

An appeal

- by -

M.V. Usher 2003 Corporation 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

**TRIBUNAL MEMBER:** John Savage

**FILE No.:** 2004A/180

**DATE OF DECISION:** January 13, 2005

## DECISION

### SUBMISSIONS

Michael V. Usher, for appellant MV Usher 2002 Corporation Inc.

Joe LeBlanc, for the Director of Employment Standards.

Rita Gluns, Chelsie Krell, Sunni Shular, Ian Shular, John Tierney, representing themselves.

### INTRODUCTION

This is an appeal from a determination of a Delegate of the Director that wages are owing Rita Gluns, Chelsie Krell, Sunni Shular, Ian Shular and John Tierney (the “Employees”) in the amount of \$10,492.45 by their employer, MV Usher 2002 Corporation Inc. (“Usher”).

Usher operated a R.V. repair and conversion business in Golden B.C. The Employees were employed in various positions at the business from July 2002 through October 2002.

At the end of October 2002 the business closed and the president of the company, Mr. M.V. Usher, precipitously left Golden and eventually relocated out of province.

The Delegate of the Director interviewed and received information and documents from the various employees who made complaints shortly after the business closed. As Mr. Usher could not be found his explanation was late coming.

On September 15, 2004 the Delegate finally contacted Mr. Usher and received his explanation which conflicted with that of the complainants. Mr. Usher did not want to attend an oral hearing and did not supply any payroll records.

On September 16, 2004 the Delegate issued his Reasons for Determination and Determination finding wages owing.

A late submission was received from the Respondents but has not been considered.

The Tribunal has determined that this appeal will be decided based on the written submissions received from the parties.

### APPEAL JURISDICTION

An appeal of the Directors decision is made pursuant to subsection 112(1) of the *Employment Standards Act*, R.S.B.C. 1996, Chap. 113:

- 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.

An appeal is not a hearing de novo but is based on the record before the Delegate which is filed with the appeal.

Subsection 115(1) of the *Act* states:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

## ISSUE

Did the Director err in law or fail to observe the principles of natural justice in making the determination?

## DISCUSSION

As noted in the Reasons for Determination, Usher did not dispute before the Delegate of the Director that some wages and vacation pay was owing to the complainants.

In Mr. Usher's written submission of December 5, 2004 to this Tribunal he says that "I am not denying that there is some wages owed".

Much of Mr. Usher's submission addresses his own personal circumstances, questions regarding why the business failed, and who should be held responsible for that failure. Answers to those questions are not germane to the issue of whether wages are owed by the company to the employees.

With respect to Rita Gluns, the Delegate of the Director found that wages are owing in the amount of \$1266.76. That was based on an NSF cheque signed by Mr. Usher in the amount of \$1079.40 plus unpaid vacation pay. Mr. Usher said this was a blank cheque for parts that he had signed in advance. That is disputed by Rita Gluns. The Delegate preferred the evidence of Rita Gluns which was substantiated by other employees who also received NSF cheques.

With respect to Ian Shular, the Delegate of the Director found that wages are owing in the amount of \$4661.35. That was based on two NSF cheques signed by Mr. Usher in the amounts of \$1803.32 and \$2272.97 plus vacation pay. Mr. Usher argues that this is not owing because Ian Shular took a truck and went to Florida and "blew \$10,000.00 at strip clubs and bars". That is disputed by Shular and others who described this trip as a business trip to promote the company. The Delegate preferred the evidence of Ian Shular which was substantiated by some of the other employees.

With respect to Sunni Shular, the Delegate of the Director found that wages are owing in the amount of \$2212.76. That was based on an NSF cheque for \$1923.33 plus vacation pay. Mr. Usher argues that

Sunni Shular was a volunteer and not an employee. The NSF cheques, however, indicates that Sunni Shular was paid as an employee. The Delegate preferred the evidence of Sunni Shular to that of Mr. Usher.

With respect to John Tierney, the Delegate of the Director found that wages are owing in the amount of \$1175.79. That is not disputed by Mr. Usher, however, he claimed that \$700 was owing on tools which was being taken from his payroll. Mr. Usher produced no payroll records or assignment of wages. The Delegate preferred the evidence of John Tierney.

With respect to Chelsie Krell, the Delegate of the Director found that wages are owing in the amount of \$1175.79. It is not disputed by Mr. Usher that some money is owned Chelsie Krell, but he disputed the amount saying that she quit. Chelsie Krell acknowledges that she quit, but claimed this amount as being owned prior to her quitting her employment. The Delegate of the Director preferred the evidence of Chelsie Krell.

As I have noted, the Delegate of the Director heard the evidence of the employees. Prior to rendering a decision, the Delegate contacted Mr. Usher who gave an explanation which was inconsistent with the evidence of the employees. Mr. Usher produced no documents that supported his position. Faced with the issue of credibility the Delegate preferred the evidence of the employees to that of Mr. Usher.

Issues of credibility and the weight to be given evidence are questions of fact, not law: *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998), 62 B.C.L.R. (3d) 354 (C.A.); *Re Britco Structures Ltd.*, [2003] B.C.E.S.T.D. No. 260 (QL), BCEST #D 260/03.

In this case the Delegate decided the issue of credibility without holding a hearing but based on his interviews with the parties. In such a case has there been a breach of natural justice? Without the cross-examination of witnesses could any finding on credibility be reliably made?

Section 77 of the *Employment Standards Act* sets out the Director's statutory obligation:

77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond. 1995, c. 38, s. 77.

In my opinion in the circumstances of this case it was unnecessary to hold an in person hearing. As I have noted, immediately following the cessation of business, the principal of Usher, Mr. M.V. Usher, left the jurisdiction. He was not located for some years. When interviewed about the allegations he gave his version of events which was contradicted by several complainants. Issues of credibility can be decided in a number of ways as noted by the Court in *Faryna v. Chorny*, [1952] 2 D.L.R. 354:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried the conviction of the truth. The test must reasonably subject the story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical and informed person would readily recognize in that place and those circumstances.

In my opinion the Delegate did not err in law or breach any principle of natural justice in making the findings he made.

**SUMMARY**

The Delegate did not err in law or breach any principle of natural justice.

The appeal is dismissed.

The Determination of the Delegate of the Director is confirmed.

**ORDER**

I Order, pursuant to section 115 of the Act, that the Determination, issued September 16, 2004, be confirmed.

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**John Savage**  
**Member**  
**Employment Standards Tribunal**