

An appeal

- by -

Kit International Transport Inc.
("KIT")

- 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.: 2008A/2

DATE OF DECISION: March 3, 2008

DECISION

SUBMISSIONS

J. Kadola	on behalf of KIT International Transport Inc.
Sharon Cott	on behalf of the Director of Employment Standards
Sandeep Rohit Kumar	on his own behalf

OVERVIEW

1. This is an appeal by KIT International Transport Inc., (“KIT”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued January 3, 2008.
2. Sandeep Rohit Kumar worked as a truck driver for KIT, a trucking business, from September 2006 until January 2007. After Mr. Kumar quit his employment, he filed a complaint alleging that KIT and Jagir Singh Kadola also known as Jerry Kadola also known as Gerry Kadola carrying on business as Karnail Logistics Ltd. (“Karnail”) had contravened the Act by failing to pay wages.
3. Following an investigation into Mr. Kumar’s complaint, the Director’s delegate determined that KIT and Karnail were associated companies pursuant to section 95 of the Act. The delegate also determined that Mr. Kumar was an employee of the associated companies (“the employer”) under the Act and that the employer had contravened Sections 18, 45 and 58 of the *Employment Standards Act* in failing to pay Mr. Kumar wages, statutory holiday pay and vacation pay. The delegate concluded that Mr. Kumar was entitled to wages and interest in the total amount of \$6,647.96. The delegate also imposed two \$2,500 penalties on the employer for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulation*.
4. KIT contends that the delegate failed to observe the principles of natural justice in finding that Mr. Kumar was entitled to wages.
5. KIT also seeks a suspension of the Determination.
6. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practise and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although KIT sought an oral hearing, I conclude that this appeal can be adjudicated on the written submissions of the parties. At issue on appeal is whether the delegate failed to observe principles of natural justice, an issue on which it is not necessary to hear *viva voce* evidence. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. Did the delegate err in finding that Mr. Kumar was owed wages?

THE FACTS AND ARGUMENT

8. As the delegate's conclusion that KIT and Karnail Logistics were associated corporations for the purposes of section 95 is not disputed, it is not necessary to review the facts leading to that conclusion. Similarly, KIT does not dispute the delegate's conclusion that Mr. Kumar was an employee.
9. On August 30, 2007, Mr. Kadola provided the delegate with three receipts in response to Mr. Kumar's claim for outstanding wages. The first was for \$1,000.00, dated January 12, 2007, a second for \$2,600.00 was dated January 19, 2007 and the third in the amount of \$2,500.00 was dated January 26, 2007. Mr. Kumar acknowledged that he signed the first receipt, but denied signing the second two.
10. The delegate spoke to a witness on behalf of the employer who told her that the employer made three cash payments to Mr. Kumar in January 2007, the first in the amount of \$1,000 and the second two in the approximate amount of \$2,500.
11. The delegate deducted the \$1,000 payment made by KIT on January 12, 2007 from the wages she determined owed to Mr. Kumar. The Determination is silent on the matter of the other two payments.
12. KIT contends that the Determination is "incorrect" because Mr. Kumar was paid his wages. Attached to the appeal submission were the three receipts.
13. The delegate says that, although she heard evidence of a witness from the employer on the issue of the payments, "you will see that the evidence of the witness has been discounted as I have only accepted \$1,000 agreed to by the employer (the appellant) and Mr. Kumar".
14. Mr. Kumar submits that of the three invoices submitted by KIT, only the January 12, 2007 invoice is authentic. He contends that the other two are fraudulent and that the signatures are not his. He also states that he did not receive the amounts indicated on those receipts.
15. In reply, KIT submits that the delegate has not stated any reason why she discounted the witness's evidence. KIT also alleges that the delegate was biased. It says that the delegate was "unprofessional and abrupt" towards the company's representative, Kelly Preston, leading Ms. Preston to make a complaint against the delegate and seeking her replacement with another delegate. KIT suggests that this complaint led the delegate to decide against it on the matter of Mr. Kumar's wages.

ANALYSIS

16. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or

- (c) evidence has become available that was not available at the time the determination was being made

17. In *J.C. Creations Ltd. (Re)* (BC EST #RD317/03), a reconsideration panel of the Tribunal determined that the Tribunal should consider the substance of the appeal regardless of whether an appellant has checked off the correct boxes:

Given the purposes and provisions of the legislation, including Section 77 of the Act – which is a statutory requirement - it would in our view be inappropriate to take the overly legalistic and technical approach of refusing to consider a procedural fairness ground because the party ticked the “error of law” box instead of the “natural justice” box on the appeal form. The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director.

...

Consistent with the nature and purposes of the legislation, we should, as much as possible, approach these potential complexities with a common sense and plain language orientation. That includes addressing the substance of appeals which are filed, as opposed to the form. ...

Error of Law

18. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors 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 be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle

Natural Justice

19. 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.
20. The principles include a requirement that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias). The concept of impartiality describes “a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case” (*Valente v. The Queen*, [1985] 2 S.C.R. 673 at p. 685).

21. The issue before the delegate, for the purposes of this appeal, was whether Mr. Kumar had been paid all wages owing to him. Mr. Kumar asserted that he had not been paid. The delegate was obliged to apply a “clear and credible” standard of proof of credibility and reliability on a balance of probabilities in assessing his claim.
22. The delegate received evidence from the employer, in the form of three documents and a witness statement, that the wages had been paid. The delegate’s conclusion on this evidence consisted of one sentence: *The \$1,000.00 paid to Mr. Kumar on the receipt dated 12Jan2007 is agreed to by the employer and Mr. Kumar and, as such, I have deducted it from the earned wages.*
23. The delegate did not address the issue of the other two payments or the witness statement. Although she says, for the first time in response to the appeal, that she accepted Mr. Kumar’s statement that he was not paid, the Determination contains no analysis of the evidence of the parties or the witness. There is no analysis of the credibility of the parties nor are there any reasons in the Determination for rejecting KIA’s evidence.
24. In my view, the delegate’s failure to properly analyze the evidence constitutes an error of law.
25. As noted in *ARA Development Ltd.* (BC EST #D012/08)

The Tribunal is limited in its review of Determinations. Those limitations are of particular significance in cases that turn on issues of credibility because credibility is a matter particularly within the purview of the delegate, who has heard the evidence first hand and observed the parties and any witnesses. (see *Volzhenin v. Haile* ([2007] B.C.J. No. 1209, 2007 BCCA 317) As a result, the delegate’s analysis and reasons for preferring the evidence of one party over another is one which must be carried out diligently and carefully. Further, the delegate’s reasons must be sufficiently adequate to enable the Tribunal to determine whether the assessment was sound.

26. In *Via Rail Canada Inc. v. National Transportation Agency* ((2000), 193 D.L.R. (4th) 357, 2 F.C. 25), the Court said:

The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., “Any attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons.”

The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

27. In *Re Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services* ((1985), 51 O.R. (2d) 302 (Ont. H.C.)), a case involving a decision of an adjudicator simply rejecting the appellant’s evidence, Justice Reid said (at pp. 310-11):

The task of determining credibility may be a difficult one but it must be faced. If the board sees fit to reject a claim on the ground of credibility, it owes a duty to the claimant to state clearly its

grounds for disbelief. The board cannot simply say, as the member did here, "I feel that I have not received credible evidence to rescind the decision of the Respondent." Some reason for thinking the evidence not credible must be given if an appearance of arbitrariness is to be avoided.

In a now famous address, Sir Robert McGarry, Vice-Chancellor of England, has reminded judges that the most important person in a lawsuit is not the judge, sitting in elevated dignity on the dais, nor the lawyers, however eminent they might be; it is the losing party: see "Temptations of the Bench" [1978] XVI Alta. L. Rev., p. 406. In order that faith may be maintained in the legal system, it is necessary that losing parties be satisfied that they have been fairly dealt with, that their position has been understood by the judge, and that it has been properly weighed and considered. It is, therefore, important that the reasons for a decision be stated, and stated in language that the party who has been dealt the blow can comprehend.

28. The delegate must set out her findings of fact and the evidence upon which those findings were based. The reasons must address the major points in issue. The delegate must also set out the reasoning process for her conclusion. As the Determination does not meet this test, I refer the issue of whether Mr. Kumar is entitled to wages back to the delegate for reconsideration. Specifically, the delegate must address the employer's assertion that Mr. Kumar was paid \$5,100 in January, 2007.
29. Given that KIT's allegation of bias arising as a result of a complaint about the delegate's behaviour was made for the first time in a reply submission, I do not have the benefit of the delegate's response. In addition, I have no evidence as to the timing of the alleged complaint and the issuance of the Determination. However, in light of my decision that the matter should be referred back to the Director for reconsideration, I need not make a decision on this issue.

ORDER

30. I Order, pursuant to Section 115 of the Act, that the Determination, dated January 3, 2008, be referred back to the Director for a reasoned analysis on the issue of whether Mr. Kumar was owed wages. In light of the allegations of bias, it may be prudent for the Director to assign another delegate to determine this issue.

Carol L. Roberts
Member
Employment Standards Tribunal