

An appeal

- by -

Bob Bottieri

- 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 Groves

**FILE No.:** 2006A/15

**DATE OF DECISION:** June 23, 2006

## DECISION

### SUBMISSIONS

Bob Bottieri	on behalf of himself
Homa Pashaye	on behalf of Oakridge Productions Ltd.
Megan Roberts	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Bob Bottieri (“Mr. Bottieri”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on December 23, 2005.
2. The Delegate investigated the complaint Mr. Bottieri had filed against his employer, Oakridge Productions Ltd. (“Oakridge”) and decided that since Mr. Bottieri had not established he was owed “wages” under the *Act* the investigation must be stopped pursuant to section 76(3)(b).
3. Mr. Bottieri delivered an Appeal Form to the Tribunal on January 6, 2006. On January 26, 2006 the Tribunal wrote to the Delegate and Oakridge inviting submissions in response to the appeal, and in the case of the Delegate, the record that was before the Director at the time the Determination was made. Oakridge delivered a brief submission dated February 13, 2006. The Delegate provided a copy of the record, and a submission dated February 3, 2006. On February 20, 2006 the Tribunal wrote to the parties requesting final replies. No further submissions were received.
4. By letter dated March 7, 2006, the Tribunal informed the parties that the appeal would be determined by a Member based on the written materials received.

### FACTS

5. Mr. Bottieri works in the film industry as a production designer. During the period from June to September, 2005, Mr. Bottieri provided production design services to Oakridge on a film called “Neal N’ Nikki” (the “Film”). Shortly after his engagement with Oakridge came to an end, Mr. Bottieri filed a complaint pursuant to section 74 of the *Act* alleging that Oakridge had failed to pay him regular wages and car allowance for his final week of work on the Film. Later, Mr. Bottieri conceded he may well have been paid all the regular wages owed to him. He continued to maintain, however, that he was owed monies in respect of car allowance. He also amended his claim to include an assertion that he was entitled to an allowance for kit rental for the duration of the project.
6. In support of his contention, Mr. Bottieri provided to the Delegate a copy of an email from the former production manager for Oakridge, one Gilles LaPlante, which stated that Oakridge had agreed to pay kit rental and car allowance to Mr. Bottieri, at the rate of \$150.00 per week for ten weeks. The Delegate was unable to verify this evidence with Mr. LaPlante directly, as the contact number for him provided by Mr. Bottieri was not in service, and Mr. Bottieri provided no other contact information for him.

7. The copies of cheques issued to Mr. Bottieri by Oakridge, and the company's payroll records, documented payments to Mr. Bottieri for his services, his use of his cellphone, and GST, but not for kit rental or car allowance. The Oakridge accounting records did, however, reveal a petty cash requisition dated July 28, 2005 in respect of a reimbursement to Mr. Bottieri for fuel expenses. The evidence of Deb Harper, the production co-ordinator for the Film, was to the effect that expenses were usually paid through petty cash requisitions. Mr. Namit Sharma, the executive producer, communicated to the Delegate that there was never any agreement requiring Oakridge to pay Mr. Bottieri for kit rental and car allowance.
8. On October 25, 2005 the Delegate wrote a letter to Mr. Bottieri, a part of which set out the Delegate's preliminary finding that the kit rental and car allowance claimed by Mr. Bottieri were excluded from the definition of "wages" under the *Act*, because they constituted "money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency", or alternatively "allowances or expenses", with the result that the *Act* did not apply to his complaint. The letter invited Mr. Bottieri to contact the Delegate by telephone if he had any questions concerning the preliminary finding, and in any event directed Mr. Bottieri to deliver detailed written reasons to the Delegate by November 8, 2005, should he dispute the findings. The October 25, 2005 letter was sent to Mr. Bottieri by certified mail which, according to the *Interpretation Act* RSBC 1996 c.238 s.29, is a species of registered mail. The record shows that the letter was received by Mr. Bottieri on November 2, 2005. The Delegate's Reasons for Determination state that Mr. Bottieri did not respond to the request for further submissions, and nowhere do I see that Mr. Bottieri has disputed this.
9. On December 5, 2005 the Delegate wrote another letter to Mr. Bottieri, enclosing copies of material the Delegate had received from Oakridge, and containing further preliminary findings stating that the Delegate was of the view that Mr. Bottieri had not been an employee of Oakridge, with the result that for this reason, too, the *Act* did not apply to his complaint. This letter also invited further submissions from Mr. Bottieri, this time by December 21, 2005. The record does not appear to contain a copy of the Canada Post Advice of Receipt card showing a signature for receipt of the letter, which it would have been of assistance to me to see, but the record includes Canada Post documentation stating that the letter was "successfully delivered to the Receiver's address" on December 7, 2005. The Delegate's Reasons say that no further submission was received from Mr. Bottieri, and again I nowhere see that Mr. Bottieri disputes this statement.
10. The December 23, 2005 Determination refers in its introduction to two issues that needed to be decided: Mr. Bottieri's employment status and what wages, if any, were owed to him. The Determination does not, however, decide Mr. Bottieri's complaint on the ground of his employment status. Indeed, the Determination contains nothing further regarding this particular issue. Instead, the Determination decides that Mr. Bottieri could not claim kit rental and car allowance as wages because these items were paid at the discretion of Oakridge, which meant that the *Act* did not apply to Mr. Bottieri's complaint.

## ISSUE

11. Can it be said that the appeal should be allowed on the basis that the Delegate failed to observe the principles of natural justice in making the Determination?

## ANALYSIS

12. Mr. Bottieri's appeal is curious because in his submission he states that he accepts the Delegate's decision and makes no appeal concerning money owed. Instead, he objects to the Delegate's referring in the Determination to statements made to her by Ms. Harper which Mr. Bottieri views as being uncomplimentary to him, and erroneous. He characterizes the Delegate's including these statements as a failure to observe the principles of natural justice, and he requests that they be "stricken" from the Determination.
13. While in these circumstances it can be said that the merits of Mr. Bottieri's original complaint are not before me, I digress to say that I have reviewed the Determination, the record, and the submissions of the parties, and I am of the view that I should not disturb the Delegate's decision that Mr. Bottieri had not demonstrated that the *Act* applied to his complaint. The *Act* defines "wages" in the following way:
- "wages" includes
- (a) salaries, commissions or money, paid or payable by an employer to an employee for work
- ...
- but does not include
- (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency;
- (h) allowances or expenses
14. At the same time, section 21 of the *Act* makes it clear that an employer cannot download onto an employee the responsibility for paying the employer's business costs. That section reads:
- 21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
- (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
- (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.
15. Several decisions of the Tribunal have held that such things as mileage expenses, travel expenses, and amounts paid for vehicle allowance are not "wages" for the purposes of the *Act* (see *Marte* BC EST #D116/04, where a number of these authorities are referred to). Other decisions have determined that if it can be said that the expenses constitute business expenses of the employer, they must be paid by the employer, and not by the employee (see *Taylor* BC EST #D082/03; *Nelson* BC EST #D002/05).
16. I do not consider it necessary in this case for me to decide into which category the kit rental and car allowance items fall, for three reasons. First, Mr. Bottieri has expressly declined to challenge the Delegate's finding that his claim for kit rental and car allowance did not fall within the purview of the *Act*.

17. Second, the Delegate came to the conclusion that Mr. Bottieri had not demonstrated that Oakridge had agreed to pay \$150.00 per week for kit rental and car allowance as alleged. The existence of such an agreement was disputed by Oakridge. The payroll records available contained no references supporting the existence of such an agreement. The Delegate's conclusion on the issue of the existence of such an agreement was essentially a finding on a question of fact. Absent a finding by me that the Delegate committed an error of fact which amounts to an error of law, I lack jurisdiction to interfere with the Delegate's findings of fact. I might find that the Delegate erred in law if it could be said that there was no evidence on the basis of which the Delegate could have concluded that there was no agreement concerning the payment of \$150.00 per week for kit rental and car allowance, but clearly there was evidence to support that conclusion and the Delegate was entitled to rely on it.
18. Third, and apart from the issue whether Oakridge and Mr. Bottieri had agreed that he should be paid \$150.00 per week for kit rental and car allowance, the record supports a conclusion that Mr. Bottieri did, in fact, submit at least one request for reimbursement for fuel for his vehicle, for which he was paid by Oakridge through petty cash. No other actual expenses incurred by Mr. Bottieri, for which he had not been paid, were submitted by him to the Delegate. Even if one could therefore say that Mr. Bottieri was entitled to reimbursement for his expenses, as wages, and that his complaint did fall within the purview of the *Act*, no evidence was presented by him to the Delegate that any money was in fact owing by Oakridge for expenses incurred.
19. I return to the stated basis for Mr. Bottieri's appeal. He objects to the Delegate's making reference, in the Determination, to certain comments of Ms. Harper, the production co-ordinator on the Film. The impugned portion of the Determination appears to be this:
- Deb Harper ("Ms. Harper") was the Production Coordinator for "Neal N' Nikki" from August through September 2005. She confirms Mr. Bottieri provided services to Oakridge as a production designer. She states Mr. Bottieri was not required to be on the set at any particular time, but was required to complete design duties based on the script requirements and shooting schedule. She states Mr. Bottieri "was often not around" and appeared to work independently, taking most of his direction from Ms. Girard, the contracted set decorator.
20. Mr. Bottieri asserts that these comments of the Delegate's constitute a failure on her part to observe the principles of natural justice. I must disagree. Such an allegation normally gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in an appellant's either not having an opportunity to know the case he was required to meet, or an opportunity to be heard in his own defence (see *Moon Arc Interiors Co. Ltd.* BC EST #D200/04).
21. It is not apparent to me from Mr. Bottieri's Appeal Form, or his submissions, that his complaint is directed to the fact that he was unaware of Ms. Harper's evidence prior to the issuance of the Determination, or that he was aware of it but he objected to the Delegate's including it in the way that she did. In my view, Ms. Harper's statements could only raise the spectre of a failure to observe the principles of natural justice if the Delegate relied on them to decide a matter that was critical to the outcome, but did not apprise Mr. Bottieri of the existence of the evidence prior to the issuance of the Determination, and provide him with an opportunity to respond. This would be so whether the statements appeared in the Determination or not.
22. In any event, I am not persuaded that the Delegate's relying on Ms. Harper's statements could amount to a failure to observe the principles of natural justice, because I do not see how they could be construed to be relevant to the decision the Delegate actually made, namely, that Mr. Bottieri had not demonstrated his

claim for amounts owed was a claim for wages under the *Act*. It is true that the Delegate was troubled by the issue whether Mr. Bottieri was, in fact, an employee of Oakridge, for the purposes of the *Act*. That, it seems, is why the Delegate wrote the second letter containing preliminary findings dated December 5, 2005. However, Mr. Bottieri's employment status was not the basis on which the Determination was made. If the Delegate had determined that Mr. Bottieri was not an employee, Ms. Harper's evidence as to his attendance at work, and the degree to which he worked "independently" would have been relevant factors. I do not, however, see how they could be relevant to the issue whether Mr. Bottieri was owed wages from Oakridge. It follows that Ms. Harper's comments need not have been included in the Determination. The fact that they were, however, is no reason, in these circumstances, to cancel or vary the Determination, or refer the matter back to the Director, on the basis that their inclusion demonstrates a failure to observe the principles of natural justice. Nor do I possess the jurisdiction to order that the offending words be stricken from the Determination. Accordingly, I decline to do so.

### **ORDER**

23. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**