



Case No. 22/09/ESC
File No. 97920

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

A B KUNG LTD.,

Employer,

- and -

Duc Van Vu,

Employee.

BEFORE:

A. Blair Graham, Q.C., Vice-Chairperson

C. Lorenc, Board Member

G. Rodgers, Board Member

SUBSTANTIVE ORDER

WHEREAS:

1. On October 6, 2008, pursuant to Section 96(1) of *The Employment Standards Code*, the Director of the Employment Standards Division of the Department of Labour and Immigration, ordered that the amount of Nine Hundred Twenty Nine Dollars and Forty Four Cents (\$929.44) being wages owing by the Employer to the Employee(s), be paid to the Director of the Employment Standards Division of the Department of Labour and Immigration by the Employer and further required the payment of the administrative fee in the amount of One Hundred Dollars (\$100.00) for a total owing of One Thousand Twenty Nine Dollars and Forty Four Cents (\$1,029.44).
2. The Employer having disputed the payment of the above-mentioned amount, the Director of the Division, pursuant to Section 110 of the *Code*, referred the matter to the Board.

3. On April 15, 2009, both parties appeared before the Board, Duc Van Vu attended the hearing with an interpreter. At the outset of the hearing, the Employer advised the Board that she required an interpreter for the hearing. The Employer was unable to secure an interpreter and as such was seeking an adjournment of the proceeding. Mr. Vu wished for this matter to proceed to hearing, however he did not oppose the Employer's request.
4. The Board, following consideration of submissions presented by the parties, granted the Employer's request and adjourned the hearing in order to allow the Employer the opportunity to arrange for an interpreter to be present at the hearing.
5. On June 24, 2009, the Board reconvened the hearing at which time both parties appeared before the Board and presented evidence and argument. Duc Van Vu attended the hearing. After hearing submissions from the parties, the Board allowed Duc Van Vu's daughter, Tu Vu, to act as his interpreter, and Lana Wong, to act as his representative and to make submissions on his behalf.
6. The Board was mindful that both the courts of this Province, and this Board in many previous decisions, have made determinations as to whether an individual is an employee or an independent contractor, by undertaking an assessment of the degree and nature of the control exercised over the individual who claims to be an employee.
7. In this case, Duc Van Vu was engaged by A B Kung Ltd. to do some painting and other miscellaneous repair and maintenance work in one or more suites in an apartment building owned by A B Kung Ltd. Duc Van Vu, through his representative, argued that the paint, and most if not all of the tools and materials necessary to do the work were supplied by A B Kung Ltd., and that he did not have a key to the suites, and therefore was only able to attend to do the required work when Diane Cung, an owner and representative of A B Kung Ltd., was present to allow him access. It was also argued on behalf of Duc Van Vu that he was being paid an hourly rate, not a fixed fee for the performance of the required work. On the other hand, Diane Cung, on behalf of A B Kung Ltd., argued that although she was present to allow Duc Van Vu access to the apartment, she would typically leave to attend her other business, and that Duc Van Vu performed the work as he saw fit, and that he could leave when he wanted to, as the door locked automatically upon being closed. Diane Cung also submitted that Duc Van Vu was paid an hourly rate because when she had asked for an estimate of the total cost of the work, Duc Van Vu indicated he could not give her an estimate and expected to be paid by the hour.

8. Notwithstanding the submissions made on behalf of Duc Van Vu, the Board found that Duc Van Vu was an independent contractor. His engagement to perform the painting and other tasks for A B Kung Ltd. was relatively short term and related to specific tasks. Although his access to the apartment was controlled by A B Kung Ltd., the manner and sequence of the performance of the tasks were not specifically controlled by A B Kung Ltd., and were determined by Duc Van Vu. There was no evidence to indicate Duc Van Vu was to work exclusively for A B Kung Ltd. If other jobs or engagements had been available to him, he was free to undertake them. Accordingly, the Board found that an Employer/Employee relationship did not exist.
9. The Board, following consideration of material filed, evidence and argument presented, has determined, to its satisfaction, the following:
- a) that an Employer/Employee relationship did not exist between A B Kung Ltd. and Duc Van Vu;
 - b) that as a consequence of the foregoing findings, Duc Van Vu is not entitled to receive any wages, overtime wages, vacation wages or general holiday wages from A B Kung Ltd. and accordingly, his claim is dismissed. A B Kung Ltd.'s appeal is allowed.

T H E R E F O R E

The Manitoba Labour Board **ALLOWS** the appeal of A B Kung Ltd. and **HEREBY DISMISSES** the claim of Duc Van Vu.

DATED at **WINNIPEG**, Manitoba, this **9th** day of **July 2009** and signed on behalf of the Manitoba Labour Board by:

"A.B. Graham"

A. Blair Graham, Q.C., Vice-Chairperson

"C.W. Lorenc"

C. Lorenc, Board Member

"G. Rodgers"

G. Rodgers, Board Member

NOTES

1. Appeal of board order re unpaid wages

130(1) A person who is a party to a final order of the board made under this Code in respect of a matter referred to the board under section 110 may appeal the order to The Court of Appeal.

2. Appeal of the Board Decision or Order to Court of Appeal

a. Leave to appeal required

130(2) An appeal may be taken only on a question of law or jurisdiction and by leave of a judge of The Court of Appeal.

b. Time for application for leave to appeal

130(3) An application for leave to appeal shall be made within 30 days after the day the order is made or within such further time as a judge may allow.

3. Board and director entitled to be heard

131 The board and the director are each entitled to be heard, by counsel or otherwise, on the argument of an application for leave to appeal and on an appeal.

4. Applicant to file proof of payment to the director

130(4) If a person that files an application for leave is not an employee and is required, under the order that is the subject of the application, to pay money to the director, the person shall file with the application evidence that he or she has complied with subsection 125(4).

5. Evidence of compliance with an Order of an Acknowledgment of Receipt from the Employment Standards Division indicating that the amount stated in the Order has been deposited in the "Province of Manitoba Wages Trust Account." *The Employment Standards Division will only accept certified cheques, money orders or cash. Personal cheques will not be accepted unless certified. Please make cheques, etc. payable to "The Province of Manitoba Wages Trust Account."*

REASONS FOR DECISION

It is the policy of the Manitoba Labour Board that where a party to the proceedings is adversely affected by an Order or by a decision of the Board, within ten (10) calendar days of the date on which the Board's Order or decision was signed that party may request the Board in writing to furnish written reasons for its Order or decision. The Board then may consider such request for reasons for its Order or decision and shall notify the requesting party as to whether reasons will be provided.