

An appeal

- by -

Sahil Development Inc.
(“Sahil”)

- 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.: 2009A/164

DATE OF DECISION: March 3, 2010

DECISION

SUBMISSIONS

Navin Sami on behalf of Sahil Development Inc.
Joy Archer on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Sahil Development Inc. (“Sahil”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 19, 2009.
2. The Determination was made by the Director on a complaint filed by Imran Malik (“Mr. Malik”), who alleged Sahil had contravened the *Act* by failing to pay regular wages. The Determination found that Sahil had contravened Part 3, sections 17 and 18 and Part 7, section 58 of the *Act* and ordered Sahil to pay Mr. Malik an amount of \$2,081.82, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Sahil under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
4. The total amount of the Determination is \$3,581.82.
5. Sahil has appealed the Determination, alleging the Director failed to observe principles of natural justice in making the Determination. Sahil has asked the Tribunal to cancel the Determination and refer the matter back to the Director

ISSUE

6. The issue in this appeal is whether Sahil has shown the Director failed to observe principles of natural justice in making the Determination

THE FACTS

7. The facts relating to the complaint are not disputed in the appeal.
8. Sahil operates a construction company in Coquitlam, BC. Mr. Malik worked for Sahil as an accounting clerk/bookkeeper from May 1, 2008 until August 31, 2008, when he left the employment to return to school. The complaint was filed in January 2009. Mr. Malik alleged he had not been paid for the last month he had worked, a total of 86.5 hours. The Determination notes that during the complaint process Sahil did not dispute either the fact wages were owed or the amount claimed.
9. On April 3, 2009, another delegate of the Director conducted a mediation session between the parties. Mr. Malik attended personally; Mr. Navil Sami, the sole director and president of Sahil, attended by phone. The delegate believed there was a resolution to the complaint, but that resolution has never been formally acknowledged by Sahil.

10. In mid April 2009, Mr. Sami's wife died. It appears from the material provided by the Director this unfortunate event affected efforts to deal with and resolve the complaint. The Director attempted to contact Mr. Sami on May 12, 2009, but was unable to do so. The first contact by the Director with Mr. Sami after his wife's passing was May 19, 2009. He indicated he was trying to restart his business and asked the Director to re-send the documents relating to the resolution of Mr. Malik's complaint.
11. In June 2009, following several more unsuccessful attempts to have Sahil deal with the complaint, the Director scheduled a complaint hearing for July 23, 2009, and sent a Notice of Complaint Hearing and a Demand for Employer Records by registered mail to the business office and the registered and records office of Sahil, to Mr. Sami and to Pradeep Naicker, Sahil's secretary. This mail was not collected. No representative of Sahil attended the complaint hearing. The Determination also records there was a discussion with Mr. Sami on July 22, 2009, and an unsuccessful attempt to contact Mr. Sami on his cell phone on the morning of the complaint hearing. In the July 22 discussion, Mr. Sami informed Ms. Joyce Graham, a delegate of the Director on the file, that he was in Fiji and that neither he nor a representative of Sahil would be attending the complaint hearing.
12. The material provided by the Director includes an affidavit from Ms. Graham, a delegate of the Director, outlining her involvement in the file between April 3, 2009, and July 22, 2009, including communications, and attempts to communicate, with Mr. Sami during that period. The information provided in this affidavit was both appropriate and necessary in view of the grounds of appeal and assertions made in the appeal submission.

ARGUMENT

13. The appeal submission from Mr. Sami, on behalf of Sahil, is brief. It notes the loss of his wife in April 2009 and that it was a difficult time for him and his young family, with many cultural responsibilities to attend and personal questions to deal with. He says he had told the Director of his wife's death and that he could not deal with the complaint for a period of time.
14. The Director acknowledges both the tragedy of Mr. Sami's personal circumstances and that he had asked the Director to give him a period of time after his wife's death before being asked to deal with the matter. The Director says that on April 17, 2009, he asked that the Director not call him for three weeks.
15. The Director says, however, that Mr. Sami did not, either directly or through a person acting on his behalf, indicate that after the mid-April discussion he needed more time to cope with his wife's passing and was unable to deal with Mr. Malik's complaint.
16. The Director also says Sahil was aware of the claim made by Mr. Malik and the basis for that claim. The parties had been involved in a mediation session prior to Mr. Sami's wife's passing. Mr. Sami did not dispute the wages claimed by Mr. Malik were owed.

