

Appeals

- by -

B. & C. List (1982) Ltd. (the “Employer”)

- and by-

James Brian McGillis (the “Employee”)

- 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: Yuki Matsuno

FILE Nos.: 2008A/100 and 2008A/115

DATE OF DECISION: January 6, 2009

DECISION

SUBMISSIONS

Barry Hyman	for B. & C. List (1982) Ltd.
James McGillis	for himself
Mary Walsh	for the Director of Employment Standards

OVERVIEW

1. This decision concerns two appeals of a Determination of the Director of Employment Standards (the “Director”) issued August 29, 2008 (the “Determination”). Both the Employer and the Employee, Mr. James McGillis, have filed appeals of the Determination under section 112 of the *Employment Standards Act* (the “Act”).
2. In the Determination, a delegate of the Director (the “Delegate”) set out the following: The Employer operates a publishing, fund raising and marketing business and employed the Employee as a telemarketer sales representative from either January 2 or 28, 2002 to December 7, 2007. During his employment, the Employee was paid first on an hourly basis and then largely on the basis of commissioned sales of advertising for various publications. The Employee filed a complaint with the Employment Standards Branch on February 4, 2008, claiming regular wages; statutory holiday pay; deductions from wages; compensation for length of service; and other unspecified funds. The Delegate conducted a hearing of the complaint by way of teleconference on June 25, 2008.
3. In the Determination, the Delegate found the Employer had contravened section 27 of the *Act* and imposed an administrative penalty of \$500.00 on the Employer, as prescribed by section 29 of the *Employment Standards Regulation* (the “Regulation”). The Determination found no merit in the Employee’s other complaints regarding compensation for length of service and payment of wages, including statutory holiday pay.
4. The Employer appeals the Determination on the basis that it was an error of law for the Delegate to have imposed the administrative penalty. The Employee appeals the Determination on the ground that the Delegate erred in law; I have reviewed his arguments and have ascertained that his submission includes what may be characterized as “new evidence”. Although the Employee did not check off the “new evidence” ground of appeal on his appeal form, I will in the circumstances proceed to consider the merits of this ground of appeal. The Tribunal should not take a mechanical approach to appeals relying solely on the grounds of appeal that are indicated by the appellant on the appeal form; rather, it should take a large and liberal view of the appellant’s explanation as to why the determination should be cancelled, varied or referred back to the Director: *Triple S. Transmission Inc.*, BCEST #D141/03.
5. A finding of credibility is not essential to the disposition of this appeal and no viva voce evidence is otherwise required; therefore, I will decide this appeal solely on the basis of the parties’ written submissions, as well as the s. 112(5) Record.

ISSUE

6. Did the Delegate err in law or fail to follow the principles of natural justice in making the Determination? Should the Tribunal consider the new evidence that the Employee seeks to adduce?

ARGUMENT AND ANALYSIS

Error of Law

7. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal noted that panels have used 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), [1988] B.C.J. No. 2275 (B.C.C.A.):
 1. a misinterpretation or misapplication of a section of the *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. (In the Employment Standards context, this may also be expressed as exercising discretion in a fashion that is wrong in principle: *Jane Welch operating as Windy Willows Farm*, BC EST #D161/05).
8. Both the Employer and the Employee, for different reasons, argue that the Delegate erred in law.

The Employer’s Argument

9. In the Determination, the Delegate concluded that the Employer had contravened the *Act* as follows:

. . . I find B&C in contravention of Section 27 of the Act which requires that on “every payday, an employer must give each employee a written wage statement for the pay period,” which identifies certain very specific information including but not limited to such information as “any money, allowance or other payment the employee is entitled to.” In the result, I have assessed an administrative penalty in the amount of \$500.00.
10. The Delegate based his conclusion on two findings of fact: (1) he reviewed the payroll records submitted by the Employer and with the exception of the statutory holiday pay for Thanksgiving 2007, he did not find any reference on any wage statements that were specific to statutory holiday pay; and (2) he accepted that the Employer did not consistently provide the Employee with a wage statement to accompany each and every paycheck he was given.

11. Section 27 provides:
- 27 (1) On every payday, an employer must give each employee a written wage statement for the pay period stating all of the following:
- (a) the employer's name and address;
 - (b) the hours worked by the employee;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the employee's overtime wage rate;
 - (e) the hours worked by the employee at the overtime wage rate;
 - (f) any money, allowance or other payment the employee is entitled to;
 - (g) the amount of each deduction from the employee's wages and the purpose of each deduction;
 - (h) if the employee is paid other than by the hour or by salary, how the wages were calculated for the work the employee is paid for;
 - (i) the employee's gross and net wages;
 - (j) how much money the employee has taken from the employee's time bank and how much remains.
12. The Employer argues that the Delegate's conclusion that it breached the *Act* was wrong. It asserts that the Employee was given a wage statement on each and every payday, and that each wage statement contained all of the information required by Section 27 of the *Act*. Further, the Employer argues that in any event Section 27 does not require statutory holiday pay to be specifically outlined on the wage statement, citing *Monday Publications Ltd.*, BC EST #D059/98.
13. In response to the Employer's appeal, the Employee argues that the Employer breached Section 27 of the *Act* because it did not outline on the wage statement all of the different rates of commission pay arising from the commission pay he was paid; as well, the Employee says that not all of the deductions from his pay were outlined on each wage statement. The Director, in his response to the Employer's appeal, reiterates the Delegate's findings and says that the Delegate did not commit an error of law.
14. In essence the Employer's submissions express disagreement with the Delegate's findings of fact in the Determination with respect to (1) the itemization of statutory holiday pay on wage statements given to the Employee; and (2) the accompaniment of each paycheque given to the Employee with a wage statement. The Employer, in effect, invites the Tribunal to find errors of fact in the Determination. However, it is outside of the jurisdiction of the Tribunal to find errors of fact; an appeal to the Tribunal is not an opportunity to re-try a case on its merits. The Employer had an opportunity to present to the Delegate the information it now brings to the Tribunal, and cannot appeal the Delegate's findings of fact made after due consideration of the Employer's information, unless it can show that the Delegate, in coming to his conclusions, acted without any evidence or acted on a view of the facts which could not reasonably be entertained. The Employer submissions contain nothing that would indicate the Delegate acted in such a manner. Further, my review of the Record reveals nothing that would support a finding that the Delegate erred in law, and nothing that would disturb the Delegate's findings made after due consideration of the evidence brought before him in the hearing, including witness testimony and the Record that was before him.

15. With respect to the Employer's argument that Section 27 of the *Act* does not require statutory holiday pay to be specifically itemized on the wage statement, In *Monday Publications Ltd.*, which dealt with the statutory holiday pay for commissioned salespersons, the Tribunal stated:

. . . . The *Act* does not require the employer to set out on an employees [*sic*] pay stub the amount of the cheque that goes for vacation pay or statutory holiday pay. Section 27 of the *Act* specifies a number of things that must be set out on a cheque, [*sic*] statutory holiday pay, however, is not one of those items.

16. While it is true that section 27 does not specifically require statutory holiday pay to be set out on a wage statement, my view is that the provisions of this section are broad enough to require such itemization under s. 27(1)(f), which requires the wage statement to indicate "any money, allowance or other payment the employee is entitled to." The Tribunal has stated in other decisions that section 27(1)(f) requires that monies paid for vacation pay be separately itemized on the wage statement: *National Signcorp Investments Ltd.*, BC EST #D163/98; *Phiroze Irani aka Phil Irani operating as Amy's Loonie Toonie Town*, BC EST #D413/01; *British Square Developments Ltd. operating as Polar Bear Painting*, BC EST #D056/99. Similarly, with respect to the importance of informing the employee about the amount of pay to which he or she is entitled for a statutory holiday, the Tribunal held in *Paul Creek Slicing Ltd.*, BC EST #D47/00:

. . . . Not only is [the employee] entitled to know how much he is receiving for each statutory holiday, but also, for the purposes of administering Part 5 of the *Act*, it is important that the statutory holiday entitlement of the employee, and the corresponding obligation of the employer, be readily and easily identified.

17. This passage speaks to the main purpose of the wage statement, which is to require the employer to provide all of the information needed, including monies paid and deductions made, for the employee to ascertain that he or she is being paid the correct amount by the employer. Such requirements support at least two of the broader purposes of the *Act* as outlined in section 2: to ensure employees in British Columbia receive basic standards of compensation and conditions of employment, and to promote the fair treatment of employees and employers.

18. With respect to statutory holiday pay, if an employee did not work on a statutory holiday, but received an average day's pay for that day as required by section 45 of the *Act*, then that pay must be listed under section 27(1)(f). Similarly, if an employee worked on a statutory holiday, then he would be paid in accordance with section 46 and this would have to be shown on the wage statement under section 27(1)(f).

19. In my view, the Delegate's assessment of an administrative penalty on the Employer was not in error.

The Employee's Argument

20. The Employee also argues that the Delegate erred in law. Much of the information he presents takes issue with the findings of fact made by the Delegate or alleged omissions in the Delegate's findings. For instance, the Employee says that the accounting information provided by the Employer contained errors and that he never accepted any of accounting information provided by the Employer; this implies that the Delegate's acceptance of the Employer's accounting information was an error. Like the Employer, it appears the Employee is also inviting the Tribunal to re-hear the case on its merits. As outlined above, the Tribunal's jurisdiction does not extend to such an exercise; further, nothing in the Employee's submission

indicates that the Delegate acted without any evidence or acted on a view of the facts which could not reasonably be entertained.

21. On the other hand, some of the Employee's other submissions merit further consideration – specifically, those that deal with the evidence considered, or not considered, by the Delegate during the hearing. The main thrust of the Employee's argument in this regard is that there were a number of documents relevant to the commissions that he was paid that he says were not presented at the hearing by the Employer. These documents include sales summaries turned in each Monday and Friday for remuneration; phone records for December 7, 2007; sales sheets; payroll summaries; and cancellations and proof of banked sales. The Employee says that he requested these documents before the hearing but was told "there was no mechanism in place to force the delivery of them". The Employee says that he was denied an impartial hearing and natural justice as a result.

22. Although these arguments hint that the Delegate failed to observe the principles of natural justice, I will proceed to consider them as arguments going to a species of error of law, namely the Delegate's exercise of discretion. What the Employee is challenging is the way in which the Delegate carried out the investigation and exercised his powers. The Delegate carried out the investigation under the provisions of section 76(1) and (2):

76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

(2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.

23. Section 85(1) of the *Act* gives the Director the power to require production of records:

85 (1) For the purposes of ensuring compliance with this Act and the regulations, the director may do one or more of the following:

...

(c) inspect any records that may be relevant to an investigation under this Part;

...

(f) require a person to produce, or to deliver to a place specified by the director, any records for inspection under paragraph (c).

24. Under the test outlined in *Britco Structures*, above, the improper exercise of discretion may amount to an error of law. The Employee's arguments regarding the Delegate's exercise of discretion may be restated as follows: by not ordering the disclosure of the daily sales summaries, sales sheets, etc. as listed by the Employee, the Delegate improperly failed to exercise his discretion under section 85(1) to order the Employer to produce or deliver these records.

25. The Tribunal has considered the issue of the extent to which it can interfere in the Director's exercise of discretion. The leading case is *Takarabe et al.*, BCEST #D160/98, which in turn quotes from the foundational case of *Jody L. Goudreau et al.*, BC EST # D066/98:

In [*Godreau*], the Tribunal recognized that the Director is "an administrative body charged with enforcing minimum standards of employment..." and "...is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate." The Tribunal also

set out, at page 4, its views about the circumstances under which it would interfere with the Director's exercise of her discretion in administering the Act:

The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229

Absent any of these considerations, the Director even has the right to be wrong.

26. In *Godreau*, the Tribunal stated the unreasonableness test as whether “the Director has considered immaterial factors or failed to consider material factors.”
27. The Director’s reply submissions simply assert that the Delegate did not err in law and do not specifically address the Employer’s argument about the specific records. The Employer in its reply submission says that all the records and specified in the Demand for Records was provided. There is nothing in the Determination that suggests that the Employer failed to respond to the Demand for Records or otherwise failed to produce any documents that the Delegate deemed necessary for the investigation.
28. Under section 85(1), the Director or his delegate has the discretion to require a person to produce or deliver any records for inspection that may be relevant to an investigation. However, the Delegate is not mandated to require the disclosure of the records to which the Employee refers. Nowhere in the Determination does the Delegate indicate that the Employer failed to produce adequate records or was unresponsive to the demand for records.
29. Although the Employee may vehemently disagree with the Delegate’s decision about what records the Employer was required to produce during the course of the investigation, in my view it would not be correct to interfere with the Delegate’s exercise of discretion in this matter. Nothing in the materials, including the Employee’s submissions, indicates that the Delegate’s decision in this respect was an abuse of process, a mistake by him in construing the limits of his authority, or involved procedural irregularity. There is no indication that the Delegate considered irrelevant factors or failed to consider relevant factors. It appears from the Determination that the Delegate had the records he thought were necessary and relevant for a proper disposition of the complaint. It was not an error of law for the Delegate to exercise his discretion in this fashion.

Conclusion re: Error of Law

30. I conclude that the Delegate did not err in law in the Determination.

New Evidence

31. The Employee also seeks to adduce “new evidence” before the Tribunal. He attaches numerous documents to his submission, including a sales summary sheet, a copy of all cheques received in November 2007, a calculation of actual gross sales and corresponding amounts the Employee was paid, and a calendar of sales for November 2007 that was kept by the Employee. The Employee also submits a list of witnesses, including employees, former employees and others that he wishes to call, presumably before this Tribunal.
32. The burden is on the Employee to establish this basis of appeal. In order for an appeal to succeed on the ground that new evidence has become available, all of the following four conditions must be met before the evidence will be considered:
1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 2. the evidence must be relevant to a material issue arising from the complaint;
 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
 4. the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

(Bruce Davies and others, Directors or Officers of Merilus Technologies Inc., BC EST #D171/03).

33. I have reviewed the evidence submitted by the Employee and conclude that none of the documents would pass the first of the conditions listed above. All the documents could have been discovered and presented to the Director during the investigation or the hearing, as they all predate the Determination and appear to have been available for presentation to the Delegate before the Determination was made. Further, there is nothing to indicate that the witnesses the Employee lists were not available to be interviewed by the Delegate during the investigation or to testify at the hearing. These conclusions render further analysis unnecessary.

Conclusion re: New Evidence

34. I conclude that the evidence attached to the Employee’s submissions cannot be considered by this Tribunal.

Disposition of the Appeals

35. Neither appeal succeeds.

ORDER

36. Pursuant to Section 115 of the *Act*, I order that the Determination dated August 29, 2008 be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal