

An appeal

- by -

Lawn Genius Manufacturing (Canada) Inc. dba Drain Master  
("Drain Master")

- 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

**ADJUDICATOR:** Ib S. Petersen

**FILE No.:** 2001/592

**DATE OF DECISION:** September 27, 2001

## DECISION

### SUBMISSIONS:

Mr. Gerry Robinson	on behalf of Drain Master
Mr. Dave Mckinnon	on behalf of the Director

### OVERVIEW

This is an appeal by Drain Master pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on March 23, 2001 which determined that Drain Master was the employer of Ceasar Gonzales (“Gonzales” or the “Employee”) and that it failed to keep payroll records required under Section 28 of the *Act*. The Delegate imposed a \$500 penalty under Section 28(a) of the *Employment Standards Regulation* (the “*Regulation*”).

### FACTS AND ANALYSIS

Drain Master appeals the Determination. The nub of its appeal is that it is not the Employer. The burden is on the appellant to show that the Determination is wrong. For the reasons set out below, I am of the view that the appellant has not met that burden.

In *Narang Farms and Processors Ltd.*, BCEST #D482/98, the penalty process is summarized as follows:

“... the penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the *Act* or the *Regulation*. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the *Regulation*.”

First, Section 28 of the *Act* requires an employer to keep certain records. The determination of whether a person is an “employee” is not as easy as one might have expected. As I noted in *Knight Piesold Ltd.*, BCEST #D093/99:

“Deciding whether a person is an employee or not often involve complicated issues of fact. With the statutory purpose in mind, the traditional common law tests assist in filling the definitional void in Section 1. The law is well established. Typically, it involves a consideration of common law tests developed by the courts over time, including such factors as control, ownership of tools,

chance of profit, risk of loss and “integration” (see, for example, *Wiebe Door Services Ltd. v. Minister of National Revenue* (1986), 87 D.T.C. 5026 (F.C.A.) and Christie et al. *Employment Law in Canada* (2<sup>nd</sup> ed.) Toronto and Vancouver: Butterworth). As noted by the Privy Council in *Montreal v. Montreal Locomotive Works*, [1947] 1 D.L.R. 161, the question of employee status can be settled, in many cases, only by examining the whole of the relationship between the parties. In some cases it is possible to decide the issue by considering the question of “whose business is it”.”

In my view, the appeal does not in any meaningful way address the legal issues raised by these tests. Even if it is true that Gonzales represented himself to be an independent contractor, that bald assertion is no defence. Considering the Delegate’s analysis in the Determination, which appears to address the substance of these tests, and which, I might add, is not seriously contested by Drain Master, I am not persuaded that the Delegate erred in his conclusion that Gonzales was an employee. As he was an employee, Drain Master was required to keep the records. It did not do so.

Second, Section 28 of the *Regulation* provides that the penalty for a contravention of Section 28 of the *Act* is \$500. The penalty in this case is the amount mandated by legislation and the Delegate did not err in this aspect of the Determination.

In brief, I am not persuaded that the delegate erred. The determination stands and the appeal is dismissed.

## **ORDER**

Under Section 115 of the *Act*, I order the Determination dated March 23, 2001 be confirmed.

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**Ib S. Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**