

An appeal

- by -

Venture Riverboats Ltd.
("VRL")

– 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)

and

An application for suspension

- by -

Venture Riverboats Ltd.
("VRL")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2010A/148 & 2010A/149

DATE OF DECISION: January 11, 2011

DECISION

SUBMISSIONS

Alex TeBrinke	on behalf of Venture Riverboats Ltd.
Herman Ensz	on his own behalf
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Venture Riverboats Ltd., (“VRL”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued September 16, 2010.
2. Herman Ensz filed a complaint alleging that VRL had contravened the *Act* by failing to pay him wages and by terminating his employment without notice or compensation for length of service.
3. Following an investigation, a delegate of the Director determined that VRL had contravened Sections 18 and 63 of the *Act* in failing to pay Mr. Ensz wages and compensation for length of service. The delegate determined that Mr. Ensz was entitled to \$5,757.89 in wages and interest. The delegate imposed a \$1,000 penalty on VRL for each of the contraventions, pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).
4. VRL contends that the delegate failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made and seeks to have the Determination varied. VRL also seeks a suspension of the Determination.
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure* provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This decision is based on the written submissions of the parties.

ISSUES

6. Whether the delegate failed to comply with the principles of natural justice in making the Determination.
7. Whether there is new and relevant evidence available that was not available at the time the Determination was being made.

FACTS

8. The following facts, set out by the delegate, are not disputed.
9. Mr. Ensz was employed as an in-house accountant by VRL, a watercraft retail business, from July 2005 until November 30, 2009. Robert Fleck and Alex TeBrinke were the two Directors of VRL.

10. During the first three years of his employment, Mr. Ensz was paid \$4,600 per month. During the last year of his employment, Mr. Ensz and VRL mutually agreed that Mr. Ensz's duties were reduced, along with a commensurate reduction in his wages to \$2,500 per month, because VRL was experiencing financial difficulties. VRL's lease ended November 30, 2009, which coincided with its fiscal year end. On November 4, 2009, VRL and Mr. Ensz agreed that Mr. Ensz would perform additional year end accounting tasks by November 30, 2009, for \$4,500, the amount he had previously been paid for doing that work. On November 30, Mr. Ensz and Mr. Fleck had a verbal confrontation. VRL alleged that Mr. Ensz began deleting records from his computer and that VRL had to engage another accountant to "go through the whole year's entries because the numbers didn't work". Mr. Ensz disputed that assertion, contending that he had prepared taxes, year end accounting, payroll and government filing for several years previously without a problem.
11. VRL contended that Mr. Ensz was to be paid at an hourly rate of \$25.00 and that he did not work the hours to justify payment of \$4,500. It also contended that Mr. Ensz did not perform the tasks outlined in his proposal. Mr. TeBrinke also contended that VRL had to engage another accountant to re-do all the accounting work.
12. Mr. Ensz contended that although the parties discussed an hourly wage when he first became an employee, he was ultimately paid a monthly wage regardless of the hours he worked. Mr. Ensz did not keep track of his hours of work because he was not aware that would become an issue. Mr. Ensz said that he often worked at home or after hours, particularly in November 2009 because the office was noisy due to the activities associated with the move. He said that he had worked at home previously without being questioned about it. Mr. Ensz said that all the work had been completed and was ready for Mr. Fleck's signature on November 30, 2009.
13. The parties agreed that Mr. Ensz had been paid \$1,500 mid month as well as an additional \$776.00 for the month.
14. The delegate held a telephone fact finding conference with Mr. Ensz and Mr. Fleck on July 22, 2010, and issued a preliminary findings letter to the parties on August 5, 2010. The delegate subsequently received a telephone call from Mr. TeBrinke, who advised her that he would submit additional evidence. The delegate received no additional evidence before she issued the Determination.
15. The delegate found that the parties agreed that Mr. Ensz was to be paid a flat amount to perform certain specified tasks. She found no evidence to support VRL's assertion that Mr. Ensz was to be paid an hourly wage or that he was to work a defined number of hours. She also noted that at no time during the fact finding meeting did Mr. Fleck assert that the proposed tasks had not been completed. She also noted that Mr. Fleck never disputed Mr. Ensz's statement that he had been paid a monthly amount during the course of his employment without accounting for his hours of work. The delegate found that Mr. Ensz's hours of work only became an issue during her telephone conversation with Mr. TeBrinke and that no evidence had been produced to support the allegation that Mr. Ensz had not completed the proposed tasks. The delegate also noted, based on email correspondence between the parties, that VRL understood that Mr. Ensz received his pay irrespective of the number of hours worked. The delegate found no evidence to support VRL's assertion that Mr. Ensz did not complete the tasks agreed to. The delegate concluded that Mr. Ensz was entitled to additional wages in the amount of \$2,224.00 plus vacation pay of 4% for a total amount of \$2,312.96.
16. There was no dispute that VRL did not provide Mr. Ensz with any notice that his employment would end November 30, 2009. Mr. Fleck advised the delegate that he had instructed Mr. Ensz to prepare termination

papers for VRL's secretary and assumed that Mr. Ensz would do the same for himself. Mr. Fleck conceded that he had not specifically told Mr. Ensz that his employment was being terminated but asserted that Mr. Ensz ought to have known that because the store was closing and the secretary's employment was also being terminated.

17. Mr. Ensz said that while he was aware the store was being closed, he knew VRL had significant inventory and assumed that there would be continued work in relation to this inventory. Mr. Ensz also said that although he did not specifically ask Mr. Fleck about the inventory, he did ask him what was happening with VRL and whether or not he would be continuing as its accountant. Mr. Ensz said that Mr. Fleck did not give him a definitive response, stating that his employment would continue "somewhere, somehow". Mr. Fleck did not dispute this statement. Mr. Ensz also asserted that he was not made aware of what VRL's future plans were and no one would tell him what was happening. Mr. Fleck conceded that he and Mr. TeBrinke had lost confidence in Mr. Ensz and were unwilling to include him in discussions about the future of the company.
18. Mr. Fleck stated that on November 30, 2009, he became angry with Mr. Ensz because VRL was to be out of the premises by 5:00 p.m. and Mr. Ensz had not yet packed up his office. Mr. Ensz said that he was all packed but for his computer, desk and chair. He had the paperwork ready for Mr. Fleck's signature but Mr. Fleck confronted him and told him to hand over his keys and computer. Mr. Fleck said that Mr. Ensz began to delete things from his computer so he "grabbed it". Mr. Ensz denied deleting anything but his son's schedule and alleged that he was "run out of the office". Mr. Fleck contended that, in any event, he received an email from Mr. Ensz on December 1 indicating that he had another job and did not require "separation papers".
19. The delegate found that VRL had not provided Mr. Ensz with information about the closing of the business generally and that Mr. Ensz had been led to believe that his employment would be continuing in some fashion. Although the delegate found that VRL intended to terminate Mr. Ensz' employment on November 30, 2009, she determined that it had not provided Mr. Ensz with written working notice of the end of his employment contrary to section 63. The delegate concluded that Mr. Ensz was entitled to compensation for length of service in the amount of \$3,341.52.

ARGUMENT

20. VRL argues that the Tribunal should change the Determination. In his appeal submission, Mr. TeBrinke repeats the arguments made to the delegate. Mr. TeBrinke submits that, as the person responsible for payroll and accounting, Mr. Ensz knew the retail location was closing November 30, 2009. It asserts that if Mr. Ensz needed a "letter stating this he could of asked for one" (sic).
21. Mr. TeBrinke also contends that Mr. Ensz was paid for the hours that were recorded. He further argues that if Mr. Ensz had performed the accounting work properly, it would not have been necessary for VRL to engage another accounting firm to complete the work. Mr. TeBrinke also suggests, for the first time on appeal, that Mr. Ensz owes VRL for its accounting costs.
22. VRL also seeks a suspension of the Determination. It alleges that the delegate verbally advised it that she would waive the administrative penalties if VRL paid Mr. Ensz for his outstanding hours of work for November. Mr. TeBrinke says that although it paid the outstanding amount, the delegate nevertheless imposed the penalty. Mr. TeBrinke also asserted that the Determination should be suspended because VRL had good reason not to pay Mr. Ensz in full.
23. The delegate contends that the appeal is without merit and seeks to have it dismissed.

24. The delegate contends that there was no denial of natural justice. She says that VRL actively participated in the investigation from January 2010 until September 2010 and has not indicated how it was denied natural justice. The delegate notes that, in her preliminary findings letter, she explained that although VRL had voluntarily paid some outstanding wages, Mr. Ensz was entitled to additional wages. In that letter, the delegate set out the outstanding amounts and indicated the penalty that would be imposed should the issue not be resolved voluntarily.
25. The delegate says that the “new evidence” submitted by VRL consists of two invoices and a letter from an accounting firm relating to VRL’s argument about the amount of wages owed to Mr. Ensz. The delegate says that she received this information by fax the day after Mr. TeBrinke received the Determination. She says that she reviewed the information carefully and notes that both documents were made well before the Determination was issued. She also submits that the evidence would not have changed her decision had she received it prior to issuing her Determination in any event. She said that VRL agreed to pay Mr. Ensz \$4,500 for the month of November and did not, in contravention of Section 18 of the *Act*. She says that although VRL attempted to justify non payment of Mr. Ensz’ wages based on the alleged errors, VRL is not relieved of its obligation to pay Mr. Ensz his salary because of any errors he may have made.
26. The delegate submits that VRL’s submissions on Mr. Ensz’ compensation for length of service is merely a re-argument of its original position and that her analysis on this point was clear.

ANALYSIS

27. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made
28. The essence of VRL’s appeal is that the Determination is wrong. A disagreement with the result, in and of itself, is not a ground of appeal, nor is an appeal an opportunity to re-argue a case that has been advanced before the delegate. An appellant must show clear and convincing reasons why the Tribunal should interfere with the delegate’s decision on one of the three stated grounds of appeal.
29. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. VRL does not say how it was denied the opportunity to present its case or to respond fully to Mr. Ensz’s complaint. The record shows that Mr. Fleck and Mr. TeBrinke participated fully and were given many opportunities to respond to the documentation.
30. In his suspension request submissions, Mr. TeBrinke asserts that the delegate told him that she would “waive” the administrative penalty if VRL paid the balance of Mr. Ensz’s wages. As the delegate made clear in her preliminary findings letter of August 5, 2010, VRL was offered the opportunity to voluntarily pay outstanding wages in the amount of \$3,640.00 to avoid the administrative penalty. Those wages were not paid in full. I find no failure to comply with natural justice in this circumstance.

31. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
32. Although VRL's appeal submission is essentially a re-argument of its initial position and does not assert an error of law, I have nevertheless carefully reviewed the delegate's analysis on the issues of Mr. Ensz's compensation for length of service and wages with a view to determine whether or not she erred in her analysis.
33. Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. Section 63(2) (a) provides that the liability is deemed discharged if the employee (a) is given **written** notice of termination, (b) is given a combination of written notice under subsection (3)(a) and money equivalent to the amount the employer is liable to pay, or(c) terminates the employment, retires from employment, or is dismissed for just cause. (my emphasis) There is no evidence, nor did VRL assert, that it gave Mr. Ensz written notice of his termination. Mr. Ensz asked for but did not receive any indication of the employer's plans for his continued employment. There is no merit to VRL's assertion that it was up to Mr. Ensz to terminate himself, or to ask for a written notice of termination in these or any other circumstances.
34. There is no dispute to the delegate's finding that VRL agreed to pay Mr. Ensz \$4,500 for the month of November, 2009. I find no error in the delegate's conclusion that this pay was not based on a specified number of hours of work. VRL cannot now say that it withheld wages for Mr. Ensz's alleged "mistakes". Even if Mr. Ensz made some bookkeeping or accounting errors, the proper course for the employer to take would be to warn Mr. Ensz that his employment was in jeopardy for failing to meet certain standards. There is no authority for VRL to withhold wages.
35. I find no error of law in the delegate's analysis.

New Evidence

36. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- 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;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - the evidence must have high potential 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.

37. The “new evidence” asserted by VRL consists of a letter dated August 25, 2010, and two invoices, dated March 12 and April 15, 2010, from the accounting firm engaged after Mr. Ensz’ employment was terminated. All of this “new evidence” was available during the time of the investigation and in fact, promised to the delegate. As such, it does not constitute “new evidence”. However, even if it had been provided to the delegate prior to the issuance of the Determination, I am not persuaded that it would have led to a different conclusion on the material issue of whether or not Mr. Ensz was entitled to wages. The firm’s letter indicates that it noted “numerous errors in the files submitted”. Not only is it unclear what files the accounting firm is referring to, even if Mr. Ensz created those errors, VRL had no authority to make deductions from his wages.
38. I find no basis for this ground of appeal.
39. The appeal is dismissed.

Request for Suspension

40. Section 113 of the *Act* provides that a person who appeals a determination may request the Tribunal to suspend the effect of the determination. The Tribunal may suspend the determination for the period and subject to conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either the total amount to be paid under the determination or a smaller amount the Tribunal considers adequate.
41. VRL’s reasons for seeking the suspension are that the delegate verbally advised it that she would waive the administrative penalties if VRL paid Mr. Ensz for his outstanding hours of work for November and because VRL had good reason not to pay Mr. Ensz in full.
42. VRL deposited no money or security for the unpaid wages with the suspension request. Furthermore, the reasons for requesting the suspension were largely subsumed in the grounds for the appeal proper. In light of my decision to dismiss the appeal and for the reasons set out above, I decline to suspend the effect of the Determination.

ORDER

43. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated September 16, 2010, be confirmed, together with whatever interest that has accrued since that date.

Carol L. Roberts
Member
Employment Standards Tribunal