



An appeal

- by -

Efilcon Consulting Tech Ltd.
("Efilcon")

- 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.: 2016A/145

DATE OF DECISION: December 20, 2016

DECISION

SUBMISSIONS

Shuang Xie on behalf of Efilcon Consulting Tech Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Efilcon Consulting Tech Ltd. (“Efilcon”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 20, 2016. In that Determination, the Director found that Efilcon had contravened sections 18 and 58 of the *Act* in failing to pay Oscar Guo \$7,208.87 representing wages, vacation pay and interest. The Director also imposed two administrative penalties in the total amount of \$1,000 for the contraventions, for a total amount owing of \$8,208.87.
2. Efilcon appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination.
3. This decision is based on the appeal submissions, 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

4. Electra Stone Ltd. (“Electra”) operates a surface mining and exporting business. Efilcon operates a consulting business.
5. Oscar Guo (“Mr. Guo”) was employed as a jade prospector from June 17, 2015, until July 16, 2015. Mr. Guo filed a complaint alleging that Efilcon and/or Electra (jointly, the “Companies”) contravened the *Act* by failing to pay him regular and overtime wages.
6. The delegate conducted a hearing on August 11 and 12, 2016. Ms. Xie, a director and officer of Efilcon, appeared on Efilcon’s behalf. John Costigan, an officer and director of Electra, appeared on behalf of Electra.
7. Efilcon and Electra had a business relationship regarding the jade market in China. In early 2015, Mr. Costigan informed Ms. Xie that Electra had secured a new jade claim and required some prospectors. According to Mr. Costigan, Ms. Xie recommended Anthony Zhang, one of her associates, and Mr. Guo as jade prospecting experts.
8. On May 25, 2015, Mr. Guo and Mr. Zhang met with a number of individuals including Mr. Costigan at Electra’s offices. Ms. Xie, who translated for the parties, told Mr. Guo that he would work between eight and 10 hours per day, and that Electra would provide tents, food and some tools. According to Mr. Guo, Mr. Costigan said that he and Mr. Zhang were being hired for 90 days to prospect for jade in northern British Columbia, and would be paid \$30 per hour.
9. Electra’s position was that Mr. Guo and Mr. Zhang were employed by Efilcon as Electra did not want to hire employees. Electra arranged for Efilcon to hire Mr. Guo and Mr. Zhang since they understood Mr. Guo and Mr. Zhang’s language and culture.

10. On June 15, 2015, Mr. Guo asked Ms. Xie to set out the terms of his employment in a written contract prior to leaving on the prospecting trip. Ms. Xie sent Mr. Guo an email setting out his hourly rate and other details. Ms. Xie contended that the contract she emailed to Mr. Guo was a “formality” as Mr. Costigan did not want to hire anyone.
11. Efilcon argued that Electra was responsible for the payment of both the project expenses as well as Mr. Guo’s wages.
12. Mr. Guo and Mr. Zhang, along with a geologist and operations manager from Electra, travelled to the prospecting area. The Electra employees left after one week, and Mr. Zhang and Mr. Guo were thereafter free to work their own time.
13. Mr. Guo and Mr. Zhang worked long hours, and worked every day with the exception of two days they spent in the tent due to bad weather. Mr. Guo kept a daily record of his hours of work. Mr. Guo and Mr. Zhang had many problems with the machinery, which kept breaking down. They did not find any jade.
14. Mr. Guo put all of the trip expenses on his credit card, and at one point, one of the Electra personnel arranged for a payment to be made to his credit card. On or about July 15, 2015, Mr. Zhang advised Mr. Guo that they were returning to Vancouver.
15. On July 20, 2015, Mr. Zhang and Mr. Guo met with Ms. Xie and Mr. Costigan at Electra’s offices to report on their efforts. On July 24, 2015, Ms. Xie told Mr. Guo that the work was finished. Mr. Guo was reimbursed for the remaining expenses he had incurred, but was not paid any wages. Mr. Guo claimed wages for 222 hours, including 12 hours of overtime, incurred when he and Mr. Zhang were driving between Smithers and the prospecting area as well as when he was waiting for equipment to be repaired.
16. Mr. Guo stated that Ms. Xie told him that the repayment of his expenses would be his wages. Mr. Guo lost contact with Mr. Zhang after this meeting.
17. Efilcon invoiced Electra for Mr. Guo and Mr. Zhang’s labour and expenses. Ms. Xie explained that she did so because she was trying to get money from Electra. She said that she estimated the hours Mr. Guo and Mr. Zhang worked at 210 each. She paid the money she received from Electra to Mr. Zhang, who she said was her consultant but not Mr. Guo, because he was not one of her consultants.
18. Ms. Xie testified that in preliminary communications with a Director’s delegate she had initially agreed that Efilcon had hired Mr. Guo because she thought she was responsible, but said that, in fact, she was merely a “go-between” Mr. Guo and Electra because of language barriers. She argued that the fact that Electra sent Mr. Guo and Mr. Zhang money while they were in the field demonstrated that Electra was responsible for their wages. Ms. Xie contended that Efilcon was not Mr. Guo’s employer. She also said that Mr. Guo had been fully paid because he received an advance for expenses as well as \$5,000 from Electra.
19. Ms. Xie also contended that if Efilcon was responsible for Mr. Guo’s wages, his hourly wage rate applied only to his actual work in the field, not his travel time or while waiting for repairs to be done.
20. Electra contended that its relationship with Mr. Guo and Mr. Zhang was through Ms. Xie. When Electra determined that neither Mr. Guo nor Mr. Zhang had any ability to operate in the bush, Ms. Xie was asked to have Mr. Guo and Mr. Zhang return to Vancouver. Upon their return, they had discovered no jade, and their report as to where and how they prospected was weak. Electra no longer required Mr. Guo and Mr. Zhang’s services.

21. Despite the fact that Electra had been misinformed about Mr. Guo and Mr. Zhang's prospecting skills, Electra said that it paid Efilcon's invoice for their trip expenses in addition to the damage they caused to its equipment, including the cost of towing and repairing a truck they had driven into the river. Electra also paid Efilcon's invoice for 210 hours of Mr. Guo's labour. Electra presented the invoices as well as deposit slips confirming that the money was deposited into Ms. Xie's bank account.
22. Mr. Costigan submitted that both Mr. Guo and Efilcon understood Mr. Guo was working for Efilcon, and was never employed by Electra.
23. The delegate determined that Mr. Guo was an employee of Efilcon, and that Mr. Guo was entitled to compensation for 210 hours of regular hours. She concluded that he was not entitled to overtime wages.

Argument

24. Efilcon contends that the delegate failed to consider payments of \$8,000 made to Mr. Guo in determining his wage entitlement. Efilcon contends that because of this error, the administrative penalty should be waived. Ms. Xie says that Mr. Guo was paid \$3,000 from her personal account at the end of June and \$5,000 from Electra's account for a total advance of \$8,000 before he completed the prospecting job. She contends that Mr. Guo was paid \$8,000 for his 210 hours of labour.
25. Ms. Xie argues that Electra was Mr. Guo's employer, not Efilcon, and that Electra paid Efilcon for Mr. Guo's wages.
26. Attached to the appeal are copies of two certified cheques, one dated in June 2015, and another where the date is not shown, from Ms. Xie to Mr. Guo in the amounts of \$1,000 and \$2,000 respectively. The documents also include what appears to be a payment of \$5,000 to Mr. Guo from Electra, dated July 8, 2015.

ANALYSIS

27. 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;
 - evidence has become available that was not available at the time the determination was being made.
28. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I conclude that Efilcon has not met that burden and dismiss the appeal.
29. In *JC Creations* (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."
30. Although Efilcon's appeal is on the basis of natural justice, the thrust of its argument is that the Determination is wrong.

Failure to observe the principles of natural justice

31. 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 who provides a cogent explanation or reasons, for the Determination. Natural justice does not mean that the delegate accepts one party's notion of "fairness".
32. Ms. Xie was notified of the basis of the complaint and indeed, responded to the allegations both by email as well as in person at a hearing before the delegate. She had every opportunity to present her case and respond to that of Mr. Guo. Efilcon did not allege, nor is there any basis for me to conclude, that the Director was impartial to either party.
33. I find no basis for the appeal on this ground.

Error of law

34. 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.
35. I understand Efilcon's appeal to be that the delegate erred in law by determining that Efilcon was Mr. Guo's employer rather than Electra, as well as in failing to consider payments made to Mr. Guo in determining his wage entitlement.
36. Having reviewed the record and the Determination, I find no basis to conclude that the delegate's conclusions on either issue to be in error.
37. The record discloses that there was sufficient evidence before the delegate for her to determine that Efilcon was Mr. Guo's employer. The delegate relied on Mr. Costigan's evidence at the hearing, which she preferred to that of Ms. Xie, as well as the documentary evidence, including the email Ms. Xie sent to Mr. Guo regarding the terms of his employment and Efilcon's invoice to Electra for Mr. Guo's wages. I find no basis to conclude the delegate's conclusion on this point was a misapplication of an applicable principle of general law, a misinterpretation or misapplication of a section of the *Act*, or that the delegate was acting on a view of the facts which could not be reasonably entertained.
38. I also find no error in the delegate's conclusion that Mr. Guo was not paid for his labour. The record indicates that the delegate considered all of the payments made to Mr. Guo, as well as the invoices and the expense claims in arriving at her conclusion. In my view, there was sufficient evidence before the delegate to arrive at her conclusion on this issue.

39. I find no basis for the appeal on this ground.

ORDER

40. Pursuant to section 115 of the *Act*, I order that the Determination, dated September 20, 2016, be confirmed in the amount of \$8,208.87 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