

An appeal

- by -

Jonathon Mark Capricci, carrying on business as Silver Cedar Roofing
(“Capricci”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2014A/56

DATE OF DECISION: July 4, 2014

DECISION

SUBMISSIONS

Jonathon Mark Capricci,

on his own behalf, carrying on business as Silver Cedar Roofing

INTRODUCTION

1. Jonathon Mark Capricci, carrying on business as Silver Cedar Roofing, (“Capricci”) appeals a Determination issued against him on March 27, 2014, pursuant to which he was ordered to pay \$852.21 to his former employee, William Martino (“Martino”). Further, and also by way of the Determination, Mr. Capricci was assessed four separate \$500 monetary penalties under section 98 of the *Employment Standards Act* (the “Act”) for having contravened sections 21 (unlawful wage deductions), 28 (failure to keep payroll records), 40 (overtime pay) and 58 (vacation pay) of the *Act*. Thus, the total amount payable under the Determination is \$2,852.21.
2. The stated grounds of appeal are that the delegate (of the Director of Employment Standards – the “delegate”) who issued the Determination failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)) and that evidence has now become available that was unavailable when the Determination was being made (subsection 112(1)(c)).
3. At this juncture, I am adjudicating this appeal based solely on Mr. Capricci’s submissions with a view to determining if the appeal should be summarily dismissed as having no reasonable prospect of succeeding (subsection 114(1)(f)). If the appeal is not summarily dismissed, the respondent parties will be notified and given an opportunity to file submissions and Mr. Capricci will be given an opportunity to respond to any submissions filed.
4. In adjudicating this appeal, I have reviewed Mr. Capricci’s submissions, the delegate’s “Reasons for the Determination” (appended to the Determination – the “delegate’s reasons”) and the subsection 112(5) “record” that was before the delegate.

BACKGROUND FACTS

5. The following summary is taken from the delegate’s reasons. Mr. Martino filed an unpaid wage complaint against a party identified as “Respectful Roofing Ltd.” (“Respectful Roofing”) and during the course of a mediation session relating to this complaint, an issue arose regarding the proper identification of Mr. Martino’s employer. This latter issue was referred to the delegate for further investigation.
6. Mr. Martino alleged that he was employed in a labouring capacity from July 18, 2012, until August 7, 2012, at a wage rate of \$17 per hour. Mr. Martino further alleged that his friend, a roofing contractor, Mr. Capricci contacted him offering him work (despite his lack of roofing experience). The terms of engagement including the following: Mr. Capricci would provide the necessary tools and safety equipment and would, in addition to the hourly wage rate, pay Mr. Martino \$25 per day to offset fuel costs and driving time as Mr. Martino would be transporting Mr. Capricci to and from work each day; Mr. Capricci would be the supervisor; and Mr. Martino would be paid each Friday.

7. Mr. Martino received his first wage payment by way of an “e-transfer” directly from Mr. Capricci. Mr. Martino maintained that over the course of his employment, Mr. Capricci “became increasingly hostile, confrontational and abrasive and many arguments ensued” eventually leading Mr. Martino to ask Mr. Capricci if the latter still wanted Mr. Martino to work for him – “Mr. Capricci told him [Martino] to go home to which he did” [*sic*] – delegate’s reasons, page R3.
8. Mr. Martino maintained that while he had been paid, he was not paid his full wages as agreed and his payments from Mr. Capricci reflected workers’ compensation payment deductions. As noted above, he subsequently filed an unpaid wage complaint against Respectful Roofing.
9. Respectful Roofing’s position was as follows. Mr. Chris Tennent (“Tennent”) is the company’s principal and he maintained that Respectful Roofing hired Mr. Capricci, operating under the business name “Silver Cedar Roofing”, to work at a townhouse project and that Mr. Capricci, in turn, hired Mr. Martino. Although Respectful Roofing has its own workforce, it “neither hired Mr. Martino nor negotiated any employment terms with him” (delegate’s reasons, page R4). The delegate’s summary of Mr. Tennent’s position continued (pages R4-R5):

Mr. Tennent acknowledged that Mr. Martino was introduced to him on his first day, and he was introduced as Mr. Capricci’s employee. Mr. Tennent agrees he had Mr. Martino sign acknowledging the site safety procedures, but Respectful did that with all of their subcontractors and the employees of the subcontractors.

Respectful never paid Mr. Martino directly; Mr. Martino would invoice Mr. Capricci for his wages. Mr. Capricci would invoice Respectful and once Respectful paid him, Mr. Tennent assumed Mr. Capricci paid Mr. Martino his wages however, that was between Mr. Capricci and Mr. Martino...

Respectful’s position is that Mr. Martino is not his [*sic*] employee; he is Mr. Capricci’s employee.
10. Mr. Capricci, for his part, “agreed Mr. Martino was a subcontractor for his company; he was not employed by Respectful” (delegate’s reasons, page R5). However, he maintained that Mr. Martino was an independent contractor rather than his direct employee.

THE DELEGATE’S FINDINGS

11. The delegate determined that the relationship between Mr. Capricci and Mr. Martino was employer-employee rather than client-contractor. In reaching this conclusion, the delegate relied on several points in Mr. Capricci’s evidence including: Mr. Capricci set the \$17 per hour wage rate; he supplied almost all of the necessary tools and equipment to do the job (which he owned); he paid Mr. Martino’s WCB premiums directly; he directed Mr. Martino’s daily work activities; and he terminated Mr. Martino’s employment.
12. Further, the delegate determined that Mr. Martino’s “true” employer was Mr. Capricci and not Respectful Roofing.
13. Having determined that Mr. Capricci was Mr. Martino’s employer, the delegate then found that Mr. Martino worked overtime (but was only paid at “straight time” rates), did not receive any vacation pay (at 4% of wages) and that a final deduction from Mr. Martino’s last invoice for “material costs” was an unlawful deduction under section 21 of the *Act* as were the WCB premiums that were deducted from his wages. Mr. Capricci admitted that he did not keep any payroll records relating to Mr. Martino and this failing, along with the section 21, 40 and 58 contraventions lead the delegate to issue four separate \$500 monetary penalties.

THE APPEAL

14. As noted above, Mr. Capricci appeals the Determination on two grounds, namely, that the delegate failed to observe the principles of natural justice and on the ground that he has “new evidence”.
15. Mr. Capricci has not submitted any evidence that was not available at the time the Determination was being made. In essence, he argues that the delegate erred in making certain findings of fact (and of mixed fact and law – a point I will return to shortly) and “ignored” evidence he provided to her. For example, he now says he never agreed to pay Mr. Martino a \$17 hourly wage even though he paid Mr. Martino a straight-time wage at \$17 per hour – “There is no dispute that Mr. Martino was paid the agreed upon rate of \$17.00 per hour for all hours worked” (delegate’s reasons, page R8).
16. The test for admission of new evidence is a strict one under subsection 112(1)(c) – the evidence tendered must be evidence that was not part of the record before the delegate; further this evidence must have been “unavailable” in the sense that, with due diligence, it could not have been reasonably expected to have been submitted to the delegate. Finally, the evidence must be credible, cogent and probative – in other words, the evidence, if it had been before the delegate, might well have caused the delegate to render a different decision (see *Davies et al.*, BC EST # D171/03). In the absence of any new evidence having been tendered, this ground of appeal cannot possibly succeed.
17. Mr. Capricci did not particularize the “natural justice” ground in his appeal documents. Although Mr. Capricci feels that the delegate did not give due consideration to his position and thus he was denied a fair hearing, there is nothing in the material before me to suggest that the delegate did anything other than make a decision in the face of somewhat conflicting arguments from the parties. For the most part, the factual evidence before the delegate was uncontroverted – the parties merely differed as to the legal consequences that flowed from the evidence (particularly on the “employee versus independent” contractor issue). The only relevant reference to a “natural justice” issue in Mr. Capricci’s materials relates to a bias allegation against the delegate – this reference reads as follows: “The taking of Billy Martino’s word over mine in regards to hourly rate I feel has been biased against me for the reason of my being upset he could not do the job he was hired for.” Bias is demonstrated by evidence that the decision-maker is, or appears to be, incapable of making a neutral and unbiased decision because, say, there is evidence of pre-disposition of some prior relationship with one of the parties that would compromise the decision-maker’s neutrality. There is no such evidence in the record before me and bias cannot be inferred from the simple fact of an adverse decision. In my view, the “natural justice” ground of appeal is wholly baseless.
18. Having reviewed Mr. Capricci’s appeal submissions, it would appear that his main ground of appeal is that set out in subsection 112(1)(a), namely, that the delegate erred in law. Even though this is not a ground of appeal that was noted on Mr. Capricci’s Appeal Form, I think it fair, in the interests of justice, to consider whether this ground has any presumptive merit (see *Triple S Transmission Inc.*, BC EST # D141/03). There are seemingly two issues discussed in Mr. Capricci’s appeal submission that might be considered alleged errors of law.
19. The first relates to the wage rate. In my view, the delegate had ample evidence before her upon which she could conclude that the parties’ agreed wage rate was \$17 per hour including the compelling fact that Mr. Martino was *actually paid* at this rate (albeit only on a straight time basis).
20. The second issue concerns the question of Mr. Martino’s status – was he an employee or an independent contractor? This issue is one of mixed fact and law. The legal issue relates to whether the delegate applied the proper legal test in determining that Mr. Martino was an employee. The delegate’s analysis of this matter

is set out at pages R6 to R8 of her reasons and she clearly applied the proper legal test. As for her application of the relevant legal considerations to the facts at hand, again, I can find no error in her analysis. Among other things, it should be noted that Mr. Capricci supplied the requisite tools and equipment, directed Mr. Martino's work and was Mr. Martino's paymaster. Indeed, in his appeal documents Mr. Capricci (perhaps unwittingly), made several concessions adverse to his position – he stated “William Martino was hired by me” [*sic*]; “Prior to him being hired...”; “his rate of pay was to be determined by myself...”; “I fired him”; “he was supposed to be hired as a skilled labourer on piecework”. All things considered, there is no credible argument to be advanced that the delegate erred in determining that Mr. Martino was Mr. Capricci's employee during the relevant time period.

21. In my view, this appeal has no prospect of succeeding and, accordingly, must be summarily dismissed.

ORDER

22. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. Pursuant to subsection 115(1)(a), the Determination is confirmed as issued in the amount of \$2,852.21 together with whatever further interest that has accrued under section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal