



An appeal

- by -

Stephen Chi Ming Law  
(“Mr. Law”)

- 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:** Robert C.P. Walker

**FILE No.:** 2012A/2

**DATE OF DECISION:** March 14, 2012

## DECISION

### SUBMISSIONS

Stephen Law	on his own behalf
Mary Zhang	on her own behalf
Andres Barker	on behalf of the Director of Employment Standards

### OVERVIEW

1. Stephen Law (“Mr. Law”) appeals pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards issued November 22, 2011. Mr. Law raises a number of issues on appeal as noted below.
2. The Tribunal has determined that this matter may be decided based upon the written submissions and the record accompanying the submissions filed by Mr. Law, the Complainant Mary Zhang (“Ms. Zhang”), and the Director on this appeal.
3. Ms. Zhang was initially hired by Mr. Law on April 28, 2011, after she responded to a Craigslist ad placed by him. He was operating an eCommerce business selling goods on the internet. The goods were located in a warehouse in Richmond, B.C. The interview took place at a McDonald’s restaurant near the warehouse and the employment arrangement was mostly oral in nature.
4. The job was described in the ad as either full or part-time sales coordinator/administrator. Responsibilities included “online research, write-ups, posting items @ ebay, yahoo, amazon, craigslist, google ad; packaging & shipping.” The successful candidate had to open an independent eBay or Amazon account. Compensation was described in the ad as \$10-15/hr depending on qualifications, plus commissions. Reference was also made to a one-three month training period.
5. Ms. Zhang commenced work on April 28, 2011, and her last day of work was May 26, 2011. She states she was given an option by Mr. Law to generally work from her home and receive an income of 20% of her sales. She would attend the warehouse only to pack and ship her sale items. The second option was to go into the warehouse and work directly from there and receive \$10 per hour plus a 10% commission on the difference between the sale price of an item and the wages paid. Her example was “If I sold \$400 worth of items and wages was \$100, I’d get a 10% commission on \$300.”
6. She advised Mr. Law that because she wasn’t a risk taker she would accept the second option. She set up a personal internet account as required but did not sell any items during the time she worked for Mr. Law. She kept records of her hours worked. She asked Mr. Law for her wages after approximately 2 weeks and the next day he gave her \$100; and over the span of the next week he gave her another \$300. The amount paid to her was not sufficient to cover the hours she had worked.
7. She continued to pursue Mr. Law for wages she believed were still payable. She met with him and also communicated by phone and email. He gave a number of reasons for not paying her more, including his assertion that her pay was based on commission sales not hourly wages, and that the business was in financial

stress for various reasons. She then filed her complaint on June 22, 2011, alleging non-payment of wages owed.

8. Andres Barker, on behalf of the Director of Employment Standards, conducted a meeting with the parties on October 14, 2011. Ms. Zhang appeared in person and Mr. Law appeared by telephone. Both gave oral testimony. Documents produced by Ms. Zhang were forwarded to Mr. Law and he was allowed to make further submissions. The Director sent a preliminary finding letter to both parties on October 26, 2011.
9. Mr. Law argued both before and after the preliminary finding letter that Ms. Zhang was not an employee at all. Instead she was self-employed and the arrangement between them was a joint venture or partnership.
10. On November 22, 2011, the Director made a Determination that included:
  - (a) Ms. Zhang was an employee of Mr. Law within the meaning of the *Act* until she quit;
  - (b) Mr. Law had contravened the *Act* because he failed to pay her wages, vacation pay plus accrued interest of \$1,020.00 within 6 days of her resigning; and Mr. Law was ordered to pay that sum;
  - (c) Mr. Law must pay two administrative penalties of \$500 each under the *Act* for failure to pay wages within the time provided in (b), above (section 18) and for failure to pay all her wages for her first pay period within 8 days of the pay period ending (Section 17).

## ISSUE

11. Should Mr. Law's application to the Tribunal to receive new evidence be granted?
12. Was Mr. Law denied natural justice by reason of its application to adjourn the teleconference hearing being denied?
13. Did the Director err in law (or deny Mr. Law natural justice) by making a Determination without regard to the evidence on the record?
14. Did the Director err in law in finding Ms. Zhang to be an employee of Mr. Law within the meaning of the *Act* until she quit?

## ARGUMENT

15. On this appeal Mr. Law relies upon all of the grounds set out in the *Act* in subsections 112(1)(a) through (c), below.
16. Mr. Law submits there is important new evidence regarding Ms. Zhang failing to continuously have an eBay account as was required for the job; thus it was impossible for her to provide her services as a viable seller of goods. He advises further that this fact was hidden from him and that Ms. Zhang made reference to a number of pending sales when seeking and advance of income. He indicates further that he was not privy to her arrangements regarding her eBay account, but subsequently determined there were no sales by Ms. Zhang via that account.
17. As a result of the new evidence Mr. Law submits that it would support his earlier submissions that Ms. Zhang is not an employee for the purposes of the *Act* and/or prove that she is not entitled to the compensation or wages awarded.

18. Mr. Law also argues that the Director erred in law in finding that he is an employer mainly because he operates his business from Point Roberts, Washington, and is not registered for GST/PST (now HST) purposes in Canada. He does admit however that he operates a warehouse in Richmond that holds the various goods that are intended to be sold via the internet. These submissions were made to and considered by the Director prior to the Determination.
19. Mr. Law submits that he did not receive natural justice at the previous hearing as the Director did not give him a chance to explain his viewpoints and situations (until urged to do so). He also felt the Director was an advocate for Ms. Zhang and was biased, assumptive and illogical. He believes the matter should not be within the jurisdiction of the Director; but should be considered by an independent Judge of the Provincial Small Claims Court.

### THE FACTS AND ANALYSIS

20. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It provides:

- 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; and*
  - (c) *evidence has become available that was not available at the time the determination was being made.*

### New Evidence

21. Section 112(1)(c) of the *Act* has been considered by the Tribunal on many occasions. The Tribunal has set out four conditions that must be met before new evidence will be considered. *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*, BC EST # D171/03; and *Alano Club of Chilliwack operating as Alano Club Coffee Bar*, BC EST # D094/05.
22. The Appellant must establish that:
- (i) 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 a Determination being made.
  - (ii) the evidence must be relevant to a material issue arising from the complaint.
  - (iii) the evidence must be credible in the sense that it is reasonably capable of belief.
  - (iv) 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.
23. In my opinion Mr. Law has established the four criteria necessary for the proposed new evidence to be considered. Although the Director may place whatever weight he chooses on the evidence as he determines it, the evidence, if believed, could certainly lead the Director to a different conclusion in respect of the legal relationship between Mr. Law and Ms. Zhang or it may be important in determining whether compensation is payable; and if so, to what value. Finally, depending on the Director's findings the administrative penalties imposed may also change.

**Natural Justice and Error of Law**

24. The numerous natural justice and error of law submissions made by Mr. Law on this appeal were based upon his perception of what occurred at the hearing. It would appear that he misapprehends the role of the Director and misunderstands that from a legal perspective the Director is the party that has jurisdiction to adjudicate (presuming the complaint affects an employer and employee in British Columbia). Further, it is clear from the record that Mr. Law and Ms. Zhang were making opposing legal arguments and giving evidence inconsistent with the other party's legal positions. The Director is obliged to, and did, thoroughly canvass and consider the legal issues, weighed the evidence, made findings of credibility and committed the Determination to writing. Having regard to Mr. Law's submissions I could not find any evidentiary or legal basis to interfere with the Determination.
25. If, however, the new evidence leads to a different finding as to the legal relationship between Mr. Law and Ms. Zhang then the Determination could change significantly.
26. Section 115(1) provides the Tribunal authority to confirm, vary or cancel the Determination under appeal; or refer the matter back to the Director. In my opinion the Director will be in a better position to further investigate and consider the new evidence and all the associated circumstances of this matter. Therefore I intend to refer the matter back.

**ORDER**

27. I Order that this matter be referred back to the Director pursuant to section 115(1)(b) of the *Act*.

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**Robert C.P. Walker**  
**Member**  
**Employment Standards Tribunal**