

An appeal

- by -

Viviane Jaqueline Guyot carrying on business as TOPI Imports
(“Ms. Guyot”)

- 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.: 2015A/3

DATE OF DECISION: February 20, 2015

DECISION

SUBMISSIONS

Viviane Jacqueline Guyot on her own behalf carrying on business as TOPI Imports

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Viviane Jacqueline Guyot carrying on business as TOPI Imports (“Ms. Guyot”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 28, 2014 (the “Determination”).
2. The Determination found that Ms. Guyot contravened sections 17 (paydays), 18 (wages) and 58 (annual vacation pay) of the *Act* and section 46 (production of records) of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Dione Howard (“Ms. Howard”), and ordered Ms. Guyot to pay Ms. Howard wages and interest in the amount of \$1,144.70, inclusive of accrued interest under section 88 of the *Act*.
3. The Determination also levied three (3) administrative penalties of \$500.00 against Ms. Guyot for contraventions of sections 17 and 18 of the *Act* and section 46 of the *Regulation*.
4. The total amount of the Determination is \$2,644.70.
5. The deadline for filing the appeal of the Determination was January 5, 2015. While Ms. Guyot filed the Appeal Form on January 2, 2015, before the expiry of the appeal period, her Appeal Form did not set out any grounds of appeal, nor was it accompanied by any substantive written submissions. Ms. Guyot did, however, request in writing with her Appeal Form, an extension of two (2) weeks to file the appeal. Subsequently, on January 19, 2015, Ms. Guyot filed her written submissions on the merits of her appeal.
6. Having reviewed the appeal materials, including the late filed written submissions of Ms. Guyot, and the section 112(5) “record” (the “Record”), I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Reasons for the Determination (the “Reasons”), the written submissions of Ms. Guyot and my review of the Record that was before the Director when the Determination was being made. If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Ms. Howard and the Director may be invited to file a reply to the question of whether the deadline for Ms. Guyot to file the appeal should be extended. On the other hand, if it is found that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

7. The issue at this stage of the appeal is whether there is any reasonable prospect the appeal will succeed.

THE FACTS

8. Ms. Guyot operates an import and wholesale botanical business as a sole proprietor under the name, TOPI Imports. Ms. Guyot employed Ms. Howard as a sales coordinator from April 10, 2014, to May 23, 2014, at the rate of pay of \$15.00 per hour.

9. On August 5, 2014, slightly over two (2) months after Ms. Guyot terminated Ms. Howard's employment, the latter filed a complaint against Ms. Guyot with the Employment Standards Branch (the "Branch"), alleging that Ms. Guyot failed to pay her regular wages and annual vacation pay (the "Complaint").
10. On October 3, 2014, the Director sent Ms. Guyot a Demand for Employer Records (the "Demand") by registered mail, requesting Ms. Guyot to deliver all payroll records pertaining to Ms. Howard's wages, hours of work, and conditions of employment, as specified in section 28 of the *Act*, no later than October 30, 2014.
11. On October 23, 2014, Ms. Guyot contacted the Branch and said she would not be sending the records requested, but was prepared to send a computer flash drive instead containing whatever information she had. She was then advised that the Demand required two (2) copies of the payroll records specified in section 28 of the *Act*.
12. Subsequently, on October 30, 2014, Ms. Guyot sent eighteen (18) pages of documentation, including a note that she was only sending a few documents showing the file on her flash drive as she did not want to print the rest of the documents as there was too much to print. The documents she sent did not include records of Ms. Howard as specified in section 28 of the *Act*.
13. On November 18, 2014, the delegate conducted a hearing of the Complaint (the "Hearing"). Both Ms. Guyot and Ms. Howard attended at the Hearing and provided evidence.
14. In the Reasons, the delegate notes that both parties agreed that Ms. Guyot did not pay Ms. Howard wages or vacation pay during or after the period of her employment, and that Ms. Guyot terminated Ms. Howard's employment on May 23, 2014. The delegate also notes that both parties agreed that they each signed an employment agreement prior to the commencement of Ms. Howard's employment and that agreement provided that the wage rate for Ms. Howard was \$15.00 per hour plus 4% holiday pay, and that wages would be paid twice per month, on the 15th and final day of each month. Therefore, the scheduled payday during Ms. Howard's period of employment were April 15, April 30, and May 15, 2014.
15. The delegate also notes, in the Reasons, that while both parties agreed that Ms. Howard is owed wages and vacation pay, the dispute between them was with respect to how much Ms. Howard was owed, and both parties gave evidence on this matter at the Hearing. In the Reasons, the delegate summarizes the material evidence of the parties and notes that both parties agreed that Ms. Guyot gave Ms. Howard the responsibility to keep track of her own hours and to submit those hours to Ms. Guyot before she would be paid.
16. On Ms. Howard's part, the delegate notes that she testified that she submitted emails to Ms. Guyot containing the work she had completed and her hours worked prior to each payday, as she worked from home for Ms. Guyot. Ms. Guyot testified that she had not received some of these emails and did not make contact with Ms. Howard to determine why she was not receiving the work and hours. Ms. Guyot stated that she did not pay Ms. Howard because she had not received Ms. Howard's work and recorded hours. Ms. Guyot additionally said she did not pay Ms. Howard because the latter failed to submit her social insurance number ("SIN") and federal income tax documentation.
17. In preferring Ms. Howard's evidence to Ms. Guyot's, the delegate states, in the Reasons, that, at the Hearing, Ms. Howard answered questions directly and consistently, and her explanation for the amount of time required to do her work was "plausible". She provided "detailed evidence at the [H]earing explaining the work she completed on specific dates and the hours she spent completing the work".

18. In the case of Ms. Guyot, the delegate states that while she said that Ms. Howard claimed too many hours for the work she performed, she “did not provide effective evidence to challenge Ms. Howard’s record of hours”. The delegate, therefore, concluded that Ms. Guyot’s concerns regarding the hours Ms. Howard claimed “do not absolve her of her obligation to pay wages for work done”. In the result, the delegate accepted Ms. Howard’s record that she worked 72.5 hours, and went on to award the latter wages based on that record at the rate of \$15.00 per hour, plus vacation pay, for a total of \$1,127.10, plus interest pursuant to section 88 of the *Act*.
19. The delegate also levied three (3) administrative penalties against Ms. Guyot pursuant to the *Regulation*. The first penalty was for breaching section 17 of the *Act*, which provides that an employer must pay an employee at least semi-monthly. The delegate notes that while both parties agreed that the scheduled paydays were April 15, April 30, and May 15, 2014, Ms. Guyot did not pay Ms. Howard on these paydays, and, therefore, she contravened section 17 of the *Act*, with the most recent contravention taking place on May 16, 2014, the first day following the last day for payment.
20. The delegate also found Ms. Guyot contravened section 18 of the *Act*, which requires an employer to pay all wages owing to an employee within 48 hours after the employer terminates the employment. He states that while Ms. Guyot terminated Ms. Howard’s employment on May 23, 2014, she failed to pay Ms. Howard all wages owed within 48 hours of termination and, therefore, contravened section 18 of the *Act* on May 25, 2014.
21. The delegate also found Ms. Guyot breached section 46 of the *Regulation* for failing to comply with the Demand by failing to produce those records requested for Ms. Howard as specified in section 28 of the *Act*. The delegate concluded that the date of contravention of section 46 of the *Regulation* occurred on October 30, 2014, the day by which the requested records were to be delivered by Ms. Guyot.
22. The delegate sent the Determination to Ms. Guyot by registered mail on November 28, 2014. The date for filing the appeal of the Determination was January 5, 2015. As indicated previously, on January 2, 2015, Ms. Guyot filed her Appeal Form appealing the Determination but without setting out her grounds of appeal and without providing any substantive written submissions, except for a short note on her fax cover requesting an extension of time to appeal.
23. In her note asking for an extension of time for filing her appeal, Ms. Guyot stated that she received the Determination on December 5, 2014. She was out of the office for a week thereafter. She attempted to consult with legal counsel and requested an appointment to see one on December 12, 2014, but was unsuccessful as it was “just before and between Christmas and New Year”. She states she even tried finding another lawyer but his office was closed until January 5, 2015.
24. She also notes, in the same submissions, that English is her second language, and she may have been misunderstood by the delegate at the Hearing in terms of the evidence she gave. She states that she wants to produce new evidence in the appeal and have a lawyer review it first. She also wants to “request the Tribunal to review the file with the proper arguments”.
25. After filing her Appeal Form, on January 19, 2015, Ms. Guyot filed her late written submissions, purportedly after seeing a lawyer.

SUBMISSIONS OF MS. GUYOT

26. In the preamble to her late written submissions, Ms. Guyot states that she is requesting an “in person” hearing of the appeal to allow both parties to bring evidence and avoid any misinterpretation. She also submits that Ms. Howard “detained all the evidence of the work she did” and never sent it to her or to the Branch.
27. She contends that the Branch neither reviewed the work Ms. Howard actually performed nor the documents she provided to Ms. Howard.
28. Ms. Guyot states she is willing to pay Ms. Howard for the work she actually performed. She then goes on to reconstruct the hours for which she thinks Ms. Howard should be paid, based on “the record of phone and email” exchanges she had with Ms. Howard over the period of Ms. Howard’s employment. She submits a summary of the phone calls between Ms. Howard and her, and concludes that Ms. Howard is entitled to 23 hours’ pay at the rate of \$15.00 per hour plus 4% for holiday pay.
29. Ms. Guyot also submits that she should not have to pay any administrative penalties. In the case of the penalty levied against her for contravention of section 46 of the *Regulation* for failing to provide employer payroll records for Ms. Howard as specified in section 28 of the *Act*, Ms. Guyot states that she forwarded some documents to the attention of a different delegate at the Branch. She further submits that if that delegate did not forward them to the adjudicator, then she should not be penalized for that.
30. Ms. Guyot also argues that Ms. Howard failed to provide her SIN, current address, and a schedule of hours she worked. She further argues that the failure of Ms. Howard to provide her SIN and to download relevant federal income tax documents from Revenue Canada’s site delayed or prevented her from paying wages to Ms. Howard in a timely fashion. Therefore, the penalty levied against her under section 17 of the *Act* should be canceled.
31. In the balance of her submissions, Ms. Guyot disputes Ms. Howard’s skillset and work performance during her employment period, which I do not find necessary to reiterate here except to say that these submissions are similar to those she made at the Hearing.
32. Ms. Guyot then concludes her written submissions by reiterating that it was Ms. Howard’s failure to provide her with the relevant information and documentation for tax purposes that prevented her from processing payroll or wages for Ms. Howard. She states that she is prepared to pay Ms. Howard based on her reconstruction of hours Ms. Howard worked, which, as indicated, she prepared for the purposes of this appeal with the assistance of her record of email and telephone exchanges with Ms. Howard.

ANALYSIS

33. Section 112(1) of the *Act* sets out the following limited grounds upon which a person may appeal a determination:
 - (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 being made.

34. In this case, as noted previously, Ms. Guyot failed to identify in the Appeal Form any grounds of appeal. She similarly failed to identify clearly the grounds of appeal in section 112 of the *Act* she was relying upon in her subsequent late submissions. However, the Tribunal does not take a mechanical approach to adjudicating an appeal. In *Triple S Transmission Inc.* (BC EST # D141/03), the Tribunal stated:

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

35. In this case, I have adopted the view expressed in *Triple S Transmission Inc.* above, and reviewed the written submissions of Ms. Guyot with a view to determining if any of the submissions invoke one of the statutory grounds of appeal in section 112 of the *Act*. Based on my review, I have concluded there is no reasonable prospect that Ms. Guyot's appeal will succeed. I will, in what follows, discuss my reasons in support of this conclusion.

36. First, with respect to the natural justice ground of appeal, it should be noted that in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)* (BC EST # D055/05), the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence, and the right to be heard by an independent decision maker. I find nothing in the submissions of Ms. Guyot to suggest that she was denied any of these procedural rights. Therefore, I do not find any basis to interfere with the Determination on the natural justice ground of appeal.

37. With respect to the error of law ground of appeal, the British Columbia Court of Appeal, in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] BCJ. No. 2275 (BCCA), provided the following instructive definitions of error of law:

1. a misinterpretation or misapplication of a section of the Act;
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

38. Based on the written submissions of Ms. Guyot, it appears that she is arguing that the delegate acted on a view of the facts that could not be reasonably entertained because he preferred the evidence of Ms. Howard with respect to the hours she worked over Ms. Guyot's evidence. In this regard, I note the testimony of Ms. Guyot at the Hearing that she did not receive Ms. Howard's work or her recorded hours, and, further, Ms. Howard did not submit her SIN and federal income tax documentation, all of which, Ms. Guyot claimed, prevented her from paying Ms. Howard wages in a timely fashion. I find the delegate correctly concluded that it is the employer's responsibility to give an employee the federal income tax documents at the start of employment, which Ms. Guyot failed to do in this case. I also find the delegate correctly concluded that it was Ms. Guyot's responsibility to ask for Ms. Howard's SIN at the beginning of her employment. Failure of Ms. Howard to carry out that which is the employer's obligation in this case does not relieve Ms. Guyot of her obligation to pay Ms. Howard wages in a timely fashion.

39. As with the delegate, I also do not find any merit in Ms. Guyot's submission that she did not receive some of the emails from Ms. Howard containing the latter's work and hours of work. Ms. Guyot stated that she did

not make contact with Ms. Howard to determine why she was not receiving Ms. Howard's work or hours of work information, which I find rather curious. One would expect an employer, having commissioned an employee to do certain specific work, to follow up with that employee if the employee did not deliver or produce the work in a timely fashion to the employer.

40. Against Ms. Guyot's questionable and unpersuasive evidence, the delegate noted that Ms. Howard provided detailed evidence at the Hearing explaining the work she completed on specific dates and the hours she spent completing the work. He also noted that while Ms. Guyot testified that Ms. Howard claimed to have worked too many hours, Ms. Guyot did not provide effective evidence to challenge Ms. Howard's record of hours at the Hearing. In the circumstances, I find it was open for the delegate to prefer the evidence of Ms. Howard and conclude, as he did, that Ms. Howard was owed wages for the 72.5 hours she recorded at the rate of \$15.00 per hour plus 4% vacation pay. I do not find the delegate, in this regard, to have erred in law by acting on a view of facts which could not reasonably be entertained.
41. I also do not find the delegate or the Director to have erred in law in levying any of the administrative penalties. More particularly, in the case of the finding of contravention of section 46 of the *Regulation*, while Ms. Guyot states that she submitted documents to the Branch in response to the Demand, the documents she submitted (which are in the Record) are not records relating to Ms. Howard's wages, hours of work and conditions of employment as specified in section 28 of the *Act*, which the Demand required. Therefore, the delegate correctly concluded that Ms. Guyot breached section 46 of the *Regulation*, and I do not find there is any reason to cancel that penalty.
42. Similarly, I do not find the delegate committed any error of law in concluding that Ms. Guyot contravened section 17 of the *Act*. The parties' evidence at the Hearing was that the scheduled paydays for Ms. Howard were April 15, April 30 and May 15, 2014, and the latter was not paid on the said paydays. The delegate rejected, correctly so in my view, Ms. Guyot's submission that Ms. Howard, by failing to provide the government income tax document and her SIN, delayed or made it difficult for Ms. Guyot to pay her wages. In the circumstances, I find the delegate correctly concluded that Ms. Guyot contravened section 17 of the *Act*, and I do not find any reason to disturb that conclusion.
43. With respect to the delegate's conclusion that Ms. Guyot contravened section 18 of the *Act*, I do not find anything in Ms. Guyot's appeal submissions that would suggest that the delegate erred in reaching this conclusion, and I do not find there is any basis to cancel the penalty levied for this contravention.
44. With respect to the new evidence ground of appeal, I note that the applicable test for accepting new evidence on appeal is delineated by the Tribunal in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In this case, the Tribunal set out the following four (4) conjunctive requirements that an applicant requesting the Tribunal to admit new evidence must satisfy before the Tribunal will admit new evidence:
- (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 the other evidence, have led the Director to a different conclusion on the material issue.

45. In this case, Ms. Guyot has reconstructed a record of Ms. Howard's hours worked based on her email and telephone exchanges with Ms. Howard. This is something Ms. Guyot did for the purposes of the appeal. In my view, this evidence could have been prepared by Ms. Guyot in advance of the Hearing and presented at the Hearing to the delegate, who could have then decided what weight, if any, to attach to this evidence. I do not find that this evidence meets the first criterion in the *Re: Merilus Technologies* decision and, therefore, I am unable to consider the purported "new evidence" of Ms. Guyot in this appeal or interfere with the Determination on the new evidence ground of appeal.
46. Finally, I note that Ms. Guyot's submissions as a whole lead me to conclude that she is, to a significant extent, re-arguing the case in her appeal, which is not permissible, as an appeal is not a forum for the unsuccessful party to have a second chance to advance arguments already advanced at the Hearing and rejected in the Determination. Further, allowing re-argument on appeal is contrary to the stated objective of the *Act* in section 2(d), namely, the fair and efficient procedures for resolving disputes.

ORDER

47. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination, dated November 28, 2014, is confirmed, together with any further interest that has accrued under section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal