Employment Standards TRIBUNAL

An appeal

- by -

Technotrash Recycling British Columbia Ltd.
("Technotrash")

- 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: Shafik Bhalloo

FILE No.: 2008A/146

DATE OF DECISION: January 16, 2009

DECISION

OVERVIEW

1. Technotrash Recycling British Columbia Ltd. ("Technotrash") originally appealed a Determination of the Director of Employment Standards (the "Director") issued on August 15, 2008 (the "Determination"). The Director's delegate determined that Technotrash contravened the *Act* by failing to pay its former employees, Jennifer Misener ("Misener") and Trevor Salembier ("Salembier") (collectively the "Employees"), wages in the amount of $1,920.00, annual vacation pay in the amount of $135.10, overtime pay in the amount of $120.00, compensation for length of service and vacation pay in the total amount of $1,337.71 and ordered Technotrash to pay the Employees the said amounts plus interest of $151.81 thereon pursuant to Section 88 of the *Act*.

2. The Determination also imposed two administrative penalties of $500.00 each on Technotrash pursuant to Section 29(1) of the *Employment Standards Regulation* ("*Regulation*") for the latter's contravention of Section 18 of the *Act* and Section 46 of the *Regulation*.

3. Technotrash, through one of its directors and officers, Mr. Robert John Hazel ("Hazel"), appealed the Determination pursuant to Section 112(1)(c) of the *Act* on the basis that evidence had become available that was not available at the time the Determination was being made. While Technotrash did not formally raise any other ground of appeal, I found Technotrash's submissions also pertained to the natural justice ground of appeal and I considered the said ground of appeal in my decision.

4. In my decision in the Appeal, I found the delegate properly afforded Technotrash the opportunity to know and respond to the case against it and I was not satisfied that there was any merit in the submissions of Technotrash that challenged or questioned the Determination on the said ground of appeal and therefore, I dismissed the natural justice ground of appeal.

5. With respect to the new evidence ground of appeal, I noted that Technotrash submitted in the Appeal as new evidence copies of two cheques dated November 1, 2007, each in the amount of $769.69 and payable to the Employees. These cheques appear to have been negotiated at a financial institution. While Technotrash did not provide any explanation in its submissions why these cheques could not, with the exercise of due diligence on its part, have been discovered and presented to the delegate during the investigation of the Employees' complaints and prior to the Determination, I decided to allow or consider the cheques in the Appeal because of the unusual circumstances of the case. In particular, the delegate, during the investigation of the Employees' complaints leading to the Determination, was lead to believe, on the basis of the Employees' payroll documents, that the cheques in question represented wages for the Employees for the period of employment ending October 15, 2007. However, the Employees, in their appeal submissions, admitted that the cheques constituted payments of compensation for length of service. This admission by the Employees sufficiently persuaded me that the Director's calculation and award pertaining to compensation for length of service and interest in the Determination should be reconsidered. In my view, Technotrash should have been credited for the amounts indicated in the cheques in question against its obligations to the Employees for compensation for length of service in the Determination. Accordingly, pursuant to Section 115(a) of the *Act*, I referred the matter back to the Director with specific instructions to provide Technotrash credit for the cheque payments of $796.69 to each employee against the amounts determined owing to them and to recalculate the interest award in the Determination.

6. In a referral back report dated December 11, 2008 ("the Report"), the Director complied with my instructions and credited Technotrash for the cheque payments to each employee and recalculated the interest award in the Determination as well.

7. Neither Misener nor Salembier have replied to the Report, although they were afforded an opportunity to do so. As a result, I find no basis to interfere with the delegate's calculations in the Report.

ORDER

8. I order, pursuant to Section 115 of the *Act*, that the Determination dated August 13, 2008, as varied by the Director's Report, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal