



An appeal

- by -

Amazon West Contracting Ltd.  
(“Amazon”)

- 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:** Carol L. Roberts

**FILE No.:** 2015A/108

**DATE OF DECISION:** October 16, 2015

## DECISION

### SUBMISSIONS

Sebastian Menezes

on behalf of Amazon West Contracting Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Amazon West Contracting Ltd. (“Amazon”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on June 29, 2015. In that Determination, the Director found that Amazon had contravened sections 18, 27, 28, 40 and 46 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in failing to pay Joshua Ter Veer (“Mr. Ter Veer”) \$3,855.07, representing overtime wages, statutory holiday pay, annual vacation pay and interest. The Director also imposed six administrative penalties in the total amount of \$3,000 for the contraventions, for a total amount owing of \$6,855.07.
2. Amazon appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination and erred in law. Amazon also says that evidence has become available that was not available at the time the Determination was being made.
3. After filing the appeal, the Director disclosed the record, or the documents that were before the delegate at the time of the hearing. Amazon objected to the completeness of that record, stating that it had discovered some material that it should have submitted at the hearing. Amazon took the position that those documents, which included text messages and invoices, should be included in the record. Amazon contended that it verbally advised the delegate of the existence of those documents at the hearing but that those references were “disregarded.” The delegate submitted that the new documents were not before her at the hearing, and that the record was complete.
4. I am satisfied that the record, or the material before the delegate at the hearing, is complete. While I accept that Amazon believes that it ought to have submitted additional material to the delegate at the hearing, that position has no bearing on the record. I have addressed Amazon’s arguments about the new material under “new evidence” below.
5. This decision is based on the submissions of the parties, the section 112(5) record that was before the delegate at the time the decision was made, and the Reasons for the Determination.

### FACTS AND ARGUMENT

6. Mr. Ter Veer was employed as a drywaller for Amazon, a drywall and painting company, from April 12, 2014, until November 18, 2014. On December 23, 2014, Mr. Ter Veer filed a complaint alleging that Amazon contravened the *Act* by failing to pay him overtime wages, statutory holiday pay and vacation pay.
7. The delegate conducted a hearing on May 29, 2015. Amazon was represented by Mr. Menezes, Amazon’s sole director and officer.
8. The facts and evidence before the delegate was as follows.

9. Mr. Ter Veer submitted invoices to Amazon containing the hours he worked each pay period. Amazon did not take issue with that record and paid Mr. Ter Veer for all recorded hours at straight time. Amazon took the position that Mr. Ter Veer was not entitled to overtime, vacation pay or statutory holiday pay because Mr. Ter Veer was an independent contractor.
10. Mr. Ter Veer began working for Amazon in April 2014 and was assigned to work with an experienced drywaller. Mr. Ter Veer's evidence was that he had had no previous experience working on his own. Mr. Ter Veer's wages were increased after two weeks and in July 2014, he began working on small jobs independently and his rate of pay was further increased. Mr. Ter Veer called Mr. Menezes each day to determine what job site he was to go to and when. Mr. Menezes supplied Mr. Ter Veer with tools necessary for Mr. Ter Veer to perform his tasks, including small hand tools, a drill, sander, mud pump, scaffolding and tape, as well as all the materials. Mr. Ter Veer returned all the tools to Mr. Menezes when he collected his final paycheque.
11. In mid-August, Mr. Menezes gave Mr. Ter Veer fewer jobs and Mr. Ter Veer learned that some customers were unhappy with his work. On November 18, 2014, Mr. Menezes stopped returning Mr. Ter Veer's calls and text messages.
12. Mr. Ter Veer's evidence was that Mr. Menezes gave him jobs that were to be completed in eight hours but that they often took longer to carry out and that Mr. Menezes told him he was required to work until the tasks were complete. Mr. Ter Veer recorded his hours of work on a daily basis and submitted that record to Mr. Menezes on the first and fifteenth of each month. Mr. Ter Veer said that Mr. Menezes told him that if he did not mark "contractor" on his invoices, they would not be paid. Mr. Ter Veer was told by a co-worker that he had to include GST on his invoices, so his first invoice included a charge for GST even though he did not have a GST registration number. Mr. Ter Veer did not pay WCB premiums and was told by Mr. Menezes that he did not require WCB coverage. Mr. Ter Veer did not know whether or not he was covered under Amazon's WCB policy.
13. Mr. Ter Veer contended that he was an employee because he had no opportunity for profit or risk of loss since he was paid an hourly rate regardless of how long it took him to complete his work. He worked for Amazon for approximately 8 months and had an expectation that he would get work every day. Mr. Menezes told him where and when he was to work and when a job had to be completed. Mr. Ter Veer said he could take time off only if he provided Mr. Menezes advance notice.
14. Mr. Menezes denied that he trained Mr. Ter Veer, stating that Mr. Ter Veer learned how to do things on his own or from another worker on site, whom Mr. Menezes contended was not an Amazon employee. Mr. Menezes contended that Mr. Ter Veer agreed to be a contractor and that Amazon would not have hired him as an employee. Mr. Menezes also contended that he told Mr. Ter Veer to obtain his own WCB coverage and asked him to provide his WCB registration number. Mr. Menezes was unable to recall if Mr. Ter Veer ever provided him with proof of WCB coverage. Mr. Menezes said that he did not require Mr. Ter Veer to have a GST number because he did not believe he earned enough income to require one. Mr. Menezes denied that he required Mr. Ter Veer to write "contractor" on his invoices.
15. Mr. Menezes agreed that he told Mr. Ter Veer when a job would start and end, but denied that he told him what time he had to be on the job site each day or that he asked him to work overtime. He also said that, although he occasionally went to the work site, he did not go to the job site daily either to supervise Mr. Ter Veer or to tell him how to do his job. Mr. Menezes contended that Mr. Ter Veer took time off and told him that he was working somewhere else for more money.

16. Mr. Menezes said that Amazon did not own any of the tools used by Mr. Ter Veer. He asserted that other contractors stored tools in Amazon's garage from time to time and that Mr. Ter Veer must have used those tools, as well as some of his own. Mr. Menezes specifically denied that Amazon owned any scaffolding and that it was the responsibility of either the general contractor or home owner to supply scaffolding for any job over 10 feet in height. Mr. Menezes also said that most of the time clients provided the materials on the job site, but occasionally he would purchase the supplies and bill the client.
17. Amazon took the position that Mr. Ter Veer was an independent contractor based on his agreement to be one as well as the fact that he issued invoices identifying himself as such, the fact that he was not under the direction or control of Amazon, set his own rate of pay and hours of work, and was able to hire helpers or work for other people if he wanted to.
18. The delegate considered the *Act's* definitions of "employee" and "employer" as well as the Supreme Court of Canada's decisions in *671122 Ont. Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 and *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986 in concluding that Mr. Ter Veer was an employee rather than a self-employed contractor. The delegate noted that Mr. Ter Veer was inexperienced when he first began working for Amazon and had no drywall tools of his own. The delegate found that Mr. Ter Veer had to be trained for two months before he could do any work on his own and was then only able to perform that work using tools supplied by Amazon. The delegate further noted that Mr. Ter Veer's lack of experience was reflected in his rate of pay, which was from \$12 to \$15 per hour during the two month training period. The delegate concluded that, at that rate of pay, there was no opportunity for profit and that, even at an hourly rate of \$18, Mr. Ter Veer assumed no risk of loss as he received an hourly wage regardless of how long it took him to complete a job.
19. The delegate placed little weight on Amazon's argument that Mr. Ter Veer stood to profit if he could increase the number of hours he took to perform a job, finding that this was very unlikely as it would increase Amazon's costs. The delegate noted that Mr. Menezes decided not to give Mr. Ter Veer any more work in November because of the cost of remedying the defects in his work.
20. The delegate also gave little weight to Amazon's contention that Mr. Ter Veer could have hired others to assist him, given that Mr. Ter Veer's hourly wage was \$12 to \$18 per hour and Mr. Ter Veer would not have made any profit had he hired others at that wage rate.
21. The delegate determined that Mr. Menezes took the client's instructions, ensured that materials were on site to complete a job and instructed Mr. Ter Veer on what had to be done, how it was to be done and when it had to be done.
22. The delegate rejected Mr. Menezes's contention that he did not exercise any control over Mr. Ter Veer's work. The delegate noted that many of Mr. Ter Veer's jobs were of short duration, lasting from a few hours to a few days, allowing for little discretion about when to start and end the work. The delegate noted that Mr. Ter Veer worked for Amazon in excess of 10 hours per day for a minimum of five days per week from April to mid-August 2014 and again from October to November 18, 2014. Although Mr. Ter Veer worked fewer days in mid-August to mid-September, the days he did work were in excess of 10 hour days. Although Mr. Menezes submitted that Mr. Ter Veer may have worked elsewhere during this period, Mr. Ter Veer denied that, contending that he called Mr. Menezes on a daily basis to be assigned work. The delegate found that Mr. Ter Veer's work with Amazon was continuous until mid-November when Mr. Menezes would not take his calls or give him any additional work.

23. The delegate concluded that, given Mr. Ter Veer's lack of experience in his trade, his lack of drywall tools, lack of opportunity for profit or risk of loss as well as the continuity of his employment and expectation of continuous work, Mr. Ter Veer was performing work for Amazon as an employee and was not in business for himself.
24. The delegate noted that Amazon did not dispute Mr. Ter Veer's hours of work, paying them at straight time. Although the hours recorded were recorded on a per-job basis rather than a daily basis, the delegate found them to be the best evidence of Mr. Ter Veer's hours of work. The delegate concluded that it was fair to the parties to divide the number of hours he worked each day over the number of days it took Mr. Ter Veer to perform the work and arrive at a daily average. The delegate calculated Mr. Ter Veer's entitlement to overtime wages, holiday pay and vacation pay using this formula.

*Argument*

25. Amazon's appeal submission makes a number of "rebuttals" to the Determination. I have set out some of those points, although not all. In essence, Amazon contends that Mr. Ter Veer was not subject to control as an employee would be, was not trained by Amazon or any Amazon contractors, did not borrow tools from Amazon and had the opportunity to experience a profit and loss.
26. In Amazon's appeal submission, Mr. Menezes contends that his "representation in the determination process was not equal to that of Mr. Joshua's." He contends, among other things, that the delegate was very critical towards him, gave Mr. Ter Veer more opportunity to speak than she gave him, and preferred Mr. Ter Veer's typed argument to that of Amazon's.
27. Mr. Menezes contends that many of Mr. Ter Veer's statements were untrue and that they were afforded significant weight. Mr. Menezes believes that he was at a disadvantage in the hearing because of his limited oral and written English communication abilities.
28. Enclosed with the appeal submission were copies of "missing invoices" that were the subject of Demands for Employer Records and not provided prior to or at the time of the hearing. Amazon contends that it should not have been required to produce Employer Records given that Mr. Ter Veer was an independent contractor. Amazon also submits that there should be no administrative penalties assessed for the same reason.
29. Mr. Menezes asserts that the delegate's conclusion that he controlled when and where Mr. Ter Veer was to work is untrue. He also submits that he did not supervise Mr. Ter Veer's work, although he would have dropped by the job site if he had the time and was nearby. He submits that, as an owner, he has to ensure that each job meets industry standards and had to note the progress of each job in the event of client inquiries.
30. Mr. Menezes also says that Mr. Ter Veer stated that he knew how to perform drywall work when he was hired and that he would not have hired someone with very little experience. Attached to the appeal submission is the Craigslist advertisement to which Mr. Ter Veer responded. He says that the advertisement clearly states that he was looking for someone with experience, their own tools and transportation. Mr. Menezes says that the drywaller who may have assisted Mr. Ter Veer was not an Amazon employee.
31. Finally, Amazon also contends that the delegate calculated wages for work on holidays that Mr. Ter Veer did not work as well as for hours that Mr. Ter Veer did not record and "did not match the times typically worked by contractors in the industry."

## ANALYSIS

32. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.

33. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Amazon has not met that burden and dismiss the appeal.

34. Amazon's submissions are, in essence, an assertion that the delegate's conclusion is wrong, or that the delegate erred in law.

35. In *J.C. Creations Ltd.* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned."

### *Failure to observe the principles of natural justice*

36. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".

37. Although I understand Mr. Menezes to say that the delegate was biased against him for giving Mr. Ter Veer more time to speak, I am not persuaded that Amazon was denied natural justice. If Mr. Menezes felt he was at a disadvantage because his ability to communicate in English was not equal to that of Mr. Ter Veer, he could have brought a lawyer, advocate or friend to assist him. He could have brought an interpreter. Mr. Menezes did none of these things.

38. Allegations of bias are serious allegations, not to be brought lightly. In the absence of any evidence that he was treated unfairly, I find no basis for this ground of appeal.

### *New Evidence*

39. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

- (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 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. Amazon had full opportunity to submit documents in support of its position at the hearing before the delegate. The material Amazon submits on appeal was clearly available at the time of the hearing and does not meet the test for new evidence.

41. As the Tribunal has said on many occasions, an appeal is not an opportunity to re-argue a case that has been fully made before the delegate. It is also not an opportunity to submit evidence that should have been submitted at the hearing.

42. I deny the appeal on this ground.

*Error of law*

43. 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.

44. The issue before the delegate was whether Mr. Ter Veer was a self-employed contractor or an employee. The delegate considered the definitions in the *Act* as well as the law, as applied by the Tribunal. I find no misinterpretation of the *Act* or the general law.

45. Amazon contends that the delegate made incorrect factual findings, including that Mr. Ter Veer did not have his own tools and that he lacked drywalling experience prior to working for Amazon. These factual findings are based on the evidence before the delegate at the time of the hearing and cannot be disturbed without a strong evidentiary basis for doing so. I note that Amazon called no witnesses at the hearing and Mr. Menezes says that he is inexperienced in this process. However, Amazon was aware that Mr. Ter Veer was claiming to be an employee. Accordingly, Amazon ought to have brought witnesses to confirm that Mr. Ter Veer was not given any tools or that he failed to return any tools when he picked up his final paycheque. Similarly, although Mr. Menezes says he would not have hired an inexperienced drywaller, there is no indication in the record that he asked for Mr. Ter Veer’s resume prior to hiring him or that he checked any references before putting him to work. Amazon also argues, apparently for the first time on appeal, that Mr. Ter Veer’s hours of work are inaccurate. I have no basis to interfere with the delegate’s factual conclusions.

46. I further find that, on the basis of the evidence before her, the delegate properly applied the law to the facts and arrived at a reasonable conclusion.

47. The appeal is dismissed.

**ORDER**

48. Pursuant to section 115 of the *Act*, I Order that the Determination, dated June 29, 2015, be confirmed in the amount of \$6,855.07 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

---

**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**