

An appeal

- by -

Clean Home Care Centre Ltd. ("Clean Home")

- and -

David Lynch, a Director or Officer of Clean Home Care Centre Ltd. ("Lynch")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/59 & 2004A/60

DATE OF DECISION: July 5, 2004

DECISION

SUBMISSIONS

David Lynch	for Clean Home Care Centre Ltd. and on his own behalf
Myriam Merabti	on her own behalf
Theresa Robertson	for the Director of Employment Standards

INTRODUCTION

I have before me two appeals filed by, respectively, Clean Home Care Centre Ltd. (“Clean Home”) and David Lynch (“Lynch”). The appeals are filed pursuant to section 112 of the *Employment Standards Act* (the “*Act*”).

Clean Home appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on March 2nd, 2004 pursuant to which it was ordered to pay its former employee, Myriam Merabti (“Merabti”), the sum of \$3,556.26 on account of unpaid wages and section 88 interest. I shall refer to this latter Determination as the “Corporate Determination”.

Mr. Lynch appeals a Determination that was issued by a Director’s delegate on March 3rd, 2004 pursuant to which he was ordered to pay Ms. Merabti the sum of \$2,263.63 on account of unpaid wages and section 88 interest (the “Lynch Determination”). This latter Determination was issued against Mr. Lynch under section 96(1) of the *Act* given his status as an officer and director of Clean Home.

By way of a letter dated June 1st, 2004 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although Clean Home, in its appeal form, requested that an oral appeal hearing be held in this matter, Clean Home did not provided an adequate explanation as to why this appeal could not be readily adjudicated by way of written submissions. I note that the salient facts are not in dispute and that both appellants base their appeal, in large measure, on alleged legal errors by the delegate.

In addition to the appellants’ appeal forms and supporting documents, I also have before me the section 112(5) record, Clean Home’s submission dated May 24th, 2004, Ms. Merabti’s submission dated May 6th, 2004 and the Director’s delegate’s submission dated May 5th, 2004.

ISSUES ON APPEAL

Clean Home appeals the Corporate Determination on the grounds that the Director’s delegate erred in law and failed to observe the principles of natural justice in making the determination [sections 112(1)(a) and (b)]. In a 11/4 page memorandum attached to its appeal form, Clean Home does not explain how or why the principles of natural justice were breached but does reiterate its position before the delegate that Ms. Merabti was an independent contractor and thus not entitled to file a complaint under the *Act*.

Mr. Lynch appeals the Lynch Determination on the same two grounds and in a 1-page memorandum attached to his appeal form states that Ms. Merabti was an independent contractor and that the delegate's calculation of his personal liability is "incorrect" although the precise nature of the alleged calculation error is not particularized. Mr. Lynch does not deny that, at all material times, he was a director and officer of Clean Home.

FINDINGS AND ANALYSIS

The Corporate Determination

The allegation that the delegate failed to observe the principles of natural justice amounts to nothing more than a simple "check" of the box so labeled on the appeal form. There is nothing in the material before me further explicating this ground of appeal. I might add that the record discloses that Clean Home was given a full and fair opportunity to participate in the delegate's investigation and to respond to Ms. Merabti's unpaid wage complaint. I consider this ground of appeal to be wholly unfounded and, indeed, frivolous and vexatious [see section 114(1)(c) of the *Act*].

As noted above, Clean Home says that the delegate erred in law in finding that Ms. Merabti was its employee rather than an independent contractor. This issue was fully addressed by the delegate in the "Reasons for Determination" in which the delegate sets out the various common law factors and fully examines the evidence in light of those factors. I cannot find any error in the delegate's analysis of this latter issue.

This case is yet another example of the somewhat familiar ruse whereby an employer requires an employee to sign an agreement (in fact, a contract of adhesion) acknowledging that he or she is an independent contractor (contrary to section 4 of the *Act*) even though all the key decision-making and financial control rests with the other party, the true employer. Ms. Merabti was an ordinary sales representative employed by Clean Home; her wages were paid in the form of a commission based on her sales performance.

The suggestion that Ms. Merabti was an independent entrepreneur who was in business for herself is untenable in light of the uncontested evidence set out in the delegate's "Reasons for Determination". Among other things, Ms. Merabti was required to forthwith remit *all* of the monies she received from Clean Home customers (sale proceeds of vacuums and related products); she had no input whatsoever into the financing arrangements entered into by purchasers and Clean Home; she was directed to attend trade shows and obtained virtually all of her sales leads emanated from Clean Home; she had no control over pricing policies for equipment and products sold and had to provide detailed customer information and documentation to Clean Home. I consider the so-called "Independent Dealer Agreement" signed by Ms. Merabti to be nothing more than a transparent attempt by Clean Home to avoid its obligations under the *Act* and other employment-related legislation such as the federal *Income Tax Act* (the latter being specifically mentioned in the agreement).

The evidence before me clearly demonstrates that Ms. Merabti was an "employee" as defined in section 1 of the *Act*.

The Lynch Determination

Mr. Lynch asserts that the delegate erred in determining that Ms. Merabti was an employee rather than an independent contractor. For the reasons set out, above, I reject that contention.

The assertion that the delegate failed to observe the principles of natural is wholly unsupported by any evidentiary foundation.

Finally, Mr. Lynch says that the delegate's calculations are "incorrect" but does not say where the error lies. I have reviewed the delegate's calculations and they seem to be entirely in order.

ORDER

Pursuant to section 114(1)(c) of the *Act*, I dismiss each of the appeals filed by Clean Home and Mr. Lynch. Pursuant to 115(1)(a) of the *Act*, I confirm both Determinations as issued in the respective amounts of **\$3,556.26** (Corporate Determination) and **\$2,263.63** (Lynch Determination) together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal