Employment Standards TRIBUNAL

An appeal

- by -

MDK Enterprises Inc. and 13192427 Enterprises Inc. carrying on business as
Wood Lake Teddy Bear Resort
("Resort")

– 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)

and

An application for suspension

- by –

MDK Enterprises Inc. and 13192427 Enterprises Inc. carrying on business as
Wood Lake Teddy Bear Resort
("Resort")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
*Employment Standards Act* R.S.B.C. 1996, C. 113 (as amended)

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2010A/34 & 2010A/35

**DATE OF DECISION:** June 8, 2010

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Jasroop S. Grewal | Counsel for MDK Enterprises Inc. and 13192427 Enterprises Inc. carrying on business as Wood Lake Teddy Bear Resort |
| Roger Weatherly | on his own behalf |
| Terry Spicer | on her own behalf |
| Kathleen Demic | on behalf of the Director of Employment Standards |

## OVERVIEW

1. This is an appeal by MDK Enterprises Inc. ("MDK") and 13192427 Enterprises Inc. ("13192427") carrying on business as Wood Lake Teddy Bear Resort (the "Resort') against a Determination of the Director of Employment Standards (the "Director") issued January 26, 2010 (the "Determination").

2. Roger Weatherly ("Weatherly") and Terry Spicer ("Spicer") (collectively the "Complainants") filed a complaint pursuant to section 74 of the *Employment Standards Act* (the "*Act*") alleging that their employer, the Resort, contravened the *Act* by failing to pay them regular wages (the "Complaint").

3. The Director's delegate (the "Delegate") investigated the Complaint and issued her Determination finding the Resort to have contravened sections 17 and 18 of the *Act* for failing to pay the Complainants regular wages and annual vacation pay. The Delegate further ordered accrued interest pursuant to section 88 of the *Act* for an all-inclusive sum of $20,023.33.

4. The Delegate also issued two (2) administrative penalties against the Resort of $500.00 each for contraventions of sections 17 and 18 of the *Act* for a total sum of $1,000.00.

5. The Resort, through its counsel, is appealing the Determination on the ground that the Director erred in law in making the Determination and additionally, on the ground that evidence has become available that was not available at the time the Determination was being made.

6. The Resort is also asking the Tribunal to suspend and cancel the Determination or, in the alternative, vary the Determination.

7. The Resort has not requested an oral hearing of its appeal and the Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this appeal. Therefore, the Tribunal will determine the appeal based on a review of the Determination, the written submissions of the Resort's counsel, the Director and the Complainants, as well as the section 112(5) "record".

## ISSUES

8. The issues to be determined are threefold:

(I) Should the Determination be suspended pending the outcome of the appeal?

(II) Did the Director err in law in making the Determination?

(III) Is there new evidence that has become available that was not available at the time the Determination was made?

9. I propose to review the pertinent facts and Reasons for the Determination and thereafter review and decide the Resort's application for suspension of the Determination. Thereafter, I propose to review and analyze the Resort's substantive grounds of appeal and decide the Resort's appeal.

## FACTS AND REVIEW OF THE REASONS FOR THE DETERMINATION

10. The Resort operates in Oyama, British Columbia and comprises of four motel units, three cabins, a campground for tents and smaller trailers and a house split into two monthly rental suites.

11. The Resort is a partnership of MDK and 1319247. MDK is a British Columbia registered corporation with two directors, namely, Mr. Derek Niewinski ("Mr. Niewinski") and Ms. Margaret Niewinski ("Ms. Niewinski"). 1319247 is also a British Columbia registered corporation with two directors, namely, Mr. Paul Bereznicki ("Mr. Bereznicki") and Ms. Agnes Bereznicki ("Ms. Bereznicki").

12. The Complainants moved in one of the cabins at the Resort on December 1, 2008. The caretakers at the Resort, at around that time, were leaving and asked the Complainants if they were interested in the caretaking job. The Complainants responded favourably as Mr. Weatherly, at around that time, had been unsuccessful in securing a mechanic job he had applied for and Ms. Spicer was only employed on a part-time basis at a retail shop, Zellers.

13. Subsequently, at the end of December 2008, Mr. Niewinski asked the Complainants if they were interested in the caretaker position and they expressed their interest and Mr. Niewinski requested their resumes and references. About a week thereafter, Mr. Niewinski telephoned the Complainants to meet for an interview with him and his partner, Mr. Bereznicki. However, the latter was unable or did not attend the meeting and Mr. Niewinski alone met with the Complainants.

14. At the meeting with the Complainants, Mr. Niewinski explained the duties and responsibilities of the position or the scope of the job. In particular, notes the Delegate, Mr. Niewinski explained to the Complainants that they were expected to do the following:

- Open the office each morning from 8:00 a.m. to 11:00 a.m. for checkouts
- Come to the office at any other time for check-ins
- Clean the motel units daily and change linens
- Perform some laundry services
- Keep the units stocked
- Clean bathroom and laundry facilities regularly and keep these areas well stocked

- Perform some grounds keeping duties including clearing snow during winter months and grass cutting, weeding, and other gardening and maintenance work during other seasons
- Collect rents from tenants and field any tenancy issues
- Show properties, clean-up properties when tenants moved, and perform any required repairs

15. The Delegate also notes in the Determination that the Complainants had available to them the Resort's pickup truck and a small tractor and some gardening and cleaning tools to perform some of the work required in the position.

16. Further, Mr. Niewinski also showed the Complainants how to operate the Resort's computer program and provided instruction to the Complainants regarding paperwork they had to perform and other office duties.

17. Mr. Niewinski also instructed the Complainants that they were to contact him if they had any problems or questions.

18. When Mr. Weatherly enquired about the pay in the position, Mr. Niewinski advised that pay would be based on the earnings of the Resort each month and that the Complainants could expect to receive a percentage on any monthly profit of the Resort exceeding $13,000. The Complainants were also led to believe that the Resort regularly made over $13,000 per month and well over that amount during the summer. Mr. Niewinski also advised them that the position came with free accommodation.

19. Both Complainants understood that the position with the Resort would be a fulltime position and accepted Mr. Niewinski's offer of employment. In the case of Mr. Weatherly, he abandoned his job search thereafter and in the case of Ms. Spicer, her work at Zellers had been cut back to 17 hours after Christmas and she altogether resigned from that position in January. Both Complainants started work for the Resort as of January 4, 2009. They were provided with a cellular telephone for work by Mr. Niewinski which they were required to keep with them for all times.

20. The Delegate notes the following pertinent additional evidence of the Complainants received during the investigation of the Complaint:

- Mr. Niewinski and not the Complainants decided the rates for monthly rentals, nightly motel rentals and camp spots.
- Ms. Spicer did office work using the Resort's computer, telephone, office supplies and materials using an office provided by Mr. Niewinski or the resort.
- All the cleaning equipment and supplies were provided to the Complainants by the resort but the vacuum provided was difficult for Ms. Spicer to use and therefore she used her own vacuum.
- Mr. Weatherly used some of his own hand and mechanical tools to maintain and repair the Resort's vehicles and anything needing to be repaired around the Resort.
- During the first several months the Complainants performed enormous amount of work as the Resort's property was run down and some of the units in disrepair.
- The Complainants had to contend with some significant issues with the septic system on the Resort property requiring clean-up work and a third-party septic repair or maintenance service to be called in a few times.

- The Complainants had to deal with problem tenants who did not pay rent or tenants who moved in the middle of the night without paying rent and the Complainants had to do repairs and major cleanings in some cases before they could rent the Resort's property again.
- The Complainants worked many hours to cleanup, remove and transport to disposal sites garbage and junk around the Resort including abandoned vehicles.
- Mr. Weatherly dealt with snow cleaning around the Resort's property by hand-shovelling and hand sanding but was unable to clear the main roads within the Resort by himself during the heavy snowfall in January and February 2009 and, with the permission of Mr. Niewinski, retained a snow plough service to assist with snow cleanup.
- When Mr. Niewinski came to the Resort each month to collect the rental income of the Resort from the Complainants, the Complainants provide him with invoices for third-party services provided to the Resort such as the snowplough service and Mr. Niewinski would pay the bills.
- When, during the busy period for the Resort in June 2009, Mr. Niewinski introduced a new computer program for reservations and payments which necessitated Ms. Spicer to spend a fair bit of time to learn, she found it difficult to deal with her other duties and used a resident of the Resort to assist her with clean-up duties in exchange for rent reduction and Mr. Niewinski was aware of this arrangement and was fine with it.
- The Complainants used their own vehicle to travel off the Resort to purchase fuel and supplies for the Resort because Mr. Niewinski did not insure the Resort's pick-up truck and tractor.
- The Complainants paid for the supplies they purchased for the Resort from the Resort's monthly rental income and submitted the receipts for the purchases to Mr. Niewinski.
- In January 2009 when the Resort earned $14,240 and the Complainants expected to be paid, Mr. Niewinski told them that the Resort had to achieve $15,000 before they could get paid. While this caused the Complainants upset and they felt misled by Mr. Niewinski, they decided to stay on and work as they had no regular income and could not afford to move.
- In and during February to April 2009, the Complainants collected and recycled bottles to obtain monies for grocery and continued to stay on and work at the resort as they could not afford to move and also because Mr. Niewinski assured them that things would improve and when the business picked up in Spring they would receive regular income.
- In late May 2009, Mr. Weatherly, to sustain the Complainants through until summer, started doing some small mechanical jobs "under the table".
- The Complainants reimbursed themselves from collected rental monies for supplies they purchased for the Resort and in all such cases wrote out a receipt to Mr. Niewinski, which they submitted to him together with the balance of the monies. While most of the few receipts were for small amounts ranging from $20 to $80, one was for $861which was a reimbursement of rent they had paid the resort for their accommodation for January 2009 since they commenced working for the Resort the same month.
- In June 2009, Mr. Niewinski had delivered to the Complainants a cheque for property taxes for the Resort in the amount of $8,500 with instructions to submit it to the tax department on July 2 before 6:00 p.m. as he had to go out of town. However, the Complainants failed to do so in a timely fashion and Mr. Niewinski or the resort received a fine of $850 for the late payment of the taxes. As a result, Mr. Niewinski decided to withhold payment the Complainants were

expecting in July 2009 and this caused the Complainants to file their Complaint with the Employment Standards Branch.

21. The Complainants provided the Delegate with names of fifteen witnesses, mainly residents and campers who stayed at the Resort and were willing to provide evidence on behalf of the Complainants. The Delegate telephoned each of them and left messages for all. Four called back and of those, the Delegate was able to interview three and receive a detailed voicemail message from one. All 4 witnesses provided information that largely corroborated the efforts of the Complainants on the Resort's property.

22. The Delegate presented the names of the witnesses and information she received from the Complainants' to the Resort who responded through counsel with their own witness statements and some pictures of the Resort property indicating that the resort, under the Complainants' management, was in disrepair. While the Complainants take issue with some of the witnesses of the Resort and their statements, I do not feel it significantly impacts on my decision on the issues presented in this appeal. I will, however, discuss this evidence in context of my review of the evidence presented by the Resort during the investigation of the Complaint below.

23. However, it is important to note that the Complainants in their responses to the Resort's evidence in their correspondences in late October 2009 state that they exerted minimal effort around the Resort in the latter part of July 2009 because they were not being paid and wanted to pressure Mr. Niewinski to pay them. They also indicate in the correspondence that during their job interview with Mr. Niewinski there was no discussion had about the Complainants working as contractors or working for themselves. They state they had never done work of this type before nor operated as independent contractors or have a GST number or business licence.

24. In the case of Mr. Weatherly, he quit working for the Resort as of August 1, 2009, and thereafter no maintenance work was being done at the Resort. In the case of Ms. Spicer, she continued with office work, checking guests in and cleaning the bathrooms and common areas on the Resort's property until the end of September 2009.

25. In August, the Complainants each received a cheque from the Resort for $430.00. The statements attached to the cheques described the payment as "commissions" and delineated deductions for employment insurance and C.P.P.

26. On August 3, 2009, stated the Complainants, Mr. Niewinski approached them and asked them if they would be interested in working as independent contractors and having a written contract for the purpose, if they agreed to continue to work for the Resort. The Complainants state that they declined Mr. Niewinski's offer or proposal as they had no desire to be in business for themselves and did not have a business license or a GST number and told Mr. Niewinski that they would leave at the end of September and he could look for new tenants. Subsequently, on October 1, 2009, the Complainants left the Resort.

27. With respect to the evidence of the Resort in the investigation, the Delegate notes in the Determination that he spoke with Mr. Bereznicki who indicated he was not involved in hiring the Complainants but Mr. Niewinski, on his own initiative, was and asked the Delegate to speak to Mr. Niewinski.

28. With respect to the evidence of Mr. Niewinski, the Delegate notes that the latter said:

- He offered the Complainants the caretaker position at the Resort in January 2009 and they commenced working in January 2009.

- In the job offer, he informed the Complainants the duties and responsibilities of the position including how to perform them and when. More particularly, he told them that the duties included collecting rents; cleaning rental and motel units; checking in/out residents; performing repairs on as required; performing all the office work including answering calls.
- He also advised the Complainants in the job interview that the position included free accommodation and 16% of the profits of the Resort over the $15,000 amount each month.
- There was no written agreement between the parties.
- He disagreed with Mr. Weatherly that the latter worked long hours on snow cleaning because the Resort had hired a snowplough service for snow removal. He also asserted that there was little work for the Complainants in the winter months but summer was very busy.
- He agreed to the offset of $861 from the rent monies the Complainants made for the rent they paid in advance for the month of January.
- The Resort did not make a profit over $15,000 until later in 2009 and he withheld pay to the Complainants in July because he had to pay a fine of $850 as a result of the Complainants failing to carry out his instructions to submit the property tax cheque for the Resort in a timely fashion.

29. Subsequently, on August 13, 2009, the Delegate issued her preliminary findings to Mr. Niewinski and the latter, after the expiry of time for responding, asked the Delegate for additional time to respond, as he wanted to communicate with his lawyer and his business partner, Mr. Bereznicki. The Delegate granted him an extension of one week.

30. Subsequently, on September 28, 2009, the Delegate received a letter dated September 24, 2009, from counsel for the Resort containing submissions on the Resort's behalf, based on the four-fold test for determining employment or independent contractor relationships, contending that the Complainants were independent contractors and not employees within the meaning of the *Act*. In support of his assertion, counsel submits the following:

- Mr. Niewinski, out of compassion for the Complainants who were recent arrivals to town with neither money nor accommodation, offered them accommodation if they were willing to help out around the Resort.
- Mr. Niewinski explained to the Complainants that they could work at their own pace, and work whatever hours they pleased and counsel states that "(t)his is somewhat confirmed" by the Complainants in their submissions when they say they worked "24 hours a day, 7 days a week on 'call'".
- The terms of the verbal agreement between the parties were that in consideration of rent-free accommodation, valued at $800 per month, the Complainants would "tend to the campgrounds of the resort and assist Mr. Niewinski where need be."
- Mr. Niewinski reiterated to the Complainants that "this was not an hourly, nor salaried position but one where [the Complainants] would tend the camp grounds, at their own discretion, in return [for] accommodation."
- Mr. Niewinski gratuitously offered the Complainants additional compensation of 16% of profit over $15,000 per month.

- The Complainants "worked independently within a defined framework, had no party overseeing their work, no defined hours, and were able to, in fact encouraged by Mr. Niewinski to seek employment outside the resort."
- The Complainants could have refused work from Mr. Niewinski at any time and they would have had to pay rent for their accommodation at the Resort.
- There was "no set contract in that the [Complainants] could quit at any time and had no loyalty to the Resort, no security in their position as the Resort could terminate their contract for services at any time".
- There was "no subordinate workman structure, nor any integration of the contractors into the company".
- The Complainants were "at various times employed with companies while living at the Resort" with Ms. Spicer working at Zellers for a number of months and Mr. Weatherly proving mechanical services to various companies of persons around town. "This in and of itself provides a very strong implication that [the Complainants] were staying at the resort for accommodation purposes, as they sought actual employment at various other companies while living at the Resort."
- The Complainants provided their own tools and equipment, particularly a vacuum cleaner to conduct maintenance work and tools for repairing the resort's vehicles.
- The Complainants "were at all times invited to hire helpers" and Ms. Spicer had a helper for some time.
- There was a chance of profit and risk of loss for the Complainants in terms of accommodation if they worked or did not work on the Resort.
- There was a chance of profit if they "went above and beyond their regular duties to ensure the Resort was desirable to live in, and thus attracted more clientele".
- In the single month when the resort attained an income over $15,000, the Complainants received monetary compensation for that month.
- The Complainants, as general contractors, "integrated the maintenance of the Resort into their schedules, and continued to work other jobs at the same time when they were available to them".
- The photographs of the resort and letters from some clients or residents of the Resort in support of the counsel's argument that the Resort was in disarray under the Complainants and that the Complainants did not "work a large number of hours per month at the Resort" as they claimed.

31. Counsel for the Resort concludes in his submissions to the Delegate:

> To conclude, it is abundantly clear that there was no employment contract entered into between the Resort and Ms. Spicer and Mr. Weatherly despite their assertions to the contrary. At all material times, both parties have worked on the understanding that the agreement was for rent-free accommodation, and that the only monetary compensation would be provided in the months when the resort posted profit of $15,000 or more. This was not a contract of employment, but essentially a contract for rent-free accommodation, and there is no tangible evidence to dispute this. No employment relationship as defined in the Employment Standards Act ever existed and thus the Employment Standards Act does not apply

> and no wages are owed to Ms. Spicer and Mr. Weatherly. They have, and to this day, continue to receive compensation for their work with an approximate value of $800 per month [the purported value of the "rent-free accommodation"], pursuant to the terms of their verbal agreement.

32. The determination of the Complaint centered on the question of the status of the Complainants, that is, whether or not they were employees or independent contractors. The Delegate, in concluding in the Determination that the Complainants were employees, reviewed the definition of "employee" in the *Act* as well as the common law tests applied by the courts and particularly the four-fold test referenced by counsel for the Resort and made the following observations:

- The payment to the Complainants by Mr. Niewinski in August showed that the resort made deductions for C.P.P. and employment insurance, which is consistent with an employment relationship.
- Mr. Niewinski, in the later submissions of the Resort's counsel, recants his previous representation to the delegate that he approached the Complainants and asked them if they would be interested in a position as caretakers. On this point, the Delegate preferred the Complainants' evidence as it contained "fulsome detail about conversations" the Complainants had with Mr. Niewinski who asked for their resumes and described the duties and responsibilities of the position and "exercised control of selection typical of an employer".
- While the parties both agreed that the Complainants were supposed to receive some payment if the Resort attained a certain level of profit each month, the Delegate noted that it was Mr. Niewinski who set the profit level as well the rate for monthly rentals, motel rentals and campground rentals.
- The undisputed evidence of the Complainants that Mr. Niewinski provided them instruction and directed them as they had no experience in caretaking work; they had to be trained on how to do office work and paper work involved in the business of the Resort.
- While the Complainants had some autonomy to work at their own pace Mr. Niewinski had final authority and control as he selected the Complainants as caretakers, he set the rates and prices for rentals, he paid for services such as snow ploughing and septic maintenance service and he deducted C.P.P. and employment insurance from their wages "in a manner befitting employees".
- The undisputed evidence of the Complainants that the Resort provided the office, gardening and cleaning supplies and equipment including a tractor and a trailer for use on the Resort's grounds.
- Mr. Weatherly owned some tools "befitting a mechanic but this would not lend weight to an argument that he was an independent contractor because many people own hand tools …and use their own hand tools for work".
- Ms. Spicer only used her own vacuum cleaner because the one provided by the Resort "was unwieldy and difficult for her to use".
- The Complainants could not set prices for rentals nor could they control costs and did not therefore influence profit or risk loss.
- There was no evidence indicating that the Complainants had any say in their remuneration under their agreement with the Resort. It was Mr. Niewinski who set their remuneration as a condition of their employment.

- The Complainants did not invest their own monies in the Resort or the Resort's business, did not have any control over the financial aspects of the Resort, and made no investment in the operation of the Resort.
- The Resort could not operate without caretakers on site especially during the busy season.
- The work the Complainants performed for the Resort such as collecting rents, cleaning, showing rental units, checking people in/out and the like was essential to the operation of the Resort.
- The Complainants did not integrate any business of their own into the Resort's business. Neither of the Complainants was in the business of managing motels or campgrounds.
- Complainants considered their position as caretakers to be full-time work and in the case of Ms. Spicer, she quit her part-time employment at Zellers and in the case of Mr. Weatherly, he ceased looking for alternative employment after securing the caretaker position with the Resort.
- As for the "under the table" cash jobs Mr. Weatherly performed, this was in May when the Complainants required grocery monies, as they were not receiving any income from the Resort.
- The Complainants did not have a GST number and no history of an independent company. They also did not make any bids for a job, as would an independent contractor.

33. In conclusion, the Delegate in the Determination states:

> In summary, the central question to ask when assessing whiter a person is an employee or an independent contractor is whose business it is? In this case, I am satisfied, based on the evidence, that the complainants were not in business for themselves and performed work for the benefit of Wood Lake Teddy Bear Resort. The evidence shows that the complainants completed tasks for the employer, were directly accountable to the employer, had regular access to office space provided by the employer, utilized supplies and equipment provided by the employer, invested none of their own funds, and did not stand to make a profit on tasks completed for the employer. Based on an analysis of the above information, I find the complainants worked under the control and direction of the employer and were integral part of the business. As such, Ms. Spicer and Mr. Weatherly were employees of the resort and therefore, the Act, applies to these complainants.

34. The Delegate then proceeded to determine the Complainants' rate of pay and hours worked during the material time in question to calculate what wages are owed to the Complainants individually. While I have reviewed that portion of the Determination, I do not propose to delineate it here as the Resort does not take any issue with the method of the Delegate's calculations except for one challenge, namely, the Delegate's alleged failure to account for the value of the rent for the accommodations the Resort provided to the Complainants and the value or cost of the utilities associated with the accommodation. According to the Resort in the appeal of the Determination, the Delegate should have discounted from the wage determination the value of both rent and utilities the Complainants benefited during their term as caretakers of the Resort. I will address this issue in the analysis portion of my decision.

**SUSPENSION REQUEST**

35. As indicated previously, the Resort, through its counsel, has requested that the Determination be suspended pending the appeal. However, the Resort has not advanced separate submissions with respect to this request.

36. The relevant provisions that govern applications for suspension of a determination are section 113 of the *Act* and Rule 31 of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*").

37. Section 113 of the *Act* provides:

> 113 (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination.
>
> (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
>
> (a) the total amount, if any, required to be paid under the determination, or
>
> (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

38. Rule 31 of the *Rules* provides:

> **Rule 31 Request to Suspend a Determination**
>
> **Requirements for suspending a determination**
>
> (1) At the request of an appellant or applicant, the tribunal may suspend a determination under section 113 of the *Act* for any period and subject to any conditions it considers appropriate.
>
> (2) An appellant or applicant requesting a suspension must deposit with the director the amount that the director requires to be paid, if any, or a lesser amount as may be ordered by the tribunal.
>
> (3) In order to request a suspension an appellant or applicant must, in writing, at the same time as filing the appeal or application for reconsideration:
>
> (a) state the reasons for the request to suspend the determination;
>
> (b) state the amount to be deposited with the director; and
>
> (c) if that amount is less than the amount required to be paid by the director, state the reason why depositing a lesser amount would be adequate in the circumstances.

39. The effect of section 113 of the *Act* and Rule 31 of the *Rules* is that the applicant requesting the suspension of a determination has to provide in writing its reasons for the request to suspend the determination and deposit with the director either the total amount, if any, required to be paid under the determination or a lesser amount that the tribunal considers adequate or appropriate in the circumstances. In this case, the applicant, the Resort, has not fulfilled the prerequisites for requesting a suspension of the Determination. The Resort has neither provided any reasons for its request to suspend the Determination, nor deposited any amount required to be paid under the Determination nor requested to deposit a smaller amount. It is not for the Tribunal to divine the basis of an applicant's suspension application. The onus is clearly on the applicant to persuade the Tribunal, on a balance of probabilities, the merits of suspending the determination. While the Tribunal may consider the merits of the appeal in assessing a suspension application, where, as in this case, the applicant, the Resort, has failed to satisfy the preconditions to the Tribunal considering a suspension request, namely, failure of the Resort to provide in writing the reasons for its request to suspend the Determination or an indication that the Resort has deposited the full amount of the Determination, or some lesser amount the Tribunal considers adequate in the circumstances, with the Director, the suspension application cannot succeed. In these circumstances, I reject the Resort's application for a suspension of the Determination.

## SUBMISSIONS OF THE RESORT

40. The Resort, through its counsel, has made written submissions on appeal. The written submissions follow a similar format to counsel's submissions to the Delegate during the investigation of the Complaint which set out instructive headings under the fourfold test for determining whether an individual is an independent contractor or an employee.

41. While in the appeal form of the Resort, both the error of law and the new evidence grounds of appeal are checked-off in the section identifying the Resort's grounds of appeal, the written submissions only relate to the error of law ground of appeal as counsel states, in the preamble to his submissions, "(i)t is the Resort's respectful submission that [the Delegate] erred in law when coming to the Determination". There is very little, if anything, the Resort is proffering in the submissions suggesting new evidence with the exception of counsel's assertion that Mr. Weatherly had a "non-resort bus which was parked on the campground, and which he often did mechanical work on, during hours that he claimed he was caretaking." This submission was made in context of the Resort's argument that Mr. Weatherly was integrating the Resort's activities with his own activities but does not explain why this submission was not made during the investigation of the Complaint or why it is "new evidence".

42. As concerns the error of law ground of appeal, I have carefully reviewed and compared the counsel's written submissions during the investigation of the Complaint with counsel's written appeal submissions and found the two very similar. In many instances, the latter reiterate verbatim the submissions made by counsel during the investigation of the Complaint. However, in the appeal submission, counsel for the Resort conspicuously disputes numerous findings of facts or conclusions of fact of the Delegate. While I do not propose to set out here those appeal submissions that repeat or reiterate, verbatim or otherwise, the submissions of counsel made during the investigation of the Complaint, I think it is important to set out the submissions challenging the Delegate's findings or conclusions of fact to illustrate the nature of the Resort's appeal. Some examples of those challenges to the Delegate's conclusions of fact include the following I have set out verbatim:

(i) "In making her Determination, Ms. Demic stated that Mr. Niewinski had final authority and control over the complainants. The Resort submits that Ms. Demic erred firstly in that, as set out above, no party was overseeing the Complainants [*sic*] work, they were working independently within the defined framework of the resort, were free to work when and for whom they chose to (and did so), and contrary to Ms. Demic's unfounded assertion that Mr. Niewinski "would have to tell [the complainants] …when and what to do" if they were assisting him at the Resort, the Complainants had no party overseeing their work in a way that a boss or manager oversees the day to day work of their employees."

(ii) "Ms. Demic stated that "the evidence shows that Mr. Weatherly owned some hand tools befitting a mechanic but this would not lend weight to an argument that he was an independent contractor because many people own hand tools and many employees are expected to use their own hand tools for work." The Resort respectfully disagrees with Ms. Demic in that most employees <u>are not</u> expected to use their own tools for work, but are expected to use work supplied tools."

(iii) "Ms. Demic, in her Determination, stated that "profit is the result of revenue less expenses" and that as the Complainants did not set prices for rentals nor could they control costs, that they could not influence profit. The Resort submits that this is untrue, while the Complainants had a guideline for the rental prices of units at the Resort, they were given the ability to modify rental prices to attract business when units were available."

(iv) "The Complainants provided evidence from witnesses whom commented on their work ethic and stated that the Resort "was very busy – they had to turn some people away because their rigs were too big or because the resort was too full." It is reasonable to believe that given the Complainants

[*sic*] claims of working to improve the resort, that it attracted clients to the resort and thus lead to a greater chance of additional remuneration for the Complainants."

(v) "Ms. Demic further stated that there was "no evidence to show the complainants invested any of their own money", however, also confirmed that they used their own vehicles, equipment and tools, suggesting an investment on behalf of the complainants."

(vi) "Ms. Demic also states that the risk of loss as set out above, was "merely a consequence of not doing the job as they were instructed to do which is something any employee would have to deal with". The Resort respectfully submits that this is incorrect. The Resort submits that the risk of loss as set out above was a risk of the loss of their accommodation, an $861 per month value."

(vii) "Ms. Demic stated in her Determination that the Complainants considered the caretaker position a full-time singular job, and later stated that one of the Complainants began to do jobs for other parties, while still working as a caretaker, which is contradictory in nature and confirms that the Complainants had the opportunity to seek other work and not only tend to the Resort campgrounds. The complainant, Mr. Roger Weatherly, further had a non-resort bus, which was parked on the campground, and which he often did mechanical work on, during hours that he claimed he was caretaking. Again, both Complainants had full opportunity to seek out other employment while in their contract with the Resort."

43. While the above only represent a significant or a large, but not a complete, sampling of the Resort's challenges to the findings of facts of the Delegate in the Determination, my decision herein is based on a full review of all challenges to the findings of fact set out in counsel's appeal submissions.

44. Counsel, after setting out the Resort's challenges to the findings of facts of the Delegate, proceeds to reiterate the submission made in the investigation of the Complaint, namely, that the parties were not engaged in a contract of employment but rather a contract for rent-free accommodation and that there is no evidence to support a contract of employment or an employment relationship under the *Act*.

45. In the alternative, counsel submits that if the Tribunal finds that the Delegate did not err in her Determination with respect to her conclusion that the Complainants were employees of the resort then the Delegate erred in not taking into account and crediting the Resort for the value of the rent and the cost of utilities for the accommodation provided to the Complainants during their 8 months employment with the Resort from the wages ordered to be paid to the Complainants.

## SUBMISSIONS OF THE DIRECTOR

46. The Director submits that the Resort "is advancing the same arguments it advanced during the course of the investigation and this appeal is an attempt to re-argue its position". The Director notes that in arguing that the relationship between the resort and the Complainants was one of independent contractor and not employment, counsel advances an argument based on an examination of the four-point control test, which is "almost exactly the same argument he advanced during the investigation". The Director then proceeds to justify all of the findings or conclusions of facts made by the Delegate in the Determination, which the Resort, through its counsel, challenges in its appeal. I do not find it necessary to set out the Director's submissions here particularly in light of my decision on the nature of challenges but I have reviewed the Director's submissions in their entirety as I have the Resort's.

47. With respect to the new evidence ground of appeal, the Director submits that the " 'new' evidence has not been well defined or specifically highlighted in the appellant's submission". To the extent that there is any new evidence in the submissions of the Resort, the Director submits that it is not something that would qualify as new evidence. The one instance of new evidence the Director identifies in the submissions of the

Resort is counsel's submission that Mr. Weatherly, during his hours of work on the Resort was working on his "non-resort bus". The Director submits that while nothing turns on that evidence, it is not something that was presented to the Delegate during the investigation of the Complaint and "to claim this information is new and has only come to light now stretches credibility".

48. With respect to the alternative argument of the Resort that if the Tribunal finds that the Delegate correctly determined that the Complainants were employees of the Resort then the Delegate failed to credit from the wages owed to the Complainants the value of the rent-free accommodations and the cost of utilities in the said accommodation for the 8-months period, the Director submits that section 20 of the *Act* stipulates that wages must be paid in Canadian currency and to accede to the Resort's argument or request that rent and utilities should be considered part of the wages would have the effect of contravening section 20 of the *Act*.

**SUBMISSIONS OF THE COMPLAINANTS**

49. The Complainants, in their very short submissions, further explain their "impression" why they believed they were employees and not independent contractors and reiterate much of what they provided already to the Director in the investigation of the Complaint. They also point out the contradictory nature of the evidence of one of the witnesses, Mr. Poisson, whose written statement the resort relied upon to impugn the work ethic of the Complainants when the same witness spoke favourably of the Complainants in his voicemail message to the Delegate during the investigation (which the Delegate made light of in the Determination).

## ANALYSIS

50. As indicated earlier in the overview section of this decision, the Resort has checked off two of the three available grounds of appeal in its appeal form, namely, the Director erred in law in making the Determination and evidence has become available that was not available at the time the Determination was being made.

51. With respect to the new evidence ground of appeal, I agree with the Director that the Resort, in its counsel's submissions on appeal, does not specify clearly what new evidence is proffered in the appeal. Perhaps one identifiable instance of evidence adduced for the first time in the appeal is counsel's assertion that Mr. Weatherly had a "non-resort bus, which was parked on the campground, and which he often did mechanical work on, during hours that he claimed he was caretaking." As indicated earlier, this submission was made in context of the Resort's argument that Mr. Weatherly was integrating the Resort's activities with his own activities but does not explain why this submission was not made during the investigation of the Complaint or why it is "new evidence".

52. The Tribunal in *Re: Merilus Technologies Inc.*, [2003] B.C.E.S.T.D. No. 171 (QL), (27 May 2003), BC EST # D171/03, faced with the issue of whether or not to accept fresh evidence, decided that it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is a four-fold test as follows:

> (a) 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;
>
> (b) The evidence must be relevant to a material issue arising from the complaint;
>
> (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) 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.

53. The criteria delineated above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence must satisfy each of them before the Tribunal will accept and consider the purported new evidence on appeal.

54. In this case, the purported new evidence, namely, that Mr. Weatherly worked on a "non-resort bus" during the time when he was responsible for caretaking for the Resort was not adduced by the Resort or Mr. Niewinski during the investigation of the Complaint by the Delegate or at any time before the Determination was made. It seems to have surfaced for the first time in the appeal. Further, the Resort or its counsel does not explain why this allegation was not adduced during the investigation of the Complaint or before the Determination was made. The evidence in question, in my view, is the type of evidence that existed at the time of the investigation of the Complaint and could have, with due diligence, been adduced during the investigation. I find it suspect on the part of the Resort why it was not produced earlier during the investigation or before the Determination was made. In the circumstance, I find that the Resort has failed the first criterion in the *Merilus* test above and I need not therefore consider the balance of the conjunctive criteria in *Re: Merilus*. In the result, I reject the Resort's new evidence ground of appeal.

55. I also note that section 2(d) of the *Act* lists one of the purposes of the *Act* is to provide "fair and efficient procedures for resolving disputes over the application and interpretation of this Act". It would defeat this very important purpose of the *Act* if the Resort were allowed to present piecemeal its evidence and upon receiving a negative determination attempt to retry its luck with "new evidence" it could have adduced properly during the investigation of the Complaint.

56. With respect to the error of law ground of appeal, I have delineated verbatim a significant number of submissions of the Resort's counsel, which, in my view, are really challenges to the Delegate's findings, or conclusions of fact. In this regard I note the Tribunal's decision in *Chilcotin Holidays Ltd.*, BC EST # D139/00, where the Tribunal stated:

> The purpose of an appeal is not simply to allow an aggrieved party a second chance to argue the same case that was argued unsuccessfully to the Director during the investigation. A party appealing a Determination must show it is wrong, in fact or in law. In the context of an appeal based on an alleged error on the facts or the conclusion to be drawn from the facts, a party saying, in effect: "I don't disagree that these are the facts and that the Director had all these facts, but I disagree with the result", will not be successful. The Tribunal is not a forum for second guessing the work of the Director.

57. I also find instructive the following passage in the Tribunal's decision in *Renshaw Travel* (BC EST # RD085/08):

> The occasions on which an alleged error of fact amounts to an error of law are few. In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST # D028/06).

58. In my view, the Resort is disagreeing with the findings and conclusions of fact made by the Delegate and this is not one of the available grounds of appeal in section 112 of the *Act*.

59. I also note, having very carefully reviewed the Delegate's Determination and the record of the proceeding, there is no "palpable and overriding error" on the part of the Delegate in the Determination. The conclusions of fact arrived at by the Delegate, in my view, were rationally supported by both the law and the evidence.

60. On the alternative argument of the Resort that the Delegate should have taken into consideration the value of the free accommodation and the cost of utilities for the entire period the Complainants resided on the Resort's property and discounted the value of both from the wages awarded, I find myself in agreement with the Director. To accede to the Resort's argument would be to disregard completely section 20 of the *Act*, which states:

> ***How wages are paid***
>
> **20** An employer must pay all wages
>
> (a) in Canadian currency,
>
> (b) by cheque, draft or money order, payable on demand, drawn on a savings institution, or
>
> (c) by deposit to the credit of an employee's account in a savings institution, if authorized by the employee in writing or by a collective agreement.

61. The language of section 20 is mandatory as the legislature has employed the word "must" and described the limited ways in which an employer may pay its employees wages. Providing accommodation and utilities in lieu of wages is not one of the prescribed modes of paying wages. As a result, I find the Delegate did not err when not discounting the wages owed to the Complainants based on the purported value of the free accommodation and utilities the Resort provided to the Complainants during their employment with the Resort.

## ORDER

62. Pursuant to Section 115 of the *Act*, I order the Determination dated January 26, 2010, be confirmed.

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