

An appeal

- by -

Gulf Coast Materials Ltd.
("Gulf Coast")

- 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: Robert E. Groves

FILE Nos.: 2015A/4, 2015A/5, 2015A/6,
2015A/7, 2015A/8, 2015A/9,
2015A/10

DATE OF DECISION: March 13, 2015

DECISION

SUBMISSIONS

David Lunny

counsel for Gulf Coast Materials Ltd.

Amanda Clark Welder

on behalf of the Director of Employment Standards

OVERVIEW

1. These proceedings commenced on January 8, 2008, when Dan Helgesen (“Helgesen”) filed a complaint pursuant to section 74 of the *Employment Standards Act* (the “*Act*”) claiming that he was owed wages by Gulf Coast Materials Ltd. (“Gulf Coast”). Helgesen later filed five further complaints covering most of the period from October 15, 2007, until he ceased to perform work at the Gulf Coast place of business on September 17, 2010.
2. The Director issued a determination concerning Helgesen’s initial complaint on February 24, 2009. The determination ordered Gulf Coast to pay Helgesen wages.
3. Appeals and an application for reconsideration brought pursuant to sections 112 and 116 of the *Act*, respectively, were subsequently adjudicated by the Tribunal.
4. Gulf Coast then brought an application for judicial review. On August 20, 2010, the Supreme Court of British Columbia, per Davies J., issued its decision regarding the application – see *Gulf Coast Materials Ltd. v. Helgesen* 2010 BCSC 1169 (the “Review Decision”). The court set aside the Director’s determination, and the decisions of the Tribunal, and referred the matter back to the Director for further investigation.
5. On December 23, 2013, a delegate of the Director (“Delegate Welder”) issued new determinations in respect of Helgesen’s complaints (the “Determinations”). Again, Gulf Coast was found to have contravened the *Act* when it failed to pay Helgesen wages.
6. Gulf Coast appealed the Determinations pursuant to section 112 of the *Act*. On January 6, 2015, the Tribunal issued my decision BC EST # D003/15 in respect of the appeal (the “Original Decision”). In it, I ordered that the matter of the determination of the amount of wages payable to Helgesen by Gulf Coast pursuant to section 80(1)(b) of the *Act* be referred back to the Director, but that in all other respects the Determinations should be confirmed.
7. Delegate Welder has now delivered a report dated January 15, 2015, in respect of the matter that was referred back (the “Report”). I have also received a submission in reply from counsel for Gulf Coast dated February 3, 2015.
8. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find that the matters raised in this aspect of the appeal can be decided on the basis of a review and consideration of the materials now before me.

FACTS

9. The issue referred back involved an analysis of the provisions of section 80(1) of the *Act*. That section reads as follows:
- 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 the 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.
10. Helgesen filed six complaints in respect of wages he claimed were owed for the period from October 15, 2007, until September 17, 2010. There were two periods between these dates, however, that were not captured by the six month limitation period established by section 80(1)(a). Those two periods ran from January 9, 2008, until June 16, 2008, and from June 3 to 15, 2009.
11. In the Determinations, Delegate Welder concluded that it was permissible to require Gulf Coast to pay wages to Helgesen for the periods falling outside the limitation periods defined by section 80(1)(a). In doing so, she relied on the provisions of section 80(1)(b). She stated that the Director had informed Gulf Coast on April 8, 2008, that an investigation was being conducted regarding wages alleged to be owed to Helgesen. She also asserted that insofar as this investigation purported to engage periods that were not captured by the limitation periods governing Helgesen's filed complaints, it was carried out pursuant to the jurisdiction bestowed in section 76(2) of the *Act*, which permits the Director to conduct an investigation to ensure compliance with the legislative scheme, whether or not the Director has received a formal complaint. For Delegate Welder, this meant that it was open to her to issue determinations for the entire period of Helgesen's employment with Gulf Coast after April 8, 2008, whether or not that entire period fell within the limitation periods established for each of his filed complaints.
12. Having regard to certain comments of Davies J. in the Review Decision, however, I decided in my Original Decision that if Gulf Coast were to be required to pay wages to Helgesen on the authority of section 80(1)(b), it had to be demonstrated that those wages became payable in a period no more than six months before the Director told Gulf Coast of the investigations that led to such a determination.
13. In the Original Decision, I noted that Delegate Welder had, in her Reasons for the Determinations, referred to correspondence from the Director to Gulf Coast dated April 8, 2008, and July 25, 2008, in which the Director had advised Gulf Coast of an investigation regarding the non-payment of wages to those dates. I noted also, however, that copies of that correspondence had not been included in the record produced by the Director for the purposes of the appeal, as required by section 112(5).
14. In addition, I noted that while Delegate Welder had stated that Gulf Coast was "notified on a number of occasions" concerning the Director's investigation regarding wages alleged to be owed to Helgesen, particulars of any specific documents confirming this statement for the purposes of the application of section 80(1)(b) were not provided in her Reasons.
15. In light of these omissions, it was unclear to me whether the Director had complied with the requirements of section 80(1)(b) before deciding that wages captured by that provision were payable by Gulf Coast.

I therefore ordered that the determination of the amount of wages payable by Gulf Coast under section 80(1)(b) be referred back.

16. In the Report, Delegate Welder confirms that there is no correspondence notifying Gulf Coast regarding an investigation that captures the period from June 3 to 15, 2009. Delegate Welder concedes, therefore, that the Determinations must exclude a calculation of wages payable in respect of that period.
17. For the period January 9, 2008, to June 16, 2008, Delegate Welder attaches copies of correspondence dated April 1, 2008, and July 25, 2008, (collectively, the “Letters”) that were omitted from the record delivered to the Tribunal prior to my issuing the Original Decision. Delegate Welder states that counsel for Gulf Coast acknowledged receipt of the Letters shortly after they were forwarded. She invites me to conclude that the Letters are sufficient to establish Gulf Coast’s liability to pay wages owed during the requisite period, pursuant to section 80(1)(b).
18. Gulf Coast argues that the Letters should not be considered at this late juncture, on fairness grounds. It also argues, in the alternative, that a proper construction of the Letters does not warrant a finding that they are sufficient to constitute the type of notice of an investigation which satisfies the requirements of section 80(1)(b).

ISSUE

19. Should the calculations of wages owed to Helgesen that are found in the Determinations, as supplemented by the Report, be confirmed, varied, cancelled, or referred back to the Director?

ANALYSIS

20. Gulf Coast argues first that the Letters were sent more than six years ago, and since Delegate Welder did not deliver copies of them to the Tribunal as part of the record for the appeal it is too late to rely on them now.
21. I do not accept this submission. Delegate Welder did rely on the Letters, because she mentioned them in her Reasons for the Determinations. I am assuming the April 1, 2008, letter she has tendered now is the letter that she refers to in her Reasons as being dated April 8, 2008 and that the reference to April 8 is a clerical error.
22. To be sure, the Letters should have been included in the record. Delegate Welder apologizes for this oversight. She states that they were omitted through inadvertence. I have no evidence that supports a different conclusion, and certainly no evidence of bad faith. Gulf Coast offers no evidence that it has been taken by surprise, or that it did not become aware of the Letters, either directly or indirectly, in a timely way when they were first sent. It offers no submission that would ground a claim that it has suffered any resulting prejudice.
23. Second, Gulf Coast argues that Delegate Welder is in error when she states that receipt of the Letters was acknowledged by counsel for Gulf Coast. Instead, it states that they were acknowledged by a former counsel for Bhora Mayer, an officer and director of Gulf Coast.
24. The correspondence acknowledging receipt of the Letters does come from counsel who identifies himself to be acting for Bhora Mayer. However, the correspondence also states that it is in response to the Letters forwarded to Gulf Coast. This is not surprising, as Bhora Mayer was the president of Gulf Coast and, as would later be confirmed, the holder of a deciding vote as a director in the event of an impasse. It is entirely

reasonable to infer, therefore, that when Bhora Mayer responded to the Letters through his counsel, he was doing so in his capacity as a representative of the company. Certainly, the submissions made in the correspondence from counsel relate to the claims made by Helgesen against Gulf Coast, and not to any claims against Bhora Mayer personally.

25. For these reasons, I have decided that I should review the Letters when considering the merits of Delegate Welder's statements in her Report.
26. Regarding the merits of the Report, Gulf Coast submits, and I agree, that the Letters say nothing expressly that would lead a reader to conclude that they were intended to constitute notice of an investigation pursuant to section 80(1)(b). Instead, they only reference the "complaints" made by Helgesen and another claimant. The April 1, 2008, letter opens with the following statements:

The Employment Standards Branch has received *complaints* from the above noted individuals [Helgesen and another]. Copies of *these complaints* and all other materials received by this office to date are attached for your review and reference. (my italics)
27. The April 1, 2008, letter goes on to seek a response from Gulf Coast to (again, my italics throughout) "*these claims*", "*these complaints*" and "*this matter*". More specifically, it requested a response in writing "with respect to each of the allegations noted in the *complaints*."
28. The first sentence in the July 25, 2008, letter informed Gulf Coast that it was a "follow up to the *complaints* filed with this office" by Helgesen and the other individual.
29. I agree with the submission of Gulf Coast that in its ordinary grammatical sense section 80 must be construed to enable the Director to issue determinations for wages in two mutually exclusive situations. Section 80(1)(a) applies "in the case of a *complaint*". Section 80(1)(b) applies "in any *other case*".
30. The Letters refer to "complaints". They do not refer to any claims for wages except in the context of complaints made by Helgesen and the other individual. Gulf Coast argues, and I agree, that a plain reading of the Letters reveals that they were meant to address the complaints made, and not "any *other case*". That being so, I cannot find that the Director has presented evidence showing that notice of an investigation under section 80(1)(b) was ever given to Gulf Coast.
31. It follows that the Director has not shown that Helgesen should be entitled to wages for the period from January 9 to June 16, 2008.

ORDER

32. Pursuant to section 115 of the *Act*, I order that the Determinations be varied to provide that the wages claimed by Helgesen for the periods January 9, 2008 to June 16, 2008, and June 3 to 15, 2009, be excluded from the calculation of the wages payable by Gulf Coast.

Robert E. Groves
Member
Employment Standards Tribunal