at Alexander Manor from November, 2012 to December 31, 2013." (delegate's reasons, page R2);
- "Mr. Corrigan stated that he has been an employee of Kranz Investments for many years, and that he has been working in the capacity of Property Manager for both Alexander Manor as well as another property owned by Kranz Investments." (page R2);
- "Mr. More and his common law partner, Ms. Jones, accepted caretaker positions from Mr. Corrigan having done previous relief work for him. Mr. More and Ms. Jones moved into Alexander Manor in 2012 and commenced their work as caretakers." (page R2);
- "Mr. More and Ms. Jones were provided occupation of suite #202, which was considered to be the manager's suite. It is agreed that the suite has a rental value of either $725.00 or $750.00 per month. There was no written employment contract or agreement between Mr. More and Mr. Kranz outlining agreed upon wages or an authorisation for rent to be deducted from wages earned. Instead Mr. More and Mr. Corrigan stated that all agreements between them were made verbally." (page R2);
- "As well as being provided with a suite, Mr. More was normally paid wages of $250.00 per month. Mr. More and Ms. Jones were paid an additional $10.00 an hour for some extra work performed." (page R2).

9. The delegate summarized Mr. More's evidence and, among other things, Mr. More maintained that he and Ms. Jones prepared and showed suites to prospective tenants, undertook building repairs and maintenance as well as providing janitorial services, collecting rent and were available "on a 24 hour basis in the event of

emergency situations" (page R3). He stated that between the two of them, they worked 40 to 55 hours each week. He stated "that he was the one who was paid by Corrigan once a month" and that "Mr. Corrigan told him that 'when Fred Kranz gets paid, you'll get paid'" (page R3). He understood that he would be paid $250 per month plus accommodation (suite no. 202) "in exchange for work performed as a caretaker" and that he could also earn an additional $10 per hour for work beyond his regular duties such as cleaning suites (pages R3 – R4). Mr. More stated he encountered Mr. Kranz on only one occasion at Alexander Manor when he showed Mr. Kranz some vacant suites; Mr. Kranz told him "to fix some of the emergency exit lights" (page R4).

10. The delegate also interviewed a witness at Mr. More's request, a tenant during Mr. More's tenure at Alexander Manor. She "confirmed" Mr. More's and Ms. Jones' accounts as to their regular duties and that she considered Mr. More to be the "Manager and Caretaker". "Mr. Corrigan had told her that Mr. More was the person to talk to in the event of requiring repairs to her suite" and that Mr. More "enforced the rules of the complex." She stated that upon moving into the building Mr. Corrigan informed her that "the Manager lives in #202 and that's where you pay your rent" (page R4).

11. The delegate also summarized the evidence of Mr. Corrigan and Mr. Kranz. With respect to the former, Mr. Corrigan stated that he was paid by Mr. Kranz and that he was the Property Manager of the Alexander Manor apartments (the record shows that he also managed another apartment complex and this is where he resides; he typically hired an assistant to undertake various chores at Alexander Manor). Mr. Corrigan personally paid Mr. More once per month and Mr. More's monthly compensation was $250 plus the "$750.00 by way of waiving the rent for suite #202 per month, in exchange for his services" (page R4). Mr. Corrigan also advised the delegate that Mr. More was not hired as a resident caretaker but, rather, as his assistant "to look after the needs of the building and tenants" and that he "authorized Mr. More to accept rent payments" (page R4).

12. Mr. Kranz told the delegate "that Mr. More was neither his employee nor a Resident Caretaker of Alexander Manor" and that he was wholly unaware that Mr. More had been hired and that if he had been, it was as a contractor not an employee. Mr. Kranz stated that Mr. Corrigan "makes all decisions around running and maintaining the building, which includes hiring people" and that he understood "Mr. Corrigan had verbally contracted with Mr. More to provide Mr. Corrigan with assistance in maintaining Alexander Manor" (page R4). I might add that the record shows Mr. Kranz's evidence regarding his relationship with Mr. Corrigan to be wholly uncontroverted and, indeed, it is fully corroborated by Mr. Corrigan.

13. The delegate considered three separate issues: first, whether Mr. More was an employee or an independent contractor; second, if the former, was he a "resident caretaker"?; and, third, was Mr. More owed any wages?

14. The delegate determined that Mr. More was an employee rather than an independent contractor and that his employer was Kranz Investments. The delegate's entire findings with respect to these latter matters is reproduced, below (page R6):

> While Mr. Corrigan's intent was to have [Mr. More] work as an independent contractor, there is no evidence that [Mr. More] risked a financial loss or stood to gain a profit by performing the work he did for Kranz Investments. The only cost of performing work was [Mr. More's] time. Mr. More invested no money into the work he performed. Further, there is no evidence that Mr. More was expected to use his own tools or materials. [Mr. More] was required to perform general work over an ongoing period of time. This work was for the benefit of Alexander Manor and the tenants living there. For these reasons, I find that Mr. More was performing work for Kranz Investments, rather than on his own account.

15. The delegate concluded that Mr. Corrigan, rather than being Mr. More's employer, was also a Kranz Investments employee: "Mr. Corrigan was an employee of Kranz Investments, working as a Property Manager, when he hired Mr. More to work at Alexander Manor. Mr. More is therefore an employee of Kranz Investments" (page R6).

16. Having determined that Mr. More was a Kranz Investments employee, he then also found that Mr. More was a "resident caretaker" as defined in the *Regulation* (see, above, for the definition).

17. Finally, the delegate found that Kranz Investments failed to pay Mr. More in accordance with the provisions of the *Act* and *Regulation*. More specifically, the delegate held that "the rent in kind was not a payment of wages under the Act" (page R7) and that there was no written assignment, as required by section 22 of the *Act*, authorizing the deduction of rent from wages otherwise payable. The delegate applied the formula set out in section 17 of the *Regulation* and, after accounting for the section 80 wage recovery limitation and payments of $1,800 actually received during that period, determined that Mr. More was owed $8,101.80 plus 4% vacation pay ($858.15) and section 88 interest ($458.95) for a total award of $9,418.90.

18. As previously noted, the delegate also levied four separate $500 monetary penalties based on Kranz Investments' contraventions of sections 17 (at least semimonthly payment of wages) and 18 (payment of wages on termination) of the *Act* and sections 17 (minimum wage for resident caretakers) and 46 (failure to produce employment records as demanded) of the *Regulation*.

REASONS FOR APPEAL

Errors of Law

19. Kranz Investments appeals the Determination on the ground that the delegate erred in law and, in particular, says that the delegate "was presented with no facts or evidence by either party" to support the assertion that "Kranz Investments operates a residential apartment building, Alexander Manor...which is located at 2568 Alexander Street, Duncan, BC" (this finding was set out a page R2 of the delegate's reasons). Kranz Investments says that, in fact, it "has no ties at all to [Alexander Manor]" and that "Kranz Investments is not the legal owner of [Alexander Manor]" and that it "does not operate" Alexander Manor nor does it "retain any contractor in charge of [Alexander Manor's] management".

20. Kranz Investments also attacks the delegate's finding that Mr. Corrigan was a Kranz Investments employee and that in making this finding the delegate "acted on a view of the facts which could not reasonably be entertained".

21. The delegate did not specifically find that Mr. Corrigan was an agent employed by Kranz Investments with authority to hire other employees on to the Kranz Investments payroll. I previously reproduced, above, the delegate's entire findings with respect to Messrs. More's and Corrigan's status. To recap, the delegate determined that while Mr. Corrigan may have intended to retain Mr. More as an independent contractor, Mr. More was actually an employee. The delegate then found that Mr. More was employed by Kranz Investments, rather than by Mr. Corrigan personally, but did not explain how he arrived at this conclusion other than to rely on his finding that Mr. Corrigan was a Kranz Investments employee. I might add that this finding was made despite the overwhelming uncontroverted body of evidence that Mr. Corrigan was *not* employed by Kranz Investments. There is absolutely nothing in the record before me indicating that Mr. Corrigan was a Kranz Investment employee. The only evidence in the record with respect to this latter question indicates that, if Mr. Corrigan were an employee rather than an independent contractor (and the evidence suggests the latter), his employer was Mr. Kranz personally and not Kranz Investments. The

delegate simply declared that Mr. Corrigan was a Kranz Investments employee and that since Mr. Corrigan hired Mr. More, Mr. More must equally be considered to have been a Kranz Investments employee: "Mr. Corrigan was an employee of Kranz Investments, working as a Property Manager, when he hired Mr. More to work at Alexander Manor. Mr. More is therefore an employee of Kranz Investments" (delegate's reasons, page R6).

22. In any event, and with respect to Mr. Corrigan's status and authority, Kranz Investments says "it is not reasonable to assume simply because Arthur Corrigan had the authority to hire 'contactors for servicing the building as needed' on Mr. Corrigan's own account, as stated in Frederick Kranz's email of February 10, 2015, that he would also have authority to hire employees on behalf of either Frederick Kranz or Kranz Investments." Kranz Investments' legal counsel's argument then takes on somewhat of a "natural justice" hue (see subsection 112(1)(b) of the *Act*):

> Furthermore, the Delegate was presented with no evidence that would support the conclusion that Arthur Corrigan had any implied or express authority to hire employees on behalf of either Frederick Kranz or Kranz Investments *and made no effort to investigate this matter*. (my *italics*)

23. Counsel asserts that Mr. Corrigan never had any "implied or express authority to hire employees on behalf of either Frederick Kranz or Kranz Investments" and that Mr. Corrigan retained both Mr. More (and Ms. Jones) "on his own account and by his own initiative as contractors".

24. Finally, Kranz Investments' legal counsel submits:

> ...while the Delegate did conduct a detailed analysis of whether [Mr. More] was an employee or an independent contractor, he simply relied on his earlier faulty assumptions and conclusions in finding that [Mr. More] was an employee of Kranz Investments

and that, in making this finding, the delegate "acted without any evidence or otherwise acted on a view of facts which could not reasonably be entertained to suggest that [Mr. More] was an employee of Kranz Investments". Kranz Investments maintains "[Mr. More] was not an employee of Kranz Investments".

New Evidence

25. Kranz Investments' legal counsel attached an affidavit to Kranz Investments' Appeal Form, sworn by Mr. Frederick Kranz on October 29, 2015, in which Mr. Kranz avers that he is the sole director and shareholder of Kranz Investments and, strictly in his personal capacity, the owner of the lands and premises known as Alexander Manor (this latter assertion is supported by land title records). He further states that Kranz Investments neither owns Alexander Manor nor employs the facility's property manager. Finally, and perhaps most importantly for purposes of this appeal, Mr. Kranz states that in 1986 he retained Mr. Corrigan as an independent contractor – through the latter's apparently unincorporated business vehicle "A & S Services" – to act as Alexander Manor's property manager and that he never gave Mr. Corrigan "any authority, whether implied or express, to hire employees on behalf of myself or Kranz Investments". Mr. Kranz maintains that he never represented to Mr. More, or "provide[d] him with any reason to believe that he was employed by me or my company, Kranz Investments".

26. Kranz Investments' legal counsel also submitted a second affidavit, sworn sometime in October 2015 (the date is not readily decipherable), by Arthur Corrigan. Mr. Corrigan avers that sometime in 1986, Mr. Kranz verbally retained him to act as the property manager for Alexander Manor. He further states: "While I had the authority to hire subcontractors to assist me in fulfilling my duties, it was my clear understanding that

Frederick Kranz never gave me any implied of express authority to hire employees on behalf of either him or his company, Kranz Investments Ltd.". Finally, Mr. Corrigan states that in November 2012, "on my own initiative, I retained David More as my subcontractor to assist me in fulfilling my property management duties at [Alexander Manor]" and that "[a]t no material time did I represent to David More or provide him with any reason to believe that he was employed by Frederick Kranz or Kranz Investments Ltd."

THE RESPONDENTS' POSITIONS AND KRANZ INVESTMENT'S REPLY

27. Mr. More, through his legal counsel, has also provided evidence that was not before the delegate, particularly in response to Mr. Kranz's affidavit and the latter's position that Kranz Investments was not Mr. More's employer. Mr. More's counsel also notes that Mr. Kranz's argument about the identity of Mr. More's employer was not raised during the course of the delegate's investigation even though Mr. Kranz was afforded ample opportunity to provide evidence on this point. Mr. More's counsel submits that the delegate's findings were all adequately supported by the evidence before him and cannot now be set aside by way of this appeal proceeding.

28. The delegate states that at no time during his investigation did Kranz Investments ever dispute its status *vis-à-vis* Alexander Manor. The delegate maintains that Mr. Kranz was afforded every reasonable opportunity to participate in the investigation but demurred preferring to have his position communicated through Mr. Corrigan. In the balance of his submission, the delegate referred to the evidence he relied on in making his various impugned findings.

29. By way of reply, Kranz Investments' legal counsel rejects the delegate's explanation for finding Kranz Investments to be Mr. More's employer and reasserts his position that the delegate failed to conduct an adequate investigation: "Instead of investigating and making findings of fact, the delegate made an assumption that Kranz Investments was the correct party to target since this issue was not raised by Frederick Kranz during the investigation". Counsel says that there was no evidence before the delegate that Mr. Corrigan was authorized to hire employees for Kranz Investments or that Kranz Investments "funnelled" funds through Mr. Corrigan to pay Kranz Investments employees.

FINDINGS AND ANALYSIS

New Evidence

30. Although Kranz Investments' legal counsel filed this appeal based solely on the "error of law" ground, as I noted above, Kranz Investments' appeal submission includes evidence that is not contained in the record and, in particular, an affidavit (with attachments) sworn by Frederick Kranz on October 29, 2015, and another affidavit sworn by Arthur Corrigan on October [the actual date is not clearly ascertainable], 2015.

31. Neither affidavit was before the delegate, nor could they be since they were not even sworn until about one month after the Determination was issued. Curiously, and despite clearly submitting evidence that was not provided to the delegate during his investigation, Kranz Investments' legal counsel did not highlight the subsection 112(1)(c) ground of appeal on Kranz Investments' appeal form, nor did he advance any arguments with respect to the admissibility of these affidavit in his submission. I should add, however, that neither the delegate nor Mr. More's legal counsel objected to these affidavits being considered in this appeal proceeding.

32. The test for the admissibility of "new evidence" on appeal was set out in *Davies et al.*, BC EST # D171/03. The Tribunal will principally consider the following four factors:

- Could the evidence, with the exercise of due diligence, have been discovered and presented to the delegate during the investigation and prior to the Determination being made?;
- Is the evidence relevant to a material issue arising from the complaint?;
- Is the evidence credible in the sense that it is reasonably capable of belief?; and
- Does the evidence 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 delegate to a different conclusion on a material issue?

33. I am satisfied that the two affidavits are relevant and potentially highly probative. I have no reason to believe that either deponent has been deliberately untruthful. Neither the delegate nor Mr. More's counsel have seriously challenged the assertions contained in the two affidavits; indeed, as noted above, neither one objects to these affidavits being considered in this appeal. Nevertheless, since this evidence was *not* presented to the delegate, I must consider whether it could have, or should have, been presented.

34. These two affidavits particularly speak to the identity of the "true employer" and the scope of Mr. Corrigan's authority, issues that the delegate addressed, albeit only in a most cursory fashion, in his reasons. I have set out the evidence in the subsection 112(5) record relating to these matters, in greater detail, below.

35. In his original complaint, Mr. More identified Kranz Investments as his "employer" and Mr. Corrigan as his "supervisor" and in an appendix to his complaint Mr. More stated: "My lawyer, Jonathan Aiyadurai, sent the self-help kit on my behalf to the owner to Alexander Manor [*sic*], Kranz Investments Ltd., on March 3, 2014. Despite this the matter remains unresolved. On May 8, 2014, my lawyer then sent the self-help kit to Arthur Corrigan because he had indicated in writing that he was my employer, though it is my position that Kranz Investments Ltd., as owner of Alexander Manor, is the employer and Mr. Corrigan simply paid me on behalf of Kranz Investments Ltd. Despite doing this the matter remains unresolved."

36. The record also includes the following documents concerning the "true employer" and "agency" issues:

- A "[t]o whom it may concern" note dated November 2, 2013, signed by Mr. Corrigan stating: "Dave more [*sic*] has worked for me as caretaker of Alexander Manor since Nov. 2012. He receives a two bedroom suite which rental would be $725.00 per month plus $250.00 and extra if work is required." Presumably, this is the "indication in writing" that Mr. More referenced in his complaint.
- A letter dated June 3, 2014, from Mr. More's legal counsel to the Victoria office of the Employment Standards Branch in which he states, among other things: "It is Mr. More's position that his employer was Kranz Investments Ltd., which owns Alexander Manor, and therefore we are submitting a Complaint and Information Form and attached Schedule 'A' naming Kranz Investments Ltd. as the 'employer'...Mr. More's position is that Kranz Investments Ltd. is the 'employer', however, because of the correspondence from Mr. Corrigan saying he hired Mr. More (see document #4), we are submitting a second Complaint and Information Form, this one naming Mr. Corrigan as the 'employer' (see document #6)."
- A copy of a cheque drawn on Mr. Corrigan's personal account, and made payable to Mr. More, in the amount of $250.00. The cheque appears to be dated November 7, 2013. There is a "memo" line on the bottom left-hand corner of the cheque and Mr. Corrigan appears to have

written the word "Alex" on this line. This cheque was attached to a July 16, 2014, e-mail from Mr. More's legal counsel to an employment standards officer (not the delegate who issued the Determination) who had apparently requested a copy of the cheque.

- A letter dated March 9, 2015, from Mr. Corrigan to Mr. More's legal counsel in which Mr. Corrigan states, in part: "I am the Property Manager and caretaker of Alexander Manor...*All decisions about running and maintaining the building are made by me. I hire people on my own account* if I need assistance with the chores. *Mr. More and I made a verbal contract that he would be my assistant* at Alexander Manor helping me with the cleaning of the building. We agreed that I would pay him $250.00 and $750.00 by way of the rent for suite #202 per month in exchange for his services." (my *italics*)

37. Clearly, on its face, this letter, as well as the November 2, 2013 "[t]o whom it may concern letter", is an admission by Mr. Corrigan that, *in his personal capacity*, he hired Mr. More under some sort of personal services contract.

- An e-mail dated March 11, 2015, from Mr. More's legal counsel to the delegate in which counsel states: "Mr. More had one meeting at the building in Duncan with Mr. Kranz (as Mr. Kranz lives in Vancouver). He showed Mr. Kranz through the building and some of the vacant suites. He recalls Mr. Kranz telling him to fix some of the emergency exit lights...During the last 6 months of his employment as caretaker, Mr. More believes that all of the cheques he received were for $250, save and except two cheques that were between the amount of $250 and $400." Mr. More's legal counsel did not indicate who was the payor for these cheques but, presumably, it was Mr. Corrigan. I note that the one cheque in the record, dated November 11, 2013 (and thus within the last six months of employment), was drawn on Mr. Corrigan's account. The delegate, at page R7 of his reasons, referred to these payments but did not indentify the party who made these payments. Mr. Corrigan's uncontested evidence is that he personally paid Mr. More.
- An e-mail dated March 27, 2015, from Mr. More's legal counsel to the delegate that states, in part: "With respect to the 'level of control' aspect that it appears you are considering in determining whether or not my client was employed by Kranz Investments or self-employed, I direct your attention to the attached Employment Standards Tribunal decision which states at paragraph 9..." [*Howard House Apartments Ltd.*, BC EST # D358/99]. This e-mail was sent in response to an earlier e-mail communication to Mr. More's counsel sent that same day from the delegate in which the latter stated: "I just spoke with Mr. More and was able to gather more details. It is sounding like he had a level of control surrounding his work that may be synonymous with being self-employed. Particularly given Kim Jones' role and direction as well as deciding when and how work was to be done. There are various other aspects to this that would be reflected in the Determination."
- An e-mail dated May 12, 2015 from the delegate to Mr. More's legal counsel in which the delegate stated: "My preliminary findings have found Mr. Kranz as the employer and Mr. Corrigan as an employee of Mr. Kranz. The Determination will show that Mr. Kranz gave Mr. Corrigan the authority to hire Mr. More into his position as Resident Caretaker and that Mr. More is entitled to compensation in keeping with the Employment Standards Regulation. As not to muddy the waters, I am requesting that Mr. More withdraw his complaint against Mr. Corrigan. If you are in support of this, I have attached a Withdrawal of Complaint form for Mr. More to complete and return to me as soon as possible."

- An e-mail dated May 21, 2015 from Mr. More's legal counsel to the delegate in which the former states: "Per your request that Mr. More withdraw his complaint against Mr. Corrigan, and on the basis that you have told you me [*sic*] that you will be issuing a decision finding that Kranz Investments Ltd. employed Mr. More, please see the attached Complaint Withdrawal signed by my client."

38. This latter e-mail stream demonstrates that there was ongoing confusion regarding the identity of the "true employer". Mr. More's counsel had maintained from the outset that the "true employer" was Kranz Investments whereas, at some point, the delegate found the employer to be Mr. Kranz in his personal capacity, but then later returned to the position reflected in the Determination. However, on the face of things, Mr. More's counsel only agreed to have his client withdraw the complaint against Mr. Corrigan because he understood the Determination would name *Kranz Investments* as Mr. More's employer.

39. The record also contains a number of documents relating to the scope of the delegate's investigation and his efforts to obtain evidence from Messrs. Corrigan and Kranz and Kranz Investments:

- An e-mail dated February 10, 2015, sent to Mr. Kranz's personal e-mail address with the following salutation "Dear Mr. Kranz (Kranz Investments Ltd.)". By way of this e-mail, the delegate advised Mr. Kranz about Mr. More's unpaid wage complaint and continued: "Based on the evidence before me, at this time my preliminary findings show that [Mr. More] was working for you and may be entitled to compensation for wages earned." The delegate invited Mr. Kranz to enter into settlement discussions and, finally, requested Mr. Kranz to reply by February 12, 2015.

40. First, I find it troubling that the delegate would have arrived at a preliminary conclusion without even having yet spoken to Mr. Kranz, the latter being Kranz Investments' principal and, apparently, the party under investigation. Second, and again, there is some confusion about the employer's identity – the delegate's e-mail refers to "working for *you*" but this communication is addressed to Mr. Kranz presumably in his capacity as the principal of Kranz Investments as reflected in the salutation. The note does not indicate whether the delegate has made a preliminary determination that Mr. Kranz, in his personal capacity, is the employer or that Kranz Investments is the employer.

- Mr. Kranz's sent an e-mail, dated February 10, 2015, and sent within two hours after the delegate's e-mail, in which he states that he had no knowledge of Mr. More's complaint and then states: "We employ a Property Manager who is in charge of the rentals and upkeep of our building. He is in charge of hiring contractors for servicing the building as needed and he is paying those contractors. We don't hire resident caretakers or, other employees." This message was sent from a personal e-mail account and is signed "Frederick Kranz" and nowhere in this message is there any reference to Kranz Investments. Later that same day, the delegate responded, by e-mail, to Mr. Kranz stating that the delegate wished to speak with Mr. Kranz and had set up an appointment on February 12, 2015, at 9:30 AM for that specific purpose. The delegate asked Mr. Kranz to confirm the appointment or suggest a more suitable day and time.
- On February 12, 2015, Mr. Kranz responded to the delegate (with a copy to Mr. Corrigan), by e-mail, stating: "Before I can speak with you on the phone about any complaint that you mentioned you have, you have to provide me with the documents that you have and the names and addresses of the people involved. You mentioned a complaint that you received in June 2014. I have not received any such complaint. You may send the documents by email to me and I will answer your questions. Again: I have never employed any person at [Alexander

Manor] as a residential caretaker. I am not in Canada and would not be able to talk to you on the phone about this matter."

- The delegate replied to Mr. Kranz by e-mail dated February 13, 2015. The delegate stated he had been in contact with Mr. Corrigan and that he understood Mr. Corrigan had, in turn, discussed the matter with Mr. Kranz. The delegate's e-mail continued: "Mr. Corrigan states that he is employed by you, and has not had his own business for 7-8 years. For this reason, my preliminary findings based on the evidence before me shows that *Kranz Investments Ltd. and its Directors and/or Officers* are liable for unpaid wages...Again, based on the evidence before me at this time, it appears that Mr. More was permitted by Mr. Corrigan to indirectly perform work for you and that *you are the owner of the property* where [Mr. More] was a Resident Caretaker." The delegate then states that he wished "to speak with you directly" and enquires about when they might be able to speak perhaps by telephone. (my *italics*)

41. Three points should be noted regarding the above February 13 e-mail message. First, despite Mr. Kranz's specific request for documentation, not a single document – in particular, the complaint – was provided. Indeed, so far as I can determine, the complaint was *never* provided to Mr. Kranz. Mr. Kranz noted this very fact in another e-mail dated February 12, 2015, to the delegate when he stated: "I see that you are ignoring my request for the documents in this matter." Second, as is clear from the italicized portion of the e-mail, the delegate was still proceeding on the assumption that Kranz Investments, not Mr. Kranz personally, was the employer. Third, the delegate notes that "you are the owner of the property" but this appears to be an assertion directed toward Kranz Investments not Mr. Kranz, personally. Since ownership of real property is a matter of public record in British Columbia, the delegate (who was conducting an investigation) could have undertaken a search to confirm the actual party who was the registered owner of Alexander Manor. I might add that the delegate may have been misled regarding this latter matter from the outset of his investigation since Mr. More's legal counsel insisted, throughout this entire matter, that Kranz Investments was the owner of Alexander Manor – it would appear that Mr. More's counsel never undertook a land title search. Since Mr. More had no records whatsoever evidencing his asserted status as a Kranz Investments employee, it probably would have been prudent to conduct a land title search.

- On February 13, 2015, Mr. Kranz sent an e-mail to the delegate detailing an ongoing despite with Mr. More under the *Residential Tenancy Act* regarding non-payment of rent and reiterating his position that he never employed Mr. More and repeating his request for documents ("I look forward to receiving from you all the documents I asked for...") and suggesting that the delegate contact Mr. Corrigan. The delegate replied by e-mail on February 16, 2015, indicating that his present investigation "has nothing to do with the security deposit or unpaid rent by [Mr. More]" and stating that his next step would be to send out a demand for employment records.
- Although this is not entirely clear from the record – and it appears that some documents are missing – on March 11, 2015, Mr. Corrigan apparently sent an e-mail to the delegate simply enclosing his March 9, 2015, letter to Mr. More's legal counsel (discussed above; by way of this letter Mr. Corrigan admitted that he *personally* retained Mr. More's services). The delegate responded by e-mail dated March 11, 2015, indicating that rent dispute issues were outside his jurisdiction and requesting further documentation relating to Mr. More's engagement. The delegate did not, in any fashion, respond to Mr. Corrigan's admission nor is this evidence discussed in the delegate's reasons with respect to the "true employer" question.
- The delegate sent an e-mail, dated March 12, 2015, to Mr. Corrigan (with a copy to Mr. Kranz) making a demand for certain records and information. The opening sentence of this e-mail reads as follows: "Dear Mr. Corrigan and Mr. Kranz: This notice is with regard to the Employment Standards Branch Complaint filed by David More against Kranz Investments Ltd.

(135-195) and against Arthur Corrigan (179-280) and ensuing investigation." The information/documentation specifically requested was described as follows: "Contact information including addresses and telephone numbers for the current caretaker, employees and contractors of Alexander Manor" and contact information for a tenant identified as the current building caretaker (incorrectly, it would appear, although a note of her evidence contained in the record indicates that she was the building caretaker "in the 80's"). The penultimate paragraph of the delegate's e-mail reads: **Upon reviewing all evidence, I will forward you a copy of my preliminary findings. As well, the evidence to support those findings will be forwarded to you for your review and you will be given an opportunity to respond. In the event of there being no response or further evidence, the preliminary findings will comprise the Determination.** (**boldface** in original text)

42. It should be noted that this demand was in regard to "employees and contractors of *Alexander Manor*" and "Alexander Manor" is an entity that has no distinct legal identity or status – it is merely the name of the apartment building in question. Much of the confusion that now arises in this case concerning the identity of the "true employer" could have easily been avoided if the demand had specifically requested information regarding the employees or contactors of, separately, Mr. Corrigan, Kranz Investments Ltd. and Mr. Kranz in his personal capacity.

- By e-mail, dated March 17, 2015, Mr. Corrigan responded to the delegate's March 12 demand. Mr. Corrigan provided some information relating to the former caretaker.
- On March 17, 2015, the delegate sent an e-mail to Mr. Corrigan (without copying Mr. Kranz) stating "I'm just about there", presumably referring to the issuance of the Determination, and requesting some additional information regarding Mr. More's hours of work and availability.
- On March 18, 2015, Mr. Corrigan replied to the delegate's request for further information regarding Mr. More. Mr. Corrigan stated that "there were no times set as to do any work" [*sic*] and that any emergency calls were automatically forwarded to Mr. Corrigan ("most of the time") or, occasionally, "Sylvia" (whomever that person might be, presumably Mr. Corrigan's spouse). Mr. Corrigan stated that "Mr. Mores [*sic*] function was to vacuum halls as needed and keep the area around the building presentable" and that Mr. More "did not have to notify anyone if he was not around as long as the place was presentable" and, insofar as Mr. Corrigan's own duties were concerned, Mr. Corrigan stated "I go to Alexander 4 to 5 times a day and do what I have to do". Mr. Corrigan sent a second e-mail later that same day to the delegate explaining that Mr. More had authority to accept rent cheques provided he "gave a receipt" but that he had no authority to enter into tenancy agreements or approve prospective tenants' rental applications and that there was no "Manager" sign on his suite door. Mr. More told the delegate that there was such a sign; the delegate apparently did not explore this issue with the former tenant that he interviewed (there is no mention of this in the delegate's notes of his conversation with this individual, who is known as "Jenny") and the delegate did not deal with this conflict in the evidence in his reasons although he purported to completely summarize her evidence at page R4 of his reasons.
- On March 31, 2015, Mr. Corrigan sent an e-mail to the delegate. Mr. Corrigan referenced "our conversation on Friday" – the delegate's notes do not indicate that he had a conversation with Mr. Corrigan on Friday, March 27, but do record a telephone conversation that occurred on Wednesday, March 25 in which the delegate notes that he advised Mr. Corrigan of his "preliminary findings" including a finding that Mr. Kranz personally hired Mr. Corrigan and wondering whether a settlement of this dispute was possible. In any event, Mr. Corrigan, in his March 31 e-mail reiterated his position that he personally retained Mr. More's services to assist

Mr. Corrigan with his duties as the Property Manager. Mr. Corrigan also indicated in his e-mail that Mr. Kranz was the owner of the Alexander Manor property. The delegate replied, by e-mail dated April 1, 2015, to Mr. Corrigan (and copied to Mr. Kranz) thanking Mr. Corrigan "for describing your position" and that he intended to proceed with issuing a Determination.

43. The delegate's "telephone correspondence notes" – which were supplied to the Tribunal after the delegate had previously delivered what he stated was the record (the delegate indicated these further records were inadvertently not disclosed previously) record five separate telephone conversations with Mr. Corrigan but none with Mr. Kranz. So far as I can determine, the delegate's note of his March 25 telephone conversation with Mr. Corrigan appears to be the first and only occasion when the delegate advised Mr. Corrigan that he was taking the position Mr. Corrigan was employed by *Mr. Kranz* (rather than being an independent contractor or employed by Kranz Investments). I can find nothing in the record of any communication directly from the delegate to Mr. Kranz indicating that the delegate was taking the position that Mr. Kranz was the employer. Of course, when the Determination was issued, on September 23, 2015, Kranz Investments was identified as the employer. It would also appear that as of March 27, 2015, the delegate was of the view that Mr. More had been "self-employed" (see March 27 e-mail to Mr. More's legal counsel discussed, above).

- On April 2, 2015, the delegate sent another e-mail to Mr. Corrigan (but only Mr. Corrigan) requesting further information and documentation concerning Mr. Corrigan's compensation. Mr. Corrigan replied by e-mail dated April 5, 2015, stating he was paid once each month by "direct deposit" to "Sylvia's" (I presume his spouse's) bank account. Mr. Corrigan indicated that he was paid a "base rate" for managing two separate apartment buildings and principally resided at the other building (known as "Parkland"). Mr. Corrigan stated: "We also get apt #202 at Alexander Manor to use as I see fit" and "I submit bills on a monthly bases [*sic*] for work that is carried out by myself or those that I farm work out to, and for extra work carried out by my assist [*sic*] at Alexander Manor. If it is work that my assist does not wish to do I again farm it out to the people that I use to assist me at Parkland. When I do not have an assist [*sic*] at Alexander Manor I use apartment #202 and then spend as much time as I have to over there to ensure it runs and is being keep [*sic*] clean and tide [*sic*]. Yes I have actually moved into apt 202 when there are times when Sylvia and I have looked after both buildings our selves [*sic*]."

44. The record indicates that the above e-mail stream was the last substantive communication the delegate had with either Mr. Corrigan or Mr. Kranz prior to issuing the Determination on September 23, 2015. As noted above, the delegate communicated with Mr. More's legal counsel in late May 2015 with respect to the withdrawal of the complaint against Mr. Corrigan (which was finalized on May 21, 2015).

45. Having summarized the relevant evidence before the delegate, I now turn to whether the two affidavits are admissible in this appeal proceeding.

46. In my view, the above summary of the evidence before the delegate clearly shows that these two affidavits are relevant. The Kranz affidavit speaks to the ownership of Alexander Manor and it would appear that the delegate assumed that Kranz Investments was the owner but never undertook a property search. Mr. Kranz, for his part, was never specifically asked if he, or Kranz Investments, retained Mr. Corrigan's services but Mr. Kranz's communications seem to suggest that he was, throughout this matter, indicating that he was the owner of Alexander Manor and *personally* retained Mr. Corrigan's services. The delegate, on the other hand, appears to have proceeded on the assumption that Kranz Investments was the owner of Alexander Manor – and thus the employer of both Messrs. Corrigan and More.

47. However, the delegate also appears to have, at some point, concluded that *Mr. Kranz* employed Mr. Corrigan (see the delegate's note of this March 25, 2015, telephone call with Mr. Corrigan) but in his reasons he seemingly abandoned this view since he concluded (page R6) that "Mr. Corrigan was an employee of Kranz Investments, working as a Property Manager, when he hired Mr. More to work at Alexander Manor". I cannot find anything in the record where the delegate specifically raised the question of the "true employer" with Mr. Kranz. The Corrigan affidavit, although not before the delegate, simply reiterates the position that Mr. Corrigan maintained throughout his communications with the delegate, namely, that he was an independent contractor and that he, not Mr. Kranz or Kranz Investments, personally retained Mr. More's services.

48. I consider the two affidavits to be relevant, credible and that they have significant probative value. The Corrigan affidavit simply reiterates the evidence that was before the delegate and, in that sense, is not "new" evidence at all. Rather, this latter affidavit summarizes, in a different format, evidence that was before the delegate when he issued the Determination. The Kranz affidavit does contain "new" evidence but in light of the fact that the delegate never explored the issue of the ownership with Mr. Kranz – and since Mr. Kranz's evidence given during the investigation is consistent with that contained in the affidavit – I am not prepared to find that the evidence contained in the affidavit was not explicitly placed before the delegate due to a lack of diligence on Mr. Kranz's part. Accordingly, and consistent with *Davies et al.*, *supra*, I find that both affidavits are properly before me and can be considered in this appeal.

The New Evidence and the Alleged Errors of Law

49. The delegate determined that Mr. More was an "employee" rather than an independent contractor. Although there was some evidence before the delegate that is consistent with an independent contractor relationship, there was also evidence consistent with Mr. More being an employee. It seems clear that Mr. Corrigan's *intention* was to retain Mr. More as a contractor and the compensation arrangements between them were consistent with a contractor relationship. Mr. Corrigan paid Mr. More from the former's own account for services rendered. Mr. More had significant flexibility as to when he undertook his tasks and he worked independently. However, Mr. Kranz's legal counsel does not say that Mr. More was *not* an employee; rather his position is that *Mr. More was not employed by Kranz Investments*.

50. I am not prepared to find that the delegate erred in finding Mr. More to be an employee. Although this was not an absolutely clear case (and the delegate, at one point, appears to have been leaning toward finding Mr. More to be an independent contractor – this is reflected in his March 27, 2015, e-mail to Mr. More's legal counsel), I accept there was sufficient evidence before the delegate to allow him to conclude that Mr. More was an "employee" as defined in section 1 the *Act*. There was an element of control (exercised by Mr. Corrigan) over Mr. More's work and there was very little cogent evidence, if any, that Mr. More was operating an independent profit-seeking business.

51. The thrust of Mr. Kranz's argument concerns the delegate's finding that Kranz Investments was Mr. More's employer. The delegate's finding on this issue is, in my view, not adequately supported by an intelligible and reasoned analysis of the evidence; indeed, to a very significant degree, the delegate's finding on this score is *contrary* to the evidence. The delegate's entire finding on this issue is set out at page R6 of his reasons. I have already excerpted the relevant portions of the delegate's reasons on this issue, above, but for ease of reference will set out the full text of the delegate's reasons on the "employer" question:

> While Mr. Corrigan's intent was to have [Mr. More] work as an independent contractor, there is no evidence that [Mr. More] risked a financial loss or stood to gain a profit by performing the work he did for Kranz Investments. The only cost of performing work was [Mr. More's] time. Mr. More invested no money in to the work he performed. Further, there is no evidence that Mr. More was expected to use his

> own tools or materials. [Mr. More] was required to perform general work over an ongoing period of time. This work was for the benefit of Alexander Manor and the tenants living there. For these reasons, I find that Mr. More was performing work for Kranz Investments, rather than on his own account.
>
> Mr. Corrigan was an employee of Kranz Investments, working as a Property Manager, when he hired Mr. More to work at Alexander Manor. Mr. More is therefore an employee of Kranz Investments.
>
> I find that the evidence clearly demonstrates that Mr. Corrigan was an employee of Kranz Investments as defined by section 1 of the Act.

52. The delegate's analysis of the "employer" issue proceeds as follows: first, Mr. More was an employee and not an independent contractor; second, Mr. More's services benefitted Kranz Investments; third, Mr. Corrigan was an employee of Kranz Investments; and, fourth, since Mr. Corrigan hired Mr. More, it follows that Mr. More was also an employee of Kranz Investments.

53. In my view, the delegate's analysis cannot stand in light of the evidence. While I am prepared to accept that Mr. More was an employee rather than independent contractor, the fundamental question concerns the identity of Mr. More's employer. The overwhelming weight of the evidence is that Mr. Corrigan was not employed, if he were employed at all, by Kranz Investments. The *uncontroverted* evidence before the delegate – consistently emanating from both Messrs. Corrigan and Kranz – was that Mr. Corrigan was an *independent contractor* with authority to delegate his responsibilities under the contract to other individuals he had the *independent authority* to retain (such as Mr. More). Mr. Corrigan, not Kranz Investments or Mr. Kranz personally, retained (and paid for) Mr. More's services and Mr. More was subject to the direction and control of Mr. Corrigan, not Kranz Investments or Mr. Kranz personally.

54. Further, Mr. More's services were not for the benefit of Kranz Investments but rather for the immediate benefit of Mr. Corrigan (these services allowed Mr. Corrigan to fulfil his obligations to Mr. Kranz under his services contract) and only for the ultimate benefit of the property owner, Mr. Kranz. The fact that Mr. Kranz, as the owner of the apartment building in question, ultimately benefitted from Mr. More's services is not determinative of the "true employer" question since, in virtually all contactor situations, the client ultimately benefits from the contractor's services – why else would they hire a contractor? A plumber or electrician may work at a particular apartment building and their labours may benefit the building owner but that fact does not make the plumber or electrician an *employee* of the building owner. Even if it could be said that Mr. Corrigan was an employee, the only reasonable conclusion one could draw on the evidence is that Mr. Corrigan was employed by *Mr. Kranz*, not Kranz Investments. Thus, the delegate's conclusion that since Kranz Investments employed Mr. Corrigan, it inevitably follows that Kranz Investments also employed Mr. More, is predicated on a demonstrably false premise and thus cannot stand.

55. My conclusion on the "true employer" issue leads me to conclude that this Determination must be cancelled and the matter returned to the Director for a new investigation or hearing.

56. I note that, at the delegate's specific request, Mr. More's complaint against Mr. Corrigan was withdrawn. That is unfortunate. I do not consider that I have any statutory authority to order that complaint to be reinstated. The evidence before me strongly suggests that Mr. More's employer was Mr. Corrigan and presumably this possible outcome was the very circumstance that led Mr. More to file a complaint against Mr. Corrigan in the first place. I am not sure to what extent, if at all, the Director can now determine that Mr. More was employed by Mr. Corrigan given that the complaint against Mr. Corrigan has been withdrawn and the time for filing a new complaint has long passed. Perhaps the Director can accept and investigate a new late complaint against Mr. Corrigan consistent with our Court of Appeal's decision in *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553. This is a matter about which I express no conclusion.

57. The entire question of the "true employer" is returned to delegate to be reinvestigated or heard anew by way of an oral complaint hearing. However, insofar as this appeal is concerned, the delegate's finding that *Kranz Investments* was Mr. More's employer cannot stand given the evidence before me in this proceeding.

Natural Justice

58. The evidence before me indicates that there was a continuing confusion throughout the course of the investigation regarding certain critical facts. The delegate's investigation was incomplete and predicated on a false understanding of some essential circumstances – such as the relationship between Mr. Corrigan and Mr. Kranz and the party that actually benefitted from Messrs. More's and Corrigan's services.

59. It should be noted, however, that Mr. Kranz must bear at least some responsibility for this confusion. He appears to have viewed Mr. More's complaint – and the ensuing investigation – as a nuisance and an unwarranted intrusion into his business affairs. Mr. Kranz did not, despite being expressly invited to do so, fully engage in the delegate's investigation. One hopes he will be more fully engaged in the new investigation or hearing that will follow as a result of my decision. Mr. Kranz should be cognizant that a failure to meaningfully participate may redound to his detriment (see, for example, *Tri-West Tractor Ltd.*, BC EST # D268/96).

60. I need not make an express finding as to whether the incomplete nature of the delegate's investigation constituted a breach of the principles of natural justice in this case, since my order cancelling the Determination and referring the matter back to the Director is the same order I would make even if I were to find a natural justice breach.

ORDER

61. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is cancelled. In accordance with subsection 115(1)(b) of the *Act*, Mr. More's complaint is referred back to the Director.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal