

An appeal

- by -

Prairies West Resources Ltd.
(“PWR”)

- 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: Carol L. Roberts

FILE No.: 2016A/162

DATE OF DECISION: February 28, 2017

DECISION

SUBMISSIONS

James Boychuk	on behalf of Prairies West Resources Ltd.
Karmen McLeod	on her own behalf
Jeff Bailey	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Prairies West Resources Ltd. (“PWR”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on October 14, 2016. In that Determination, the Director found that PWR had contravened sections 17, 18 and 21 of the *Act* and section 46 of the *Employment Standard Regulation* (the “*Regulation*”) in failing to pay Karmen McLeod (“Ms. McLeod”) \$8,659.39, representing wages, statutory holiday pay, annual vacation pay, unauthorized deductions and interest. The Director also imposed four administrative penalties in the total amount of \$2,000 for the contraventions, for a total amount owing of \$10,659.39.
2. PWR appealed the Determination contending that the delegate failed to observe principles of natural justice in making the Determination. PWR also contended that evidence had become available that was not available at the time the Determination was being made. In reviewing the record, I was of the view that the question of whether or not the complaint had been filed within the statutory time period had not been satisfactorily addressed in the Determination and sought submissions from the parties on that issue.
3. This decision is based on the submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

FACTS AND ARGUMENT

4. PWR operates a landscaping and driveway construction business in Fort St. John, British Columbia. Mr. Boychuk is the sole director.
5. Ms. McLeod filed a complaint alleging that she was employed by PWR from May 23, 2015, until September 17, 2015, and that PWR contravened the *Act* by failing to pay her regular wages, annual vacation pay and issuing her an NSF cheque. Ms. McLeod filed her complaint on March 8, 2016.
6. Mr. Boychuk contended that Ms. McLeod was not an employee, that any services she performed arose because he and Ms. McLeod had a personal relationship, and that, in any event, she was not associated with the company after the end of August 2015.
7. The delegate investigated Ms. McLeod’s complaint in part because the parties were living in different communities and in part because of a court order prohibiting contact between them. At issue before the delegate was whether the complaint had been filed within the time period provided in the *Act*, whether Ms. McLeod was an employee, if so, what wages she was entitled to, and whether she was entitled to vacation pay and reimbursement for paying a business cost.

8. As I have concluded that the delegate erred in concluding that the complaint was filed within the time period provided in the *Act*, I have set out only the facts related to that issue.
9. Ms. McLeod rented a room in Mr. Boychuk's house in May 2015 and began a romantic relationship with him shortly after. She said that she performed a variety of tasks for Mr. Boychuk, including bookkeeping and secretarial services during the term of that relationship.
10. Ms. McLeod went to visit her mother at the end of August 2015, and moved out of Mr. Boychuk's house in September 2015. She started a new job in Grande Prairie, Alberta around September 24, 2015. Ms. McLeod said that although she was no longer physically in Fort St. John, she continued to perform work for PWR until approximately September 17, 2015.
11. Mr. Boychuk contended that at the end of August 2015, Ms. McLeod told him she had found work in Alberta and that she returned to Fort St. John only briefly in October to collect her personal possessions. There was a dispute between the parties at that time, which led to the criminal charges against Ms. McLeod.
12. After quitting her employment in September 2015, Ms. McLeod used Mr. Boychuk's e-mail system to request wage statements from PWR's bookkeeping service for the pay periods July 26 to September 2015. The service sent her four wage statements that Mr. Boychuk contended were fraudulent. Mr. Boychuk provided the delegate with copies of his own wage statements which differed from those submitted by Ms. McLeod. PWR's bookkeeping service informed the delegate that Ms. McLeod contacted the service on September 23, 2015, requesting wage statements which indicated she worked 80 hours every two weeks. The bookkeeping service did so and sent them to Ms. McLeod. The bookkeeping service informed the delegate that neither PWR nor Ms. McLeod had requested this service previously. The service also informed the delegate that Ms. McLeod did not send a record of hours nor any other documentation indicating her rate of pay along with her request.
13. The delegate contacted a former PWR employee, Ms. Clarke, who was unable to confirm Ms. McLeod's employment status with PWR in September 2015.
14. Mr. Boychuk submitted a letter from a witness who resided on Mr. Boychuk's property stating that Ms. McLeod moved out of Mr. Boychuk's property in August and returned in October to collect some of her belongings. The delegate spoke with the witness who said that he wrote the letter at Mr. Boychuk's request and wrote what Mr. Boychuk asked him to. The witness said that he did not know when Ms. McLeod moved into Mr. Boychuk's house because he tried to mind his own business and did not have a good memory. He did not know if Ms. McLeod worked for PWR. The delegate placed little weight on the witness's statement.
15. The delegate noted that complaints had to be filed within six months from the last day of employment under Section 74 of the *Act*, and as the complaint was filed March 8, 2016, he had to determine whether Ms. McLeod was employed as of September 9, 2015.
16. The delegate noted that Ms. McLeod sent an e-mail to PWR's bookkeeping service on September 23, 2015, indicating that she was still working for PWR. Mr. Boychuk provided the delegate with text messages Ms. McLeod sent to him on September 1, 2015, indicating that she was at her mother's house.
17. The delegate concluded that Mr. Boychuk was less credible than Ms. McLeod based on the witness's statement that Mr. Boychuk told him what to write in the statement and Mr. Boychuk's position that Ms. McLeod did not work for PWR. Preferring Ms. McLeod's evidence over Mr. Boychuk's, the delegate determined that Ms. McLeod was performing services for PWR on or after September 9, 2015.

18. The delegate submitted that, although the evidence indicated that the parties' romantic relationship ended in August 2015, that event did not preclude the continuation of the employment relationship. The delegate says that neither party submitted any credible evidence indicating when the employment relationship ceased and that he specifically placed no weight on the wage statements issued by the bookkeeping service.
19. The delegate submitted that he was required to assess the credibility of the parties and found Ms. McLeod's evidence to be more reliable based on the inconsistencies in Mr. Boychuk's evidence.
20. Ms. McLeod says that she provided evidence demonstrating that she was living at Mr. Boychuk's residence and working at PWR after September 9, 2015. She said that she responded to telephone calls at her new job and relayed those messages to Mr. Boychuk and performed bookkeeping and secretarial work after September 1, 2015.

ANALYSIS

21. Section 112 of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
22. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision.
- Failure to observe the principles of natural justice*
23. Although PWR alleges a failure to comply with principles of natural justice as the ground of appeal, its written submissions are, in essence, an assertion that the delegate's conclusion is wrong.
24. In *JC Creations* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned."
25. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".
26. I am satisfied that PWR knew the case it had to meet and a full opportunity to present all relevant evidence. There is no assertion, or evidence, that the delegate was biased. In short, I find no merit to this ground of appeal.

Error of law

27. 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] B.C.J. No. 2275 (B.C.C.A.):
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.
28. Although Mr. Boychuk did not allege that the delegate erred in concluding that the complaint was filed within the statutory time period, as noted above, I sought submissions from the parties on this issue.
29. Mr. Boychuk’s evidence was that Ms. McLeod left the community at the end of August 2015 and returned only briefly to move out some of her personal possessions. In support of this assertion, Mr. Boychuk provided the delegate with copies of text messages Ms. McLeod sent to him, confirming that she was away from Fort St. John. While the text messages indicate that Ms. McLeod stated she would be returning September 5, 2015, Mr. Boychuk informed the delegate that she did not return on September 5, 2015. Ms. McLeod did not dispute this. Mr. Boychuk also provided the delegate with evidence that PWR had no work between August 14 and September 22, 2015. Ms. McLeod contended that she did work for PWR even though she was not in Fort St. John, including bookkeeping and secretarial services, until approximately September 17, 2015.
30. Ms. McLeod’s complaint was filed March 8, 2016. Section 74(3) of the *Act* provides that a complaint relating to an employee whose employment has terminated must be delivered to the Director of Employment Standards within six months after the last day of employment.
31. There is no dispute that the relationship between the parties ended unhappily at some point in September 2015, and that when Ms. McLeod returned in October to pick up some personal possessions, there was an altercation that led to police intervention.
32. The delegate preferred the evidence of Ms. McLeod over that of Mr. Boychuk based on what the delegate characterized as Mr. Boychuk’s inconsistent evidence and his conclusion that he had “coached” a witness what to write regarding Ms. McLeod’s residency at his home.
33. In my view, the delegate erred in law in his conclusion, adopting a view of the facts that cannot be reasonably entertained.
34. The burden was on Ms. McLeod to establish, on a balance of probabilities, that she performed work on PWR’s behalf after September 9, 2015. She provided no documentary evidence in support of that assertion, which Mr. Boychuk disputed.
35. The delegate then considered the credibility of the parties, and preferred Ms. McLeod’s evidence that she did perform work until September 17, 2015, over that of Mr. Boychuk, who denied her assertions. The delegate

determined Ms. McLeod was more credible because Mr. Boychuk made inconsistent statements as well as his finding that Mr. Boychuk “coached” one of the witnesses.

36. It is a well-accepted legal principle that credibility assessments are best made by the decision-maker before whom the parties appear and that such assessments are usually granted a high degree of deference. In this case, for reasons set out above, the delegate did not conduct an oral hearing, speaking to each of the parties separately by telephone and had limited ability to assess the demeanor of the parties.
37. Furthermore, the delegate’s analysis for preferring the complainant’s evidence lacked detail, and did not reference any of the criteria set out British Columbia Court of Appeal in *Faryna v. Chorny* (1952) 2 D.L.R. 354. Credibility assessments are made having regard to a number of factors, including memory, motive and self-interest, internal contradictions and inconsistencies, the degree of detail and forthrightness.
38. Although the delegate addressed the issue of inconsistencies in Mr. Boychuk’s evidence, in my view, those inconsistencies were not material (that Mr. Boychuk denied an employment relationship is not an unusual position for parties in Employment Standards complaints to take). The record demonstrates that Ms. McLeod’s evidence was also not consistent in some respects (those inconsistencies, such as the asserted last day of work, were also, in my view, not material). The delegate stated that he also preferred Ms. McLeod’s evidence because Mr. Boychuk “coached” a witness. However, the record demonstrates that Ms. McLeod may not have been entirely forthright by having a payroll service prepare wage statements without any foundation. In other words, both parties may not have had entirely “clean hands.”
39. The delegate did not assess motive, which in my view was an important factor to be considered. Not only was motive, or self-interest, raised repeatedly by Mr. Boychuk, but the employment relationship arose in the context of a personal relationship which ended with a restraining order being issued against Ms. McLeod.
40. Most disturbingly however, there was no independent or objective evidence, which is a critical indicator of credibility, of Ms. McLeod’s “work”.
41. Neither party maintained a record of Ms. McLeod’s hours of work. The sole evidence that Ms. McLeod presented to support her assertion that she was performing services for PWR after August 31, 2015, was her own testimony coupled with invoices created by a bookkeeping service based on Ms. McLeod’s instructions, and which were prepared without any underlying documentation.
42. In my view, Ms. McLeod has not established, on a balance of probabilities, that she performed work for PWR after September 9, 2015. As a result, I conclude that her complaint was not filed within the six month period provided under section 74(3) of the *Act*.
43. I allow the appeal and cancel the Determination.

ORDER

44. Pursuant to section 115 of the *Act*, I Order that the Determination, dated October 14, 2016, be cancelled.

Carol L. Roberts
Member
Employment Standards Tribunal