

An appeal

- by -

Sean Thomas Gallagher operating as
Bristol Fashion Brightwork & Custom Canvas

- 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/61

DATE OF DECISION: August 16, 2006

DECISION

SUBMISSIONS

Sean T. Gallagher	for Bristol Fashion Brightwork & Custom Canvas
Neil Bailey	on his own behalf
Ian MacNeill	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Sean Gallagher, operating as Bristol Fashion Brightwork & Custom Canvas ("Mr. Gallagher") 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 March 31, 2006 in respect of a complaint filed by one Neil Bailey ("Mr. Bailey").
2. The Delegate determined that Mr. Gallagher had violated sections 17, 18, 28, 40 and 45 of the *Act*, and that he owed Mr. Bailey wages in the amount of \$1,406.67. The Delegate imposed five administrative penalties of \$500.00 each. The total assessed was therefore \$3,906.67.
3. Mr. Gallagher filed an appeal with the Tribunal on May 8, 2006. On May 10, 2006 the Tribunal wrote to Mr. Bailey and to the Delegate inviting submissions, and in the case of the Delegate, the record that was before the Director at the time the Determination was made. Mr. Bailey delivered a submission to the Tribunal, dated May 24, 2006. The Delegate delivered a submission dated May 26, 2006, together with the documents the Delegate considered to be the contents of the record.
4. The Tribunal forwarded copies of the material received from Mr. Bailey and from the Delegate to the other parties, and solicited final reply submissions. Mr. Gallagher delivered a reply submission to the Tribunal dated June 21, 2006.
5. By letter dated June 23, 2006, the Tribunal informed the parties that the appeal would be decided by a Member based on the written materials received from the parties.

FACTS

6. Mr. Gallagher operates a boat maintenance, repair and custom canvas outdoor enclosure business in the Vancouver area. In the spring of 2005, he hired Mr. Bailey to assist in the completion of contracts he had secured for the repair of three vessels. The Delegate found that Mr. Bailey was hired at a "training wage" of \$11.00 per hour. The plan was that Mr. Bailey would be trained by Mr. Gallagher so that the former would learn proper habits and work without supervision on future projects.
7. The work Mr. Bailey was asked to perform consisted of refinishing wood trim, repairing gel coat, caulking around stanchions and end of day cleanup. Mr. Bailey did supply some basic tools from a previous graphics job, consisting of a brush, dustpan, plastic containers, cloths and knives. The other

materials required for the work, including sandpaper, solvents, caulking and gel coat repair products, were all supplied by Mr. Gallagher.

8. Mr. Gallagher did not provide constant supervision of Mr. Bailey's work, as he was often elsewhere. However, he did take Mr. Bailey to the vessels in question, gave him instructions on what needed to be done on each one, and told him how the work should be done.
9. Mr. Bailey kept detailed records of his hours worked, which he submitted to Mr. Gallagher. Initially, Mr. Bailey was fully paid for the work he performed, but after the completion of the work on the third vessel Mr. Gallagher, for the first time, questioned whether he was receiving proper value. At the hearing conducted by the Delegate, Mr. Gallagher said he had been told by others in the industry that Mr. Bailey's work was substandard, but he chose to keep Mr. Bailey on because he was "under the gun" to get the work completed.
10. Discussions ensued concerning the amount Mr. Bailey should be paid for the balance of the work he had performed. Mr. Gallagher offered to settle the matter in return for a payment of 50% of the balance owed, provided that Mr. Bailey signed CCRA T5018 forms documenting that he was a contractor, and not an employee. Mr. Bailey declined, and filed a complaint under section 74 of the *Act* alleging that Mr. Gallagher had contravened the *Act* by failing to pay his wages in full.
11. The Delegate conducted a hearing on March 8, 2006 at which both Mr. Bailey and Mr. Gallagher attended and gave evidence. Mr. Bailey produced the detailed time records he had kept while working on the jobs. Mr. Gallagher produced no records specifically relating to Mr. Bailey's work, save for some undated notes of numbers Mr. Gallagher testified related to two of the jobs on which Mr. Bailey worked, but which did not establish in respect of whose work the numbers had been recorded. The Delegate found the notes to be of little utility.
12. Mr. Gallagher said that he only hires contractors and that he thought he had made it clear to Mr. Bailey upon hiring him that Mr. Bailey would be responsible for his own taxes. Mr. Bailey stated that Mr. Gallagher at no time advised him he was a contractor until the issue of his wages arose after the completion of the work on the third vessel. He said he had no recollection of any discussion about his taking care of his own taxes, he did not bid on the work, and he had no experience in the industry which would have allowed him to operate within it as a contractor. Mr. Gallagher acknowledged that Mr. Bailey had no prior experience, did not bid on the work, and had no contract. He also confirmed that to the best of his knowledge Mr. Bailey had no business licence, tax number, or WorkSafe number.
13. Upon a review of the evidence, the Delegate concluded that Mr. Bailey was an employee under the *Act*, and not a contractor. The Delegate also accepted Mr. Bailey's testimony concerning the hours he had worked, as it was supported by detailed records, and Mr. Gallagher had submitted no records of substance in reply.
14. In the result, the Delegate determined that Mr. Gallagher had contravened the following provisions in the *Act*:
 - section 17 – failure to pay wages earned by an employee in a pay period at least semi monthly and within 8 days of the end of a pay period;
 - section 18 – failure to pay wages within 6 days of an employee's terminating the employment;

- section 28 – failure to maintain a daily record of hours worked by an employee;
- section 40 – failure to pay overtime
- section 45 – failure to compensate an employee for a statutory holiday.

15. Mr. Gallagher's appeal alleges that the Delegate failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.

ISSUE

16. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

17. The Tribunal's jurisdiction with respect to appeals is set out in section 112(1) of the *Act*, which provides that a person served with a determination may appeal it 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;
- c) evidence has become available that was not available at the time the determination was being made.

18. Here, the Mr. Gallagher alleges on his Appeal Form that there was a failure to observe the principles of natural justice in the making of the Determination. In general, such a challenge 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 it was required to meet, or an opportunity to be heard in its own defence (see *Moon Arc Interiors Co. Ltd.* BC EST #D200/04).

19. In the context of proceedings under the *Act*, the obligation to observe the principles of natural justice is informed by the language of section 77, which reads:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

20. I see nothing in the record, or the submissions received from Mr. Gallagher, that supports an argument that the Delegate treated Mr. Gallagher unfairly in any substantive sense, or at all. Mr. Gallagher was fully aware that the principal issue for Mr. Bailey was that he had not been paid the wages he said were owed to him for his work. Mr. Gallagher himself raised the question whether Mr. Bailey was in fact a contractor, and not an employee, and he made ample use of the opportunity to argue for the former characterization at the hearing the Delegate conducted. Moreover, there is no suggestion the Delegate

considered evidence or submissions of which Mr. Gallagher was unaware, or that the latter was deprived of anything other than a full opportunity to present his case as he saw fit.

21. What Mr. Gallagher really objects to is the fact that the Delegate reached a conclusion that did not conform to Mr. Gallagher's view of what the right result should be. Unhappiness with a result, however, does not, of itself, give grounds for challenging the Determination on the basis of an allegation that the Delegate failed to observe the principles of natural justice.
22. Mr. Gallagher further asserts that evidence has become available that was not available at the time the Determination was made. The evidence of substance to which he refers is the records he indicates he kept of the hours worked by the persons he hired for his contracts, together with the times at, and the dates on which, that work occurred. Mr. Gallagher says those records were in the hands of a bookkeeper whom he could not contact in preparation for the hearing. He also refers to his not having his personal journal and some photographs with him at the hearing.
23. This ground of appeal engages section 112(1)(c) of the *Act*. That section requires that the evidence sought to be adduced must not have been available at the time the Determination was made.
24. Previous decisions of the Tribunal have held that section 112(1)(c) is not intended to permit a party such as Mr. Gallagher, who is unhappy with the result in the Determination, to seek out new evidence to bolster a case that failed to persuade the Delegate at first instance. The Tribunal has also stated that an appeal does not amount to a re-hearing, or a re-investigation of a complaint (see *Re Bruce Davies et al.* BC EST #D171/03, *J.P. Metal Masters 2000 Inc.* BC EST #D057/05). These statements are consistent with a principle underlying the *Act* expressed in section 2(d), which is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the legislation. A party is therefore expected to take the complaint process seriously, to co-operate with the Delegate, and to present all arguments which the party may reasonably expect should be made to the Delegate before the Determination is made.
25. Having said that, the Tribunal retains a discretion to allow an appeal based on fresh evidence, but it must be exercised with caution. One of the criteria that the Tribunal will apply in determining whether an appeal should be allowed on this basis is to ask itself whether the evidence could not, with the exercise of due diligence, have been discovered and presented to the Delegate during the investigation or adjudication of the complaint and prior to the Determination being made. In other words, was the evidence really unavailable to the party seeking to tender it.
26. In my opinion, Mr. Gallagher has failed to meet this test. No explanation is given as to why, in the lengthy period leading up to the hearing, Mr. Gallagher could not have contacted the bookkeeper and obtained the records in question. As for the personal journal, and the photographs, Mr. Gallagher must have considered them to be important to his case, yet he offers no reasons for his failure to supply them to the Delegate either before or at the hearing. There is also no evidence that Mr. Gallagher raised any concern relating to these documents with the Delegate, or asked for an adjournment of the hearing so that he might be in a position to produce them. Nor have the records to which he refers been produced on this appeal. In these circumstances, I am far from persuaded that the records were unavailable in the sense described in the statute.
27. Is what I have said sufficient to dispose of the appeal? In my opinion, it is not. While Mr. Gallagher did not allege an error of law on his Appeal Form, I am of the view that his appeal material raises a question

of law. Specifically, he challenges the Delegate's finding that Mr. Bailey was an employee, and not an independent contractor.

28. Does the fact that Mr. Gallagher did not assert an error in law on his Appeal Form preclude me from considering whether such an error has been made? I do not think so. While Mr. Gallagher did not formally indicate that he intended to raise an error of law as a basis for his appeal, the Tribunal will seek to discern the true basis for a challenge to the Determination, in order to do justice to the parties, regardless of the particular box an appellant has checked off on the Appeal Form (see *Triple S Transmission Inc.* BC EST #D141/03). I turn, therefore, to the question whether it can be said the Delegate erred in law in deciding that Mr. Bailey was an employee, and not an independent contractor.
29. Whether a person is an employee or an independent contractor depends on the application of a legal standard to a set of facts. It is therefore a question of mixed fact and law (see *Housen v. Nikolaisen* 2002 SCC 33). Whether the Delegate applied the correct legal standard to the relevant facts is, however, solely a question of law.
30. Previous decisions of the Tribunal (see, for example, *Jane Welch, operating as Windy Willows Farm* BC EST #D161/05, citing *Gemex Developments Corp. v. British Columbia (Assessor Area #12 – Coquitlam)* [1998] BCJ No.2275) have confirmed that the types of errors of law the Tribunal may review under section 112 of the *Act* include:
- a misapplication of an applicable principle of general law;
 - acting without any evidence;
 - acting on a view of the facts which could not reasonably be entertained.
31. In determining whether an applicable principle of the general law has been misapplied in this case, it is important to recall that the common law tests developed to assist in identifying whether a person is an employee or an independent contractor, while useful in resolving such a question posed in the context of a complaint under the *Act*, are not conclusive. The primary focus of the inquiry is the wording of the *Act*, and in particular the definition of "employee", which, it has been said, casts a broader net than that which flows from the application of the common law tests (see *Bero Investments Ltd.* BC EST #D035/06). This is consistent with the following comments made by the Supreme Court of Canada in *Machtiger v. HOJ Industries Ltd.* (1992) 91 DLR 4th 491 at 507, in the context of the Ontario legislation, a close cousin to our own:
- ...an interpretation of the *Act* which encourages employers to comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible, is favoured over one that does not.
32. In the case before me, the Delegate considered the definitions of "employee" and "employer" found in section 1 of the *Act*. The relevant portions of those definitions read as follows:
- "employee" includes
- (a) a 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,...

"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.

33. The Delegate noted, correctly in my view, that these definitions must be given a broad interpretation. In addition, the Delegate stated, again correctly, that the common law tests may be considered to determine if they might shed light on the nature of the relationship between Mr. Gallagher and Mr. Bailey.

34. A leading authority which discusses the content of the common law tests is the decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] SCJ No. 61, where Major J. said this at paragraphs 46-48:

In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor...

...The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

35. In this case, the significant factors the Delegate considered which tend to confirm his decision that Mr. Bailey was an employee are as follows:

- Mr. Gallagher hired Mr. Bailey at a fixed rate of pay per hour worked, which meant that Mr. Bailey had no opportunity to earn a profit from his work, nor did he expose himself to a risk of loss. It was, therefore, Mr. Gallagher who was in business on his own account, not Mr. Bailey;
- Mr. Gallagher obtained the work, identified the place where the work would occur, and set the standards by which the work was to be done. He also attended at the various work sites and supervised Mr. Bailey's work from time to time. In sum, Mr. Gallagher exercised significant control over Mr. Bailey and his work. The fact that Mr. Gallagher allowed Mr. Bailey to continue to work when he was unhappy with the value he was receiving for Mr. Bailey's work does not undermine the notion that Mr. Gallagher controlled the work. He simply chose not to raise the quality issue with Mr. Bailey because he was under pressure to complete the work;
- Mr. Bailey's work was integral to Mr. Gallagher's total operation in the sense that he was not hired to perform a discrete task, but several tasks that were fundamental to Mr. Gallagher's fulfilling the terms of the contracts he had obtained.

36. A factor which at first blush suggests that Mr. Bailey may not have been an employee is that he provided some of his own tools in order to do his work. However, the evidence revealed that those tools were not tools of the trade in any strict sense, and it was Mr. Gallagher who supplied most of the materials that were necessary in order for Mr. Bailey to perform the tasks assigned to him. From Mr. Gallagher's point of view, therefore, this factor was at best neutral, and it appears that the Delegate treated it as such.

37. The evidence relating to the discussions about the nature of the relationship which both Mr. Gallagher and Mr. Bailey said they had before the work commenced was equivocal. Mr. Gallagher said he thought he made it clear to Mr. Bailey that he was being retained as an independent contractor. Mr. Bailey said the issue did not come up until the relationship had broken down, and Mr. Bailey had already completed his work. There was no documentary evidence which conclusively supported one interpretation over the other. The absence of one type of document did, however, make a significant impression on the Delegate. This was the CCRA T5018 form. If Mr. Bailey had signed such a form, then that fact would have constituted a form of acknowledgement by him that he was an independent contractor. The fact that he did not supports the inference the Delegate drew that it was the intention of the parties that Mr. Bailey instead be considered an employee.
38. All of this in my opinion supports a conclusion that the Delegate did not misapply the law. He considered the relevant facts, directed himself as to the proper law, and in my view applied it correctly. He did not act in the absence of evidence. Nor did he act on a view of the facts which could not reasonably be entertained.

ORDER

39. Pursuant to section 115 of the *Act*, I order that the Determination dated March 31, 2006 be confirmed.

Robert Groves
Member
Employment Standards Tribunal