

An appeal

- by -

Richetti Marble & Tile Ltd.
(“RMT”)

- 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: Elena Miller

FILE No.: 2015A/47

DATE OF DECISION: June 24, 2015

DECISION

SUBMISSIONS

Sandra Kilpatrick

on behalf of Richetti Marble & Tile Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Richetti Marble & Tile Ltd. (“RMT”) has filed an appeal of a determination (the “Determination”) issued by a delegate (the “Delegate”) of the Director of Employment Standards on January 21, 2015. The Determination found that RMT had contravened the *Act* by failing to pay overtime wages, annual vacation pay and statutory holiday pay to a complainant, Terry Pattison (“Mr. Pattison”). The Delegate assessed the total wages payable, including interest accrued to the date of the Determination, at \$2,162.87. In addition, he imposed \$2,000.00 in mandatory administrative penalties, for a total amount payable of \$4,162.87.
2. RMT asks the Tribunal to overturn the Determination on appeal and substitute a decision that Mr. Pattison was a contractor, not an employee within the meaning of the *Act*, and that accordingly he was paid in full for the work he performed for RMT.

FACTS

3. The factual background is set out in some detail in the Determination and can be summarized as follows.
4. RMT is a tiling company whose directors are Sandra Kilpatrick (“Ms. Kilpatrick”) and George Kilpatrick (“Mr. Kilpatrick”). Mr. Pattison had been a tile setter for more than 25 years when he responded to an advertisement RMT placed in the summer of 2013 for experienced tile setters. Prior to applying, he had been away from work for an extended period on disability benefits. When he was interviewed, he told RMT he continued to have disability related issues, and he may require time off work at short or notice. RMT offered, and he agreed, that he would work for RMT as a contractor for an hourly rate of pay of \$25.00.
5. Mr. Pattison began performing work for RMT on August 20, 2013. He worked primarily on a condominium development site in Osoyoos, BC, but also performed work on other sites for RMT from time to time. Mr. Kilpatrick directed which unit in the condo development to work on, and when to report to other job sites to do work for RMT. Mr. Pattison worked exclusively for RMT until December 14, 2013, when he ceased to perform work for RMT.
6. At the hearing before the Delegate, Mr. Pattison provided copies of semi-monthly invoices he submitted to RMT for the work he performed, as well as emails he initially sent to Ms. Kilpatrick recording the hours he worked. Ms. Kilpatrick advised him he did not need to send her his hours worked and should simply invoice RMT for “contract tile work”. Mr. Pattison invoiced RMT for work performed and for some supplies he purchased. He also invoiced RMT a set rate for fuel costs.
7. The primary issue before the Delegate was whether, when Mr. Pattison performed work for RMT from August 20 to December 14, 2013, he did so as an independent contractor or as an “employee” within the meaning of the *Act*. The Delegate noted the broad definition of “employee” in section 1 of the *Act*, and that in the “construction industry, it can often be difficult to determine whether a person is performing work as an independent contractor or an employee” (Determination, p. R5).

8. The Delegate further noted that the parties' characterization of their relationship, or their stated intention as to its nature, was not determinative of the issue: "It is necessary to examine the actual relationship between the parties to determine whether Mr. Pattison was in business on his own account, or was employed for RMT's business" (Determination, p. R6).
9. The Delegate considered a number of factors in relation to the evidence before him on this issue, including the degree of control and direction RMT exercised over Mr. Pattison's work for it; which of them owned the tools Mr. Pattison used to perform the work; the degree to which Mr. Pattison could increase his profit or risked loss from the work he performed; and how integral the work he performed was to RMT's business. After analysing the evidence in relation to these factors (Determination, pp. R6-R7), the Delegate concluded that the "balance of the factors outlined above favour a finding that Mr. Pattison was an employee of RMT" (Determination, p. R7).
10. As there was no disagreement between the parties regarding Mr. Pattison's hours of work or rate of pay, or regarding the amount RMT paid him for work performed, the Delegate relied on the evidence before him to calculate the wages owing to Mr. Pattison under the *Act* for overtime pay, statutory holiday pay and annual vacation pay (Determination, pp. R7 – R8).

ARGUMENT

11. In appealing the Determination, RMT emphasizes that the company intended, and Mr. Pattison agreed, that he was being hired as a contractor, not an employee, because his disability made him unable to work regular employee hours.
12. RMT also takes issue with Mr. Pattison's position before the Delegate, noted in the Determination, that he supervised other employees, submitting he was not given any instructions to supervise and did not have the "people skills" to do so.
13. With respect to the finding in the Determination that Mr. Pattison worked at other sites for RMT besides the Osoyoos site, RMT submits he was hired to work on the Osoyoos site "to test his abilities". When there were breaks in that work from time to time, he asked if there was other work and RMT gave it to him. RMT submits he was not ordered or required to work at other sites.
14. With respect to the finding in the Determination that Mr. Pattison's tile setting work was integral to RMT's business as a tiling contractor, RMT submits that, during the period he worked for it, RMT had numerous other jobs on the go besides the Osoyoos project, and numerous other contractors working for it or that it could have hired to do work for it. RMT submits that Mr. Pattison left the Osoyoos project prior to its completion, and he was not an integral part of RMT's tiling business.
15. With respect to the finding in the Determination that Mr. Pattison did not have an appreciable risk of loss because he was not required to correct substandard work at his own expense, RMT submits it did not require this only because, by December 2013, Mr. Pattison was suffering disability-related issues and it did not want him on the work site any longer and believed it was not safe for him to be there.
16. RMT also takes issue with the Delegate's findings as to the ownership of tools used by Mr. Pattison in performing work for RMT. To the extent he used RMT's tools to do work, RMT submits this was done without its permission. It submits it has evidence that he owned all the tools necessary to complete the work. RMT submits that Mr. Pattison was affected by his disability in the last few weeks he worked for RMT in December 2013 and his evidence as to "work conditions and tools etc." was therefore not "in reality".

17. RMT submits Mr. Pattison was “unsupervised” and it gave him no direction on how to do the work as he was an experienced tile setter who had previously worked as an independent contractor for another company.

ANALYSIS

18. Under section 112(1) of the *Act*, a determination may be appealed on the grounds that (a) the director erred in law, (b) the director failed to observe the principles of natural justice in making the determination; or (c) evidence has become available that was not available at the time the determination was being made. In the present case, RMT characterizes its appeal submissions as falling under the grounds of error of law and new evidence. However, I find its appeal submissions effectively quarrel with findings of fact made by the Delegate based on the evidence he heard, and they do not raise any error of law or meet the Tribunal’s established test for admitting new evidence.
19. Under section 112 of the *Act*, error of law is a ground for appeal, but error of fact is not. The Tribunal has therefore found that only errors of fact which rise to the level of constituting errors of law give rise to a ground of appeal. As explained in *Rose Miller, Notary Public*, BC EST # D062/07, at para. 48:

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 she 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).

20. In the present case, I find RMT’s submissions on appeal do not establish that the factual findings of the Delegate which RMT challenges were inadequately supported or wholly unsupported by the evidentiary record, such that there is no rational basis for the finding. That is, RMT’s submissions do not establish palpable and overriding error or errors of fact by the Delegate. Rather, I find RMT submissions invite the Tribunal to reconsider the evidence, including the testimony of the witnesses, and substitute different findings of fact for the ones made by the Delegate. As explained above, this is not something the Tribunal has jurisdiction to do on appeal.
21. I further find RMT’s application does not meet the Tribunal’s established test for admitting new evidence on appeal. To the extent the application seeks to proffer evidence about ownership of tools that was not before the Delegate, I find RMT has not established that evidence could not have been obtained earlier, with due diligence, and placed before the Delegate. I also note the issue is ownership of the tools used to do the work, not ownership of tools generally, and that it is only one factor among several that were considered in deciding whether Mr. Pattison was an employee of RMT within the meaning of the *Act*.
22. In that regard, I note that the Tribunal has made it clear the applicable test for employee status is not necessarily the same as the common law test: see *634245 B.C. Ltd.*, BC EST # D077/14 (application for reconsideration dismissed, BC EST # RD097/14) at paras. 28 – 34 and Tribunal decisions cited therein. As explained in *634245 B.C. Ltd.*:

Many decisions of the Tribunal have considered the issue raised here and all have made it clear that the definition of “employee” is to be broadly interpreted and that the common law tests for employment developed by the courts are subordinate to the definitions contained in the *Act*, see for example, *Kelsey Trigg*, BC EST # D040/03, *Christopher Sin*, BC EST # D015/96, and *Jane Welch operating as Windy Willows Farms*, BC EST # D161/05.

...

Accordingly, while the common law tests remain useful in focusing attention on relevant factors, they must be applied bearing in mind the broad statutory definitions, which must in turn be interpreted in light of the policy objectives of the *Act*. ... (paras. 30 & 33)

23. I find no err of law in the approach the Delegate took to the issue of whether Mr. Pattison was an employee within the meaning of the *Act*. He considered the evidence in light of several relevant factors and came to a conclusion that was open for him to reach on the facts he found. It is not for the Tribunal to second-guess his conclusion, absent any error of law, which I do not find.
24. RMT submits it intended to create a contractual relationship, not an employment relationship, with Mr. Pattison, and that he agreed to that arrangement. However, the intention of the parties is only one factor that may be considered; it is not determinative. The Delegate considered a number of relevant factors and concluded that, on balance, they favoured a finding that Mr. Pattison was an employee of RMT. I find no error in the Delegate’s analysis and conclusion in that regard.
25. For example, there is no error in the Delegate’s finding that the work of Mr. Pattison as a tile setter was integral to the work of RMT as a tiling company, notwithstanding his work may only have been a small part of RMT’s overall tiling work or that it could have been performed by other tile setters. RMT’s submissions similarly do not raise any palpable or overriding errors of fact with respect to other findings of the Delegate, such as that Mr. Pattison’s work was, broadly speaking, controlled and directed by RMT notwithstanding that, as an experienced tile setter, he may have worked without supervision.
26. With respect to the dispute over whether Mr. Pattison supervised other RMT workers, the Delegate did not rely on Mr. Pattison’s claim in that regard in concluding he was an employee of RMT within the meaning of the *Act*. As he did not rely on this claim (and as supervisory duties are not a requirement of employee status), the Delegate did not need to decide whether Mr. Pattison supervised other employees or not.
27. With respect to RMT’s submission on appeal that Mr. Pattison’s “thinking” was affected by disability, I note RMT does not claim to have made this submission at the hearing before the Delegate. The time to have raised any such argument, presumably for the purpose of impugning the weight or reliability of Mr. Pattison’s testimony, was at the hearing before the Delegate. It cannot be raised now for the first time, as a basis for appeal of the Delegate’s decision.
28. In summary, I accept that, as the Delegate noted, in the construction industry it can be difficult to determine whether an employee is performing work for a company as an employee or an independent contractor. However, I find RMT’s application does not establish any error of law or other proper ground for interfering with the Delegate’s conclusion that Mr. Pattison fell within the broad definition of “employee” under the *Act* in his relationship with RMT, for the reasons given in the Determination.

ORDER

29. For the reasons given, the appeal is dismissed. Pursuant to section 115 of the *Act*, the Determination is confirmed.

Elena Miller
Member
Employment Standards Tribunal