EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Diamond Shine Holdings Ltd.
("Diamond Shine" or the "Employer")

- and -

Alnoor Damji, a Director or Officer of
Diamond Shine Holdings Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No: 1999/760 and 1999/761

DATE OF HEARING: February 15, 2000

DATE OF DECISION: February 23, 2000

DECISION

APPEARANCES:

Mr. Alnoor Damji	on behalf of on behalf of the Employer ("Damji")
Mr. Jesse Karaul	on behalf of himself ("Karaul" or the "Employee")
Ms. Judy McKay	on behalf of the Director

FACTS AND ANALYSIS

This is an appeal by Damji and the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations of the Director of Employment Standards (the "Director") issued on November 25, 1999 which determined that Karaul was an employee of the Employer and was owed wages (Section 18). The Determination awarded him $1,372.72.

The Damji and the Employer appeal the Determination. The appellants have the burden to show on the balance of probabilities that the delegate erred in making the Determination. For the reasons set out below, I am not satisfied that the appellants have met that burden with respect to the main issue before me, Karaul's employee status.

Diamond Shine operates a pressure washing business, cleaning, among others, apartment buildings. I understand that painting is another component of the business. Damji is the principal of the business and was listed with the Registrar of Companies as a director or officer. There is no dispute that Damji was a director or officer at the material time. As mentioned, the Determinations concluded that Karaul was an employee of the Employer between July 17 and August 11, 1999 at $8.00 per hour.

According to the Determination, Damji took the position on behalf of the Employer that Karaul was not its employee. Rather, he was an independent contractor or an employee of a Mr. Claude Laundry ("Laundry"). In the result, briefly put, the issue before the delegate was whether or not Karaul was an employee of the Employer. The delegate interviewed Damji, Karaul, a former employee of the Employer, the receptionist of a firm that had referred Karaul to the Employer, and the manager of a building where Karaul had performed work. Among others, the building manager explained that the contract for pressure washing and painting was with the Employer. The delegate applied the traditional common law tests to determine Karaul's status.

The Determination notes that the Employer was provided with several opportunities to provide information with respect to Karaul's employee status, including any evidence the Employer might have to substantiate that Laundry was the proper employer, and that the Employer failed to respond to these requests. At the hearing the Employer conceded that it may have been "a little naive" and that it "didn't respond". In my view, this is fatal to the Employer's case. I agree with my colleagues in *Kaiser Stables*, BCEST #D058/97, and numerous other cases, that the Tribunal will not generally allow an appellant who refuses to participate in the Director's investigation, to

file an appeal on the merits of the Determination. The issue of Karaul's employment status could have been addressed during the investigation. In my view, the Employer refused to participate in the investigation and, in the result, the appeal must fail with respect to the issue of employee status.

In any event, even if I am wrong in that regard, I would, nevertheless, still uphold the Determination on this point. In other words, I am satisfied, on the basis of the evidence presented at the hearing, that Karaul was an employee of the Employer at the material time. As there is no dispute that Karaul performed work on the apartment building in question, in order to show that the delegate erred in making her Determination that Laundry and not Diamond Shine is the employer, the appellants, in my view, would have to present compelling evidence of the Employer's relationship with Laundry. While Damji questioned various factual aspects of the Determination, he did not dispute that the contract for the cleaning and painting of the apartment building was between the owner of the building and Diamond Shine. While it is perfectly plausible that Diamond Shine could have "contractors" perform the work, and that these--depending on the circumstances--may be independent contractors or employees, the latter covered by the *Act*, there was no evidence to support a conclusion that Karaul was an employee of Laundry. Aside from Damji's assertion that he did not employ Laundry, there was no evidence of the contractual relationship between Diamond Shine and Laundry. The latter did not invoice Diamond Shine for the work. The paint was supplied by Diamond Shine and so was, in fact, the pressure washing equipment (which was leased by Diamond Shine from its accountant). In the circumstances, it is more plausible, as argued by Karaul, that Laundry was the Employer's foreman on the site. As well, I understood from Karaul's evidence that he continued to work after Laundry had quit and, that after that time, he received his instructions directly from Damji. In the circumstances, as well, I am not persuaded that Karaul was an independent contractor working with Diamond Shine. In my view, the delegate thoroughly analysed the facts and applied the correct law to those facts. In short, I am not persuaded that the delegate erred.

That, however, is not the end of the matter. It is clear that there was some dispute with respect to the accuracy of the records of hours worked, relied upon by the delegate, in determining the amount owed. These records consisted of notations on a calendar. The Employer questioned the accuracy of these records. He presented some persuasive documentary evidence to support his position. It is clear that this evidence was not submitted to the delegate during the investigation. For that reason I might be inclined to disregard it. However, the documentation may not have been available during the investigation. In any event, Karaul agreed with the Employer evidence that he did not work on August 3, 1999, one of the days indicated on the calendar as having been worked. Karaul, whom I find to be a credible witness, testified that he, in fact, worked more than the hours indicated on the calendar. In the circumstances, I am not generally prepared to disregard the evidence supplied to the delegate by Karaul with respect to hours worked. I will however, reduce the amount owing by $64.00 (8 hours at $8.00) in respect of August 3.

ORDER

The Determinations dated November 25, 1999 are confirmed, except to the extent that $64.00 should be deducted from the amount awarded in the Determinations.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal