

An appeal

- by -

ALR Technologies Inc.
("ALR")

- 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: Carol L. Roberts

FILE No.: 2006A/54

DATE OF DECISION: June 23, 2006

DECISION

SUBMISSIONS

Sidney Chan, Chairman of ALR	on behalf of ALR
Connie Jansen	on behalf of the Director of Employment Standards
Edgar Luk	on his own behalf

OVERVIEW

1. This is an appeal by ALR Technologies Inc. (“ALR”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued March 20, 2006.
2. Edgar Luk worked as a computer programmer for ALR, a company involved in designing, marketing and distributing technology based products, from April 17, 2005 until July 7, 2005. Mr. Luk filed a complaint alleging that he was owed regular wages for the period June 1, 2005 to July 7, 2005.
3. Following an investigation, the Director’s delegate determined that Mr. Luk was an employee, and that ALR had contravened Sections 18, 21 and 28 of the *Employment Standards Act*, and section 46 of the *Employment Standards Regulations* in failing to pay Mr. Luk wages and vacation pay. She concluded that Mr. Luk was entitled to wages, vacation pay and interest in the total amount of \$4,334.22. The delegate also imposed a \$1,500 penalty on ALR for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulations*.
4. ALR contends that the delegate erred in law in finding Mr. Luk to be an employee rather than a contractor, and failed to observe the principles of natural justice.
5. Although ALR sought an oral hearing, I am satisfied that this matter can be decided based on the written submissions of the parties, the section 112(5) “record”, and the Reasons for the Determination.

ISSUE

6. Did the delegate err in law in concluding that Mr. Luk was an employee rather than an independent contractor?
7. Did the delegate fail to observe the principles of natural justice in denying ALR the opportunity to respond to Mr. Luk’s allegations?

ARGUMENT

8. ALR says that Mr. Luk presented no evidence that he was an employee, and that it was “very clear” to both parties that Mr. Luk was an independent contractor. Mr. Chan, on behalf of ALR, submits that Mr. Luk billed ALR for his work under his business name, Mr. Luk was able to choose his own hours of

work, and that Mr. Luk did not perform his work at the company's offices in Winston-Salem, North Carolina, or at Mr. Chan's Vancouver office. ALR submits that all of the evidence supported a conclusion that Mr. Luk was in business for himself, that he was only commissioned to write a program for a specific project, and that ALR simply laid down the parameters and specifications of the project.

9. ALR also says that the delegate accepted all Mr. Luk's arguments and did not check with ALR to determine whether the information was factual. This information included Mr. Luk's weekend attendance at a UBC course, and his assertion that he was not reimbursed for computer supplies.
10. The delegate contends that she considered all of ALR's submissions even though they were all received late, and that ALR had adequate opportunity to participate in the investigation. She submits that any new evidence ought not be considered.
11. Mr. Luk submits that he had an employment relationship with ALR.

THE FACTS AND ANALYSIS

12. Mr. Chan represented ALR during the delegate's investigation. During a telephone conversation with the delegate, Mr. Chan acknowledged that Mr. Luk worked for ALR, that he had hired him, and that Mr. Luk reported to him.
13. The delegate issued a Demand for Records on October 28, 2005. Mr. Chan's response was that Mr. Luk was an independent contractor because he issued invoices to ALR. He also advised the delegate that Mr. Luk was employed full time for another company as well as working on an MBA, and had limited time to spend on ALR work.
14. The delegate issued preliminary findings on December 12, 2005, with a deadline for a response of December 28, 2005. Mr. Chan's response was received on January 31, 2006. In his response, Mr. Chan asserted that Mr. Luk was an independent contractor, and that ALR was Mr. Luk's employer.
15. The delegate determined that Mr. Luk was an employee. She considered the common law tests of employment. She also considered Mr. Chan's April 15, 2005 email to Mr. Luk setting out his start date, compensation and option package. She noted that Mr. Chan provided Mr. Luk with a computer and told him he would reimburse him for computer maintenance and supplies.
16. The delegate also noted that Mr. Luk worked from home with specific deadlines for his tasks and that Mr. Luk and Mr. Chan communicated almost daily by email with Mr. Chan setting out what was to be done and when, and which new programmers were to be hired. She noted that Mr. Luk did not have a direct financial investment in ALR's business, and that there was no specific end date to the relationship.
17. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (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

18. The burden of establishing the grounds for an appeal rests with an Appellant. ALR must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. Having considered ALR's submissions, I am not persuaded the Determination should be cancelled or varied.
19. The record shows that ALR knew the details of Mr. Luk's complaint, and had the opportunity to respond to them. The delegate issued a Demand for Records, and issued preliminary findings in early December. Although the delegate conceded she had not provided ALR with evidence Mr. Luk was enrolled in a UBC course, that evidence was not material to her findings. I am not persuaded that the delegate failed to observe the principles of natural justice.
20. Having reviewed the record, I am also not persuaded that the delegate erred in law in concluding that Mr. Luk was an employee. There was sufficient evidence before her that supported her conclusion on this issue.
21. The appeal is denied.

ORDER

22. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated March 20, 2006, be confirmed in the amount of \$5,834.22, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal