

Manitoba Labour Board

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Case No. 22/09/ESC

File No. 97920

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

A B KUNG LTD.,

Employer,

- and -

D.V.V.,

Employee.

BEFORE:

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

C. Lorenc, Board Member

G. Rodgers, Board Member

This Decision/Order has been edited to protect the personal information of individuals by removing personal identifiers.

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, D.V.V. 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. D.V.V. 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. D.V.V. attended the hearing. After hearing submissions from the parties, the Board allowed D.V.V.'s daughter, T.V., to act as his interpreter, and L.W., 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, D.V.V. 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. D.V.V., 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 D.C., an owner and representative of A B Kung Ltd., was present to allow him access. It was also argued on behalf of D.V.V. that he was being paid an hourly rate, not a fixed fee for the performance of the required work. On the other hand, D.C., on behalf of A B Kung Ltd., argued that although she was present to allow D.V.V. access to the apartment, she would typically leave to attend her other business, and that D.V.V. performed the work as he saw fit, and that he could leave when he wanted to, as the door locked automatically upon being closed. D.C. also submitted that D.V.V. was paid an hourly rate because when she had asked for an estimate of the total cost of the work, D.V.V. indicated he could not give her an estimate and expected to be paid by the hour.
8. Notwithstanding the submissions made on behalf of D.V.V., the Board found that D.V.V. 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 D.V.V. There was no evidence to indicate D.V.V. 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 D.V.V.;
 - b) that as a consequence of the foregoing findings, D.V.V. 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 D.V.V.

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

“Original signed by”

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

“Original signed by”

C. Lorenc, Board Member

“Original signed by”

G. Rodgers, Board Member