

An appeal

- by -

Aileen Packaging Ltd.  
(“APL”)

- 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.:** 2011A/37

**DATE OF DECISION:** May 31, 2011

## DECISION

### SUBMISSIONS

Fei Fei Ren	on behalf of Aileen Packaging Ltd.
XueFeng Zhang	on his own behalf
Zhongfeng Wang	on his own behalf
Fan Dong Meng	on his own behalf
Zhijun Zhang	on his own behalf
Victor Lee	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), brought by Ms. Fei Fei Ren (“Ms. Ren”), a Director and Officer of Aileen Packaging Ltd., of a Determination that was issued against Aileen Packaging Ltd. (“APL”), and Bob Shaoming Wang carrying on business as Yueng-Feng Construction (“Mr. Wang”), on February 22, 2011, by a Delegate of the Director of Employment Standards (the “Director”). The Determination found, pursuant to section 95 of the *Act*, APL and Mr. Wang were associated employers in respect of the employment of Fan Dong Meng (“Mr. Meng”), Zhongfeng Wang, Xue Feng Zhang and Zhijun Zhang (collectively “the Complainants”) and contravened sections 18 and 58 of the *Act* in respect of the Complainants employment. The Determination ordered APL and Mr. Wang, jointly and severally, to pay the Complainants a total of \$11,803.23 for unpaid wages, vacation pay and accrued interest, pursuant to section 88 of the *Act*.
2. The Determination also imposed an administrative penalty of \$500 under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for contravention of section 18 of the *Act*.
3. The total amount of the Determination is \$12,303.23.
4. I note that in paragraph 1 of the Appeal Form, Ms. Ren is shown as the “[p]erson making the appeal” and she is a Director and Officer of APL. Ms. Ren confirms, in her email of April 5, 2011, in response to the Tribunal’s inquiry as to whether she was also appealing the Determination on behalf of Mr. Wang, that her appeal was only on behalf of APL as she has “not used Yueng-Feng Construction” to do business. However, as I will note later in my decision, the final reply in APL’s appeal appears to be signed by Mr. Wang.
5. APL’s appeal is rather limited in that it questions the Director’s Determination with respect to two (2) of the four (4) Complainants, namely Zhongfeng Wang and Xue Feng Zhang. While the appeal does not dispute the calculation of wages owed to either of these complainants, APL disputes the Director’s Determination that these two (2) complainants, Zhongfeng Wang and Xue-Feng Zhang, were employees of APL.
6. APL’s appeal invokes section 112(1)(c) of the *Act*, namely, there is “new evidence” available that was not previously available at the time the Determination was made.

7. APL is seeking the Tribunal to change or vary the Determination. While APL does not specifically set out how it wants the Determination changed or varied in respect of Zhongfeng Wang and Xue-Feng Zhang, it would appear from the written submission of Ms. Ren, that APL is seeking the Determination to be cancelled in respect of these two complainants because they are not employees under the *Act*, but subcontractors or independent contractors over whom the Director does not have jurisdiction under the *Act*.
8. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated in the *Act* (s. 103), and Rule 17 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

### ISSUE

9. The sole issue in this appeal is whether there is new evidence that has become available that was not available at the time the Determination was being made, and, if so, does that evidence justify cancelling the Determination?

### FACTS AND REVIEW OF THE DETERMINATION

10. Ms. Ren is the sole Director and Officer of APL and Mr. Wang carries on business under the name Yueng-Feng Construction (collectively the "employer"). The employer operates a building construction and renovation business within British Columbia and employed the Complainants in various positions on its construction projects at different dates and rates of pay.
11. Between July 19, 2010, and October 2010, the Complainants filed their complaints under section 74 of the *Act*, alleging that the employer contravened the *Act* by failing to pay them wages (the "Complaints").
12. The delegate of the Director investigated the Complaints and both Ms. Ren and Mr. Wang participated in the investigation of the Complaints.
13. In the Reasons for the Determination, the delegate very parsimoniously summarizes the Complainants' evidence adduced in the investigation as follows:

The common arguments of the complainants are that they were hired by Wang who directed and supervised their work performance. They did not sign any 'contractor' agreement nor did they invoice the employer for the work they performed. They reported their hours and performance to the employer by telephone at least once daily. They kept their own records of the hours and projects they had worked on. The employer paid them by the hour. They worked solely for the employer and could not engage in other work or hire another person to replace them. The complainants produced a record of the hours and places they had worked on. They also provided telephone invoices showing the calls they made to the employer daily. The employer had refused to pay them their final wages stating that the work was not performed satisfactorily.

14. Similarly, the delegate summarizes the evidence of the employer as follows:

With the exception of one complainant, the employer contends that the others were 'subcontractors' and not employees under the Act and therefore, not entitled to the protection of the Act.

The employer submits that the complainants had agreed on the 'price' of a renovation/installation/construction project before work commenced. The employer alleges that the complainants did not perform the work to the satisfaction of the employer or the home owners and

abandoned the project without completing the job agreed upon. As a result, the employer had to engage another person to rectify and complete the work and suffered loss. The employer claims that the complainants are not entitled to any further payments as claimed.

15. In making his determination on the penultimate issue of whether or not the Complainants were employees of the employer, the delegate, in the Reasons for the Determination, reviews the statutory definitions of “employee” and “employer” and the very instructive decisions of the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, which called for a “broad and generous” interpretation of benefits-conferring legislation such as the *Act* and *Machtiger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.), which saw the Supreme Court favouring an interpretation of employment standards legislation that extended its protection to as many employees as possible over one that did not.
16. The delegate also considered common law tests governing determination of employment relationships – control, ownership of tools, chance of profit/risk of loss, integration, economic reality and specific results – and applied them in relation to the evidence of the parties and went on to conclude that the Complainants were all employees of the employer. More specifically, the delegate reasoned that there was no evidence provided by the employer that any of the Complainants operated their own business. To the contrary, the delegate found that the evidence indicated that they were “hired for their personal services” and they worked “solely for the employer and could not engage another person to do the work”. Further, the homeowners who engaged the employer to do the construction work “reported all the alleged defects in workmanship to the employer directly” and not to the Complainants.
17. The delegate also identified in the evidence that the employer had “full control over the projects that the Complainants worked on” and Mr. Wang “personally directed when and how the work would be done by the Complainants and supervised their performance”. The delegate also observed that “the employer provided the tools and equipment for the Complainants to use in the performance of their jobs” and that the Complainants were “paid by the hour and could not engage another person to do their work for them”. They also had “no chance of profit or risk of loss in performing their services to the employer”.
18. The delegate found the Complainants were “integral to the employer’s business” as the employer “needed a crew of workers” to perform construction and renovation projects for the employer and without the services of the Complainants, “the employer would not be able to operate its business”. There was also a “long term relationship envisioned by the parties”, and this was evidenced by one of the Complainants who “worked for almost 2 years” for the employer. In these circumstances, the delegate concluded that the Complainants were in an employee/employer relationship.
19. With respect to the delegate’s finding that both APL and Mr. Wang were associated employers within the meaning of section 95 of the *Act* in relation to the employment of the Complainants, I note that the delegate relied on the Tribunal’s decision in *Invicta Security Systems Corp.*, BC EST # D249/96, which delineated four (4) conditions that must be met when associating related businesses as “one employer” under section 95 of the *Act*:
  - i. there must be more than one corporation, individual, firm, syndicate, or association;
  - ii. each of these entities must be carrying on a business, trade or undertaking;
  - iii. there must be common control or direction; and
  - iv. there must be some statutory purpose for treating the entities as one employer.

20. Applying the foregoing criteria in this case, the delegate reasoned as follows in concluding that APL and Mr. Wang were “one employer” for the purposes of the *Act*:

Specifically, I am satisfied that there is more than one corporation, individual, firm, syndicate or association which meets the first criteria under section 95. A BC corporate search confirms that APL is an active corporation. Its sole director and officer, FeiFei Ren, is the wife of Wang and she represented him throughout the investigation process. Each of these entities appears to be actively engaged in carrying on a business at the same location. Wang’s business card identified his business as Yueng-Feng Construction. There is common control and direction in that Wang did all the hiring, directing and supervising of the complainants while APL did all the administrative work including payroll. Lastly, as I have found the complainants to be employees, I further accept that there is statutory purpose in treating APL and Wang as one employer. That purpose is compliance with and enforcement of the *Act*’s minimum employment standards.

21. Having concluded that APL and Mr. Wang are one employer and having previously concluded that the Complainants were in an employer/employee relationship in this case, the delegate went on to next determine if the Complainants were owed any wages. In this regard, the delegate noted that the Complainants, during the investigation of their Complaints, provided a record of the hours they worked and a calculation of wages they were owed by the employer. These records, the delegate notes, were forwarded to the employer for response but the employer “did not challenge these records for accuracy or provide contradictory evidence to rebut their claims” except advance the argument that the Complainants were “subcontractors” or “self-employed” and had agreed to work on the basis of “price for a particular piece of work”. In the circumstances, the delegate accepted the Complainants’ uncontested evidence as credible and went on to make the individual awards in the summary sheets attached to the Determination. These awards included outstanding wages for each, as well as vacation pay thereon.
22. The delegate also levied an administrative penalty of \$500 under section 29(1) of the *Regulation* for the employer’s contravention of section 18 of the *Act*.

### SUBMISSIONS OF APL

23. Ms. Ren, on behalf of APL, made the following written submission in a letter dated March 29, 2011, which I set out verbatim:

Mar.29 2011

Dear Sir or Madam

My name is FeiFei Ren, [sic] I would like to appeal part of the employment standard branch decision, file NR. [sic] ER#166-737

1. Re. Mr. Zhong Feng Wang

I’m providing a new evidence prove [sic] that Mr. Zhong Feng Wang was hired Mr. zhang to do the project. [sic] Attached the sheet what is the price of project. [sic]

2. Re. Mr. Xue Feng Zhang Make a fake ads [sic] on Chinese newspaper buy and sell. We know him from news paper [sic], in the Ad he descript him [sic] as computer expert and electrician. He did fix once computer for our office. And after we hired him to do a few small project [sic] and he failed to do so. We have to hire Mr. Sheng Min Wang to fix all the problem [sic] he left over. Through the corresponds [sic] with employee standard office, we found out he never had an electrician license [sic]. He never worked for us as a worker, please check. [sic] And he also accused me to add subcontractor to the receipts which proved he was lie. [sic]

Because my office door has been broken twice, I guess from above two case related person from Mr. Fan Dong Meng and Zhong Feng Wang [sic], I receive the determination really late [sic].

I had issued a check already in whole amount to Employment standard branch already [sic], but I don't think the decision from director Victor lee [sic] is 100% right, please consider it again. [sic]

Thanks very much

24. Attached to this March 29, 2011, letter is the following declaration of Zhe Bin Li ("Mr. Li") dated March 17, 2011. This declaration reads as follows:

Mar.17 2011

To who it may concern,

My name is Zhe Bin Li has worked for Aileen packaging ltd. From April 01 to Sept 15 2011. Here I declare that as I know. [sic] Mr, [sic] Fan Dong Meng, and Zhong Feng Wang are subcontractors of Aileen packaging ltd. [sic] They are paid by project.

On Aug 24 2010, Mr. Zhong Feng Wang comes in our office about the problem of 3577 W 29<sup>th</sup> Ave. the price of the job is \$2100.00 [sic]. he [sic] requires a [sic] increase of \$1500.00 of the job. And Bob denied him [sic]. Mr. Zhong Feng wang [sic] also request [sic] the payment of total other two projects he worked on, which he not finished. [sic] I also know Mr. zhong feng Wang has a [sic] employee help work for him on the projects. [sic] His last name is Zhang.

At the time total four people was in presence, [sic] me, Bob, Zhong Feng Wang, also another coworker named Tai wang. [sic] Because zhong Feng wang was threaten [sic] as Bob Wang if Bob not pay all the money to him, he will go to court sue Bob. [sic] So Bob asked me and the other coworker Tai Wang to record the incident in paper, me and Tai Wang signed for it too. [sic]

On the day 25<sup>th</sup> of Aug, Mr. zhong Feng Wang [sic] came to our office again, and asked me don't work for Aileen packaging [sic], I ignored him and left office. Mr. Fei told me after, he threatened Ms. Fei. Mr. fei [sic] has ask [sic] police help to make him leave the office.

If you have question [sic] please contact me. My nr. [sic] is [telephone number]

25. I note that both Ms. Ren's written submissions and Mr. Li's declaration are written in the same computer font and similarly dated and the writing is very similar stylistically.
26. There is a further document, which is adduced as new evidence and in similar font to the previous two but dated August 24, 2010. This document appears to have been initialled by Mr. Li and, according to Ms. Ren, evidences the contracted price of the various residential projects of APL that Mr. Zhong Feng Wang was engaged to work on. However, the document does not, on its face, show Mr. Zhong Feng Wang's signature or any other indication of his agreement to the contract prices for the projects set out therein. It is also not clear whether the document was created on the date it is dated and who created it.
27. The submissions of APL also include a photocopy of a business card for Mr. Xue Feng Zhang showing his anglicised name "Sam Zhang". The business card describes his business as "Professional Computer Service".
28. APL's submissions also include computer records of some cheques APL appears to have issued previously to Mr. Meng, although APL's appeal does not dispute the determination in respect of Mr. Meng.
29. There is also included in the submissions the email of the Tribunal to Ms. Ren and the latter's responding email clarifying that the appeal of the Determination she has filed is in respect of APL and not Mr. Wang or Yueng-Feng Construction.

30. I also note that there is a written final submission in the appeal materials filed by APL, which shows the names of both Mr. Wang and Ms. Ren on the signature page but which only Mr. Wang has signed. As the delegate noted in the Reasons for the Determination previously that Ms. Ren served as an interpreter and translator for Mr. Wang in the investigation, it would appear that Ms. Ren prepared the final submissions that Mr. Wang signed. I only point this out because Mr. Wang or Yueng-Feng Construction has not appealed the Determination and only APL has appealed.
31. In the final reply of APL, Mr. Wang submits that the delegate, during the investigation, “did not really focus on the case” and in three numbered paragraphs goes on to explain why and requests the Tribunal to have a second “detail(ed) look” at the case. In paragraph one of his submission, he states that Ms. Ren mentioned to the delegate a few times that she was not his wife but he still thought she was. In paragraph two of his submissions he primarily reviews the evidence he gave to the Delegate during the investigation and disputes the Delegates findings of fact including credibility determinations. He also states that he did not receive the written submission of one Mr. Meng from the Delegate during the investigation suggesting that he did not have an opportunity to respond properly. Lastly, in the third paragraph, he states that “Mr. Meng told one of our customers, he organized a lots [sic] of people to make a complaint about me, Bob would suffer deeply (sic).” He also attaches a copy of the Notice of Civil Claim filed by APL against Mr. Meng in the Vancouver Registry of the Supreme Court of British Columbia on February 3, 2011, claiming, *inter alia*, breach of contract, negligence, interference with contractual relations and slander on the part of Mr. Meng.

### **SUBMISSIONS OF THE DIRECTOR**

32. The Director, in response to the appeal submissions of Ms. Ren states that APL was afforded an opportunity to submit its evidence in support of its position and the evidence now presented on appeal is not new evidence as it was either presented previously or could have been presented previously during the investigation. According to the Director, the purported “new evidence” fails the test set out by the Tribunal in *Re Merilus Technologies Inc.*, BC EST # D171/03, and therefore the appeal should be denied.

### **SUBMISSIONS OF THE COMPLAINANTS**

33. I have carefully read the written submissions of Mr. Xue Feng Zhang, Mr. Zhongfeng Wang, Mr. Zhijun Zhang and both (the April 17 and May 20, 2011) submissions of Mr. Meng all of which in one form or another respond to the purported “new evidence” of APL adduced by Ms. Ren and Mr. Wang. For the reasons set out in my decision under the heading Analysis below I do not find it necessary to review or reiterate here those submissions.

### **ANALYSIS**

34. APL’s appeal is based on the new evidence ground in section 112(1)(c) of the *Act*, namely, evidence has become available that was not available at the time the Determination was made. As indicated by this Tribunal in previous decisions invoking the “new evidence” ground of appeal, the test this Tribunal is bound by in determining whether or not to accept new evidence or whether evidence qualifies as new evidence for acceptance on an appeal is delineated in *Re: Merilus Technologies Inc.*, *supra*. In the latter decision, the Tribunal set out the following four conditions that must be met before new evidence will be considered in an appeal:
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.

35. It should be noted that the four criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence has the onus to satisfy each of them before the Tribunal will admit any new evidence.

36. In this case, I am not satisfied that APL has met the first criterion in the *Merilus* test. The evidence Ms. Ren wishes to adduce as new evidence in this appeal is not evidence that 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. In this case, in advance of the Determination and particularly during the investigation of the Complaints, Ms. Ren could have adduced the evidence in her written submissions including that contained in Mr. Li's statement, the purported business card of Mr. Xue Feng Zhang as well as the document dated August 24, 2010, that is presented as evidence of the contracted price of the various residential projects of APL that Mr. Zhong Feng Wang was engaged on. There is no explanation offered by APL or Ms. Ren as to why this information or evidence was not previously adduced.

37. While I find that the evidence adduced by APL or Ms. Ren fails the first of the four-fold test in *Merilus, supra*, and it is not necessary for me to review the said evidence in relation to the balance of the *Merilus* test, I wish to observe that the evidence would likely fail on at least one or more of the balance of the criteria in *Re Merilus*. For instance, the written statement of Mr. Li is prepared in the same style, typed in the same font, and uses similar language as Ms. Ren's own written submissions which raises the question whether the statement is really Mr. Li's statement. With respect to the document dated August 24, 2010, which is presented as evidence of the contracted price of the various projects of APL that Mr. Zhong Feng Wang was engaged to work on by APL as well as the business card of Mr. Xue Feng Zhang which shows the latter engaged in a computer servicing business, neither of these documents are of "high potential probative value" such that if believed would have led the Director or the delegate to a different conclusion on a material issue, in this case whether or not either of these complainants were engaged in an employment relationship with APL or an independent contractor relationship.

38. Having said this, I also add that another compelling reason for not allowing APL or Ms. Ren to adduce the purported new evidence in the appeal is that it would have the effect of frustrating one of the fundamental purposes of the *Act* contained in Section 2(d), namely, to provide fair and efficient procedures to resolve disputes.

39. As for Mr. Wang's written final submissions on behalf of APL, I note that while Ms. Ren's original written submissions in the appeal, with one exception, focus on Mr. Zhong Feng Wang and Mr. Xue Feng Zhang, Mr. Wang's submissions focus on Mr. Meng. Ms. Ren's original submission mention Mr. Meng only in passing in suggesting that he, together with Mr. Zhong Feng Wang, may have some role in her office break-in which led to her receiving the Determination late. Having said this, since Ms. Ren, in APL's limited appeal of the Determination, has not taken any issue with the status of Mr. Meng as an employee of APL or the wages awarded to him in the Determination, I find Mr. Wang's final submissions as they relate to Mr. Meng, which while substantively would fail to qualify as "new evidence" on at least one or more criteria under the *Merilus* test, not relevant.

40. I also find that nothing turns on Mr. Wang's assertion that the delegate was wrong in concluding in the determination that Ms. Ren was his wife.



41. I also find that Mr. Wang's submissions challenging generally and specifically the delegate's findings of fact and credibility determinations inappropriate on appeal. The Tribunal has indicated, time and time again, that it does not have jurisdiction over questions of fact (see *Re Pro-Serv Investigations Ltd.*, BC EST # D059/05; *Re Koivisto (c.o.b. Finn Custom Luminum)*, BC EST # D006/05), unless of course the matter involves errors on findings of fact which may amount to an error of law. The Tribunal in *Re Funk*, BC EST # D195/04, expounded on the latter point stating that the appellant would have to show that the fact finder made a "palpable and over-riding error" or that the finding of fact was "clearly wrong" to establish error of law. In this case, I find that neither Mr. Wang nor Ms. Ren or APL has shown that the delegate made a "palpable or over-riding error" in his findings of fact such as to give rise to an error or law.
42. I also note that on matters of credibility determinations, a delegate, whether involved in the investigation of a complaint or presiding over a hearing, is far better positioned to deal with questions of credibility than the Tribunal on an appeal. The Tribunal is generally reluctant to substitute the delegate's findings of facts even if it is inclined to reach a different conclusion on the evidence.
43. In the result, I find that APL has not made out its case on appeal.

### **ORDER**

44. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued, together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the issuance of the Determination.

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