ANALYSIS

17. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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 made.*

18. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds. 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.
19. Sahil's submission on this appeal is that Mr. Sami was unable to deal with the complaint because of the untimely death of his wife and its effect on him; that he had notified the Director of his situation but the Director proceeded to deal with the complaint "as they wanted".
20. Having reviewed the Determination, Ms. Graham's affidavit, the section 112(5) Record and considered the positions of Sahil and the Director, I am unable to accept there was any failure by the Director to observe principles of natural justice in making the Determination.
21. There is no doubt that Sahil knew of the details of the wage claim being made by Mr. Malik. The material in the file supports the finding in the Determination that there was no dispute from Sahil that wages were outstanding in the amount claimed by Mr. Malik. As well, there is support for the finding in the Determination that Sahil and Mr. Sami were aware that a Demand for Employer records had been issued and that complaint hearing would take place on July 23, 2009. The material submitted with the appeal confirms Mr. Sami was aware of the demand and the complaint hearing date on or about July 7, 2009. There was no request from Sahil to postpone the requirement to provide the employer's records or adjourn the complaint hearing to a later date. Mr. Sami chose not to attend personally on behalf of Sahil or to send a representative of Sahil to the complaint hearing.
22. The Director had provided Mr. Sami with a period of grace in respect of his wife's death. If Sahil and Mr. Sami needed more than the four months' period between his wife's passing and the date of the complaint hearing in order to come to grips with his personal tragedy and deal with Mr. Malik's claim, it was incumbent on Sahil to request a postponement of the process and an adjournment of the complaint hearing and to provide a reasonable explanation of the reasons for the request.
23. Instead, Sahil, through Mr. Sami, failed or refused to respond to several attempts by the Director to discuss the complaint, deflected discussion of the complaint when he was contacted and, at the last minute, advised the Director that Mr. Sami was unable to attend the complaint hearing and Sahil would not be sending a representative in his place.
24. The Director has framed their response on the natural justice issue solely in the context of section 77 of the *Act*. I have, however, also considered the natural justice question in the context of what the Tribunal has recognized as a broader duty to proceed fairly than what is specifically prescribed by section 77, and which is summarized in the following excerpt from *Kyle Frenay*, BC EST # D130/04:

The Supreme Court of Canada has repeatedly stated that determining the content of the duty of fairness is a highly contextual exercise. The relevant factors are to be weighed and applied with a view to requiring public bodies to act with courtesy and common sense, in a manner commensurate with the interest at stake, but without imposing unrealistic institutional burdens on the public body: see most recently, *Congregation des temoins de Jehovah v. Lafontaine (Village)* 2004 SCC 48. It is what the English have concisely referred to as "fair play in action".

25. A recognition of a broader duty of fairness as described above is consistent with purposes of the *Act* identified in sections 2(b) and (d), namely, the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and operation of the legislative scheme.
26. While there are aspects of this case that engage a consideration of that broader duty of fairness, I do not find these considerations outweigh the legislative interest in the expeditious resolution of complaints and finality in the complaint process, or the legitimate interest of ensuring that parties are subject to appropriate discipline during the complaint process.
27. Sahil has failed to show the circumstances demonstrate the Director failed to observe principles of natural justice in making the Determination. Sahil was aware of the claim by Mr. Malik and was given a reasonable opportunity to respond to it, including the opportunity to attend and participate in the complaint hearing. Additionally, the steps taken by the Director in advancing the complaint to a final resolution have not been shown to have been unfair to Sahil.
28. As a result of my conclusions, the appeal is dismissed.

ORDER

29. Pursuant to Section 115, I order the Determination dated November 19, 2009, be confirmed in the amount of \$3,581.82, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal