



An appeal

- by -

P & J International Stoneworks Inc.
("P & J")

- 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: Carol L. Roberts

FILE No.: 2006A/11

DATE OF DECISION: March 7, 2006

DECISION

SUBMISSIONS

Jocelyne Pericas	on behalf of P & J
Greg Brown	on behalf of the Director of Employment Standards
Adam Beedle	on his own behalf

OVERVIEW

1. This is an appeal by P & J International Stoneworks Inc. (“P & J”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued August December 13, 2005.
2. Adam Beedle filed a complaint alleging that P & J, a stone installation business, owed him regular wages, overtime wages and annual vacation pay during the period May 9, 2005 until July 16, 2005.
3. The Director’s delegate held an oral hearing into Mr. Beedle’s complaint on November 15, 2005. Mr. Beedle appeared on his own behalf, and Ms. Pericas represented P & J.
4. The delegate determined that Mr. Beedle was an employee of P & J, rather than an independent contractor as it contended. He also determined that P & J had contravened Section 18 of the *Employment Standards Act* in failing to pay Mr. Beedle all regular and overtime wages within 6 days after he quit his job. He further determined that P & J contravened section 58 of the *Act* in failing to pay Mr. Beedle overtime wages. The delegate found P & J in contravention of section 46 of the *Employment Standards Regulations* in failing to produce payroll records by November 1, 2005, following a demand for those records. He concluded that Mr. Beedle was entitled to wages and interest in the total amount of \$2,563.47. The delegate also imposed a \$1,500 penalty on P & J for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
5. P & J contends that the delegate erred in law in finding that Mr. Beedle was an employee, and that the delegate failed to observe the principles of natural justice in making the determination. P & J also says that new evidence has become available that was not available at the time the Determination was being made.
6. This appeal is decided on the written submissions of the parties.

ISSUES

1. Did the delegate err in law in finding that Mr. Beedle was an employee rather than an independent contractor?
2. Did the delegate fail to observe the principles of natural justice?
3. Has new and relevant evidence become available that was not available at the time the Determination was being made that would lead the delegate to a different conclusion on a material issue?

ARGUMENT

7. Rather than addressing the grounds of appeal separately, demonstrating how the delegate erred in law, or setting out evidence as to how the delegate failed to observe the principles of natural justice, P & J's appeal submission consists of "explanations" which dispute the delegate's conclusions and largely consist of a re-argument of matters that were before the delegate during the hearing.

THE FACTS AND ANALYSIS

8. For the purposes of this appeal, the facts may be briefly stated. Mr. Beedle performed work for P & J. The parties presented evidence and argument to the delegate about whether Mr. Beedle was an independent contractor or an employee. The only written document was a "payment agreement", signed by both parties which provided that Mr. Beedle would "sub contract" his work to P & J and be paid a percentage of profits. The parties presented oral evidence and were given the opportunity to cross-examine each other. Although the delegate had issued a Demand for Records, P & J took the position that Mr. Beedle was an independent contractor and provided no employer records.
9. The delegate analyzed the facts and, after setting out the various tests for determining whether an employee/employer relationship existed, concluded that Mr. Beedle was an employee. In the absence of any employer records, the delegate heard the sworn testimony of Mr. Beedle and Ms. Pericas, preferred that of Mr. Beedle, and determined that he was entitled to additional wages as noted above.
10. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - a) the director erred in law
 - b) the director failed to observe the principles of natural justice in making the determination; or
 - c) evidence has become available that was not available at the time the determination was being made
11. I will address the last issue first.

New Evidence

12. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
 - 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;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and

- 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

13. The hearing into Mr. Beedle’s complaint was held in November, 2005. The “new evidence” consists of an email dated March 17, 2005, various invoices and documents dated in June, July and August 2005, some cancelled cheques issued in May and June 2005, and other miscellaneous documentation from a federal government web site. This “new evidence” does not meet the test set out above. It was all available to P & J at the time the hearing was conducted with the exercise of due diligence, and ought to have presented to the delegate during that time.

14. I deny the appeal on this ground.

Natural Justice

15. Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker.

16. Parties alleging a denial of a fair hearing must provide some evidence in support of that allegation. (see *Dusty Investments Inc. dba Honda North BC EST #D043/99*)

17. Nothing in P & J’s appeal documentation addresses the allegation that the delegate denied it a fair hearing. The record discloses that P & J knew about Mr. Beedle’s allegations, appeared at the hearing, and presented its arguments. I am not prepared to infer that there was a denial of natural justice. Furthermore, the delegate’s preference of Mr. Beedle’s evidence over that of P & J does not constitute a breach of natural justice. I am unable to find that the appeal has been substantiated in this respect.

Errors of Law

18. 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).

19. Whether a person is an employee or an independent contractor depends on the application of a legal standard to a set of facts, and is thus a question of mixed fact and law: *Housen v. Nikolaisen* , [2002] 2 S.C.R. 235, 2002 S.C.C. 33, at para. 37. However, the question of whether the correct legal standard has been applied is a question of law.

20. The Tribunal has adopted the following factors, set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (C.A.), defining the types of errors of law which are reviewable by the Tribunal under s. 112:

- (1) A misinterpretation or misapplication of a section of the Act;
- (2) A misapplication of an applicable principle of general law;
- (3) Acting without any evidence;
- (4) Acting on a view of the facts which could not reasonably be entertained; and
- (5) Exercising discretion in a fashion that is wrong in principle.

21. Because P & J's appeal disputes the delegate's conclusion that Mr. Beedle was an employee, which is the application of facts to a legal test, it is appropriate for me to review the delegate's conclusion on this issue. (see also *Jane Welch operating as Windy Willows Farms* (BC EST #D161/05)). Therefore, the issue is whether the Delegate erred in law by concluding that the Complainant was an employee based on no evidence, or on evidence that provided no rational basis for his finding?
22. 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?" However, the overriding test is that contained in the *Act*:
23. Section 1 of the *Act* defines employee to include
- (a) a person....receiving or entitled to wages for work performed for another, and
 - (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee....
24. An employer is defined as including 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.
25. Work is defined as meaning "the labour or services an employee performs for an employer whether in the employee's residence or elsewhere."
26. As the Tribunal also noted in *Welch*, although the common law tests remain useful in focusing attention on relevant factors, they must be applied bearing in mind the broad statutory definitions, which must in turn be interpreted in light of the policy objectives of the Act. The Supreme Court of Canada made the following statement in *Machtinger v. HOJ Industries Ltd.* (1992), 91 D.L.R. (4th) 491 at 507, concerning Ontario employment standards legislation, that applies equally to the Act:
- ...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.
27. There is no dispute that Mr. Beedle was approached by Mr. Pericas, a Director/Officer of P & J to work for or with him. Mr. Beedle worked alongside Mr. Pericas on a daily basis, performing stone mason work. He was paid a percentage of profits as determined by the written agreement, which was drafted by P & J, but had no say in the costing of the work or determining the amount of profit for each job. The invoices were prepared and sent to customers by P & J, and payment received by P & J. The delegate found that P & J issued Mr. Beedle business cards. Although P & J now disputes that, there is no evidence it did so at the hearing. Mr. Beedle used P & J's tools and materials, and worked under the direction of Mr. Pericas. The delegate rightly placed no weight on the fact that Mr. Beedle had a GST number, or that P & J took no statutory deductions from his paycheques. Those factors have little weight in determining the true nature of the employment relationship.

28. After a review of all of the factors, the delegate concluded that Mr. Beedle was an employee. I find no basis to interfere with this decision. Mr. Beedle clearly performed work normally performed by an employee under the general direction of Mr. Pericas, for P & J's business.
29. Once he determined that an employment relationship existed, in the absence of any employer records, the delegate assessed Mr. Beedle's oral evidence about his hours of work and preferred that to the evidence of Ms. Pericas. As the Tribunal has noted on numerous occasions, issues about the weight to be given to certain evidence and about credibility are questions of fact, not law (see *Gemex Developments Corp. - and- Assessor of Area #12 - Coquitlam*, (1998) 62 B.C..L.R. (3d) 354) (C.A.); [1998] B.C.J. No. 2275 (BCCA)). There is no basis to interfere with the delegate's conclusion on the amounts owing to Mr. Beedle.
30. The appeal is dismissed.

ORDER

31. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated December 13, 2005, be confirmed in the amount of \$4,063.47, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal