

An appeal

- by -

Galleria Della Pietra Marble & Granite Services Ltd.  
("Galleria")

- 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:** Robert C.P. Walker

**FILE No.:** 2011A/156

**DATE OF DECISION:** December 28, 2011

## DECISION

### SUBMISSIONS

Franco Caporusso on behalf of Galleria Della Pietra Marble & Granite Services Ltd.

Ed Wall on behalf of the Director of Employment Standards

### OVERVIEW

1. Galleria Della Pietra Marble & Granite Services Ltd. (“Galleria”) appeals, pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued September 16, 2011. Galleria raises a number of issues on appeal as noted below.
2. The Complainant Nancy Wang was initially employed by Galleria as a sales representative as part of a wage subsidy program known as JobOptionsBC sponsored by Richmond Youth Service Agency (“RYSA”). Galleria agreed to pay her \$11 per hour for the six week period beginning January 4 and ending February 11, 2011. Thereafter, until she quit on March 11, 2011, she continued to work for Galleria as a sales representative. Galleria failed to pay her for work done from Mar 1 to 11, 2011. Ms. Wang filed her complaint with the Director for wages owing on May 18, 2011.
3. On July 18, 2011, the Director issued a Demand for Employer Records pursuant to section 85 of the *Act*. Production of the records was to have been made by August 2, 2011, but the records were not produced.
4. Delegate Ed Wall on behalf of the Director held a teleconference complaint hearing on August 17, 2011. Galleria submits that the delegate initially heard and rejected an application by Galleria for an adjournment. The reasons for the adjournment request included the fact that Galleria believed a settlement of Ms. Wang’s claim had previously occurred. It was allegedly caught off-guard and had insufficient time to then obtain further evidence supporting its positions when advised of the hearing date. Further, Galleria’s representative Franco Caporusso allegedly had health issues seriously limiting his ability to properly represent Galleria at that time; thus warranting an adjournment. Apparently, no adjournment was granted.
5. On September 16, 2011, the Director made a Determination finding that:
  - (a) Ms. Wang was an employee of Galleria within the meaning of the Act until she quit;
  - (b) Galleria had contravened the Act because it failed to pay Ms. Wang all wages owing within 6 days of her quitting. Galleria was ordered to pay that sum plus accrued interest.
  - (c) Galleria must pay two administrative penalties under the Act for failure to pay wages within the time provided (section 18 of the Act) and for failure to produce records in accordance with the Demand made on July 18, 2011 (section 46 of the Regulation).
6. Section 36 of the Administrative Tribunals Act (“ATA”), which is incorporated into the Employment Standards Act (Section 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. This decision is based on the Section 112(5) “record” and the written submissions of the parties.

## ISSUES

7. Should Galleria's application to the Tribunal to receive new evidence be granted?
8. Was Galleria denied natural justice by reason of its application to adjourn the teleconference hearing being denied?
9. Did the Director err in law (or deny Galleria natural justice) by making a Determination without regard to the evidence on the record?
10. Did the Director err in law in finding Ms. Wang to be an employee of Galleria's within the meaning of the *Act* until she quit?

## ARGUMENTS

11. On Appeal Form 1 received by the Tribunal on October 25, 2011, Galleria checked the box indicating "The Director of Employment Standards failed to observe the principles of natural justice in making the determination." However, it did not become clear as to what facts Galleria might be relying upon to support its argument until I reviewed Galleria's final reply dated November 28, 2011.
12. Galleria appears to rely upon two sets of circumstances to argue a denial of natural justice. The first set of circumstances suggests that the delegate did not make a determination based on the evidence provided at the hearing.
13. The second set of circumstances relied upon by Galleria concerns the rejection by the delegate of its application for an adjournment of the hearing held on August 17, 2011. The application for adjournment was based on two arguments. Firstly, Galleria states that it delivered a settlement cheque to the Employment Standards Branch on August 11, 2011, and that "Ms. Nancy Wang first accepted it, so we did not prepare to gather more evidence. However, later on, Ms. Wang changed her mind and rejected to accept the settlement, and the appeal deadline was not extended for her change of mind. Thus, her change of mind has limited our opportunity to get more credible and supportive evidence because we had to ask our clients to provide evidence at a later time and we had less allowable time to gather evidence."
14. Secondly, Galleria focuses on the health of Mr. Franco Caporusso resulting from an earlier motor vehicle accident which "had a huge, negative impact in participating as well as preparing for the hearings."
15. Galleria also argues that new evidence has become available that was not available by the time of the Determination.
16. A final argument made by Galleria, is that upon consideration of all the evidence (including some of the new evidence), the Director erred in law in finding that Ms. Wang was at all relevant times an employee of Galleria. Galleria's position is that her status changed after February 11, 2011, to that of independent contractor.

## THE FACTS AND ANALYSIS

17. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a Determination of the Director. It provides:

- 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; and
  - (c) evidence has become available that was not available at the time the determination was being made.

### Natural Justice

18. Galleria argues it was denied natural justice because the Director failed to consider or follow the evidence. One “example” of not following the evidence was provided. However, this was more an example of the delegate allegedly misconstruing evidence of one of Galleria’s witnesses. No other examples were given. A general statement was made by Galleria that “The delegate misinterpreted the uncertain statements to some statements favorable towards Ms. Nancy Wang”.
19. The burden rests with the party alleging an error of natural justice to demonstrate that error. There is no substantive evidence provided by Galleria or located in the record to support its allegation. An appeal to the Tribunal is not a re-investigation of the complaint. The purpose of the Appeal is to decide whether there is any error in the determination (*Pannu Bros.Trucking Ltd., BC EST # D055/06*).
20. Galleria also argues it was denied natural justice because its request to adjourn the August 17, 2011 hearing, due to Mr. Caporrosso’s ill health, was denied and it was given too short notice to properly prepare and obtain evidence for that hearing. As noted above, Galleria has the onus of proof to provide evidence to support its position that it was denied natural justice. It has not indicated, for example, when the motor vehicle accident occurred, what injuries Mr. Caporrosso sustained; and their effects on his inability to properly represent Galleria’s interests at the scheduled hearing. Nor have any medical letters or records been produced or found in the record. There was no reference to an application to adjourn in the record. I note the Director did not address the application to adjourn in its response to the appeal but, as noted in paragraph 11 above, the details of the appellants argument were submitted in the appellant’s final reply. Galleria has not met the onus of proof of establishing it was denied natural justice as it relates to the medical issues.
21. Mr. Caporrosso, on behalf of Galleria, appears to have partaken in a mediation in mid-July and dealt with potential settlement of the claim between that time and the hearing of August 17, 2011. He claims he was taken by surprise when the formal hearing was scheduled and he had a week to prepare. Mr. Caporrosso has attached “new evidence” in support of the appeal. The evidence includes a partly filled out set of forms from Richmond Youth Service Agency relating to the JobOptionsBC program, an email dated October 24, 2011, from Camille Rambharat, RYSA representative, relating to a meeting with “Franco and Nancy” prior to the program ending, as well as three, standard form, unsworn documents from clients or potential clients of Galleria relating in very general terms to time Ms. Wang spent at their locations on unknown dates. I note that the record already includes a more complete copy of the form from Richmond Youth Services Agency, but not the email.

### New Evidence

22. Section 112(1)(c) of the *Act* has been considered by the Tribunal on many occasions. The Tribunal has set out four conditions that must be met before new evidence will be considered (*Bruce Davies and others, Directors*

or *Officers of Merilus Technologies Inc*, BC EST # D171/03; and *Alano Club of Chilliwack operating as Alano Club Coffee Bar*, BC EST # D094/05).

23. Galleria must establish the following conditions:
- (i) 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 a Determination being made.
  - (ii) the evidence must be relevant to a material issue arising from the complaint.
  - (iii) the evidence must be credible in the sense that it is reasonably capable of belief.
  - (iv) 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.”
24. It appears to me that the evidence sought to be introduced now was indeed available and “could have been discovered with the exercise of due diligence” and made available to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. It may be that Galleria believed that a settlement would occur and did not exercise due diligence to prepare for a formal hearing; or provide details of the evidence to the Director beforehand. In any event, I do not believe Galleria has established the first criteria necessary to introduce new evidence.
25. Further, although the email dated October 24, 2011 of Camille Rambharat submitted as “new evidence” appears to confirm that Ms. Wang was supposed to prepare reports for Galleria, I am not satisfied it has a “high probative value” as indicated in part (iv) of the test.

### **Error in Law**

26. The final issue raised by Galleria is whether the Director erred in law (or failed to observe the principles of natural justice) in finding Ms. Wang to be an employee rather than an independent contractor after February 11, 2011.
27. In *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05, a case concerning whether a person was an independent contractor or an employee, the Tribunal established the following approach:
- Did the Delegate err in law by misinterpreting the *Act* or applying an incorrect legal test?
  - Did the Delegate err in law by concluding that the Complainant was an employee based on no evidence, or on evidence that provided no rational basis for his finding?
  - Did the Delegate fail to observe the principles of natural justice by failing to consider relevant evidence before concluding that the Complainant was an employee?
28. I have reviewed the record and the Reasons for Determination. It is clear to me that the delegate clearly understood the legal distinction between an employee and independent contractor and he applied the correct legal test. There was no error in law. Further, the delegate appears to have considered all the relevant evidence; and there is sufficient evidence to provide a rational basis for his finding that Ms. Wang was an employee until she quit.

29. In summary I find there is no legal basis for the Tribunal to interfere with the Determination.

**ORDER**

30. Pursuant to section 115 of the Act, I Order that the Determination dated September 16, 2011, be confirmed together with whatever interest may have accrued since the date of issuance.

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**Robert C.P. Walker**  
**Member**  
**Employment Standards Tribunal**