

An appeal

- by -

Michael Lord Developments Ltd.
("MLD")

- 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: April D. Katz

FILE No.: 2002/586

DATE OF DECISION: February 18, 2003

DECISION

OVERVIEW

Michael Lord Developments Ltd. (“MLD”) appealed a Determination from the Director of Employment Standards (“Director”). The Determination concluded that MLD had an employee named Robert Laudy Williams (“Williams”) to whom it owed \$1654.13 in wages. MLD did not participate in the investigation and bases its appeal on the argument that Williams was a subcontractor not an employee.

This appeal proceeded by written submissions.

ISSUE

1. Should MLD be allowed to present evidence on appeal that was not provided to the Director during the investigation?
2. If MLD’s evidence is considered, did the Director err in finding that Williams was an employee of MLD?

ARGUMENT

In its appeal MLD argued that MLD was a project manager on a number of construction work sites and not an employer. MLD argues that Williams was treated as a part time subcontractor for his periodic labouring work between June 15, 2001 and November 14, 2001. MLD expected all subtrades to submit invoices to MLD, which were then submitted to the owners of the property for payment. MLD argued that Williams was asked for invoices of his periodic labouring work but none were submitted. MLD indicated if Williams submitted invoices MLD would try and collect but it would be hard to go to the owners a year later and ask for payment. MLD relied on the pay cheques issued to show some were paid by property owners and some by MLD.

Williams argued that Canada Customs and Revenue Agency had ruled he was an employee of MLD and submitted the ruling. Williams argued he was hired by MLD as he had been on previous occasions and should be paid by MLD.

The Director’s Delegate argued that the MLD declined to participate in the investigation. The Delegate argued that MLD had not replied to phone messages left on May 8, 2002, June 18, 2002, June 20, 2002, or July 11, 2002. MLD did not reply to letters sent on May 23, 2002 and did not pick up the registered letter sent on July 16, 2002. The Delegate argues that the evidence from MLD could have been produced during the investigation and was not and it should not now be used in support of the appeal.

ANALYSIS

There are two issues to be decided in this appeal. If I rule against accepting the new evidence from MLD at this stage of the process, there is no evidence to support the appeal. Therefore I must first address whether it is appropriate to consider the new evidence.

MLD has not provided any explanation for why the evidence was not presented to the Delegate during the investigation. In fact the appeal does not address why the Delegates, phone messages and letters received no response throughout the investigation process. There is no dispute that none of the new evidence was presented to the Delegate during the investigation of Williams' complaint.

When an appellant proposes to introduce new evidence on an appeal the Tribunal has consistently followed principle set out in the Tri-West/Kaiser Stables decisions. Some decisions refer to this principle as the Tri-West/Kasier Stables Rule.

In Tri-West the employer sought to justify its termination of the complainant on the basis of some information that had, apparently, not been given to the Director's delegate during the investigation of the complaint. The adjudicator ultimately held that evidence in question--a two-page memorandum prepared by the employer's accountant--did not prove that the employer had just cause for termination. However, in any event, the adjudicator held that the evidence was inadmissible because:

"This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it...The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but **we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.**" Emphasis added.

In Kaiser Stables the employer based its appeal on evidence not provided to the investigating officer. At the appeal hearing, an objection was raised as to whether or not the employer could present certain evidence and the adjudicator ruled that the evidence was inadmissible. It should be noted that in Kaiser there was a consistent and willful refusal by the employer to participate in the delegate's investigation--the employer repeatedly ignored letters, telephone calls and faxes from the delegate.

Subsequent decisions of the Tribunal have adopted the approach taken in Kaiser Stables, namely, in the face of a concerted refusal to participate in an investigation, the employer will not be permitted to rely on evidence that was available and that could have been presented to the investigating officer. The principle espoused in Kaiser Stables is entirely consistent with two of the Act's stated purposes--the encouragement of open communication between employers and employees and the fair and efficient resolution of disputes arising under the *Employment Standards Act* subsections 2(c) and (d).

To be administratively fair, evidence is not inadmissible merely because it was not provided to the investigating officer. Where there are legitimate reasons why particular evidence may not have been provided to the investigating officer an adjudicator ruling on the admissibility of such evidence must weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure.

In this situation MLD, like Kaiser Stables, did not respond to any of the messages or letters from the Delegate. MLD's explanation is that it is sorry no response was given to the Delegate but MLD did not consider Williams to be an employee. Unfortunately this opinion was not expressed to the Delegate.

Even in the reply to the Delegate's submission on the Kaiser Stables principle, the appellant did not provide any reason for failing to participate in the investigation. Based on the facts presented, I must conclude that there are no legitimate reasons for not participating in the investigation.

Having come to this conclusion I find the new evidence submitted to be inadmissible. The onus of proving the Director has erred is on the appellant in an appeal to the Tribunal. There is no evidence to support the appeal and it is therefore dismissed.

If I had considered the merits of the appeal, I cannot find any evidence that would lead me to conclude that Williams was an independent contractor. The normal criteria applied to determine if someone is an independent contractor are control, whose tools are used, were there opportunities for profit or loss and was the work integral to the business. There is no evidence in the job duties or method of work that Williams was an independent contractor. He followed the pattern set when MLD employed him on a site. Williams did not profit differently on this work from the work he did when MLD was the employer

If there was a different arrangement in the contract of employment on these sites, Williams was not aware of it. If Williams did not agree to the different arrangement, there is no consensus to establish a contract. Only MLD was able to tell the difference based on its arrangement with the property owner. Based on the evidence provided by MLD and Williams, Williams' role and responsibilities did not change.

CONCLUSION

Based on the evidence provided I find no evidence to support the appeal. The Determination is therefore confirmed.

ORDER

Pursuant to section 115 of the Act, I order that the Determination in this matter, dated November 6, 2002 is confirmed.

April D. Katz
Adjudicator
Employment Standards Tribunal