

An appeal

- by -

Genetrack Biolabs Inc.  
(“Genetrack”)

- 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.:** 2013A/63

**DATE OF DECISION:** October 22, 2013

## DECISION

### SUBMISSIONS

Edmond Wong

on behalf of Genetrack Biolabs Inc.

### INTRODUCTION

1. This is an appeal filed by Genetrack Biolabs Inc. (“Genetrack”) pursuant to subsections 112(1)(a) and (b) of the *Employment Standards Act* (the “*Act*”). The appeal concerns a Determination issued by a delegate of the Director of Employment Standards (the “delegate”) on July 26, 2013, pursuant to which Genetrack was ordered to pay its former employee, Huiming Luo (“Luo”), the sum of \$2,594.25 on account of unpaid wages, concomitant vacation pay and section 88 interest. In addition, and also by way of the Determination, the delegate levied two separate \$500 monetary penalties (see section 98) against Genetrack based its contraventions of sections 18 (timely payment of wages following termination) and 28 (failure to keep payroll records) of the *Act*. Thus, the total amount payable under the Determination is \$3,594.25.
2. The Determination, along with the delegate’s accompanying “Reasons for the Determination” (the “delegate’s reasons”), was issued on July 26, 2013, about six months following the completion of an oral complaint hearing conducted on January 17, 2013. One of the central issues before the delegate at the hearing was Mr. Luo’s status, namely, was he an employee as defined in section 1 of the *Act* or an independent contractor? The Director does not have any statutory authority to award compensation to true “independent contractors”; absent an arbitration provision, an unpaid contractor must pursue a claim for compensation under his or her contract in the civil courts. The delegate ultimately determined that Mr. Luo *was* an employee under the *Act* and thus entitled to the benefit of the statute’s wage protection provisions.
3. Genetrack’s appeal, although grounded under the “error of law” and “breach of natural justice” grounds set out in subsections 112(1)(a) and (b), respectively, of the *Act*, is fundamentally a challenge to the delegate’s finding that Mr. Luo was an employee rather than an independent contractor.
4. At this juncture, I am adjudicating this appeal based on the submissions filed by Genetrack and, in addition, I have reviewed the subsection 112(5) “record” that was before the delegate when she issued the Determination. I am presently assessing the appeal to determine if it should be dismissed under subsection 114(1)(f) as having no reasonable prospect of success. If the appeal passes this threshold, the respondent parties will be invited to provide their submissions in response to Genetrack’s material.

### FACTUAL BACKGROUND

5. The following factual recitation is drawn from the delegate’s reasons and from the section 112(5) record. For the most part, the relevant facts are not in dispute. Genetrack, a British Columbia business corporation, offers DNA testing services and Mr. Edmond Wong, who has represented the firm throughout these proceedings, is one of its two directors. Mr. Luo contacted Genetrack in response to an online advertisement seeking a website developer. Mr. Wong interviewed Mr. Luo on January 16, 2012, and given the tone of an e-mail from Mr. Wong to Mr. Luo dated January 17, 2012, that interview went quite well. Mr. Wong stated “we would like to have you join our team in principle” and “[w]hat we could offer you is a full time work with our company on a project basis” [*sic*]. The January 17, 2012, e-mail continued: “If this project is successful and we feel that you are a good fit, then we will hire you to stay on permanently. If the project is not successful for any reason, we have a number of other projects that could make use of an additional programmer, so in

any event, we can eventually provide you with relatively stable long term employment if things work well.” The e-mail also contained a wage proposal of \$25 per hour but with the proviso: “If the project is successful and you perform at a high level, we will review that amount and offer you a salaried position.”

6. Mr. Luo was contracted to develop a website that would allow Genetrack clients to schedule appointments at its various clinical locations across Canada and the United States. Mr. Luo worked from his own residence and the project was expected to take about three months to complete. Mr. Luo testified at the complaint hearing that he commenced his work on the project on March 1, 2012, and devoted 40 hours each week to the project. He was paid for his first two weeks’ work that he billed at the \$25 per hour rate but thereafter a dispute arose regarding the quality of Mr. Luo’s work and Genetrack refused to pay him any further monies. Mr. Luo, in his unpaid wage complaint, stated that he was employed from March 1 to April 2, 2012, when he quit because he could no longer accept the “disrespected attitude from...Mr. Wong”. He claimed \$2,400 in unpaid wages (based on the \$25 per hour rate) for the period from March 16 to April 2, 2012.
7. On April 4, 2012, Mr. Wong sent an e-mail to Mr. Luo confirming receipt of the latter’s resignation and further stating: “Upon completion and verification of the work for this week...we will issue and send your final paycheque to you via letter mail...We presume you will be claiming that you were working on a full-time basis and will issue the cheque based upon this presumption...We regret that the working relationship did not work out as hoped, and wish you success in your career going forward”. As is reflected in a later e-mail, dated April 18, 2012 from Mr. Wong to Mr. Luo, Genetrack subsequently took the position that Mr. Luo’s work was shoddy and left the company “with an unusable mess”. Genetrack ultimately refused to pay anything further to Mr. Luo beyond that paid for his first two weeks’ work.
8. As previously noted, Mr. Luo’s unpaid wage complaint came on for hearing before the delegate on January 17, 2013, and both Messrs. Luo (in person) and Wong (by teleconference) testified at the hearing. Perhaps not surprisingly, Mr. Luo testified that his work was entirely satisfactory whereas Mr. Wong had quite a different view about the quality of Mr. Luo’s work. I think it important to note that Mr. Wong was afforded, but chose to not take up, the opportunity to cross-examine Mr. Luo. Mr. Wong testified that Mr. Luo was hired as a “consultant contractor” and that it was never his intention to hire Mr. Luo as a regular employee and that there was no signed employment agreement between the parties. Although not specifically referenced in the delegate’s reasons, Genetrack purchased a laptop computer for Mr. Luo’s use and it also provided him with a desk (there is a dispute about the cost of the laptop, Mr. Wong says it cost \$2,000 while Mr. Luo says its purchase price was about \$600). Mr. Wong pointed to several facts that he said supported Genetrack’s position that there never was an employment relationship between the parties – Mr. Luo “would work at his leisure, at any location, at any hours”; no statutory deductions and remittances were made on Mr. Luo’s behalf; Mr. Luo was not given a copy of the employee handbook; Mr. Luo was free to take on other work and hire other workers (a point disputed by Mr. Luo); Mr. Luo was not provided with any of the benefits that other Genetrack employees received. Mr. Luo did not cross-examine Mr. Wong although he was given the opportunity to do so.
9. In response to questions from the delegate, the following additional information came to light: the original “Craigslist” posting indicated Genetrack wished to hire a computer programmer; the parties agreed that the workload would be on a “full-time” basis (which, of course, would reduce the available time for Mr. Luo to work on other projects); Mr. Luo was paid for his first two weeks’ work based on a \$25 hourly rate for a 40-hour workweek and he was paid a gross amount without any statutory deductions; Mr. Luo submitted a timesheet to Genetrack and while he worked from home, he also attended Genetrack’s offices two or three times each week (Mr. Wong put the attendances at once or twice each week); Mr. Luo testified that he devoted his full-time efforts to the website project; Mr. Luo was given a task sheet and his work was reviewed by, and he received feedback from, Mr. Wong; Mr. Wong testified that he did not give Mr. Luo specific

“orders or instructions” but, on the other hand, he also testified that while “he was the project lead but has no experience in computer programming [so] he relied on [Mr. Luo’s] expertise”.

## THE DETERMINATION

10. The delegate considered both the definition of “employee” contained in section 1 of the *Act* and the various common law considerations that guide a decision about whether a person is an employee or an independent contractor and ultimately concluded that the parties were in an employment relationship. In reaching this conclusion, the delegate noted that “there is marginal evidence that Genetrack controlled and directed the work”; Mr. Luo was retained to produce a website for Genetrack with no chance of profit or risk of loss and there was no credible evidence that he had the right to subcontract his work obligations to a third party; Mr. Luo made no direct financial investment in carrying out his duties nor did he operate an independent business of which Genetrack was a client; and finally, the limited documentation between the parties was more consistent with an employment, rather than an independent contractor, relationship.
11. Having concluded that Mr. Luo was employed by Genetrack, the delegate held Mr. Luo was entitled to the benefit of the *Act’s* wage protection provisions. The delegate accepted Mr. Luo’s evidence that he actually worked the hours he claimed to have worked (and this evidence was not challenged by Genetrack) and, accordingly, awarded him \$2,400 in unpaid wages (12 days x 8 hours/day x \$25 per hour) together with 4% vacation pay and section 88 interest.

## FINDINGS AND ANALYSIS

12. Genetrack appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. Genetrack, in its appeal materials, asserts that it was never its intention to engage Mr. Luo as an employee and while that may be true, it is not particularly relevant inasmuch as Mr. Luo felt equally strongly that he was being hired as an employee. In this instance, the parties’ intentions, whatever they may have been, must be subordinated to the available evidence that speaks to the true substance of the parties’ relationship.
13. The issue relating to Mr. Luo’s status is a matter of mixed fact and law. In regard to the legal issue, the relevant provisions of the *Act*, rather than the common law tests, must be given precedence (see *Yellow Cab Ltd. v. Board of Industrial Relations et al.*, [1980] 2 S.C.R 761). The relevant provisions of the *Act* are set out below:

“**employee**” includes

- (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
- (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
- (c) a person being trained by an employer for the employer’s business,
- (d) a person on leave from an employer, and
- (e) a person who has a right of recall...

“**employer**” includes a person

- (a) who has or had control or direction of an employee, or
- (b) who is or was responsible, directly or indirectly, for the employment of an employee;

“wages” includes

- (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
- (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
- (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
- (d) money required to be paid in accordance with
  - (i) a determination, other than costs required to be paid under section 79 (1) (f), or
  - (ii) a settlement agreement or an order of the tribunal, and
- (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,

but does not include

- (f) gratuities,
- (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,
- (i) penalties, and
- (j) an administrative fee imposed under section 30.1;

“work” means the labour or services an employee performs for an employer whether in the employee’s residence or elsewhere.

14. Taking the above statutory provisions into account, I am of the view that the delegate correctly determined that the parties were in an employment relationship. The fact that Mr. Luo worked from his home is irrelevant since “work” can be undertaken at a person’s residence rather than at the employer’s business premises. Mr. Luo was paid a “wage” in the form of the \$25 per hour agreed rate. Clearly, Genetrack was directly responsible for securing Mr. Luo’s services and the entire process was very much like the ordinary hiring process – an advertisement posted seeking to hire an individual with a particular skill set, followed by an interview and an offer of work. Whatever Genetrack’s *post hoc* view of the matter might be, I think it reasonable to view its January 17, 2012, e-mail to Mr. Luo as an offer of employment – “we would like to have you join our team” and “[w]hat we could offer to you is a full time work with our company on a project basis”. Although someone may be retained to work full time on a time-limited project, it does not follow that, while that project is underway, the person is not an employee; indeed, this very sort of employment relationship is specifically contemplated in subsection 65(1)(c) of the *Act*. Clearly, Mr. Luo was not operating his own business whereby he solicited Genetrack as a client. Genetrack provided the key equipment he required to carry out his duties, namely, a laptop computer and a desk. Since Mr. Luo was retained for his particular expertise, it is not surprising that he was given a measure of independence in carrying out his duties but, even so, he was obliged to report to Genetrack officials (in writing and in person) who carefully reviewed his work and provided (mostly negative, it would appear) feedback to him.
15. Genetrack, in its appeal submission, asserted that the delegate denied it a “presumption of innocence” contrary to subsection 11(d) the *Canadian Charter of Rights and Freedoms* but this provision only applies in a criminal or quasi-criminal context. In a civil case, such as the present proceedings, the delegate must be satisfied on the balance of probabilities that Mr. Luo was an employee and, in my view, there was more than sufficient evidence before the delegate on this score. As I read the delegate’s reasons, she did not proceed on

the assumption that Mr. Luo was an employee and then placed the burden on Genetrack to prove otherwise; rather, she considered all of the evidence before her and concluded, on balance, that an employment relationship existed between the parties.

16. Genetrack now wishes to challenge the delegate's finding regarding the hours worked. Genetrack says that Mr. Luo's evidence regarding his hours – testimony that Genetrack never challenged at the complaint hearing although it was given the opportunity to do so – was “outrageous” and that “Mr. Luo was unable to furnish any direct evidence as to the number of hours he claimed to have worked” and that his unpaid wage claim was “completely arbitrary and unsubstantiated”. First, there *was* evidence before the delegate, namely, Mr. Luo's testimony regarding his hours – testimony, I might add, that Genetrack did not challenge at the hearing. Further, Genetrack paid Mr. Luo's first invoice, based on a 40-hour workweek without disputing its veracity. Genetrack now says that it was a breach of the rules of natural justice for the delegate to have accepted Mr. Luo's evidence but I fail to see how it is a breach of the rules of natural justice for the delegate to have accepted wholly uncontroverted evidence that was consistent with both parties' understanding about what the work would entail (recall Mr. Wong's January 17 e-mail that referred to “full time work” and his April 4 e-mail where he seemingly accepted that Mr. Luo had been working on a “full-time basis” and thus he would be paid “based on this presumption”).
17. Although Genetrack has not predicated its appeal on the “new evidence” ground (subsection 112(1)(c)), it nevertheless submitted evidence that was not before the delegate in an effort to demonstrate that Mr. Luo's work product would not have taken any more than a few days to complete. This evidence is simply not admissible in light of the stringent test governing the admission of new evidence set out in *Davies et al.*, BC EST # D171/03. This evidence could have – and perhaps should have – been submitted to the delegate at the complaint hearing and, in that instance, Mr. Luo would have been afforded the opportunity to respond to it. However, this evidence is not admissible in this appeal proceeding.
18. Since the delegate correctly determined that Mr. Luo was an employee and that Genetrack failed to pay him his earned wages within the time limited by section 18 of the *Act*, a \$500 penalty was properly levied on this account. Further, since Genetrack conceded that it did not maintain any payroll records relating to Mr. Luo, the second \$500 monetary penalty for failing to maintain payroll records was also properly levied.
19. In my view, there is no reasonable prospect that this appeal will succeed and, accordingly, it is dismissed.

## **ORDER**

20. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. In accordance with subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of \$3,594.25 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**