

An appeal

- by -

The Portables Exhibit Systems Limited  
(“Portables”)

- 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:** Raewyn J. Brewer

**FILE No.:** 2011A/188

**DATE OF DECISION:** March 16, 2012

## DECISION

### SUBMISSIONS

Hanif Muljiani	on behalf of The Portables Exhibit Systems Limited
Christopher Walker	on his own behalf
Sukh Kaila	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by The Portables Exhibit Systems Limited (“Portables”), pursuant to section 112(1) of the *Employment Standards Act* (the “*Act*”), of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 15, 2011, (the “Determination”).
2. Christopher Walker (“Mr. Walker”) was employed as a senior exhibit designer by Portables from May 12, 2003, to April 30, 2010. In his complaint filed with the Employment Standards Branch, Mr. Walker alleged that Portables had contravened the *Act* by failing to pay annual vacation pay.
3. Following a hearing on June 21, 2011, a delegate of the Director of Employment Standards (the “Delegate”) issued the Determination. In the Determination, the Delegate concluded that Portables had contravened section 58 of the *Act* by failing to pay annual vacation pay to Mr. Walker. The Director ordered Portables to pay Mr. Walker an amount of \$9,483.74, which was comprised of the outstanding annual vacation pay and accrued interest.
4. The Director also imposed the mandatory administrative penalty of \$500.00 for the contravention of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.
5. In this appeal Portables contends that the Director failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled.

### ISSUE

6. Did the Delegate fail to observe the principles of natural justice in making the Determination?

### FACTS

7. Mr. Walker filed a complaint under section 74 of the *Act* alleging Portables contravened the *Act* by failing to pay annual vacation pay. A hearing was originally scheduled for March 16, 2011; however, Portables requested an adjournment to be allowed to produce further payroll records. The adjournment request was granted and a second hearing was conducted on June 21, 2011. The Determination was issued on November 15, 2011.
8. The only issue before the Delegate was whether Mr. Walker was owed vacation pay by Portables. The Delegate had before him the argument and evidence of Mr. Walker and Portables. Mr. Walker represented himself and Portables was represented by Mr. Muljiani and another individual.

9. According to Mr. Walker, vacation pay was outstanding for the entire period of his employment. However, given the anniversary date of Mr. Walker's employment and the timing of his complaint, the recovery period was May 12, 2008, to April 30, 2010.
10. Mr. Walker claimed that during this nearly two year period he had taken only two vacation days. In response, Portables stated that all vacation pay was paid to Mr. Walker and that Mr. Walker had taken his allotted vacation time. Portables submitted that Mr. Walker was able to take annual vacation at the onset of employment and any vacation pay was paid in the same year it was earned.
11. Portables stated that Mr. Walker's vacation requests were granted through leave authorization requests and email requests. Portables provided the Delegate with photocopies of two leave authorization forms each requesting a ten day vacation in the summer months – one for 2008 and one for 2009. Portables stated Mr. Walker requested these 20 vacation days and signed and dated the leave authorization forms. Mr. Walker denied that he had signed the leave authorization forms, claiming they were falsified. The Delegate requested that the original signed copies of the leave authorization forms be produced by Portables. These were not produced as and when required.
12. Mr. Walker contended that he was in fact working on each of the days that Portables claimed he took off as vacation days. To support his claim that he was working Mr. Walker provided copies of emails that he sent to co-workers on work related matters. These emails corresponded to the alleged vacation times. Mr. Walker also produced a travel itinerary and email correspondence outlining the dates and duties of a work related trip that was also at the same time as one of the alleged annual vacations.
13. Portables also produced three emails which referenced Mr. Walker requesting vacation days for varying lengths of time. Further, in response to the demand for a record of annual vacation taken by Mr. Walker, as required under section 28 of the *Act*, Portables submitted payroll records including pay statements and monthly vacation summaries which show vacation days taken by employees each month, including Mr. Walker.
14. In the Determination, the Delegate outlines the law regarding vacation under section 58 of the *Act*. He then references and assesses the argument and evidence before him, including the pay statements, the monthly vacation summaries, the two leave authorization forms, and the three email requests for annual vacation.
15. In terms of the payroll records, the Delegate noted that they indicated salary and statutory deductions for each pay period but no vacation pay information was specified on the statements. With respect to the monthly vacation summaries, the Delegate found “[t]he monthly vacation summaries do aid to corroborate the leave authorization forms.”
16. However, the Delegate found both the leave authorization forms and the monthly vacation summaries unreliable. The Delegate clearly preferred the evidence and credibility of Mr. Walker in this regard. Citing Mr. Walker's denial that he had submitted and signed the forms, the emails and travel documents submitted by Mr. Walker, and the fact that Portables did not produce the originals when asked to do so, the Determination is strongly worded in favour of Mr. Walker's credibility and evidence on the matter of the vacation days noted in both the monthly vacation summaries and the leave authorization forms.
17. With respect to the three email requests for annual vacation produced by Portables, the Delegate found that one referenced a date Mr. Walker acknowledged as a vacation day he had taken. In the Delegate's view, the second email was unclear as to whether the request was granted or denied by Portables. The Delegate again preferred the evidence of Mr. Walker who stated that he had in fact worked on the day referenced in the

second email request. In terms of the third email request for four hours off during one work day, the Delegate found that the nature and tone of the email was reasonable to conclude the time was taken off by Mr. Walker. Accordingly an additional four hours of vacation was added to the two days Mr. Walker stated he had taken, bringing the total hours of vacation taken by Mr. Walker to 20.

18. Based on Mr. Walker's employment anniversary date, length of service, and gross wages for the relevant period, the Delegate calculated the vacation pay outstanding to Mr. Walker totalled \$9,085.78, plus interest. An administrative penalty of \$500.00 was imposed for Portables' contravention of section 58 of the *Act*.
19. Portables filed an appeal under section 112(1) of the *Act* on December 23, 2011.

### **SUBMISSIONS OF PORTABLES**

20. Portables asserts that the Delegate failed to observe principles of natural justice in making the Determination because the Delegate "ignored two key pieces of evidence that were presented to him".
21. First, Portables submits that the Delegate ignored "significant amounts" of the monthly vacation summaries. In support of this submission, the following arguments are advanced by Portables: (a) the monthly vacation summaries were prepared by the accounting department in recognition that all vacation time is taken prior to the end of each calendar year; (b) the emails produced by Mr. Walker and cited by the Delegate as contradicting the monthly schedules cannot be verified as true by Portables; (c) even if the emails are verifiable, "the mere fact that an employee chose to send a few emails while on vacation does not preclude the fact that they acknowledged they were taking time out of the office to use their allotted vacation time"; and (d) such behaviour is neither encouraged nor expected by Portables, rather is the choice of the individual employee.
22. Second, Portables submits that the Delegate ignored the two vacation request forms. In support of this submission, the following arguments are advanced by Portables: (a) Mr. Walker's signature is on the forms; (b) the annual vacation summaries substantiate the vacation request forms; (c) the work trip that was presented as contradictory evidence was not a required trip for Mr. Walker, rather he made the choice to use some of his vacation time to accompany and help a fellow employee; and (d) even if the work trip was found to be non-vacation time, it represented a small portion of the vacation time allowed by Portables and therefore the remaining days should be counted as vacation days taken by Mr. Walker.

### **SUBMISSIONS OF MR. WALKER**

23. Mr. Walker submits that the appeal should be dismissed on the basis that the evidence and argument submitted on appeal by Portables was considered and rejected by the Director in making the Determination.

### **SUBMISSIONS OF THE DIRECTOR**

24. The Director's position is that natural justice was fully observed and thus the Tribunal should confirm the Determination in whole and dismiss the appeal. In response to Portables' contention that the Delegate failed to consider relevant evidence, the Director notes that the Delegate identifies and addresses the reliability of the leave authorization forms and the annual vacation summaries in the Determination. With respect to the remainder of Portables submissions, the Director submits that Portables provided no new evidence or argument that should be considered by the Tribunal.

## ANALYSIS

25. Section 112(1) of the *Act* sets out the grounds upon which an appeal may be made to the Tribunal from a determination by the Director. That provision reads:
- 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 being made.*
26. Portables alleges that the Director failed to observe the principles of natural justice in making the Determination.
27. Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. The burden to establish an infringement rests with the party asserting the breach of the principles of natural justice; in this case, Portables (See *Dusty Investments Inc. dba Honda North*, BC EST # D043/99, and *Imperial Limousine Services Ltd.*, BC EST # D014/05).
28. In this appeal there is no allegation that Portables did not have an opportunity to know the case against it or was not given a full and fair opportunity to present its evidence. Prior to issuing the Determination, the Delegate conducted an investigation and an oral hearing at which the parties presented their evidence and made submissions. There is also no allegation that the Delegate was not an independent and impartial decision maker.
29. The substance of Portables' appeal and objection to the Determination is that the Delegate ignored key evidence before him and consequently made factual errors in determining vacation pay was owed to Mr. Walker.
30. There is authority for the proposition that failure to consider relevant evidence is a breach of the principles of natural justice. In *Jane Welch dba Windy Willows Farm*, BC EST # D161/05, the Tribunal reviewed the principles established in the common law and noted that a failure to consider relevant evidence may constitute a breach of the principles of natural justice. The determination as to whether a breach has occurred depends on an analysis of the particular circumstances of each case. Such a contextual analysis accounts for the recognition that there are compelling reasons to exercise caution in intervening with a decision of the Director on the basis that a delegate failed to consider relevant evidence. Most importantly, that a question of fact, alone, is not within the Tribunal's jurisdiction under section 112 (See *Britco Structures Ltd.*, BC EST # D260/03).
31. In this appeal it is clear from the face of the Determination that the Delegate expressly referred to the evidence at issue – the monthly vacation summaries and request forms. I am therefore unable to conclude that such evidence was “ignored” by the Delegate, as advocated by Portables.
32. The crux of Portables' argument rests on the weight given to the vacation summaries and the vacation request forms. Portables' appeal submissions detail and expand upon the reasons why it believes the Delegate should have given more weight to the vacation summaries and request forms. It is clear that Portables disagrees with the findings of fact made by the Delegate and seeks to have the Tribunal arrive at a

different conclusion. In this sense, Portables adduces no new evidence that was not available at the time the Determination was being made. Rather, Portables uses this appeal to re-argue portions of its case.

33. The Delegate states in the Determination that he did not consider the leave authorization forms trustworthy or credible, even though the dates on the forms were corroborated by the dates on the annual vacation summaries. The Delegate explained that the annual vacation summaries merely served to summarize information outlined on the leave authorization forms and failed to provide any additional information. Hence, the value of the vacation summaries is closely tied to the credibility of the leave authorization forms which were found by the Delegate to have been less than trustworthy.
34. As aptly stated by the Tribunal in *Dongoh Educational Company Ltd.*, BC EST # D049/09:
- Natural justice does not require the decision maker to accept everything each party says – that would be absurd and make the process unworkable – nor does it prohibit the decision maker from accepting the position of one party and rejecting the position of the other so long as reasons are provided for the choice made and those reasons are based on relevant considerations [...] In deciding the merits of the complaint, the Director had to make some choices between the competing positions of the parties. The reasons for those choices are explained in the Determination. [The appellant] may not like the choices made, but they were provided with an opportunity to present their position in evidence and argument and, in the circumstances, I am unable to accept there was any failure by the Director to observe principles of natural justice in making the choices and the resulting Determination.
35. The above excerpt describes exactly the circumstances of the Determination under appeal. The Delegate was obliged to and did consider, evaluate and weigh the evidence and arguments. The Delegate heard testimony from the parties and made assessments of credibility. The credibility of the parties was of primary importance in deciding whether to accept the monthly vacation summaries and the vacation request forms as evidence of Mr. Walker having taken the vacation days asserted by Portables. The Delegate was required to make choices in respect of the competing positions of the parties and the Delegate chose to prefer Mr. Walker’s position.
36. Reasons for preferring Mr. Walker’s position were provided for in the Determination and appear to be based on relevant considerations. In this regard, I have examined the record submitted by the Director, including the submissions before the Delegate, the monthly vacation summaries and the vacation request forms. I find nothing inappropriate about the manner in which the Delegate dealt with the contentious evidence given his clear findings on the credibility of the parties before him.
37. An appeal before the Tribunal is not a forum for one to reargue the Determination or have a “second kick at the can” because one is dissatisfied with the results. Disagreement by Portables with the conclusions reached by the Delegate does not constitute grounds for finding a breach of fundamental justice. The Delegate considered, evaluated and weighed the evidence in question. Portables has thus not demonstrated that the Delegate failed to observe the principles of natural justice in making the Determination.
38. The appeal is dismissed.

**ORDER**

39. Pursuant to Section 115 of the *Act*, I order that the Determination dated November 15, 2011, be confirmed as issued.

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**Raewyn J. Brewer**  
**Member**  
**Employment Standards Tribunal**