Employment Standards TRIBUNAL

An appeal

- by -

0862284 B.C. Ltd.
("0862284")

- 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: David B. Stevenson

FILE No.: 2013A/51

DATE OF DECISION: April 8, 2014

DECISION

SUBMISSIONS

Paul Alexander Bourassa	on behalf of 0862284 B.C. Ltd.
Jani Martinius	on his own behalf
Jonty Davies	on his own behalf
Stephan Nolan	on his own behalf
Joao Vitor Wilke Silva	on his own behalf
Hans Suhr	on behalf of the Director of Employment Standards

OVERVIEW

1. On June 28, 2013, the Director of Employment Standards (the "Director") issued a Determination against 0862284 B.C. Ltd., 0862284 B.C. Ltd. carrying on business as Fun City Sightseeing, and Fun City Sightseeing Inc. on behalf of forty-two former employees of Fun City, many of whom had complained to the Director that they had not received all wages owing from their employment with Fun City.

2. In respect of those that had not filed a complaint, the Director added to the Determination wage entitlements for twenty employees found as a result of a review of payroll records provided by the former bookkeeper of the business.

3. The Director determined that 0862284 B.C. Ltd., 0862284 B.C. Ltd. carrying on business as Fun City Sightseeing, and Fun City Sightseeing Inc. ("collectively, "Fun City") should be associated as one employer under section 95 of the *Employment Standards Act* (the *"Act"*), found Fun City had contravened the *Act* by failing to pay wages, annual vacation pay and statutory holiday pay and that the former employees were owed wages and interest in the amount of $50,466.16.

4. The Director also imposed administrative penalties on Fun City under section 29(1) of the E*mployment Standards Regulation* (the *"Regulation")* in the amount of $4,000.00.

5. The total amount of the Determination is $54,466.16.

6. 0862284 B.C. Ltd. ("0862284") has appealed the Determination, submitting the Director erred in law in finding 0862284 was an employer under the *Act* and associating 0862284 with Fun City Sightseeing Inc., failed to observe principles of natural justice in making the Determination and demonstrated a reasonable apprehension of bias against 0862284 and its sole director and officer, Mr. Paul Bourassa ("Mr. Bourassa"), during the investigation of the file.

7. 0862284 seeks to have the Determination cancelled.

8. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission

hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) "record", together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the "record".

ISSUE

9. The issues in this appeal are whether the Director erred in law in deciding 0862284 was an employer under the *Act* and could be associated under section 95 of the *Act* with other entities named in the Determination, and whether the Director failed to observe principles of natural justice in making the Determination and demonstrated a bias against 0862284 and its director, Mr. Bourassa.

FACTS

10. The Determination and an examination of the section 112(5) "record" provide the following background information.

11. Between September 13, 2012, and March 20, 2013, the Director received complaints from twenty-two persons claiming unpaid wages from Fun City. The Director's initial review of the payroll records for Fun City, which the Director appears to have received in early June 2013, showed another twenty employees that had not been paid all wages owing.

12. 0862284 is a company incorporated in British Columbia on September 27, 2009. As of November 5, 2012, filed corporate records showed Mr. Bourassa was its sole director and officer. Fun City Sightseeing was the business name of a sole proprietorship registered by 0862284 on July 19, 2012. That sole proprietorship was dissolved December 5, 2012.

13. Fun City Sightseeing Inc. ("FCSI") is a company incorporated in British Columbia on December 7, 2010. As of September 17, 2012, filed corporate records listed Mr. Jordan Prince ("Mr. Prince") as the sole director and an officer of FCSI. Mr. Bourassa was listed as an officer. When advised of this information, Mr. Bourassa claimed the listing was incorrect and had his legal counsel take steps to remove him from the registry listing. An application to obtain this result was made to the B.C. Registry Services on, or about, October 12, 2012.

14. The Determination identifies two issues that required a decision: whether 0862284 B.C. Ltd., 0862284 B.C. Ltd. carrying on business as Fun City Sightseeing, and Fun City Sightseeing Inc. should be treated as one employer for the purposes of the *Act*; and whether the *Act* was contravened.

15. On the first issue, the evidence included material provided to the Director by third parties pursuant to sections 84 and 85 of the *Act*. Based on that evidence and a consideration of the wording in section 95 of the *Act*, the Director decided it was appropriate to treat 0862284 B.C. Ltd., 0862284 B.C. Ltd. carrying on business as Fun City Sightseeing, and Fun City Sightseeing Inc. as one employer. In doing so, the Director found the following evidence was relevant:

    (i) while the complainants said they took day-to-day direction from Mr. Prince, some of the complainants stated they had met Mr. Bourassa "who told them "he was only the money man" and had nothing to do with the business";

    (ii) Mr. Bourassa responded to the complaints on behalf of 0862284 B.C. Ltd. and 0862284 B.C. Ltd. carrying on business as Fun City Sightseeing;

(iii) in November 2012, Mr. Bourassa had the corporate records of FCSI "corrected" to show he had ceased to be an officer of that company in November 2011;

(iv) Mr. Bourassa contended he had never consented, in writing or otherwise, to be director or officer of FCSI except for a brief period between April 30, 2012, and May 12, 2012, for the express purpose of obtaining the necessary licences from the City of Vancouver;

(v) the bank records provided showed the accounts used by the business in 2012 were held in the names of 0862284 and FCSI;

(vi) those records also showed Mr. Bourassa opened the accounts on April 2, 2012, was the sole signatory on them, certified at that time he was a director and officer of FCSI, signed the banking documents as "President" of FCSI, signed cheques for both FCSI and 0862284 carrying on business as Fun City Sightseeing; and wrote and signed cheques to repay monies allegedly loaned or advanced by 804885 B.C. Ltd., PAB Transportation Corp. and National Charter Service, all of which were legal entities controlled by Mr. Bourassa during the period material to the investigation; and

(vii) evidence received from the City of Vancouver showed Mr. Bourassa stating on a "vehicles for hire application form" signed on April 24, 2012, that he is one of the owners of FCSI and confirming that information with his signature.

16. The Determination notes that the bookkeeper for the business had stated she had sent the payroll records for the business to Mr. Bourassa and, notwithstanding a Demand for Employer Records issued to him by the Director in November 2012, he had failed or refused to provide those records.

17. For reasons stated in the Determination, some of which are suggested in the above evidence, the Director found Mr. Bourassa was not a credible source of information, noting his evidence in critical areas conflicted with the records received from the bank, the City of Vancouver Licence Division, and the bookkeeper.

18. The Director found Mr. Bourassa was the controlling mind behind the business; that he controlled the funds, had sole signing authority on the bank accounts, moved funds between various entities of which he was the sole director and used funds generated by the business to pay personal expenses and business expenses of other entities he owned and/or controlled.

19. The Director found the evidence showed that notwithstanding Mr. Bourassa's efforts to remove himself as a director and officer of FCSI he remained a *de facto* director and officer of that company at all times material to the complaints.

20. The Director also found there was substantial functional integration between the associated entities that included the use of equipment, the payment of wages, the "borrowing and repaying" of monies to other entities owned and/or controlled by Mr. Bourassa, monies spent through the debit card and payment made to Mr. Bourassa personally and on behalf of other entities owned and/or controlled by him.

21. Applying the statutory elements of section 95 to the circumstances, the Director found it was an appropriate case to associate the entities under the *Act*.

22. On the second issue, the Director found the employees named in the Determination had not received all wages owed and were entitled to various amounts that included unpaid regular and overtime wages and unpaid annual vacation and statutory holiday pay. The Director calculated the amounts for each employee using information provided by the employee and/or the payroll and bank records. The amounts, the

calculations and the reasoning and analysis for those amounts are included in summary sheets for each employee attached to the Determination.

23. The Director found Fun City had contravened section 17 by failing to pay all wages owed. In making this finding, the Director also found all wages should have been paid to employees no later than October 7, 2012; the last date worked by any employee was October 5, 2012; Fun City contravened section 18 by failing to pay all wages owing within 48 hours of termination; and the contraventions of section 18 were ongoing through the 2012 season, with the latest date of contravention being October 8, 2012, the day after expiry of the 48 hour period.

24. The Director also found Fun City had contravened sections 28, 40, 45, 46 and 58 of the *Act* and section 46 of the *Regulation*. The reasons for those findings are set out in the Determination.

ARGUMENT

25. The appeal is broadly framed and includes an extensive recitation of "background facts". To the extent the "facts" alleged are inconsistent with factual findings made in the Determination, I will need to be persuaded by 0862284 the findings made by the Director should be disregarded in favour of the facts asserted in the appeal. An analysis of this aspect of the appeal will be undertaken later in this decision applying well established legal principles under the *Act*.

26. Much of the evidence submitted in the appeal provides an overview of the incorporation and structure of 0862284 and FCSI, and shows that through 2011, these entities were incorporated by different persons for unrelated purposes and were operating along different paths. The appeal states that "at all times material to the within proceeding, Jordan [Mr. Prince] was a director of FCSI, and the general manager. Cathy [Prince] continued to be the bookkeeper." As I read the material in the "record", there is no issue or doubt about the correctness of that statement. The more relevant question is why that fact should make any difference.

27. 0862284 argues the Director made no specific finding that 0862284 or Mr. Bourassa were at any time the employer of the complainants. 0862284 submits it was not an employer "vis-à-vis the FCSI employees" and points out that all employment decisions were made by Mr. Prince alone (as they had been in 2011); that he hired and discharged the employees of the business, determined job descriptions and wage rates; he supervised all of the work. All employee records regarding hiring, hours worked, wages earned and employment generally were prepared in the name of FCSI, with no reference to Mr. Bourassa at all.

28. 0862284 contends the decision by Mr. Bourassa to purchase the three buses from FCSI and lease them back was done to allow FCSI to meet its wage liabilities and allow them to continue to operate their business.

29. 0862284 says it applied to register Fun City Sightseeing with the intention of starting another tour bus operation and opened a bank account in the name of 0862284 dba Fun City Sightseeing, but never followed through on that plan, allowing the application to lapse and the bank account to lay idle.

30. 0862284 says no payment was ever made from a bank account in its name to FCSI, FCSI's employees or to anyone else. The appeal discusses how Mr. Bourassa became a director of FCSI and submits the finding made in the Determination against Mr. Bourassa's credibility in this area was "perverse". The appeal submission also says the finding that Mr. Bourassa was the "controlling mind behind the operation" of the business is "similarly specious and perverse".

31. The appeal accepts the finding that Mr. Bourassa was the sole authorized signatory on the FCSI bank account, but says it was open at any time following his resignation as a director for Mr. Prince and FCSI to remove that authority. Nor does 0862284 deny the finding that Mr. Bourassa used the funds generated by the business to pay personal and business expenses, but submits he was never given an opportunity to explain the use of those funds. 0862284 submits it was only providing some credit facility to FCSI for, among other things, "fuel and servicing costs vis-à-vis the operation of the buses" for which it was partially recompensed.

32. 0862284 contends the relationship chart of the associated entities in the Determination is "to a great extent a work of fiction" and demonstrative of bias on the part of the Director. 0862284 alleges there were other statements made during the investigation that also show bias.

33. 0862284 alleges neither it nor Mr. Bourassa were ever provided with copies of the complaints or given an opportunity to review and respond to them. It is asserted the Director never identified how many and which of the complainants had failed to file a complaint within the time prescribed by section 74 of the *Act* and says that clearly the persons added to the list of complainants did not file a complaint in the manner required in that provision. 0862284 suggests the additional complainants were solicited by the Director and that conduct represents a clear manifestation of bias against it and Mr. Bourassa.

34. 0862284 says the Director should not have accepted the evidence of Mr. Prince at "face value", alleging Mr. Prince has made threatening remarks to Mr. Bourassa and has attempted to deflect creditor's claims from himself to others, including Mr. Bourassa.

35. 0862284 agues the facts raise a reasonable apprehension of bias by the Director, demonstrated by the Director engaging in an investigation beyond the original complaints, not providing information, making adverse findings on insufficient evidence, or no evidence, and drawing conclusions that were neither reasonable or justified on the facts.

36. Also, based on all the assertions of fact in the appeal submission, 0862284 says the Director erred in law in associating the three entities as one employer. 0862284 relies on comments found in several Court decisions which, while helpful, do not completely incorporate how section 95 is applied under the *Act*.

37. Several of the former employees have filed submissions. All of the submissions express astonishment at the nature and substance of the submissions made by Mr. Bourassa on behalf of 0862284 and express support for the Determination. However, only the submission of Stephen Nolan has provided any response to the substantive elements of the appeal. Mr. Nolan submits his personal experience confirms the assertions made by many former employees, and the finding in the Determination, concerning Mr. Bourassa's involvement in the business as "the money man". He also submits it is "incredulous" that Mr. Bourassa could take control of the assets of an insolvent company, allow that company to continue operation, have a subsequent role in the proceedings and the revenue/profit intake of the company, but claim not to be responsible for the debts and liabilities of that company.

38. The Director points out that many of the factual assertions in the appeal pre-date the period relevant to the events that were subject to complaints and Determination. The Director submits the basis for the decision to associate the entities under section 95 is fully and clearly set out in the Determination. The Director acknowledges not knowing the "intentions" of Mr. Bourassa and 0862284 in respect of dealings he may have had with his brother or in respect of the opening of the bank account. The Director says he based his findings on the facts, rather than any speculation about Mr. Bourassa's "intention". The Director says the statement made in paragraph 27 of the appeal submission, claiming Mr. Bourassa's appointment as director of FCSI lasted from the end of March to the 10th of May 2012, clearly contradicts the assertion made during the

investigation process, where Mr. Bourassa claimed he was only a director of FCSI from April 30 to May 10, 2012. The Director submits this reversal of position, which is an attempt to explain away Mr. Bourassa's involvement as a director of FCSI on April 2 and 24, 2012, goes against his credibility and supports the finding made in the Determination on that matter. The Director also points to a document in the "record", an e-mail dated May 10, 2012, where Mr. Bourassa refers to himself as one of the "new owners of this company". I note the time of the e-mail is 6:45 pm. The Director notes the filing of the Notice of Change of Directors was filed with BC Registry Services at 5:06 pm.

39. The Director says 0862284 has not provided any evidence to support the several allegations contending findings of fact are wrong or "perverse" and that aspects of the Determination are "fiction". Similarly, the Director says the allegations of bias are unsupported by any evidence.

40. The Director submits that much of the appeal submission overlooks evidence received during the investigation from third parties. The Director says the assertion made in paragraph 33 of the appeal submission is contradicted by the evidence that Mr. Bourassa was in possession and control of the payroll records, but failed or refused to provide them to the Director.

41. The Director acknowledges that while Mr. Bourassa made several assertions during the investigation, many of those were contradicted by the evidence gathered during the investigation. Arguments that revisit those assertions are nothing more than attempts to alter the findings of fact without establishing a reviewable error.

42. The Director submits the allegations of "solicited" complaints are false. The persons added to the Determination were included as a result of a review of the payroll records provided by the former bookkeeper. The Director rejects any suggestion the addition of persons shown by an examination of the payroll records to be owed wages was a manifestation of bias, submitting, "[p]roceeding pursuant to section 76(2) of the *Act* does not constitute bias on my part".

43. The Director says the assertions made at paragraph 42 of the appeal submission are wrong. While Mr. Bourassa did submit that any evidence provided by Mr. Prince should be "closely scrutinized", there was no mention of an attempt by Mr. Prince to "extort a transfer of the buses" from Mr. Bourassa to him.

44. The Director submits 0862284 is attempting to use information from an earlier Determination issued by a delegate of the Director in respect of unpaid wage claims from 2011 and which predates the Determination under appeal here. None of the information from that Determination was considered in making the Determination now being appealed.

45. The Director says there is no basis for the allegations of bias.

46. The Director submits 0862284 has not provided any evidence or argument that could seriously challenge the findings of fact made on the section 95 issue. There are elements of the appeal submission that contradict previous evidence provided by Mr. Bourassa and/or counsel acting on his behalf during the investigation. None of the submissions made challenge the correctness of the evidence received from the Bank of Montreal and the City of Vancouver or show the other facts on which Mr. Bourassa was found to be a *de facto* director of FCSI to be wrong as a matter of law.

47. 0862284 has filed responses to the submission of the Director on January 15, 2014, January 29, 2014, and February 6, 2014, that do not add anything to the substance of the appeal. 0862284 also made an unsuccessful application for an extension of time to file a final reply on January 30, 2014.

48. On February 14, 2014, I notified the parties of a concern that had arisen during my review of the appeal. The parties were invited to address this concern. On February 28, 2014, the Director filed a submission. No other party has filed a submission. The notice indicated I would decide, after receiving and reviewing any submission, whether a further response would be necessary. I do not find any submissions responding to the Director are necessary.

ANALYSIS

49. The grounds of appeal are statutorily limited to those 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 being made.*

50. An appeal to the Tribunal under section 112 is not intended as an opportunity to either resubmit the evidence and argument that was before the Director in the complaint process or submit evidence and argument that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.

51. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

52. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show, not merely declare, that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation.

53. Generally, the Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] BCJ No. 2275 (BCCA):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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.

54. 0862284 alleges the Director demonstrated an actual bias or a reasonable apprehension of bias. Such an allegation must be proven on the evidence. As the Tribunal noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the test for determining actual bias or a reasonable apprehension of bias is an objective one and the evidence presented should allow for objective findings of fact:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

55. The Tribunal also noted the following in *Alpha Neon Ltd.*, BC EST # D105/11:

> An allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

56. In *R. v. S. (R.D.), [1997] 3 S.C.R. 484*, the Supreme Court added the following to the concern expressed above:

> Regardless of the precise words used to describe the test (of apprehension of bias), the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the ***personal*** integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)

57. As well, the Tribunal has adopted the view that allegations of bias against a delegate, as has been done here, must be considered in light of the fundamental nature of the statutory process within which a delegate functions and which was described as follows in *The Director of Employment Standards (re Milan Holdings)* (BC EST # D313/98):

> An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77 which requires only that "If an investigation is conducted, the director must make *reasonable efforts* to a give a person under investigation an opportunity to respond". This modification of the common law standard is legislative recognition that the Director's role is more subtle and more complicated than can be expressed by the label "quasi-judicial". On completing an investigation, the director may make a determination: s. 79(1). At the time such a determination is made, it is an unavoidable practical reality that other investigations on related subjects may still be underway and that tentative conclusions may have been reached in respect them, pending a decision as to what, if any enforcement action is appropriate on an individual or more general basis: *Re Takarabe* (BCEST #D160/98). This is precisely the situation which presents itself here.

58. It follows from all of the above that the burden of proving actual or a reasonable apprehension of bias is high and demands "clear and convincing" objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias.

59. I will first address the section 95 issue. 0862284 contends the Director erred in law in associating it with the other entities under section 95 of the *Act*. I disagree. Section 95 reads:

> *95 If the director considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction,*

> *(a) the director may treat the corporations, individuals, firms, syndicates or associations, or any combination of them as one employer for the purposes of this Act, and*
>
> *(b) if so, they are jointly and separately liable for the amount stated in a determination, a settlement agreement or an order of the tribunal, and this Act applies to the recovery of that amount from any or all of them.*

60. Whether the conditions necessary for a decision under section 95 exists is primarily a question of fact. On my analysis of the facts, and the section 112(5) "record", I find there was ample evidence for the decision of the Director to associate the entities under section 95 of the *Act*. There is nothing in the appeal that shows the section 95 decision was a misinterpretation or a misapplication of that provision on the facts as found. 0862284's submission that it is not an "employer" is simply another way of stating its disagreement with the section 95 conclusion. The statutory effect of a section 95 decision is that entities are considered "one employer" under the *Act*.

61. I find the facts recited in the first 16 paragraphs of the appeal dwell on facts that are not material to the Determination at issue here. As well, several of the assertions made in the appeal are inconsistent with the findings of fact and contradict evidence in the "record". I agree with the Director that the statements made in the appeal that are contradicted by evidence in the "record" typically go to key findings on the section 95 question and those statements in the appeal support the Director's view of Mr. Bourassa's credibility in those areas. I refer particularly to the evidence that Mr. Bourassa was not a director or officer of FCSI and had "minimal" involvement in that company over the claim period.

62. In respect of the allegations of bias against the Director, as indicated above, the burden of proving actual or perceived bias is high. The burden requires "clear and convincing" objective evidence from which a reasonable person, acting reasonably and informed of all the relevant circumstances would conclude the object of the allegation was biased against Mr. Bourassa and, hence, his company. The burden has not been met; there is no clear objective evidence from which it can reasonably be found the Director was disposed to hold an adverse view of Mr. Bourassa and 0862284 such that the Director's ability to analyze the evidence neutrally and render an impartial decision was compromised.

63. I now turn to the last matter raised by this appeal. The Director found twenty former employees had not been paid all wages owing. These former employees had not filed complaints but were uncovered by the Director in the course of dealing with the filed complaints.

The Statutory Framework

64. Subsection 74(1) of the *Act* allows "an employee, former employee or other person" to complain that a requirement of the *Act* has been contravened. Subsection 74(2) requires a complaint be in writing and delivered to an office of the Employment Standards Branch. Subsections 74(3), (3.1) and (4) govern the time for delivering a complaint to the Branch.

65. Subsections 76(1) and (2) read:

> *76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.*
>
> *(2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.*

66. Subsection 76(3) sets out circumstances that allow the Director to refuse to accept, etc., or to stop investigating, etc., "a complaint".

67. Section 77 states that if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

68. Subsection 80(1) reads:

> *80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*
>
> *(a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of employment, and*
>
> *(b) in any other case, 6 months before the director first told the employer of the investigation that resulted in the determination,*
>
> *plus interest on those wages.*

69. When I raised my concern with the parties about the inclusion of twenty persons in the Determination who did not file a complaint with the Director, I understood the Director had conducted an investigation of Fun City under section 76(2) of the *Act*. I was led to this belief by the comment in the Director's January 13, 2014, submission, referring to "proceeding pursuant to section 76(2) of the *Act*". It appears I was mistaken on that, as in the reply to my invitation for submissions, the Director has stated:

> The comment in the delegate's response with respect to section 76 (2) was not intended to infer that a section 76 (2) investigation had taken place, rather it was made in the context that not all investigations need a formal complaint before being initiated.

70. The Director's confirmation that no section 76(2) investigation was undertaken assists the analysis of my concern, but doesn't affect the outcome because, in any event, I can find nothing in the "record" indicating the Director told 0862284 there would be such an investigation. I am left in the same situation in respect of the requirements of the *Act* whether there was or was not a section 76(2) investigation.

71. The *Act* requires a complaint to be in writing and delivered to the Branch. The *Act* does not require the written complaint to take a particular form or contain any particular information, although for reasons of procedural fairness there must be sufficient information in a complaint to inform an employer of the case against them to allow a reasonable opportunity to present evidence and argument in response: see *Inshalla Contracting Ltd.*, BC EST # RD054/06, at paras. 23-28 and cases cited therein. However, the *Act*, as I read it, provides no other way for finding wages are owing under the *Act* than through a complaint or a section 76(2) investigation.

72. A complaint delivered outside of the statutory time limits provided in section 74 of the *Act* may be rejected by the Director. In respect of a wage claim that is before the Director, an employer's liability for wages is limited: "in the case of a complaint", from the earlier of the date of the complaint or termination of employment; or, "in any other case", from the Director first telling the employer of the section 76(2) investigation (section 80(1)).

73. In this case, there are up to twenty former employees who have received the benefit of the Determination without either having directly filed a complaint or having the wage liability of 0862284 assessed against the requirements of subsection 80(1). I say "directly" because there is evidence, to which I will refer later, that some of the twenty former employees are the beneficiaries of a written complaint filed on their behalf by Jeff Weiss and acknowledged by Mr. Bourassa. The "record" and the Determination indicate evidence of the amounts owing to these former employees were not before the Director until the payroll records provided by the former bookkeeper were reviewed by him in June 2014.

74. In my view, the *Act* does not allow the Director to avoid the statutory requirements for filing a complaint and award wages on what would be an untimely complaint if one were made and would, in any event, reach back past the wage liability period in subsection 80(1), since there were no complaints filed by the twenty former employees and section 76(2) was not used by the Director. While it may be of benefit to the former employees who have been awarded wages without having participated in the process, it is quite unfair to the employer who has had no opportunity to respond to the validity of the claims or to seek to invoke the statutory limitations for filing a complaint and limiting its wage liability: see section 2(b).

75. Accordingly, the Determination must be varied to exclude those former employees for whom no complaint was made. In reaching this conclusion, I would not exclude those three employees whose names appear on the list prepared by Mr. Weiss and was provided to the Director by Mr. Bourassa on March 14, 2013. Mr. Weiss' document satisfies the requirement of a written complaint and it was delivered to the Branch. In his communication to the Director, Mr. Bourassa acknowledges the list is of "employees that are owed money from Fun City Sightseeing Inc." Even if the amounts found owing to those former employees in the Determination might now differ from what Mr. Bourassa accepted was owing in his communication, determining wages owing in respect of a complaint is a function of the role of the Director and, if the amounts do differ, there is nothing in this appeal that provides any basis for finding the Director erred in law in calculating wages owing for those former employees entitled to wages under the *Act*.

ORDER

76. Pursuant to section 115 of the *Act*, I order the Determination dated June 28, 2013, be varied in accordance with this decision. The matter is still before the Director and the amount of wages owed need to be recalculated.

David B. Stevenson
Member
Employment Standards Tribunal