

An appeal

- by -

Rimon Gendi
("Gendi")

- 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: David B. Stevenson

FILE No.: 2008A/79

DATE OF DECISION: October 16, 2008

DECISION

SUBMISSIONS

| | |
|---------------|--------------------------------|
| Rimon Gendi | on his own behalf |
| Bert de Vries | on behalf of ABC Profiles Inc. |
| Greg Brown | on behalf of the Director |

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Rimon Gendi (“Gendi”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 28, 2008.
2. The Determination was made on a complaint filed by Gendi against ABC Profiles Inc. (“ABC Profiles”). Gendi alleged ABC Profiles had failed to pay regular wages, overtime wages, annual vacation pay and length of service compensation. ABC Profiles denied there had been any contravention of the *Act* because Gendi was never an employee of ABC Profiles under the *Act*.
3. The Director investigated the complaint and found Gendi was not an employee of ABC Profiles and, consequently, there had been no contravention of the *Act*. The Director issued a Determination to that effect.
4. Gendi has submitted an appeal to the Tribunal, alleging the Director failed to observe principles of natural justice in making the Determination. The appeal attaches a copy of an affidavit and a submission which were provided by Gendi to the Director during the complaint process. This material is included in the Section 112 (5) record provided to the Tribunal by the Director.
5. Gendi has requested an oral hearing on the appeal. The Tribunal has a discretion whether to hold a hearing on an appeal and, if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue raised in the appeal is whether the Gendi has shown there is any reviewable error in the Determination.

THE FACTS

7. ABC Profiles operated a metal shingle manufacturing and installation business in Maple Ridge. Gendi filed a complaint with the Director in March 2007, claiming he was an employee of ABC Profiles from March 1, 2006 until February 15, 2007 and was owed regular wages, overtime wages and annual vacation pay for that entire period of time. He also claimed length of service compensation and repayment for “purchases and payments” made by him on behalf of ABC Profiles and its owner.
8. The Determination indicates the Director administered the complaint process through a combination of oral hearing, investigation and written submissions. A substantial amount of evidence and material was provided to the Director by the parties, and their witnesses, during the complaint process.
9. The Determination contains a relatively comprehensive outline of the evidence provided by the parties. The appeal does not allege the factual basis for the Determination was incomplete.
10. While the Director found Gendi was not an employee of ABC Profiles, it was accepted that Gendi had performed accounting services for ABC Profiles for their 2006 year-end and was paid an amount of \$4500.00 for these services. It was also accepted that other payments were made to Gendi by ABC Profiles for materials and supplies he purchased on their behalf and for teaching Mrs. De Vries the Simply Accounting computer program in the spring of 2006. The Director found these services were performed by Gendi as a self-employed consultant hired on a contract basis.
11. Notwithstanding the conclusion of the Director on the status of Gendi under the *Act*, a considerable portion of the Determination considered, hypothetically, what his wage rate and hours of work might have been if he were found to be an employee. In this hypothetical, the Director found that even if Gendi were an employee, his wage rate would be fixed at minimum wage and, using the amount he was paid by ABC Profiles for the year-end accounting services, he was “more than adequately compensated for any and all hours he may have hypothetically worked” for ABC Profiles.

ARGUMENT

12. Gendi has raised two points in his appeal.
13. First, he alleges he was told at one time during the complaint process by the investigating delegate that his claim would be successful, then “changed his mind”. When asked by Gendi what had happened to change his mind, the investigating officer is alleged to have indicated that he was told to do so by his senior officer when that person reviewed the document.
14. Secondly, he argues that the Determination is wrong, that the director should have found he was an employee of ABC Profiles and awarded the wages he claimed.
15. In response, the Director says Gendi is simply attempting to re-argue his case before the Tribunal. All of the material submitted with the appeal was before the Director when the Determination was made, was considered in making the Determination and was addressed in the Determination. In response to the alleged statement made during the complaint process by the investigating officer, such a statement is neither confirmed nor denied, but is submitted to be irrelevant as the complaint was decided on the evidence and argument provided.

16. ABC Profiles has filed no argument on the appeal. Mr. de Vries says he agrees with the Determination and it should not be disturbed.

ANALYSIS

17. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) *Subject to this section, a person served with a determination may appeal the determination 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 made.*

18. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. As the Tribunal said in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST #D050/96).

19. Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).

20. There are no submissions in the appeal specific to this ground and no evidence that Gendi was not provided an opportunity to know the position being taken by ABC Profiles and given an opportunity to respond. I find that Gendi has failed to meet the onus of demonstrating on a balance of probabilities that the Director failed to observe principles of natural justice in making the Determination.

21. Even though Gendi has grounded this appeal on an alleged failure by the Director to observe principles of natural justice, it is in reality based almost entirely on his disagreement with findings of fact made by the Director in the Determination. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];

2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
22. None of the findings made by the Director in the Determination raise an error of law. It is quite accurate to describe this appeal as Gendi simply re-arguing his case in the hope that the Tribunal will reach a different conclusion than the Director on the facts alleged. Having reviewed the Section 112 (5) record, I accept that the conclusions reached in the Determination are consistent with the evidence found in that body of material. There is no indication or allegation in the appeal that relevant evidence was overlooked by the Director, only that the evidence provided by Gendi should have led the Director to find he was an employee of ABC Profiles under the *Act*. The reasons for not accepting much of Gendi's evidence on that issue are adequately explained in the Determination, as are the reasons for accepting the evidence which the Director relied on to decide that question. The resulting findings made by the Director based on those reasons are, in this case, findings of fact in respect of which the *Act* does not provide an appeal.
23. For the above reasons, the appeal is dismissed.

ORDER

24. Pursuant to Section 115 of the *Act*, the Determination, dated May 28, 2008, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal