



An appeal

- by -

Darya Construction Inc.
("Darya")

- 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.: 2012A/147

DATE OF DECISION: February 5, 2013

DECISION

SUBMISSIONS

Majid Mojahed

on behalf of Darya Construction Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Darya Construction Inc. (“Darya”) has filed an appeal of a determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on November 2, 2012 (the “Determination”).
2. The Determination found that Darya had contravened Part 3, section 18, Part 5, section 45 and Part 7, section 58 of the *Act* in respect of the employment of Sam Mousavi (“Mr. Mousavi”) and Parvaneh Azizi (“Ms. Azizi”) (collectively the “Complainants”), and ordered Darya to pay them a total of \$17,434.45, an amount that included wages and interest under section 88 of the *Act*.
3. The Director also imposed administrative penalties on Darya under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$2,000.00 for contraventions of sections 17, 18, and 45 of the *Act*, as well as section 46 of the *Regulation*.
4. The total amount of the Determination is \$19,434.45.
5. In its appeal, Darya alleges that new evidence has become available that was not available at the time the Determination was made and seeks to have the matter referred back to the Director for further consideration based on the purported new evidence.
6. Having said this, I note that Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) and section 114 of the *Act*, both of which are substantively similar in terms, delineate identical circumstances in which the Tribunal may dismiss all or part of an appeal without seeking submissions from the concerned parties. I have decided that this appeal is an appropriate case for consideration under Rule 22 of the *Rules* and section 114 of the *Act* and, accordingly, I will assess the appeal based solely on the Reasons for the Determination, Darya’s written submissions, and my review of the section 112(5) “record” that was before the Director when the Determination was being made.
7. If the Tribunal is satisfied that the appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114 of the *Act* or Rule 22 of the Tribunal’s *Rules*, the Tribunal may invite Ms. Azizi, Mr. Mousavi, and the Director to file a reply submission on the appeal, and Darya will be given an opportunity to make a final reply to those submissions, if any.

BACKGROUND

8. The Complainants filed a complaint under section 74 of the *Act* alleging that their former employer, Darya, which operates a construction business, failed to pay them wages for work they performed for Darya during September 2011 to January 2012 (the “Complaint”). In support of their allegations, the Complainants submitted copies of their job offer letter setting out their hours of work, rate of pay, and timesheet requirements; amended job offer letter; copies of timesheets signed by the employee and employer; wage

statements and, in the case of Mr. Mousavi, a letter reassigning him to a related company called Treasure Gallery as of January 5, 2012.

9. During her investigation of the Complaint, the delegate made several attempts to contact and obtain information from Darya starting with her initial call on March 20, 2012, to Darya's office, but the telephone number was out of service. She then called Majid Mojahed ("Mr. Mojahed"), one of the directors of Darya, on his mobile phone and informed him of the Complaint. Mr. Mojahed, during that telephone call, advised the delegate that his cellular phone number was the best number to contact him at and he also confirmed that Darya employed the Complainants and owed them wages. He further advised the delegate that he had an arrangement or a deal with the Complainants that they would get paid after all work was completed and when Darya received payments on the projects. Mr. Mojahed ended the call advising the delegate that he would fax her all documentation pertaining to the Complainants, including their hours worked, wages paid and wages owed to them.
10. The delegate called Mr. Mojahed again on March 23, 2012, and inquired about the records pertaining to the Complainants she had previously requested and which he advised he would send to her. Mr. Mojahed indicated to the delegate that his accountant was preparing them and he would send them to her via fax before the end of business that day. He also agreed to discuss the records with the delegate on the following Monday. However, Mr. Mojahed did not send the delegate the promised records. As a result, on March 27, 2012, the delegate once again telephoned Mr. Mojahed, but she was unsuccessful in contacting him via telephone. She resorted to leaving him a voice message requesting that he call her by the end of business that very day. When she did not receive a response from him, she phoned him again on March 29 and April 3, 2012, and both times left voice messages for him.
11. On April 3, 2012, the delegate also sent an email to Mr. Mojahed's email address attaching the Complainants complaints. In the same email, she confirmed a previous telephone discussion with Mr. Mojahed wherein he indicated that each of the Complainants was owed wages. She also repeated her request for payroll documents pertaining to the Complainants and asked that Mr. Mojahed send these to her by April 10, 2012.
12. On April 5, 2012, the delegate sent yet another email to Mr. Mojahed attaching the documents or evidence of the Complainants. In the same email, she confirms a telephone call with Mr. Mojahed that morning and his advice to the delegate that he would respond to the allegations and evidence of the Complainants by April 9, 2012.
13. The delegate again telephoned Mr. Mojahed on April 10, 2012, after she did not receive the payroll records she had requested on April 9, 2012. In her telephone call with Mr. Mojahed, she informed him that she had not received the documents that he had agreed to send her and indicated that she would be sending him a formal Demand for Records on the next business day. Mr. Mojahed then assured her that the records would be sent to her by April 16, 2012. When the delegate requested the name of Mr. Mojahed's accountant, who was purportedly preparing the record or documents, Mr. Mojahed was unable to provide the accountant's name and refused to provide the accountant's telephone number.
14. The delegate then issued a Demand for Records on April 11, 2012 (the "Demand") and sent it via registered mail to Darya's office and by email to Mr. Mojahed. The Demand required production of the payroll records no later than April 20, 2012. However, the registered mail was returned unclaimed and Mr. Mojahed did not provide the requested records by the deadline.
15. Subsequently, on April 24, 2012, the delegate left a voice-mail message for Mr. Mojahed advising him of the penalty that would be assessed for failure to produce the payroll records requested in the Demand, and

further advised that the investigation of the Complaint would continue without Darya's records. On the same date, in the evening, Mr. Mojahed left a voice-mail message for the delegate advising that no payroll or employment records existed for the Complainants and asked the delegate to contact him. The delegate obliged and called him the following day, and was forced to leave a voice-mail message for him. A few days later, on April 27, 2012, Mr. Mojahed contacted the delegate and advised her that his accountant had sent all the records and information to him via email, but his email account, where he stored the records and information, was hacked and he no longer had the information she wanted. However, he advised the delegate that his accountant's records confirmed that the Complainants were paid in full. When asked by the delegate why he had not previously provided the records, Mr. Mojahed responded that it was the Complainants who had the burden of proving that they were owed wages. In the same conversation, the delegate notes that Mr. Mojahed acknowledged having received the Demand for Records from her and he was aware when the records were due.

16. On May 18, 2012, the delegate sent a registered letter to the business address of Darya and to the home addresses of Mr. Mojahed and the second director of Darya, Azam S. Tousi ("Ms. Tousi"). The delegate also emailed the same letter to Mr. Mojahed. The letter delineated, in detail, the Complainants' complaints and the amount each claimed. The letter also set out that a written decision would be issued based solely on the available evidence and asked Darya to respond to the delegate by May 31, 2012, with any evidence. The delegate did not hear from Darya or its directors by May 31, 2012, and the delegate went ahead and issued the Determination on November 2, 2012, based on the evidence of the Complainants.

SUBMISSIONS OF DARYA

17. Mr. Mojahed, on behalf of Darya, contends that he now has "supporting evidence that was not available when the determination was made". He then goes on to delineate his "story", stating that both of the Complainants were offered employment by him and the positions they were offered "were not posted and were not real". Darya, he states, was not actively doing business and did not need employees, but he hired them "simply to make the office look busy in case there was an opportunity for contracts".
18. Mr. Mojahed also submits that the letters of employment and timesheets were issued by him to the Complainants so they could use them "in seeking employment elsewhere". He further submits that the documentation setting out the precise agreement between Darya and the Complainants was taken by Mr. Mousavi. He also alleges that if one looks at the timesheets they produced in their complaints, they were all prepared "in one day". He also submits that the Complainants did not work the hours they claimed they did.
19. Mr. Mojahed also attaches the Small Claims' Notice of Claim filed July 23, 2012, by Mr. Mousavi against Darya, as well as an amended Notice of Claim in that very action filed on October 17, 2012, and he contends that in that claim, Mr. Mousavi indicates he worked until September 2011 and then was away on sick leave for two (2) months. He states that this is inconsistent with the evidence in Mr. Mousavi's complaint before the Employment Standards Branch. I note that the same pleading that Mr. Mojahed relies upon, also contains, under the heading "Description", a claim by Mr. Mousavi for unpaid salary from September 1, 2011, to February 3, 2012.
20. Mr. Mojahed is also seeking to bring a witness by the name of Mr. Shahidi, who, allegedly, has an audio recording of a conversation with Mr. Mousavi in which the latter purportedly admitted that no wages were owed to him from Darya.

ANALYSIS

21. In *Re: Merilus Technologies Inc.* (BC EST # D171/03), the Tribunal, in deciding whether to accept fresh evidence on appeal of a determination, was guided by the test applied in civil courts for admitting fresh evidence on appeal. The Tribunal went on to describe the test as follows:
- (a) 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;
 - (b) The evidence must be relevant to a material issue arising from the complaint;
 - (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) 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.
22. It should be noted that the four (4) criteria above are a conjunctive requirement and, therefore, the party requesting the Tribunal to admit new evidence has the onus to satisfy each of them before the Tribunal will admit the new evidence.
23. As indicated by this Tribunal in *Re: 607470 B.C. Ltd. c.o.b. Michael Allen Painting* (BC EST # D096/07), new evidence cannot arise as a result of a party turning a blind eye to telephone calls and correspondence from the delegate during the investigation stage of a complaint and adducing evidence that was otherwise available to it.
24. In the case at hand, I am not satisfied that Darya has met the first criterion in *Re: Merilus Technologies Inc., supra*, for adducing new evidence on appeal. More specifically, I find that the evidence that Mr. Mojahed, on behalf of Darya, wishes to now adduce as new evidence is not evidence that could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or during the adjudication of the Complaint and prior to the Determination being made. There were numerous attempts by the delegate to obtain the evidence of Darya and numerous chances afforded to Darya to presents its “story” during the investigation of the Complaint, but Darya failed to diligently participate in the investigation. This is clearly a case of an appellant sitting in the weeds, failing or refusing to cooperate with the delegate in providing its evidence and later filing an appeal of the Determination when it disagrees with it. As indicated by the Tribunal in *Tri-West Tractors Ltd.* (BC EST # D268/96), while the Tribunal will not foreclose any party from bringing forward evidence in support of their case, it will not allow the appeal procedure to be used to make the case that should have, and could have, been made during the investigative process.
25. Having concluded that Darya fails on the first criterion in *Re Merilus Technologies Ltd., supra*, I need not review the evidence in context of the balance of the criteria. However, I feel compelled to add, based on what little evidence Mr. Mojahed gave to the delegate during the investigation when he admitted to owing wages to the Complainants, that the evidence on appeal raises issues of credibility and I do not find the evidence to be reasonably capable of belief.
26. I also add that Mr. Mojahed and Darya have not explained why the evidence of the witness, Mr. Shahidi, was not presented during the investigation of the Complaints or what efforts Mr. Mojahed or Darya made, if any, to present Mr. Shahidi’s evidence to the delegate during the investigation. It is not appropriate for the appellant to now seek out a witness at the appeal stage and present the evidence of that witness for the first

time. The time for presenting its full case was during the investigation of the Complaints and Darya failed to do that.

27. In the circumstances, I find that Darya's appeal has no reasonable prospect of succeeding.

ORDER

28. Pursuant to subsection 114(1)(f) of the *Act* I dismiss this appeal on the ground that there is no reasonable prospect that it will succeed. Accordingly, the Determination, dated November 2, 2012, is confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal