

An appeal

- by -

SYNC2 Agency Ltd.
(“Sync2”)

- 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: Shafik Bhalloo

FILE No.: 2010A/181

DATE OF DECISION: March 9, 2011

DECISION

SUBMISSIONS

John Moore	on behalf of SYNC2 Agency Ltd.
Keith O’Conner	on his own behalf
Ali K. Zafar	on his own behalf
Olga Shelkovnykova	on her own behalf
Jim Dunne	on behalf of the Director of Employment Standards

OVERVIEW AND FACTS

1. This is an appeal by SYNC2 Agency Ltd. (“Sync2”) under section 112 of the *Employment Standards Act* (the “*Act*”) of a determination of the Director of Employment Standards (the “Director”) issued November 10, 2010 (the “Determination”).
2. Sync2 operates a web development and management company within the jurisdiction of the *Act*. Bogdan I. Cirstea, Jae-Hong Joo, Richard J. Knight, Keith O’Connor, Julian Palmer, Hyun Jung Helen Park, Olga Shelkovnykova, and Ali K. Zafar (the “Complainants”) worked for Sync2, starting various dates but ending on December 15, 2009, when Sync2’s CEO and Chairman of the Board, Mr. John Moore (“Mr. Moore”), advised each that they were laid off immediately due to work shortage. The Complainants were not recalled to work thereafter and Sync2 has since closed its business.
3. Between December 8, 2009, and March 3, 2010, within the time period allowed under the *Act*, the Complainants all separately filed their complaints (the “Complaints”) against Sync2, alleging that the latter contravened the *Act* by failing to pay them regular wages for two (2) pay periods from November 16 to December 15, 2009, inclusive (with the exception of one of the Complainants who claimed he was owed one week’s pay only), vacation pay and compensation for length of service. In the case of one (1) of the Complainants, an additional claim was made for reimbursement for business expenses he incurred on behalf of Sync2.
4. The delegate of the Director, in his investigation of the Complaints, received evidence from the Complainants in support of their Complaints and also communicated with Mr. Moore, the President and CEO of Sync2 Networks Incorporation, the parent company of Sync2, to obtain Sync2’s position. Mr. Moore, on March 20, 2010, confirmed to the delegate that Sync2 owed the Complainants wages and provided a spreadsheet, which delineated specifics of wages owed to each of the Complainants, totalling \$48,975.39. While the claim of one of the Complainants for reimbursement of business expenses was rejected or not recognized initially, Sync2 later recognized the claim, according to the delegate.
5. The delegate also notes in his Reasons for the Determination that while there were some discrepancies between the Complainants’ claim for wages and what Mr. Moore identified as owing to them on March 20, 2010, the Complainants, for the purposes of the investigation, were prepared to agree to Mr. Moore’s calculations.

6. The delegate further noted in the Reasons for the Determination that Mr. Moore, in March 2010, advised him that Sync2 would pay all of the Complainants their unpaid wages within a couple of weeks. However, as at April 1, 2010, Sync2 had not done so because financing Sync2 was relying on to pay the Complainants was delayed, according to Mr. Moore. Subsequently, Mr. Moore advised the delegate that Sync2 would be in a position to pay the outstanding wages to the Complainants by April 6, 2010. This representation was again unfulfilled leading the delegate to send an email to Mr. Moore on April 27, 2010, requesting that Sync2 pay all wages to the Complainants by April 30, 2010. Mr. Moore responded that Sync2 would do so very soon.
7. Over the course of the next few months, there were a few more exchanges between Mr. Moore and the delegate and, each time, Mr. Moore provided further explanations for additional delay on Sync2's part in paying the Complainants.
8. On August 25, 2010, the delegate sent Mr. Moore an email advising him that a determination would be issued if payment of the outstanding wages were not received forthwith. Mr. Moore responded on September 2, 2010, explaining that Sync2 was not prepared to pay any outstanding wages owing to the Complainants until October 1, 2010, when it was anticipated a resolution would be had with respect to some ongoing court proceeding between Sync2 and the company Sync2 had bought out.
9. As with past-unfulfilled representations, October 1, 2010, came and went, and Sync2 did not pay the Complainants any outstanding wages. As a result, on October 21, 2010, the delegate sent an email to Mr. Moore providing Sync2 a final deadline to pay the wages owing or to respond in writing with any dispute Sync2 may have regarding the Complainants' complaints, failing which the delegate indicated he would issue his determination. When Mr. Moore and Sync2 failed to respond to the delegate's deadline in the said email, the delegate went ahead and issued his Determination on November 10, 2010.
10. The Determination found Sync2 to have contravened sections 18 (wages), 58 (annual vacation pay), 63 (compensation for length of service) and 21 (business expenses) of the *Act* in respect of the employment of the Complainants and ordered Sync2 to pay the employees, inclusive of accrued interest pursuant to section 88 of the *Act*, a total of \$50,005.51. In addition, the Determination levied three (3) administrative penalties of \$500.00 each against Sync2 for breaches of sections 17, 18 and 21 of the *Act* for a total award against Sync2 of \$51,505.51.
11. On December 20, 2010, Sync2's director, Jacqueline Bauer ("Ms. Bauer"), filed an appeal of the Determination on the sole ground, under section 112(1)(c), that new evidence has become available that was not available at the time the Determination was made.
12. Pursuant to section 36 of the *Administrative Tribunals Act* (the "*ATA*"), which is incorporated in the *Act* (s. 113), and Rule 17 of the Tribunal's *Rules Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the section 112(5) "record", the written submissions of the parties and the Reasons for the Determination.

ISSUE

13. The sole issue to be determined in this appeal is whether there is evidence that has become available that was not available at the time the Determination was being made, and if so, does that evidence justify changing or varying the Determination in any manner or referring the Determination back to the Director?

ARGUMENT

SUBMISSIONS OF SYNC2

14. The Appeal Form of Sync2 does not really contain any substantive submissions. It simply has attached to it certain documents. The first set of documents appears to be five (5) separate documents, one (1) page each, and dated January 8, 2010. In total, the documents are in respect of five (5) of the eight (8) Complainants and appear to be assignments of undetermined wages in favour of Sync2 in exchange for the latter's agreement to allow the Complainants named in the documents to retain possession of the company's computers already in their possession. The purported assignment agreements also contemplate the determination of the fair market value of the computers in their possession when Sync2 pays them outstanding wages. It is noteworthy that two (2) of the five (5) purported assignments are unsigned and three (3) are initialled by the Complainants named therein.
15. In addition to the five (5) purported assignment agreements referred to above, there is also another document dated January 8, 2010, signed by Mr. Moore, acknowledging that he received a computer from one (1) of the Complainants, Mr. Bogdan Cirstea. The same document also notes Mr. Moore confirming the "former employees of Sync2 Agency have not been paid for the period 15 November – 15 December, 2009". The document further goes on to state, "(f)ormer employees have also not received any severance pay, length of work compensation pay, vacation pay or benefits, expenses reimbursed".
16. Also attached to the Appeal Form is a document entitled "Sync2 Agency Payroll Reconciliation" for the months of November and December, 2009 showing, collectively, the wages of \$48,975.39 owing to the Complainants, which amount was noted in the Reasons for the Determination and considered by the delegate in making the Determination.
17. One final document attached to the Appeal Form is a two-page document from Canada Revenue Agency to Ms. Bauer suggesting she may be personally liable for the unpaid source deductions of Sync2.
18. To fully comprehend why Sync2 adduced any of these documents as new evidence in the appeal of the Determination, one needs to review Sync2's Final Reply submission filed by Mr. Moore. In this submission, Mr. Moore points out the reason for supplying the Canada Revenue Agency letter to Ms. Bauer "was to provide evidence that the deductions related to these past employees have been audited by CRA".
19. With respect to the purported assignments of wages, Mr. Moore appears to contend that these documents give Sync2 authority to deduct from the wages owing to the concerned Complainants the fair market value of the computers in their possession. He then proceeds in his submissions to determine the fair market value of the computers based on what he contends to be the insurance replacement cost of the computers in question. I do not find it necessary to go into the specific details and calculations he delineates in his final reply. However, I note that Mr. Moore also indicates in his submissions that some of the Complainants have expressed their interest to return to Sync2 the company's computers in their possession along with the operating system and purged memory and some have expressed an interest to keep their computer while others have not indicated their preference. Mr. Moore asserts that with respect to those who want to return their computers to Sync2, they are bound by the purported assignment agreements they executed.

SUBMISSIONS OF THE DIRECTOR

20. The Director submits that the purported assignment agreements do not qualify as new evidence under the four-part test in *Re Merilus Technologies Inc.*, BC EST # D17/03, and should therefore be rejected. More

particularly, the Director submits that the employer fails on the first of the four-fold test in *Re Merilus* decision because the purported assignment agreements were in the control and possession of Sync2 at all material times and could have, with the exercise of due diligence, been adduced by Sync2 for consideration by the delegate before the Determination was made.

21. In the alternative, even if the purported assignment agreements were accepted as new evidence, the Director argues that it would not lead to a different legal conclusion because they do not meet the requirements of the *Act* for proper assignments as two (2) of the five (5) documents are not signed by the employees and while one (1) appears to be signed, there is no proof of the employee's signature in that case. In the case of the remaining two (2) documents, the Director argues that they appear to have initials, but are not signed. Additionally, the documents "do not stipulate the amount authorized by the employees to be deducted from their wages". The Director also points out that the wages have not been paid for an offset to occur.
22. With respect to the document signed by Mr. Moore acknowledging receipt of a computer from one (1) of the Complainants and admitting that none of the employees have been paid wages (for the period November 16 to December 15, 2009), severance pay, vacation pay and expenses, the Director questions the documents probative value as it only serves to confirm that wages, as outlined in the Determination, are owed.
23. With respect to the letter from Canada Revenue Agency to Ms. Bauer, again, the Director questions the relevance or probative value of this document in the appeal.
24. Finally, with respect to the payroll document showing wages of \$48,975.39 admittedly owing by Sync2 to the Complainants, the Director notes that this document was part of the record and considered by the delegate in making the Determination.
25. The Director, in summary, asks the Tribunal to dismiss Sync2's appeal.

SUBMISSIONS OF THE COMPLAINANTS

26. Three (3) of the Complainants in similarly-worded single-page letters dispute that they took computers in lieu of pay or any part of pay, and say that they agreed that the computers would be returned to Sync2 when they received payment of their outstanding wages.

ANALYSIS

27. Sync2's appeal is based on the ground that new evidence has become available that was not available at the time the Determination was made. The test employed by this Tribunal in determining whether to accept new evidence or whether evidence qualifies as new evidence for acceptance on an appeal is set out in *Re: Merilus Technologies Inc., supra*. In the latter decision, the Tribunal set out four conjunctive requirements that must be met before new evidence will be considered:
 - The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - The evidence must be relevant to a material issue arising from the complaint;
 - The evidence must be credible in the sense that it is reasonably capable of belief; and

- The evidence must have high potential probative value in the sense that, if believed, it could on its own, or when considered with the other evidence, have led the Director to a different conclusion on the material issue.

28. It is Sync2 that has the onus to satisfy the above pre-conditions before the Tribunal will admit or consider the purported new evidence in the appeal of the Determination.

29. Having said this, I find in this case that the five (5) documents in the nature of an assignment of wages by some of the Complainants to Sync2, all dated January 8, 2010, were in existence for at least ten (10) months prior to the date of the Determination and prior to that time during the investigation of the Complaints but not produced. The record adduced by the Director in the appeal, including the Reasons for the Determination, show numerous contacts and attempted contacts by the delegate with Mr. Moore and at all material times, before the Determination was made, Sync2 had an opportunity to introduce the purported assignment agreements to the delegate, but failed to do so. I also note Sync2 has not provided any explanation of why these documents were not adduced into evidence during the investigation or prior to the issuance of the Determination. In my view, the assignment documents cannot enter or be considered as new evidence in this appeal. I also note that one of the significant purposes of the *Act* set out in section 2(d) is “to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the “*Act*”]. In my view, to allow the purported assignment documents, as new evidence at this stage would also run counter to this very important purpose of the *Act*. Sync2 cannot be allowed to introduce its evidence piecemeal pending the outcome of the Complaints. It is important for all parties to adduce all relevant evidence upon which they wish to rely during the investigation of the Complaint and, at the very latest, before the Determination is made.

30. While I have resolved not to consider the purported assignment agreements at this stage and not required to further opine on the merits of the documents, I note that having reviewed the purported assignment documents, I agree with the Director that they would not qualify as proper assignment of wages under the *Act*. In particular, section 22(4) of the *Act* provides:

22(4) An employer may honour an employee’s written assignment of wages to meet a credit obligation.

31. In this case, the purported assignment documents do not state the amount of the “credit obligation”, but leave it for a later determination based on “fair market value...at the time payment” is made of unpaid wages to the Complainants concerned. In my view, this does not constitute “written assignment of wages to meet a credit obligation” contemplated described in section 22(4) of the *Act* (See *Re: E.V. Tommasters Services Ltd.*, BC EST # D469/97). There must be a specific amount set out in the assignment and that is not the case with respect to all five of the purported assignments. In addition, in the case of two (2) of the purported assignment documents, there is no evidence of execution of the document by the Complainants concerned and in the case of the remaining three (3) Complainants, it is not clear on the basis of simple abbreviated signatures whether the Complainants concerned signed those documents.

32. With respect to the document entitled “Sync2 Agency Payroll Reconciliation” for the period November and December, 2009, this document does not constitute new evidence as it was adduced during the investigation of the Complaints, and the delegate considered the said document and the information contained therein in the Reasons for the Determination. It does not in any way assist Sync2’s appeal of the Determination, but simply further substantiates the amount of wages Sync2 admitted to owing its employees during the investigation of the Complaints.

33. Finally, with respect to the letter from Canada Revenue Agency to the Director of Sync2, Ms. Bauer, advising her of her potential liability for unpaid source deductions of Sync2, while I note that this document is dated December 7, 2010, after the Determination was made, I agree with the Director that the probative value of this document is suspect or questionable. I do not think anything in this document raises any questions about the merits of the Determination or causes me to question the correctness of the Determination.

ORDER

34. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued, together with whatever additional interest that may have accrued, pursuant to section 88 of the *Act*, since the issuance of the Determination.

Shafik Bhalloo
Member
Employment Standards Tribunal