

An appeal

- by -

CeramB Technologies Inc.
("CeramB")

- 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.: 2015A/180

DATE OF DECISION: February 16, 2016

DECISION

SUBMISSIONS

Cheng Sheng Wang

on behalf of CeramB Technologies Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), CeramB Technologies Inc. (“CeramB”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 30, 2015 (the “Determination”).
2. The Determination found that CeramB contravened Part 3, section 18 (payment of wages on termination of employment); Part 5, section 46 (statutory holiday pay); Part 7, section 58 (vacation pay); and Part 8, section 63 (liability resulting from length of service) of the *Act* in respect of the employment of Richard G. Abrahamsen (“Mr. Abrahamsen”), and ordered CeramB to pay wages to Mr. Abrahamsen in the amount of \$10,332.90. The Determination also levied administrative penalties in the amount of \$2,000.00. The total amount of the Determination is \$12,332.90.
3. CeramB has filed this appeal based on the “new evidence” ground of appeal pursuant to subsection 112(1)(c) of the *Act*. CeramB seeks to have the Determination cancelled.
4. On December 30, 2015, the Employment Standards Tribunal (the “Tribunal”) acknowledged to the parties that an appeal had been received from CeramB, requested production of the section 112(5) “record” (the “Record”) from the Director, and notified the parties, *inter alia*, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
5. On January 19, 2016, the Director provided the Record to the Tribunal, and a copy was sent to CeramB on January 20, 2016. CeramB was advised of its right to object to the completeness of the Record. CeramB did not submit any objections within the time permitted. Therefore, the Tribunal accepts the Record as complete.
6. I have reviewed the appeal, including the submissions of CeramB supporting the appeal, the Reasons for the Determination (the “Reasons”) and the Record, and have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, I will assess the appeal based solely on the Reasons, the appeal submissions of CeramB and my review of the Record that was before the Director when the Determination was being made. Pursuant to section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in sub-section 114(1). If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Abrahamsen will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

7. The sole issue to be considered at this stage is whether there is any reasonable prospect that CeramB’s appeal can succeed.

THE FACTS

8. CeramB operates an import and sales business.
9. A BC Online: Registrar of Companies – Corporation Search, conducted on February 18, 2015, indicates that CeramB was incorporated on September 19, 2008. Cheng Sheng Wang (“Mr. Wang”) is listed as a director and officer of CeramB. Wenhua Yu is also listed as an officer.
10. The Reasons note that the relationship between Mr. Abrahamsen and CeramB spanned over the period October 2012 to October 2, 2014. On October 24, 2014, Mr. Abrahamsen filed a complaint under section 74 of the *Act* alleging that CeramB contravened the *Act* by failing to pay him regular wages, annual vacation pay and compensation for length of service (the “Complaint”).
11. On March 25, 2015, the delegate of the Director conducted a hearing into the Complaint (the “Hearing”).
12. The Hearing was attended by Mr. Wang on behalf of the CeramB and by Mr. Abrahamsen on his own behalf. Mr. Abrahamsen argued that the *Act* applied to his claim, while CeramB contended that he was a partner in the business or an independent contractor but not an employee under the *Act*.
13. In the Reasons, the delegate notes that she considered the following issues at the Hearing:
 - Is Mr. Abrahamsen an “employee” as defined by the *Act*?
 - If so, is he owed regular wages and, if so, in what amount?
 - Is Mr. Abrahamsen owed compensation for length of service and, if so, in what amount?
 - Is Mr. Abrahamsen owed annual vacation pay, and, if so, in what amount?
14. In determining whether Mr. Abrahamsen had an employee/employer relationship with CeramB, the delegate considered the evidence of the parties in context of the definitions of “employee”, “employer” and “work” in the *Act*, as well as common-law tests - the “four-fold test”, the ‘organization or integration test’ and the “permanency test” - noting that no single test is determinative and that all aspects of the relationship between the parties must be viewed in their entirety.
15. In concluding that Mr. Abrahamsen was in an employment relationship with CeramB, the delegate reasoned as follows:

CeramB imported goods which it then sold. The Complainant solicited customers and potential customers to purchase the goods CeramB imported. I find this service meets the definition of ‘work’ [in the *Act*]. The undisputed evidence is that CeramB provided the Complainant with a list of potential customers and product knowledge. This supports a finding that the Complainant was working under the direction of CeramB. Accordingly, CeramB meets the definition of ‘employer’ as someone who has control or direction of an employee. The Complainant performed this ‘work’ for CeramB and completed work normally performed by an employee and thus I find the definition of ‘employee’ applies.
16. The delegate next turned to common-law tests starting with the four-fold test:

The ‘four-fold test’ consists of an analysis of the ‘control test’, who owns the tools, whether there is a chance of profit, and whether there is a risk of loss. The ‘control test’ determines whether one person is in a position to order not only what is to be done, but also how it is to be done. The control test [*sic*]

traditionally includes an evaluation of whether the payer retains the power to select the worker, whether the payer has the right to suspend or dismiss the worker, whether the payer controls the method in which the job is carried out and whether the payer sets the rate of remuneration.

There is no evidence that CeramB set the Complainant's hours of work. The Complainant's evidence was that he decided when to leave the office so as to avoid rush hour. There is no evidence that the Complainant was subject to discipline, apart from the termination, or that CeramB assigned daily tasks or evaluated progress. This lack of control could suggest an independent contractor relationship. However, the [sic] CeramB did provide the Complainant with a list of potential clients and provided product knowledge and direction concerning prices, demonstrating the type of control employers often exercise over employees. CeramB ended its relationship with the Complainant after it viewed the Complainant's actions as unacceptable, demonstrating another element of control over the Complainant. CeramB owned the product and the tools and equipment the Complainant used to complete his job. CeramB's evidence is that the Complainant was to receive a portion of the profit if profit was made. The Complainant's evidence is that based on the agreement regarding the \$45,000 of overstocked product where he received 10% commission, he assumed he was going to get a percentage of the sales he made. In either regard the Complainant was unable to control pricing or costs so as to affect profit levels; he did not have control in this regard. Furthermore, paying commissions is a way to calculate wages; it is not indicative of a profit. The undisputed evidence is that CeramB carried all of the risk in the business venture. Although there were some elements of an independent contractor relationship such as the ability to make his own hours, an evaluation of the four fold test [sic] against the evidence supports a finding that the Complainant was an employee.

17. The delegate also considered the "organization or integration test" to determine whether the work Mr. Abrahamsen performed was integral to, or contributed to, CeramB's operation. In this regard, the delegate stated:

CeramB sells imported goods. The Complainant marketed and attempted to sell these goods. This work is integral, not ancillary, to CeramB's business. The integrated nature of the work the Complainant performed in relation to CeramB's business is indicative of an employment relationship.

18. The delegate also stated:

Although the Complainant referred to Mr. Wang as a partner in an email, there is no evidence that the Complainant and Mr. Wang formed a partnership. Both the Complainant and Mr. Wang gave evidence that they considered forming a partnership however both also gave evidence that this arrangement never took form. There is no evidence of a partnership agreement or that the Complainant had signing authority on CeramB's bank account. Financial control rested with Mr. Wang. The Complainant is not listed as a director or officer and there is no evidence that he made financial or executive decisions for CeramB. I find for the reasons above that the definition of employee applies to the Complainant.

19. Having determined that Mr. Abrahamsen was an employee of CeramB, the delegate then went on to determine any wages, statutory holiday pay, annual vacation pay and compensation for length of service to which Mr. Abrahamsen was entitled. I do not find it necessary to set out, in any detail, these determinations here as the sole issue in the appeal of the Determination pertains to Mr. Abrahamsen's status under the *Act*.

SUBMISSIONS OF CERAMB

20. As indicated previously, CeramB relies on the "new evidence" ground of appeal.
21. In his submissions on behalf of CeramB, Mr. Wang contends that Mr. Abrahamsen was never CeramB's employee and, therefore, not entitled to any "monetary compensation" awarded in the Determination. In

support of this contention, Mr. Wang attaches a statement, dated November 25, 2015, (the “Witness Statement”) purportedly signed by Mr. Abrahamsen’s “significant other”, Allison Abrahamsen (“Ms. Abrahamsen”). In the letter, Ms. Abrahamsen indicates that she has had to return to Winnipeg to care for an ailing family member, but can be reached by email. She states that Mr. Abrahamsen was “in deed [*sic*] a partner with Cheng Sheng Wang and not an employee”, and that she was in a relationship with [Mr. Abrahamsen] during his partnership with Cheng Sheng Wang and “will swear this to be the whole truth and nothing but the truth so help me God”.

22. In addition to Ms. Abrahamsen’s letter, Mr. Wang submits that Ms. Abrahamsen and Mr. Abrahamsen moved from Winnipeg with the understanding that Mr. Abrahamsen had the opportunity to be a partner of CeramB, and not an employee. He states that it is “simply absurd” that Mr. Abrahamsen moved across the country with his significant other to accept an hourly paying job as he would have been able to find a job closer to home. He would not have uprooted his entire life for a minimum paying job, states Mr. Wang.
23. Mr. Wang also submits that CeramB does not have any records or documentation of the exact hours Mr. Abrahamsen worked as they were partners in CeramB. He states that it was Mr. Abrahamsen who decided to “dismiss himself from the business by dodging” his phone calls and emails for two weeks straight. Mr. Wang states that it is unacceptable for a partner to cut off all communication and abandon his responsibilities in the business and leave him “to pick up where Mr. Abrahamsen had left and carry on business”.
24. Mr. Wang concludes his submissions by referring to an email from Mr. Abrahamsen to an inquiry from a Craigslist responder which Mr. Wang refers to as an advertisement (the “Craigslist Email”). He contends that the document shows that Mr. Abrahamsen was illegally selling stolen inventory of CeramB’s online for personal gain and is now trying to “strong-arm” CeramB into paying him wages.

ANALYSIS

25. As indicated previously, CeramB appeals the Determination pursuant to section 112(1)(c) of the *Act*, which states:

Appeal of director’s determination

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:

...

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

26. The governing test for allowing new evidence on appeals is delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In *Re: Merilus*, the Tribunal indicated that for new evidence to be considered in the appeal it must satisfy the following four (4) conditions, which are conjunctive:

- (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.

27. In this case, Mr. Wang presents the Witness and the Craigslist Email as new evidence.
28. The Witness Statement is produced by Mr. Wang in support of his submission that Mr. Abrahamsen was not an employee, but a partner of his in CeramB. Mr. Wang does not explain why he did not call Ms. Abrahamsen as a witness at the Hearing, as the evidence she provides in the Witness Statement appears to be the sort of evidence that CeramB could have, with the exercise of due diligence, presented to the Director during the adjudication of the Complaint and prior to the Determination being made. Therefore, the Witness Statement fails the first condition of the test for adducing new evidence on appeal set out in *Re: Merilus Technologies, supra*.
29. I also note that, in the Witness Statement, Ms. Abrahamsen makes a bare assertion that Mr. Abrahamsen was a partner of Mr. Wang and not an employee. There is no explanation given for this conclusion. In the circumstances, I find that the Witness Statement also fails the fourth condition of the test for adducing new evidence on appeal; namely, it does not contain evidence of 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 issue of the status of Mr. Abrahamsen under the *Act*.
30. Therefore, I find the Witness Statement is not new evidence, and I will not consider it in this appeal.
31. With respect to the Craigslist Email, dated June 11, 2014, it clearly existed prior to the Determination being made, but Mr. Wang does not explain why he failed to produce it at the Hearing. I also find that the evidence contained in the Craigslist Email is not relevant to a material issue arising in the Complaint and also lacks probative value, and, therefore, does not qualify as new evidence under the test in *Re Merilus Technologies, supra*. Therefore, I will not consider it in this appeal.
32. Having said this, I note that although CeramB has not advanced the error of law ground of appeal or argued that the Director erred in law on the issue of Mr. Abrahamsen's status under the *Act*, I have taken the liberty to review that question.
33. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.), the British Columbia Court of Appeal adopted the following definition of “error of law”:
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.
34. In this case, the delegate, in determining whether there was an employee/employer between the parties, analysed the evidence presented at the Hearing in context of the definitions of “employee”, “employer” and “work” under the *Act* first, and, secondarily, sought assistance in the common-law tests, noting that no single common-law test is determinative. I find, on the balance, the delegate correctly applied the *Act* and applicable principles of general law in concluding that Mr. Abrahamsen was an employee of CeramB under

the *Act*. I find that there was sufficient evidence for the Director to conclude the existence of an employment relationship between Mr. Abrahamsen and CeramB. In these circumstances, I do not find that the delegate erred in law.

35. In conclusion, CeramB has not shown, on a balance of probabilities, any reviewable error in the Determination. Therefore, pursuant to section 114(1)(f) of the *Act*, I find that CeramB's appeal of the Determination has no reasonable prospect of success.

ORDER

36. Pursuant to section 115 of the *Act*, I confirm the Determination, made on October 30, 2015, against CeramB Technologies Inc., together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal