



An appeal

- by -

Tammy Lynn Fraser carrying on business as Abbey Road Renovations
(“Ms. Fraser”)

- 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: Shafik Bhalloo

FILE No.: 2011A/107

DATE OF DECISION: September 30, 2011

DECISION

SUBMISSIONS

Tammy Fraser	on her own behalf carrying on business as Abbey Road Renovations
Kristine Booth	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), brought by Tammy Lynn Fraser (“Ms. Fraser”) of a Determination that was issued against Jason John Piers (“Mr. Piers”) and Ms. Fraser carrying on business as Abbey Road Renovations on July 8, 2011, by a Delegate of the Director of Employment Standards (the “Director”).
2. The Determination found that Mr. Piers and Ms. Fraser carrying on business as Abbey Road Renovations contravened sections 18 and 58 of the *Act* in respect of the employment of Wayne W. Schmidt (“Mr. Schmidt”), and ordered Mr. Piers and Ms. Fraser to pay Mr. Schmidt \$1,131.32 for unpaid wages, vacation pay and accrued interest pursuant to section 88 of the *Act*.
3. The Determination also imposed a single administrative penalty of \$500.00 under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for contravention of section 18 of the *Act*.
4. The total amount of the Determination is \$1,631.32.
5. In the Appeal Form, Ms. Fraser is appealing the Determination on the grounds set out in section 112(1)(b) and (c), namely, the Director failed to observe the principles of natural justice in making the Determination and evidence has become available that was not available at the time the Determination was made. I also note that in Ms. Fraser’s written submissions, she is also arguing that the Director acted without any evidence in concluding that she was a “part owner” of Abbey Road Renovations, which submission, in my view, invokes the “error of law” ground of appeal under section 112(1)(a) of the *Act*.
6. Ms. Fraser, by way of a remedy, is seeking the Tribunal to vary or change the Determination although effectively she is seeking the Tribunal to cancel that part of the Determination that found her to be a “part owner” of Abbey Road Renovations with Mr. Piers.
7. Ms. Fraser is not seeking an oral hearing and, in my opinion, Ms. Fraser’s appeal can be properly adjudicated on the written submissions of the parties without resort to an oral hearing. Accordingly, this appeal will be decided on the written submissions of the parties, the section 112(5) “record” and the Reasons for the Determination.

ISSUES

8. The issues to be determined in this appeal are threefold:
 - (i) Did the Director err in law in determining that Ms. Fraser was a “part owner” or a co-owner of Abbey Road Renovations with Mr. Piers?

- (ii) Did the Delegate fail to observe the principles of natural justice in making the Determination?
- (iii) Is there evidence that has become available that was not available at the time the Determination was being made and, if so, does that evidence justify changing or varying the Determination in any manner?

FACTS

9. Abbey Road Renovations operated a renovation business on Vancouver Island, British Columbia.
10. On April 8, 2010, Mr. Schmidt filed a complaint under section 74 of the *Act* alleging that Mr. Piers, carrying on business as Abbey Road Renovations, employed him to provide drywall, mudding and taping services for Abbey Road Renovations from March 3, 2010, to March 11, 2010, at the wage rate of \$25 per hour, but failed to pay him the sum of \$1,050.00 in regular wages he earned during this period in contravention of the *Act* (the “Complaint”).
11. The Delegate investigated the Complaint and considered the following three (3) issues in her investigation:
 - (1) Was Mr. Schmidt an employee or was he an independent contractor?
 - (2) If Mr. Schmidt was an employee, who was his employer?
 - (3) If Mr. Schmidt was an employee, is he owed any wages and, if so, how much?
12. During the investigation of the Complaint, the Delegate, in addition to speaking with Mr. Schmidt and Mr. Piers, also spoke with Ms. Fraser, and apprised all three of the evidence adduced by each and gave each of them an opportunity to respond which they individually did.
13. Based on the evidence adduced by all of the parties in the investigation, the Delegate, without a hearing, made the Determination concluding that Mr. Schmidt was an employee (and not an independent contractor) and he was owed \$1,131.32 comprising of wages, annual vacation pay and interest on the first two amounts.
14. As to the question of who was Mr. Schmidt’s employer, the Delegate, based on the evidence of the parties, determined that both Mr. Piers and Ms. Fraser carrying on business as Abbey Road Renovations employed Mr. Schmidt. I note that Ms. Fraser, in her appeal, does not dispute the Delegate’s finding and conclusion that Mr. Schmidt was an employee or that he was owed wages ordered in the Determination. However, Ms. Fraser disputes the conclusion of the Delegate in the Determination that Ms. Fraser was a “part owner of Abbey Road Renovations together with Mr. Piers”. I will, therefore, focus on that issue in this decision and consider the relevant evidence adduced in the investigation on that subject.
15. Having said this, I note that in the Reasons for the Determination, at pages R11 and R12, the Delegate succinctly summarizes the evidentiary basis for her finding that Ms. Fraser, together with Mr. Piers, was a part owner of Abbey Road Renovations. I propose to set out the Delegate’s analysis on the matter verbatim below:
 2. If Mr. Schmidt was an employee, who was his employer?As set out above, section one of the Act defines the word employer as:

‘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;

As found above, Mr. Schmidt was, for the purposes of the Act, an employee of Abbey Road Renovations. Mr. Piers was operating Abbey Road Renovations as an unregistered entity and as such the legal entity, for the purposes of the Act, is open to interpretation. What is in question is whether Ms. Fraser's involvement with the business was significant enough so that she either had control or direction over Mr. Schmidt, or that she was responsible, directly or indirectly, for Mr. Schmidt's employment and therefore an 'employer' under the Act.

Ms. Fraser put forth that she was an employee of Abbey Road Renovations; no substantiating evidence on this point has been provided and in fact Ms. Fraser confirmed that there was no evidence to corroborate her claim. Ms. Fraser was not forthcoming in her evidence both with respect to the length of time she was involved with Abbey Road Renovations and with respect to duties she performed. Initially, Ms. Fraser affirmed that she had no involvement in the business apart from that of an employee providing labour. Ms. Fraser explained that she painted, cleaned, demolished, helped Mr. Piers make measurements and picked up supplies paid for by Mr. Piers as needed. She elaborated that Mr. Devlin's house was the only site she was engaged with [sic]. She offered no information with respect to signing the quote on behalf of the Abbey Road Renovations.

Later in the investigation, Ms. Fraser's evidence evolved, when questioned about the quote for Mr. Devlin's house she acknowledged she signed it on behalf of Abbey Road Renovations; she affirmed that she 'signed the contract' and continued that she often signed contracts. Ms. Fraser's signature on the invoice demonstrates that her involvement with Abbey Road Renovations was more than providing labour and her evidence that she often signed contracts demonstrates her relationship with Abbey Road Renovations was lengthier than renovating Mr. Devlin's house. Additionally, Ms. Fraser's unsubstantiated evidence about being an employee was self-serving; Ms. Fraser has interest in distancing herself from the business so that she would not be held liable for the wages. I give no weight to Ms. Fraser's evidence that she was an employee of Abbey Road Renovations as it is uncorroborated and I do not find it credible.

In the alternative, she argued that she supported Mr. Piers as his girlfriend. Ms. Fraser's involvement in intimate business matters included: the uncontested evidence that she participated in negotiating the Devlin contract, signed contracts, authorized the use of her cellular phone number for business purposes and apologized on behalf of Abbey Road Renovations. Additionally, Ms. Fraser acknowledged creating the LinkedIn profile where she held herself out to be the owner of Abbey Road Renovations. Mr. Piers' evidence, which was ultimately substantiated by Ms. Fraser, namely the use of Ms. Fraser's stronger credit rating, and the reliance on Ms. Fraser's capital establish that Ms. Fraser provided more than moral support to Mr. Piers, she provided financial support for business purposes.

Given the nature of the work Abbey Road Renovations was conducting, I find on the balance of probabilities that Ms. Fraser's involvement with Abbey Road Renovations was significant enough to make her, along with Mr. Piers responsible for the employment of Mr. Schmidt. I find Mr. Schmidt was an employee of Jason John Piers and Tammy Lynn Fraser carrying on business as Abbey Road Renovations.

SUBMISSIONS OF MS. FRASER

16. In her written submissions, Ms. Fraser states that "There is no proof that I am part owner or partner of Abbey Road Reno".
17. Ms. Fraser also contends that Mr. Piers told the Delegate that she was not a partner in Abbey Road Renovations. She also points out "when [Mr. Piers] applied for his business name it states sole proprietor" (sic). She also submits that Mr. Piers opened a business bank account for Abbey Road Renovations at Coastal Community Credit Union as a sole proprietorship but she was unable to get "a copy" of the banking documents because she is not named on the bank account.

18. Ms. Fraser also contends that Mr. Piers started Abbey Road Renovations in 2008 and she had nothing to do with the hiring or firing of Mr. Schmidt.
19. Ms. Fraser complains that the Delegate, in her investigation, did not contact other past employees of Mr. Piers or Abbey Road Renovations. She states that she asked the Delegate to speak with Mr. Schmidt's son-in-law, "Sam", as well as Nick Charleton neither of whom were contacted by Ms. Booth according to Ms. Fraser.
20. Ms. Fraser also complains that Mr. Piers, before the Determination was made, agreed to make payments to Mr. Schmidt but the Delegate advised Mr. Schmidt that if he disagreed Mr. Piers would have to pay him an additional \$500, which Ms. Fraser found "very unprofessional" of the Delegate. Ms. Fraser contends that "the problem could (have) been taken care of" but for the Delegate's said conduct described above.
21. Ms. Fraser reiterates that she was "not part owner of Abbey Road Renovations" and there is "no real proof showing" she was a part owner. She states that Mr. Piers admitted "full responsibility" for the matter to the Delegate. She contends that she was merely Mr. Piers' girlfriend and simply helped him in any way she could.
22. She reiterates that she did not earn or receive any money from Abbey Road Renovations. She asks the Tribunal to contact Tony Paller for whom, she states, Mr. Piers did some work in the past.
23. Ms. Fraser also submits a statement from her friend, Noni Ousey ("Ms. Ousey"). In Ms. Ousey's statement, she states that, in January 2011, both Mr. Piers and Ms. Fraser came to her home "to do an estimate on getting some renovations done". She states that Ms. Fraser told her "previously that her boyfriend had a reno company, Abbey Road Renovations, and that he would be happy to give [her] a quote". The balance of the statement sets out Ms. Ousey's dissatisfaction with the work performed by Abbey Road Renovations and particularly an employee named "Nick".
24. Ms. Fraser also attaches a letter of July 20, 2011, from Catherine M. Laverdure ("Ms. Laverdure"), a Certified Management Accountant, who completed Ms. Fraser's personal income tax returns for 2009 and 2010. Ms. Laverdure states in her letter that she did not receive any information from Ms. Fraser regarding any involvement by the latter in business activities involving Abbey Road Renovations. She also notes that the tax returns she prepared were "on information provided by the tax payer and an audit or review engagement was not performed".

SUBMISSIONS OF THE DIRECTOR

25. The Director submits that Ms. Fraser, while relying upon the natural justice ground of appeal, has not made any "specific argument" or given any "evidence regarding how natural justice was denied [her]". The Director also sets out the history of her dealings with Ms. Fraser, starting with the Delegate's letter to Ms. Fraser advising her of the investigation of the Complaint, which letter explained the issues the Delegate would be considering in the investigation and invited Ms. Fraser to provide any argument or evidence relevant to the investigation.
26. The Director also notes that she subsequently spoke with Ms. Fraser about the investigation of the Complaint by telephone and, thereafter, on February 16, 2011, issued her preliminary findings that she sent by both regular and registered mail to Ms. Fraser. While the registered mail was unclaimed by Ms. Fraser and returned to the Employment Standards Branch (the "Branch"), the letter sent by regular mail was not returned.

27. Subsequently, on February 22, 2011, Ms. Fraser verbally provided her evidence to the Delegate and on April 4, 2011, she again made contact with the Delegate by telephone. The Delegate advised her that “additional evidence was being gathered” and she would be afforded an opportunity to respond to any relevant evidence. Subsequently the Delegate apprised Ms. Fraser of further relevant evidence gathered and afforded her an opportunity to respond, which Ms. Fraser did. The Director submits, therefore, that Ms. Fraser’s natural justice ground of appeal is unmeritorious and should be dismissed.
28. With respect to the new evidence ground of appeal, the Director submits that Ms. Fraser has not demonstrated why the written statements of Ms. Ousey and Ms. Laverdure could not have been made available during the Delegate’s investigation of the Complaint. The Director also submits that Ms. Fraser has not demonstrated the relevance of this evidence and why it ought to be viewed as having high probative value and, therefore, the purported new evidence ought not to be permitted and the new evidence ground of appeal should also be dismissed.
29. With respect to the error of law ground of appeal, the Director notes that while Ms. Fraser asserts that “there is no proof that [she is] part owner or partner of Abbey Road Reno”, in the Reasons for the Determination, at pages R11 and R12, the Delegate set out her findings in support of her conclusion that Mr. Schmidt was an employee of both Mr. Piers and Ms. Fraser carrying on business as Abbey Road Renovations. Therefore, the Director disputes Ms. Fraser’s contention that the Delegate acted without any evidence in concluding that she was a part owner of Abbey Road Renovations.
30. The Director then addresses each and every point raised by Ms. Fraser in her submissions. More specifically, with respect to the submissions of Ms. Fraser that Mr. Piers told the Delegate that she was not a partner in Abbey Road Renovations and that Mr. Piers admitted to the Delegate full responsibility for the matter, the Director submits that Ms. Fraser was not a party to any discussions between the Delegate and Mr. Piers and questions her ability and credibility with respect to these submissions and points to the evidence of Mr. Piers referred to by the Delegate at pages R5 and R8 of the Determination.
31. The Director notes that while the Delegate agrees that Mr. Piers stated that the business was his, Mr. Piers also gave evidence of Ms. Fraser’s financial involvement in the operation, including the financial loss she experienced in the business and the business’ dependence on Ms. Fraser’s credit rating to open a supply account.
32. With respect to Ms. Fraser’s submission that Mr. Piers applied to operate Abbey Road Renovations as a sole proprietorship, the Director submits that this information could have been raised during the investigation and Ms. Fraser has not demonstrated why it was not, nor has she demonstrated its relevance or probative value.
33. With respect to Ms. Fraser’s assertion that the Delegate informed Mr. Schmidt that he would receive an additional \$500 if he disagreed with the payment Mr. Piers was willing to make to Mr. Schmidt, the Director again submits that Ms. Fraser was not privy to any conversation between the Delegate and Mr. Schmidt and, therefore, the Director questions this assertion of Ms. Fraser and asks the Tribunal not to give it any weight. The Director also notes that the \$500 amount Ms. Fraser is referring to is the administrative penalty levied under the *Regulation* for contravention of section 18 a section of the *Act* in this case and it would not be paid to Mr. Schmidt.
34. In the balance of the submissions of the Director, the latter specifies the page numbers in the Reasons for the Determination where the Delegate addressed the points or arguments Ms. Fraser reiterates in her appeal submissions taking issue with the Delegate’s findings or conclusions of fact. I do not find it necessary to reiterate those submissions here except to note that with respect to the matter of the employees of Abbey

Road Renovations Ms. Fraser wanted the Delegate to contact in the investigation, the Director notes the Delegate, in the Reasons for the Determination, explained that she did not contact them as their confirmation that they were employees of Abbey Road Renovations is not determinative of the question who is Mr. Schmidt's employer.

ANALYSIS

35. As indicated previously, in the Appeal Form, Ms. Fraser has expressly relied upon the natural justice, as well as the new evidence grounds of appeal, but her written submissions also suggest that she is relying upon the error of law ground of appeal. I will deal with all three (3) grounds of appeal under separate descriptive headings below starting with the natural justice ground of appeal.

(i) *Natural Justice*

36. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal explained the principles of natural justice as follows:

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 # D050/06.

37. In this case, Ms. Fraser has failed to provide any evidence in support of her allegation that the Director breached the principles of natural justice in making the Determination. There is no evidence whatsoever that the Delegate was biased or did not afford procedural fairness to Ms. Fraser during the investigation of the Complaint. Ms. Fraser was not only afforded sufficient opportunity to know the matters in dispute in the Complaint and discover the evidence of Mr. Schmidt, but she was also afforded sufficient opportunity to respond to that evidence and did so in at least two (2) separate communications with the Delegate.
38. Ms. Fraser was also apprised of the Delegate's findings in the investigation set out in the Delegate's letter of February 16, 2011, which the latter sent to Ms. Fraser by both regular and registered mail. While the registered mail was unclaimed and returned to the Branch, the regularly mailed letter was not returned. Apparently Ms. Fraser received that mailed letter, as she does not dispute receiving it and in any event, she did contact the Delegate subsequently and gave further evidence. In these circumstances, I do not find Ms. Fraser's natural justice ground of appeal meritorious and dismiss it as baseless.

(ii) *New Evidence*

39. The test for adducing new evidence on appeal is set out in the Tribunal's decision in *Re: Merilus Technologies Inc.*, BC EST # D171/03. In this case, the Tribunal resolved that in deciding whether to accept fresh evidence on appeal of a determination, it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. The Tribunal went on to describe the test as follows:
- (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

- (b) The evidence must be relevant to a material issue arising from the complaint;
- (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) The evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.”

40. The four-fold criteria set out above are a conjunctive requirement and, therefore, any party requesting the Tribunal to admit new evidence must satisfy each of the criteria before the Tribunal will admit the purported new evidence. In this case, Ms. Fraser, in her Appeal Form, attaches “new evidence” in the form of statements from Ms. Ousey, as well as Ms. Laverdure. Ms. Ousey, as indicated, is a friend of Ms. Fraser. She simply states that Ms. Fraser had previously told her that her boyfriend had a “reno company” and she engaged the company to carry out some work, which was performed unsatisfactorily. Ms. Fraser does not indicate why she did not adduce this evidence previously. In my view, it is not the sort of evidence that 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 certainly prior to the Determination being made. I also do not find this evidence to be of high probative value such that if believed it could, on its own or when considered with other evidence, have led the Delegate to a different conclusion on the issue of whether Ms. Fraser is a part owner of Abbey Road Renovations.
41. With respect to Ms. Laverdure’s letter of July 20, 2011, as indicated previously, she is the Certified Management Accountant who prepared Ms. Fraser’s personal income taxes for 2009 and 2010. In her letter, Ms. Laverdure reports that she did not receive any information from Ms. Fraser about her involvement in Abbey Road Renovations. Again, Ms. Fraser does not explain why she did not adduce this evidence during the investigation of the Complaint or prior to the Determination being made. In my view, as with Ms. Ousey’s statement, Ms. Laverdure’s letter is not evidence that 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. Also, as with Ms. Ousey’s statement, I find Ms. Laverdure’s letter and the evidence contained therein lacking the necessary probative value. There is nothing in that letter that could, on its own or when considered with other evidence, have led the Delegate to a different conclusion on the material issue.
42. Lastly, in her submissions, Ms. Fraser also advises, for the first time, that when Mr. Piers applied for a business name, presumably Abbey Road Renovations, “it states sole proprietor”. Ms. Fraser, once again, does not explain why she did not adduce this evidence during the investigation of the Complaint or before the Determination was made.
43. In these circumstances, I dismiss Ms. Fraser’s new evidence ground of appeal.

(iii) Error of Law

44. The Tribunal has consistently adopted the following definition of “error of law” delineated 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;
 - (2) A miscalculation 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.

45. Having reviewed the record and submissions of Ms. Fraser, I find that Ms. Fraser's appeal is largely based on a dispute with the Delegate's conclusions of fact; particularly the Delegate's conclusion that Ms. Fraser was a part owner with Mr. Piers of Abbey Road Renovations. While in some cases errors on findings of fact may amount to an error of law, the Appellant will have to show in such case either that there was no evidence to support the findings of fact made, or that the Delegate took a view of the facts that could not reasonably be entertained based on the evidence before the Delegate. In my view, Ms. Fraser has failed to discharge this onus. Moreover, in my view, it was open to the Delegate to conclude that Ms. Fraser was a part owner of Abbey Road Renovations on the basis of the evidence by the parties during the investigation. The Delegate, more specifically, set out that evidence at pages R11 and R12 of the Reasons for the Determination, and I have set out that evidence verbatim at pages 3 and 4 of my decision and will not reiterate it here.
46. Accordingly, I reject Ms. Fraser's ground of appeal based on an error of law.
47. I also note that I find no basis in Ms. Fraser's argument or suggestion that the Delegate influenced or persuaded Mr. Schmidt to reject any settlement offer made by Mr. Pier's to Mr. Schmidt. This is because I find the Delegate's explanation of the matter persuasive. More specifically, I note that Ms. Fraser was not directly privy to any discussion between Mr. Schmidt and the Delegate. Further, the additional \$500 levied in the Determination is the administrative penalty under the *Regulation* for contravention of the *Act*, which is not awarded to Mr. Schmidt. Therefore, the Delegate could not have influenced or suggested to Mr. Schmidt that he would, on rejecting any settlement offer of Mr. Piers, receive \$500 more in the Determination.

ORDER

48. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued, together with whatever additional interest has accrued since the issuance of the Determination, pursuant to section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal