Employment Standards TRIBUNAL

An appeal

- by -

Casey Inglis

- 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.: 2012A/14

DATE OF DECISION: April 11, 2012

DECISION

SUBMISSIONS

Casey Inglis	on his own behalf
Troy Wistoski	on his own behalf
Reena Grewal	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Casey Inglis pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards ("the Director") issued January 20, 2012.

2. Mr. Inglis operates a floor installation business. Troy Wistoski worked with Mr. Inglis as a floor installer from October 16, 2009, until December 16, 2009. Mr. Wistoski filed a complaint alleging that Mr. Inglis had contravened the *Act* in failing to pay regular wages and vacation pay.

3. Following an investigation, the Director concluded that Mr. Inglis had contravened section 18 of the *Act* in failing to pay Mr. Wistoski wages and annual vacation pay. The Director also found Mr. Inglis in contravention of section 46 in failing to produce Employer Records. The Director's delegate determined that Mr. Wistoski was entitled to wages and accrued interest in the total amount of $1,087.52. The Director imposed two administrative penalties in the amount of $500 for each of the contraventions, for a total amount payable of $2,087.52.

4. Mr. Inglis contends that the Director failed to observe the principles of natural justice in making the Determination and seeks to have it cancelled or referred back.

5. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575). This decision is based on the written submissions of the parties.

ISSUE

6. Whether or not the Director failed to observe the principles of natural justice in making the Determination.

FACTS

7. During the investigation, Mr. Wistoski told the delegate that Mr. Inglis did work for Windmill Home Services ("Windmill") and Jordon's Flooring ("Jordon's) through his business, Rainy-City Flooring Corp. Mr. Inglis hired Mr. Wistoski to assist him in completing that work.

8. Mr. Wistoski said that Mr. Inglis provided him with all of the supplies necessary to install the floors and that Mr. Inglis called him whenever he got a job from Windmill or Jordon's and that together they would pick up supplies before heading to the job site. Sometimes Mr. Wistoski worked with Mr. Inglis and at other times he worked alone. Mr. Wistoski said that he used his own tools to complete the work. Mr. Wistoski also said

that he sent invoices to Mr. Inglis for payment and that he had no chance of increased profit or of risking a loss on the job sites. Mr. Wistoski also said that he did not have his own business nor work with any other employers.

9. The delegate sent Mr. Inglis a preliminary findings letter on November 18, 2011, along with a Demand for the Production of Employer Records. Those records were to be produced by December 2, 2011. Mr. Inglis did not respond to the preliminary findings letter or produce any records. However, on January 5, 2012, the delegate had a telephone conversation with Mr. Inglis in which he stated Mr. Wistoski was an independent contractor rather than an employee. He also contended that Mr. Wistoski had been paid all outstanding wages.

10. The Director's delegate considered the definition of "employee", "employer" and "work" contained in the *Act* and considered the evidence in light of these definitions. She noted that although Mr. Inglis asserted that Mr. Wistoski was a self-employed contractor rather than employee, he had provided no evidence in support of that position.

11. After considering Mr. Wistoski's evidence and after considering the definitions contained in the *Act*, she concluded that the relationship between Mr. Wistoski and Mr. Inglis was that of an employer and employee.

12. The delegate noted that on December 16, 2009, Mr. Inglis issued Mr. Wistoski a $1,000 cheque that had been returned NSF, and found the NSF cheque to be evidence that no wages had been paid. The delegate also found no evidence that Mr. Wistoski had been paid vacation pay on his wages. The delegate concluded that Mr. Wistoski was entitled to $40 vacation pay as well as interest in the amount of $47.52 on the unpaid wages.

ARGUMENT

13. Mr. Inglis argues that the Director erred in finding that Mr. Wistoski was an employee rather than a contractor. In his submission, Mr. Inglis sets out the following factors:

- Mr. Wistoski was responsible for obtaining his own supplies and material and transporting those materials;
- Mr. Wistoski was responsible for supplying his own tools;
- Mr. Wistoski worked independently to complete jobs and for invoicing the flooring company once the work was completed. He was not paid an hourly wage but a percentage of the total job;
- Mr. Wistoski was responsible for scheduling his own work hours.

14. Mr. Inglis contends that he was an independent contractor and that he sub-contracted work to Mr. Wistoski as well as other sub-contractors, all of whom were responsible for their own schedules and hours. Mr. Inglis asserted that once Mr. Wistoski's work was completed, Mr. Wistoski was responsible for collecting payment from the customer and remitting it to Windmill.

15. Attached to Mr. Inglis' submission was a letter from Windmill's owner, who wrote that Mr. Inglis "worked as a sub-contractor" for Windmill.

16. The Director contends that Mr. Inglis produced no evidence that the principles of natural justice have been breached. The Director says that Mr. Inglis was provided with a preliminary findings letter regarding

Mr. Wistoski's allegations by registered mail. The letter was not claimed and sent back to the Branch. However, the delegate notes that Mr. Inglis was aware that the Branch was investigating two complaints against him. The delegate says that on March 24, 2011, a Determination was issued against Rainy-City Flooring Corp., of which Mr. Inglis is a Director, for wages owed to Mr. Wistoski. She says that Determination was subsequently cancelled because the delegate noted that Rainy-City Flooring had not been incorporated at the time Mr. Wistoski earned his wages. She says that Mr. Wistoski's allegations and a Demand for Employer Records were sent to Mr. Inglis' home by registered mail, and that this package was received by Mr. Inglis on February 3, 2011. She submits that Mr. Inglis was aware of the substance of the allegations as well as the Director's Demand for records.

17. The Director contends that Mr. Inglis was given an opportunity to respond to the allegations and provide documents in support of his position and that there is no evidence in support of his ground of appeal.

18. The Director notes that Mr. Inglis has provided new evidence on appeal even though "new evidence" was not set out as a ground of appeal. The Director says that, despite a request for evidence supporting his position that Mr. Wistoski was a contractor, Mr. Inglis failed to provide that evidence prior to the issuance of the Determination. The Director submits that section 112(1) of the *Act* is not intended to allow a person dissatisfied with the result of the Determination to seek evidence to supplement their failure to provide it at first instance, during the investigation of the complaint. The Director seeks to have the appeal dismissed.

19. Mr. Wistoski also seeks to have the appeal dismissed.

ANALYSIS

20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was made.

21. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.

22. Although Mr. Inglis alleges a failure to comply with principles of natural justice as the ground of appeal, his written submissions have no bearing on that ground of appeal. It seems that Mr. Inglis has equated his notion of "fairness" with a natural justice argument. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".

23. I am satisfied that Mr. Inglis was provided with the details of the complaints and had full opportunity to respond to them. The record discloses that the delegate made several attempts to obtain records from Mr. Inglis and provided Mr. Inglis with not only Mr. Wistoski's allegations but also with a preliminary findings letter which Mr. Inglis refused to accept. Mr. Inglis was well aware of the fact that the Director was conducting an investigation. Mr. Inglis cannot use his refusal or failure to accept a package from the Director as the basis for an appeal. I find no grounds for Mr. Inglis' ground of appeal.

24. In *JC Creations* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned."

25. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

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. adopting a method of assessment which is wrong in principle.

26. In my view, there was sufficient evidence before the delegate to support her conclusion that Mr. Wistoski was an employee as well as the wages he was entitled to.

27. Mr. Inglis' submission contains new evidence as a basis for the appeal. 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:

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. 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.

28. An appeal is not an opportunity for Mr. Inglis to provide evidence he ought to have presented during the investigation. I find that all the "new evidence" was available during the investigation. Having reviewed the submissions and the record, I am not persuaded that the delegate would have arrived at a different conclusion in any event.

29. The appeal is dismissed.

ORDER

30. Pursuant to section 115 of the *Act*, I order the Determination dated January 20, 2012, be confirmed in the amount of $2,087.52, together with any interest that has accrued under Section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal