



An appeal

- by -

Asian Drywall Ltd.  
(the “Company”)

- 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.:** 2017A/7

**DATE OF DECISION:** March 21, 2017

## DECISION

### SUBMISSIONS

Naresh Aggarwal

counsel for Asian Drywall Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Asian Drywall Ltd. (the “Company”) has filed an appeal of the Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 9, 2016.
1. It should be noted that the time and date for filing the appeal was 4:30 p.m. on January 16, 2017, but the Company filed its appeal, through counsel, after 4:30 p.m. on January 16. Therefore, the filed appeal was received by the Tribunal on January 17. In the circumstances, the Company has applied for an extension of time to file its appeal.
2. The Determination found that the Company contravened sections 17 and 18 of the *Act* and 46 of the *Employment Standards Regulation* (the “*Regulation*”) and ordered the Company to pay Harwinder Sangha (“Mr. Sangha”) \$12,811.42 consisting of wages, vacation pay and accrued interest on the first two amounts. The Determination also imposed three administrative penalties of \$500 each on the Company. The total amount of the Determination is \$14,311.42.
3. The Company’s appeal invokes all three grounds of appeal available in section 112(1) of the *Act*, namely, the Director erred in law and breached the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was being made. The Company is seeking to have the Tribunal refer the Determination back to the Director or, in the alternative, vary it or dismiss it.
4. In correspondence dated January 19, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any of them pending review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed. If the Tribunal does not dismiss all of the appeal or does not confirm all of the Determination, Tribunal will invite Mr. Sangha and the Director to file a reply to the question of whether to extend the deadline to file the appeal and may request submissions on the merits of the appeal. In such case, the Company will be given an opportunity to make a final reply to the submissions, if any.
5. The Tribunal received the section 112(5) “record” (the “Record”) from the Director on February 2, 2017, and forwarded a copy of the same to the Company, and provided it the opportunity to object to its completeness. The Company did not object to the completeness of the Record. Accordingly, the Tribunal accepts the Record as complete.
6. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the appeal form and written submissions of the Company and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal without a hearing of any kind, for any of the reasons listed in that subsection. If satisfied the appeal or part of it has some presumptive merit and should not be dismissed under section 114(1), Mr. Sangha and the Director will be invited to file a reply to the question of

whether to extend the deadline for the Company to file the appeal and to make submissions on the merits of the appeal. The Company will then be given an opportunity to make a final reply to the submissions, if any.

## ISSUES

7. Did the Director err in law or fail to observe the principles of natural justice in making the Determination? Is there new evidence that would justify the Tribunal in varying or canceling the Determination or referring it back to the Director?

## THE FACTS AND FINDINGS OF THE DIRECTOR IN THE DETERMINATION

8. The Company was incorporated under the laws of British Columbia on September 23, 2011, and operates a drywall business.
9. A BC online corporate search of the Company, conducted by the delegate on December 14, 2015, shows that Neeraj Walia (“Mr. Walia”) is the sole director and officer of the Company.
10. On December 11, 2015, Mr. Sangha filed a complaint against the company under section 74 of the *Act* alleging that the latter contravened the *Act* by failing to pay him regular wages (the “Complaint”).
11. On January 26, 2016, an officer of the Employment Standards Branch (the “Branch”) served a Hearing Notice (the “Notice”) and Demand for Employer Records (the “Demand”) on the Company by registered mail. Both documents were received and signed for by the company on January 29, 2016. The Notice delineated the hearing date for Mr. Sangha’s Complaint on March 10, 2016, at 9:00 a.m. The Demand required the Company to deliver the employer records specified therein by February 15, 2016.
12. According to the Reasons, prior to the Hearing date, Mr. Walia requested an adjournment of the Hearing because of a scheduled house inspection, the timing of which conflicted with the Hearing. The delegate does not indicate the specific date when Mr. Walia made this request and there is nothing in writing from Mr. Walia or the Company pertaining to this request in the Record or the appeal submissions of the Company. The delegate also notes in the Reasons that the Company failed to provide any supporting documentation for its adjournment request and the request was denied.
13. With respect to the employer records requested in the Demand, in the Company’s appeal submissions there is an email exchange dated February 11, 2016, between Mr. Walia and an officer at the Branch wherein Mr. Walia acknowledges receipt of the records submitted by Mr. Sangha to the Branch. In the same exchange, Mr. Walia requests the Branch to provide him an extension of time “to submit all documents” as a result of his “health issue”. He does not explain what health issue he has or provide any medical documentation to substantiate the health issue.
14. On the Hearing date, on March 10, 2017, at 9:00 a.m., the Company failed to appear and the delegate notes “an employment standards officer called and emailed [the] Employer to enquire about its whereabouts as well as to inform them that the adjudicator would be proceeding with the hearing at 9:25 a.m. if the employer did not contact the Branch.” When the Branch did not receive any contact from the Company, the Hearing proceeded at 9:25 a.m. with only Mr. Sangha in attendance.
15. The evidence of Mr. Sangha, at the Hearing, is summarized in the Reasons. It is noted in the Reasons that Mr. Sangha submitted that the Company was always late in paying him wages. In support of his position, Mr. Sangha produced several invoices he gave to the Company. The invoices reference or summarize both

piece rate and hours he worked on various projects for the Company. However, the delegate notes that Mr. Sangha acknowledged that the irregular manner in which he was paid by the Company made it difficult to isolate the exact amount of wages he was owed and there were no detailed records of hours he worked for the Company that could be relied upon.

16. Having said this, in the evidence he adduced, Mr. Sangha provided three cheques of \$4,000 each he was issued from the Company totalling \$12,000. Two of the cheques did not clear the Company's bank account and are marked "Insufficient Funds" by the bank and the third is marked "PAYMENT STOPPED". The cheques are dated September 18, 2015, October 20, 2015, and December 24, 2015, respectively. Mr. Sangha claimed that the cheques represent wages owing to him by the Company for the period August 2015 until the end of his employment and the Company never replaced them.
17. As for his status or relationship with the Company, Mr. Sangha submitted that he was an employee and not an independent contractor. While he admitted that he provided some of his own tools as drywall work requires little in the way of tools and equipment, the Company had full control and direction over him with respect to how and when specific jobs were to be completed by him. He also claimed he had no ability to make a profit or take a loss on the job as he was paid an hourly rate. Furthermore, he stated he did not have other clients to whom he provided drywall services to.
18. While the Company did not participate at the Hearing, on February 19, 2016, well in advance of the Hearing, Mr. Walia sent the Branch some documents of the Company together with a summary of the Company's position. The Company claimed that from the onset of his relationship with the Company in 2014, Mr. Sangha acted as an independent contractor. He had his own GST and WCB numbers and marketed himself as an independent contractor.
19. The company also provided unsigned written statement from a Mr. Tarinder Singh ("Mr. Singh") of ARB Drywall Ltd. prepared in the same style and font as the Company's submissions of February 19, stating that he witnessed Mr. Sangha make "a business agreement" in his presence at the Company's office but does not explain the terms of the "business agreement".
20. The Company also submitted an unsigned brief statement of Mr. Walia, similarly styled and in the same font as the statement of Mr. Singh stating that the Company never provided tools and equipment to any of its subcontractors.
21. The Company also provided names of three other "independent subcontractors" in the same position as Mr. Sangha who acted, according to the Company, as independent contractors with the Company. The Company invited the delegate to contact them.
22. The Company also submitted some time cards for some of its employees contending that hours worked by employees of the Company are set out in time cards that show code numbers assigned to them by the Company. Mr. Sangha was not an employee and therefore did not have a code number like the Company's employees.
23. Finally, in the same written submissions, the Company provides names of two other companies Mr. Sangha allegedly worked for as an independent contractor "because "he [was] free to lookout for more business in order to gain profits" and asks the delegate to contact these companies.
24. In considering the question of the nature of Mr. Sangha's relationship with the Company, the delegate notes in the Reasons that the test for determining whether a person is an employee for the purposes of the *Act* is

based on the definitions and objectives of the *Act*. The delegate also adds that the test must take into account the remedial nature of the *Act* which must be given large and liberal interpretation as best to ensure the attainment of its purposes and objects. The delegate then considers the inclusive definitions of “Employee”, “Employer” and “Work” in the *Act* and concludes that, based on these definitions and the evidence of the parties, Mr. Sangha was not in business for himself but instead performed work for the Company as an employee for which he should be compensated. In arriving at this conclusion, the delegate reasons as follows:

Mr. Sangha provided uncontested evidence that Asian Drywall directed and controlled how and when the work will be performed. Mr. Sangha does acknowledge that he provided some of his own tools but this single factor, alone, is insufficient to call the Complainant an independent contractor. As Mr. Sangha was paid by the hour, he was not in a position to make a profit or take a loss.

Asian Drywall, by not participating in the hearing, failed to clearly present and defend its position. Although it provided a list of companies that Mr. Sangha allegedly supplied services to, it did not provide dates or any details. Its submission is simply a bald assertion of its position that Mr. Sangha is an independent contractor. In addition, Mr. Sangha refutes much of the information contained in the Employer’s submission. For all of these reasons, I find Mr. Sangha was an employee of Asian Drywall under the *Act*.

25. The delegate then considers the three cheques for \$4,000 each the Company provided to Mr. Sangha which were returned by the financial institution either marked “Insufficient funds” or “Payment Stopped” and concluded that, pursuant to section 126 of the *Act*, these cheques are evidence that payment was not made to Mr. Sangha by the Company. The delegate also notes that the Company did not provide any evidence that it replaced these cheques. Accordingly, the delegate concludes that Mr. Sangha is owed \$12,000 in regular wages and 4% vacation pay thereon.
26. Having so concluded, the delegate then went on to levy two administrative penalties of \$500 each under the *Regulation* against the Company for breaching sections 17 and 18 of the *Act*.
27. The delegate also imposed a further administrative penalty of \$500 against the Company for contravention of section 46 of the *Regulation* for failing to provide all payroll records required to be produced under the Demand by February 15, 2016.

## **APPEAL SUBMISSIONS OF THE COMPANY**

28. The Company’s counsel advances four arguments in support of the Company’s appeal. First, counsel asserts that the director erred in law in “holding the complainant as [*sic*] an employee.” Second, and related to the first, counsel submits the delegate failed to apply the “test” to determine whether Mr. Sangha was an employee or an independent contractor and misapplied the definitions of “Employee, Employer and Work” in the *Act*.
29. Counsel next in his submissions disputes the delegate’s conclusion that Mr. Sangha was an employee of the Company. He states, “[i]t is a proven fact that Mr. Sangha has been working as an independent contractor in the market” for other drywall companies including the Company. He further states that “[i]t is also an [*sic*] proven fact that under a [*sic*] oral contract the complainant has been working as a [*sic*] independent contractor for [*sic*] various jobs of the Appellant.” He adds that while working for the Company Mr. Sangha used his “own tools and vehicle” and the Company “never advised or directed” him.
30. Counsel also submits the delegate “wrongly decided that [Mr. Sangha] was not in a position to make profit or loss”. He states that Mr. Sangha was “not paid a salary or daily rate for his services, and had to provide

quotes with fixed dollar amounts to cover all labor and materials [which] indicates that an individual contract could be more or less profitable depending on how accurately [he] estimated the costs and how efficiently he completed the work.”

31. Counsel also submits that Mr. Sangha “paid for various other expenses such as his tools and equipment, and his gas and other transportation costs.” These expenses, he states, would “contribute to the extent to which [Mr. Sangha] could have an overall profit or loss in the course of a year.”
32. Counsel further submits that Mr. Sangha submitted invoices to the Company; “never produced or maintained any time cards”; “never disclosed to the [Company] how many people performed the job”; “maintained his own GST no.”; collected GST; “file[d] his own GST return with the CRA”; and “registered with the Worker’s Compensation Board as an Independent Contractor.” He concludes by stating that the delegate has “totally ignored the fact that [Mr. Sangha] at one time was performing different jobs for the [sic] various contractors.”
33. The third argument counsel advances on behalf of the Company is that the director erred in law in determining that Mr. Sangha was entitled to vacation pay when Mr. Sangha did not claim vacation pay in his Complaint nor ever demand it from the Company. He also adds the Company “never paid any Vacation pay to the Complainant.”
34. Counsel also questions the calculation of vacation pay by the delegate stating that the delegate did not make any determinations regarding the hours Mr. Sangha worked and his “agreed hourly wages”.
35. The final argument counsel advances on behalf of the Company is that the Director breached the principles of natural justice by failing to provide the Company an opportunity to “falsify the allegations by the Complainant”. I believe counsel mistakenly uses the word “falsify” above when he means “dispute”. Counsel goes on to add that the Company was not “given [a] proper opportunity to produce evidence and witnesses to prove his [sic] case against the allegations made by the complainant.” Counsel is referring here to the delegate’s decision to deny the Company an adjournment of the Hearing. He states the Company “wants to produce evidence, to prove his case [sic] and falsify [sic] the allegations made by the complainant” and therefore, requests the matter “be referred back to the Director for redetermination.” In the alternative, he asks the Tribunal to vary the Determination or dismiss it.

## ANALYSIS

36. Section 112(1) of the *Act* provides that a person may appeal the 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; and
  - (c) evidence has become available that was not available at the time the determination was being made.
37. The burden is on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds listed in section 112(1) above.
38. As indicated above, the Company’s appeal is based on the “error of law”, “natural justice” and the “new evidence” grounds of appeal in section 112(1)(a)(b) and (c) of the *Act*.
39. I will address each ground of appeal under a separate heading below.

(i) **Error of law**

40. In *Gemex Developments Corp. v. British Columbia (Assessor) of Area #12 – Coquitlam*, [1998] B.C.J. No. 2275, the BC Court of Appeal defined error of law inclusively as follows:
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. acting on a view of the facts which could not reasonably be entertained; and
  5. adopting a method of assessment which is wrong in principle.
41. The question of one's status as an employee is a question of mixed law and fact. For the Company to succeed in its appeal, it must show an error in the legal analysis applied to the facts as found by the delegate. The Tribunal has no jurisdiction on questions of fact (see *Re Pro-Serv Investigations Ltd.*, BC EST # D059/05).
42. In this case, as indicated under the heading "APPEAL SUBMISSIONS OF THE COMPANY" above, the Company's counsel challenges the delegate's finding that Mr. Sangha was an employee and not an independent contractor and relatedly argues that the delegate failed to apply the proper "test" for determining Mr. Sangha's status with the Company and failed to apply the definitions of "Employee", "Employer" and "Work" in the *Act*.
43. I have reviewed the Reasons and while they are somewhat sparse, I do not find the Company has established that the delegate misapplied or misinterpreted the "test" for determining Mr. Sangha's status as an employee or failed to apply the definitions of "Employee", "Employer" or "Work" in the *Act*. I also do not find this to be a case of the delegate acting without any evidence or on a view of the facts which could not be reasonably entertained. I find that the delegate relied on the unchallenged evidence of Mr. Sangha to conclude as he did that Mr. Sangha was an employee. While the Company may have been able to successfully challenge Mr. Sangha's evidence by presenting its own evidence and testing the evidence of Mr. Sangha at the Hearing, it failed to attend at the Hearing.
44. Having said this, I note the Company did make written submissions to the delegate on February 19, 2016, which the delegate, in my view, correctly found to be no more than in the nature of a bald assertion that Mr. Sangha was an independent contractor and which Mr. Sangha, at the Hearing, refuted. I also note the Company's submissions included a written but unsigned statement from Mr. Walia that the Company never provided its subcontractors with tools and equipment. It also included a written but unsigned statement of Mr. Singh of ARB Drywall Ltd., prepared in the same style and font as Mr. Walia's statement and the written submissions of the Company, stating that he witnessed Mr. Sangha make "a business agreement" in his presence at the Company's office with no explanation of the terms of the "business agreement". I find neither of these statements is particularly helpful to the Company. In the case of the statement of Mr. Walia, I agree with the delegate's conclusion that while Mr. Sangha provided some of his tools, this factor alone is insufficient to make him an independent contractor. As for the unsigned statement of Mr. Singh, if indeed Mr. Singh made this statement, it is lacking any relevant details of the alleged "business agreement" he said he allegedly witnessed Mr. Sangha make with the Company.
45. In the result, I am not persuaded that the delegate applied the wrong legal principles or a wrong legal test in deciding the status of Mr. Sangha as an employee of the Company. It is apparent to me that while the Company's arguments do not demonstrate an error of law in the Director's factual findings, they do

demonstrate the Company's disagreement with the conclusions of the delegate on those facts. The Tribunal has consistently stated that the grounds of appeal listed in section 112 of the *Act* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law, which they do not in this case (see *Britco Structures Ltd.*, BC EST # D260/03).

46. I also note that, under the error of law ground of appeal, the Company disputes the delegate's award of vacation pay to Mr. Sangha in the Determination stating that Mr. Sangha did not claim vacation pay in his Complaint and Mr. Sangha never demanded it from the Company. The Company also submits that since the delegate did not make any determination of the hours Mr. Sangha worked or his "agreed hourly wages", the delegate was not in a position to calculate vacation pay. I find neither of these submissions meritorious. First, it is not a precondition for an award of vacation pay by the delegate that the employee ask for it expressly in his complaint. Pursuant to section 4 of the *Act*, the requirements of the *Act* are minimum requirements and cannot be waived. Even if the employee does not ask for vacation pay, the employer is not removed from the requirement to pay its employee vacation pay as set out in section 58 of the *Act*. The delegate is not limited to only awarding wages claimed in the employee's complaint but can order wages for any contraventions of the *Act* he finds based on the evidence of the parties. Having said this, in this case, the delegate did not need to establish Mr. Sangha's hours worked or hourly wage rate to determine vacation pay owing to Mr. Sangha. The delegate, pursuant to section 126 of the *Act*, determined that the three cheques of \$4,000 each from the Company to Mr. Sangha returned by the financial institution with the words "Insufficient Funds" and "Payment Stopped" constituted evidence that payment of wages set out in the cheques was not made by the Company to Mr. Sangha and accordingly determined that \$12,000 was owing to Mr. Sangha. The delegate then based his calculation of the vacation pay award to Mr. Sangha accordingly. It should be noted that counsel in the Company's appeal submissions states that "the Complainant has never demanded and the Appellant has never paid any vacation pay to the Complainant". This admission only supports the award of vacation pay made by the delegate in the determination.

**(ii) Natural Justice**

47. The Company has checked off the natural justice ground of appeal in its appeal form.
48. In *Imperial Limousine Service Ltd.* (BC EST # D014/05), the Tribunal explained the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring the 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 opportunity to respond to the evidence and arguments presented by an adverse party: (See *B.W.I. Business World Incorporated*, BC EST # D050/96)

49. I understand the Company's argument under the natural justice ground of appeal is that the delegate ought to have granted an adjournment of the Hearing, and his decision to deny the adjournment and proceed with the Hearing was a failure to observe the principles of natural justice.
50. I note the Company was sent the Notice of Complaint Hearing, on January 26, 2016. The Notice was received and signed for by the Company on January 29, 2016. The Company does not dispute receipt of the



Notice. The Notice indicated, *inter alia*, the hearing date of March 10, 2016. A few lines below the hearing date in the Notice, it states:

The Branch Adjudicator may make a Determination based on information before them, **even if you choose not to participate at the hearing.**

51. Additionally, in the last full paragraph of the Notice it states:

**Adjournments**

A request for an adjournment must be made in writing and be delivered to the Branch at least seven days before the scheduled hearing date. It must advise whether the other party consents and include reasons, alternate available dates and supporting documentation if applicable.

Parties should remain prepared to attend the hearing on the originally scheduled date until advised in writing that the adjournment has been granted. If a party does not appear, the hearing may proceed in their absence.

52. The Reasons state that Mr. Walia, prior to the Hearing, requested an adjournment of the Hearing as a result of a scheduled house inspection, the timing of which conflicted with the Hearing. The Reasons do not specify when exactly, prior to the Hearing, the request for adjournment was made by the Company and there is nothing in writing in the Record showing when the request was made. The request was denied and the delegate notes the Company failed to provide any supporting documentation for the request. As with the delegate, I find the lack of supporting evidence for the request for an adjournment also noteworthy as the onus is on the party seeking an adjournment of the Hearing to make out its case for an adjournment which the Company has failed to do here.
53. I also find the Company's request for an adjournment was not delivered in writing and it did not advise whether the other party (Mr. Sangha) consented and provided no alternate available dates. Furthermore, I also find that the Company was aware of the consequences of not appearing as well as the requirements for seeking adjournments. I also find the Company was or should have been aware that if an adjournment was not granted, the Hearing would proceed in its absence. I also note that the delegate, before commencing the hearing, attempted to contact the Company by telephone and email but to no avail. In the circumstances, I am not persuaded that the delegate's decision to proceed with the Hearing in the absence of the Company constituted a denial of natural justice.

**(iii) New Evidence**

54. The Company also appeals the Determination on the basis of the new evidence ground of appeal. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, (BC EST # D171/03), the Tribunal delineated four conjunctive requirements that must be met before new evidence will be considered. More particularly, the appellant must establish that:
- (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.

55. I find the material the Company has submitted on appeal was available at the time the delegate adjudicated the Complaint and, therefore, fails to qualify as “new evidence” based on the first criteria for admitting new evidence in *Re Merilus Technologies Inc., supra*. Further, much of counsel’s appeal submissions are reiteration of the Company’s position in the February 19, 2016, written submissions and an attempt to reargue the Company’s position or buttress it.
56. In the circumstances, I find the new evidence of ground of appeal of the Company also fails.
57. For all of the above reasons, I find there is no reasonable prospect that this appeal can succeed and I dismiss it pursuant to section 114(1)(f) of the *Act*.

### **ORDER**

58. Pursuant to section 115 of the *Act*, I order the Determination issued on December 9, 2016, be confirmed together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

---

**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**