

An appeal

- by -

Power Pacific Poles (2006) Inc.
("PPP06")

- 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: David B. Stevenson

FILE No.: 2008A/114

DATE OF DECISION: January 14, 2009

DECISION

SUBMISSIONS

Harri Rauma on behalf of Power-Pacific Poles (2006) Inc.

Sherri Wilson on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Power-Pacific Poles (2006) Inc (“PPP06”) of a Determination that was issued on August 29, 2008 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that PPP06 had contravened Part 7, Section 58 of the Act in respect of the employment of six former employees (the “complainants”) and ordered PPP06 to pay the complainants an amount of \$4,289.68, an amount which included both wages and interest.
2. The Director also imposed administrative penalties on PPP06 under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$500.00.
3. The total amount of the Determination is \$4,789.68.
4. PPP06 has filed an appeal of the Determination, alleging the Director failed to observe principles of natural justice in making the Determination and has asked that the Determination be varied or cancelled. The central assertion upon which the appeal is based is that the Director erred in assigning any wage liability to PPP06.
5. PPP06 has also requested a suspension of the Determination pending the outcome of the appeal, but has not provided any reasons supporting that request.

ISSUE

6. The issue is whether the Director failed to observe principles of natural justice or committed any other reviewable error in making the Determination.

THE FACTS

7. PPP06 operated a steel pole manufacturing plant in Squamish. The complainants filed complaints with the Director saying they had been employed by PPP06 for varying periods ranging from late May or early June 2007 until early October 2007 and had not been paid all of the wages owed to them. The Determination finds each of the complainants’ period of employment occurred within that late May, early June to October time frame.
8. Prior to their employment with PPP06, each of the complainants had been employed by another company, called Power-Pacific Poles Ltd. That company went bankrupt in April 2007 and a receiver was appointed for that company. In June 2007, the receiver and PPP06 concluded an agreement that allowed PPP06 to

operate Power-Pacific Poles Ltd.'s manufacturing plant for a period of up to three months, ending August 31, 2007. The documents in the section 112 record indicate that PPP06 defaulted on that agreement and it was subsequently replaced by another agreement with the Court appointed receiver which is dated August 21, 2007. Essentially, this agreement continued to allow PPP06 to operate the manufacturing plant for an undefined period of time on the terms set out in the agreement. The agreement continued until early October 2007, when the Court appointed receiver closed the doors of the plant. The agreement was signed on behalf of PPP06 by Rick Cox, who appears to have been a *de facto* director of PPP06¹. According to the appeal submission, Cox was the sole signing officer for PPP06's corporate account.

9. In early June 2007, PPP06 offered each of the complainants employment for a fixed term, "commencing June 1, 2007 and ending August 31, 2007" and each of the complainants accepted that employment. The term of each complainants' employment with PPP06 was extended for an additional period of time – based on the agreement between the Court appointed receiver and PPP06 – and continued until the doors of the plant were closed in October.

ARGUMENT

10. Mr. Rauma, who is listed as a director of PPP06, says the "determination of the Director of Employment Standards is incorrect in the assignment of liability of any purported outstanding amounts owing to past employees of Power-Pacific Poles (2006) Inc. and the predecessor Power-Pacific Poles Ltd. which was adjudged bankrupt May 24th, 2007." He submits the termination of the agreement between PPP06 and the receiver also terminated the fixed term employment agreements and the employment of the complainants. The appeal is not clear on when this cancellation occurred, but based on information in both the section 112 record and the appeal, it appears to have occurred in late July or early August, 2007.
11. Mr. Rauma says that after those fixed term employment agreements were cancelled, the complainants went to work for another entity, Annacis Enterprises Ltd., under the direction of the president of that company Dean Dricos, who was also at one time a director of Pacific-Power Poles Ltd.
12. The Director says the information provided and contained in the section 112 record is an accurate record of the investigation. It shows the complainants were on the payroll of PPP06 during the period covered by the Determination for each of the complainants, that Mr. Rauma provided this information during the investigation, also indicating he had provided a T4 to each complainant and copied CRA with that information.
13. In response to the director's submission, Mr. Rauma says, in part, that even though he provided the information, he also explained that he was not personally involved in the production of any labour related documentation or in the work being done by the complainants.

¹ While there are documents in the section 112 record relating to the formal appointment of Mr. Cox as a director of PPP06 and the filing of that appointment in the Registry of Companies, there is no indication those documents were completed or filed.

ANALYSIS

14. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
- 112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was made.*
15. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.
16. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03).
17. PPP06 has grounded this appeal in the allegation that the Director failed to observe principles of natural justice in making the Determination. As the Tribunal said in *Imperial Limousine Service Ltd.*, BC EST #D014/05:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST #D050/96).
18. Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).
19. There are no submissions in the appeal specific to this ground and no evidence that PPP06 was not provided an opportunity to know the position being taken by the complainants and given an opportunity to respond. I find that PPP06 has not met the burden of demonstrating on a balance of probabilities that the Director failed to observe principles of natural justice in making the Determination.
20. At its core, however, this appeal is not about principles of natural justice at all, but is about a disagreement by PPP06 with the conclusion reached by the Director that the complainants were employees of PPP06 for the full period covered by the Determination.

21. There are several difficulties for Mr. Rauma in this appeal based on review of the Determination and the section 112 record.
22. First, the August 21, 2007 agreement between PPP06 and the Court appointed receiver, signed by Mr Cox, specifically states that any employees engaged in the operation of the manufacturing plant shall be under contract to PPP06.
23. Second, the definition of employee in section 1 of the *Act* includes “*a person, including a deceased person, receiving or entitled to wages for work performed for another*”. There is no issue that the complainants worked and were entitled to wages. The issue raised by Mr. Rauma is whether they worked for PPP06. However, while Mr. Rauma says the complainants were not employed by PPP06 after the end of July 2007, he seems to accept that Mr. Cox had assumed control over PPP06, was a *de facto* director of PPP06 and “dealt exclusively with Dricos in all matters pertaining to the employees”. The material indicates the work done by the complainants was done for PPP06.
24. Third, Mr. Rauma makes assertions of fact that are not consistent with the information in the section 112 record. For example, he says the agreement that replaced the June 2007 arrangement was between the Court appointed receiver and Mr. Dricos. The section 112 record contains a copy of that agreement; it is dated August 21, 2007 and is between the Court appointed receiver and PPP06; Mr. Cox signed on behalf of PPP06. Mr. Rauma also says Mr. Dricos “assigned duties, recorded and paid wages and took all liability of the operation of the premises”. This assertion is not borne out by an examination of the documents which set out the terms on which the manufacturing plant would be operated. Those documents clearly indicate that PPP06 had the primary responsibility for the employment of the complainants and that the complainants were performing work belonging to PPP06.
25. Mr. Rauma has not shown the Director erred in finding the complainants were employees of PPP06 during the period covered by their respective complaints and the appeal is dismissed.

ORDER

26. Pursuant to Section 115, I order the Determination dated August 29, 2008 be confirmed in the amount of \$4,789.68, plus any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal