Employment Standards TRIBUNAL

BC EST # D003/06

An appeal

- by -

Zone Construction Inc.

- 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:	John Savage
FILE No.:	2005A/195
DATE OF DECISION:	January 6, 2006

DECISION

SUBMISSIONS

Jeff Pasechnik, for the Employer, Zone Construction Inc.

Darcy Carruthers, for the Employee

M. Elaine Phillips, for the Director of Employment Standards

OVERVIEW

1. Zone Construction Inc. ("Zone") appeals a Determination of the Director that it contravened the *Employment Standards Act* (the "Act") by failing to pay Darcy Carruthers ("Carruthers") wages including overtime, statutory holiday pay, and annual vacation pay. Wages were found payable in the amount of $2,208.13 and administrative penalties were imposed totaling $2,500.00.

2. The grounds of appeal are that the Director erred in law and that new evidence has become available that was not available at the time of the hearing. On reviewing the submissions of the parties and the Determination of the Director it is clear that no error of law is particularized, rather the issues centre on why Zone did not participate in the hearing before the Director.

3. The submissions of the parties address (1) whether Carruthers was an employee, (2) whether there was a reasonable excuse for Zone not participating in the hearing, and (3) whether new evidence has become available that was not available at the time of the hearing.

4. With respect to the first issue, whether Carruthers was an employee, there is no error of law alleged; only that certain evidence that was not before the Director was not considered. The Director is only required to consider such evidence if there was a breach of natural justice in the circumstances that gave rise to the absence of Zone at the hearing, or if this is new evidence admissible under the limited grounds permitted under section 112 of the Act. In either case if these circumstances are made out the Director would be required to reconsider the issue of whether Carruthers was an employee.

ISSUES

5. Should the proposed evidence of Zone be admitted (1) because there was a breach of natural justice in the circumstances that gave rise to the hearing, or (2) because the evidence should be admitted under section 112 of the Act?

APPEALS UNDER SECTION 112

6. An appeal of the Director's Determination is not a new hearing of the complaint, but a limited appeal that must be founded on an error of law, a breach of natural justice, or the finding of evidence that was not available at the time the determination was made: subsection 112(1) *Employment Standards Act*.

7. With respect to appeals alleging an error of law, this Tribunal has a jurisdiction similar to that of an appellate court. In a number of decisions of the Tribunal, panels have adopted the 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)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:

1. a misinterpretation or misapplication of a section of a statute;
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 methodology that is wrong in principle.

8. This limited form of appeal is to be contrasted with, for example, a hearing de novo which is provided for in some statutes and in the course of which the parties are entitled to produce new evidence unrestricted by the issues at or evidence submitted in earlier proceedings: *Trizec Equities Ltd. v. Assessor of Area No. 10 – Burnaby/New Westminster* (1983), 45 B.C.L.R. 258, 147 D.L.R. (3d) 637.

9. Because of the limited nature of an appeal under the Act, it is incumbent on the parties to produce evidence during the investigation and be present at and produce their evidence at scheduled hearings.

10. A party that fails to produce evidence before the Delegate cannot simply produce evidence during an appeal. For such evidence to be considered an appellant must show either that the failure to produce evidence was due to circumstances giving rise to a breach of natural justice at the original hearing of the complaint or investigation, or because the evidence was not available at the time of the investigation or hearing of the complaint. These matters are considered in this appeal.

BREACH OF NATURAL JUSTICE

Factual Background

11. The Delegate set the Complaint Hearing for July 5, 2005 at 10:00am at the offices of the Employment Standards Branch at Burnaby, B.C. A Notice of Complaint Hearing was sent to Zone addressed to Jeff Pasechnik ("Pasechnik") at 6507 Angus Drive in Vancouver, B.C., and a copy sent to the registered and records office of Zone in Vancouver. According to the Delegate records from Canada Post show that these were successfully delivered June 20, 2005.

12. On the date set for hearing Zone had not appeared by 10:18am. An officer of the Employment Standards Branch telephoned Pasechnik who confirmed that he had received the Notice of Complaint Hearing. Pasechnik informed the officer that he had other meetings to attend he felt were more important for him. As Pasechnik advised the Branch employee that he was not planning to attend at the Complaint Hearing that day, the hearing was held in the absence of Pasechnik who represented Zone.

13. The above facts are recited in the Determination appealed and no issue is taken with them by Zone. Zone provides an explanation of their absence at the hearing.

14. In the Appeal Form the short explanation given by Zone on this issue is that:

> "The complaint hearing set for July 5, 2005 was missed for Business emergencies. I apologize".

15. In its Reply Zone elaborates as follows:

> "Zone Construction feels the need to explain the reason why the original meeting for a complaint hearing set for the date of July 5, 2005 couldn't be attended by us. On that day in the morning we received a phone call from a development company that we sub contracted for, that we either attend an immediate meeting with them to discuss some site related issues or our contract would be terminated. Jeff of Zone Construction made the executive decision that that meeting would priorize over Carruthers, since we couldn't even explain a reason for this meeting".

16. For the purpose of the analysis that follows I have assumed that these are all the relevant facts relating to the absence of Zone at the hearing. These are the only facts brought forward by Zone.

Analysis

17. The phrase *audi alteram partem*, which means hearing both sides fairly, describes the duty to act judicially. The parties to a dispute are entitled to know the case against them and to be heard by, and make submissions to, the decision-maker.

18. Arising out of the duty to act judicially are several rights: the right to notice, the right to be heard (although not necessarily to have an oral hearing), the right to know the case to be met and to answer it, the right to cross-examine witnesses (in appropriate circumstances), the right to counsel, and the right to a decision on the evidence: *D. Jones & A. de Villars, Principles of Administrative Law*, (Toronto: Carswell, 1985) c. 8 at 197-241; *Hundal v. Superintendent of Motor Vehicles* (1985), 32 M.V.R. 197 (B.C.C.A.); *Murphy v. Dowhaniuk* (1986), 22 Admin. L.R. 81 (B.C.C.A.); *R. v. Canada Labour Relations Board* (1971), 18 D.L.R. (3d) 226 (Man. C.A.), *Omineca Enterprises Ltd. v. British Columbia (Minister of Forests)*, [1994] 2 W.W.R. 422, *Re City of Vancouver and Assessment Appeal Board et al.* (1996), 135 D.L.R. (4th) 48.

19. One of the questions in this case is whether Zone was denied a right to be heard.

20. It is clear from the facts described above that Zone received notice of the hearing but chose to attend another meeting in priority to that of the Complaint Hearing. The hearing Zone chose not to attend would have afforded it a full opportunity to be heard.

21. In circumstances such as these, in my opinion, it would have been appropriate for Zone to request an adjournment of the hearing. Failing to consider such a request would be a wrongful: *Pacheco v. Canada (Minister of Employment & Immigration)* (1990), 71 D.L.R. (4th) 762 (FCA).

22. While the decision to grant or refuse an adjournment is a matter of discretion, the adjudicator's decision on an adjournment application cannot be contrary to procedural fairness, the basic question being whether an adjournment is required in order to ensure that the party concerned has a reasonable opportunity in all the circumstances to answer the case: *Yang v. Canada (Minister of Citizenship and Immigration)* (2001), 202 F.T.R. 130 (FCTD).

23. These rights regarding the discretion to adjourn a hearing are not engaged, however, when a party fails to request an adjournment and/or simply fails to appear. In such case it is clear that a tribunal may proceed to hear and determine a matter in the absence of a party: *Powar v. Canada (Minister of Citizenship and Immigration)* (2001), 274 N.R. 360(FCA); *510264 N.B. Inc. v. New Brunswick (Department of Public Safety)* (2004), 710 A.P.R. 175 (NBCA); *Canadian Automated Sprinkler Assn. v. Nova Scotia (Labour Relations Board)* (1974), 11 A.P.R. 36 (NSTD); *R. v. Ontario (Labour Relations Board)* (1970), 13 D.L.R. (3d) 289 (Ont. C.A.).

24. Here, as I have noted, there was no request for an adjournment. The complainant attended at the hearing as scheduled. The Employer did not attend. When telephoned by the Employment Standards Branch the Employer advised they would not attend the hearing.

25. One of the purposes of the provisions of the Act is to provide for "fair and efficient procedures for resolving disputes": subsection 2(d). That purpose is frustrated when parties do not participate in scheduled hearings.

26. It follows, in my opinion, that there was no breach of natural justice in the Delegate proceeding with the hearing after receiving advice from the Employer that the Employer would not attend the hearing *in the absence of a timely request for an adjournment*. In my opinion it is incumbent on a party, in a timely way, to request an adjournment or postponement if it is unable to attend a scheduled hearing or provide information on or by a given date. Accompanying such request should be a reasonably detailed explanation for the reasons the adjournment or postponement is requested. Faced with such a request a Delegate is required to act judicially which may entail granting an adjournment of the hearing to another day.

27. In this case, as I have said, there was no request made for an adjournment. Indeed, it is clear that the Employer had determined that it would not attend the hearing and, but for the telephone call from the Branch, would have simply allowed the hearing to proceed in their absence. It was not a breach of natural justice for the Delegate to have proceeded with the hearing in these circumstances.

RECEIPT OF NEW EVIDENCE

Factual Background

28. As noted above, the Delegate set the complaint for hearing and issued a Notice of Hearing that was received by Zone. Zone elected not to attend the hearing and did not request an adjournment. In its submission on appeal Zone relates its version of events that it says supports a determination that Carruthers was not an employee.

Analysis

29. Subsection 112(1)(c) of the Act provides that a person served with a determination may appeal on the basis that "evidence has become available that was not available at the time the determination was made".

30. With respect the admission of new evidence, subsection 112(1)(c) of the Act requires that the evidence was "not available" at the hearing. For example, if the exercise of due diligence would have revealed the

evidence then such evidence would have been available in the requisite sense: *Triple S Transmission Inc.*, [2003] BC EST #D141/03.

31. Moreover, subsection 112(1)(c) is not intended to allow an appellant dissatisfied with a Determination to simply supplement the evidence led at the original hearing: *Re Merilus Technologies Inc.*, [2003] BC EST #D171/03.

32. In deciding whether the Tribunal should receive new evidence this Tribunal noted in *Re Merilus Technologies Inc.*, [2003] BC EST #D171/03 that it is guided by the factors applied in civil courts for admitting fresh evidence on appeal: (1) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing, (2) the evidence must be relevant to a material issue in the appeal, (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 a material issue.

33. In my opinion the circumstances presented here fail to satisfy the first factor to be considered. The evidence sought to be introduced is simply Zone's version of events concerning Carruthers work. This evidence was available at the time of the hearing but Zone, in choosing not to attend the hearing, chose all the consequences that flow from that, including the consequence of not being present to introduce evidence.

34. A party cannot fail to attend a hearing, or fail to request an adjournment of a scheduled hearing, and then, on appeal, elect to call evidence for the first time under the auspices of subsection 112(1)(c).

35. As the evidence was available at the time of the determination it cannot be adduced for the first time on appeal under subsection 112(1)(c) of the Act. It is therefore unnecessary to consider whether the other requirements of subsection 112(1)(c) have been met.

SUMMARY

36. The evidence proposed to be introduced on appeal cannot be introduced since (1) there was no breach of natural justice in the Delegate proceeding with the hearing in the absence of a request for an adjournment by Zone, and (2) the evidence sought to be introduced was available within the meaning of subsection 112(1)(c) of the Act at the time of the original hearing.

ORDER

37. The appeal is dismissed. Pursuant to Section 115 of the *Act*, the Determination of the Delegate is confirmed.

John Savage
Member
Employment Standards Tribunal