



An appeal

- by -

Old Yale Log Homes Ltd.  
("Old Yale")

- 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

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 2004A/4

**DATE OF DECISION:** March 3, 2004



## DECISION

### SUBMISSIONS

Donald B. Miller, Cert. Mgt. Acct.	for Old Yale Log Homes Ltd.
Robert Sampson	on his own behalf
Richard Sauders, E.S.O.	for the Director of Employment Standards

### INTRODUCTON

I have before me an appeal, filed pursuant to section 112 of the *Employment Standards Act* (the “Act”), by Old Yale Log Homes Ltd. (“Old Yale”). Old Yale appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on December 3rd, 2003 (the “Determination”).

By way of the Determination (which was issued after an oral hearing conducted by the delegate on September 2<sup>nd</sup>, 2003), Old Yale was ordered to pay its former employee, Robert Sampson (“Sampson”), the sum of \$2,903.95 on account of unpaid wages and section 88 interest. Sampson’s unpaid wage claim included regular wages, overtime pay and vacation pay; his claim for payment for two statutory holidays was dismissed.

In addition, Old Yale was assessed three separate \$500 administrative penalties for having contravened three separate provisions of the *Act*. Thus, Old Yale has been ordered to pay a total amount of \$4,403.95.

It should be noted that although Sampson attended the oral hearing before the delegate, Old Yale was not represented at that hearing. The delegate concluded that Sampson’s records were credible and, in the absence of any contrary evidence from Old Yale, held in favour of Sampson with respect to the bulk of his claim. I might also add that even though Old Yale did not attend the appeal hearing, its position that Sampson was an independent contractor was nonetheless fully addressed by the delegate in his reasons for decision.

The parties were advised by the Tribunal’s vice-chair, in a letter dated February 23<sup>rd</sup>, 2004, that this appeal would be adjudicated based solely on their written submissions. In my view, and consistent with section 107 of the *Act*, it is not necessary that an oral hearing be held in this matter. I note that Old Yale, in its appeal form, indicated that it did not believe that an oral hearing was necessary.

I have before me, in addition to the record that was before the delegate [section 112(5) of the *Act*], the submissions of the Director’s delegate, Mr. Sampson and the appellant, Old Yale. Having reviewed the parties’ submissions and the record, I am of the view that this appeal is not meritorious. My reasons for so concluding are set out below.



## REASONS FOR APPEAL

Old Yale appeals the Determination on the grounds that the Director's delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b)] and on the ground that it has new and relevant evidence [section 112(1)(c)].

I shall deal with each ground in turn.

## ANALYSIS

### *Breach of the Principles of Natural Justice*

As noted above, Old Yale was not represented at the appeal hearing. Clearly, when a matter proceeds in the absence of one of the parties, one must be especially vigilant that the party not in attendance was given proper notice of the hearing. On the other hand, a willful failure to attend a hearing can hardly be said to constitute a breach of the rules of natural justice.

The various efforts made by the Employment Standards Branch to communicate with Old Yale throughout the period prior to the issuance of the Determination are recounted, in some detail, in the Determination itself. In my view, a reasonable view of the facts leads one to conclude that Old Yale followed a deliberate, though ill-advised, path of refusing to accept delivery of notices (forwarded by registered mail) or to meaningfully communicate with Employment Standards Branch officers. Whether the Branch communicated by way of registered mail or by telephone call, the result was pretty much the same—a resolute failure by Old Yale to meaningfully respond to the Branch's enquiries.

Old Yale says that it turned the matter over to its accountant so that he might deal with the Branch directly. I can only say that if, in fact, that was the case (and the evidence before me is rather vague on that point), the accountant could have—indeed, should have—taken a much more proactive approach.

In my view, the Director fully complied with section 77 of the *Act* and I do not see that Old Yale's failure to attend the hearing—given the facts of this case—amounted to breach of principles of natural justice.

### *New Evidence*

The so-called “new evidence” does not amount to evidence that was *unavailable* when the Determination was being made. Although this evidence was not, obviously (since Old Yale failed to attend the delegate's hearing), before the delegate, had Old Yale chosen to attend the hearing, the evidence in question could have been presented to the delegate.

In my view, this ground of appeal is more accurately characterized as an error of law [section 112(1)(c)]. More particularly, Old Yale says that the delegate erred in finding that Sampson was an employee rather than an independent contractor.

However, Old Yale's evidence relating to this issue should have been placed before the delegate at the original hearing; an appeal hearing is not the place to introduce evidence that should have been placed before the delegate. The Tribunal is an *appeal* body; the *Act* does not authorize the Tribunal to conduct an entirely new evidentiary inquiry (that is, a trial *de novo*) into the entire dispute. Quite apart from this latter procedural hurdle, I note that Sampson's status (employee or independent contractor?) was fully



addressed in the delegate's reasons for decision and, on the face of things, I can find no error whatsoever in the delegate's analysis of this question. Indeed, so far as I can determine, any suggestion that Sampson was a true independent contractor is rather fanciful.

## **ORDER**

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued in the amount of **\$4,403.95** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**