

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Medallion Developments Inc.
("Medallion" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/183

DATE OF DECISION: June 20, 2000

DECISION

OVERVIEW

This is an appeal brought by Medallion Developments Inc. (“Medallion” or the “employer”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 23rd, 2000 under file number ER 080-024 (the “Determination”).

According to Medallion’s principal, Mr. Ken Magoski (president/secretary and sole director), Medallion is “struggling” and has “recently shut down”. Nevertheless, there is no evidence before me that the employer has entered bankruptcy--an event which would affect the legitimacy of the present appeal proceedings.

THE DETERMINATION

The Director’s delegate determined that Medallion owed a total sum of \$3,509.08 on account of unpaid wages and interest to four former employees, namely, Allen Altenburg (“Altenburg”), Alfred Auger (“Auger”), Paul Van Diessen (“Van Diessen”) and Peter A. Waddell (“Waddell”). Further, by way of the Determination, the Director also levied a \$0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation*. The penalty was assessed in light of the employer’s contravention of certain provisions of the *Act* (specifically identified at page 18 of the Determination).

In finding in favour of the four employees, the delegate specifically rejected the employer’s contention that all four were independent contractors and, therefore, not entitled to file a complaint under the *Act*. The particulars of the four employees’ claims are set out below:

<i>Employee</i>	<i>Position</i>	<i>Award</i>
Allen Altenburg	Carpenter	\$51.00
Alfred Auger	General Labourer	\$1,141.28
Paul Van Diessen	Sales Estimator	\$1,193.45
Peter A. Waddell	Sales Estimator	<u>\$1,123.35</u>
TOTAL		<u>\$3,509.08</u>

REASONS FOR APPEAL

In a letter to the Tribunal dated March 15th, 2000 (appended to its notice of appeal), Medallion advanced several grounds of appeal which may be summarized as follows:

- “This appeal is being made because the individuals referenced in the determination were merely subcontractors who were being evaluated”.

Medallion also asserts that the complainants “were not forced to work as sub contractors” and were hired on the clear understanding that they were “independent subcontractors to perform work on a piecemeal basis as and when work was available”;

- the delegate erred in making awards in favour of the four complainants whose claims were “inaccurate, superficial and fabricated in an attempt to get a free ride from the government and revenge for their dismissal”; and
- although this ground is set out in a rather oblique fashion, I understand the employer to be saying that the delegate did not afford Medallion a reasonable opportunity to respond to the complaints contrary to the dictates of section 77 of the *Act*.

I should add that Medallion’s March 15th letter also contains a number of other allegations and submissions, none of which is relevant to the present appeal. For example, I understand that Medallion takes the position that it has some sort of negligence claim against Mr. Auger. However, that claim will have to be addressed in the civil courts as neither the Director nor this Tribunal has any legal authority to address an employer’s tort claim against a former employee.

I will now proceed to address the issues that are properly before the Tribunal.

ANALYSIS

Were the complainants employees or independent contractors?

It seems clear that it was Medallion’s *intention* to treat all of the four complainants as independent contractors. However, from a legal perspective, it is irrelevant whether someone is referred to as an employee or an independent contractor (or, as in this case) a subcontractor. The individual’s status must be determined by reference to the *actual relationship* between the parties. In section 1 of the *Act*, an “employer” is defined, *inter alia*, in terms of the direction and control exercised over the individual in question by the alleged “employer”.

It is abundantly clear that Medallion exercised significant direction and control over the work activities of all four complainants--incidents of this control are more fully set out in the Determination and need not be repeated at any great length here. Suffice to say that Medallion established what work was to be done and when it was to be done; Medallion--as set out in its May 29th, 1999 written submission to the delegate--closely supervised and monitored the work of the complainants; the complainants submitted time sheets setting out their working hours which, in turn, was the basis for their pay. Unlike the typical independent contractor, the complainants used Medallion’s tools and equipment rather than their own. None of the complainants faced any risk of loss nor did they have any opportunity to profit beyond the hourly wage or commissions that Medallion agreed to pay them. It should perhaps also be noted that the employer’s own submissions (both to the delegate and to the Tribunal) belies its position on appeal--in various documents, the employer refers to it having “dismissed” the complainants from their “jobs” because they were, in essence, incompetent.

In my view, the delegate correctly instructed herself with respect to the governing legal principles and appropriately applied those principles to the facts at hand. Although the employer has consistently *asserted* that the four complainants were subcontractors, the employer has not provided any *evidence*--although specifically invited to do so--to substantiate that position. In sum, I see no basis to overturn the delegate's conclusion that all four complainants were "employees" for purposes of the *Act*.

The Complainants' Wage Claims

The complainants were paid on the basis of "invoices" that were submitted to Medallion. In the case of Altenburg, the delegate rejected the bulk of his claim and assessed Medallion's unpaid wage liability to Altenburg based on the employer's own time records. The employer has not identified any calculation error--indeed the employer has not even made a submission on this point--with respect to Altenburg's award. Accordingly, based on the material before me, there is no basis upon which I could set aside or vary the award in favour of Altenburg.

Similarly, with respect to the claims of the other three complainants, Medallion has not provided *any information or documentation* to substantiate its position that these three employees' wage claims were incorrectly determined. Although requested to do so during the delegate's investigation, the employer did not provide adequate--or in some cases any--payroll records to support its position that the complainants had been fully paid for their labour. Thus, both the delegate and I face the same conundrum--the employer simply asserts that the complainants' wage claims were incorrectly determined but has provided absolutely no evidence to support that position. Indeed, the employer has not even gone as far as suggesting where the errors in the delegate's calculations might lie--for example, is it the employer's contention that the employees did not work the hours credited to them or, perhaps, that vacation pay was incorrectly calculated? I simply have no idea what the employer's substantive objection might be.

On an appeal to the Tribunal it is the appellant's burden (in this case, Medallion's burden) to show that the Determination is incorrect. There is nothing in the material before me that would raise even a *prima facie* case that the Determination is incorrect.

Section 77

The employer claims that during her investigation the delegate failed to attend two scheduled meetings with the employer and refused to reschedule a third meeting--which the employer did not attend. First, I would note that there is nothing in section 77 that mandates a face to face meeting between the delegate and the person under investigation. The nub of section 77 is that the person subject of a complaint be given a reasonable opportunity to respond to the complaint.

The *employer's own documents* show that the delegate made several inquiries of the employer and that the employer, in response, sent several letters to the delegate setting out its position. In some cases, the employer simply ignored requests for information made by the delegate.

Second, the material before me seriously calls into question the employer's assertion that the delegate simply failed to attend previously arranged meetings, however, quite apart from whether the delegate did, or did not, attend previously arranged meetings, the record before me makes it abundantly clear that Medallion was very much aware of the nature of the allegations being

advanced and was afforded a reasonable opportunity to respond to those allegations. During the course of the investigation, no fewer than five separate telephone calls were made to Medallion's principal; two letters setting out the nature of the complaints were also forwarded and, in turn, Medallion forwarded to the delegate at least three separate letters setting out its position regarding the various unpaid wage claims.

I am fully satisfied that Medallion was given, consistent with section 77 of the *Act*, a fair and reasonable opportunity to respond to the unpaid wage complaints filed against it.

The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination made in favour of Allen Altenburg, Alfred Auger, Paul Van Diessen and Peter A. Waddell as against Medallion Developments Inc. be confirmed as issued in the total amount of **\$3,509.08** together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

It follows from the foregoing that the \$0 penalty must be similarly confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal