



An appeal

- by -

Treasure Gallery Inc.
(“TGI”)

- 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/148

DATE OF DECISION: February 5, 2013

DECISION

SUBMISSIONS

Majid Mojahed

on behalf of Treasure Gallery Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Treasure Gallery Inc. (“TGI”) 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 TGI had contravened Part 3, section 18, Part 4, section 40 and Part 7, section 58 of the *Act* in respect of the employment of Sam Mousavi (“Mr. Mousavi”), and ordered TGI to pay him a total of \$3,256.41, an amount that included wages and interest under section 88 of the *Act*.
3. The Director also imposed administrative penalties on TGI under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00 for contravention of sections 17, 18 and 40 of the *Act*.
4. The total amount of the Determination is \$4,756.41.
5. In its appeal, TGI 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. I note that the new evidence TGI relies upon is similar or identical to the evidence adduced by its related company, Darya Construction Inc. (“Darya”), in an appeal the latter lodged of a determination of complaints lodged by Mr. Mousavi and another individual arising out of their employment with Darya before Mr. Mousavi was reassigned to TGI.
7. Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) and section 114 of the *Act* set out the circumstances in which the Tribunal may dismiss all or part of an appeal without seeking submissions from parties in an appeal. 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, TGI’s written submissions, and my review of the section 112(5) “record” that was before the Director when the Determination was being made.
8. 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 Mr. Mousavi and the Director to file a reply submission on the appeal, and TGI will be given an opportunity to make a final reply to those submissions, if any.

BACKGROUND

9. TGI operates a retail art gallery, and employed Mr. Mousavi as a sales person from January 5, 2012, until he quit his job on February 3, 2012. On March 1, 2012, Mr. Mousavi filed a complaint under section 74 of the *Act* against TGI alleging that the latter failed to pay him wages for work he performed during the period of his employment with TGI (the “Complaint”). In support of his allegations, Mr. Mousavi submitted copies of

his job offer letter setting out his hours of work, rate of pay and timesheet requirements; an amended job offer letter; a copy of a TGI timesheet signed by both Mr. Mousavi and TGI's sole director, Majid Mojahed ("Mr. Mojahed"); and a letter signed by Mr. Mojahed from TGI's related company, Darya, reassigning him to TGI as of January 5, 2012.

10. During the investigation of the Complaint, the delegate made several attempts to contact and obtain information from Mr. Mojahed. These attempts were made at the same time the delegate was investigating the complaints of Mr. Mousavi and one other employee against the related company, Darya, of which Mr. Mojahed was one of the directors. More particularly, the delegate states she telephoned Mr. Mojahed on March 20, 2012, and spoke with the latter about the Complaint. Mr. Mojahed advised her that he did employ Mr. Mousavi and he owed him wages. He further advised the delegate that he had an arrangement or a deal with Mr. Mousavi that he would get paid after all work was completed on construction projects with his other company, Darya. He also advised the delegate that he would fax to her all documentation pertaining to Mr. Mousavi, including his hours worked, wages paid and wages owed to him.
11. On March 23, 2012, when the delegate did not receive the documentation promised by Mr. Mojahed, she telephoned him to inquire about those records. She states Mr. Mojahed advised her that his accountant was compiling them and he would send them to her by fax before the end of business that day. He also agreed to discuss those records with the delegate on the following Monday.
12. On March 27, 2012, the delegate states she made a further follow-up call to Mr. Mojahed as she did not receive the records he promised. She states she was unable to reach him and left a voice-mail message requesting that he return her call by the end of that day. When she did not receive Mr. Mojahed's call, she, again, telephoned him on March 29 and April 3, 2012, and on both occasions left him a voice-mail message.
13. On April 3, 2012, she sent Mr. Mojahed an email at his email address at Darya. The email contained the Complaint. The delegate also repeated in the email her previous telephone discussion with Mr. Mojahed wherein he confirmed that he owed Mr. Mousavi wages, and she reiterated her request for the records he had promised to send her.
14. The delegate states she sent Mr. Mojahed a further email on April 5, 2012, containing copies of supporting documentation she received from Mr. Mousavi. In that email, she also confirmed a telephone call she had with Mr. Mojahed earlier that day, and his advice to her that he would respond to the allegations and evidence of Mr. Mousavi by April 9, 2012.
15. On April 10, 2012, the delegate states she again telephoned Mr. Mojahed as she had not received the promised documents by April 9, 2012. On this occasion, he assured her that he would provide the records to her by April 16, 2012.
16. On April 11, 2012, the delegate states she issued a Demand for Records (the "Demand"), and sent it by registered mail to Mr. Mojahed and emailed the Demand to Darya as well. The Demand required the employer to provide the requested records by April 20, 2012. The registered mail was returned as unclaimed, and the delegate did not receive the records requested by the deadline set out in the Demand. On April 24, 2012, the delegate states she 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 proceed without the employer's records. On the same date, in the evening, Mr. Mojahed left a voice-mail message for the delegate, stating that no payroll or employment records existed for Mr. Mousavi and requested the delegate to contact him. The following day, the delegate telephoned Mr. Mojahed and left him a voice-mail message.

17. Subsequently, on April 27, 2012, the delegate states Mr. Mojahed contacted her 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 that information. However, he stated that his accountant had confirmed that Mr. Mousavi was paid in full and also submitted that it was Mr. Mousavi who should be responsible to prove his case.
18. On May 18, 2012, the delegate states she sent a registered letter to the business address of the employer as well as to the home address of Mr. Mojahed. She states she also emailed the letter to Mr. Mojahed. She states the letter summarized, *inter alia*, the Complaint and the amount of Mr. Mousavi's claim. The letter also specified that a written decision would be issued based solely on the available evidence, and afforded the employer an opportunity to submit evidence by May 31, 2012. The registered mail was returned as unclaimed and Mr. Mojahed did not respond to the emailed letter. As a result, the delegate, relying on the evidence of Mr. Mousavi, issued the Determination on November 2, 2012.

SUBMISSIONS OF TGI

19. Mr. Mojahed, on behalf of TGI, has submitted almost identical submissions to those he made in the appeal of his related company, Darya, with a single exception, namely, he excluded a single paragraph in Darya's submissions that dealt with a second employee who apparently was not reassigned from Darya to TGI, unlike Mr. Mousavi. In his submissions on behalf of TGI, Mr. Mojahed 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 Mr. Mousavi was offered employment by him and the position he was offered "was not posted and was not real". He states that neither Darya, nor TGI, have been actively doing business and did not need employees, but he hired Mr. Mousavi "simply to make the Darya office look busy in case there was an opportunity for contracts".
20. Mr. Mojahed also submits that the letters of employment and timesheets were issued by him to Mr. Mousavi so he could use them "in seeking employment elsewhere". He further submits that the documentation setting out the precise agreement between TGI and Mr. Mousavi was taken by Mr. Mousavi. He also alleges that if one looks at the timesheets Mr. Mousavi has produced in the Complaint, the timesheets appear to be prepared "all in one day". He also submits that Mr. Mousavi did not work the hours he claimed he worked.
21. 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 contends that in that action, Mr. Mousavi indicates he worked until September 2011 and then was away on sick leave for two (2) months. Mr. Mojahed states that this is inconsistent with the evidence in the Complaint before the Employment Standards Branch. I note that the same Small Claims' 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.
22. Mr. Mojahed, as in the appeal involving Darya, is 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.

ANALYSIS

23. As indicated previously, TGI's appeal is based on the new evidence ground of appeal in section 112(1)(c) of the *Act*. In *Re: Merilus Technologies Inc.* (BC EST # D171/03), the Tribunal was guided by the following four-part test applied in civil courts for admitting fresh evidence on appeal:

- (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.

24. The above four (4) criteria 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 consider it in the appeal as new evidence.
25. Having said this, I note that this Tribunal in *Re: 607470 B.C. Ltd. c.o.b. Michael Allen Painting* (BC EST # D096/07) stated that 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 subsequently, in the appeal, adducing evidence that was otherwise available to it during the investigation stage.
26. In this case, TGI has failed to meet the first criterion in *Re: Merilus Technologies Inc., supra*, for adducing new evidence on appeal. The evidence Mr. Mojahed now adduces on behalf of TGI is not new evidence. It is the sort of evidence that could have, with the exercise of due diligence, been discovered and presented to the Director during the investigation or during the adjudication of the Complaint and prior to the Determination being made. I have described in this decision numerous attempts by the delegate, during the investigation of the Complaint, to obtain the evidence of TGI, including the opportunities the delegate afforded Mr. Mojahed to present TGI's "story", but Mr. Mojahed and TGI failed to diligently participate in the investigation. TGI and Mr. Mojahed disregarded all of the deadlines of the delegate, including the delegate's deadline to provide the relevant records requested under the Demand, as well as a response to the Complaint and Mr. Mousavi's claim. This, indeed, is 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 the Determination is unfavourable. I agree with the Tribunal in *Tri-West Tractors Ltd.* (BC EST # D268/96), that 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.
27. I also note that Mr. Mojahed has not explained why he did not bring the evidence of the witness, Mr. Shahidi, or present the witness to the delegate during the investigation of the Complaint. There is no suggestion in the submissions of Mr. Mojahed that Mr. Shahidi was unavailable during the investigation of the Complaint.
28. I find that TGI's appeal has no reasonable prospect of succeeding, and I dismiss it.

ORDER

29. 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, against Treasure Gallery Inc. is confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal