

An appeal

- by -

Marek Gabinski  
(“Mr. Gabinski”)

- 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.:** 2010A/122

**DATE OF DECISION:** November 9, 2010

## DECISION

### SUBMISSIONS

Marek Gabinski	on his own behalf
Rubin Roldan	on his own behalf
Kristine Booth	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Marek Gabinski (“Mr. Gabinski”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued July 30, 2010.
2. Mr. Gabinski operates a tile and marble installation business under the name Czar Tile & Marble (“Czar Tile”). Rubin Roldan worked for Mr. Gabinski as a tile setter from March 19, 2007, until September 22, 2008. Mr. Roldan filed a complaint alleging that Czar Tile contravened the *Act* in failing to pay him wages.
3. After many unsuccessful attempts to settle the complaint by different officers of the Employment Standards Branch, the Director’s delegate held a hearing into Mr. Roldan’s complaint on June 16, 2010.
4. Following the hearing, the delegate determined that Czar Tile had contravened Sections 18, 45 and 58 of the *Act* in failing to pay Mr. Roldan wages, statutory holiday pay and annual vacation pay. The delegate found that Mr. Roldan was entitled to wages and interest in the total amount of \$4,507.40. The delegate also imposed a \$1,500 penalty on Czar Tile for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.
5. Mr. Gabinski contends that the delegate failed to observe the principles of natural justice in finding Mr. Roldan to be an employee rather than a sub-contractor.
6. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (See also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575.) This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

### ISSUE

7. Whether or not the delegate failed to observe the principles of natural justice in arriving at his conclusion that Mr. Roldan was an employee rather than a sub-contractor.

### FACTS AND ARGUMENT

8. The evidence before the delegate may be summarized as follows:

9. In March 2007, Mr. Gabinski offered Mr. Roldan a job assisting him with a tiling contract. Although Mr. Roldan had previously worked in the construction industry, he had no experience tiling. Mr. Gabinski lent Mr. Roldan money to purchase basic tools and initially paid him an hourly wage. Mr. Roldan quickly mastered the necessary skills and after two months, Mr. Gabinski began paying him a square foot piece rate, which is the industry standard. Mr. Roldan and Mr. Gabinski initially had a good working relationship and Mr. Roldan worked for Czar Tile on a successive number of job sites. The relationship ended following a dispute over unpaid work which escalated into allegations of, among other things, cheating and filing false claims. Mr. Roldan contended that Mr. Gabinski had not paid him for work performed in September 2008. After they were unable to resolve the dispute, Mr. Roldan stopped work as he did not want to continue to work if he was not going to be paid.
10. To determine whether he had jurisdiction to decide the complaint, the delegate first had to decide whether Mr. Roldan was an employee, or a sub-contractor, as asserted by Mr. Gabinski. Mr. Roldan kept detailed records of the projects he worked on, the work he performed at those sites, as well as the square footage of tile he installed. He submitted this record to Mr. Gabinski every two weeks. The Canada Revenue Agency had provided an oral opinion to Mr. Roldan that he was self-employed and Mr. Gabinski did not make any statutory deductions when paying Mr. Roldan's invoices.
11. Mr. Gabinski paid no WorkSafe benefits on his own behalf or that of Mr. Roldan and carried no liability insurance. He acknowledged that he was responsible for fixing any tiling errors that Mr. Roldan might have made, although he did not recall that there were any errors that required fixing.
12. The delegate determined that Mr. Gabinski secured the jobs and supplied the tile, thin set, grout and other products necessary for the projects. Although Mr. Roldan provided some of his own small tools, Mr. Gabinski supplied the larger tools. Mr. Roldan received successive increases in his rate of pay as his proficiency increased over the two year period. Those rates were set by Mr. Gabinski. Mr. Roldan worked only for Czar Tile, although he occasionally did small jobs for friends or neighbours on nights and weekends. Mr. Roldan had significant flexibility in scheduling his work hours.
13. The delegate had regard to the definitions of 'employee' and 'employer' contained in the *Act* as well as Tribunal jurisprudence and common law tests governing the employment relationships in concluding that Mr. Roldan was an employee of Mr. Gabinski. He noted that Mr. Gabinski secured the jobs that Mr. Roldan worked on and determined where and what work Mr. Roldan performed on each site. The delegate also noted that although Mr. Roldan had significant flexibility in his hours of work, Mr. Gabinski attempted to exert the type of control typical of an employer/employee relationship.
14. The delegate had regard to the fact that Mr. Gabinski increased Mr. Roldan's rate of pay after two months of work and suggested during the hearing that he was considering firing him in September, indicators of an employment relationship.
15. The delegate considered the fact that Mr. Gabinski supplied the specialized tools necessary to perform the job, such as tile cutting saws. He also noted that Mr. Gabinski and Mr. Roldan's relationship had developed some permanency as Mr. Roldan had become an integral part of the Czar Tile "team" over the two years.
16. The delegate concluded that Czar Tile was Mr. Gabinski's business and that Mr. Roldan was an employee. Having found Mr. Roldan to be an employee, the delegate reviewed the records submitted by the parties and determined that Mr. Roldan was entitled to wages set out above.

17. Mr. Gabinski seeks to have the Determination cancelled. He asserts that Mr. Roldan was in business for himself and simply “partnered up” with him when he needed assistance. Mr. Gabinski submits that because he had experience in the industry he felt obligated to give Mr. Roldan instructions and directions about time and place to work. Mr. Gabinski also says that he felt obligated to pay for glue and setting material because the builders expected him to provide those items. Finally, Mr. Gabinski submits that Mr. Roldan had control over the profit he made because it was up to him how much work he completed.
18. The delegate submits that Mr. Gabinski’s appeal is nothing more than an attempt to re-argue issues dealt with in the Determination. She contends that Mr. Gabinski has not demonstrated any denial of natural justice. She further submits that the delegate at the hearing considered all of the factors advanced by Mr. Gabinski and that the Determination should stand.
19. In a reply submission, Mr. Gabinski poses a number of questions to ‘clarify’ Mr. Roldan’s status.

## ANALYSIS

20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law
- the director failed to observe the principles of natural justice in making the determination; or
- evidence has become available that was not available at the time the determination was being made

21. The burden of establishing the grounds for an appeal rests with an Appellant.

### Natural Justice

22. 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. Mr. Gabinski’s appeal document does not outline how he was denied natural justice and the record does not disclose any breach of natural justice. The record suggests that Mr. Gabinski appeared at a number of settlement hearings in an effort to resolve the complaint. As such, he had full knowledge of the case he had to meet. I find he was given the opportunity to present his case and respond to the complaint. I find no basis for this ground of appeal.

23. Mr. Gabinski’s appeal submissions indicate that he disagrees with the delegate’s conclusion. However, although he re-argues the point he made before the delegate, he does not specifically identify any error of law. Although disagreement with a result is not a ground of appeal, it is important that the Tribunal as well as the Director address the substance of the appeal rather than the form. (See *JC Creations*, BC EST # RD317/03.)

### Error of Law

24. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the 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 be reasonably entertained; and
  5. Exercising discretion in a fashion that is wrong in principle
25. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
26. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error. I have reviewed the delegate's analysis based on his factual findings, which Mr. Gabinski does not appear to dispute.
27. In *Kopchuk* (BC EST # D049/05) the Tribunal said:
- The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin*, BC EST # D015/96), and have become less helpful as the nature of employment has evolved (*Kelsey Trigg*, BC EST # D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant “performed work normally performed by an employee” or “performed work for another” (*Web Reflex Internet Inc.*, BC EST # D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:
- 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 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 own 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.
28. The delegate considered the *Act's* definitions of employee and employer as well as Tribunal jurisprudence and common law tests in light of those factual findings. Although Mr. Gabinski disagrees with the delegate's conclusion, I find no error in the delegate's reasoning or conclusion. In the absence of any demonstrated legal error in the delegate's analysis, I dismiss the appeal.
29. As a final note, although Mr. Gabinski did not specifically challenge the delegate's calculations as to Mr. Roldan's wage entitlement, once the delegate determined that parties' relationship was one of employee and employer, he had an obligation to determine Mr. Roldan's wage entitlement according to the provisions of the *Act*, which are minimum standards. There is no evidence they are incorrect.

**ORDER**

30. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 30, 2010, be confirmed.

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