Employment Standards TRIBUNAL

An appeal

- by -

Central Island Towing Ltd.
("Central Island")

- 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: David B. Stevenson

FILE No.: 2004A/196

DATE OF DECISION: January 20, 2005

DECISION

SUBMISSIONS

Mark Kusznir	on behalf of Central Island Towing Ltd.
Michael Winbow	on his own behalf
Robert D. Krell	on behalf of the Director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Central Island Towing Ltd. ("Central Island") of a Determination that was issued on October 8, 2004 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Central Island had contravened Part 3, Section 18 of the *Act* in respect of the employment of Michael Winbow ("Winbow") and ordered Finn to pay Winbow an amount of $3,159.15.

The Director also imposed an administrative penalty on Central Island under Section 29(1) of the *Employment Standards Regulation* (the *"Regulations"*) in the amount of $1500.00. The total amount of the Determination is $4,659.15.

In this appeal, Central Island says the Director failed to observe principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was being made.

The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

The issue in this appeal is whether Central Island has shown there is an error in the Determination that allows or justifies the Tribunal's intervention under Section 115 of the *Act*.

THE FACTS

Central Island operates a vehicle towing business in Nanaimo, BC. Winbow was employed by Central Island as a driver from March 24, 2004 to June 1, 2004.

Following the termination of his employment, Winbow claimed he was owed wages by Central Island. Winbow argued, relying on the definition of "work" in Section 1 of the *Act*, that he was entitled to be paid at least minimum wage for 24 hours on each day he was required to be available for work. Alternatively, Winbow claimed he was regularly required to work in excess of 18 hours in a day and was owed at least minimum wages for that work.

The Director, after receiving the position of both parties during an oral hearing held on September 15, 2004, determined the evidence supported a conclusion that Winbow had worked a sufficient number of hours to entitle him to wages over and above what had been paid to him by Central Island.

The central finding of fact supporting the Determination is found in the following:

> I accept Mr. Joneson's evidence that the "first driver" out could be expected to work 6-8 hours in a 12 hour period. Since Mr. Winbow was "first out" for 24 hours a day from May 9th to 22nd, I conclude his actual hours of work, at a minimum would be 12 hours a day.
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> Based on Messrs. Joneson's and Mullholland's evidence, I am also convinced the Mr. Winbow worked a minimum of at least 10 hours a day on days when he served as "first out" for 12 hours and then "second out" for the remaining 12 hours a day.

I point out that Mr. Joneson and Mr. Mullholland were witnesses for Central Island at the oral hearing. The Director applied those conclusions to other conclusions of facts and did the necessary calculations to reach the amount of wages owing.

ARGUMENT AND ANALYSIS

Central Island says the Director failed to observe principles of natural justice by making findings and assumptions "without either party having evidence to back up their claims" and that Central Island has evidence that contradicts findings and assumptions made by the Director.

Central Island has provided a significant body of documents, consisting of cash out sheets, invoices signed by Winbow and daytime, evening and weekend call logs, which it argues supports the above position. Central Island says in the appeal form, as a partial explanation for only introducing this material at the appeal stage, that much of the information included with the appeal had been archived in preparation for corporate year end.

In response to the appeal, the Director says the material supporting the appeal was available and could have been entered for consideration during the oral hearing, but was not provided to the Director by Central Island at any time during the complaint process, even though Central Island had agreed in July to forward payroll and time records covering Winbow's 2.5 months' of employment and a Demand For Employer Records had been issued to Central Island on August 16, 2004. On that basis, the Director objects to Central Island now seeking to present this material with the appeal and says the appeal should be denied.

In his response to the appeal, Winbow also argues the material on which Central Island bases its appeal existed at the time of the hearing and could have been brought.

In reply to the arguments made by the Director and Winbow, Central Island says the material was not covered by any agreement or by the Demand. Central Island re-asserts its explanation that the material was with their accountant at the time of the hearing.

The burden is on Central Island, as the appellant, to persuade the Tribunal that the Director committed some error in making the Determination such that the Tribunal should intervene. The grounds upon which an appeal may be made are 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.

Central Island has grounded this appeal in subsections 112(1)(b) and (c). Notwithstanding two grounds are identified, this appeal is initially dependent on whether the Tribunal accepts the new, or additional, material provided with the appeal.

There is no issue that the material filed in support of the appeal was not presented to the Director during the complaint process.

The Director argues the failure to provided that material was a breach of the agreement made in July and a refusal to comply with the Demand For Employer Records made in August. Central Island rejects both those arguments. While I am not entirely convinced by the Director that this material was caught by the Demand, I am satisfied that it was, on any reasonable reading of the agreed statement of facts, information which Central Island committed to forward to the Director, but did not. The agreed statement of facts refers to "payroll and time records". In its appeal submission, Central Island refers to information required to be put on an invoice as "the only way that we can keep records of times dedicated to towing". Some of the invoices record a time, many do not. To the extent, however, that any of them record time, and in light of the foregoing statement, Central Island was under some obligation to provide them to the Director as they had agreed to do.

There are two considerations that arise in the circumstances of this case, both of which militate against Central Island.

First, where new, or additional, evidence is presented to the Tribunal with an appeal, the Tribunal uses the following considerations to determine whether it will be accepted:

- could the new evidence, with the exercise of due diligence, have been discovered and presented to the Director during the complaint process and prior to the Determination being made?
- is the new evidence relevant to a material issue arising from the complaint?
- is the new evidence credible, in the sense that it is reasonably capable of belief? and
- does the evidence have probative value, in the sense that if believed it could, on its own or in combination with other evidence, have led the Director to a different conclusion on the material issue?

It is clear all of the new evidence included with the appeal was reasonably available to Central Island to provide to the Director during the complaint process. I have considered Central Island's explanation for not providing the documents during the complaint process. I do not accept it was inaccessible to Central Island and could not have been retrieved from either the "archive" or the accountant with the exercise of some due diligence. I am also troubled by the complete absence of any reference during the complaint process to the existence of this material, to its potential probative value or to its unavailability. Common sense dictates that if there were any intention on the part of Central Island to provide, and rely, on this material, the Director would have been alerted by them and some arrangement made to have it produced for consideration.

Second, the Tribunal has long taken the following approach in respect of a party who has failed or refused to cooperate in the complaint process:

> This Tribunal will not allow appellants to "sit in the weeds", failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.
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> (Tri-West Tractors Ltd., BC EST #D268/96)

For the above reasons, I refuse to accept or consider the new, or additional, evidence provided by Central Island with their appeal (see *Bruce Davies and others, Directors and Officers of Merilus Technologies Inc.*, BC EST #D171/03). That disposes of one of the grounds of appeal.

As indicated above, the second ground of appeal is substantially dependent on the acceptance of the new, or additional, evidence.

Central Island says the Director made findings and assumptions without either party having evidence to support their position. I do not accept the Director made findings of fact without any evidence. There was evidence, which is identified in the Determination and in the excerpts from the Determination quoted above, which were relied on by the Director to support the conclusions made. In the circumstances, the only basis for attacking the findings made by the Director is to show the Director took a view of the facts that could not reasonably be entertained based on the evidence. That argument depends on the Tribunal accepting the new, or additional, evidence and accepting it demonstrates the Director could not have made the findings of fact which are challenged. Since I do not accept the new, or additional, evidence, there is nothing against which the Director's findings can be placed other than what is found in the record. On that material, I cannot find the director erred in any way or failed to observe principles of natural justice in making the Determination.

While it is not necessary for the purpose of disposing of this appeal, I also find that the probative value of the new evidence is not apparent. While the documents seem to indicate the Director might have erred in concluding Winbow worked on days he appears to have taken off (I use the term "appears" intentionally), the Director also appears to have concluded Winbow was off on days he was clearly working. The key findings in the Director's analysis related not so much to which specific days Winbow worked as how

many hours were worked on those days when he did work. While the material might, if accepted, require adjustments to the Director's calculations, it does not show the Director's conclusion that wages were owing in the amount ordered would be any different.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination, dated October 8, 2004, be confirmed in the amount of $4,659.15, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal