

An appeal

- by -

Kevin Buchan carrying on business as Buchan Boatworks
("Buchan")

- 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: David B. Stevenson

FILE No.: 2007A/33

DATE OF DECISION: June 7, 2007

DECISION

SUBMISSIONS

Kevin Buchan	on his own behalf
Oleksandr Krotenko	on his own behalf
Mary Walsh	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Kevin Buchan carrying on business as Buchan Boatworks (“Buchan”) of a Determination that was issued on March 2, 2007 by a delegate of the Director of Employment Standards (the “delegate”). The Determination found that Buchan had contravened Part 3, Section 18, Part 4, Section 40, Part 5, Section 45 and Part 7, Section 58 of the *Act* in respect of the employment of Oleksandr Krotenko (“Krotenko”) and ordered Buchan to pay Krotenko an amount of \$9,181.21, an amount which included both wages and interest.
2. The Director also imposed an administrative penalty on Buchan under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$3500.00.
3. The total amount of the Determination is \$12,681.21.
4. Buchan says the Determination is wrong and has asked the Tribunal to review, and cancel, the Determination on the basis of new evidence that has come available that was not available at the time the Determination was made. The appeal is, on its face, based on a combination of evidence that was available at the time the Determination was made and new information relating to Krotenko’s current work circumstances. Buchan has provided the following explanation for the ground of appeal he has indicated on the Appeal Form:

Evidence, in respect of the claim, has become available and was available but, at the time, it was not felt necessary in this matter. Because of the decision, this evidence is now essential:

- A witness with direct knowledge of the relationship between Buchan and Krotenko is obtainable.
- Krotenko continues the practice of contracting work at the Lynnwood Marina with Buchan Boatwork [sic] clients.
- Krotenko continues to provide contracting to other repair shops in Lynnwood Marina.
- Krotenko twice requested written confirmation of his contractor status and rate of income for Immigration Canada.
- Krotenko admitted that he files Revenue Canada returns as self employed for the last several years.
- Krotenko evaded questions by pretending not to understand English.

5. Buchan says that if the witness and the additional evidence are allowed and considered by the Tribunal, the Determination will be altered. The appeal contains no indication who the potential witness would be or what that person would say.
6. Buchan has asked for an oral hearing.
7. The Tribunal is not required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act*, SBC 2004, ch. 45 (“ATA”), including section 36 which states, in part: “. . . 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).
8. Findings of fact and conclusions on the claim have already been made by the Director in the complaint hearing. The Tribunal has reviewed the material and the parties’ submissions and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

9. The issue in this appeal is whether Buchan has shown there is any reviewable error in the Determination.

THE FACTS

10. The central issue before the delegate, and the central issue in this appeal, is whether Krotenko was an employee for the purposes of the *Act* or an independent contractor. The Determination contains an extensive examination of that issue.

ARGUMENT AND ANALYSIS

11. In this appeal, Buchan has the burden of persuading the Tribunal that the Determination is reviewable on one of the grounds set out in Subsection 112(1) of the *Act*, which states:

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:

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

12. An appeal is an error correction process with the burden of showing the error being on the appellant. It is not simply an opportunity to add further information and re-argue one’s case, hoping the Tribunal will reach a different conclusion.
13. As indicated above, Buchan has grounded this appeal on Section 112(1)(c). In relying on this ground of appeal, Buchan has three hurdles to overcome.

14. The first is that the new or additional evidence is being provided for the purpose of challenging the conclusion that Krotenko is an employee for the purposes of the *Act*. Whether a person is an employee under the *Act* or an independent contractor is predominantly fact driven. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law.
15. The fact that Krotenko had sought to establish his status with Revenue Canada as a contractor is largely irrelevant to his status under the *Act*. The Tribunal has consistently said that an individual's status under federal taxing legislation is not determinative of that individual's status under the *Act*; the statutory definitions and purposes in the *Act* and the federal legislation are quite different. It is the application of the definitions and purposes of the *Act* which determines an individual's status for the purposes of a complaint under the *Act*.
16. The second relates to the approach taken by the Tribunal to this ground. The Tribunal is given discretion to accept or refuse new or additional evidence. The Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03). New or additional evidence which does not satisfy any of these conditions will rarely be accepted.
17. The third relates to the ground of appeal itself: new evidence in an appeal is statutorily limited to evidence that was not available at the time the Determination was made.

Having reviewed the proposed evidence and the submissions by all of the parties relating to it, I conclude it should not be accepted under either the general discretionary authority of the Tribunal to allow additional evidence on appeal or the applicable provision of the *Act*.
18. Buchan acknowledges that some of the evidence he seeks to place before the Tribunal in this appeal was available at the time the Determination was made. He does not identify which evidence that is, but it is fair to say it includes evidence "of the relationship between Buchan and Krotenko", that Krotenko had "twice requested written confirmation of his contractor status and rate of income for Immigration Canada" and that Krotenko "files Revenue Canada returns as self employed".
19. Krotenko's current working relationships with other persons, even if it is properly described as "contracting" (rather than employment), does not change his relationship with Buchan, which on the facts described in the Determination was clearly an employment relationship.
20. The assertion by Buchan that Krotenko "evaded questions by pretending not to understand English" is unrelated to potential new or additional evidence. Nor is that assertion supported by anything in the appeal and is, in any event, by the delegate who conducted the complaint hearing.
21. Buchan has not shown there is any reviewable error in the Determination and for the above reasons, the appeal is dismissed.

ORDER

22. Pursuant to Section 115 of the *Act*, I order the Determination dated March 2, 2007 be confirmed in the total amount of \$12,681.21, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal