

An appeal

- by -

Bill Basra
("Basra")

- 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: Robert C.P. Walker

FILE No.: 2012A/39

DATE OF DECISION: June 28, 2012

DECISION

SUBMISSIONS

Bill Basra	on his own behalf
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. Bill Basra (“Mr. Basra”) appeals pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a Determination of the Director of Employment Standards issued March 12, 2012. Mr. Basra raises a number of issues on appeal as noted below.
2. Kishor Karan (“Mr. Karan”) was initially hired as a tile installer by Mr. Basra from October 11, 2010, until November 16, 2010. Mr. Basra, a building contractor, was building his own home and wanted Mr. Karan to install tile and granite in the home. He had previously hired Mr. Karan’s now defunct company on a number of occasions to work as a sub-contractor on homes being built by Mr. Basra’s company. Mr. Karan advised that his company, Can-Am Tiling Ltd., ceased operating in 2009 and a search confirmed the company was dissolved for failure to file on August 10, 2009.
3. Mr. Karan was hired in his personal capacity on an hourly basis by Mr. Basra as temporary labour. Mr. Basra submits he hired Can-Am Tiling Ltd. as an independent tile contractor. He does not dispute that he (versus his company) was the employer. Mr. Basra advised he gave Mr. Karan a \$3,000 cash advance in October 2010, and that Mr. Karan did not finish the job. He had previously loaned Mr. Karan money in 2008. There is no written agreement specifically relating to the arrangement made in October 2010. Mr. Karan denied receiving a \$3,000 advance. However, note the reference to a \$2,000 note in paragraph 5.
4. At the initial hearing Mr. Basra did not dispute the hours allegedly worked by Mr. Karan; or his hourly wage of \$25.00. Mr. Karan submitted details of hours worked. Mr. Basra’s present argument is that there was no need to dispute this information because it was clear to him that Mr. Karan was an independent contractor.
5. Mr. Basra has applied to introduce new evidence on this appeal that take the form of two documents indicating that Mr. Karan was purchasing materials under his corporation in February of 2010. He also seeks to introduce a handwritten note dated 24/09/2010 stating “I Kishor Karan received \$2000.00 from Bill Basra for Tile job 3542 E Price St”.
6. The delegate was very much alive to the issue of whether Mr. Karan was an independent contractor or an employee. He spent considerable time in the Reasons for Determination discussing the legal concepts and evidence. He ultimately determined in the circumstances that Mr. Karan was an employee.
7. Pursuant to section 36 of the *Administrative Tribunals Act*, as incorporated into these proceedings by section 103 of the *Act*, and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings when deciding an appeal. I have determined that this appeal may be decided based upon the written submissions and the record accompanying the submissions filed by Mr. Basra and the Director on this appeal. Kishor Karan did not make any submissions on the appeal.

8. On March 12, 2011, the Director made a Determination that included:
- (a) Mr. Karan was an employee of Mr. Basra within the meaning of the *Act*;
 - (b) Mr. Basra had contravened the *Act* because he failed to pay Mr. Karan wages, annual vacation pay, statutory holiday pay plus accrued interest totalling \$4,865.79;
 - (c) Mr. Basra must pay two administrative penalties of \$500 each under the *Act* for failure to pay wages within the time provided in section 18; and for failure to pay him wages as required under section 17.

ISSUES

9. Should Mr. Basra's application to the Tribunal to receive new evidence be granted?
10. Did the Director err in law (or deny Mr. Basra natural justice) by making a Determination without regard to the evidence on the record?
11. Did the Director err in law in finding Mr. Karan to be an employee of Mr. Basra within the meaning of the *Act* until he quit?

ARGUMENTS

12. On this appeal Mr. Basra relies upon all of the grounds set out in the *Act* in subsections 112(1)(a) through (c), below.
13. However, the key to his submissions is that Mr. Basra states there is important new evidence regarding Mr. Karan continuing to operate as a corporate entity-and hence was an independent contractor. He submits the two invoices included in his Appeal clearly show Mr. Karan was operating his company in February 2010. He submits further that Mr. Karan accepted \$2,000 in bulk funds in September 2010, in respect of work to be done by him for Mr. Basra at 3542 E Price St. Presumably this amount was intended to be a deposit on the independent contract.
14. As a result of the new evidence Mr. Basra submits that it would support his earlier submissions that Mr. Karan is not an employee for the purposes of the *Act*. In effect, Mr. Basra submits he hired Mr. Karan's company as an independent contractor; not Mr. Karan as temporary labour.

ANALYSIS

15. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It provides:

- 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; and
 - (c) evidence has become available that was not available at the time the determination was being made.

NEW EVIDENCE

16. Section 112(1)(c) of the *Act* has been considered by the Tribunal on many occasions. The Tribunal has set out four conditions that must be met before new evidence will be considered. *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc*, BC EST # D171/03; and *Alano Club of Chilliwack operating as Alano Club Coffee Bar*, BC EST # D094/05.
17. The Appellant (Mr. Basra) must establish that:
 - (i) 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 a Determination being made.
 - (ii) the evidence must be relevant to a material issue arising from the complaint.
 - (iii) the evidence must be credible in the sense that it is reasonably capable of belief.
 - (iv) 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.
18. In respect of the September 24, 2010, note in my opinion Mr. Basra has not established the first of the four criteria necessary for the proposed new evidence to be considered. It appears clear to me that the note of September 24, 2010, has been available since that date. Why it was not produced earlier is unexplained by Mr. Basra. It is likely that it would be relevant to the issues, potentially credible (the signature is illegible) and that it potentially has high probative value. It may well be that the reference to the \$3,000 loan in the Reasons for Determination actually refers to this note; but the amount was referenced inaccurately by Mr. Basra in his submission. However, the note did not form part of the record. It is too late for it to be permitted at this time.
19. In respect of the two invoices dated 2/18/2010 and 2/22/2010 there is no explanation by Mr. Basra as to why they were not produced earlier. Further, they are of little probative value in the determination of whether Mr. Karan was an independent contractor on the job in question; or whether he was an employee. They refer to a time period many months prior to October 2010.
20. As a result I decline to exercise my discretion to admit new evidence.

NATURAL JUSTICE and ERROR OF LAW

21. The natural justice and error of law submissions made by Mr. Basra focus on the Director reviewing the record and the applicable law when making a Decision.
22. In my opinion it is clear from the record that Mr. Basra and Mr. Karan were making opposing legal arguments and giving evidence inconsistent with the other party's legal positions. The Director is obliged to, and did, thoroughly canvass and consider the legal issues, weighed the evidence, made findings of credibility and committed the Determination to writing. Having regard to Mr. Basra's submissions I could not find any evidentiary or legal basis to interfere with the Determination.
23. There is no doubt that there has been a long business and personal history between Mr. Basra and Mr. Karan. The relationship transcends over years; and includes personal loans but, apparently, very little documentation

to set out the working relationships. They may wish to commit the arrangements to writing in the future for accuracy and clarity.

24. Section 115(1) provides the Tribunal authority to confirm, vary or cancel the Determination under appeal; or refer the matter back to the Director. I intend to confirm the Determination.

ORDER

25. I Order that the Determination under appeal be confirmed pursuant to section 115(1)(a) of the *Act*.

Robert C.P. Walker
Member
Employment Standards Tribunal